SBH Exh. 31

SBH Exh. 31

# 96-5112

## UNITED STATES COURT OF APPEALS

FOR THE

## SECOND CIRCUIT

IN RE:
ASTROLINE COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
*Debtor.*

---

MARTIN W. HOFFMAN, Chapter 7 Trustee of the Bankruptcy Estate of
ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,
*Plaintiff-Appellant-Cross-Appellee,*

vs.

WHCT MANAGEMENT, INC.; THOMAS A. HART, JR.; ASTROLINE COMPANY;
ASTROLINE COMPANY, INC.; HERBERT A. SOSTEK; FRED J. BOLING, JR.;
RICHARD H. GIBBS; CAROLYN H. GIBBS, Co-Exec. of Estate of Joel A. Gibbs;
RICHARD GOLDSTEIN, Co-Exec. of Estate of Joel A. Gibbs; EDWARD A. SAXE,
Co-Exec. of Estate of Joel Gibbs; ALAN TOBIN, Co-Exec. of Estate of Joel A. Gibbs;
ROBERT ROSE; MARTHA GIBBS ROSE,
*Defendants-Appellees,*

RANDALL L. GIBBS,
*Defendant-Appellee-Cross-Appellant,*

U.S. TRUSTEE, OFFICE OF,
*U.S. Trustee.*

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT AND THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

---

**BRIEF OF THE APPELLANT,**
**MARTIN W. HOFFMAN, TRUSTEE**

---

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November 8, 1996

Federal Communications Commission

Docket No. Exhibit No. 31

Presented by Shurberg Broadcasting

Disposition Identified X

Received X

Rejected

Reporter George Holmes

Date 9-23-91

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## PRELIMINARY STATEMENT

Appellant Martin W. Hoffman, Chapter 7 Trustee (the "Trustee") of the bankruptcy estate of Astroline Communications Company Limited Partnership ("ACCLP" or the "Debtor"), submits this brief in support of his appeal from the final Judgment entered on October 25, 1995 in an adversary proceeding before the United States Bankruptcy Court for the District of Connecticut (Krechevsky, C.J.), Hoffman v. WHCT Management, Inc. (In re Astroline Communications Co. Ltd. Partnership), 188 B.R. 98 (Bankr. D. Conn. 1995)(Appendix ("App.") at 7), and the affirmation thereof by the United States District Court for the District of Connecticut (Nevas, J.) in its final Ruling on Appeal from Bankruptcy Order dated August 12, 1996. (App. at 18). The Trustee timely appealed to this Court by his Notice of Appeal dated August 30, 1996. (App. at 61).

## BASIS OF APPELLATE AND SUBJECT MATTER JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(d), which establishes jurisdiction for appeals from final orders, decisions, judgments and decrees of bankruptcy judges reviewed by a district court pursuant to 28 U.S.C. § 158(a). Jurisdiction in the Bankruptcy Court is based on 28 U.S.C. §§ 1334(b), 157(a) and 157(b), because this adversary proceeding arises in and/or is related to the Chapter 7 case of the Debtor now pending before the Bankruptcy Court. Jurisdiction in the District Court is based on 28 U.S.C. § 158(a).

## STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the Trustee have standing under Sections 723(a) and/or 544(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), to bring this action against the defendants?

2. Based upon the Bankruptcy Court's findings that the defendants exercised control over the Debtor's cash and finances, are the defendants liable as a general partner of the Debtor, pursuant to Section 723(a) of the Bankruptcy Code, to satisfy the deficiency of property of the estate to pay in full all claims that are allowed in this bankruptcy case?

3. Did the defendants' actions, as proven by the Trustee at trial and found by the Bankruptcy Court, constitute participation in control of the Debtor's business substantially the same as the exercise of the powers of a general partner?

4. Did the defendants have to engage in "actual control" rather than "a mere right to control" the Debtor's cash and finances in order to be held liable as general partners?

5. Did the defendants' actions, as proven by the Trustee at trial and found by the Bankruptcy Court, constitute "actual control" over the Debtor's cash and finances?

## STANDARD OF APPELLATE REVIEW

Pursuant to Rule 8013 of the Federal Rules of Bankruptcy Procedure and the law of the Second Circuit, the Bankruptcy Court's findings of fact are to be reviewed under the "clearly erroneous" standard. Shugrue v. Air Line Pilots Assoc. Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 988-89 (2d Cir. 1990)(citing Gulf State Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1388 (2d Cir. 1990)). The Bankruptcy and District Courts' conclusions of law, however, are subject to de novo review. Ionosphere Clubs, 922 F.2d at 988; Manville, 896 F.2d at 1388; In re Boston Post

Rd. Ltd. Partnership, 154 B.R. 617, 619-20 (D. Conn. 1993), aff'd, 21 F.3d 477 (2d Cir. 1994), cert. denied, 115 S.Ct. 897 (1995). Additionally, "[t]he legal conclusions to be drawn from factual findings ... are subject to de novo review." Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1176 (2d Cir. 1995), cert. denied, 116 S.Ct. 1351 (1996).

In a case involving issues of financial control substantially similar to those presented here, this Court in Hochstein v. United States, 900 F.2d 543, 547 (2d Cir. 1990), cert. denied, 504 U.S. 985 (1992), announced the applicable standard of review:

> [W]e believe that the issue whether a person is responsible [under a statute imposing tax liability on persons who control a corporation's finances] presents a mixed question of fact and law. See Thibodeau v. United States, 828 F.2d 1499, 1503 (11th Cir. 1987)(deciding question of responsibility as question of law when facts undisputed). Therefore, we will review the district court's findings on [plaintiff's] control over [the corporation's] finances only for clear error, and give plenary review to its conclusion that this control did not make him responsible within the meaning of the statute. Cf. Puma Indus. Consulting, Inc. v. Daal Assocs., Inc., 808 F.2d 982, 986 (2d Cir. 1987)("When a conclusion represents a mixed question of law and fact, ... that conclusion is open to full review.").

Id. at 547 (emphasis added). Concluding that the plaintiff exercised "significant control" over the corporation's finances based on the District Court's findings that he had authority to sign checks in any amount, make suggestions regarding the payment of bills, prepare tax returns and oversee the corporation's bookkeeping, this Court reversed the judgment entered by the District Court and imposed liability on the plaintiff. See also United States v. McCombs, 30 F.3d 310, 319 (2d Cir. 1994); Taylor v. IRS, 69 F.3d 411, 415 (10th Cir. 1995).

## STATEMENT OF THE CASE

By his Amended Complaint dated February 15, 1994, the Trustee seeks to recover from the defendants the deficiency of property of the estate necessary to pay allowed claims of creditors, pursuant to Section 723 of the Bankruptcy Code. Richard P. Ramirez ("Ramirez") and WHCT Management, Inc. ("WHCT Management") were general partners of ACCLP. Astroline Company was ACCLP's putative limited partner, which, through its general partners and successor, Astroline Company, Inc., exercised complete control over the Debtor's cash and financial operations.

A nine day bench trial was held from April 19 through May 10, 1995 before the Bankruptcy Court. On October 24, 1995, the Bankruptcy Court filed its Memorandum of Decision, in which the court expressly found that Astroline Company: (1) maintained exclusive "control of the Debtor's checkbook;" (2) twice-weekly swept "all of the Debtor's income to [an] out-of-state bank;" (3) caused two checks inexplicably to be drawn "payable to Astroline Company for interest, without Ramirez's knowledge;" and (4) "had the power to empty the Debtor's bank account." In re Astroline, 188 B.R. at 106 (App. at 15). Despite these findings and other facts proven at trial demonstrating Astroline Company's pervasive control over the Debtor's cash and finances, the Bankruptcy Court reached the legal conclusion that "the actions of Astroline Company, proven at trial, do not constitute participation in control of the business substantially the same as the exercise of the powers of a general partner." Id. (App. at 15). The Bankruptcy Court, therefore, entered Judgment in favor of the defendants. (App. at 16).

The Trustee timely filed his Amended Notice of Appeal dated November 15, 1995. (App. at 53, 57). By its Ruling on Appeal of Bankruptcy Order dated August 12, 1996, the District Court affirmed the Bankruptcy Court Judgment on an alternate ground that the Trustee lacks standing to pursue his claims against the defendants. (App. at 18). By his Notice of Appeal dated August 31, 1996, the Trustee timely appealed to this Court. (App. at 61).

## STATEMENT OF FACTS

### A. Formation and Structure of the Debtor

ACCLP is a Massachusetts limited partnership formed on May 29, 1984 to "acquire, own and operate" a television station known as WHCT-TV Channel 18 ("Channel 18") in Hartford, Connecticut. (Trial Transcript, Vol. 3 at 71; Joint Trial Exhibit 165).[1] Prior to ACCLP's formation, Channel 18 was owned by Faith Center, Inc. ("FCI"), whose license to operate the television station had been designated for a revocation hearing by the Federal Communications Commission ("FCC"). In re Astroline, 188 B.R. at 100 (App. at 9)(T. Vol. 3 at 62; Ex. 2). During the pendency of its license revocation proceedings, FCI twice petitioned the FCC for permission to sell its broadcast license to Interstate Media Corporation ("IMC") under the FCC's minority distress sale policy, which allowed an owner of a television station whose licence was subject to revocation

[1]Trial transcripts and exhibits, Nos. 159 through 166 on the Bankruptcy Court docket, will hereinafter be referred to as "T. Vol. __ at __; Ex. __."

to sell the license to a qualified minority applicant at a discount from fair market value. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 557-58 (1990)(T. Vol. 1 at 22-25). Although the FCC approved both petitions by FCI for the distress sale of Channel 18 to IMC, a sale was not consummated within the time prescribed by the FCC. Id. at 561.

In April, 1984, Thomas A. Hart, Jr. ("Hart"), a Washington, D.C. lawyer (and also a defendant in this adversary proceeding), contacted Fred J. Boling ("Boling"), a general partner of Astroline Company, and informed him that Channel 18 could be purchased pursuant to the FCC minority distress sale policy. In re Astroline, 188 B.R. at 100 (App. at 9)(T. Vol. 3 at 61-62). At the time, Hart represented Astroline Company, a Massachusetts partnership that had been formed in 1981. In re Astroline, 188 B.R. at 100 (App. at 9)(T. Vol. 3 at 21-23, 44-45; Ex 150). Astroline Company's partners included defendants Boling, Herbert A. Sostek ("Sostek"), Randall L. Gibbs, Richard A. Gibbs and Joel A. Gibbs. In re Astroline, 188 B.R. at 100 (App. at 9)(T. Vol. 3 at 61, Ex. 150).

On April 27, 1984, Hart provided financial material concerning Channel 18 to Sostek, reminding him that time was "of the essence" because the license revocation hearing had been scheduled for May 16, 1984. (T. Vol. 3 at 64-65; Ex. 1). Once the hearing commenced, FCI would lose its right to participate in the minority distress program. (T. Vol. 1 at 26-27). Hart had made it clear to Boling that, in order to obtain an extension of the hearing date, it was necessary to demonstrate to the FCC that a sale was underway. (T. Vol. 3 at 65, 69; Ex. 2). Boling recognized, therefore, that Astroline Company was

under extreme time pressure to execute an agreement to purchase the television license from FCI before the license revocation hearing started. Hart, on behalf of Astroline Company, persuaded the FCC to postpone the revocation hearing for two weeks, to May 30, 1984. (T. Vol. 3 at 69, 71). The revocation hearing was extended in order to allow Astroline Company to find a member of a qualified minority group with whom to become a partner. (T. Vol. 3 at 71)..

Negotiations between Astroline Company and FCI continued through May 29, 1984, when ACCLP signed a Purchase and Sale Agreement with FCI. (Ex. 5). Although the precise date that FCI signed the agreement is unclear, it was signed by FCI before May 29, 1984. (T. Vol. 1 at 75; T. Vol. 3 at 74-75; Ex. 5). FCI had, therefore, agreed to sell the television station and license to a yet-to-be-formed entity in which the Astroline Company partners were to be involved, directly or indirectly. In fact, Section 22 of the Purchase and Sale Agreement provides that any notices to be sent to the buyer be directed to "Fred J. Boling, Astroline Company, 855 Broadway, P.O. Box 989, Saugus, MA 01906." (Ex. 5).

Hart advised Astroline Company that, in order to purchase the Channel 18 license, Astroline Company needed a partner who could qualify as a minority applicant under the FCC guidelines. In re Astroline, 188 B.R. at 100 (App. at 9)(T. Vol. 3 at 71). Hart suggested Richard Ramirez; no Astroline Company partner had ever met Ramirez or even heard of him. (T. Vol. 1 at 9; T. Vol. 3 at 68). Ramirez was, however, Hispanic and could be used to qualify ACCLP, an entity not then created, as a minority applicant under the FCC distress sale policy. (T. Vol. 1 at 22). Ramirez had graduated from college in 1976. Except for approximately a

one-year period, he had worked only for radio stations. All of his experience had been in sales. (T. Vol. 1 at 32-41; Ex. 4). Prior to May, 1984, Ramirez had never been the general manager of a radio or television station; nor had he been in charge of any business. (T. Vol. 1 at 43). It was not until sometime during Memorial Day weekend, May 26-28, 1984, that the Astroline Company partners first met Ramirez. In re Astroline, 188 B.R. at 100 (App. at 9) (T. Vol. 1 at 5-14; T. Vol. 3 at 71). After just two hours of discussion, Astroline Company offered him a partnership interest. In re Astroline, 188 B.R. at 100 (App. at 9)(T. Vol. 1 at 58-59).

ACCLP and WHCT Management were formed on May 29, 1984, the same day on which ACCLP signed the agreement to purchase Channel 18 from FCI. In re Astroline, 188 B.R. at 100 (App. at 9)(Exs. 5, 6, 19, 165). The Astroline Company partners had initially preferred that the entity created to acquire the television license be a corporation in order to insulate them from individual liability, but were later advised by Hart that compliance with the FCC minority distress policy would be "easier" if instead they used the limited partnership form. (T. Vol. 3 at 75; T. Vol. 5 at 6-7). As Boling explained at trial, the FCC guidelines dictated that the qualified minority in a corporate structure hold a greater ownership percentage than in a partnership structure. (T. Vol. 5 at 7).

The ACCLP partnership agreement listed its partners and their respective ownership interests as follows: Ramirez, the sole individual general partner, held a 21 percent interest; WHCT-TV Management, a corporate general partner, held a 9 percent interest; and Astroline Company, purportedly the limited partner, held the remaining 70 percent.

In re Astroline, 188 B.R. at 101 (App. at 10). Astroline Company owned 100 percent of the WHCT Management stock until February, 1986, when stock ownership was transferred to Sostek, Boling and the three Gibbs brothers. In re Astroline, 188 B.R. at 101 (App. at 10)(Ex. 19).

According to the ACCLP partnership agreement, Ramirez made an initial capital contribution of just $210 for his 21 percent interest in ACCLP; Ramirez never made any other contribution. (T. Vol. 1 at 48; Ex. 9). Astroline Company made an initial equity contribution of $500,000. In re Astroline, 188 B.R. at 101 (App. at 10)(Ex. 9). The partners of Astroline Company never expected Ramirez to contribute any money to ACCLP. (T. Vol. 1 at 48-49, T. Vol. 3 at 76). Ramirez admitted that ACCLP's finances were principally the responsibility of Astroline Company. (T. Vol. 1 at 92).

B. Astroline Company

Astroline Company was formed for the purpose of making purportedly passive investments in a broad array of businesses and industries, most of which included "Astroline" in their name. (T. Vol. 3 at 21-23, 44-45; Ex. 150). The partners of Astroline Company made investment decisions based, in large part, upon input and guidance provided by Sostek and Boling. (T. Vol. 3 at 46-48). Moreover, although there were five partners, Boling was principally responsible for all of Astroline Company's financial matters, (T. Vol. 5 at 149-50), and was designated as the tax matters partner on the partnership tax returns. (T. Vol. 3 at 33-34; Ex. 53). Boling administered Astroline Company's financial

affairs with the help of Richard Sullivan and Peter Siciliano, both employees of Astroline Corporation, an affiliate of Astroline Company owned by the general partners of Astroline Company. (T. Vol. 3 at 94-95, 145; T. Vol. 5 at 9-10, 16, 18-19, 150). Sullivan had responsibility for cash and bank accounts and Siciliano managed accounts payable and receivable. (T. Vol. 3 at 121-22; T. Vol. 5 at 9-20). Each had staff to assist them in performing these functions. (T. Vol. 5 at 150).

Prior to the creation of ACCLP, the single largest investment made by Astroline Company in any one business was $1 million. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 3 at 50-51). Boling testified at trial that he and the other partners of Astroline Company initially had no expectation that Astroline Company's investment in ACCLP would exceed that amount. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 3 at 51). The Astroline Company partners anticipated at the outset in May, 1984 that all additional funds necessary to build and operate the television station would be provided by third-parties, In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 3 at 52), and that total capital of $15 million would be necessary for the television station to achieve a break-even operating level. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 1 at 68-79, T. Vol. 3 at 52). Astroline Company also expected that prior to reaching profitability ACCLP would incur losses that would be passed through to the partners of Astroline Company as tax benefits. (T. Vol. 3 at 27-28).

C. Astroline Company's Growing Investment in the Debtor

Ultimately, Astroline Company's efforts to obtain additional equity or debt capital for ACCLP were unsuccessful, In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 3 at 78-79), and the Astroline Company partners considered abandoning the venture. Instead, Astroline Company chose to continue to fund ACCLP's operations and capital needs itself, as it had done since ACCLP's inception. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 1 at 134-37; T. Vol. 3 at 81).

Consistent with its decision to fund all of ACCLP's capital requirements itself, Astroline Company caused the terms of the ACCLP partnership agreement to be modified such that Astroline Company significantly increased its share of the equity in the Debtor and secured more of the valuable tax benefits for its partners. Notwithstanding the FCC minority preference guidelines, the amendment resulted in Ramirez no longer owning 21% of the equity in ACCLP. (T. Vol. 1 at 138-63; Exs. 9, 54). Rather than retaining 21% of the equity, as specified in the original partnership agreement, Ramirez was given the right only to receive 21% of all partnership distributions after Astroline Company had been repaid its equity contributions in full, with a return. (T. Vol. 1 at 162, Ex. 9). Ramirez's interest, which had been reflected as 21% on the 1984 ACCLP tax return, was shown to have been reduced to less than 1% on the 1985, 1986 and 1987 tax returns. (Exs. 10-13). Astroline Company's interest was correspondingly increased from 70% to 82% in 1987. (Ex. 13). This increased interest reflected Astroline Company's equity investment of $22 million. In re Astroline, 188 B.R. at 101 (App. at 10).

D. Cash Control System

Boling admitted at trial that Astroline Company created and administered a comprehensive "cash control system" over the Debtor's funds. (T. Vol. 5 at 8-9, 18-19, 104-05). Sullivan was responsible for managing ACCLP's cash. (T. Vol. 5 at 14-15, 18-19). The cash control system covered all receipts and disbursements of the Debtor from its inception until August 31, 1988, when Astroline Company ceased investing in the Debtor. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 1 at 175-77, 188; T. Vol. 5 at 16, 18-19). One of Sullivan's principal responsibilities was to reduce interest expense to the Astroline Company partners, who personally were borrowing the money they invested in the Debtor through Astroline Company. (T. Vol 4 at 65; T. Vol. 5 at 20). Boling admitted that this particular feature of the cash control system was established for the personal benefit of the Astroline Company partners. (T. Vol. 5 at 20, 105). There was no evidence at trial that the cash control system conferred any benefit on the Debtor. (T. Vol. 5 at 8-20; 103-05).

Until just prior to the bankruptcy filing on October 31, 1988, there was never a checkbook in the Debtor's Hartford office for the Debtor's only checking account, which was maintained at State Street Bank in Boston. In re Astroline, 188 B.R. at 102 (App. at 11)(T. Vol. 1 at 193-95; T. 4/21/95 at 141, 166, 185). All ACCLP bank statements were sent to and reconciled by Astroline Company staff in Massachusetts. In re Astroline, 188 B.R. at 102 (App. at 11)(T. Vol. 7 at 54-55). Significantly (and remarkably), Boling rejected Ramirez's repeated

requests that the Debtor be allowed to maintain its checkbook in its own office in Hartford. (T. Vol. 1 at 203, 236-37).

To control ACCLP's cash, Astroline Company imposed an intricate payables system on the Debtor. (T. Vol. 1 at 172-173; Exs. 87, 152). By denying the Debtor possession of its checkbooks, Astroline Company was able to maintain complete control over ACCLP's cash. In order for ACCLP to get a check from Astroline Company to pay any bill (even for petty cash or paper clips), it had to obtain the appropriation authorization of an Astroline Company partner or employee. Only upon such approval and authorization could a check be drawn and sent from the Astroline Company office in Massachusetts to ACCLP in Hartford. In re Astroline, 188 B.R. at 102 (App. at 11)(T. Vol. 1 at 176, 195, 240; T. Vol. 3 at 106, 145; Exs. 136, 137). As described at trial by Alfred Rozanski, ACCLP's business manager, every invoice received by ACCLP in Hartford was sent to Astroline Company's office along with a transmittal memorandum, backup documentation and, in most circumstances, a check request. (T. Vol 7 at 42-44, 61; Exs. 39, 210). Ramirez testified that ACCLP could not obtain a check from Astroline Company's office in Massachusetts without submitting the proper documentation; as Ramirez put it, ACCLP "had to dot all the I's and cross the T's" in order to get a check. (T. Vol. 1 at 240). Astroline Company demanded that this procedure be followed, notwithstanding the fact that ACCLP had a fully functional office in Hartford, at least from the beginning of 1985, and, thereafter, had a sophisticated computer system specifically designed to accomplish automatically the functions performed by Astroline Company. (T. Vol. 1 at 181-84, 198-99; T. Vol. 3 at 142; T. Vol. 7 at 61-62).

The Bankruptcy Court expressly found after trial that "[p]rior to August 31, 1988, Astroline Company processed all of the Debtor's checks, which numbered in the thousands...." In re Astroline, 188 B.R. at 102 (emphasis added)(App. at 11). Every one of the thousands of checks was prepared in the Astroline Company office in Massachusetts by its employees. (T. Vol. 7 at 15, 43; T. 4/15/95 at 140; Ex. 212). This was a cumbersome and expensive process that even ACCLP's auditors, Arthur Andersen, had formally recommended be changed. (T. Vol. 1 at 199, 233-37; Ex. 55 at 10). As stated in an Arthur Andersen memorandum dated May 30, 1986, "accounts payable are being paid through a related party [identified as Astroline Company by Ramirez (T. Vol 1 at 234-35)] ... consideration should be given to moving the accounts payable function to Hartford." (Ex. 55 at 10). In fact, Ramirez admitted that by the beginning of 1986, ACCLP had sufficient staff and capability through its sophisticated computer accounting system to handle the payable and check-writing functions. (T. Vol. 1 at 183). The fact that these functions continued to be performed by Astroline Company in Massachusetts demonstrates Astroline Company's control over the Debtor.

Boling admitted at trial that he wrote "O.K." or "O.K. per FJB" on hundreds of check requests, transmittal forms and invoices; In re Astroline, 188 B.R. at 102 (App. at 11)(T. Vol. 3 at 110-139; Exs. 39, 39 A-H, 216); and Ramirez acknowledged that if Boling did not approve the payment of an invoice, the Astroline Company personnel that worked in Astroline Company's office in Massachusetts would not have drawn the check. (T. Vol. 1 at 202, Exs. 35, 39). As Ramirez explained at trial:

Q. And if [Boling] didn't say okay, they wouldn't have drawn the check, would they?

A. In all likelihood, they would not have.

Q. And if they didn't draw the check, you couldn't pay the bill?

A. In all likelihood, I couldn't.

(T. Vol. 1 at 202).

Boling also admitted that it was the practice, at least in 1984 and 1985, that he or Sostek "initial" all invoices of ACCLP before they were paid. (T. Vol. 3 at 158). He also acknowledged that there were instances where, rather than writing "O.K." on an invoice, they wrote "No" or "Hold" or some other order "by" or "per" their direction. (T. Vol. 3 at 117-127, 129, 133-36, Ex. 130). Moreover, the evidence also established that Sostek approved the payment of invoices. (T. Vol. 3 at 133, Exs. 39I, 141-148). It is clear that no check to pay any ACCLP obligation would (or could) have been written if Astroline Company did not consent. (T. Vol. 1 at 202, T. Vol. 3 at 121-123). Indeed, Astroline Company would not transfer funds into the ACCLP account until Boling or Sostek approved a check for payment. (T. Vol. 3 at 110-11).

In addition to its total control of the expense side of ACCLP's business, Astroline Company also completely controlled the Debtor's income and cash. At Astroline Company's insistence, all operating revenues received by ACCLP were deposited in a lock box account at Bank of Boston Connecticut, which had a twice-weekly sweep feature that automatically transferred all funds to a bank account at State Street Bank in Massachusetts. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 1 at 185-189; T. Vol. 7 at 36, 56-58; Exs. 22, 55, 129, 47, 48). Although the defendants claimed at trial that Ramirez had "access" to

the Debtor's funds because he had authority to sign checks, it was undisputed that, prior to August 31, 1988, Ramirez never had a checkbook (or a check) in Hartford and could not draw on that account unless someone in the Astroline Company office in Massachusetts chose to give him a check to sign. In re Astroline, 188 B.R. at 102 (App. at 11)(T. Vol. 1 at 202). Further, Ramirez had no access to the Debtor's revenues, all of which were deposited in the lock box account from which they were swept to Boston. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 7 at 56-60).

Significantly, it is undisputed that, even if Ramirez had "access" to the Debtor's funds, certain general partners of Astroline Company (Sostek, Boling, Richard Gibbs and Joel Gibbs) each had individual signature authority on the ACCLP bank accounts at State Street Bank and Security National Bank in Massachusetts, always having unchecked authority "to empty the Debtor's bank account at any time without Ramirez's knowledge, consent or participation...." In re Astroline, 188 B.R. at 104, 106 (App. at 13, 15)(T. Vol. 1 at 220-21, 225-26; T. Vol. 3 at 90, 93, 98-101; T. 4/21/95 at 185; Exs. 20, 21, 212, 215, 216). As Ramirez admitted with respect to the Debtor's State Street Bank account:

> Q. Okay. But four other people had control of the account?
>
> A. That's true.
>
> Q. Okay. And they could have taken the money out any time they wanted?
>
> A. They never did, but they could have.

(T. Vol. 1 at 238).

Contrary to Ramirez's belief, however, the partners of Astroline Company did sign at least two checks on the Debtor's account, each payable to Astroline Company for "interest," without the knowledge or

consent of Ramirez. In re Astroline, 188 B.R. at 102, 106 (App. at 11, 15)(T. 4/21/95 at 179-180; Exs. 216A, 216B). Ramirez testified about those checks as follows:

> Q. Okay. So you don't know why Joel Gibbs wrote a check to the Astroline Company on April 10th, 1985 for $20,071, do you?
>
> A. No.
>
> Q. And you don't know why Mr. Boling wrote a check to the Astroline Company for interest on February 6th, 1985 in the amount of $5,352, do you?
>
> A. No, I do not.

(T. 4/21/95 at 179-80). As the Bankruptcy Court concluded, "[t]he two checks ... defy an explanation." In re Astroline, 188 B.R. at 106 (App. at 15). The defendants offered no evidence at trial to explain why Boling and Gibbs wrote checks for "interest" to Astroline Company without Ramirez's knowledge. There was no evidence offered at trial of any debt owed by the Debtor to Astroline Company in 1985.

The evidence also demonstrated numerous instances in which ACCLP checks were signed by the partners of Astroline Company. (Exs. 212, 215, 216). Although the testimony was that many of these checks had been requested by personnel in ACCLP's Hartford office and approved by Ramirez (and prepared by Astroline Company personnel in Massachusetts), certain checks, in addition to those payable to Astroline Company, were prepared by Astroline Company with no involvement by Ramirez or any ACCLP employees. One example was a check payable to Rev. Gene Scott of FCI for $100,000 that even Boling (who signed the check) could not explain at trial. (T. Vol. 3 at 147-48; Ex. 212).

In addition to control of the revenue and expenses of ACCLP, Astroline Company also was substantially involved in other aspects of the Debtor's financial reporting and planning. Financial projections for the business were prepared by ACCLP's accountants for review by Boling and Sostek. (Exs. 61, 63). Drafts of annual financial statements and tax returns were prepared by ACCLP's accountants and submitted to Boling for his review and input. (Exs. 68, 84, 118). Ramirez and Rozanski regularly submitted revenue and expense projections for ACCLP to Sostek and Boling for their review and approval. (T. Vol. 7 at 63-68; Exs. 69, 70, 112, 113, 116, 117, 120, 121). The financial reporting requirements imposed by Astroline Company on ACCLP were so rigorous that, at one point, Ramirez apologized to Sostek and Boling for the poor quality and frequency of ACCLP's financial reporting. (T. Vol. 2 at 29-33; Ex. 78).

Astroline Company also manipulated ACCLP's financial reporting and tax treatment of certain transactions for the personal benefit of its partners which further evidenced the substantial degree of control imposed by the putative limited partner over the business of the Debtor. (T. Vol. 6 at 94). It was established at trial that equity contributions of $4 million made by Astroline Company in 1987 were "reclassified" as debt in January, 1988. (T. Vol. 2 at 62-66; T. Vol. 7 at 75-79; Ex. 24). Boling testified that he prepared a Promissory Note, drove to Hartford and demanded that Ramirez sign the note in favor of Astroline Company. (T. Vol. 5 at 55-56; Exs. 23, 144). Although the "reclassification" was shown on the 1987 audited statements of ACCLP, the 1987 monthly internal statements never showed the $4 million debt. (Exs. 15, 205).

Six months later, in May, 1988, the Promissory Note was secured by a mortgage on real property owned by ACCLP, again at Boling's direction and insistence. (T. Vol. 2 at 82-85; Ex. 154). Significantly, ACCLP sought unsuccessfully to obtain a secured loan of $5.5 million in November, 1987, presumably to pay the Astroline Company "loan" that, incidentally, was still classified as equity on the October, 1987 financial statement. (T. Vol. 3 at 82-86, Exs. 153, 205). Again in September, 1988, just two months before the bankruptcy filing, Astroline Company required that ACCLP sign a Revolving Loan Agreement, this time purporting to evidence a $2,930,000 loan, all of which had been advanced to ACCLP prior to the date the loan agreement was signed. (T. Vol. 5 at 78-83; Exs. 31, 155).

In addition to maintenance of complete dominion and control over the cash and finances of ACCLP, Astroline Company exerted control over other aspects of ACCLP's business. Numerous correspondence from the Debtor's professional firms were addressed exclusively or copied to Boling and/or Sostek. (Exs. 60, 62, 65, 90, 93, 94). Ramirez sought Boling's and Sostek's approval for certain construction modifications at ACCLP's Garden Street facility and made recommendations to Boling. (T. Vol. 2 at 40-47; T. 4/21/95 at 180-81; Exs. 82, 83). Ramirez also sought direction from Boling and Sostek regarding advertising, marketing and programming issues. (Exs. 71, 72, 73, 76, 86, 87, 91, 92, 111, 123, 133).

Significantly, in two documents submitted to third parties, Astroline Company or its general partners were actually identified as "general partners" of ACCLP. First, in an Authority for Deposit and Borrowing, submitted to State Street Bank in Boston, Massachusetts,

Boling signed the document stating that he, Sostek, Joel Gibbs and Richard Gibbs were the general partners of ACCLP. (Ex. 217). Second, in a document submitted to the FCC on May 29, 1985, Ramirez certified that Astroline Company was a general partner, owning 70% of the equity of the partnership. (Ex. 221).

E. The Debtor's Bankruptcy Proceedings and the Formation of Astroline Company, Inc.

On October 31, 1988, an involuntary petition under Chapter 7 of the Bankruptcy Code was filed by certain creditors of ACCLP. The Debtor consented to an order for relief and, at the Debtor's request, the Bankruptcy Court converted the case to one under Chapter 11. Upon motion by the Official Committee of Unsecured Creditors, the Debtor's case was reconverted to a case under Chapter 7 on April 9, 1991. Also on that date, the plaintiff was appointed Interim Trustee of the Debtor's bankruptcy estate. On June 13, 1991, the plaintiff was appointed Permanent Trustee.

On November 2, 1988, two days after the involuntary petition was filed, Astroline Company was purportedly dissolved and all of its assets transferred to Astroline Company, Inc., a Massachusetts corporation of which Sostek, Boling, Richard Gibbs and Randall Gibbs are the sole officers, directors and shareholders. (T. Vol. 3 at 5, 7-9; Ex. 18). Although Astroline Company was "reconstituted" as Astroline Company, Inc., its business remained precisely the same. The defendants admitted at trial that the transfer to corporate form was an effort to limit the liabilities of the Astroline Company partners. (T. Vol. 3 at 7-8; T. Vol. 5 at 137-138). At the same time, the Astroline Company partners transferred their shares in WHCT Management to Ramirez for no consideration. (Ex. 19).

The Trustee commenced this adversary proceeding on June 10, 1993, seeking to recover from the defendants the deficiency in the property of the debtor to pay in full the claims of its creditors pursuant to Section 723 of the Bankruptcy code. There is a substantial deficiency in the property of the estate necessary to pay in full the allowed claims of creditors. (T. Vol. 5 at 155). The Trustee is entitled to recover that deficiency from the defendants, jointly and severally. By agreement of the parties approved by the Bankruptcy Court, the liability and damage portions of the trial were bifurcated: if liability is found to exist, this case should be remanded to the Bankruptcy Court for a hearing to establish the amount of the deficiency.

## SUMMARY OF ARGUMENT

The Trustee commenced this action pursuant to his statutory authority granted by Sections 723(a) and/or 544(a) of the Bankruptcy Code. These two statutory provisions have uniformly been interpreted by other federal courts and by the Bankruptcy Court in its Memorandum of Decision to empower Chapter 7 trustees to seek recovery from limited partners who exercise control of a debtor substantially the same as that of a general partner. Moreover, because the claims asserted by the Trustee are, by definition, generalized claims of all creditors, not particularized claims of individual creditors, the Trustee is the only proper party to assert such claims. Accordingly, this Court should first reject the District Court's legal conclusions and conclude that the Trustee has standing to assert his claims against the defendants in this case.

The second legal issue for this Court to decide, based on the facts proven at trial, "is whether the [defendants] had so deported themselves as to become general partners of [the Debtor] and therefore liable for its debts also." In re Verses I, 15 B.R. 48, 50 (Bankr. W.D. Pa. 1981). "[The] determination of whether a limited partner's conduct amounts to control over the business affairs of the partnership must be determined by consideration of several factors, including the purpose of the partnership, the administrative activities undertaken, the manner in which the entity actually functioned, and the nature and frequency of the limited partner's purported activities." Alzado v. Blinder, Robinson & Co., 752 P.2d 544, 552 (Colo. 1988). "Liability results, not from injury to a particular creditor or class of creditors, but rather from the behavior of a limited partner which is seen as an abuse of the limited partnership device." Stamps v. Knobloch (In re City Comm., Ltd.), 105 B.R. 1018, 1023 (Bankr. N.D. Ga. 1989).

The Bankruptcy Court's factual findings that Astroline Company maintained exclusive control over the Debtor's checkbook, twice weekly swept all of the Debtor's income to an out-of-state bank, caused checks to be written to itself from partnership funds without Ramirez' knowledge, and had the absolute power to empty the Debtor's bank account, demonstrate that the defendants exercised a level of financial control that is unparalleled by any other limited partnership either recognized in the case law or permitted by statute. Because such control is fundamentally inconsistent with Astroline Company's claimed status as a limited partner of the Debtor, this Court should conclude, under de novo review of the Bankruptcy and District Courts' legal conclusions, that the defendants are

liable as general partners for the deficiency of property of the estate, and remand the case to the Bankruptcy Court for a determination of that deficiency.

## ARGUMENT

### I. BASED ON THE BANKRUPTCY COURT'S FINDINGS OF FACT AND THE EVIDENCE AT TRIAL, DEFENDANTS ARE LIABLE AS GENERAL PARTNERS OF THE DEBTOR PURSUANT TO SECTION 723 OF THE BANKRUPTCY CODE.

#### A. The Trustee Has Standing To Assert His Claims

The District Court held below that Section 723 of the Bankruptcy Code permits a partnership trustee to recover a deficiency of property of the estate to pay claims of creditors only for partners who are titled "general partners." This restrictive view of Section 723, rejected by every court to have considered the question before, is inconsistent with both the Bankruptcy Code and well-established precedent in this Circuit. Because the Trustee is authorized to pursue his claims against the defendants under Sections 723 and/or 544 of the Bankruptcy Code, this Court should conclude that the Trustee has standing to assert his claims.

##### 1. The Trustee May Pursue the Defendants Directly Under Section 723 of the Bankruptcy Code.

According to the District Court's narrow interpretation of Section 723, a Chapter 7 trustee of a debtor limited partnership cannot, under <u>any</u> circumstances, pursue a partner of the partnership debtor, either general or limited, that acted as a general partner unless that partner is specifically identified as a "general partner" in the applicable partnership agreement. Were this Court to endorse the

District Court's reading of Section 723, partners of a debtor limited partnership bearing the label "limited partner" would be immune under the Bankruptcy Code, despite having exercised control over the partnership and having acted as general partners so as to become liable as general partners under state law. Neither the language nor the policy of Section 723 supports this result.

The Bankruptcy Court below and all other courts to address the standing issue have held consistently that Section 723 creates a cause of action for a trustee to pursue a claim against a party not denominated as a "general partner," but who has exercised control of a general partner and is liable as one under state partnership law. See Hoffman v. WHCT Management, Inc. (In re Astroline Communications Co. Ltd. Partnership), 188 B.R. 98, 102-03 (Bankr. D. Conn. 1995)(citing Marshack v. Mesa Valley Farms L.P. (In re Ridge II), 158 B.R. 1016, 1023 (Bankr. C.D. Cal. 1993)), on subsequent appeal, 86 F.3d 1163 (9th Cir. 1996); Jahn v. Lamb (In re Lamb), 36 B.R. 184, 188-89 (Bankr. E.D. Tenn. 1983); In re Verses I, 15 B.R. 48, 50 (Bankr. W.D. Pa. 1981).

In In re Lamb, 36 B.R. 184 (Bankr. E.D. Tenn. 1983), a Chapter 7 trustee commenced an action pursuant to Section 723 against an individual who the trustee contended had so comported himself as to be held liable as a general partner. Applying state partnership law concepts, the court analyzed the conduct of the defendant and found him to be liable as a general partner under Section 723. Id. at 188

A similar conclusion was reached in In re Verses I, 15 B.R. 48 (Bankr. W.D. Pa. 1981), where the bankruptcy court stated that if the defendants had acted so as to become liable as general partners under

state law, then they would be liable to the trustee under Section 723. Seemingly, the District Court misread this case to hold that the Verses defendants were held liable only because they had failed to comply with the statutory requirements of the applicable Limited Partnership Act. To the contrary, the court said, "[t]he dispute is whether [defendants] so deported themselves as to become general partners." Id. at 50. The Verses defendants had argued that a failure to comply with the statutory requirements for formation of a limited partnership meant that they were not partners at all and, therefore, not liable for the partnership debts. The court rejected that argument, holding that the putative limited partners exercised control over the partnership and held themselves out as partners. It was not the failure to file the limited partnership certificate that resulted in general partnership liability. Id.

More recently, in Marshack v. Mesa Valley Farms L.P. (In re Ridge II), 158 B.R. 1016 (Bankr. C.D. Cal. 1993), a trustee sought to make limited partners generally liable because of the degree of control the partners exercised over the debtor. Although the court dismissed the Trustee's claims on the merits, it held that Section 723 can be used to pursue limited partners that acted as general partners:

> On its face, § 723(a) reaches only "general partners" of a debtor. Nevertheless, I have explored the limits of § 723(a) beyond its plain meaning because the arguments of the Trustee insinuate that such is required. I find precedent for referring to state law in analyzing § 723(a) because § 723(a) is, itself, conceptually based on state partnership law and other Bankruptcy Courts have relied upon state partnership law in other contexts.

Id. at 1023.

Consistent with the above-cited cases, the Bankruptcy Court in this case held, three times, that Section 723 "is the vehicle through which limited partners who act as general partners may be held liable to a chapter 7 trustee." Hoffman v. Ramirez (In re Astroline Communications Co. Ltd. Partnership), 161 B.R. 874, 879 (Bankr. D. Conn. 1993)(App. at 63); Hoffman v. WHCT Management, Inc. (In re Astroline Communications Co. Ltd. Partnership), 188 B.R. 98, 103 (Bankr. D. Conn. 1995)(App. at 7); (Transcript of Hearing on Motion for Summary Judgment dated October 12, 1994, at 8)(App. at 71). While it is obvious that Congress intended to exclude legitimate limited partners from the reach of Section 723, it is illogical to suggest that merely because Congress used the words "general partner" in Section 723, it intended to insulate from any liability those who, having tagged themselves with the appellation "limited partner," nevertheless exercise sufficient control over the partnership so that they would be liable under state law as general partners. In fact, Congress has expressly stated that, because the Bankruptcy Code does not define the term general partner or limited partner, non-bankruptcy state law definitions are to be utilized. H.R. Rep. No. 595, 95th Cong., 2d Sess. 381 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6337. Therefore, Congress has mandated that state law is to be used to determine who is a general partner or liable as one.

It is a fundamental principle of statutory construction that a court should construe a statutory term in accordance with its ordinary or natural meaning unless "'the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242

(1989)(quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). When read in conjunction with the legislative history, the plain and ordinary meaning of Section 723 is that the Trustee is allowed to pursue limited partners who, under state partnership law, are liable as general partners. The contrary interpretation, leaving a trustee with no recourse against controlling limited partners, violates the basic principle that courts must not interpret statutes in a manner that leads to an absurd result. Griffin v. Oceanic Contractors, Inc., 458 U.S. at 575. The District Court's interpretation of Section 723 is wrong and must be rejected by this Court.[2]

2. The Trustee May Assert A Claim Under Section 19 of the MLPA Against the Defendants Pursuant To Section 544(a).

While recognizing that Section 723 of the Bankruptcy Code authorizes the Trustee to pursue claims against putative limited partners of the Debtor, the Bankruptcy Court also correctly held that Section 544(a) confers on the Trustee the authority to pursue such claims. In re Astroline, 161 B.R. at 879 ("Even if § 723 were not available to the trustee in pursuing limited partners who have acted as general partners, the trustee may rely on the 'strong arm' clause of Bankruptcy Code § 544.")(App. at 68). Section 544(a) vests the

[2]Defendants' view of Section 723 surely would lead to anomalous results. For example, because the Massachusetts version of the Uniform Partnership Act, Mass. Gen. L. ch. 108A, refers to partners of a general partnership as "partners" (as opposed to "general partners"), slavish adherence to the tortured interpretation advocated by the defendants here would suggest that Section 723 would not be applicable to "partners" of a Massachusetts general partnership. As even the defendants have acknowledged, partners of general partnerships unquestionably have joint and several obligations to satisfy the debts of the partnership under Section 723.

Trustee with all rights and powers of a hypothetical judicial lien creditor. The status of the Trustee is that of "the ideal creditor, irreproachable and without notice, armed cap-à-pie with every right and power which is conferred by the law of the state upon its most favored creditor." Lancaster v. Hurst (In re Hurst), 27 B.R. 740, 742 (Bankr. E.D. Tenn. 1983). The rights conferred by the strong arm clause are not limited to avoidance powers; rather, a trustee is given the "full gamut of remedies that applicable state laws make available to any creditor of the debtor, who might be in a position to assert them, whether any such creditor exists or not." In re Louisiana Indus. Coatings, Inc., 31 B.R. 688, 692 (Bankr. E.D. La. 1983). Because creditors can pursue RULPA and alter ego actions under state law, so too may a trustee under Section 544(a) of the Bankruptcy Code. In re Verses I, 15 B.R. at 51; cf. Salomon v. Graphic Comm. Corp. (In re IMFC Fin. Corp.), 11 B.R. 874, 876 (Bankr. S.D.N.Y. 1981) ("a trustee has not only the rights of the bankrupt, but the rights of a bankrupt's creditors").

Significantly, under Section 19(a) of the MLPA, there is no requirement to show creditor reliance when, as the Trustee has alleged and proven, the purported limited partner's participation in the control of the business was substantially the same as the exercise of the powers of a general partner.[3] The defendants' liability for such participation extends to all creditors. It is beyond dispute, and overlooked by the District Court in its Ruling, that the Trustee can assert a claim that

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[3]The element of creditor reliance was not introduced in Massachusetts until the statute was revised effective March 1, 1989, four months after the bankruptcy petition was filed here.

could be asserted by any creditor. St. Paul Fire & Marine Ins. Co. v. PepsiCo. Inc., 884 F.2d 688, 701 (2d Cir. 1989).

The basis for a trustee's standing to pursue limited partners under Section 544 is best explained in Stamps v. Knobloch (In re City Comm., Ltd.), 105 B.R. 1018 (Bankr. N.D. Ga. 1989). In that case, the court found that the claims against the limited partners arising from their control over the debtor were functionally equivalent to alter ego claims. As such, in construing Georgia's adaptation of RULPA § 19(a) (identical in all material respects to the statute at issue here), the court concluded that

> [l]iability results, not from injury to a particular creditor or class of creditors, but rather from the behavior of a limited partner which is seen as an abuse of the limited partnership devise.... As a result, the Trustee has standing to assert Defendants are liable as general partners because, as limited partners, they exercised control of the business.

Id. at 1023. For purposes of trustee standing, the court concluded that it is irrelevant whether the claims belong to the debtor or its creditors. Outside bankruptcy it could hardly be expected that a partnership would pursue an alter ego or contribution action against those who comprise and control it. Thus, creditors may pursue those actions directly. The purposes, policies and procedures of bankruptcy law and "normal" partnership law are, however, entirely different. In bankruptcy, the trustee is the "logical and proper party to pursue such a claim" and "[p]ractically, if the Trustee is prevented from asserting [these] claims against Defendants, no other party is in a position to do so." Id. at 1022-23. See also Moore v. Kumer (In re Adam Furniture Indus., Inc.), 191 B.R. 249, 254 (Bankr. S.D. Ga. 1996)

("The equitable nature of the [bankruptcy] proceeding leads to the expansion of traditional notions of standing.").[4]

The District Court failed to consider these and other authorities broadly construing a trustee's standing to assert general claims on behalf of and belonging to the estate. Because the District Court's conclusion that the Trustee lacks standing to pursue his claims is demonstrably at odds with the procedures and goals of bankruptcy, as set forth in the Bankruptcy Code and Rules and as recognized by the courts, it must be rejected by this Court.

3. The Trustee's Claims Against the Defendants Are Not Personal Claims Of Individual Creditors.

The Trustee did not assert in his Complaint any claims for "particularized injury" that are unique to individual creditors. St. Paul Fire & Marine Ins. Co. v. PepsiCo. Inc., 884 F.2d 688, 704 (2d Cir. 1989) (citing Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1349 (7th Cir. 1987), cert. denied, 485 U.S. 906 (1988); Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132, 135 (4th Cir. 1988)). Rather, the Trustee's claims are the very type recognized by this Court as "general claims" that, "if proved, would have the effect

[4]Moreover, the state law cause of action under MLPA is property of the estate under Section 541 and may be pursued by the Trustee. According to Section 541(a), property of the estate includes "all legal and equitable interests." See Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132, 135 (4th Cir. 1988) (alter ego claim was property of the estate and pursuable by trustee); In re Litchfield County of S.C. Ltd. Partnership, 135 B.R. 797, 803 (W.D. N.C. 1992) (state law partnership contribution claim held to be property of the estate assertable by the Trustee); In re Lima Days Inn, Ltd., 10 B.R. 173, 174-75 (Bankr. N.D. Ohio 1981).

of bringing the property of a third party into the debtor's estate, and thus, would benefit all creditors." St. Paul, 884 F.2d at 701.

"A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause." Koch, 831 F.2d at 1348. Where, however, there is no special damage to the creditor suing, and the claim is common to other creditors, then it is a general action on behalf of all creditors that the trustee may pursue. In re Western World Funding, Inc., 52 B.R. 743, 775 (Bankr. D. Nev. 1985). The key factor is the commonality of the injury alleged and "whether it is peculiar and personal to the claimant." Koch, 831 F.2d at 1349.

In this case, the Trustee is not pursuing and need not prove any special damages of particular creditors. As noted above, the Trustee's claims under Section 544 do not depend on reliance by any single creditor. Instead, they are generalized claims common to all creditors and from which all creditors will equally benefit if the Trustee is successful. Liability here is premised solely on Astroline Company's control over ACCLP's business and finances and must not be confused with the proportionate share of the deficiency to be born by any one of the Astroline Company partners. All creditors have a claim against Astroline Company, of which Boling, Sostek and the Gibbs brothers were each general partners.

More importantly, however, an action under Section 723 is, by definition, a general action inuring to the benefit of all creditors for "a deficiency of property of the estate to pay in full all claims...." 11 U.S.C. § 723(a). The referenced "deficiency" is a general term and does not depend on the claim of any one creditor: all creditors benefit

from recovery under Section 723. Because Astroline Company, through its partners, comported itself such that it must be held liable as a general partner of the debtor, then all of its partners are derivatively liable to the Trustee under Section 723 for the deficiency.

In this case, there is no single injured person with a "personal" injury. Rather, the Trustee is seeking to recover on behalf of all of the creditors of the estate. Under such circumstances, it is the Trustee, not an individual creditor, who is the only proper party to maintain this action. St. Paul Fire & Marine Ins. Co. v. PepsiCo. Inc., 884 F.2d at 701 ("If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action.")(citations omitted).

Under the Bankruptcy Code, which requires recovery and liquidation of the property of the estate and the equitable distribution of the proceeds to creditors, any interpretation of the law whereby "limited" partners may escape liability regardless of their own misdeeds is intolerable. It simply cannot be the law that those who call themselves limited partners but comport themselves as general partners may entirely escape liability to a Chapter 7 trustee by the simple device of choosing the correct label. The limited partnership form is not, nor was it intended to be, a shield for limited partners that behave like general partners. The Trustee has standing to pursue the claims. The District Court wrongly rejected the Bankruptcy Court's legal analysis on the standing issue.

B. Liability Under the Massachusetts Limited Partnership Act

Section 19(a) of the Massachusetts Limited Partnership Act, Mass. Gen. L. ch. 109, as amended in 1982 ("MLPA"), which is based on Section 303 of the Revised Uniform Limited Partnership Act ("RULPA"), provides that a limited partner loses its limited liability and becomes liable for partnership debts as if it were a general partner if it exercises "substantially" the same control over the business as would a general partner. The operative version of the statute has been held not to require any evidence of creditor reliance or deception. See Bingham v. Goldberg, Marchesano, Kohlman, Inc., 637 A.2d 81, 88 (D.C. 1994); Gateway Potato Sales v. G.B. Inv. Co., 170 Ariz. 137, 822 P.2d 490, 497 (Ariz. App. 1991).

There is a dearth of authority concerning what level of control makes a limited partner liable as a general partner under RULPA in general, and MLPA in particular. Those few reported decisions to address the issue were decided on a case-by-case basis and provide no clear guidelines. See Barry Feldman, The Limited Partner's Participation in the Control of the Partnership Business, 50 Conn. B.J. 168, 189-90 (1976). As recognized by one leading commentator, however, "[c]ontrol over bank accounts is important not only because of the inherent importance of money in most businesses but also because it is easier to document." Alan R. Bromberg & Larry E. Ribstein, 4 Bromberg & Ribstein on Partnership, § 15.14(d), at 15:128 (1996).

The central role that a limited partner's control over partnership cash and finances plays is best exemplified by the seminal case of Holzman v. De Escamilla, 86 Cal. App. 2d 858, 195 P.2d 833, 834 (1948). In Holzman, a bankruptcy trustee brought suit against three partners, two of whom claimed to be limited partners, of the trustee's debtor. The trustee claimed the limited partners had become liable as general partners by taking part in the control of the partnership business. After trial, judgment was entered in favor of the trustee primarily based upon the control exerted by the limited partners over partnership funds kept in two bank accounts, each of which required the signatures of two of the three partners on checks. Affirming the judgment, the Court of Appeal found it "particularly illuminating" on the issue of control that the two claimed limited partners: (a) had "absolute power" to withdraw all of the partnership funds without the knowledge or consent of the general partner; and (b) could take control of the business from the general partner by refusing to sign checks. Id. Accordingly, the court held the limited partners "clearly ... took part in the control of the business of the partnership and thus became liable as general partners." Id.; cf. Plasteel Prods. Corp. v. Helman, 271 F.2d 354, 356 (1st Cir. 1959).

Other cases have similarly emphasized control over partnership finances in imposing liability on limited partners. Recently, in Fernot v. Crafts Inn, Inc., 895 F. Supp. 668 (D. Vt. 1995), a putative limited partner, who controlled "'every dollar that came in and every dollar that went out'" of the partnership's business, was held liable as a de facto general partner despite the fact that a general manager oversaw the employees and the business of the partnership "on a day-to-day basis." Id. at 674, 680.

Entering judgment against the limited partner, the court rejected as "entirely without merit" the argument that "because of the financial crisis the partnership was in, [the limited partner] had the right to preserve his business investment by becoming involved in the day to day activities of the partnership without losing his limited partner status." Id. at 680. See also FSLIC v. Stefanoff (In re Stefanoff), 106 B.R. 251, 256 (Bankr. N.D. Okl. 1989)(limited partner held liable where he took part in control of business with respect to decisions concerning financing of partnership); Mursor Builders, Inc. v. Crown Mountain Apartment Assocs., 467 F. Supp. 1316, 1333-34 (D.V.I. 1978)(limited partners held liable where they co-mingled partnership funds with personal funds and failed to maintain separate and complete financial records for partnership).[5]

Similar to Holzman, the Bankruptcy Court here expressly found that Astroline Company had "the power to empty the Debtor's bank account" at any time without Ramirez's knowledge, consent or participation. In re Astroline, 188 B.R. at 104, 106. Although Sostek, Boling, Joel Gibbs, Richard Gibbs and Ramirez each had signature authority on the ACCLP bank

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[5]The defendants place a great emphasis below on the fact that the Debtor was experiencing financial difficulties before the bankruptcy petition was filed. Relying on First Wisconsin Nat'l Bank v. Towboat Partners, Ltd., 630 F. Supp. 171 (E.D. Mo. 1986), aff'd sub nom., 802 F.2d 1069 (8th Cir. 1986), the defendants proclaimed that, when a partnership is in financial distress, limited partners may engage in a higher level of participation to protect their investments. Significantly, however, Astroline Company had control of the Debtor's funds from the inception of the partnership. The Debtor never had access to its own money. Moreover, this argument has been expressly rejected by other courts. See, e.g., Fernot v. Crafts Inn, Inc., 895 F. Supp. 668, 680 (D. Vt. 1995); Hystro Prods., Inc. v. MNP Corp., 18 F.3d 1384, 1392 (7th Cir. 1994)(rejecting a claim that the parent corporation was permitted to control the cash and finances of the subsidiary in order to protect its substantial investment in the subsidiary).

account maintained in a Massachusetts bank, In re Astroline, 188 B.R. at 102, Ramirez, the "general partner", himself had no ability to withdraw money without the knowledge and approval of Astroline Company, simply because Astroline Company had exclusive possession of all the checks until the bankruptcy. Id. (T. Vol. 1 at 193-95; T. 4/21/95 at 141, 166, 185).

In reaching the opposite result from Holzman, the Bankruptcy Court concluded that there was "a critical distinction between the actual exercise of control and the potential to exercise control." In re Astroline, 188 B.R. at 105. Leaving aside, for the moment, whether one the distinction compels a different result from Holzman, the Bankruptcy Court failed to explain the Bankruptcy Court's own findings cataloguing numerous instances where control was actually exercised by the defendants, including their exclusion of Ramirez from possession of and control over the Debtor's checkbook, the twice-weekly sweeping of all Debtor's income to an out-of-state bank account to which Ramirez had no access and the two checks that were "inexplicably" made payable to Astroline Company without Ramirez's knowledge or consent. Even assuming that a distinction between actual and potential exercise of control can be found in the law, it is not present in this case. (See Section II infra).

Additionally, in construing a comment by the drafters of Section 303 of RULPA, the Bankruptcy Court raised, but did not decide, the issue of whether a limited partner, in order to be held liable as a general partner, must exercise "all" of the powers of a general partner. See In re Astroline, 188 B.R. at 105, 106. Such a requirement would, however, render meaningless the "substantially the same as" standard of the statute, which, as the comment explained, was intended by the drafters to

be a compromise between the prior "takes part in the control of the business" standard and the more stringent requirement of proof of creditor knowledge or reliance. RULPA § 303(a) comment, 1976. If such a construction of the statute were to be accepted by this Court, then a limited partner would be free to exercise all but one power of a general partner (for example the power to hire and fire employees) and never be exposed to liability as a general partner. This is neither the law nor the intent of the drafters of the uniform law.

Moreover, the case cited by the Bankruptcy Court concerning this issue, Hommel v. Micco, 76 Ohio App. 3d 690, 602 N.E.2d 1259, 1262 (1991), itself precludes such interpretation. In Hommel, the court found that the limited partners "'controlled' the direction" of the partnership business (the construction of a condominium complex) even though an employee of the general partner "made the day-to-day decisions." Id. Based on such control, the court reversed the judgment entered by the trial court, which had erroneously concluded that "a limited partner can only become liable if he exercises control which goes beyond that which is normally exercised by the general partner." Id. Hommel fully supports the Trustee's claims in this case. The defendants' assertion that Ramirez and ACCLP's staff made day-to-day decisions regarding the operation of the television station does not preclude the conclusion, which this Court should reach, that Astroline Company's absolute power over the Debtor's finances as found by the Bankruptcy Court was sufficient to make it and its partners liable as a general partner.

1. Piercing the Veil of Limited Liability

Because of the lack of substantial decisional law regarding limited partner liability, courts have often sought guidance from analogous standards in other areas of the law. As recognized by several courts, deficiency claims against limited partners are similar in many respects to alter ego claims against corporate shareholders. See, e.g., In re City Comm., 105 B.R. at 1023; Mount Vernon Sav. & Loan Ass'n v. Partridge Assocs., 679 F. Supp. 522, 528 n.7 (D. Md. 1987). Both limited partners and shareholders are investors cloaked with limited liability, provided that they refrain from asserting a voice in the operations of the enterprise. See Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 277 N.Y.S.2d 377, 223 N.E.2d 869, 873 (1966); City Comm., 105 B.R. at 1023. While legal standards for "piercing the corporate veil," which often require substantial unity of identity and fraud or injustice, are more rigorous than for claims against limited partners, financial control is similarly given primary importance.

Recently, the Seventh Circuit Court of Appeals pierced a parent corporation's veil of limited liability in a case remarkably similar in its facts to this case. In Hystro Prods., Inc. v. MNP Corp., 18 F.3d 1384, 1389-90 (7th Cir. 1994), all of the subsidiary's accounting and check- writing functions were moved to the parent's headquarters, where none of the subsidiary's employees had the ability to disburse or borrow money. Id. at 1389. Employees of the parent, not on the subsidiary's payroll, wrote all of the subsidiary's checks and prepared its monthly financial statements. Id. Although the subsidiary did have its own operating account, it kept a zero balance unless and until money was

transferred by the parent; all of the subsidiary's receivables went to a related third party, which financed the subsidiary through advances on receivables. Id. Based upon such close control of the subsidiary's finances, the Seventh Circuit concluded that the evidence was "clearly sufficient" to pierce the parent's veil of limited liability. Id. at 1390. Rejecting the defendant's claimed justification for its conduct based upon its substantial investment in the subsidiary, the court refused to permit the parent to escape liability and affirmed the judgment entered by the district court on the alter ego claim. Id. at 1392.

Here, of course, Ramirez, at all times prior to the start of the bankruptcy case, was denied physical possession of checks. In re Astroline, 188 B.R. at 102. Indeed, as the undisputed evidence shows, the Debtor could not buy a paper clip unless Astroline Company approved and sent a check from Astroline Company's Massachusetts headquarters to Hartford to pay for it. (T. Vol. 1 at 176, 195, 240; T. Vol. 3 at 106). Only after the Debtor complied with rigorous accounts payable procedures, which were reviewed and approved by Peter Siciliano, the Controller of Astroline Corporation (an affiliate of Astroline Company owned by the Astroline Company partners), would checks be prepared by Astroline Corporation personnel in its Massachusetts office. In re Astroline, 188 B.R. at 102. "Prior to August 31, 1988, Astroline Company processed all of the Debtor's checks, which numbered in the thousands, in this manner." Id. Although the bank accounts into which the Debtor's revenues were swept, and from which the Debtor's bills were paid and payroll was funded, were in the name of ACCLP, the checks and monthly account statements listed the address of ACCLP as Saugus, Massachusetts and then later as

Reading, Massachusetts, the two locations of Astroline Company's offices. (T. Vol. 1 at 192; T. Vol. 3 at 43, 44; Exs. 32, 33, 42, 46, 212). Reading, Massachusetts was also listed as the address for ACCLP on the bank signature card, which gave Sostek, Boling, Joel Gibbs and Richard Gibbs sole signature authority on the ACCLP account. (Ex. 20).

In addition to absolute control over ACCLP's expenses, Astroline Company exercised equivalent dominion over ACCLP's income and financial reporting. All revenues of ACCLP ($2,509,459 in 1987, for example) were deposited into a lock box account at Bank of Boston Connecticut in Hartford and transferred on a twice-weekly basis to an account at State Street Bank in Boston. In re Astroline, 188 B.R. at 101 (App. at 10)(T. Vol. 1 at 187-189; T. Vol. 7 at 36, 56-58; Exs. 22, 55, 129, 47, 48). Neither ACCLP nor Ramirez ever had any control over (or even access to) any of ACCLP's funds. Moreover, financial projections, drafts of annual financial statements and tax returns were prepared by ACCLP's accountants and submitted to Boling and/or Sostek for their review, input and approval. (T. Vol. 7 at 68; Exs. 61, 63, 68, 69, 70, 84, 112, 113, 116, 117, 118, 120, 121). Based on such pervasive control, and similar to the Seventh Circuit's decision in Hystro, it would be an injustice to permit the defendants to escape liability to ACCLP's creditors for the consequences of their own actions.

2. Industry Standards Must Be Considered

No assessment of a limited partner's control over the business affairs of the partnership can be made without consideration of the specific nature of the business conducted by the partnership. Alzado v.

Blinder, Robinson & Co., 752 P.2d at 552. In this case, ACCLP was engaged in operating a television station, an industry pervasively regulated by the FCC, as is well illustrated by the complicated legal history of ACCLP prior to bankruptcy. The FCC, to minimize abuse by nominally passive investors, closely scrutinizes limited partnerships and similar two-tier stock corporations to determine whether such investors in reality exert influence or control over the television station. Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220, 1223 (D.C. Cir. 1993). The standards adopted by the FCC and the courts in this regard provide useful insight in determining the permissible level of control that could be exerted by Astroline Company over the finances of the Debtor.

In determining whether a limited partner exerts de facto control over the operations of a station, it has long been recognized that "finances and control are closely linked." Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d at 1233 (citations omitted). As stated by the Circuit Court in Heitmeyer v. FCC, 95 F.2d 91, 99 (D.C. Cir. 1937):

> It is well known that one of the most powerful and effective methods of control of any business ... is the control of its finances.

Id.; Weyburn Broadcasting, 984 F.2d at 1233 (citing Benito B. Rish, M.D., 6 F.C.C.R. 2628 (1991)("finances can demonstrate that control has been relinquished to another unauthorized person.")). As such, the FCC has, and continues, to give heightened scrutiny to the level of financial control exerted by purportedly passive limited partners to eliminate the "mischief" caused by "sham" limited partnerships. In re Isis Broadcast Group, 7 F.C.C.R. 5125, 5131 (Rev. Bd. 1992), aff'd, 8 F.C.C.R. 7040 (1993); Astroline Communications Co. Ltd. Partnership v. FCC, 857 F.2d

1556, 1566 (D.C. Cir. 1988)(warning that, to the extent that the FCC considered finances to be of "diminished relevance," its rationale "could represent a significant departure from its own precedent in this area.").

In In re Bellingham Television Assocs., Ltd., 103 F.C.C.2d 230, 273 (1985), aff'd, 103 F.C.C.2d 222 (1986), a limited partner who controlled the financial affairs of the partnership was deemed a de facto general partner. The administrative law judge found that the putative limited partner had joint signature authority on the partnership's bank account and maintained custody and control of the checkbook and paid partnership bills. Id. at 260. Bank statements were sent to the limited partner's office, where an assistant under his employ reconciled the account and made deposits. Id. In addition to obtaining financing, the limited partner "loaned" money to the partnership by sending an unexecuted note to the general partner and requesting that he sign it. Id. at 270. On several occasions, the limited partner communicated directly with professionals and other third parties, erroneously identifying himself as "managing partner" in two correspondence. Id. at 268-69. Based on such findings, the judge concluded that the limited partner's "conduct and actions on behalf of the ... partnership belie [its] claim that it is a bona fide limited partnership...." Id. at 273.

Similarly, in In re Isis Broadcast Group, 7 F.C.C.R. 5125 (1992), aff'd, 8 F.C.C.R. 7040 (1993), a two-tiered stock corporation was denied a broadcasting license where a nominally passive investor kept the voting stockholders on such a "tight rein financially" that the FCC concluded he was "monitoring" the management of the business. Id. 8 F.C.C.R. at 7042. Although the "passive" shareholder did not personally pay the bills, the

voting stockholders were "compelled repeatedly to request funds from [him], accounting to him for the specific purpose of nearly every disbursement. ...[T]his practice resulted in [the company's] checking account being empty most of the time, and making the voting stockholders' control of the account illusory." Id. Based upon such "probative evidence," the FCC found "a degree of accountability and monitoring that is inconsistent with effective insulation." Id. The FCC reached this conclusion even though the voting stockholders "actively" managed the partnership business, without ever being "overruled" by the passive stockholder. Id.

Similar to the financial control in Bellingham and Isis, the rigorous accounts payable procedures mandated by Astroline Company constitute "probative evidence" that Ramirez was "closely accountable" to Astroline Company and that Astroline Company was "monitoring" the business. Every invoice received by ACCLP in Hartford was sent to Astroline Company's office along with a transmittal memorandum, backup documentation and, in most circumstances, a check request. (T. Vol 7 at 42-44, 61; Exs. 39, 210). Astroline Company demanded that this procedure be followed, notwithstanding the fact that ACCLP had a fully functional office in Hartford, at least from the beginning of 1985. (T. Vol. 3 at 142; T. Vol. 7 at 61-62). Ramirez acknowledged that ACCLP could not obtain a check from Astroline Company's office in Massachusetts without submitting the proper documentation; as Ramirez put it, ACCLP "had to dot all the I's and cross the T's" in order to get a check. (T. Vol. 1 at 240).

Justifying the "Cash Management System" imposed by Astroline Company on the Debtor, the Bankruptcy Court unduly credited Ramirez's claimed role

in approving payment of expenses of the Debtor. The issue, however, is not whether Ramirez had to approve the payments. Rather, the issue is whether the general partners of Astroline Company (or Astroline Corporation employees acting on their behalf and at their direction) also had to approve the payment of invoices. It was certainly undisputed at trial that no invoice could be paid if Astroline Company did not release the funds. (T. Vol. 1 at 202). At a minimum, the evidence demonstrates that Astroline Company had an equal voice in deciding whether to approve and pay partnership obligations. The initials of Sostek or Boling on check requests, invoices and the transmittal forms, along with orders for payment "by" or "per" their direction, provide undeniable evidence of their approval of the payments (T. Vol. 3 at 113-15, 133-33), and reflect sufficient control over the partnership business to render Astroline Company liable as a general partner.

## II. THE BANKRUPTCY COURT ERRED IN CONCLUDING THAT THE DEFENDANTS HAD TO ENGAGE IN "ACTUAL CONTROL" RATHER THAN "A MERE RIGHT TO CONTROL" THE DEBTOR'S CASH AND FINANCES.

Dispositive to the conclusion of the Bankruptcy Court was the "critical distinction between the actual exercise of control and the potential to exercise control." In re Astroline, 188 B.R. at 105. Nowhere in its decision, however, did the Bankruptcy Court demonstrate that the numerous actions of Astroline Company relative to the Debtor's finances, as found by it to have occurred, constitute only "potential" exercise of control. Instead, the Court implied that, because Astroline Company did not "empty the Debtor's bank account," it is somehow relieved from liability. Id. at 106. The Court's conclusion fundamentally misconstrues

legal standards governing the nature and level of control necessary to impose liability on a limited partner and ignores the economic realities and abuse that such control entails. Upon examination, the Bankruptcy Court's distinction proves illusory, elevating form over substance, and is utterly inconsistent with the equitable nature of bankruptcy proceedings.

The Memorandum of Decision is replete with findings of financial control actually exercised by the defendants over ACCLP. This control, which prohibited Ramirez' access to partnership funds without Astroline Company's participation and consent, was very real and distinguishes the Debtor from any bona fide limited partnership. Incidental to its financial control over ACCLP, Astroline Company had the absolute authority to "empty the Debtor's bank account," and thus terminate ACCLP's operations. Unquestionably, the right to terminate gave Astroline Company the ultimate control over the partnership business. As such, it was a powerful tool that did not have to be used by Astroline Company to be effective. The mere ability to cut off funding was sufficient to control the partnership business. Under the guise of suggestions or advice, regularly sought by Ramirez from Boling and Sostek, their words had the effect of commands, affecting all aspects of ACCLP's operations. (Exs. 71, 72, 73, 76, 86, 87, 91, 92, 111, 123, 133).

No court has ever required that a limited partner actually terminate the partnership's operations (or "empty the bank account") as a condition to imposing liability. To the contrary, courts have recognized the injustice of permitting equity owners to hide behind the shield of limited liability while carrying on business without providing any sufficient basis of financial responsibility to creditors. See Hystro Prods. v. MNP Corp.,

18 F.3d at 1390 (citing cases). As such, mere possession of the right of ultimate control is all that is necessary to impose liability. Hommel v. Micco, 602 N.E.2d at 1262 ("[A] limited partner is not to have ultimate control over the decisions which are made [by others] during the ordinary course of business. That is the function of the general partner.") (emphasis added). Even if some "actual" control were required under Section 723, the Bankruptcy Court's findings compel the conclusion that Astroline Company and its partners exercised the requisite control over the Debtor so as to be liable for the deficiency in Debtor's property.

## III. THE BANKRUPTCY COURT ERRED IN REQUIRING THAT THE DEFENDANTS DO SOMETHING MORE THAN EXERCISE CONTROL OVER THE DEBTOR'S CASH AND FINANCES.

Despite its undisputed findings of fact that Astroline Company exercised control over the Debtor's cash and finances, the Bankruptcy Court pointedly stated that it "cannot find as a fact that Astroline Company ever did anything more...." In re Astroline, 188 B.R. at 106 (emphasis added). As the plain language of Section 723 and the case law makes clear, however, nothing more is required to impose liability. Although the Bankruptcy Court never elaborated on what "more" is required in order to impose liability the Court did indicate that either "empty[ing] the Debtor's bank account" or "refus[ing] to prepare checks" would suffice. Neither finding is required under Section 723.

In its Memorandum of Decision, the Bankruptcy Court expressly found that the Astroline Company partners had "the power to empty the Debtor's bank account" without Ramirez's knowledge, consent or participation. In re Astroline, 188 B.R. at 104, 106. In the end, however, the Court concluded

that because they "never did so," they are relieved from liability. Id. at 106. In reaching this conclusion, the Bankruptcy Court improperly equated "control" with "abuse of control," requiring that the Trustee prove fraud or misappropriation of partnership funds in order to recover on its claims. Neither the Bankruptcy Code nor any court has ever required such a showing as an element of a trustee's claim under Section 723. Nor has any court interpreting state partnership law required such a showing.

Similarly, despite the undisputed evidence introduced at trial that payments were approved "by" or "per" Boling or Sostek under the "cash control system," which included their initialing of invoices and preparing of all checks, the Bankruptcy Court gave undue weight to the lack of evidence that Astroline Company "refus[ed] to prepare checks in order to override any decision of Ramirez." In re Astroline, 188 B.R. at 106 (emphasis added). Even if the Trustee could uncover such a "smoking gun" from documents produced by the defendants, no such action was proof under either Section 723 or applicable partnership law. Through the intricate payables system, which "was continued at the request of Astroline Company," id. at 101, the partners of Astroline Company, at a minimum, had an "equal voice" in paying partnership obligations. Id. at 105. An equal voice, however, does not mean a louder voice. Astroline Company was not required to "override" any decision by Ramirez in order to be held liable as a general partner. Id. at 106; see Hommel v. Micco, 602 N.E.2d at 1262 (reversing trial court which required that a limited partner "exercise[] control ... beyond that which is normally exercised by a general partner").

As the Bankruptcy Court's findings demonstrate, the defendants exercised complete control over the Debtor's cash and finances, twice-

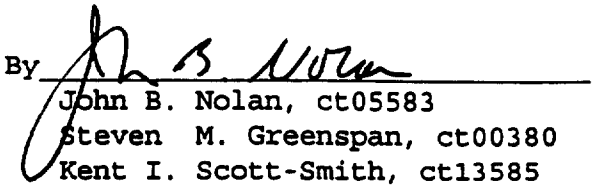
weekly sweeping all of its income to an out-of-state bank account to which Ramirez was denied access. Putting aside the instances of abuse that were expressly found by the Bankruptcy Court (i.e., the two checks "inexplicably" drawn payable to Astroline Company for interest), and other such instances that may never be discovered, nothing more is required to impose liability on the defendants in this case. The financial control actually exercised by the defendants is unparalleled, distinguishing the operations of ACCLP from any other limited partnership recognized in the case law or literature, and is inconsistent with Astroline Company's claimed status as limited partner.

## CONCLUSION

For all of the foregoing reasons, this Court should conclude that the Trustee has standing to maintain this action and that the Bankruptcy Court erred in holding that the actions of the defendants, found to have been proven at trial, do not constitute participation in control of the business substantially the same as the exercise of the powers of a general partner. Accordingly, the Trustee respectfully requests that this Court reverse and vacate the Judgment entered by the Bankruptcy Court, enter an order declaring that Astroline Company, its general partners and its successor are liable as general partners of the Debtor and remand this case to the Bankruptcy Court with an order to proceed with a hearing to establish the amount of the deficiency to be recovered from the defendants.

Respectfully Submitted,

APPELLANT,
MARTIN W. HOFFMAN, TRUSTEE

By 

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## ADDENDUM

11 U.S.C. § 544 (1994) . . . . . i

11 U.S.C. § 723 (1994) . . . . . ii

Mass. Gen. L. ch. 109 § 19 (1983) . . . . . iii

**UNITED STATES CODE ANNOTATED**
**TITLE 11. BANKRUPTCY**
**CHAPTER 5 — CREDITORS, THE DEBTOR AND THE ESTATE**

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

## § 723. Rights of partnership trustee against general partners

(a) If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency.

(b) To the extent practicable, the trustee shall first seek recovery of such deficiency from any general partner in such partnership that is not a debtor in a case under this title. Pending determination of such deficiency, the court may order any such partner to provide the estate with indemnity for, or assurance of payment of, any deficiency recoverable from such partner, or not to dispose of property.

(c) Notwithstanding section 728(c) of this title, the trustee has a claim against the estate of each general partner in such partnership that is a debtor in a case under this title for the full amount of all claims of creditors allowed in the case concerning such partnership. Notwithstanding section 502 of this title, there shall not be allowed in such partner's case a claim against such partner on which both such partner and such partnership are liable, except to any extent that such claim is secured only by property of such partner and not by property of such partnership. The claim of the trustee under this subsection is entitled to distribution in such partner's case under section 726(a) of this title the same as any other claim of a kind specified in such section.

(d) If the aggregate that the trustee recovers from the estates of general partners under subsection (c) of this section is greater than any deficiency not recovered under subsection (b) of this section, the court, after notice and a hearing, shall determine an equitable distribution of the surplus so recovered, and the trustee shall distribute such surplus to the estates of the general partners in such partnership according to such determination.

**MASSACHUSETTS GENERAL LAWS ANNOTATED**
**CHAPTER 109. LIMITED PARTNERSHIP**
**LIMITED PARTNERS**
(in effect prior to March 1, 1989)

§ 19. Liability of limited partners

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business; provided, however, that if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

(b) A limited partner shall not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

(1) being a contractor for or an agent or employee of the limited partnership or of a general partner;

(2) consulting with and advising a general partner with respect to the business of the limited partnership;

(3) acting as surety for the limited partnership;

(4) approving or disapproving an amendment to the partnership agreement; or

(5) voting on one or more of the following matters:

(i) the dissolution and winding up of the limited partnership;

(ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;

(iii) the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;

(iv) a change in the nature of the business; or

(v) the removal of a general partner.

(c) The enumeration in subsection (b) shall not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him in the control of the business of the limited partnership.

(d) A limited partner who knowingly permits his name to be used in the name of the limited partnership, except under circumstances permitted by subclause (i) of clause (2) of section two, is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

## CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 8th day of November, 1996 two copies of the foregoing Brief of the Appellant were served via U.S. mail, postage prepaid, on:

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