Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

September 23, 2002

Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

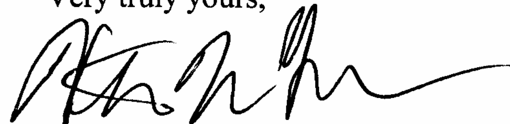
Re: Premier Van Lines, Inc.
Case No.: 01-20692
Chapter 7

Dear Mr. Cordero:

You have repeatedly contacted my office regarding the property you stored with the debtor Premier Van Lines, Inc. prior to its filing for bankruptcy. I have repeatedly advised you that I do not possess nor control any property which was stored by customers of Premier Van Lines. Assets that were stored by customers of Premier Van Lines are not property of the bankruptcy estate and I have no right nor have I asserted any control over those assets. From the latest communications I have read which have been sent to you by the attorneys for James Pfunter and M&T Bank, it appears as if your property is located at the Sackett Road warehouse in Avon, New York. I have advised all concerned in this case that you should be allowed along with any other former customer of Premier Van Lines to have access to and repossession of your assets.

Further efforts by you to acquire your assets through my office are pointless. Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again.

Very truly yours,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/brs

pc: David D. MacKnight, Esq.
Michael Beyma, Esq.
Ray Stilwell, Esq.

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

September 27, 2002

Kenneth Gordon, Esq.
Gordon & Schaal, LLP
100 Meridian Center Blvd., Suite 120
New York, NY 14618

Re: Your letter of September 23, 2002, and
Premier Van Lines, bankruptcy case number 01-20692, Chapter 7

Dear Mr. Gordon,

Your letter to me of September 23, 2002, has arrived. It is as unjustified in its content as it is unprofessional in its tone. I take exception to it.

Had you deigned to take my first call or return it, I would not have had to keep calling you, to no avail. The fact is that we have spoken only once, on May 16, and only after I had called several times. Even to obtain a response from you to my May letter to you I had to call your office.

It should be quite obvious to you and everybody else why a creditor of a bankrupt company and those similarly situated would have to contact its trustee. That is particularly so in a case like this where the owner of the bankrupt company cannot be found and his lawyer will not reveal his whereabouts. It has been more necessary to contact you because only through my relentless efforts to locate my stored property, which turned out not to be where I had been told it was, has it come to light that there is another place where debtor Premier had stored property of its clients, including mine, namely the warehouse at Sackett Road, owned by Mr. James Pfuntner.

It has been still more necessary to contact you because Mr. Pfuntner's lawyer had not answered my letter to him and would not even take my calls. However, after I had no choice but to contact Mr. Pfuntner, he said on the phone that he could not release my stored belongings claiming that Premier's trustee, that is you, could then sue him. Naturally, I needed to know what your position was on the matter and whether there had even been any contact between you and Mr. Pfuntner, who would not put anything in writing either. All that you would have known had you taken any of my calls, if not out of professional duty as Premier's trustee, then out of professional courtesy to another lawyer.

Why you would not communicate with me is all the more questionable and unacceptable given the fact that you did communicate with everybody else concerning me specifically. Indeed, in your improper letter to me of September 23 you state that, "I have advised all concerned in

this case that you should be allowed along with any other former customer of Premier Van Lines to have access to and repossession of your assets." You communicated with them because you entertained their communications to you, which you revealed when writing in that letter that, "From the latest communications I have read which have been sent to you by the attorneys for James Pfuntner and M&T Bank, it appears as if your property is located at the Sackett Road warehouse in Avon, New York." Why would you then advise them but not even take or return my calls? Why did you send them copies of your improper letter to me, but not send me a copy of your letters to them, even though I sent you a copy of my August letter to Mr. Pfuntner's lawyer?

Had you communicated with me, you would have spared yourself the calls that I had to make to your office. Thus, it is utterly unjustified for you to accuse me of "harassment of my staff," and to enjoin me not to call again and even to "have directed my staff to receive and accept no more telephone calls from you regarding this subject". I am a professional and do not harass anybody! What I certainly do is expect and insist that those that have information directly affecting my interests do share with me that information, particularly if they are officers of the court and all the more so if they have been appointed by the court.

Given that you meet both criteria, that you are the trustee for Premier, that other parties refer me to you concerning my interests, that even you refer to other parties concerning me, and thus that you are an integral party in this transaction that affects my interests, I have a legitimate and justifiable reason for contacting you. I expect that you will play your role professionally.

Therefore, I request that you:

1. apologize for your unjustified and unprofessional letter to me,
2. assure me that the lines of communication between us will be opened, and
3. send me copies of the letters concerning me that you sent to other parties.

Meantime, I am requesting that the Hon. Judge John C. Ninfo, II, determine whether in this case your performance complies with your duties as trustee and whether you are fit to continue as such.

Sincerely,

Dr. Richard Cordero

Cc: Judge John C. Ninfo, II
Michael J. Beyma, Esq.
David D. MacKnight, Esq.
Raymond Stillwell, Esq.

Blank

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

September 27, 2002

Hon. Judge John C. Ninfo, II
United States Bankruptcy Court
1220 US Court House
100 State Street
Rochester, NY 14614

Re: Premier Van Lines, bankruptcy case number 01-20692, Chapter 7

Dear Judge Ninfo,

Kindly find herewith a copy of the letter that the trustee in the above captioned case, Kenneth Gordon, Esq., sent me last September 23. It confirms his refusal to communicate with me in this matter although I have a legitimate and justifiable interest in knowing about the course of the proceedings, and all the more so since they have taken a new turn upon the discovery of other assets of the debtor.

To assist you in understanding the context in which Mr. Gordon wrote that letter, I am sending you my reply to him and supplying a Statement of Facts, which is supported by pertinent documents.

I am submitting this material to you so that you may determine whether in this case Mr. Gordon's performance complies with his duties as trustee and whether he is fit to continue as such.

Looking forward to hearing from you, I remain,

yours sincerely,

Dr. Richard Cordero

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

September 27, 2002

STATEMENT OF FACTS
and
APPLICATION FOR A DETERMINATION

In re Premier Van Lines, bankruptcy case number 01-20692, Chapter 7
and its Trustee Kenneth Gordon, Esq.

Submitted by: Dr. Richard Cordero, Esq.

to: Hon. Judge John C. Ninfo, II
United States Bankruptcy Court
1220 US Court House
100 State Street
Rochester, NY 14614

1. The bankrupt company, Premier Van Lines, located at 900 Jefferson Road, Rochester, NY 14623, was in the storage business and had received my property for storage. For more than three months beginning in early January 2002, I communicated with both Premier's owner, Mr. David Palmer, and the manager of the warehouse where my property allegedly was stored, Mr. David Dworkin of Jefferson Henrietta Associates, at 415 Park Avenue, Rochester, NY 14607, to find out where and in what condition my property was and to have them commit themselves in writing to their response. Yet throughout those months neither informed me that Premier was in bankruptcy proceedings, let alone that it was in liquidation. On the contrary, they told me that my property was safely stored in the Jefferson Henrietta warehouse and continued billing me. Then Mr. Palmer disappeared and even his telephone was disconnected

2. It was only when Mr. Dworkin referred me to a Premier lien holder, Manufacturers & Traders Trust Bank (M&T), 255 East Avenue, Rochester, NY 14604, that I first learned that Premier was in bankruptcy proceedings. By that time all the filing deadlines had passed. What is more, although Premier had filed under Chapter 11 over year earlier, in March 2001, both Mr. Palmer and Mr. Dworkin kept billing me for storage for a year thereafter and for months after the conversion of the case to Chapter 7 in December 2001, as if the company were a going concern.

3. Lien holder M&T referred me to Premier's lawyer, Raymond Stilwell, Esq., at Adair, Kaul, Murphy, Axelrod & Santoro, LLP, 300 Linden Oaks, Suite 220, Rochester, NY 14625-2883. Mr. Stilwell would not put me in contact with Mr. Palmer. Instead, he wrote me that Mr. Dworkin, "with the trustee' knowledge, had assumed responsibility for, and the right to rentals concerning, the stored belongings. The trustee for the Premier estate has objected to my

having any continuing role in the completion of the affairs of this company." I wrote to Mr. Dworkin, but he refused to commit himself in writing concerning the whereabouts and condition of my stored property.

4. Likewise, M&T referred me to the trustee, Kenneth Gordon, Esq., of Gordon & Schaal, 100 Meridian Center Blvd., Suite 120, Rochester, NY 14618. I had to call Mr. Gordon several times until he first took my call on May 16, 2002, and requested information from him about the case and the parties dealing with him. When no information or documents were forthcoming, I had to write to him on May 30. I had to follow up with calls to him, which were neither taken nor returned. It was not until two weeks later that for all communication with me Mr. Gordon sent me copy of his letter to Mr. Dworkin dated April 16, 2002, and a letter to me simply suggesting "that you retain counsel to investigate what has happened to your property."

5. I kept investigating. I found out that even the information that M&T provided to me was, at the very least, incorrect. M&T informed me that it sold the crates containing the stored property of Premier's clients, but not the property itself, to Champion Moving & Storage, located at 795 Beahan Road, Rochester, NY 14624. M&T let me know that the crates with my property were included in the sale and referred me to Champion. But Champion indicated that it had not received either my property or that of other Premier clients. At my instigation, M&T launched another investigation. It then found out that Premier had stored crates in a warehouse on 2140 Sackett Road, in Avon, NY 14414. His owner is Mr. James Pfuntner and M&T referred me to him and his lawyer. I was being bandied yet to another party.

6. I wrote to Mr. Pfuntner's lawyer, Mr. David MacKnight, of Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604. In light of the discovery of new assets of Premier and the appearance of another of its creditors, who according to M&T was "claiming a self-storage lien against the storage cabinets," I copied Mr. Gordon. For weeks Mr. MacKnight would neither answer my letter nor take my calls; neither would Mr. Gordon.

7. Thus, I had to contact Mr. Pfuntner by phone. He expressed his wish to be paid for the storage of my property in his warehouse. I asked and he promised to find out and let me know the number of crates in which my property was stored. Yet, he failed to provide that information. When I called him again, he told me that he would not release my property because the Premier trustee, Mr. Gordon, could then sue him. I asked him to put that in writing. Mr. Pfuntner refused and then hung up on me.

8. Once more, I had no other source of information but Trustee Gordon. Consequently, I called him. But he would not take or return any of my calls. In my last call to his office, on Monday, September 23, I asked to speak with him. His secretary Brenda put me on hold. When she came back she said that Mr. Gordon was not taking any more calls concerning Premier. I asked why and she said that I could write. I told her that I had sent Mr. Gordon a copy of my letter to Mr. Pfuntner's lawyer, Mr. MacKnight, but that Mr. Gordon had not given me any feedback on it. Therefore, I asked whether Mr. Gordon would reply to any letter from me. Brenda said that she was only a secretary following instructions and hung up on me. A few days later I received Mr. Gordon's letter of September 23. In my response to his letter, which I hereby incorporate by reference, I have stated why Mr. Gordon's letter is unjustified in its content and unprofessional in its tone.

9. I respectfully request that the Court determine whether Mr. Gordon, as a court appointed trustee in bankruptcy with fiduciary duties to all the parties,

   a. failed to recognize that clients of Premier, who had entrusted it with their property for storage for a fee, are parties in these bankruptcy proceedings and should have been informed of such proceedings as were creditors of the debtor,

   b. failed to provide me -and perhaps others similarly situated- with adequate information when I was referred to him by lien holder M&T, and I contacted him and specifically requested such information in May and June 2002,

   c. failed to identify debtor's assets, such as those in Mr. Pfuntner's warehouse, and/or to take a position on them so that Mr. Pfuntner's lawyer now has "drafted a complaint to determine the obligations and duties of the Trustee…,"

   d. fails in his basic duty of fairness as a fiduciary by having refused to communicate with me and explicitly enjoining me not to contact his office again, although he has provided other parties with information concerning me,

   e. fails to recognize his duty to allow me access to him and provide me with information, particularly since I have been referred to his role as trustee by a creditor, Mr. Pfuntner, who refuses to release my property lest the Trustee sue him; and

   f. is not fit to continue as trustee in this case.

Dr. Richard Cordero

TABLE OF EXHIBITS

1) Dr. Richard Cordero's letter of September 27, 2002, to Trustee Gordon .... [A:2]
2) Letter of Kenneth Gordon, Esq., Chapter 7 Trustee, of September 23, 2002, to Dr. Richard Cordero, with copy to Hon. Judge John C. Ninfo, II, United States Bankruptcy Judge for the Western District of New York, and others .... [A:1]
3) Letter of David MacKnight, Esq., attorney for James Pfuntner, plaintiff in the Adversary Proceeding, case no. 02-2230, of September 19, 2002, to Dr. Richard Cordero .... [A:14]
4) Dr. Cordero's letter of August 26, 2002, to Att. MacKnight .... [A:15]
5) Trustee Gordon's letter of June 10, 2002, to Dr. Cordero .... [A:16]
6) Trustee Gordon's letter of April 16, 2002, to David Dworkin, manager/owner of the Jefferson-Henrietta warehouse .... [A:17]
7) Letter of Raymond Stilwell, Esq., attorney for Premier Van Lines, Debtor in the Chapter 7 bankruptcy case no. 01-20692, of May 30, 2002, to Dr. Richard Cordero .... [A:18]

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

COPY

September 27, 2002

Kenneth Gordon, Esq.
Gordon & Schaal, LLP
100 Meridian Center Blvd., Suite 120
New York, NY 14618

Re: Your letter of September 23, 2002, and
Premier Van Lines, bankruptcy case number 01-20692, Chapter 7

Dear Mr. Gordon,

Your letter to me of September 23, 2002, has arrived. It is as unjustified in its content as it is unprofessional in its tone. I take exception to it.

Had you deigned to take my first call or return it, I would not have had to keep calling you, to no avail. The fact is that we have spoken only once, on May 16, and only after I had called several times. Even to obtain a response from you to my May letter to you I had to call your office.

It should be quite obvious to you and everybody else why a creditor of a bankrupt company and those similarly situated would have to contact its trustee. That is particularly so in a case like this where the owner of the bankrupt company cannot be found and his lawyer will not reveal his whereabouts. It has been more necessary to contact you because only through my relentless efforts to locate my stored property, which turned out not to be where I had been told it was, has it come to light that there is another place where debtor Premier had stored property of its clients, including mine, namely the warehouse at Sackett Road, owned by Mr. James Pfuntner.

It has been still more necessary to contact you because Mr. Pfuntner's lawyer had not answered my letter to him and would not even take my calls. However, after I had no choice but to contact Mr. Pfuntner, he said on the phone that he could not release my stored belongings claiming that Premier's trustee, that is you, could then sue him. Naturally, I needed to know what your position was on the matter and whether there had even been any contact between you and Mr. Pfuntner, who would not put anything in writing either. All that you would have known had you taken any of my calls, if not out of professional duty as Premier's trustee, then out of professional courtesy to another lawyer.

Why you would not communicate with me is all the more questionable and unacceptable given the fact that you did communicate with everybody else concerning me specifically. Indeed,

in your improper letter to me of September 23 you state that, “I have advised all concerned in this case that you should be allowed along with any other former customer of Premier Van Lines to have access to and repossession of your assets.” You communicated with them because you entertained their communications to you, which you revealed when writing in that letter that, “From the latest communications I have read which have been sent to you by the attorneys for James Pfunter [sic] and M&T Bank, it appears as if your property is located at the Sackett Road warehouse in Avon, New York.” Why would you then advise them but not even take or return my calls? Why did you send them copies of your improper letter to me, but not send me a copy of your letters to them, even though I sent you a copy of my August letter to Mr. Pfuntner’s lawyer?

Had you communicated with me, you would have spared yourself the calls that I had to make to your office. Thus, it is utterly unjustified for you to accuse me of “harassment of my staff,” and to enjoin me not to call again and even to “have directed my staff to receive and accept no more telephone calls from you regarding this subject”. I am a professional and do not harass anybody! What I certainly do is expect and insist that those that have information directly affecting my interests do share with me that information, particularly if they are officers of the court and all the more so if they have been appointed by the court.

Given that you meet both criteria, that you are the trustee for Premier, that other parties refer me to you concerning my interests, that even you refer to other parties concerning me, and thus that you are an integral party in this transaction that affects my interests, I have a legitimate and justifiable reason for contacting you. I expect that you will play your role professionally.

Therefore, I request that you:

1. apologize for your unjustified and unprofessional letter to me,
2. assure me that the lines of communication between us will be opened, and
3. send me copies of the letters concerning me that you sent to other parties.

Meantime, I am requesting that the Hon. Judge John C. Ninfo, II, determine whether in this case your performance complies with your duties as trustee and whether you are fit to continue as such.

Sincerely,

Dr. Richard Cordero

Cc: Judge John C. Ninfo, II
Michael J. Beyma, Esq.
David D. MacKnight, Esq.
Raymond Stillwell, Esq.

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

September 23, 2002

Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

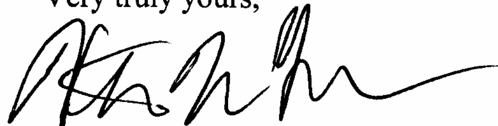
Re: Premier Van Lines, Inc.
Case No.: 01-20692
Chapter 7

Dear Mr. Cordero:

You have repeatedly contacted my office regarding the property you stored with the debtor Premier Van Lines, Inc. prior to its filing for bankruptcy. I have repeatedly advised you that I do not possess nor control any property which was stored by customers of Premier Van Lines. Assets that were stored by customers of Premier Van Lines are not property of the bankruptcy estate and I have no right nor have I asserted any control over those assets. From the latest communications I have read which have been sent to you by the attorneys for James Pfunter and M&T Bank, it appears as if your property is located at the Sackett Road warehouse in Avon, New York. I have advised all concerned in this case that you should be allowed along with any other former customer of Premier Van Lines to have access to and repossession of your assets.

Further efforts by you to acquire your assets through my office are pointless. Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again.

Very truly yours,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/brs

pc: David D. MacKnight, Esq.
Michael Beyma, Esq.
Ray Stilwell, Esq.

Lacy, Katzen, Ryen & Mittleman, LLP

LOUIS A. RYEN
RONALD A. MITTLEMAN
MICHAEL S. SCHNITTMAN
PETER T. RODGERS
SALLY A. SMITH+
KAREN SCHAEFER
RICHARD G. CURTIS
LAWRENCE J. SCHWIND
DAVID E. ANDERSON
CRAIG R. WELCH
CHRISTOPHER B. MUMFORD
LESLIE W. KERNAN JR+
TERRANCE W. EMMENS
MARK H. STEIN
JACQUELINE M. THOMAS

HERBERT W. LACY
(1920 - 1989)

ATTORNEYS AT LAW
THE GRANITE BUILDING
130 EAST MAIN STREET
ROCHESTER, NEW YORK 14604-1686

(585) 454-5650
FACSIMILE (585) 454-6525

LEON KATZEN
GEORGE F. FREY

DAVID D. MACKNIGHT*
DENINE K. CARR*
MATTHEW A. RYEN
JENNIFER L. CHADWICK
JOANNE CONSTANTINO
LARA R. BADAIN
SUZANNE L. AMICO
KEVIN MORABITO
DANIEL S. BRYSON
LISA C. ARRINGTON°

ALSO ADMITTED IN:
* ILLINOIS
+ NEW JERSEY
° DISTRICT OF COLUMBIA

September 19, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Re: Stored Property

Dear Dr. Cordero:

I have drafted a complaint to determine the obligations and duties of the Trustee, M&T Bank, Mr. Pfunter and those claiming on interest in property stored in and around the Sackett Road warehouse. Please look forward to receipt of a summons and complaint.

Very truly yours,

David D. MacKnight

DDM/cc
Cc: Trustee
Michael Beyma, Esq.

A:14 Exhibit: Att. MacKnight's letter of 9/19/2 to Dr. Cordero announcing Mr. Pfuntner's summons & complaint

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

COPY

August 26, 2002

Att: Thomas: kindly acknowledge receipt at (718) 827-9521.

David MacKnight, Esq.
130 East Main Street
Rochester, NY 14604

fax 585-454-6525; tel. 585-454-5650

Dear Mr. MacKnight,

I have been referred to you by Mr. Michael J. Beyma, attorney for Manufacturers & Traders Trust Bank (M&T) who copied you to his letter to me of last August 15. Mr. Beyma indicated that you represent Mr. James Pfuntner, landlord of the Avon warehouse at 2140 Sackett Road in Avon, where two "Pyramid" storage cabinets are located which contain property of mine that I entrusted for storage to the now bankrupt Premier Van Lines.

I would like to remove my property. Hence, I would like to make arrangements with your client for access to the warehouse. The removal would be carried out by either Champion Moving & Storage or a similar company. I understand that Champion bought from M&T these two cabinets as well as those of other people similarly situated as part of a batch of storage containers and other assets owned by Premier and that Champion has the right to remove them to its own warehouse. Presently, I am only interested in the storage containers holding my property. Therefore, I would like to know the following:

1. whether in addition to these two "Pyramid" storage cabinets there are any other storage containers holding property of mine at the Sackett Road warehouse or elsewhere known to Mr. Pfuntner;
2. what the dimensions, material, and condition of any such cabinets and containers are which hold property of mine;
3. whether and, if so, when I, Champion, and/or any similar company can have access to the Sackett Road warehouse to inspect the condition of such cabinets and containers and remove them as appropriate;
4. if such cabinets or containers cannot themselves be taken away from the Sackett Road warehouse, why that is so, and what it would take to be able to remove them together with my property;
5. if the cabinets or containers cannot be removed, how access to them can be arranged in order to remove only my property;
6. regardless of whether it may be to remove such cabinets and containers or just my property in them, whether a forklift or similar machine would be necessary and, if so, whether there is such forklift or machine at the Sackett Road warehouse that can be used for that purpose and, if so, under what terms.

I thank you in advance for your attention to this matter and would appreciate any other piece of pertinent information.

Yours sincerely,

Dr. Richard Cordero

cc: Michael J. Beyma, Esq.
Kenneth Gordon, Esq.
Christopher Carter, Champion Moving & Storage

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (716) 244-1070
Facsimile (716) 244-1085

June 10, 2002

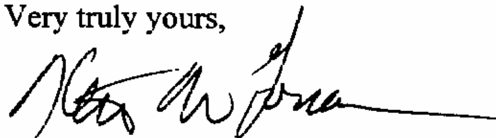
Dr. Richard Cordero, Esq.
59 Crescent Street
Brooklyn, New York 11208-1515

RE: Premier Van Lines
900 Jefferson Road, Rochester, New York
Case No: 01-20692
Chapter 7

Dear Dr. Cordero:

Enclosed please find a copy of correspondence dated April 16, 2002 from myself as the Chapter 7 Trustee to Mr. Dworkin, landlord of 900 Jefferson Road, with respect to the above-referenced bankruptcy proceeding. I suggest that you retain counsel to investigate what has happened to your property.

Very truly yours,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem
Enclosure

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (716) 244-1070
Facsimile (716) 244-1085

April 16, 2002

David Dworkin
415 Park Avenue
Rochester, New York 14607

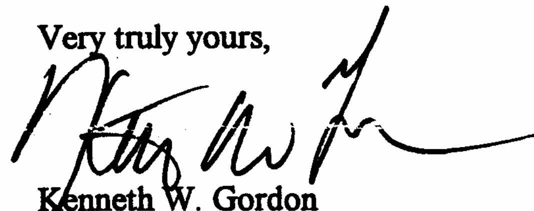
RE: Premier Van Lines
900 Jefferson Road, Rochester, New York
Case No: 01-20692
Chapter 7

Dear Mr. Dworkin:

Please be advised that M&T Bank has a blanket lien against the assets of Premier Van Lines. As the Chapter 7 Trustee, I will not be renting or controlling the storage units or any of the assets at the Jefferson Road location. Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank. M&T Bank is represented by Mike Beyma and Tim Johnson of Underberg & Kessler, LLP.

Should you have any questions, please do not hesitate to contact my office.

Very truly yours,



Kenneth W. Gordon

KWG/sem

Exhibit: Tr Gordon's letter of 4/16/2 to Warehouser Dworkin re M&T Bank's blanket lien on Premier's assets A:17

ADAIR, KAUL, MURPHY, AXELROD & SANTORO, LLP
ATTORNEYS AND COUNSELORS AT LAW

Raymond C. Stilwell 300 Linden Oaks • Suite 220 • Rochester, New York 14625-2883
Telephone: 585/248-3800 • Fax: 585/248-4961
E-mail: rcstilwell@adairlaw.com
Please reply to:
Rochester

May 30, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208

VIA FACSIMILE 718/827-9521

Re: Premier Van Lines, Inc.

Dear Dr. Cordero:

I am in receipt of your May 21 letter and am aware of additional attempts by you to contact this office. While I appreciate your frustration with the way the "system" has failed you in this case, I regret that I am unable to be of either legal or practical assistance to you in trying to solve your problem.

Premier ceased operations at the end of 2001. Our understanding was that the landlord of the 900 Jefferson Road premises, with the trustee's knowledge, had assumed responsibility for, and the right to rentals concerning, the stored belongings. David Palmer has confirmed this fact with Mr. Dworkin as recently as yesterday, and the landlord has been attempting to reach you to confirm that, in fact, his company is in possession of the items you are inquiring about.

I must suggest- in fact insist- that you direct your inquiries to the landlord as the party in a position to be of assistance to you. The trustee for the Premier estate has objected to my having any continuing role in the completion of the affairs of this company (at least to the extent I would be entitled to be compensated for such efforts), and it is not my place to question his judgment on such matters.

You have asked me to attend to your inquiries with a sense of professional responsibility. That is exactly what I am doing. I have an obligation to avoid conflicts of interest, which prevent me from offering you any form of legal advice other than to advise you to seek your own independent counsel. I also have an obligation to maintain the confidences of our own client, which precludes me from putting you in direct contact with Mr. Palmer or assisting in your efforts to do so without his consent. Within these bounds, I have provided you with every permissible courtesy, but I cannot permit continued repeated contacts- particularly to our office staff- which are directed at obtaining things from us which we cannot give you.

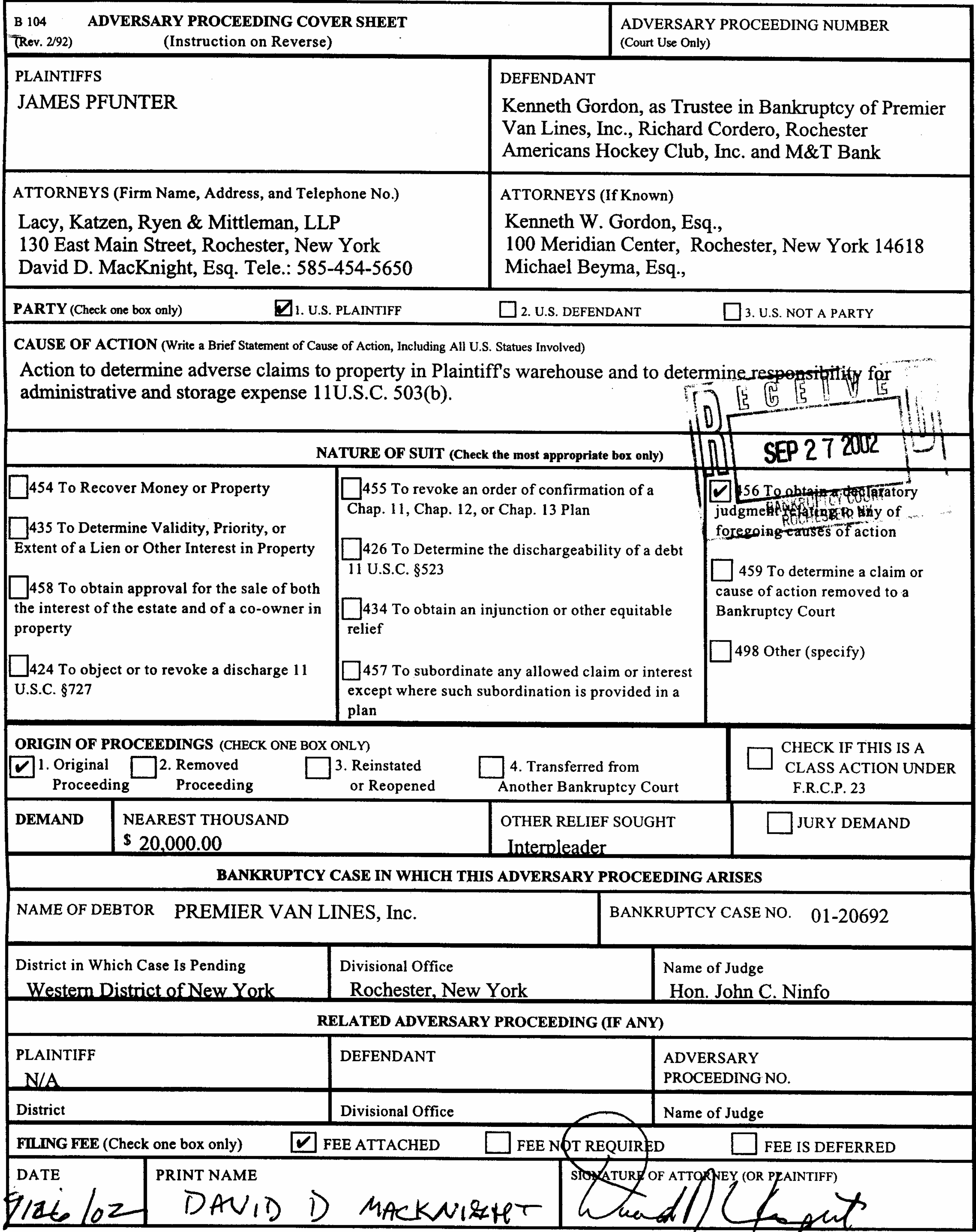
Very truly yours,

Raymond C. Stilwell

RCS\

Buffalo Office: The Law Center, 17 Beresford Court, Williamsville, NY 14221 • Phone (716)634-8307• Fax (716)630-0714

A:18 Exhibit: Att. Stilwell's letter of 5/30/2 to Dr. Cordero re Premier's cessation of operations at end of 2001



B 104 (Rev. 2/92) **ADVERSARY PROCEEDING COVER SHEET** (Instruction on Reverse)

ADVERSARY PROCEEDING NUMBER (Court Use Only)

PLAINTIFFS	DEFENDANT
JAMES PFUNTER	Kenneth Gordon, as Trustee in Bankruptcy of Premier Van Lines, Inc., Richard Cordero, Rochester Americans Hockey Club, Inc. and M&T Bank
ATTORNEYS (Firm Name, Address, and Telephone No.)	ATTORNEYS (If Known)
Lacy, Katzen, Ryen & Mittleman, LLP 130 East Main Street, Rochester, New York David D. MacKnight, Esq. Tele.: 585-454-5650	Kenneth W. Gordon, Esq., 100 Meridian Center, Rochester, New York 14618 Michael Beyma, Esq.,

PARTY (Check one box only) ☑ 1. U.S. PLAINTIFF ☐ 2. U.S. DEFENDANT ☐ 3. U.S. NOT A PARTY

CAUSE OF ACTION (Write a Brief Statement of Cause of Action, Including All U.S. Statues Involved)

Action to determine adverse claims to property in Plaintiff's warehouse and to determine responsibility for administrative and storage expense 11U.S.C. 503(b).

RECEIVED SEP 27 2002 BANKRUPTCY COURT ROCHESTER

NATURE OF SUIT (Check the most appropriate box only)

☐ 454 To Recover Money or Property

☐ 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property

☐ 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property

☐ 424 To object or to revoke a discharge 11 U.S.C. §727

☐ 455 To revoke an order of confirmation of a Chap. 11, Chap. 12, or Chap. 13 Plan

☐ 426 To Determine the dischargeability of a debt 11 U.S.C. §523

☐ 434 To obtain an injunction or other equitable relief

☐ 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan

☑ 456 To obtain a declaratory judgment relating to any of foregoing causes of action

☐ 459 To determine a claim or cause of action removed to a Bankruptcy Court

☐ 498 Other (specify)

ORIGIN OF PROCEEDINGS (CHECK ONE BOX ONLY)
☑ 1. Original Proceeding ☐ 2. Removed Proceeding ☐ 3. Reinstated or Reopened ☐ 4. Transferred from Another Bankruptcy Court

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND	NEAREST THOUSAND	OTHER RELIEF SOUGHT	
	$ 20,000.00	Interpleader	☐ JURY DEMAND

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES

NAME OF DEBTOR	BANKRUPTCY CASE NO.	
PREMIER VAN LINES, Inc.	01-20692	
District in Which Case Is Pending	**Divisional Office**	**Name of Judge**
Western District of New York	Rochester, New York	Hon. John C. Ninfo

RELATED ADVERSARY PROCEEDING (IF ANY)

PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
N/A		
District	Divisional Office	Name of Judge

FILING FEE (Check one box only) ☑ FEE ATTACHED ☐ FEE NOT REQUIRED ☐ FEE IS DEFERRED

DATE	PRINT NAME	SIGNATURE OF ATTORNEY (OR PLAINTIFF)
9/26/02	DAVID D MACKNIGHT	[signature]

Cover sheet of 9/26/2 in *Pfuntner v. Gordon et al,* WBNY, with Plaintiff claiming $20,000 in interpleader A:18a

Blank

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

October 1, 2002

Hon. John C. Ninfo, II
U.S. Bankruptcy Justice
100 State Street
Rochester, New York 14614

Re: Premier Van Lines, Inc.
Case No.: 01-20692
Chapter 7

Dear Judge Ninfo:

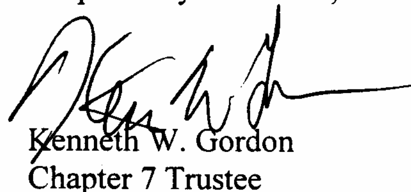
Please accept this letter as my response to the application made by Richard Cordero dated September 27, 2002 in the above-referenced matter in which he seeks my removal as Trustee. This converted Chapter 11 filing involves a corporation which provided both moving and storage services for its customers. Since conversion of this case to Chapter 7, I have undertaken significant efforts to identify assets to be liquidated for the benefit of creditors. Unfortunately, I have discovered that the assets of the corporation which remained upon conversion are insubstantial or otherwise liened in amounts exceeding the value of the assets. Accordingly, I am in the process of abandoning the remainder of the assets of the corporation and will shortly be filing a No Distribution Report.

Richard Cordero is apparently a former customer of Premier Van Lines whose possessions were stored by the company. It has been my position consistently since my appointment as Trustee in this case that the property owned by customers of Premier Van Lines and stored by it was not property of the bankruptcy estate for administration. Moreover, as the Court is aware, I have not sought to operate the corporation under Chapter 7. Accordingly, I have instructed my staff to advise former customers of Premier Van Lines that items stored with Premier Van Lines were not property of the bankruptcy estate, were not to be administered by me and could be accessed by contacting either the landlord from whom Premier Van Lines rented its facilities or the attorney's for M&T Bank who held a lien on the assets of Premier Van Lines. Mr. Cordero was so advised when he contacted my office in the early spring of 2002. In fact, my staff has received more than 20 telephone calls from Mr. Cordero and my staff has advised me that he has been belligerent in his conversations with them. I spoke myself with Mr. Cordero on at least one occasion to reemphasize

the fact that I did not have possession nor control of his assets and that he would need to seek recovery through the landlord or M&T's attorneys. I wrote to the landlord of the Jefferson Road facility in April of 2002 and later provided a copy of that letter to Mr. Cordero. Copies of my letters dated April 16, 2002 and June 10, 2002 are enclosed herewith. Mr. Cordero continued to contact my office throughout the summer of 2002 and in the face of my staff's consistent message to him that we did not control nor have possession of his assets, he became more demanding and demeaning to my staff. After a final telephone call from Mr. Cordero on September 23, 2002 during which time he became very angry at my staff, I wrote to Mr. Cordero again to advise him of my position with respect to his assets and to insist he no longer contact my office regarding reacquisition of his assets. A copy of my September 23, 2002 letter is also enclosed herewith.

I have tried to explain to Mr. Cordero that I am not his attorney and that he should seek his own legal representation if he is having difficulty reacquiring his assets. Apparently, he has chosen not to seek his own legal counsel. I believe he either fails or refuses to understand the limited role that I play as Trustee in a Chapter 7 proceeding and that poor understanding has given rise to his current application. As I will soon be issuing a No Distribution Report, this case will be closed and my duties as Trustee will come to an end. Accordingly, I do not believe that it is necessary for the Court to take any action on Mr. Cordero's application. However, should the Court desire to calendar this matter, please let me know so that I may appear in Court and answer any questions that the Court may have regarding this matter.

Respectfully submitted,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/brs
Enclosure

pc: Kathleen Dunivin Schmitt, Esq.
Richard Cordero
David MacKnight, Esq.
Michael Beyma, Esq.
Ray Stilwell, Esq.

RECEIVED OCT 0 4 2002

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

PREMIER VAN LINES, INC.,

Debtor.

B01-20692

JAMES PFUNTNER,

Plaintiff,

-vs-

KENNETH GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. and M & T BANK,

Defendants.

Adversary Proceeding
Case No.: 02-2230

SUMMONS IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint with 35 days.

Address of Clerk: United States Bankruptcy Court
100 State Street
Rochester, New York 14614

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney:
Lacy, Katzen, Ryen & Mittleman, LLP
David D. MacKnight, Esq.
130 East Main Street
Rochester, New York 14604

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

PAUL R. WARREN
Clerk of the Bankruptcy Court

10/3/02
Date

By: [signature]
Deputy Clerk

9-23-02

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

PREMIER VAN LINES, INC.,

Debtor.

B01-20692

JAMES PFUNTNER,

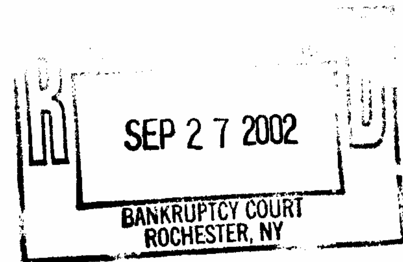
Plaintiff,

-vs-

KENNETH GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. and M & T BANK,

Defendants.

Adversary Proceeding
Case No.: 02-_______



INTERPLEADER COMPLAINT TO DETERMINE RIGHTS IN PROPERTY OF THE DEBTOR AND IN PROPERTY IN THE DEBTOR'S POSSESSION, TO GRANT PLAINTIFF AND COMPEL THE TRUSTEE TO PAY ADMINISTRATIVE EXPENSES OR OTHERWISE DETERMINE THE LIABILITY OF THOSE FOUND TO HOLD AN INTEREST IN THE DEBTOR'S PROPERTY OR PROPERTY IN POSSESSION OF THE DEBTOR FOR THE USE AND OCCUPANCY OF THE PLAINTIFF'S REAL PROPERTY, AND TO VACATE THE AUTOMATIC STAY OF ACTIONS

TO: HON. JOHN C. NINFO, II, Chief United States Bankruptcy Judge:

1. The filing of this Complaint commences an Adversary Proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001.

Pfuntner/1772-B.DDM

2. Heretofore the above-named Debtor filed a Petition for relief pursuant to the provisions of Chapter 11 of the Bankruptcy Code. An Order for relief was entered.

3. Thereafter, the case was converted to a case under the provisions of Chapter 7 of the Bankruptcy Code. Plaintiff is a creditor of the above-named Debtor and the estate. Plaintiff's the holder of both Chapter 11 and Chapter 7 administrative expense claims arising out of a lease between Plaintiff and Debtor in respect to 2140 Sackett Road, Avon, New York (the "Property").

4. Kenneth Gordon is made a party hereto in his capacity as the duly appointed Trustee in bankruptcy in the above-captioned case.

5. M&T Bank is a national banking association with its principal place of business in the Western District of New York.

6. Richard Cordero, upon information and belief, resides in the Borough of Brooklyn located in the Eastern District of New York.

7. Rochester Americans Hockey Club, Inc. is a New York corporation with a principal place of business at 100 Exchange Boulevard, Rochester, New York in the Western District of New York.

8. Upon information and belief, the Trustee through the bankruptcy estate, M&T Bank, Richard Cordero, Rochester Americans Hockey Club, Inc. and possibly others have, or claim to have, interests in or own property of the estate or in the possession of the estate consisting of three over-the-road trailers, two over-the-road tractors, a straight truck, shipping containers and storage boxes, the contents, if any, of the shipping containers, and miscellaneous scrap, all located in or on the Property.

9. This Court has jurisdiction of this Adversary Proceeding pursuant to 28 U.S.C. 1334 and 28 U.S.C. 157(b)(2).

10. Venue is properly place in this Court in which the above-captioned case is pending pursuant to 28 U.S.C. 1409.

STATEMENT OF RELEVANT FACTS

11. Plaintiff repeats paragraphs 1 through 9, inclusive, as if set forth at length.

12. Before the filing of the Debtor's Petition in reorganization, Plaintiff and Debtor entered into a lease providing for monthly rent of $2,170 in respect to the Property.

13. The Debtor occupied the Property and stored shipping containers and storage boxes inside the warehouse. The Debtor parked or stored numerous trucks and trailers, as well as items that the Plaintiff now considers to be junk on the Property outside the warehouse.

14. Debtor defaulted in making monthly payments before the filing of its Petition.

15. After the filing of the Petition, Debtor made one payment of $2,170 to Plaintiff and then defaulted in further payments.

16. From the time of the filing of the Debtor's Petition through August 2002, the Debtor had shipping containers and storage boxes stored inside the Plaintiff's warehouse and five trailers, two tractors, a straight truck, and miscellaneous items parked outside of the warehouse on the Property.

17. In August 2002, the Trustee, upon information and belief, caused his auctioneer to remove one of the trailers without notice to Plaintiff and during the nighttime for the purpose of selling the trailer at an auction to be held by the Trustee on September 26, 2002.

18. Upon information and belief, the Trustee's Notice of Sale disclosed that certain of the other trailers would also be sold at the Trustee's scheduled auction.

19. In August 2002, M&T Bank, which claimed it held a security interest in Debtor's storage equipment, upon information and belief, sold certain of the shipping containers stored in Plaintiff's warehouse to a Rochester moving company, which moving company removed the shipping containers, leaving four open-sided storage boxes and four sealed shipping containers.

20. Except for the property specified above as having been removed, the balance of the Debtor's property remains on and in the Property.

21. Upon information and belief, at various times during the summer of 2002, Cordero made numerous demands upon M&T Bank for access to what he claims to be property in which he has an ownership interest and which is stored in the warehouse. Plaintiff notes that the name "Cordero" appears on the outside of one of the shipping containers.

22. Rochester Americans Hockey Club, Inc. claims that it owns certain personal property which the Debtor stored for it in Plaintiff's warehouse.

23. Plaintiff has been advised by Rochester American Hockey Club, Inc. that it has paid rent to the Debtor by checks, which checks were cashed by the Debtor. Plaintiff notes that a shipping container has the hockey club's name on the outside.

24. Plaintiff does not know and has never had access to the contents of any of the shipping containers and has no knowledge of who has a claim in or may claim the contents of any of the shipping containers.

25. M&T Bank continues to assert a security interest in the shipping containers and storage boxes. The Plaintiff does not know whether Defendant Cordero has paid any storage

charge to anyone since the beginning of the Debtor's case or the amount that is due to the Debtor.

26. Upon information and belief, Rochester Americans Hockey Club, Inc. has neglected to pay all of the sums due to the Debtor and Trustee, the amount of which Plaintiff has no knowledge.

27. Heretofore Plaintiff, by his attorneys, requested M&T Bank and the Trustee to agree upon and arrange for the payment of the fair use and value of the Property until the Debtor's property had been removed. The Trustee and M&T Bank have neglected, or have declined, to pay for the fair use and occupancy of the premises in any measure.

28. Plaintiff has no means to determine the ownership, or interests in the property left in or on the Property.

29. Plaintiff has demanded $2,170 per month as compensation for the use and occupancy of the premises in that the fair and reasonable storage charge for motor vehicles of the nature and description of those owned by the Debtor runs between $20 and $50 per vehicle per day depending upon the length of the vehicle. Thus, $2,170, the stipulated rent, is smaller than the storage charge for each lot or parcel of the Debtor's property and third-party property stored by the Debtor, if charged by the item.

30. Plaintiff believes that he cannot protect himself from possible conflicting and, multiple claims in the Debtor's property in the contents of the shipping containers because he has no means of determining the ownership of the contents of the shipping containers.

STATEMENT OF CLAIMS

31. The Court should determine the ownership and interests in the Debtor's property located on the Property or stored by the Debtor on the Property.

32. The Court should determine and decree that Plaintiff shall be discharged from any and all liability and be indemnified for defending against adverse claims to the property in issue or any portion thereof together with the reason attorneys fees and other expense for bringing this proceeding. 28 U.S.C. 1335. That the Court determine the fair use and occupancy of the leased premises, determine which of the Defendants are liable for the fair use and occupancy and determine the amount for which each Defendant is liable.

33. To the extent that Plaintiff is entitled to a Chapter 11 administrative expense, that the Trustee be directed to pay such Chapter 11 administrative expense, along with all other Chapter 11 administrative expenses pursuant to Bankruptcy Code §503.

34. To the extent that the Trustee is liable for storage charges after the conversion of the case to Chapter 7, that the Court direct that such storage charges be allowed as an administrative expense of this superseding Chapter 7 case and paid with other Chapter 7 administrative expenses.

35. That the Court vacate the stay of actions to permit Plaintiff to evict the Debtor and those claiming under the Debtor from the premises, to remove the goods left in the Property by third parties, and to collect from those responsible for the fair use and occupancy such sums as a state court may allow therefor.

36. That this Court direct the Trustee to forthwith abandon such property as he does not intend to administer and give Plaintiff notice of the effected of such abandoned property.

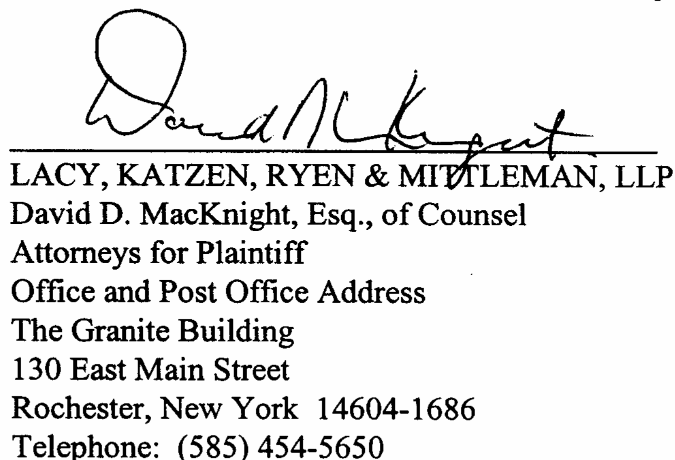
37. That in respect to such property stored by the Debtor on account of its customers, that the Court direct the Trustee to make reasonable efforts to identify those who have an interest in or a claim upon property not belonging to one of the Defendants and if owners or interest holders in such property cannot be identified, that the Trustee treat the property as abandoned property under the New York Abandoned Property Law.

38. That this Court determine the extent of any lien that Plaintiff may have pursuant to the New York Lien Law §§180 through 200 and declare and fix such liens upon the property and give Plaintiff leave to enforce such liens as the Court may find.

39. In the event that the Court determines that Plaintiff had a lien upon the stored motor vehicles, that the Court direct that after a prorata share of the proceeds of sale at the Trustee's auction, that the Trustee forthwith pay the unpaid balance of such lien to Plaintiff before any other use is made of such money.

WHEREFORE, Plaintiff requests the Court grant the leave set forth above, the costs and disbursements of this action, reasonable attorneys' fees for Plaintiff bringing this action, money judgments or administrative expense claims against the estate and each of the other Defendants for such portion of the fair use and occupancy of the leased premises as to the Court seems just and proper, together with interest, and for such other and further relief as to the Court seems just and proper.

DATED: Rochester, New York
September 20, 2002



LACY, KATZEN, RYEN & MITTLEMAN, LLP
David D. MacKnight, Esq., of Counsel
Attorneys for Plaintiff
Office and Post Office Address
The Granite Building
130 East Main Street
Rochester, New York 14604-1686
Telephone: (585) 454-5650

Pfuntner/1772-B.DDM

United States Bankruptcy Court
Western District of New York
1400 UNITED STATES COURTHOUSE
ROCHESTER, NEW YORK 14614

Hon. John C. Ninfo, II
CHIEF UNITED STATES
BANKRUPTCY JUDGE

October 8, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Re: Premier Van Lines, Inc.
Case No:. 01-20692

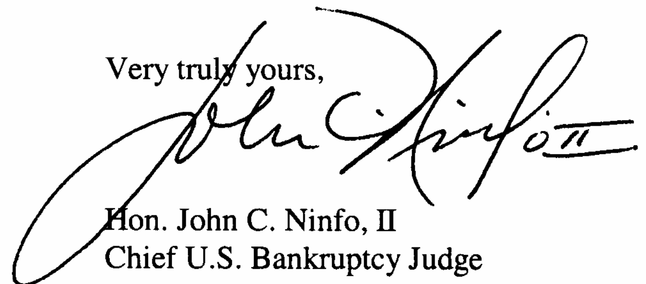
Dr. Cordero:

By copy of this letter the Court acknowledges receipt of your correspondence, dated September 27, 2002, in which you request the Court to make a determination as to whether the Chapter 7 Trustee, Ken Gordon, Esq., is satisfactorily administering the above-referenced bankruptcy estate. Such a determination, however, is not appropriate for the Court to make at this time.

The appointment of a Chapter 7 trustee is a function of the Department of Justice, Office of the United States Trustee, and the supervision of the Chapter 7 trustee remains in the province of that office. Accordingly, any concerns that you may have regarding Mr. Gordon's capacity as the Chapter 7 trustee in this case should first be addressed to Kathleen Dunivin Schmitt, Esq., Assistant United States Trustee, 100 State Street, Room 6090, Rochester, New York 14614.

I am confident that Ms. Schmitt will make thorough inquiry and assist you in reconciling this matter. Thank you for your continued patience.

Very truly yours,



Hon. John C. Ninfo, II
Chief U.S. Bankruptcy Judge

JCN/ams

cc: Kathleen Dunivin Schmitt, Asst. U.S. Trustee
Kenneth W. Gordon, Chapter 7 Trustee

U.S. Department of Justice

Office of the United States Trustee
Western District of New York

100 State Street, Suite 609
Rochester, New York

(585) 263-5706
FAX (585) 263-5862

October 8, 2002

Dr. Richard Cordero, Esquire
59 Cresent Street
Brooklyn, NY 11208-1515

Re: Premier Van Lines

Dear Dr. Cordero:

I am writing to you in response to your letter to the Court dated September 27, 2002, concerning the chapter 7 trustee, Mr. Kenneth Gordon, in the above referenced case. The United States Trustee Program is a component of the Department of Justice that supervises the administration of bankruptcy cases and trustees.

As part of our investigation into this matter, we have contacted Mr. Gordon for response. Our office will contact you as information is received and reviewed.

The concerns raised in your letter are appreciated. The United States Trustee encourages active involvement by parties to promote efficient and appropriate case administration.

Please let me know if I may be of further assistance.

Very truly yours,

Kathleen Dunivin Schmitt
Assistant United States Trustee

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

PREMIER VAN LINES, INC.,

Case No: 01-20692

Debtor

JAMES PFUNTER,

Plaintiff,

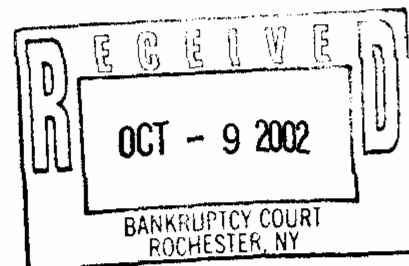
-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK,

Defendants

TRUSTEE'S ANSWER

Adversary Proceeding
Case No: 02-2230



Defendant, Kenneth W. Gordon, as the Chapter 7 Trustee in Bankruptcy for Premier Van Lines, Inc., answering the Complaint:

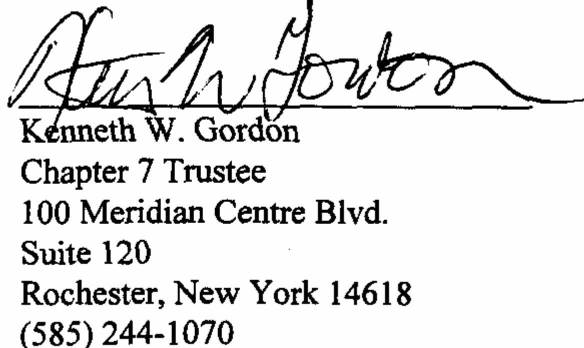
1. Denies the allegations set forth in paragraph 17 of the Plaintiff's Complaint.

2. Denies knowledge and information sufficient to form a belief as to the remaining allegations of this Complaint.

3. Affirms that all of the assets of the estate have been abandoned on due notice and that there are no assets out of which to pay any claims.

WHEREFORE, Kenneth W. Gordon, as Trustee, requests dismissal of the Complaint against the Trustee together with such other and further relief as is just and proper.

Dated: Rochester, New York
October 9, 2002

By: 

Kenneth W. Gordon
Chapter 7 Trustee
100 Meridian Centre Blvd.
Suite 120
Rochester, New York 14618
(585) 244-1070

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

October 14, 2002

Hon. Judge John C. Ninfo, II
United States Bankruptcy Court
1220 US Court House
100 State Street
Rochester, NY 14614

Re: Premier Van Lines, bankruptcy case number 01-20692, Chapter 7; and case no. 02-2230

Dear Judge Ninfo,

Thank you for your letter of 8 instant acknowledging receipt of my letter to you of last September 27 and of your transmittal of it to Assistant U.S. Trustee Kathleen Dunivin Schmitt.

I have also received a copy of the reply that Trustee Kenneth Gordon sent you dated October 1, 2002. In that letter, Mr. Gordon makes allegations to refute the contents of my Statements of Facts with a view to moving the Court to take no action on my application. Hence, I am copying you to the Rejoinder that analyzes Trustee Gordon's allegations, which I submitted to Ms. Schmitt.

In this context, I respectfully draw your attention to section **II. Whether the Trustee's statements to Court & U.S. Trustee are true.** I believe that the Court will want to insure that submissions to it, particularly if made by an officer of the court, are truthful and comport with high ethical standards.

I would also like to note that through a copy of Trustee Gordon's answer in case no. 02-2230, I have learned that I am a named defendant in the lawsuit brought by the owner of the warehouse at Avon, namely, James Pfuntner, against the Trustee and others. However, I have not yet being served.

When Mr. Pfuntner and I spoke on the phone, he said that he wanted to receive storage fees from Premier clients with property in his warehouse. It is decidedly odd that he should want to receive a fee from me, not to mention sue me, without even stating in writing what property of mine is in his warehouse and in what condition. Thus, his lawyer, David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, has not only refused to take or return any of my calls, but has also failed to answer either my letter of August 26 or October 7, 2002, in which I requested information about my property and its condition.

I look forward to hearing from you and remain,

yours sincerely,

Dr. Richard Cordero

cc. Assistant U.S. Trustee Kathleen Dunivin Schmitt
Trustee Kenneth Gordon, Esq.

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

COPY

August 26, 2002

Att: Thomas: kindly acknowledge receipt at (718) 827-9521.
David MacKnight, Esq.
Lacy & Katzen
130 East Main Street
Rochester, NY 14604 fax 585-454-6525; tel. 585-454-5650

Dear Mr. MacKnight,

I have been referred to you by Mr. Michael J. Beyma, attorney for Manufacturers & Traders Trust Bank (M&T) who copied you to his letter to me of last August 15. Mr. Beyma indicated that you represent Mr. James Pfuntner, landlord of the Avon warehouse at 2140 Sackett Road in Avon, where two "Pyramid" storage cabinets are located which contain property of mine that I entrusted for storage to the now bankrupt Premier Van Lines.

I would like to remove my property. Hence, I would like to make arrangements with your client for access to the warehouse. The removal would be carried out by either Champion Moving & Storage or a similar company. I understand that Champion bought from M&T these two cabinets as well as those of other people similarly situated as part of a batch of storage containers and other assets owned by Premier and that Champion has the right to remove them to its own warehouse. Presently, I am only interested in the storage containers holding my property. Therefore, I would like to know the following:

1. whether in addition to these two "Pyramid" storage cabinets there are any other storage containers holding property of mine at the Sackett Road warehouse or elsewhere known to Mr. Pfuntner;
2. what the dimensions, material, and condition of any such cabinets and containers are which hold property of mine;
3. whether and, if so, when I, Champion, and/or any similar company can have access to the Sackett Road warehouse to inspect the condition of such cabinets and containers and remove them as appropriate;
4. if such cabinets or containers cannot themselves be taken away from the Sackett Road warehouse, why that is so, and what it would take to be able to remove them together with my property;
5. if the cabinets or containers cannot be removed, how access to them can be arranged in order to remove only my property;
6. regardless of whether it may be to remove such cabinets and containers or just my property in them, whether a forklift or similar machine would be necessary and, if so, whether there is such forklift or machine at the Sackett Road warehouse that can be used for that purpose and, if so, under what terms.

I thank you in advance for your attention to this matter and would appreciate any other piece of pertinent information.

Yours sincerely,

Dr. Richard Cordero

cc: Michael J. Beyma, Esq.
Kenneth Gordon, Esq.
Christopher Carter, Champion Moving & Storage

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

COPY

October 7, 2002

Please acknowledge receipt at (718) 827-9521.

David MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman
130 East Main Street
Rochester, NY 14604 fax 585-454-6525; tel. 585-454-5650

Dear Mr. MacKnight,

Despite your letter of last September 19, I have not yet received from either you or your client, Mr. James Pfuntner, any information concerning my property that the now bankrupt Premier Van Lines stored in your client's warehouse at 2140 Sackett Road in Avon. Therefore, I request that you provide the information that I already requested in my letter to you of August 26, as restated below, to which you never replied.

As indicated before, Mr. Michael J. Beyma, attorney at Underberg & Kessler for Manufacturers & Traders Trust Bank (M&T), copied you to his letter to me of last August 15. Therein Mr. Beyma stated that "Pyramid" storage cabinets containing property of mine are in your client's warehouse at 2140 Sackett Road. I want to make arrangements with your client for access to his warehouse and removal of my property. Therefore, I would like to know the following:

1. whether in addition to those "Pyramid" storage cabinets there are any other storage containers holding property of mine at the Sackett Road warehouse or elsewhere known to Mr. Pfunter;
2. how many of any such cabinets and containers are there which hold property of mine and what are their dimensions, material, and condition;
3. whether and, if so, when I and/or a moving company can have access to the Sackett Road warehouse to inspect the condition of such cabinets and containers and remove them if appropriate;
4. if such cabinets or containers cannot themselves be taken away from the Sackett Road warehouse, why that is so, and what it would take to be able to remove them together with my property;
5. if the cabinets or containers cannot be removed, how access to them can be arranged in order to remove only my property;
6. regardless of whether it may be to remove such cabinets and containers or just my property in them, whether a forklift or similar machine would be necessary and, if so, whether there is such forklift or machine at the Sackett Road warehouse that can be used for that purpose and, if so, under what terms.

I trust that this time you will be kind enough to provide me with this and any other piece of pertinent information. If I do not receive that information by next Saturday, October 12, I will make every effort to obtain it from your client directly, who also promised to give me that information but then failed to do so.

Yours sincerely,

Dr. Richard Cordero

Lacy, Katzen, Ryen & Mittleman, LLP

LOUIS A. RYEN
RONALD A. MITTLEMAN
MICHAEL S. SCHNITTMAN
PETER T. RODGERS
SALLY A. SMITH+
KAREN SCHAEFER
RICHARD G. CURTIS
LAWRENCE J. SCHWIND
DAVID E. ANDERSON
CRAIG R. WELCH
CHRISTOPHER B. MUMFORD
LESLIE W. KERNAN JR+
TERRANCE W. EMMENS
MARK H. STEIN
JACQUELINE M. THOMAS

HERBERT W. LACY
(1920 - 1989)

ATTORNEYS AT LAW
THE GRANITE BUILDING
130 EAST MAIN STREET
ROCHESTER, NEW YORK 14604-1686

(585) 454-5650
FACSIMILE (585) 454-6525

LEON KATZEN
GEORGE F. FREY

DAVID D. MACKNIGHT*
DENINE K. CARR*
MATTHEW A. RYEN
JENNIFER L. CHADWICK
JOANNE CONSTANTINO
LARA R. BADAIN
SUZANNE L. AMICO
KEVIN MORABITO
DANIEL S. BRYSON
LISA C. ARRINGTON°

ALSO ADMITTED IN:
* ILLINOIS
+ NEW JERSEY
° DISTRICT OF COLUMBIA

September 19, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Re: Stored Property

Dear Dr. Cordero:

I have drafted a complaint to determine the obligations and duties of the Trustee, M&T Bank, Mr. Pfunter and those claiming on interest in property stored in and around the Sackett Road warehouse. Please look forward to receipt of a summons and complaint.

Very truly yours,

David D. MacKnight

DDM/cc
Cc: Trustee
Michael Beyma, Esq.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

PREMIER VAN LINES, INC.,

Debtor

Case No: 01-20692

JAMES PFUNTER,

Plaintiff,

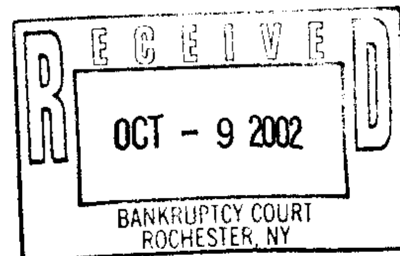
-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK,

Defendants

TRUSTEE'S ANSWER

Adversary Proceeding
Case No: 02-2230



Defendant, Kenneth W. Gordon, as the Chapter 7 Trustee in Bankruptcy for Premier Van Lines, Inc., answering the Complaint:

1. Denies the allegations set forth in paragraph 17 of the Plaintiff's Complaint.

2. Denies knowledge and information sufficient to form a belief as to the remaining allegations of this Complaint.

3. Affirms that all of the assets of the estate have been abandoned on due notice and that there are no assets out of which to pay any claims.

WHEREFORE, Kenneth W. Gordon, as Trustee, requests dismissal of the Complaint against the Trustee together with such other and further relief as is just and proper.

Dated: Rochester, New York
October 9, 2002

By: [signature]

Kenneth W. Gordon
Chapter 7 Trustee
100 Meridian Centre Blvd.
Suite 120
Rochester, New York 14618
(585) 244-1070

 Exhibit: Tr Gordon's answer of 10/9/2 in *Pfuntner*: he abandoned Premier's assets, none available to pay claims

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

October 14, 2002

Ms. Kathleen Dunivin Schmitt
Assistant United States Trustee
U.S. Department of Justice
100 State Street, Suite 609
Rochester, NY 14614 tel. 585-263-5706; fax. 585-263-5862

Re: Kenneth Gordon, Esq., Trustee for Premier Van Lines,
Chapter 7 bankruptcy case number 01-20692

Dear Ms. Schmitt,

Thank you for your letter of 8 instant informing me that my letter of last September 27, to Judge John C. Ninfo concerning the above-captioned case was transmitted to you.

I understand that you were also copied by the trustee in this case, Kenneth Gordon, Esq., to his letter of October 1, 2002, to U.S. Bankruptcy Judge John C. Ninfo, II. In that letter, Mr. Gordon makes allegations to refute the contents of my Statements of Facts with a view to moving the Court and persuading you not to take any action on my application. Hence, I am submitting to you a Rejoinder that analyzes Trustee Gordon's allegations.

Please rest assured of my willingness to cooperate with you and your office in the review of this matter.

I look forward to hearing from you and remain,

yours sincerely,
Dr. Richard Cordero

Cc: Judge John C. Ninfo, II
Trustee Kenneth Gordon, Esq.
Michael J. Beyma, Esq.

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

October 14, 2002

REJOINDER
and
APPLICATION FOR A DETERMINATION

In re Kenneth Gordon, Esq., Trustee for Premier Van Lines,
Chapter 7 bankruptcy case number 01-20692

Submitted by: Dr. Richard Cordero, Esq.

to: Ms. Kathleen Dunivin Schmitt
Assistant United States Trustee
U.S. Department of Justice
100 State Street, Suite 609
Rochester, NY 14614

1. On September 27, 2002, I submitted to U.S. Bankruptcy Judge John C. Ninfo, II,[1] (hereinafter referred to as the Court) a Statement of Facts and Application for a Determination concerning the performance and fitness to serve of Kenneth Gordon, Esq.,[2] Chapter 7 Trustee for Premier Van Line[3] , (hereinafter referred to as Premier), a company formerly engaged in the business of moving and storing property of customers. Trustee Gordon sent an Answer dated October 1, 2002, to the Court with copy to the U.S. Trustee. The Court transmitted my Statement and the Trustee's Answer to Assistant U.S. Trustee Kathleen Dunivin Schmitt (hereinafter referred to as the U.S. Trustee). This is my Rejoinder to that Answer.
2. Trustee Gordon's performance has adversely affected the steps that I have taken since early January 2002 to locate and retrieve the property that I entrusted for storage to Premier, which packed it in storage containers owned by and constituting assets of Premier. Till this day, I have no certainty of the whereabouts of all my property, let alone its condition. This property interest justifies my concern in the proper handling and disposition of the bankruptcy proceedings relating to Premier.

I. Trustee Gordon's "significant efforts" as Premier's trustee

3. In his answer dated October 1, 2002, to the Court with copy to the U.S. Trustee, Trustee Gordon alleges that, "Since conversion of this case to Chapter 7, I have undertaken significant efforts to identify assets to be liquidated for the benefit of creditors."

---

[1] Judge John C. Ninfo, II, U.S. Bankruptcy Judge, United States Bankruptcy Court, Western District of New York, 1400 United States Courthouse, Rochester, NY 14614, tel. (585) 263-3148.

[2] Kenneth Gordon, Esq., of Gordon & Schaal, 100 Meridian Center Blvd., Suite 120, Rochester, NY 14618, tel. (585) 244-1070, fax (585) 244-1085.

[3] Premier Van Lines, 900 Jefferson Road, Rochester, NY 14623.

4. By the common sense standard that when success is possible, efforts that failed were poor, Mr. Gordon's efforts, and consequently, his performance, were poor. Indeed, he failed to find out that Premier had assets at a warehouse located in Avon,[4] and owned by Mr. James Pfuntner.[5] It fell upon me, in my quest for my property, to instigate other parties to this case to launch a search for other assets of Premier. It was through those parties that the discovery of other Premier's assets was made, including storage containers in which my property is said to be contained. The facts surrounding this discovery raise some very troubling questions about what efforts, let alone significant ones, Mr. Gordon has been making in this case. The facts are as follows:

a. The facts of Trustee Gordon's performance

5. Premier never informed me that it had filed for bankruptcy in March 2001. Instead, it kept billing me and I kept paying it. Neither Premier nor Trustee Gordon informed me that the case had been converted from Chapter 11 to Chapter 7 in December 2001. Far from it, in January 2002, Mr. David Palmer, owner of Premier,[6] assured me repeatedly that my property was safe and referred me to the manager of the warehouse where he had stored the containers with my property, Mr. David Dworkin.[7]
6. Mr. Dworkin also assured me that my property was safe and in good condition in his warehouse and then billed me on March 7, 2002, on Jefferson Henrietta stationery for storage fees. However, he failed to give me his assurances in writing, as I had requested and he had agreed to do. This was well before Mr. Gordon wrote to Mr. Dworkin on April 16, as follows:

> "Please be advised that M&T Bank has a blanket lien against the assets of Premier Van Lines. As the Chapter 7 Trustee, I will not be renting or controlling the storage units or any of the assets at the Jefferson Road location. Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank…"

7. It was not Trustee Gordon, but rather Mr. Dworkin who in March had referred me to M&T Bank.[8] I had to find out on my own who were the officers in charge of the Premier case. They turned out to be Mr. Vince Pusateri,[9] and Mr. David Delano.[10] Mr. Delano told me that he had seen containers with my name at Mr. Dworkin's warehouse. After being bandied between these parties and by them to yet other parties, I found out that M&T Bank had sold the Premier's assets stored at Mr. Dworkin's warehouse to Champion Moving & Storage.[11]
8. Champion's owner is Mr. Christopher Carter.[12] He informed M&T Bank and me by letter of July

---

[4] Avon warehouse, located at 2140 Sackett Road, Avon, NY 14414.

[5] James Pfuntner, (585) 738-3105, owner of the Avon warehouse; see footnote above; also an officer of Western Empire Truck Sale, 2926 West Main Street, Caledonia, NY 14423, tel. (585) 538-2200.

[6] David Palmer, tel. (585) 292-9530, owner of the now bankrupt Premier Van Lines.

[7] David Dworkin, manager of the warehouse of Jefferson Henrietta Associates, 415 Park Avenue, Rochester, NY 14607, tel. (585) 442-8820; fax (585) 473-3555; and of Simply Storage, tel. (585) 442-8820; officer also of LLD Enterprises, tel. (585) 244-3575; fax 716-647-3555.

[8] M&T Bank, Manufacturers & Traders Trust Bank, 255 East Avenue, Rochester, NY 14604.

[9] Vince Pusateri, M&T Bank Vice President in Rochester, tel. (716) 258-8472.

[10] David Delano, M&T Bank Assistant Vice President in Rochester, tel. (585) 258-8475; (800) 724-2440.

[11] Champion Moving & Storage, 795 Beahan Road, Rochester, NY 14624, tel. (585) 235-3500; fax (585) 235-2105.

[12] Christopher Carter, cellphone (585) 820-4645, owner of Champion; see footnote above.

30, 2002, that my property was not among the storage containers and other assets that he had bought from M&T Bank and picked up at Mr. Dworkin's warehouse. By contrast, among those assets were Premier's business files. There Mr. Carter was able to find Premier invoices indicating that in 2000, Premier had stored my property in a warehouse in Avon.

9. The ensuing search discovered that not only at least one storage container there is said to bear my name, but that other assets belonging to Premier are also at that warehouse in Avon owned by Mr. Pfuntner; see footnotes 4 and 5 above. The latter has acknowledged that there is property belonging to me in his warehouse, but refused to state its condition. In addition, he claimed that he wanted compensation for storage and that if he let me take my property, the Trustee could sue him.

10. Mr. Pfuntner's lawyer is Mr. David MacKnight.[13] The latter has not answered any of my letters to provide me the requested information concerning the number of containers with property of mine and the condition of such property. Nor has he taken or returned any of my calls. However, Mr. MacKnight sent me a letter dated September 19, 2002, stating that:

> "I have drafted a complaint to determine the obligations and duties of the Trustee, M&T Bank, Mr. Pfunter [sic] and those claiming on [sic] interest in property stored in and around the Sackett Road warehouse. Please look forward to receipt of a summons and complaint."

11. From a copy of Trustee Gordon's answer, I have learned that I am a named defendant in the law-suit brought by Mr. Pfuntner against Trustee Gordon et al, although I have not yet being served.

b. Questions to assess Trustee Gordon's "significant efforts"

12. Did Trustee Gordon ever look at the Premier business files at Mr. Dworkin's warehouse, which would have allowed him to discover that Premier had assets at the Avon warehouse, just as Mr. Carter of Champion did? Where else did Trustee Gordon, or for that matter any trustee, look for assets of the debtor when he does not look at the debtor's business files?

13. If Trustee Gordon did not look at those files, why did he not do so given that with due diligence he would have found out that, as Mr. Dworkin told me, Premier had also rented office space at the Dworkin's warehouse and had his office equipment and cabinets there?

14. If Trustee Gordon did look at those files and that enabled him to write to Mr. Dworkin on April 16 that, "I will not be renting or controlling the storage units or any of the assets at the Jefferson Road" warehouse, that is, Mr. Dworkin's, why did he not notify the Premier clients with property in Premier's storage containers? Without notifying them, Trustee Gordon could not properly dispose of Premier's assets. Indeed, professional experience or common sense would have told Trustee Gordon that such Premier clients would want to have their property back or know its whereabouts. Therefore, they had claims on Premier, but would run into difficulty with Premier creditors, including those that had possession or control of Premier's containers and assets stored elsewhere. The correctness of this elemental reasoning is shown by Mr. Pfuntner's refusal to release Premier's assets in the Avon warehouse, including the property of Premier customers stored in Premier's storage containers.

---

[13] David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604, tel. (585) 454-5650, fax 585-454-6525.

15. Trustee Gordon wrote to me on September 23, 2002, that, "From the latest communications I have read which have been sent to you by the attorneys for James Pfunter [sic] and M&T Bank, it appears as if your property is located at the Sackett Road warehouse in Avon, New York." Did Trustee Gordon try to ascertain with due diligence what other Premier assets were at that Avon warehouse? Or did he just wait until receiving the summons and complaint of Mr. Pfuntner's lawsuit against him et al?

16. That suit shows that Trustee Gordon made a gross mistake in his way of handling this case, which he thus expressed in his October 1 Answer to the Court and the U.S. Trustee: "It has been my position consistently since my appointment as Trustee in this case that the property owned by customers of Premier Van Lines and stored by it was not property of the bankruptcy estate for administration." With that statement, the disposition of Premier' assets, including containers with customers' property, is not solved as if by magic. Far from it! Now Trustee Gordon is facing a lawsuit. Therefore, how can the Trustee affirm in that same letter that, "this case will be closed and my duties as Trustee will come to an end. Accordingly, I do not believe that it is necessary for the Court to take any action on Mr. Cordero's application." Are bankruptcy cases closed when the trustee is sued?

17. Since Trustee Gordon abandoned Premier assets at Mr. Dworkin's warehouse, failed to identify other Premier assets elsewhere, and after third parties without his help found more such assets at the Avon warehouse, satisfied himself with "it appears as if your property is" there, to what were Trustee Gordon's "significant efforts" addressed and what were their results? Can another trustee find other Premier assets by making "efforts" to that end, particularly "significant" ones, which could avoid issuing a No Distribution Report?

II. Whether the Trustee's statements to Court & U.S. Trustee are true

18. When on September 27, I applied to the Court for a review of Trustee Gordon's performance and fitness to continue as trustee in this case, I also protested the unjustified content and unprofessional tone of Trustee Gordon's letter to me of September 23. Therein the Trustee wrote, among other things, that "Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject." In his October 1 Answer, submitted to the Court with copy to the U.S. Trustee, Trustee Gordon made the following allegations, among others:

> "In fact, my staff has received more than 20 telephone calls from Mr. Cordero and my staff has advised me that he has been belligerent in his conversations with them…
>
> "Mr. Cordero continued to contact my office throughout the summer of 2002 and in the face of my staff's consistent message to him that we did not control nor have possession of his assets, he became more demanding and demeaning to my staff…
>
> "After a final telephone call from Mr. Cordero on September 23, 2002 during which time he became very angry at my staff, I wrote to Mr. Cordero again to advise him of my position with respect to his assets and to insist he no longer contact my office regarding reacquisition of his assets."

19. With these statements Trustee Gordon casts aspersions on me and my conduct. With them he also intends to make the Court as well as the U.S. Trustee believe that his own conduct was

justified. Moreover, he intends to obtain a personal benefit, namely, that the Court take no action on my application for review of his performance and fitness as trustee. Since Trustee Gordon is both an officer of the court and an appointee under federal law, he must know that when he addresses either, his declarations must be truthful. His character and his fitness, not only as trustee, but also as an officer of the court, would be revealed by the truthfulness or lack thereof of his declarations.

20. By the same token, both the Court and the U.S. Trustee must require that officers that have been sworn to uphold the law make truthful declarations before them. The insistence that this requirement be satisfied is indispensable for the application of the law and the administration of justice. Likewise, ethical considerations requiring that lawyers conduct themselves with honesty and candor are predicated on lawyers being truthful.

21. Therefore, let Trustee Gordon present the evidence supporting his statements. It should be very easy for him to do so. To begin with, he says that "In fact" his staff has received more than 20 calls from me. Thus, he must have a record keeping system for phone calls whereby incoming calls are logged, whether manually or electronically. Such systems do exist and they make it possible to bill clients for the time that the staff spent answering phone calls pertaining to their cases. Anyway, since Trustee Gordon asserts as a matter of his own knowledge that it is a "fact," then he can prove it. Let him do so.

22. By contrast, in the second part of the sentence, Trustee Gordon relies on hearsay to impugn my conduct and move the Court to favor him: "my staff has advised me that he has been belligerent… became more demanding and demeaning to my staff… became very angry at my staff." These are categorical statements. No reasonable person would have any doubt as to what constitutes such conduct. Hence, the Trustee's staff should easily state the details that describe such conduct, particularly since the Trustee submits as a "fact" that his staff received more than 20 of my calls. Let Trustee Gordon provide, not hearsay, but rather affidavits from his staff to substantiate his statements. Let him also describe in an affidavit of his own the tenor of our phone conversation, for he acknowledges that we spoke on the phone "on at least one occasion."

23. Meantime, the degree of Trustee Gordon's due care in preparing his statements and of their reliability can begin to be assessed when he writes thus:

> ""Richard Cordero is apparently a former customer of Premier Van Lines…Mr. Cordero was so advised…that former customers of Premier['s] items…were not to be administered by me…when he contacted my office in the early spring of 2002…I spoke myself with Mr. Cordero on at least one occasion to reemphasize the fact that I did not have possession nor control of his assets and that he would need to seek recovery through the landlord or M&T's attorneys."

24. If Trustee Gordon is truthfully submitting to the Court and the U.S. Trustee that he and his staff have received more than 20 calls from me, how come he cannot state for sure but only "apparently" that I am a former Premier customer? Or does it take still more calls for him to make a truthful determination? For the sake of truthfulness, it should also be noted that I did not contact his office in early spring. Nor was it in March or April, but only as late as mid-May. His intended implication in the statement that "on at least one occasion" he spoke with me is that he may have spoken with me more than once. His implication is misleading. He has spoken with me exactly one single time, on May 16, 2002. On that single occasion, he could not possibly have

spoken with me "to reemphasize" anything, not only because there had been no previous occasion in which he could 'emphasize' it, but also because nobody else had told me his position on the Premier case. Trustee Gordon should be able to easily challenge this assertion of mine since he must have a record keeping system that allows him to state as a "fact" that I called his staff more than 20 times and he knows from his staff what transpired in those calls.

III. The understanding of Trustee Gordon's role

25. Trustee Gordon not only impugns my character and conduct, but also belittles my competence when he writes that:

> "I believe he either fails or refuses to understand the limited role that I play as Trustee in a Chapter 7 proceeding and that poor understanding has given rise to his current application."

26. If Trustee Gordon's role were so unambiguously understandable, there should be no reason for Lawyer David MacKnight, who represents Mr. Pfuntner, the Avon warehouse owner, to be suing him "to determine the obligations and duties of the Trustee…," or for Mr. Pfuntner both to refuse to release my property in Premier's storage containers for fear that the Trustee may sue him and to refer me to the Trustee. Nor would there be any reason for Lawyer Raymond Stilwell,[14] who represents Mr. Palmer, the owner of Premier, to have engaged in conduct objected to by the Trustee, as shown in Mr. Stillwell's letter of last May 30. Nor would Lawyer Michael Beyma,[15] who represents M&T Bank, have referred me to the Trustee, just as did M&T Bank Vice President Vince Pusateri and Assistant Vice President David Delano. Nor would Lawyers MacKnight and Beyma feel compelled to copy the Trustee to letters that they wrote to me. Likewise, there should have been no need for the Trustee to write to Mr. Dworkin, in whose warehouse Premier had leased storage and office space, in April 2002, four months after the conversion of the case from Chapter 11 to Chapter 7, to let him know what the Trustee would be or not be renting or controlling and how Mr. Dworkin should handle Premier clients. Nor would Mr. Dworkin too deem it necessary to refer me to the trustee for Premier.

27. Is it because Trustee Gordon understands his role as being so limited that he is issuing a No Distribution Report? After all, he gave Lawyer Stilwell to understand, as the latter stated in his May 30 letter, "Our understanding was that the landlord of the 900 Jefferson Road premises, with the trustee's knowledge, had assumed responsibility for, and the right to rentals concerning, the stored belongings." Why did Trustee Gordon let one creditor, Mr. Dworkin, keep running the Premier as if it still were an ongoing business and without distributing its income?

IV. Request for review of Trustee Gordon's performance and fitness

28. I respectfully request that the U.S. Trustee, taking into account this Rejoinder as well as my Statement of September 27, determine whether Trustee Gordon, as trustee of Premier Van Lines:

---

[14] Raymond Stilwell, Esq., at Adair, Kaul, Murphy, Axelrod & Santoro, LLP, 300 Linden Oaks, Suite 220, Rochester, NY 14625-2883, tel. (585) 248-3800; fax (585) 248-4961; attorney for Mr. David Palmer; see footnote 6 above.

[15] Michael J. Beyma, Esq., tel. (585)-258-2890, at Underberg & Kessler, LLP, 1800 Chase Square, Rochester, NY 14604, tel. (585)-258-2800; fax (585) 258-2821; attorney for M&T Bank; see footnotes 8-10 above.

1. failed to recognize that clients of Premier, who had entrusted it with their property for storage for a fee, are parties in these bankruptcy proceedings and should have been informed of such proceedings as were creditors of the debtor;
2. failed to provide me -and perhaps others similarly situated- with adequate information when I was referred to him by lien holder M&T, and I contacted him and specifically requested such information in mid-May and June 2002;
3. failed to identify Premier's assets, such as those in Mr. Pfuntner's warehouse, and take such action as to render unnecessary his being sued by Mr. Pfuntner;
4. fails in his basic duty of fairness as a fiduciary by having refused to communicate with me and explicitly enjoining me not to contact his office again, although he has provided other parties with information concerning me;
5. fails to recognize his duty to allow me access to him and provide me with information, particularly since I have been referred to him for his role as Premier's trustee by a creditor, Mr. Pfuntner, who refuses to release my property lest the Trustee sue him;
6. failed to make "significant efforts" to discharge his duties competently;
7. made untruthful statements to the Court and the U.S. Trustee;
8. cast aspersions on me, my conduct, and my competence; and
9. is not fit to continue as trustee in this case.

Sincerely,

Dr. Richard Cordero

Cc: Judge John C. Ninfo, II
Kenneth Gordon, Trustee
Michael J. Beyma, Esq.

TABLE OF EXHIBITS

a. Trustee **Gordon**'s letter of **April 16**, 2002, **to Dworkin**, manager/owner of the Jefferson-Henrietta warehouse .... [A:17]

b. Letter of Raymond **Stilwell**, Esq., attorney for Premier Van Lines, of **May 30**, 2002, **to** Dr. **Cordero** .... [A:18]

c. Trustee **Gordon**'s letter of **June 10,** 2002, **to** Dr. **Cordero** with copy of his April 16 letter to Warehouser David **Dworkin**, manager/owner of the Jefferson Henrietta Associates' warehouse where Premier rented space to store the storage containers holding the property of its clients........ [A:16]

d. Letter of **July 30,** 2002, of Christopher **Carter** -owner of Champion Moving & Storage, Inc., which bought storage containers of Bankrupt Premier Van Lines sold by Lienholder M&T Bank- **to** Dr.

Cordero stating that his stored property is in a warehouse in Avon, NY .... [A:45]

e. Christopher **Carter**'s letter of **July 30,** 2002, **to** Vince **Pusateri**, Vice President of M&T Bank, general lienholder against Bankrupt Borrower Premier Van Lines, Inc., stating that his company did not receive containers with property of Dr. Cordero among the containers bought from M&T Bank .... [A:46]

1) **Bill of sale** from M&T Bank for Mr. Carter to sign to acknowledge receipt of containers bought from M&T, which liquidated its lien on them after Premier bought them with an M&T loan and subsequently went bankrupt .... [A:47]

2) **List of former Premier clients** whose property was allegedly in storage containers sold by M&T Bank to Champion's Mr. Carter, who received no containers with Dr. Cordero's name so he did not sign the acknowledgment .... [A:48]

3) **Premier** Van Lines' **invoice** of September 26, 2000, for storage of Dr. Cordero's property .... [A:49]

f. Att. **MacKnight**'s letter of **September 19,** 2002, **to** Dr. **Cordero** .... [A:14]

g. Trustee **Gordon**'s letter of **September 23,** 2002, **to** Dr. **Cordero** .... [A:1]

h. Trustee **Gordon**'s **Answer** of **October 9,** 2002**, to** Plaintiff **Pfuntner's complaint** .... [A:31]

Blank

Champion Moving & Storage, Inc.

795 Beahan Road
Rochester, New York 14624
Tel: (585) 235-3500

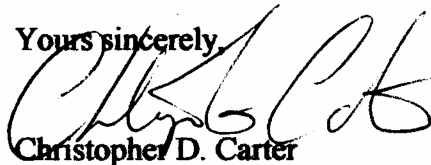
July 30, 2002

Dr. R. Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Dear Dr. Cordero,

Please find enclosed my letter to Mr. Busateri, a copy of an old Premier Van Lines invoice indicating the goods are in Avon. I also enclose an unsigned Bill of Sale.

Yours sincerely,



Christopher D. Carter

Enc.

ALLIED
Agent for Allied Van Lines®

Exh: Warehouser Carter's letter of 7/30/2 to Dr. Cordero with letter to M&T **P**usateri & bill of containers sale A:45

Champion Moving & Storage, Inc.

795 Beahan Road
Rochester, New York 14624
Tel: (585) 235-3500

July 30, 2002

Manufacturers and Traders Trust Company
255 East Avenue
Rochester, New York 14604

Dear Mr. Busateri,

Dr. Cordero has contacted us regarding his goods, which were stored by Premier Van Lines. In the transfer of goods from Premier's warehouse no containers for Dr. Cordero were received. In looking on the invoices from Premier it would appear Dr. Cordero's items are still in Avon (please see enclosed invoice). I understand that the Avon building is for rent, and there are still containers for storage their. Champion would be willing to pick up their storage lots.

Please call me at 235-3500 x 312 to discuss.

Yours sincerely,

Christopher D. Carter

Enc.
Cc: Dr. R. Cordero

ALLIED
Agent for Allied Van Lines®

A:46 Exh: Buyer Carter's letter of 7/30/2 to M&T **P**usateri re Dr. Cordero's containers not received, are in Avon

BUYER'S ACKNOWLEDGMENT AND AGREEMENT

The undersigned Buyer certifies to Manufacturers and Traders Trust Company (the "Secured Party") that (1) a fully completed copy of the foregoing Bill of Sale executed by the Secured Party has been delivered to such Buyer and (2) such Buyer (a) has received and accepted all of the Property, as such term is defined in such Bill of Sale, (b) has fully inspected such Property prior to its payment of the purchase price of the Property pursuant to such Bill of Sale and (c) accepts and agrees to all terms and conditions of such Bill of Sale.

The undersigned shall indemnify, defend and hold Secured Party harmless against: (1) any and all claims which may arise out of the undersigned's assumption of Debtor's rights and obligations under the storage contracts with the Debtor's customers, including but not limited to those customers listed on the attached Schedule B, and (2) any and all liability, obligations, losses, damages, penalties, claims, actions, suits, costs and expenses (including its reasonable attorneys' fees) of whatever kind or nature which may be imposed on or incurred by the Secured Party at any time, which arises out of the sale and transfer or ownership of the personal property of the Debtor which is the subject of this Bill of Sale.

The undersigned hereby agrees to notify the customers of the Debtor, including but not limited to those listed on the attached Schedule B, that the personal property of said customers shall now be stored at the offices of the undersigned located at 795 Beahan Road, Rochester, New York 14624, or at such other appropriate location. The undersigned also acknowledges that it will only endeavor to collect rent from the Debtor's customers going forward and has no claim to any past due rents due the Debtor prior to the date of this Bill of Sale.

Dated: June ____, 2002

CHAMPION MOVING & STORAGE, INC.

By: ______________________________

Name: ______________________

Title: ______________________

G:\UKM\M&TTRUST\Premier\Bill of Sale_1.wpd

M&T's 6/2 bill of sale for Buyer Carter to sign to acknowledge receipt of Premier's containers sold to him A:47

SCHEDULE B

	Customer Name	Monthly Charges		
1	Ms. Linda Hight 906 Stoney Way Farmington, NY 14425	$	132.00	
2	Red Wings	$	65.00	Removed From Warehouse
3	Gary Krolikowski 4380 Lakeshore Castile, NY 14427	$	65.69	
4	Richard Cordero 59 Crescent Street Brooklyn, NY 11208-1515	$	60.32	Has Never Paid
5	Ms. Yamize Elias Calle 12 # 1085 Villa Nevarez Puerto Rico 00927	$	43.52	Has Never Paid
6	Mr Michael Kelly 777 Belvidere Avenue Plainfield, NJ 07062	$	195.17	Current
7	Ms. Roberta Pilloise 14 Beverly Lane Shelton, CT 06484	$	85.56	
8	Mr. William Baroody PO Box 10727 Rochester, NY 14610	$	256.50	
9	Palmer Moving & Storage (Youseff Kazc C/o Shirley Monchman 24660 Dequindre Warren, MI 48091	$	251.94	
10	Ms. Mary Bride Lill 786 Oakridge Drive Rochester, NY 14617	$	26.25	
11	Eastman Kodak Company C/o Jerri Foos 343 State Street Rochester, NY 14650	$	68.22	
12	Ms. Georgina Walker 15 Jacqueline Way #6 Geneseo, NY 14454	$	123.93	

JUN-20-2002 14:08 716 546 7584 99% P.02

A:48 M&T's bill of sale of 7/20/2: Premier's clients with property stored in containers sold to Warehouser Carter

Premier Van Lines, Inc.
10 Thruway Park Dr
West Henrietta, NY 14586

Invoice

DATE	INVOICE #
9/26/'00	1205

BILL TO
Dr. Richard Cordero 59 Crescent Street Brooklyn, NY 11208

TERMS	CONTRACT #
Net 30	Lot 6901

DESCRIPTION	AMOUNT
Storage 10/1/00 to 11/1/00	57.60T
Valuation	2.72
Mr. Cordero Premier van Lines,Inc has two storage warehouses in Rochester,NY. Your belongings are still being stored in Avon,NY	
Our billing address is now 10 Thruway Park Dr.	
Thank You	
Sales Tax	4.03

Paid.

Inv # 598
11/1 - 12-1

Thank you for your business.	Total	$64.35

Copy with Mr. Carter's letter of 7/30/2 of Premier Van Lines' invoice for storage of Dr. Cordero's property A:49

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor	Chapter 7 bankruptcy case no. 01-20692
JAMES PFUNTNER, Plaintiff, -vs- KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICABS HOCKEY CLUB, INC., and M&T BANK Defendants	Adversary proceeding no. 02-2230 **CORDERO'S VOLUNTARY** **WAIVER OF SERVICE OF SUMMONS** **AND** **PETITION FOR CLARIFICATION**

Dr. Richard Cordero, co-defendant, gives the Court notice of the following:

1. Dr. Cordero has become aware that he is a named co-defendant in the above-captioned Adversary Proceeding because Co-Defendant Kenneth Gordon sent him a copy of his answer.
2. The Plaintiff's lawyer sent Dr. Cordero by regular mail a summons and copy of the complaint but failed to comply with the applicable rules in that he:
   a) Failed to send a notice of lawsuit
   b) Failed to request a waiver of service
   c) Failed to serve the summons and complaint
   d) Failed to obtain the seal of the court on the summons (see the copy attached hereto)
   e) Failed to provide an extra copy of the notice and request
   f) Failed to include a prepaid means of compliance in writing.
3. However, in order to satisfy the duty to avoid unnecessary costs of serving the summons, Dr. Cordero hereby voluntarily tenders a waiver of service of a summons, without prejudice to any objection to the venue or to the jurisdiction of the court over his person.

4. Dr. Cordero petitions that the Court states a certain date by which he must file his answer given that:
   a) the date written on the summons sent by Plaintiff's lawyer is "10/3/02",
   b) but a date stamp on it reads, "RECEIVED OCT O4 2002," and
   c) Dr. Cordero only received it much late (see the attached copy of the letter of Plaintiff's lawyer).
   d) Moreover, under FRCP Rule 4(d)(2)(F), the plaintiff, "shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent."
   e) However, since the Plaintiff failed to send such request, Dr. Cordero submits that the period for him to file the answer should begin to run from the day when he volunteered a waiver of service of summons, and
   f) that such period should last 60 days as provided under FRCP Rule 4(d)(2)(G)(3), "A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent…"
   g) Consequently, Dr. Cordero should provide his answer by December 23, 2002.

5. Dr. Cordero kindly requests that the Court send him the mailing address of the other co-defendants.

Dated: October 23, 2002
59 Crescent Street
Brooklyn, NY 11208

Dr. Richard Cordero
Dr. Richard Cordero
tel. (718) 827-9521

Mailed on Wednesday, October 23, 2002, to:

Mr. Paul R. Warren
Clerk of the Bankruptcy Court
United States Bankruptcy Court
1220 US Court House
100 State Street
Rochester, NY 14614

Lacy, Katzen, Ryen & Mittleman, LLP

LOUIS A. RYEN
RONALD A. MITTLEMAN
MICHAEL S. SCHNITTMAN
PETER T. RODGERS
SALLY A. SMITH+
KAREN SCHAEFER
RICHARD G. CURTIS
LAWRENCE J. SCHWIND
DAVID E. ANDERSON
CRAIG R. WELCH
CHRISTOPHER B. MUMFORD
LESLIE W. KERNAN JR+
TERRANCE W. EMMENS
MARK H. STEIN
JACQUELINE M. THOMAS

HERBERT W. LACY
(1920 - 1989)

ATTORNEYS AT LAW
THE GRANITE BUILDING
130 EAST MAIN STREET
ROCHESTER, NEW YORK 14604-1686

(585) 454-5650
FACSIMILE (585) 454-6525

LEON KATZEN
GEORGE F. FREY

DAVID D. MACKNIGHT*
DENINE K. CARR*
MATTHEW A. RYEN
JENNIFER L. CHADWICK
JOANNE CONSTANTINO
LARA R. BADAIN
SUZANNE L. AMICO
KEVIN MORABITO
DANIEL S. BRYSON
LISA C. ARRINGTON°

ALSO ADMITTED IN:
* ILLINOIS
+ NEW JERSEY
° DISTRICT OF COLUMBIA

October 16, 2002

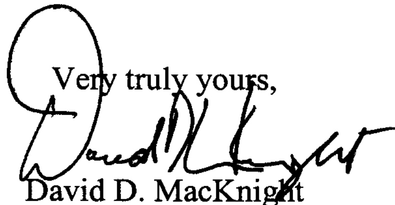
Mr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208

Re: Your October 7, 2002 Letter

Dear Mr. Cordero:

You should have received a copy Mr. Pfutner's complaint to have the court determine the rights and interest of all parties who have claimed or may claim an interest in the property left by the Debtor at Mr. Pfutner's Sackett Road warehouse. If the complaint has not reached you before this letter, you should anticipate receiving a copy of the summons and complaint in the near future.

Very truly yours,



David D. MacKnight

DDM/cc

A:52 Att. MacKnight's letter of 10/16/2 to Dr. Cordero re impending receipt of summons & complaint in *Pfuntner*

U.S. Department of Justice

Office of the United States Trustee
Western District of New York

---

100 State Street, Suite 609
Rochester, New York

(585) 263-5706
FAX (585) 263-5862

October 22, 2002

Dr. Richard Cordero, Esquire
59 Cresent Street
Brooklyn, NY 11208-1515

Re: Premier Van Lines

Dear Dr. Cordero:

This is in further response to your letter to the Court dated September 27, 2002, and to this Office dated October 14, 2002, concerning the Premier Van Lines chapter 7 bankruptcy case. I understand from your letter that you are concerned that despite numerous phone calls made to various parties, including the chapter 7 trustee in this case, you have been unsuccessful in regaining possession of items that you had paid to store with the debtor.

As you are aware, the United States Trustee Program is a component of the Department of Justice that supervises the administration of bankruptcy cases and trustees. In order to respond to your inquiry, we contacted the chapter 7 trustee, the attorney for the party who is now believed to be in possession of your belongings, and reviewed the docket and papers in this case.

By way of background, we learned that the case originally was filed as a chapter 11. In chapter 11, the debtor generally retains possession of the estate and continues to operate the business as a debtor-in-possession while it attempts to formulate a plan of reorganization. As a result, it is not surprising that Premier Van Lines continued to bill and collect fees for items it held in its storage facilities while it was attempting to reorganize. The case later was converted to one under chapter 7 on December 20, 2001. At this point, the debtor ceased operating as a business and a chapter 7 trustee was appointed to liquidate any assets of the estate and distribute any proceeds therefrom according to a scheme of distribution set forth in 11 U.S.C. § 726.

We learned from the chapter 7 trustee that on April 16, 2002, he wrote to M&T Bank, in care of Mr. David Dworkin, informing them that he did not plan to administer any items being stored by the debtor as he had determined that these stored items were not property of the bankruptcy estate. He further stated that if any rental issues arose, that M&T Bank should handle them directly. I understand that a copy of this letter was sent to you on June 10, 2002 after the trustee learned of your difficulties in trying to locate and retrieve your property.

On June 13, 2002, the chapter 7 trustee filed a formal Notice of his intent to abandon all assets of Premier Van Lines, which was served on all creditors. In addition, on September 26,

2002, the trustee filed a Notice of his intent to abandon unscheduled assets of the debtor recently learned to have been located in Avon, New York. Apparently, the trustee was unaware of these "assets" as they had not been listed on the debtor's schedules or disclosed at the meeting of creditors. We further understand that on September 23, 2002, the trustee sent a second letter to you further explaining his position that your stored items were not property of the bankruptcy estate and that he had no right or control over them.

It would appear that most of the difficulties you encountered in trying to obtain your property were not a result of the chapter 7 trustee's diligence, but rather involved the debtor's failure to inform its customers about its progress in the bankruptcy case and to carefully and fully identify where it had stored certain items. Although, we are unable to comment fully on your particular issue because of a lack of jurisdiction, we can say that the debtor should have kept proper books and records while in chapter 11, and it should have identified on the Schedules and Statement of Financial Affairs where assets were located, and where it kept all of its books and records. In this case, it did not. As noted earlier, the schedules do not reflect the property kept at the Avon location and the Statement of Financial Affairs do not identify this location as an additional place where records were maintained. Unfortunately, it is not uncommon for debtors to keep incomplete books and records. As a result, trustees frequently must learn of potential assets through outside sources.

We understand from the docket, your letter, and from speaking with David MacKnight that pending before the bankruptcy court is a Complaint to determine, inter alia, what property stored at the Avon location belongs to whom. To that end, although we are prohibited from providing you with legal advice, and strongly suggest that you consult with a lawyer to understand what legal rights you may have, a letter to the court specifically outlining what items you had stored with the debtor may be appropriate at this time.

With regard to your concern that the trustee failed to notify you regarding the progress of the case and to help you locate your property, our review does not indicate any deviation from applicable law and procedure. The trustee in a chapter 7 estate represents the creditor's of that estate, not clients or customers of the debtor, unless, of course, those clients are owed funds. As such, the trustee had no legal responsibility to locate the assets belonging to the debtor's customers and clients and to negotiate their return to them. I do understand, however, that early on in the case, the chapter 7 trustee made repeated requests to counsel for the debtor to provide a list of all customers who currently were storing items with the debtor. Counsel failed to provide such a list.

Concerning your comments that all parties who appear before the court are officers of that court and must conduct themselves with "honesty and candor," we couldn't agree more. To that extent we have talked with Mr. Gordon about the need to maintain the highest level of professionalism as he administers bankruptcy cases and reminded him that he and his staff must remain courteous during all exchanges with the public, even when frustrated. We also reiterated that he and his staff must respond courteously and timely either by telephone or in writing to questions posed. Mr. Gordon states that generally, it is his policy to correspond with parties via mail rather than telephone.

Finally, to the extent you disagree with the legal position taken by Mr. Gordon, you should resolve that issue(s) in court.

We appreciate your correspondence and trust that this information will be of assistance to you.

Sincerely yours,

Kathleen Dunivin Schmitt
Assistant United States Trustee

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re: PREMIER VAN LINES, INC.,
Debtor

Chapter 7 bankruptcy
case no. 01-20692

JAMES PFUNTNER,
Plaintiff,
-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICABS HOCKEY CLUB, INC., and M&T BANK
Defendants

Adversary proceeding
no. 02-2230

CORDERO'S ANSWER and COUNTERCLAIM

Dr. Richard Cordero, co-defendant, answers the complaint in the above-captioned adversary proceeding and sets forth his counterclaim as follows:

Table of Contents

Answer 56
Statement of Counterclaims 60
Relief 61
Table of Exhibits 62

****

ANSWER

1. The summons is defective under Rule 7004(a) of the Federal Rules of Bankruptcy Procedure (FRBkrP), which makes applicable Rule 4(a) of the Federal Rules of Civil Procedure (FRCivP), which provides that, "The summons shall be signed by the clerk, bear the seal of the court…," whereas the summons lacks such seal, having only a date seal. (see the copy attached hereto as exhibit [A:21])

2. Dr. Cordero never requested or knowingly received any service whatsoever from Plaintiff, whether at Plaintiff's warehouse at 2140 Sackett Road, Avon, New York, or anywhere else.
3. Plaintiff never entered into any contract, whether explicit or implicit, with Dr. Cordero, and therefore, lacks privity of contract to sue him or make upon him any claim for payment or compensation on any grounds.
4. On the contrary, Dr. Cordero had every reason to believe that his property was at the warehouse located at 900 Jefferson Road, Rochester, NY, 14623, and owned and/or operated by Jefferson Henrietta Associates, 415 Park Avenue, Rochester, NY 14607, (hereinafter the Jefferson-Henrietta warehouse) because representations to that effect were made to him, among others:
   a. by Mr. David Palmer, the owner of the Debtor, Premier Van Lines;
   b. by Raymond Stilwell, Esq., attorney for Mr. David Palmer, at Adair, Kaul, Murphy, Axelrod & Santoro, LLP, 300 Linden Oaks, Suite 220, Rochester, NY 14625-2883;
   c. by Mr. David Dworkin, the manager and/or owner of the Jefferson-Henrietta warehouse, who even billed Dr. Cordero for storing his property in that warehouse;
   d. by David Delano, Assistant Vice President in Rochester of Manufacturers & Traders Trust Bank (M&T Bank) at 255 East Avenue, Rochester, NY 14604, whose Bank holds a blanket lien against the Debtor's assets, including the storage containers supposedly containing Dr. Cordero's property; and
   e. by Amber M. Barney, Esq., at Underberg & Kessler, LLP, attorneys for M&T Bank, at 1800 Chase Square, Rochester, NY 14604.
5. When Dr. Cordero was informed that his property was actually not located at the Jefferson-Henrietta warehouse, but rather at the Plaintiff's warehouse in Avon, he contacted the Plaintiff's lawyer, David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604, by letter of August 26, 2002, to let him know that he wanted to remove his property from the Plaintiff's warehouse (see the copy attached hereto [A:65]).
6. However, the Plaintiff's lawyer not only did not reply to that letter, but also never took or returned any phone calls from Dr. Cordero.
7. Then on September 16, 2002, Dr. Cordero placed his first phone call to the Plaintiff, and told him that he wanted to remove his property from his warehouse. The Plaintiff said that

he would talk to his lawyer about it and get back to Dr. Cordero. Plaintiff failed to do so. Dr. Cordero called Plaintiff twice more to let him know that he wanted to remove his property; again Plaintiff promised to get back to him about it, and on each occasion Plaintiff failed to fulfill his promise.

8. Dr. Cordero wrote to Plaintiff's attorney again on October 7, 2002, (see the copy attached hereto [A:67]), to let him know again that he wanted to remove his property from the Plaintiff's warehouse and make arrangements to that end. Once again, Plaintiff's attorney did not reply.

9. Likewise, Plaintiff failed to reply to Dr. Cordero's letter of October 17, 2002, (see the copy attached hereto [A:68]), although he promised to do so upon acknowledging receipt of the letter.

10. Nor did Plaintiff's attorney reply to it, although Dr. Cordero copied him to his October 17 letter to Plaintiff.

11. Plaintiff's and his attorney's failure to even respond to Dr. Cordero's requests for information about his property belies Plaintiff's assertion in paragraph 30 of his Complaint that,

> "Plaintiff believes that he cannot protect himself from possible conflicting and, multiple claims in the Debtor's property in the contents of the shipping containers because he has no means of determining the ownership of the contents of the shipping containers."

Plaintiff did have such means, the first one of which was to respond to Dr. Cordero' letters and calls and ask that he show proof of ownership.

12. Plaintiff's reliance on Dr. Cordero's proof of ownership would have been warranted because, contrary to what Plaintiff affirms in paragraph 30 quoted above, there were no multiple claims on Dr. Cordero's property.

13. Far from it, M&T Bank through his attorney Michael Beyma at Underberg & Kessler copied the Plaintiff's attorney to his letter of August 15, 2002, to Dr. Cordero, where he stated that, "M&T Bank claims no lien on your [Dr. Cordero's] assets and M&T Bank consents to the removal of your stored assets;" (see the copy attached hereto [A:63]).

14. Likewise, the Chapter 7 Trustee, Kenneth Gordon, Esq., copied the Plaintiff's attorney to his letter of September 23, 2002, to Dr. Cordero where he stated that, "I have advised all

concerned in this case that you [Dr. Cordero] should be allowed along with any other former customer of Premier Van Lines to have access to and repossession of your assets;" (see the copy attached hereto [A:66])

15. By failing even to reply to Dr. Cordero, let alone give access to his property, Plaintiff deprived Dr. Cordero of his property and did so without any right since Dr. Cordero never asked Plaintiff for warehousing service for his property but did ask him to let him inspect and remove his property.
16. Thereby Plaintiff also unjustifiably further lengthened all the efforts that Dr. Cordero had already made and aggravated the inconvenience and sheer frustration that he had already sustained while searching for the whereabouts of his property.
17. But Plaintiff should not have waited until being contacted by Dr. Cordero or other parties at the latter's instigation. Plaintiff had the duty as well as ample opportunity to mitigate his losses resulting from the default of his lessee, the Debtor in the bankruptcy case, on the lease. To that end, Plaintiff should have exercised the due diligence proper of a reasonable businessman from the moment he realized the repeated non-payment by his lessee.
18. Indeed, in paragraph 14 of the Complaint, Plaintiff states that, "Debtor defaulted in making monthly payment before the filing of its Petition." Moreover, it appears that his lessee, the Debtor, filed for Chapter 11 protection in March 2001. However, it was not until October 2002 when Plaintiff took action to try to recoup his losses on the back of both his lessee's clients and the other defendants in this adversary proceeding.
19. The event that, upon information and belief, appears to have prompted Plaintiff into taking any action is the following: In his search for his property, Dr. Cordero found out that M&T Bank had sold the Debtor's assets stored at Mr. Dworkin's warehouse to Champion Moving & Storage, located at 795 Beahan Road, Rochester, NY 14624.
20. Dr. Cordero also found out from Champion's owner, Mr. Christopher Carter, that contrary to M&T Bank's assertions, his property was not in any of the storage containers picked up at Mr. Dworkin's warehouse. However, among the assets that Mr. Carter picked up were Premier's business files. There Mr. Carter found invoices indicating that in 2000, Premier had stored Dr. Cordero's property in a warehouse in Avon.

21. At Dr. Cordero's instigation, Mr. Carter informed M&T Bank of his find, and the Bank contacted Plaintiff. It appears that only then did Plaintiff see the opportunity to recoup his losses on the backs of the defendants and feel motivated to take any action.
22. Yet, Plaintiff had no right to at his will and as an afterthought turn clients of his own lessee, such as Dr. Cordero, into the surety for the payments that his lessee contracted to pay him under the lease.
23. Plaintiff had already disregarded for at least a year and a half his first remedy, namely to file claims for payments in default in the bankruptcy proceedings, which he apparently failed to do given that neither the Trustee, nor lienholder M&T Bank, nor Mr. Dworkin, nor the Jefferson Henrietta Associates knew that Plaintiff was warehousing lessee's assets and property entrusted to lessee by his clients for storage.
24. Plaintiff's next remedy upon being awakened by some of his lessee's former clients was to give those clients notice and the opportunity to remove their assets and property from his warehouse. But Plaintiff could not force them to have been their clients given that some, such as Dr. Cordero, had neither requested nor wanted any services from Plaintiff. Hence, Plaintiff has no justification for charging or expecting payment from Dr. Cordero. He lost any such justification when, upon realizing his lessee's financial problems, Plaintiff failed to show a reasonable businessman' diligence in order to timely contact and inform Dr. Cordero of the whereabouts of his property and the warehousing service that he, Plaintiff, would begin to offer him in a near future if Dr. Cordero left his property in Plaintiff's warehouse.
25. By doing so nevertheless, Plaintiff failed to mitigate his damages; he must now bear their cost to him and the harm and wrong that he thus did to Dr. Cordero as well as other lessee's clients.

STATEMENT OF COUNTERCLAIMS

26. The jurisdiction of the Court over this Adversary Proceeding and counterclaim is provided by 28 U.S.C. 1334 and 28 U.S.C. 157(b) (2) and (c)(1).
27. Under 28 U.S.C. 1409, the Court is the proper venue for this Adversary Proceeding and counterclaim.

28. All relevant statements in the Answer above are incorporated herein.

29. Plaintiff is in the business of warehousing. He leased storage space to a moving and storage company whom he knew to be in the business of providing storage services for third parties, that is, the company's clients.

30. Thus, either explicitly in the lease or implicitly by entering that type of business relation with a storage company, the Plaintiff warranted that his warehouse and warehousing service were fit and proper for the intended purpose of storing property.

31. Consequently, under that explicit or implicit third-party beneficiary contract, Dr. Cordero claims compensation for any deterioration, loss, or theft of any or all of his property.

32. In any event, if Plaintiff substituted himself for the lessee as the company with which Dr. Cordero contracted to store his property and through which Dr. Cordero insured his property against deterioration, loss, and theft, then Plaintiff also assumed liability for any such insured damage to Dr. Cordero's property.

RELIEF

33. Therefore, Dr. Cordero respectfully requests that the Court:
    a. Grant summary judgment for Dr. Cordero, or in the alternative, dismiss the Complaint against him in all respects;
    b. Declare that Plaintiff is barred by laches from asserting any claim against Dr. Cordero;
    c. Hold Plaintiff liable for any deterioration, loss, or theft of Dr. Cordero's property;
    d. Order Plaintiff to:
        1) compensate Dr. Cordero for denying his right to access, inspect, remove, and enjoy his property
        2) pay Dr. Cordero compensation for the deterioration, loss, or theft of his property;
        3) provide information about the whereabouts and condition of Dr. Cordero's property by answering in writing and detail Dr. Cordero's letter to him and his attorney dated October 17, 2002;
        4) allow and facilitate access, inspection, and removal of Dr. Cordero's property wherever it may be in Plaintiff's possession or under his control;
    e. Award Dr. Cordero any and all costs and expenses, and the reasonable attorney's fees, and any such other and further relief as is just and proper.

TABLE OF EXHIBITS

1. Plaintiff **Pfuntner**'s **Summons** of **October 3**, 2002, in Adversary Proceeding *Pfuntner v. Trustee Gordon et al.*, no. 02-2230, to Dr. Cordero....... [A:21]

2. Letter of Michael **Beyma**, Esq., attorney for M&T Bank and Assistant Vice President David G. DeLano, of **August 15**, 2002, **to** Dr. **Cordero** responding to the latter's August 7 letter that his property is in two "Pyramid" storage cabinets in Warehouser James Pfuntner's warehouse in Avon....... [A:63]

3. Dr. **Cordero**'s letter of **August 26**, 2002, **to** Att. **MacKnight**....... [A:15]

4. Trustee **Gordon**'s letter of **September 23**, 2002, **to** Dr. **Cordero** .... [A:1]

5. Dr. **Cordero**'s letter of **October 7**, 2002, **to** Att. **MacKnight**....... [A:34]

6. Dr. **Cordero**'s letter of **October 17**, 2002, **to** Plaintiff **Pfuntner** stating that he has not yet received from them the requested information about the Pyramid containers storing his property in Mr. Pfuntner's warehouse in Avon, NY, and requesting them to provide such information....... [A:65]

Dated: November 1, 2002

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208

Dr. Richard Cordero
tel. (718) 827-9521

UNDERBERG & KESSLER LLP

1800 Chase Square
Rochester, New York 14604

Telephone: (585) 258-2800
Facsimile: (585) 258-2821
www.underberg-kessler.com

1100 Main Place Tower
Buffalo, New York 14202

Telephone: (716) 848-9000
Facsimile: (716) 847-6004

Writer's Direct Number:

(585) 258-2890
mbeyma@underberg-kessler.com

Reply to
Rochester Office

August 15, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Dear Mr. Cordero:

I understand that David DeLano has informed you that your two "Pyramid" storage cabinets are located at 2140 Sackett Road, Avon, New York. The owner of the property is James Pfuntner and he is represented by David MacKnight (585-454-5650).

In response to your letter of August 7, 2002 please be advised as follows:

1. M&T Bank has obtained an order to lift the stay and does have the right but not any duty to sell the cabinets of Premier Van Lines. M&T Bank has sold the cabinets but not the contents of storage cabinets located in Rochester. At the present time, M&T Bank does not intend to sell the storage cabinets of Premier Van Lines located at Avon. We understand that the owner of the property and landlord apparently is claiming a self-storage lien against the storage cabinets and you should contact either James Pfuntner or his attorney, David MacKnight, with regard to your contents.

2. The trustee of Premier Van Lines is Kenneth Gordon, Esq. (585-244-1070).

3. With regard to any future storage fees that you may pay, you must deal directly with whoever buys the storage cabinets and/or Mr. Pfuntner.

M&T Bank claims no lien on your assets and M&T Bank consents to the removal of your stored assets.

We urge you to contact Mr. Pfuntner so that you may obtain the contents of your storage cabinets.

G:\UKM\M&TTRUST\Premier\Cordero, Dr. Richard.ltr.wpd

UNDERBERG & KESSLER LLP

Very truly yours,

Michael J. Beyma

MJB:ds

cc: Vincent Pusateri
David G. DeLano
David D. MacKnight, Esq.
Kenneth W. Gordon, Esq.

G:\UKM\M&TTRUST\Premier\Cordero, Dr. Richard.ltr.wpd

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

October 17, 2002

Please acknowledge receipt at (718) 827-9521.
Faxed to (585) 454-6525

COPY for David MacKnight, Esq.

Att.: Margie
Mr. James Pfuntner
Western Empire Truck Sale
2926 West Main Street
Caledonia, NY 14423

Faxed to (585) 538-9858; tel. 585-538-2200

Dear Mr. Pfuntner,

You may remember that we spoke in September concerning my property stored in your warehouse at Avon. You were going to inspect it and let me know about its condition. However, I have not received the information yet. Nor has Mr. David MacKnight provided it to me, as requested in my letters of August 26 and October 7.

I want to make arrangements to go to your warehouse and remove my property. Therefore, I would like to know the following:

1. whether in addition to the storage containers –Pyramid cabinets, crates, storage boxes, shipping container, whatever it is my property is contained in- at the Sackett Road warehouse there are any such containers holding property of mine elsewhere that you know;
2. how many of any such containers are there which hold property of mine and what are their dimensions, material, and condition;
3. whether and, if so, when I and/or a moving company can have access to the Sackett Road warehouse and any other place to inspect the condition of such property and remove it if appropriate;
4. if such containers cannot themselves be taken away from the Sackett Road warehouse, why that is so, and what it would take to be able to remove them together with my property;
5. if the containers cannot be removed, how access to them can be arranged in order to remove only my property;
6. regardless of whether it may be to remove such containers or just my property in them, whether a forklift or similar machine would be necessary and, if so, whether there is such forklift or machine at the Sackett Road warehouse that can be used for that purpose and, if so, under what terms.

I trust that this time you will be kind enough to provide me with this information in writing and any other piece of pertinent information.

Yours sincerely

Dr. Richard Cordero

cc: David MacKnight, Esq.

UNDERBERG & KESSLER LLP

1800 Chase Square
Rochester, New York 14604

Telephone: (585) 258-2800
Facsimile: (585) 258-2821
www.underberg-kessler.com

1900 Main Place Tower
Buffalo, New York 14202

Telephone: (716) 848-9000
Facsimile: (716) 847-6004

Reply to
Rochester Office

Writer's Direct Number:

(585) 258-2890
mbeyma@underberg-kessler.com

November 6, 2002

David D. MacKnight, Esq.
Lacy Katzen, Ryen & Mittleman, LLP
130 E. Main Street, 2nd Floor
Rochester, New York 14604

Re: Premier Van Lines, Inc.
Adversary Proceeding; Case No.: 02-2230

Dear Mr. MacKnight:

In response to the Summons filed by your client, enclosed is a time-stamped copy of M&T Bank's Answer which was filed in Bankruptcy Court on November 6, 2002.

Very truly yours,

Michael J. Beyma

MJB:ds

cc: Kenneth W. Gordon, Esq. (w/enclosure)
~~Dr.~~ Richard Cordero (w/enclosure)
David DeLano, Assistant Vice President (w/enclosure)

G:\UKM\M&TTRUST\Premier\MacKnight, David, Esq. 11-6-02.ltr.wpd

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re: PREMIER VAN LINES, INC., Debtor.	BO1--20692 **ANSWER**
JAMES PFUNTNER, Plaintiff, vs. KENNETH GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. and M & T BANK, Defendants.	Adversary Proceeding Case No.: 02-2230

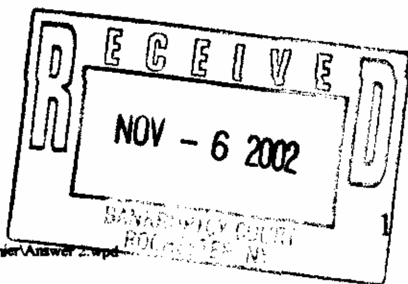
M & T Bank by its attorneys Underberg & Kessler LLP, Michael J. Beyma of counsel in answer to the complaint alleges:

1. M & T Bank sold various storage containers of Debtor which were located only at Debtor's Rochester location. M & T Bank did not sell any contents in any containers. Upon information and belief the purchaser of the containers in Rochester contacted all the owners of contents of such containers. M & T Bank did not intend to sell any property of Debtor in plaintiff's warehouse and believes it did not do so.

2. M & T Bank claims no interest in Debtor's property at Plaintiff's warehouse and if M & T Bank's security interest attached to such property it is hereby released and abandoned.

3. M & T Bank has never benefitted from Debtor's property being stored at Plaintiff's property and is not in any way liable for any storage charges to plaintiff.

Wherefore, M & T Bank requests that the complaint be dismissed as against it together with whatever further relief the Court deems just and proper.



Michael J. Beyma, Esq.
UNDERBERG & KESSLER LLP

G:\UKM\M&TTRUST\Premier\Answer 2.wpd

Lacy, Katzen, Ryen & Mittleman, LLP

LOUIS A. RYEN
RONALD A. MITTLEMAN
MICHAEL S. SCHNITTMAN
PETER T. RODGERS
SALLY A. SMITH'
KAREN SCHAEFER
RICHARD G. CURTIS
LAWRENCE J. SCHWIND
DAVID E. ANDERSON
CRAIG R. WELCH
CHRISTOPHER B. MUMFORD
LESLIE W. KERNAN JR'
TERRANCE W. EMMENS
MARK H. STEIN
JACQUELINE M. THOMAS

HERBERT W. LACY
(1920 - 1989)

ATTORNEYS AT LAW
THE GRANITE BUILDING
130 EAST MAIN STREET
ROCHESTER, NEW YORK 14604-1686

(585) 454-5650
FACSIMILE (585) 454-6525

LEON KATZEN
GEORGE F. FREY

DAVID D. MACKNIGHT*
DENINE K. CARR*
MATTHEW A. RYEN
JENNIFER L. CHADWICK
JOANNE CONSTANTINO
LARA R. BADAIN
SUZANNE L. AMICO
KEVIN MORABITO
DANIEL S. BRYSON
LISA C. ARRINGTON"

ALSO ADMITTED IN:
* ILLINOIS
' NEW JERSEY
" DISTRICT OF COLUMBIA

November 11, 2002

United State Bankruptcy Court
100 State Street
Rochester, New York 14614

Re: Premier Van Lines, Inc., Case No.: B01-20692,
James Pfuntner vs. Kenneth Gordon, as Trustee in Bankruptcy for Premier Van Lines, Inc., Richard Cordero, Rochester Americans Hockey Club, Inc. and M & T Bank, AP Case No.: 02-02-2230

Dear Sir or Madam:

Enclosed herewith is the Plaintiff's Reply to Cordero's Counterclaim in regards to the above referenced matter.

Very truly yours,

David D. MacKnight

DDM/cc
Enclosure
Cc: Kenneth Gordan, Esq.
Michael J. Beyma, Esq.
Dave M. DeLaus, Esq.
United States Trustee
Dr. Richard Cordero ✓
Rochester Americans Hockey Club, Inc.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

B01-20692

PREMIER VAN LINES, INC.,

Debtor.

JAMES PFUNTNER,

Plaintiff,

-vs-

Adversary Proceeding
Case No.: 02-02-2230

KENNETH GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. and M & T BANK,

Defendants.

PLAINTIFF'S REPLY TO CORDERO COUNTERCLAIM

Plaintiff for his reply to the counterclaim of Richard Cordero respectfully shows:

1. Plaintiff denies the allegations of Paragraphs 26 and 27 of the Counterclaim.

2. Plaintiff is unable to determine those allegations that Cordero deems relevant and therefore is unable to admit or deny such allegations. Thus Plaintiff denies the allegations of Paragraph 28 of the Counterclaim.

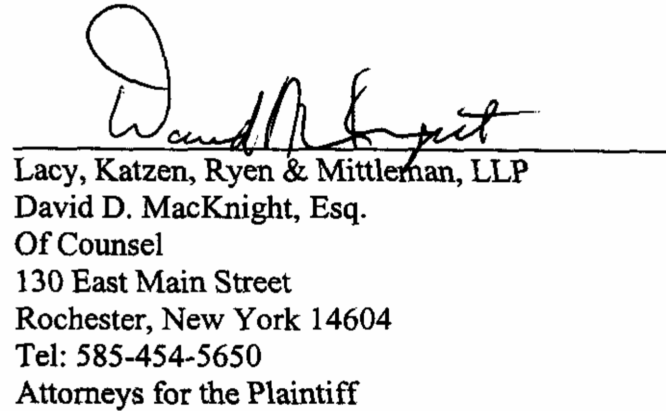
3. Plaintiff denies the allegations of Paragraphs 29, 30, and 31 of the Counterclaim.

4. Paragraph 32 does not allege facts that requires an admission or denial, but a hypothetical conclusion of law and, therefore, Plaintiff denies such allegations.

AFFIRMATIVE DEFENSE

5. The Counterclaim fails to state facts on which relief can be granted.

Wherefore, Plaintiff demands judgement for the relief requested in the Complaint together with the dismissal of the Cordero counterclaim and for such other and further relief as to the court seems just and proper.



Dated: November 8, 2002
Rochester, New York

Lacy, Katzen, Ryen & Mittleman, LLP
David D. MacKnight, Esq.
Of Counsel
130 East Main Street
Rochester, New York 14604
Tel: 585-454-5650
Attorneys for the Plaintiff

B250D
(1/88)

United States Bankruptcy Court

______________________ District of ______________________

In re PREMIER VAN LINES, INC.,
Debtor

JAMES PFUNTNER,
Plaintiff

KENNETH W. GORDON, TR., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., M&T Bank, Defendants, cross-defendants

RICHARD CORDERO, **Defendant and Third-Party Plaintiff**

DAVID PALMER, DAVID DWORKIN, JEFFERSON HENRIETTA ASSOCIATES, DAVID DELANO, **Third-Party Defendants**

Bankruptcy Case No. 01-20692

Adversary Proceeding No. 02-2230

THIRD-PARTY SUMMONS

YOU ARE SUMMONED and required to submit a motion or answer to the third-party complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the third-party complaint within 35 days.

Address of Clerk
Paul Warren 1220 US Court House, 100 State Street Rochester, NY 14614

At the same time, you must also serve a copy of the motion or answer upon Plaintiff's attorney.

Name and Address of Plaintiff's Attorney
David MacKnight, Esq. Lacy, Katzen Ryen & Mittleman 130 East Main Street, Rochester, NY 14604

At the same time, you must also serve a copy of the motion or answer upon Defendant and Third-Party Plaintiff's Attorney.

Name and Address of Attorney
Dr. Richard Cordero, Pro Se 59 Crescent STreet Brooklyn, NY 11208

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012. If you are also being served with a copy of the complaint of the plaintiff you have the option of not answering the plaintiff's complaint **unless** this is an admiralty or maritime case subject to the provisions of Federal Rules of Civil Procedure 9(h) and 14(c), in which case you are required to submit a motion or an answer to both the plaintiff's complaint and the third-party complaint, and to serve a copy of your motion or answer upon the appropriate parties.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE THIRD-PARTY COMPLAINT.

PAUL R. WARREN
Clerk of the Bankruptcy Court

November 19, 2002
Date

By: Karen S. Tay
Deputy Clerk

3rd party summons of 11/19/2 by Bkr Clerk Warren for Dr. Cordero's cross- & 3rd party claims in *Pfuntner* A:69b

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor	Chapter 7 bankruptcy case no. 01-20692
JAMES PFUNTNER, Plaintiff -vs- KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK Defendants	Adversary proceeding no. 02-2230
RICHARD CORDERO Cross- and Third-party Plaintiff -vs- KENNETH W. GORDON and M&T BANK Cross-defendants DAVID PALMER, DAVID DWORKIN, DAVID DELANO, and JEFFERSON HENRIETTA ASSOCIATES Third party defendants	

CORDERO'S

AMENDED ANSWER

WITH

CROSSCLAIMS

AND

THIRD-PARTY CLAIMS

Dr. Richard Cordero, co-defendant, incorporates herein his Answer, mailed to the Plaintiff and each co-defendant on November 2, 2002, in its entirety without modifying its contents. Thus, this pleading serves as a vehicle to add his cross-claims against co-defendants Trustee Kenneth Gordon, Esq., and Manufacturers & Traders Trust Bank. The pleading also gives notice to the Plaintiff and the co-defendants of Dr. Cordero's third-party claims against Mr. David Palmer, Mr. David Dworkin, Jefferson Henrietta Associates, and Mr. David Delano.

1. Mr. David Palmer, who owned the Debtor, Premier Van Lines, (hereinafter referred to as Premier) doing business from the warehouse at 900 Jefferson Road, Rochester, NY, 14623,

and who represented to Dr. Cordero that his property was stored there, is joined as a third-party defendant.

2. Mr. David Dworkin, owner and/or manager of the warehouse at 900 Jefferson Road, Rochester, NY, 14623, (hereinafter referred to as the Jefferson-Henrietta warehouse), who represented to Dr. Cordero that his property was stored there and billed him therefor, is joined as a third-party defendant.

3. Jefferson Henrietta Associates, at 415 Park Avenue, Rochester, NY 14607, which is the company that owns or manages the Jefferson-Henrietta warehouse where Dr. Cordero's property was represented to be stored by Mr. Dworkin, its principal or agent, is joined as a third-party defendant.

4. Manufacturers & Traders Trust Bank, at 255 East Avenue, Rochester, NY 14604, (hereinafter referred to as M&T Bank), which holds a blanket lien against the Debtor's assets, including the storage containers supposedly containing Dr. Cordero's property, is served as a cross-defendant.

5. Mr. David Delano, Assistant Vice President at M&T Bank in Rochester, who represented to Dr. Cordero that his property was stored at the Jefferson-Henrietta warehouse, is joined as a third-party defendant.

6. Kenneth Gordon, Esq., the Chapter 7 Trustee, is served as a cross-defendant.

7. The jurisdiction of the Court over this Adversary Proceeding, which relates to Chapter 7 Case No: 01-20692, pending in the U.S. Bankruptcy Court of the Western District of New York, and over the herein stated cross-claims, and third-party claims is provided by 28 U.S.C. 1334 and 28 U.S.C. 157(b) (2) and (c)(1).

8. Under 28 U.S.C. 1409, the Court is the proper venue for this Adversary Proceeding and cross-claims and third-party claims.

TABLE OF CONTENTS

I. Statement of Facts 72

II. Statement of Claims 78

A. David Palmer 78

B. David Dworkin 79

C. Jefferson Henrietta Associates 81
D. David Delano 82
E. M&T Bank 83
F. Trustee Kenneth Gordon 83
III. Statement of Relief Sought 87
A. All Cross-Defendants and Third-Party Defendants 87
B. David Palmer, David Dworkin, and Jefferson Henrietta Associates 88
C. Trustee Kenneth Gordon 88
IV. Table of Exhibits 89

****

I. STATEMENT OF FACTS

9. The parties listed above are the main actors in this almost year-long saga about how principals or agents can bounce forward and kick back a person that lives hundreds of miles away in order to escape responsibility for their own lack of due care and diligence and thereby, with no regard for that person's property, effort, time, money, and needs, pass on that responsibility to someone else…and the customer?, 'may he fend for himself!' Some of the salient bouncings are the following, whose account may not make for a soothing bedtime reading, but the events that they refer to have certainly constituted a nightmarish imbroglio for Dr. Cordero. Enjoy!

10. Premier was in the storage business and had received Dr. Cordero's property for storage.

11. Beginning on January 9, 2002, and continuing for more than three months Dr. Cordero communicated with Premier's owner, Mr. David Palmer, who assured him that his property was safe at the Jefferson-Henrietta warehouse. Yet, Mr. Palmer failed to keep his promise to confirm that in writing... At no time did he mention that Premier was in financial difficulties, let alone in liquidation under Chapter 7. Then he bounced Dr. Cordero to his associate, Mr. David Dworkin, and eventually, even his phone would be disconnected and there would be no way of getting in touch with Mr. Palmer.

12. Likewise beginning in January 2002 and continuing for some three months, Dr. Cordero communicated with Mr. Dworkin. He too assured Dr. Cordero that his property was in good

condition at the Jefferson-Henrietta warehouse, where Premier rented warehousing space and Mr. Palmer had his office. Just as Mr. Palmer, Mr. Dworkin failed to keep his promise to state that in a letter and send it to Dr. Cordero. Nor did he mention for months that Premier was in any sort of financial difficulties, let alone that it had gone bankrupt.

13. By contrast, Jefferson Henrietta Associates, Mr. Dworkin's company, sent Dr. Cordero a bill for the storage of his property, including the insurance fee.

14. After Dr. Cordero kept calling Mr. Dworkin and asking him for that written statement of the whereabouts and condition of his property, Mr. Dworkin told him for the first time in April that Premier was in bankruptcy proceedings. By that time all the filing deadlines had passed. What is more, although Premier had filed under Chapter 11 over a year earlier, in March 2001, both Mr. Palmer and Mr. Dworkin kept billing Dr. Cordero for storage for a year thereafter and for months after the conversion of the case to Chapter 7 in December 2001, as if the company were a going concern and without giving notice of to Dr. Cordero of any bankruptcy proceedings. Then Mr. Dworkin bounced Dr. Cordero to M&T Bank, a Premier lien holder, without stating the name of any officer in specific.

15. M&T Bank, through Mr. Mike Nowicki in Buffalo and his Vice President Vince Pusateri in Rochester, acknowledged that their Bank held a general lien against Premier's assets, including storage containers, but not against the property of Premier's customers contained in them. Mr. Pusateri referred Dr. Cordero to his Assistant Vice President David Delano, to Trustee Kenneth Gordon, and to Premier's attorney, Raymond Stilwell, Esq., at Adair, Kaul, Murphy, Axelrod & Santoro.

16. Dr. Cordero called Attorney Stilwell, explained the situation, and asked to be put in touch with Mr. Palmer. Attorney Stilwell agreed and said that he would have Mr. Palmer call him and added that if Mr. Palmer did not call him by the end of the week, Dr. Cordero could call back.

17. Mr. Palmer never called, wrote, or otherwise communicated with Dr. Cordero through his attorney or anybody else.

18. Dr. Cordero kept calling Attorney Stilwell, who did not take or return his calls. Eventually he wrote to Dr. Cordero that he could not disclose Mr. Palmer's whereabouts and that, "Premier ceased operations at the end of 2001. Our understanding was that the landlord of

the 900 Jefferson Road premises, with the trustee's knowledge, had assumed responsibility for, and the right to rentals concerning, the stored belongings. David Palmer has confirmed this fact with Mr. Dworkin as recently as yesterday, and the landlord has been attempting to reach you to confirm that, in fact, his company is in possession of the items you are inquiring about.…The trustee for the Premier estate has objected to my having any continuing role in the completion of the affairs of this company…."

19. Dr. Cordero had to call Trustee Gordon several times until he first took his call on May 16, 2002. The Trustee said that he did not run Premier's business; that Mr. Dworkin had taken it over, and told Dr. Cordero to file a proof of claim in the bankruptcy court, whose phone number and case number 01-20692 he gave him. Dr. Cordero requested Trustee Gordon to put in writing the information about the case and the parties that he had already dealt with in his search for his property. The Trustee agreed to do so. Then he bounced Dr. Cordero back to Mr. Dworkin, saying that he would know about Dr. Cordero's property.

20. Dr. Cordero called the Bankruptcy Court only to learn from Deputy Clerk Karen Tacy that the deadline for filing a proof of claim had already gone by on April 24, 2002, and that Dr. Cordero was not in the mailing matrix.

21. After Trustee Gordon failed to send the promised information and documents, Dr. Cordero had to write to him on May 30, and then follow up with calls, which Trustee Gordon neither took nor returned. It was not until two weeks later that for all communication with Dr. Cordero the Trustee sent him copy of his letter to Mr. Dworkin dated April 16, 2002, and a cover letter to Dr. Cordero simply suggesting "that you retain counsel to investigate what has happened to your property."

22. Dr. Cordero called Mr. Dworkin, who said that he had received from Trustee Gordon the keys to Mr. Palmer's office, located in the Jefferson-Henrietta warehouse.

23. Dr. Cordero called M&T Bank Pusateri, who said that he would try to find a list of Premier's customers, that Mr. Delano was in charge of the Premier case and was working with an appraiser to determine the value of Premier's assets in order to determine the value of the lien, and that he would have Mr. Delano call Dr. Cordero.

24. Mr. Delano called Dr. Cordero on June 18, 2002, and said that he had called Mr. Dworkin to request a list of all the Premier customers with belongings in the Jefferson-Henrietta

warehouse and that Mr. Dworkin had agreed to send it, and that Mr. Dworkin was billing the other Premier customers with belongings in that warehouse. Mr. Delano said that he had seen crates with the label "Cordero" in the warehouse. He referred Dr. Cordero to M&T Bank's Attorney Mike Beyma, at Underberg & Kessler, and told Dr. Cordero that he would have his lawyer call him once he had received the documents from Mr. Dworkin.

25. Attorney Amber Barney, at Underberg & Kessler, called Dr. Cordero. She said that the Bank sold at auction storage containers and other assets of Premier to Champion Moving & Storage. Then by letter she bounced Dr. Cordero to Champion at 795 Beehan Road, Rochester, NY 14624.

26. Dr. Cordero called Champion and talked to his manager, Mr. Scott Leonard, who confirmed that Champion had bought Premier's assets and equipment, including storage containers. He promised to send information thereabout and Champion catalogs. Mr. Leonard never sent anything to Dr. Cordero. He bounced Dr. Cordero to Trustee Gordon.

27. Dr. Cordero called Mr. Delano. He confirmed the sale to Champion of the Premier assets on which M&T Bank had a lien, but that it was still too earlier for Champion to contact Dr. Cordero about his property and that Champion would continue to serve the storage contracts.

28. Dr. Cordero called Champion's owner, Mr. Christopher Carter, who indicated that he had not received either his property or that of some other Premier customers.

29. Mr. Carter then examined the business files included among the Premier assets and equipment that he had removed from the Jefferson-Henrietta warehouse to Champion's warehouse. Thereby he discovered that Premier had assets, including storage containers, at Plaintiff's warehouse located on 2140 Sackett Road, in Avon, NY, and that Dr. Cordero's property had been stored there some years earlier.

30. When Dr. Cordero next phoned Mr. Carter and learned about it, he requested that Mr. Carter write to Mr. Pusateri of M&T Bank to let him know.

31. M&T Bank launched another investigation. It then found out that Premier had stored at Plaintiff's warehouse assets and storage containers, including some with a label bearing Dr. Cordero's name and a lot number. The Bank informed Dr. Cordero of the name and address of Plaintiff Pfuntner' lawyer, Mr. David MacKnight.

32. Dr. Cordero wrote to Mr. MacKnight, who neither wrote back nor took or returned any of his phone calls.

33. Thus, Dr. Cordero had to contact Plaintiff Pfuntner by phone. Plaintiff expressed his wish to be paid for the storage of his property in his warehouse. On three occasions, Dr. Cordero asked and Plaintiff Pfuntner promised to find out and let him know the number of storage containers in which his property was held and the condition of the property. However, on each occasion Plaintiff failed to provide that information.

34. By contrast, Plaintiff Pfuntner said that he would not release his property because the trustee for Premier, Mr. Gordon, could then sue him. On the last occasion that Dr. Cordero asked him to put that in writing, Plaintiff Pfuntner refused and then hung up on Dr. Cordero.

35. Dr. Cordero called Trustee Gordon, who would not take or return any of his calls. In his last call to his office, on Monday, September 23, Dr. Cordero asked to speak with him. His secretary Brenda put him on hold. When she came back, she said that Mr. Gordon was not taking any more calls concerning Premier. Dr. Cordero asked why and she said that Dr. Cordero could write. He told her that he had copied his letter to Mr. Pfuntner's lawyer to the Trustee, but the latter had not given him any feedback on it. Therefore, Dr. Cordero asked whether Mr. Gordon would reply to any letter from him. Brenda said that she was only a secretary following instructions and hung up on him.

36. Trustee Gordon sent Dr. Cordero a letter dated September 23, in which he accused Dr. Cordero of harassing his staff: "Your continual telephone calls to my office and harassment of my staff must stop immediately." He published his accusation by copying that letter to David D. MacKnight, Esq., Michael Beyma, Esq., and Ray Stilwell, Esq. Other people in his and their offices may have read that letter and its accusation of harassment.

37. Trustee Gordon also wrote there that, "I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again."

38. On September 27, 2002, Dr. Cordero wrote to Trustee Gordon to let him know why his letter of September 23, was unjustified in its content as well as unprofessional in its tone, to request an apology, an assurance that the lines of communication would be opened, and copies of letters con-

cerning him that the Trustee had sent to other parties. Trustee Gordon never replied to Dr. Cordero.

39. Dr. Cordero wrote to Hon. Judge John C. Ninfo, II, on September 27, to complain about Trustee Gordon's refusal to communicate with him about the course of the proceedings, although the importance of being able to do so had increased upon the discovery of other assets of the Debtor. He also applied for a determination of whether Mr. Gordon's performance in this case complied with his duties as trustee and whether he was fit to continue as such.

40. Judge Ninfo referred that application to Assistant United States Trustee Kathleen Dunivin Schmitt.

41. Trustee Gordon wrote to Judge Ninfo on October 1, 2002, and claimed that Dr. Cordero had made more than 20 phone calls to his staff and that because the same message had been repeated to him, he had been belligerent, demanding, and demeaning to the Trustee's staff, and had become very angry at it. The Trustee also portrayed Dr. Cordero as lacking the capacity or good faith to understand the Trustee's role. His own words were these:

    a) "I have instructed my staff to advise former customers of Premier Van Lines that items stored with Premier Van Lines were not property of the bankruptcy estate, were not to be administered by me and could be accessed by contacting either the landlord from whom Premier Van Lines rented its facilities or the attorney's for M&T Bank who held a lien on the assets of Premier Van Lines. Mr. Cordero was so advised when he contacted my office in the early spring of 2002. In fact, my staff has received more than 20 telephone calls from Mr. Cordero and my staff has advised me that he has been belligerent in his conversations with them. I spoke myself with Mr. Cordero on at least one occasion to reemphasize the fact that I did not have possession nor control of his assets and that he would need to seek recovery through the landlord or M&T's attorneys.…Mr. Cordero continued to contact my office throughout the summer of 2002 and in the face of my staff's consistent message to him that we did not control nor have possession of his assets, he became more demanding and demeaning to my staff. After a final telephone call from Mr. Cordero on September 23, 2002 during which time he became very angry at my staff, I wrote to Mr. Cordero again to advise him of my position with respect to his assets and to insist he no longer contact my office regarding reacquisition of his assets.…I believe he either fails or refuses to understand the limited role that I play as Trustee in a Chapter 7 proceeding and that poor understanding has given rise to his current application."

42. Trustee Gordon published that letter of October 1, by sending it Judge Ninfo, and copying it to Assistant U.S. Trustee Kathleen Dunivin Schmitt, Esq.; David D. MacKnight, Esq.; Michael Beyma, Esq.; Ray Stilwell, Esq.; and Dr. Cordero. Other people in his and their offices may have read that letter.

II. STATEMENT OF CLAIMS

43. All averments made above are hereby adopted by reference.

A. David Palmer

44. Regardless of how Mr. Palmer may have benefited from his application for protection under the bankruptcy laws, he did not thereby acquire immunity from all his liability to all people for any harm that he did to any person. This is particularly so with respect to those people, such as Dr. Cordero, to whom he failed to give notice of, and from whom he concealed, the financial difficulties of his company.

45. Moreover, having invoked the jurisdiction of the Court to benefit from the application of the bankruptcy laws, Mr. Palmer remains under that jurisdiction until the final disposition of all matters related to the company and his management of it for whose benefit he made such application.

46. Mr. Palmer intentionally misrepresented the condition of Premier when in his conversations with Dr. Cordero beginning on January 9, 2002, he concealed that his company, not only had financial difficulties, but was already in liquidation under Chapter 7, yet pretended that it was in a position to store safely his property. Thereby Mr. Palmer deprived Dr. Cordero of the opportunity to take action to protect his property.

47. Mr. Palmer intentionally, recklessly, or negligently misrepresented the whereabouts of Dr. Cordero's property when in his conversations with Dr. Cordero beginning on January 9, 2002, he affirmed that his property was in the Jefferson-Henrietta warehouse, when in fact either none or only some of his property was there, although [t]he was in a position and had the duty to know where it was since he had collected money to store and insure it.

48. Mr. Palmer failed his duty of due care for Dr. Cordero's property when he intentionally, recklessly, or negligently left all or some of it in Plaintiff Pfuntner's warehouse in Avon; failed to pay Plaintiff under the lease with Plaintiff for warehousing it there; and failed to disclose in the bankruptcy filings and proceedings his liability for that property and his asset in the storage containers holding such property and in his right to collect fees for its storage.

49. Mr. Palmer breached his contract with Dr. Cordero for the safe storage of his property in exchange for the monthly storage fee as well as insurance fee for which he billed and received payment from Dr. Cordero.

50. Mr. Palmer committed fraud if he billed and received payment from Dr. Cordero for storage of, and insurance for, Dr. Cordero's property although he had lost or abandoned such property.

51. Mr. Palmer committed insurance fraud if he billed and received payment from Dr. Cordero to insure his property but failed to secure insurance coverage for it, and all the more so if he was in no position to secure such coverage because he had lost or abandoned such property.

52. By proceeding so fraudulently, recklessly, or negligently, Mr. Palmer has caused the loss of some or all of Dr. Cordero's property, has for the best part of a year caused Dr. Cordero an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims.

B. David Dworkin

53. Mr. Dworkin rented warehousing and office space in his Jefferson-Henrietta warehouse to Premier since June 2001 or thereabouts. He had such close business relations to Mr. Palmer that the latter represented him as his associate to Dr. Cordero and Mr. Dworkin for months did not correct Dr. Cordero when the latter made statements to him to the effect that Mr. Dworkin and Mr. Palmer were associates or partners. Thus, Mr. Dworkin must have known the financial condition of Premier and Mr. Palmer.

54. Yet, Mr. Dworkin intentionally concealed and misrepresented that condition when in his

conversations with Dr. Cordero beginning in January 2002 and his correspondence to him beginning with his letter of March 1, 2002, he concealed that Premier, not only had financial difficulties, but was already in liquidation under Chapter 7, that Mr. Palmer had taken off, and gave the impression that Premier was a going concern capable of storing his property safely.

55. Likewise, Mr. Dworkin fraudulently, recklessly, or negligently misrepresented the condition of Dr. Cordero's property when in his conversations with Dr. Cordero beginning in January 2002, he affirmed that his property was in the Jefferson-Henrietta warehouse and was safe, when in fact either none or only some of his property was there.

56. Thereby Mr. Dworkin fraudulently avoided prompting Dr. Cordero into taking action to protect his property and preserved his opportunity to step into the shoes of Premier to bill Dr. Cordero for the storage of his property.

57. When Mr. Dworkin accepted the transfer from Premier of the right to bill Dr. Cordero for the storage of his property, as stated in his letter of March 1, 2002, and did bill him therefor on the invoice dated March 7, 2002, Mr. Dworkin became the party to a contract for storage with Dr. Cordero.

58. But if no such contract existed, Mr. Dworkin had no right to bill Dr. Cordero and committed fraud by pretending that he had such right.

59. Mr. Dworkin was fraudulent, reckless, or negligent when he caused his company Jefferson Henrietta Associates to issue an invoice dated March 7, 2002, billing Dr. Cordero for storage of, and insurance for, his property, although he later admitted that he never even knew for sure whether Mr. Palmer had ever moved Dr. Cordero's property into the Jefferson-Henrietta warehouse.

60. Mr. Dworkin committed insurance fraud when on the March 7, 2002, invoice he billed Dr. Cordero for insurance coverage for his property although he later admitted in his letter of April 25, 2002, that Jefferson Henrietta Associates was not carrying any insurance on his property.

61. Mr. Dworkin was reckless or negligent when, after assuming from Premier the right to bill Dr. Cordero for the storage of his property and the obligation to exercise due care for it, he

failed to inventory the property that he allowed Champion Moving & Storage to remove from his Jefferson-Henrietta warehouse and did not monitor such removal so that now Champion can plausibly claim that it never took possession or delivery of Dr. Cordero's property.

62. By proceeding so fraudulently, recklessly, or negligently, Mr. Dworkin has breached his storage contract with Dr. Cordero, caused the loss of some or all of Dr. Cordero's property, has for the best part of a year caused Dr. Cordero an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims.

C. Jefferson Henrietta Associates

63. When Jefferson Henrietta Associates accepted the transfer from Premier of the right to bill Dr. Cordero for the storage of his property, as stated in the letter of March 1, 2002, and did bill him therefor on the invoice dated March 7, 2002, Jefferson Henrietta Associates became the party to a contract for storage with Dr. Cordero.

64. But if no such contract existed, Jefferson Henrietta Associates had no right to bill Dr. Cordero and committed fraud by pretending that it had such right.

65. Jefferson Henrietta Associates was fraudulent, reckless, or negligent when on its March 7, 2002 invoice it billed Dr. Cordero for storage of, and insurance for, his property, without first ascertaining that the property for which it claimed to be providing storage was in fact in its warehouse or despite its reason to believe that it might never have been there.

66. Jefferson Henrietta Associates committed insurance fraud when on the March 7, 2002, invoice it billed Dr. Cordero for insurance coverage for his property although it later admitted in its letter of April 25, 2002, that it was not carrying any insurance on his property.

67. Jefferson Henrietta Associates was reckless or negligent when, after assuming from Premier the right to bill Dr. Cordero for the storage of his property and the obligation to exercise due care for it, it failed to inventory the property that it allowed Champion Moving & Storage to remove from its Jefferson-Henrietta warehouse and did not monitor such removal so that

now Champion can plausibly claim that it never took possession or delivery of Dr. Cordero's property.

68. By proceeding so fraudulently, recklessly, or negligently, Jefferson Henrietta Associates has breached his storage contract with Dr. Cordero, caused the loss of some or all of Dr. Cordero's property, has for the best part of a year caused Dr. Cordero an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims.

69. Jefferson Henrietta Associates is the employer of Mr. Dworkin and as the principal is liable for the acts of its agent.

D. David Delano

70. Mr. Delano was reckless or negligent when on June 18, 2002, he stated to Dr. Cordero that he had seen storage containers bearing the label 'Cordero' in the Jefferson-Henrietta warehouse, if he did not actually see any such containers there.

71. Mr. Delano, as the M&T Bank officer in charge of the Premier case, was reckless or negligent when he failed to inventory Premier's assets and equipment on which his Bank held a lien and which were stored in the Jefferson-Henrietta warehouse, although he knew that some or all of Premier's storage containers held third-parties' property, such as that of Dr. Cordero; failed to give them notice of M&T Bank's intended sale of such containers to Champion Moving & Storage and to obtain the consent of those parties, such as Dr. Cordero, for their removal to Champion's warehouse; and failed to monitor such removal so that now Champion can plausibly claim that it never took possession or delivery of Dr. Cordero's property.

72. By proceeding so recklessly or negligently, Mr. Delano has caused the loss of some or all of Dr. Cordero's property, has for months caused Dr. Cordero an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused

him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims.

E. M&T Bank

73. M&T Bank was reckless or negligent when it failed to inventory Premier's assets and equipment on which it held a lien and which were stored in the Jefferson-Henrietta warehouse, although it knew that some or all of Premier's storage containers held third-parties' property, such as that of Dr. Cordero; failed to give them notice of the Bank's intended sale of such containers to Champion Moving & Storage and to obtain the consent of those parties, such as Dr. Cordero, for the removal of the container and their property to Champion's warehouse; and failed to monitor such removal so that now Champion can plausibly claim that it never took possession or delivery of Dr. Cordero's property.

74. By proceeding so recklessly or negligently, M&T Bank has caused the loss of some or all of Dr. Cordero's property, has for months caused Dr. Cordero an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims.

75. M&T Bank is Mr. Delano's employer and as the principal is liable for the acts of its agent.

F. Trustee Kenneth Gordon

76. Trustee Gordon failed to exercise due diligence in finding out whether Premier had assets elsewhere than at the Jefferson-Henrietta warehouse, even though he had access and control of Premier's business files, and he could have done exactly what Mr. Carter did after removing to Champion's warehouse Premier's assets and equipment, including its business files, that is, examine its files to determine whether Premier had assets, including storage containers, elsewhere. By so doing, Mr. Carter was able to discover that Premier had such assets at the Plaintiff's warehouse in Avon. This made it possible to find some such containers labeled "Cordero" and presumably containing property of Dr. Cordero.

77. Trustee Gordon recklessly or negligently abandoned Premier's assets and equipment, including storage containers, to third parties, namely, Mr. Dworkin and Jefferson Henrietta Associates, without even making an inventory of what he was abandoning, although he knew that the containers held property of Premier's customers, who had substantial claims on Premier for the property that they had entrusted to it for storage.

78. Trustee Gordon recklessly or negligently handled Premier's liquidation under Chapter 7 when he failed to give those customers notice, not only that Premier was in liquidation, but also that he was abandoning such assets and equipment, including the containers with their property, to Mr. Dworkin and Jefferson Henrietta Associates, then allowing yet another party, namely, M&T Bank, to sell them to still another party, that is, Champion Moving & Storage, which would even physically remove the containers with their property to Champion's warehouse; failed to ask the customers to consent to such removal; and failed to monitor it. Thereby he deprived Premier customers, such as Dr. Cordero, of the opportunity to protect their property and their claims against Premier.

79. Trustee Gordon failed to exercise good judgment and due diligence by failing to recognize and discharge his duty so to notify such Premier customers, who formed a class of claimants whose notification was required for the proper liquidation of Premier's assets. Indeed, professional experience or common sense would have told Trustee Gordon that such Premier customers would want to have their property back or know its whereabouts. Therefore, they had claims on Premier, but would run into difficulty with Premier creditors, including those that had possession or control of Premier's storage containers and equipment stored elsewhere. The correctness of this elemental reasoning is shown by Plaintiff Pfuntner's refusal to release to the defendants Premier's assets in his Avon warehouse or even to allow Premier customers, with whom Plaintiff had never entered into any contract, such as Dr. Cordero, to remove their property stored in Premier's storage containers.

80. By proceeding so recklessly or negligently, Trustee Gordon has caused the loss of some or all of Dr. Cordero's property, has for months caused Dr. Cordero an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims. What was he thinking!? Is this how a company is liquidated

competently under Chapter 7? To end up in this tangle, what need was there for a trustee?

81. Trustee Gordon defamed Dr. Cordero when in the abovementioned letters of September 23 and October 1, 2002, published to, among others, the peers and professionals named above, and in all likelihood their and the Trustee's staff, the Trustee, negligently or with either knowledge that it was false or reckless disregard for the truth, falsely accused him of harassing his staff, demeaning it, becoming very angry at it, behaving unreasonably in his demands of it, and being irrationally stubborn in making more than 20 phone calls to his staff just to be told the same message.

82. This false accusation stated conduct unbecoming of a professional, damaging to the image of a reasonable and well-respected person, and apt to make a person the subject of ridicule. Hence, it cast Dr. Cordero's general character in a false light and impaired his reputation and standing in the community, particularly among his peers, other professionals, and their staff.

83. Trustee Gordon also impugned Dr. Cordero's professional capacity and competency as well as his good faith when, in the above indicated instances, he stated that Dr. Cordero failed or refused to understand the Trustee's limited role and showed poor understanding of it. This impugnment was particularly defamatory and uncalled-for given the facts.

84. Indeed, if Trustee Gordon's role were so unambiguously understandable, there should be no reason:

    a) for Attorney David MacKnight, who represents Plaintiff Pfuntner, to sue him "to determine the obligations and duties of the Trustee…," as Mr. MacKnight stated he would do in his letter to Dr. Cordero of September 19, 2002, with copy to the Trustee;

    b) for Mr. Pfuntner both to refuse to release Dr. Cordero's property in Premier's storage containers for fear that the Trustee may sue him and to refer Dr. Cordero to the Trustee;

    c) for the Trustee to write to Mr. Dworkin, in whose warehouse Premier had leased storage and office space, in April 2002, four months after the conversion of the case from Chapter 11 to Chapter 7, to let him know what the Trustee would be or not be renting or controlling and how Mr. Dworkin should handle Premier's customers;

d) for Mr. Dworkin to deem it necessary to refer Dr. Cordero to the trustee for Premier to find out how to proceed with his respect to his property;

e) for Attorney Raymond Stilwell, who represents Mr. Palmer, to have engaged in conduct that was then objected to by the Trustee, as shown in Mr. Stillwell's letter of May 30, 2002;

f) for Attorney Michael Beyma, who represents M&T Bank, to have referred Dr. Cordero to the Trustee;

g) for Attorneys MacKnight and Beyma to feel compelled to copy the Trustee to letters that they wrote to Dr. Cordero;

h) for M&T Bank Vice President Vince Pusateri and Assistant Vice President David Delano to have referred Dr. Cordero to Trustee Gordon.

85. Is it because Trustee Gordon understands his role as being so limited that he stated in his October 1 letter that he would "soon be issuing a No Distribution Report"?

86. The fact that those parties referred Dr. Cordero to Trustee Gordon shows also that they deemed the Trustee to have information that Dr. Cordero needed to obtain to pursue the search of his property. Thus, the Trustee failed in his duty as such when he enjoined Dr. Cordero not to call his office any more, thereby denying him information and assistance that he had the duty and was in a position to provide to Dr. Cordero.

87. By casting these aspersions on Dr. Cordero's conduct and character, Trustee Gordon intended to make the Hon. John C. Ninfo, II, to whom Dr. Cordero had applied for a review of the Trustee's performance and fitness, as well as Assistant United States Trustee Kathleen Dunivin Schmitt, in whose province remains the supervision of a Chapter 7 trustee, believe that his own conduct was justified so as to obtain a personal benefit, namely, that no action be taken on Dr. Cordero's application. As the Trustee put it in his October 1 letter, "Please accept this letter as my response to the application made by Richard Cordero dated September 27, 2002 in the above-referenced matter [Premier Van Lines, Inc., Case No.: 01-20692, Chapter 7] in which he seeks my removal as Trustee.…Accordingly, I do not believe that it is necessary for the Court to take any action on Mr. Cordero's application."

88. Since Trustee Gordon is both an officer of the court and an appointee under federal law, he knew that such status imposes upon him the duty to be truthful and act in good faith when he

makes statements either to the court or the U.S. Trustee. Likewise, ethical considerations applicable to members of the bar and requiring lawyers to conduct themselves with honesty and candor also impose the same duty on him.

89. The peers and professionals and their staff to whom Trustee Gordon published his defamatory statements, aware of the Trustee's status, could reasonably assume that he was properly discharging that duty. Their assumption would have led them to lend even more credence to the Trustee's statements, thereby aggravating the detrimental impact of his statements on Dr. Cordero's reputation and standing.

90. By means of his defamatory statements, Trustee Gordon intended to lead the Judge and the U.S. Trustee to dismiss Dr. Cordero's application as one not to be taken seriously because submitted by just an irascible, verbally abusive man of limited intelligence and little intellectual honesty that had gotten mad because not able or willing to get it however many times he was told while searching for his things: Trustee Gordon could do nothing for him…and neither could the Court nor the U.S. Trustee. This is outrageous!

III. STATEMENT OF RELIEF SOUGHT

91. All averments made above are hereby adopted by reference.

92. Dr. Cordero respectfully requests that the Court:

A. All cross-defendants and third-party defendants

93. Hold the parties addressed by this pleading, namely, Trustee Gordon and M&T Bank, the cross-defendants, and Mr. Palmer, Mr. Dworkin, Jefferson Henrietta Associates, and Mr. Delano, the third-party defendants, jointly and severally liable to Dr. Cordero for their failure to establish the whereabouts of, and produce, Dr. Cordero's property;

94. Order those parties to establish the whereabouts of, and produce, Dr. Cordero's property;

95. Order those parties jointly and severally to pay compensation to Dr. Cordero for the deterioration, loss, or theft of his property, whose value is estimated at $14,000 incremented by the capitalized moving, storage, insurance and related fees and taxes that Dr. Cordero has

paid since his property went into storage in August 1993;

96. Order the parties jointly and severally to move at their expense and risk Dr. Cordero's property wherever they may find it to an agreed storage place, just as the property of the other Premier customers was moved free of charge to them to another storage place;

97. Hold each of those parties liable for punitive damages to Dr. Cordero for having engaged in fraudulent, reckless, or negligent conduct that for the best part of a year has caused him an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims;

98. Hold the parties jointly and severally liable for any award or prorata share for which Dr. Cordero may be found liable to Plaintiff Pfuntner;

B. David Palmer, David Dworkin, and Jefferson Henrietta Associates

99. Hold Mr. Palmer, Mr. Dworkin, and Jefferson Henrietta Associates liable for breach of contract and order them to pay compensation to Dr. Cordero;

C. Trustee Kenneth Gordon

100. Hold Trustee Gordon liable for defamation to Dr. Cordero and/or for having cast him in a false light, and order him to pay compensation in the amount of $100,000;

101. Order Trustee Gordon to pay Dr. Cordero punitive damages for his malicious and outrageous statements, contained in his September 23 and October 1, 2002, letters, to Judge Ninfo, hearing the case where he was the trustee, and to Assistant U.S. Trustee Schmitt, supervising his performance as trustee, in order to disparage Dr. Cordero and dissuade them from taking any action on Dr. Cordero's application for a review of Trustee Gordon's performance and fitness as trustee;

102. Order Trustee Gordon to issue a retraction of his defamatory and false light statements as well as an apology and publish them to everybody who may have read or otherwise learned

of such statements;

103. Hold that Trustee Gordon failed to recognize his duty to provide to Premier customers in general notice and information necessary to protect their property held in Premier's storage containers, and in particular to Dr. Cordero, since he was repeatedly referred to the Trustee by other parties, and order him to pay compensation to Dr. Cordero for not having provided such notice and information;

104. Hold that Trustee Gordon failed in his basic duty of fairness as a fiduciary by having refused to communicate with Dr. Cordero, explicitly enjoining him not to contact his office again, and directing his staff to receive and accept no more telephone calls from Dr. Cordero regarding this subject, although the Trustee provided other parties with information concerning Dr. Cordero, and order him to pay compensation to Dr. Cordero;

105. Order Trustee Gordon to afford Dr. Cordero access to him and his staff and all the information that a competent and responsible trustee would provide to any party in general and to a party similarly situated as Dr. Cordero, including any information that may help in locating and retrieving his property;

106. Hold that Trustee Gordon failed to perform competently as trustee;

107. Hold that Trustee Gordon is not fit to continue as trustee in this case;

108. Award Dr. Cordero reasonable attorney's fees, court costs, and the expense concomitant with litigating this case hundreds of miles from his home, together with such other relief as may seem just and proper.

IV. Table of Exhibits

1) Letter of David **Dworkin**, owner/manager of Jefferson Henrietta Associates, of **March 1**, 2002, **to** Dr. **Cordero** informing him that from then on monthly storage payments are to be made to Jefferson Henrietta Associates, not to Premier....................[A:91]

2) **Bill** for past storage and insurance from **Jefferson Henrietta** Associates of **March 7**, 2002, **to** Dr. **Cordero**....................[A:92]

3) Manager **Dworkin**'s letter of **April 25**, 2002, **to** Dr. **Cordero** stating that his property has not been removed from the **Jefferson**

Henrietta warehouse since it took possession of the premises, but it is no longer insured ....[A:93]

4) Trustee **Gordon**'s letter of **April 16**, 2002, **to** Warehouser **Dworkin** stating that M&T Bank has a blanket lien on Premier's assets in his Jefferson-Henrietta warehouse and that the Trustee will not rent or control them ....[A: 17]

5) Trustee **Gordon**'s letter of **June 10**, 2002, **to** Dr. **Cordero** with copy of his April 16 letter to Warehouser David Dworkin ....[A: 16]

6) Letter of **May 30, 2002,** of Raymond **Stilwell**, Esq., attorney for David Palmer, owner of Premier Van Lines, **to** Dr. **Cordero** stating that **Premier** Van Lines ceased operations at the end of **2001** ....[A: 18]

7) Letter of Michael **Beyma**, Esq., attorney for M&T Bank, of **August 28**, 2002, **to** Dr. **Cordero** stating that the **Bank did not sell** to Champion or any other party the **cabinets storing his property** ....[A:94]

8) Att. **MacKnigh**t's letter of **September 19**, 2002,**to** Dr. **Cordero** stating that he will soon be receiving Mr. Pfuntner's **summons and complaint** ....[A:14]

9) Trustee **Gordon**'s letter of **September 23**, 2002, **to** Dr. **Cordero** enjoining him from contacting his office .... [A:1]

10) Trustee **Gordon**'s letter of **October 1**, 2002, **to** Judge **Ninfo** asking the Judge not to take any action on Dr. Cordero's September 27 Application..[A:19]

Dated: November 21, 2002
59 Crescent Street
Brooklyn, NY 11208

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718) 827-9521

JEFFERSON HENRIETTA ASSOCIATES
415 PARK AVENUE
ROCHESTER, NEW YORK
(585) 244-3575
(585) 473-3555 Fax

March 1, 2002

Mr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208-1515

Re: Storage Space Rochester New York

Dear Richard,

As per our conversation the following shall serve as formal written notification that Premier North American Van Lines is no longer receiving payments for your belongings. All payments are to be forwarded to Jefferson Henrietta Associates at the above referenced address.

A statement will be forthcoming which will outline your past due balances and I will follow up with you as soon as I have an answer to the insurance question.

Very truly yours,
Jefferson Henrietta Associates

David M. Dworkin

DMD/lg

Exh: Warehouser Dworkin's letter of 3/1/2 to Dr. Cordero: pay for storage to Jefferson H Assoc, not Premier A:91

JEFFERSON HENRIETTA ASSOCIATES
415 Park Avenue
Rochester, New York 14607
585-244-3575

Date: March 7, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208-1515

Re: Storage Rochester, N.Y.

CODE	EXPLANATION	AMOUNT
1	Storage 11-1-01 to 12-1-01	$ 57.60
1	Storage 12-1-01 to 1-01-02	$ 57.60
1	Storage 1-1-02 to 2-01-02	$ 57.60
1	Storage 2-1-02 to 3-01-02	$ 57.60
1	Storage 3-1-02 to 4-1-02	$ 57.60
3	Insurance from 11-01-01 to 4-1-02 @ $2.72 per month	$ 13.60
	Please make check payable to: Jefferson Henrietta Associates	
	AFTER 30 DAYS A 2% LATE FEE WILL BE APPLIED TO ALL OUTSTANDING INVOICES	
	TOTAL	$ 301.60

CODE
1.Storage Rent
2.Late Fee
3.Insurance

A:92 Exhibit: Jefferson Henrietta Associates' warehouse bill of 3/7/2 to Dr. Cordero for past storage & insurance

JEFFERSON HENRIETTA ASSOCIATES
415 PARK AVENUE
ROCHESTER, NEW YORK
(585) 244-3575
(585) 473-3555 Fax

April 25, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208-1515

Re: Storage Space Rochester New York

Dear Richard,

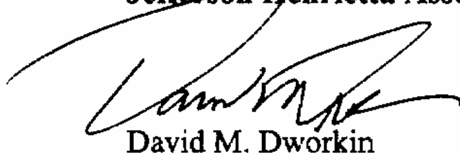
As per our conversation the following shall serve as a recap of our April 22, 2002 telephone conversation. While you indicated to me that you were paying monthly insurance to Premier North American Van Lines our current insurance policy does not provide for such insurance. Accordingly, the following shall serve as formal written notification that Jefferson Henrietta Associates is **not** carrying any insurance on your personal belongings. Should you wish to insure your belongings I suggest you do at your own expense.

Additionally, while we cannot make any representations as to the status or condition of your belongings prior to the date possession of the premises were given to us, we are able to inform you that no belongings have been removed since that date without being witnessed by me.

M & T Bank located at 255 East Avenue; Rochester New York is the lien holder of all of Premier Van Line's assets. I suggest you contact them with respect to the status of your belongings.

As I indicated to you I will attempt to find the name of the insurance carrier who handled the Premier account. Should I be successful in my search I will follow up with you.

Very truly yours,
Jefferson Henrietta Associates



David M. Dworkin

DMD/pb

Exh: Manager Dworkin's letter of 4/25/2 to Dr. Cordero: his property is in JHA warehouse but is not insured A:93

UNDERBERG & KESSLER LLP

1800 Chase Square
Rochester, New York 14604

Telephone: (585) 258-2800
Facsimile: (585) 258-2821
www.underberg-kessler.com

1100 Main Place Tower
Buffalo, New York 14202

Telephone: (716) 848-9000
Facsimile: (716) 847-6004

Writer's Direct Number:

(585) 258-2890
mbeyma@underberg-kessler.com

Reply to
Rochester Office

August 28, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Dear Dr. Cordero:

This letter is in reference to your letter to David MacKnight, Esq. dated August 26, 2002. As I previously advised you, M&T Bank has not sold your cabinets to Champion or any other party. M&T Bank sold only Pyramid cabinets which were located in Rochester. Nevertheless, M&T has no objection to your proceeding to obtain your belongings.

Very truly yours,

Michael J. Beyma

MJB:ds

cc: David G. DeLano, Assistant Vice President, M&T Bank
David D. MacKnight, Esq.
Kenneth W. Gordon, Esq.

G:\UKM\M&TTRUST\Premier\Cordero,Richard 8-28-02.ltr.wpd

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

November 21, 2002

Att. Ms Karen Tacy
Mr. Paul R. Warren
Clerk of the Bankruptcy Court [tel. 585-263-3148]
United States Bankruptcy Court
1220 US Court House
100 State Street
Rochester, NY 14614

Re: Premier Van Lines, bankruptcy case number 01-20692, Chapter 7
Adversary proceedings case no. 02-2230

Dear Mr. Warren,

I received the Third-party summons today and would like to thank you for the information that you gave me and Karen for having sent it to me so promptly. I have mailed them together with this letter, which I intend as proof of service since I do not find a proof of service form. The certificate of service is for a server who is "not a party to the matter concerning which complaint was made." I, of course, am a party; so I cannot use that form.

The parties that I am serving are the following:

I. Third-party summons with complaint, served by first class mail:

1. Raymond Stilwell, Esq., Adair, Kaul, Murphy, Axelrod & Santoro, LLP, 300 Linden Oaks, Suite 220, Rochester, NY 14625-2883, attorney for Mr. David Palmer
2. Mr. David Dworkin, Jefferson Henrietta Associates, 900 Jefferson Road, Rochester, NY, 14623
3. Jefferson Henrietta Associates, att. Mr. David Dworkin, 415 Park Avenue, Rochester, NY 14607, also with third-party summons and complaint against Mr. David Dworkin
4. Mr. David Delano, Assistant Vice President (585-258-8475), Manufacturers & Traders Trust Co., 255 East Avenue, Rochester, NY 14604
5. David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604, attorney for Mr. James Pfuntner, Plaintiff; to give notice of my third party complaints.
6. United States Trustee, U.S. Department of Justice, 100 State Street, Suite 609; for filing purposes.
7. Kenneth Gordon, Esq., Trustee, at Gordon & Schaal, 100 Meridian Center Blvd., Suite 120, Rochester, NY 14618;for filing purposes.

As you and Mr. Stickle suggested, I have amended my Answer in order to include the cross-claims. Thus, I am hereby filing the enclosed **Amended Answer with Cross-claims.** I have served it by first class mail on the following parties:

II. Amended Answer with Cross-claims, served by first class mail:

1. Kenneth Gordon, Esq., Trustee, at Gordon & Schaal, 100 Meridian Center Blvd., Suite 120, Rochester, NY 14618; to serve him with cross-claims.
2. Mike Beyma, Esq., Underberg & Kessler, LLP, 1800 Chase Square, Rochester, NY 14604, attorney for Manufacturers & Traders Trust Bank, also with third-party summons and complaint against Mr. David Delano.
3. David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604, attorney for Mr. James Pfuntner, Plaintiff.
4. United States Trustee, U.S. Department of Justice, 100 State Street, Suite 609; for filing purposes together with the original Answer

Should you spot any defect, please let me know and I will endeavor to correct it as soon as possible. If there is any proof of service form, kindly send me one.

Please give my regards to Karen and Mr. Stickle. I am grateful for the help that you so kindly are giving me with these filing matters.

Yours sincerely,

Dr. Richard Cordero

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

November 21, 2002

Mike Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604

Re: Cross-claim against M&T Bank
in Adversary Proceeding case no. 02-2230

Dear Mr. Beyma,

Kindly find herewith my Amended Answer with Cross-claims, wherein I bring a cross-claim against your client Manufacturers & Traders Trust Bank, co-defendant in the above-captioned case, which is linked to Premier Van Lines, Inc., Chapter 7 bankruptcy case number 01-20692.

I have also enclosed a third-party summons and complaint for Mr. David Delano, Assistant Vice President of M&T Bank, in order to bring him as a third-party defendant into the same Adversary Proceeding.

Yours sincerely,

Dr. Richard Cordero

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

November 21, 2002

Mike Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604

Re: THIRD-PARTY SUMMONS and COMPLAINT
Against David Delano, Assistant Vice President of M&T Bank;
Adversary Proceeding case no. 02-2230

Dear Mr. Beyma,

Kindly find herewith my summons and third-party complaint against Mr. David Delano, Assistant Vice President of Manufacturers & Traders Trust Bank, your client in the above-captioned Adversary Proceeding -linked to Premier Van Lines, Inc., Chapter 7 bankruptcy case number 01-20692- in which I am co-defendant and third-party plaintiff.

Mr. Delano was the one who referred me to you while I was trying to secure his assistance to recover my property in storage with Premier and he was managing his Bank's general lien on that company. You also sent him a copy of your letter to me of August 28, 2002.

For good measure, I have also served Mr. Delano with a third-party summons and complaint by first class mail addressed to his business place at Manufacturers & Traders Trust Co., 255 East Avenue, Rochester, NY 14604

Enclosed is also my Amended Answer with Cross-claims through which I bring cross-claims against M&T Bank, co-defendant in the same Adversary Proceeding.

Yours sincerely,

Dr. Richard Cordero

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

November 21, 2002

Mr. David Delano
Assistant Vice President (tel. 585-258-8475)
Manufacturers & Traders Trust Bank
255 East Avenue
Rochester, NY 14604

Re: THIRD-PARTY SUMMONS and COMPLAINT
in Adversary proceeding no. 02-2230

Dear Mr. Delano,

Kindly find herewith my third-party summons and complaint against you in the above-captioned Adversary Proceeding -linked to Premier Van Lines, Inc., Chapter 7 bankruptcy case number 01-20692- in which I, as co-defendant and third-party plaintiff, bring you in as a third-party defendant.

I am also bringing a cross-claim against M&T Bank through and Amended Answer and Cross-claim, which I have served on Mike Beyma, Esq., at Underberg & Kessler, LLP, 1800 Chase Square, Rochester, NY 14604. For good measure, I also sent Mr. Beyma a similar third-party summons and complaint against you.

Yours sincerely,

Dr. Richard Cordero

UNDERBERG
&KESSLER LLP

1800 Chase Square
Rochester, New York 14604

Telephone: (585) 258-2800
Facsimile: (585) 258-2821
www.underberg-kessler.com

1900 Main Place Tower
Buffalo, New York 14202

Telephone: (716) 848-9000
Facsimile: (716) 847-6004

Reply to
Rochester Office

Writer's Direct Number:

(585) 258-2890
mbeyma@underberg-kessler.com

December 16, 2002

Dr. Richard Cordero ***CERTIFIED MAIL***
59 Crescent Street
Brooklyn, New York 11208-1515

Dr. Richard Cordero ***REGULAR MAIL***
59 Crescent Street
Brooklyn, New York 11208-1515

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614

David Dworkin
415 Park Avenue
Rochester, New York 14607

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Jefferson Henrietta Associates
415 Park Avenue
Rochester, New York 14607

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686

David Palmer
1829 Middle Road
Rush, New York 14543

Rochester Americans Hockey Club
Office of the President
100 Exchange Blvd.
Rochester, New York 14614

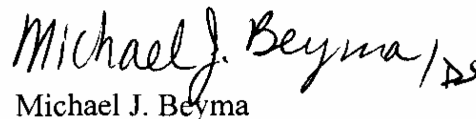
Raymond Stilwell, Esq.
Attorney for Debtor
300 Linden Oaks, Suite 220
Rochester, New York 14625

Re: Richard Cordero vs. Kenneth Gordon, et al.

Gentlemen:

Enclosed please find the Answer of M & T Bank and David DeLano to the above entitled action.

Very truly yours,



Michael J. Beyma

MJB:ds
Enclosure

G:\UKM\M&TTRUST\Premier\Cordero, et al. ltr.wpd

A:100 Att Beyma's letter of 12/16/2 to parties with answer of M&T Bank & DeLano to Dr. Cordero in *Pfuntner*

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PREMIER VAN LINES, INC., Debtor.	Chapter 7 Case No.: 01-20692 AP No.: 02-2230
JAMES PFUNTNER, Plaintiff, vs. KENNETH GORDON, AS TRUSTEE IN BANKRUPTCY FOR PREMIER VAN LINES, INC., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. AND M & T BANK, Defendants.	**ANSWER TO THIRD PARTY COMPLAINT**
RICHARD CORDERO Third Party Plaintiff, vs. DAVID PALMER, DAVID DWORKIN, DAVID DELANO AND JEFFERSON HENRIETTA ASSOCIATES, Third Party Defendants	

M & T Bank and David DeLano by their attorneys Underberg & Kessler LLP in answer to the Third Party Complaint and cross claim of Richard Cordero allege as follows:

FIRST: Admit those allegations set forth in paragraphs 1, 6, 8, 15, 23, 31, 75, 88, 89.

SECOND: Denies those allegations contained in paragraphs 9, 24, 25, 27, 70, 71, 72, 73, 74, 86, 93, 94, 95, 96, 97, 98, 108.

G:\UKM\M&TTRUST\Premier\AnswerTo3rd PartyComp.wpd

THIRD: Lack information as to the truth or falsity of the allegations contained in paragraphs 2, 3, 7, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 26, 28, 29, 30, 32, 33, 34, 35, 38, 40, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 90, 99, 100, 101, 102, 103, 104, 105, 106, 107 and therefore denies the same.

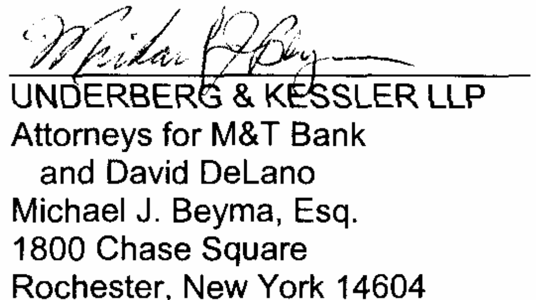
FOURTH: Denies each and every other allegation not otherwise controverted.

FIFTH: Admits part of paragraph 4 but denies that it holds a lien on debtor's assets. It has been released.

SIXTH: Admits David DeLano is joined as a defendant but denies the rest of the paragraph.

SEVENTH: With respect to paragraphs 36, 37, 39, 41 and 42, the letter speaks for itself. All other allegations are conclusions of law or opinions which the defendants have no knowledge and therefore are denied.

Wherefore, M&T Bank requests the dismissal of the third party complaint and cross claim together with the costs and disbursements of this action and whatever further relief the Court deems just or proper.



UNDERBERG & KESSLER LLP
Attorneys for M&T Bank
and David DeLano
Michael J. Beyma, Esq.
1800 Chase Square
Rochester, New York 14604

G:\UKM\M&TTRUST\Premier\AnswerTo3rd PartyComp.wpd

To: Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Raymond Stilwell, Esq.
Attorney for Debtor
300 Linden Oaks, Suite 220
Rochester, New York 14625

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686

Rochester Americans Hockey Club
Office of the President
100 Exchange Blvd.
Rochester, New York 14614

David Palmer
1829 Middle Road
Rush, New York 14543

Jefferson Henrietta Associates
415 Park Avenue
Rochester, New York 14607

David Dworkin
415 Park Avenue
Rochester, New York 14607

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

November 25, 2002

Ms. Carolyn S. Schwartz [212-510-0500]
United States Trustee
3 Whitehall Street, Suite 2100
New York, NY 10004

Re: Assistant U.S. Trustee Kathleen Dunivin Schmitt and
Kenneth Gordon, Esq., Trustee; Chapter 7 case no. 01-20692

Dear Ms. Schwartz,

I understand that you are the hierarchical superior of Ms. Kathleen Dunivin Schmitt, Assistant United States Trustee in the Western District of New York. Thus, I am taking to you an appeal from a decision that Assistant Schmitt made regarding my application for the review of the performance and fitness to serve of Kenneth Gordon, Esq., Trustee in the above-captioned bankruptcy case under Chapter 7.

Initially, I submitted my application to the Hon. Judge John C. Ninfo, II, of the United States Bankruptcy Court for the Western District of New York. He referred it to Assistant Schmitt, presumably together with a reply submitted to the Judge by Trustee Gordon with copy to Assistant Schmitt. Thereupon, I submitted a rejoinder directly to Assistant Schmitt. She then sent me her letter of October 22, 2002. For the reasons set forth in the accompanying brief of appeal, her supervisory review of this matter is based on substandard investigation and is infirm with mistakes of fact and inadequate coverage of the issues raised.

While I am aware that you are not a court, you have supervisory functions. Hence, my appeal seeks to have Assistant Schmitt's decision reviewed and to launch an adequate inquiry into trustee Gordon's handling of the case at hand and of his fitness to continue in charge of it.

I thank you in advance for the time and effort that you dedicate to this appeal and look forward to hearing from you soon.

Yours sincerely,

Dr. Richard Cordero

Cc: The Hon. Judge John C. Ninfo, II
Ms. Kathleen Dunivin Schmitt
Kenneth Gordon, Esq.

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

November 25, 2002

APPEAL

against a supervisory opinion of

Kathleen Dunivin Schmitt

Assistant United States Trustee

USTP Region 2

In re Kenneth Gordon, Esq., trustee for Premier Van Lines,
Chapter 7 bankruptcy case number 01-20692

Submitted:
By: Dr. Richard Cordero, Esq.

To: Ms. Carolyn S. Schwartz
United States Trustee
Whitehall Street, Suite 2100
New York, NY 10004
Phone: 212-510-0500
Fax: 212-668-2256
USTP Region 2

A. Procedural Background

1. On September 27, 2002, Dr. Richard Cordero, submitted to the Hon. Judge John C. Ninfo, II,[1] (hereinafter referred to as Judge Ninfo or the Court) a Statement of Facts and Application for a Determination (hereinafter referred to as the original Application) concerning the adequacy of the performance and fitness to serve as trustee of Kenneth Gordon, Esq.,[2] (hereinafter referred to as Trustee Gordon or the Trustee), who is the Chapter 7 trustee for Premier Van Lines, Inc.,[3] (hereinafter referred to as Premier or the Debtor), a company formerly engaged in the business of moving and storing property of customers. Judge Ninfo had been assigned the Premier case,

[1] Hon. Judge John C. Ninfo, II, United States Bankruptcy Judge, United States Bankruptcy Court, Western District of New York, 1400 United States Courthouse, Rochester, NY 14614; tel. (585) 263-3148.

[2] Kenneth Gordon, Esq., of Gordon & Schaal, 100 Meridian Center Blvd., Suite 120, Rochester, NY 14618; tel. (585) 244-1070, fax (585) 244-1085.

[3] Premier Van Lines, Inc., 900 Jefferson Road, Rochester, NY 14623.

at first filed under Chapter 11 and subsequently converted to a Chapter 7 case. Trustee Gordon opposed Dr. Cordero's Application in a letter dated October 1, 2002, (hereinafter referred to as the Answer), which he sent to Judge Ninfo with copy to Assistant United States Trustee Kathleen Dunivin Schmitt (hereinafter referred to as Assistant Schmitt). Judge Ninfo transmitted the Application on October 8, 2002. Dr. Cordero sent directly to Assistant Schmitt a Rejoinder and Application for a Determination dated October 14, 2002, (hereinafter referred to as the second Application or Rejoinder). In turn, Assistant Schmitt sent Dr. Cordero a letter on October 22, 2002, after concluding her supervisory review of the matter (hereinafter referred to as the Opinion). This is an appeal from Assistant Schmitt's Supervisory Opinion.

2. Trustee Gordon's performance has adversely affected the steps that Dr. Cordero has taken since early January 2002 to locate and retrieve his property, which Premier received for storage packed in storage containers owned by and constituting assets of Premier. Till this day, Dr. Cordero has no certainty of the whereabouts of all his property, let alone its condition. This property interest justifies his concern in the proper handling and disposition of the bankruptcy case of Premier and, consequently, the competent and prompt discharge by Trustee Gordon of his duties as Premier's trustee.

B. Standards of review and "thorough inquiry"

3. Title 28 of the United States Code provides in §586(a), that the United States Trustee must supervise the actions of trustees in the performance of their responsibilities. In turn, the United States Trustee Manual adopted by the Department of Justice and its United States Trustee Program states in §2.1.1. of Chapter 7 Case Administration that the actions of the United States Trustee are guided by "the primary goals of ensuring the prompt, competent, and complete administration of chapter 7 cases."

4. The exercise in which these principles would have guided the determination of Trustee Gordon's competence of performance and fitness to serve applied for by Dr. Cordero was named by Judge Ninfo when he referred to Assistant Schmitt Dr. Cordero's initial Application. In his referral letter of October 8, Judge Ninfo wrote, "I am confident that Ms. Schmitt will make thorough inquiry and assist you in reconciling this matter."

5. A "thorough inquiry" is an investigative exercise that entails, at a minimum, reading closely the terms of the problem to the point of mastering its key issues, names, and relations; choosing evaluating standards and formulating the specific questions on which to focus the exercise; requesting documentary evidence and interviewing third-parties for independent corroboration of what is alleged to have been done as well as to unearth what was embarrassing or incriminating enough not to have been even mentioned; asking all along tough whys, hows, and whens about the relevant acts and omissions; and finally reaching concrete findings and conclusive value judgments in which the specific questions of the inquiry are determined. Alas!, there is no evidence that this is the kind of exercise that Assistant Schmitt undertook.

TABLE OF CONTENTS

A. PROCEDURAL BACKGROUND 102
B. STANDARDS OF REVIEW AND "THOROUGH INQUIRY" 103
C. QUICK CONTACT CONDUCTED INSTEAD OF "THOROUGH INQUIRY" 107
1. Failure to press the Trustee on Debtor's assets and files not looked up 108
2. Failure to notice that Debtor did not cease operating as a business 109
3. Failure to understand who the parties and their relations are 110
4. Failure to understand the facts of the case: assets and storage containers 111
5. Failure to grasp difference between "rental issues" and renters' property 111
6. Failure to find out why wait 4 months to instruct holder of estate assets 111
7. Failure to find out whether Trustee protected estate assets 112
8. Failure to find out why Trustee gave the estate's storage fees to M&T Bank 112
9. Failure to inquire into no distribution report and Premier as asset case 112
10. Failure to analyze instruction for Dworkin to refer customers to 113
11. Failure to visualize the blamable referral to just "M&T Bank" 113
12. Failure to recognize Premier's customers as creditors of Premier 114
13. Failure to notice the Trustee's reluctance to provide information 114
14. Failure to recognize the Trustee's duty to inform and his breach of it 115
15. Failure to recognize the Trustee's duty to assist in locating property 115
16. Failure to listen attentively and question the Trustee's words 116
17. Failure to pick up the inconsistency between Trustee's words and actions 116
18. Failure to pick up inconsistency in her own actions 117
19. Failure to pick up indicia of Trustee's need to be prompted into action 117
20. Failure to wonder 'what has Trustee Gordon been doing?!' 118
21. Failure to deal with the issues of untruthfulness and defamation 119
22. Failure to realize the inadequacy of a mere chatty supervisory 'contact' 120
D. RELIEF REQUESTED 121

E. EXHIBITS

[page numbers in the original [and in this record]

1. Letter of Kathleen Dunivin **Schmitt**, Assistant United States Trustee, of **October 22**, 2002, **to** Dr. Richard **Cordero** .... 22 [A:123]
2. Letter of Assistant Kathleen Dunivin **Schmitt**, of **October 8**, 2002, **to** Dr. Richard **Cordero** .... 25 [A:126]
3. Letter of Hon. Judge John C. **Ninfo**, II, United States Bankruptcy Judge, of **October 8**, 2002, **to** Dr. Richard **Cordero** .... 26 [A:127]
4. Letter of Kenneth **Gordon**, Esq., Chapter 7 Trustee, of **October 1**, 2002, **to** Judge John C. **Ninfo**, II .... 27 [A:128]
5. Trustee Kenneth **Gordon**'s letter of **September 23**, 2002, **to** Dr. Richard **Cordero** .... 29 [A:130]

F. RECORD

I. Dr. Richard Cordero's Rejoinder and Application for a Determination of October 14, 2002 to Trustee Kathleen Schmitt

1. Dr. Richard **Cordero**'s cover letter of **October 14**, 2002, **to** Kathleen Dunivin **Schmitt**, Assistant U.S. Trustee .... 30 [A:37]
2. **Rejoinder** & Application for a Determination of **October 14**, 2002 .... 31 [A:38]
   - I. Trustee Gordon's "significant efforts" as Premier's trustee .... 31 [A:38]
     - a. The facts of Trustee Gordon's performance .... 32 [A:39]
     - b. Questions to assess Trustee Gordon's "significant efforts" .... 33 [A:40]
   - II. Whether the Trustee's statements to Court & U.S. Trustee are true .... 34 [A:41]
   - III. The understanding of Trustee Gordon's role .... 35 [A:43]
   - IV. Request for review of Trustee Gordon's performance and fitness .... 36 [A:44]
3. Letter of **April 16**, 2002, of Kenneth **Gordon**, Esq., Chapter 7 Trustee, **to** David **Dworkin**, manager/owner of the Jefferson-Henrietta warehouse .... 38 [A:17]
4. Letter of **May 30**, 2002, of Raymond **Stilwell**, Esq., attorney for David Palmer, owner and debtor in the Chapter 7 bankruptcy case *In re Premier Van Lines, Inc.*, no. 01-20692, WBNY, **to** Dr. Richard **Cordero** .... 39 [A:18]
5. Trustee Kenneth **Gordon**'s letter of **June 10**, 2002, **to** Dr. Richard **Cordero** .... 40 [A:16]

6. Letter of July 30, 2002, of Christopher **Carter**, owner of Champion Moving & Storage, Inc., **to** Dr. Richard **Cordero** .... 41 [A:45]

7. Christopher **Carter**'s letter of **July 30**, 2002, **to** Vince **Pusateri**, Vice President of M&T Bank, general lienholder against Premier Van Lines, Inc., debtor .... 42 [A:46]

8. Letter of **September 19**, 2002, of David **MacKnight**, Esq., attorney for James Pfuntner, plaintiff in the Adversary Proceeding *Pfuntner v. Trustee Gordon et al*., no. 02-2230, WBNY, **to** Dr. Richard **Cordero** .... 43 [A:14]

9. Trustee Kenneth **Gordon**'s letter of **September 23**, 2002, **to** Dr. Richard **Cordero** .... 44 [A:13]

10. Trustee Kenneth **Gordon's Answer** of **October 9**, 2002, in the Adversary Proceeding *Pfuntner v. Trustee Gordon et al*., no. 02-2230, WBNY .... 45 [A:31]

II. Statement of Facts and Application for a Determination of Dr. Richard Cordero, of September 27, 2002

1. Dr. Richard **Cordero**'s letter of **September 27**, 2002, **to** the Hon. Judge John C. **Ninfo**, II .... 46 [A:7]

2. Dr. Richard **Cordero**'s Statement of Facts and Application for a Determination of **September 27**, 2002, **to** Judge **Ninfo** .... 47 [A:8]

3. Dr. Richard **Cordero**'s letter of **September 27**, 2002, **to** Trustee Kenneth **Gordon**, Esq., Chapter 7 Trustee .... 50 [A:2]

4. Trustee Kenneth **Gordon**'s letter of **September 23**, 2002, **to** Dr. Richard **Cordero** .... 52 [A:1]

5. Letter of **September 19**, 2002, of David **MacKnight**, Esq., attorney for James Pfuntner, plaintiff in the Adversary Proceeding *Pfuntner v. Trustee Gordon et al*., no. 02-2230, **to** Dr. Richard **Cordero** .... 53 [A:14]

6. Dr. Richard **Cordero**'s letter of **August 26**, 2002, **to** Att. David **MacKnight** .... 54 [A:15]

7. Trustee Kenneth **Gordon**'s letter of **June 10**, 2002, **to** Dr. Richard **Cordero** .... 55 [A:16]

8. Trustee Kenneth **Gordon**'s letter of **April 16**, 2002, **to** David **Dworkin**, manager/owner of the Jefferson-Henrietta warehouse .... 56 [A:17]

9. Letter of **May 30**, 2002, of Raymond **Stilwell**, Esq., attorney for David Palmer, owner and debtor in the Chapter 7 bankruptcy case *In re Premier Van Lines, Inc*., no. 01-20692, WBNY, **to** Dr. Richard **Cordero** .... 57 [A:18]

C. Quick contact conducted instead of *"thorough inquiry"*

6. Judge Ninfo referred Dr. Cordero's original Application to Assistant Schmitt expecting that she would conduct a "thorough inquiry," and Dr. Cordero followed up with his second Application, the Rejoinder, requesting that she make specific determinations concerning Trustee Gordon, her supervisee. She then went to work to carry out her idea of a "thorough inquiry"…or rather, simply of 'inquiry,' which she described in her own words in her Supervisory Opinion of October 22, as follows: "In order to respond to your inquiry, we **contacted** the chapter 7 trustee, the attorney for the party who is now believed to be in possession of your belongings, and reviewed the docket and papers in this case;" (emphasis added).
7. Assistant Schmitt's statement that her exercise was "to respond to your inquiry," points to her awareness and acceptance that she was supposed to conduct a "thorough inquiry" and that she had been asked something by Dr. Cordero. What he had asked in both Applications was that determinations be made as to specific failings in Trustee Gordon's performance and his fitness to serve as trustee.
8. However, as will be shown below, what Assistant Schmitt actually conducted was only a 'contact': a communication exercise limited in its scope to two people and in its depth to uncritically accepting at face value what she was told. As to the requested determinations, they flowed from three main issues discussed by Dr. Cordero in his Rejoinder, namely,
   a. Trustee Gordon's key claim that, "Since conversion of this case to Chapter 7, I have undertaken **significant efforts to identify assets** to be liquidated for the benefit of creditors;" (emphasis added);
   b. whether the Trustee had made untruthful statements to the Court and the United States Trustee; and
   c. whether the Trustee had cast aspersions on Dr. Cordero's character and competence in order to dissuade the Court and the U.S. Trustee from undertaking the review of his performance and fitness to serve as trustee requested by Dr. Cordero.
9. Assistant Schmitt failed to grasp the central importance to the assessment of the Trustee's performance and fitness to serve as well as to the conduct of a focused investigative exercise, of ascertaining the Trustee's "significant efforts to identify assets" claim. Thus, she failed to identify any such efforts. Likewise, she failed to check other Trustee's claims against the documentary evidence submitted by Dr. Cordero; nor is there evidence that she obtained documents or interviewed independent third-parties to corroborate or refute his claims. She made no findings as to what other efforts the Trustee made to liquidate the estate, not to mention whether they were significant to the "prompt, competent, and complete" discharge of his duties as trustee. As to the other two main issues, Assistant Schmitt failed even to grasp their gist, let alone their legal and professional implications, by reducing them to "your comments [about] "honesty and candor"" followed by a reminder to the Trustee about being courteous. And she dealt with both grave issues of untruthful and defamatory statements by a trustee under her supervision in one single short paragraph!
10. One reason why Assistant Schmitt missed the key issues presented is that she did not allow herself enough time to grasp them. Thus, Dr. Cordero's Rejoinder and Application for a Determination consisted of 7 pages of exposition and 8 pages of exhibits plus a cover letter, for

a total of 16 pages. They were mailed late on Tuesday, October 15, from Brooklyn, in New York City, and may have arrived in Rochester on Friday, October 18, and perhaps were first read only on Monday, October 21. By the following day, Tuesday, October 22, Assistant Schmitt had completed her 'contact' with Trustee Gordon and was dating and mailing her letter of reply to Dr. Cordero. That was awfully quick!

11. It should be noted that the issues that Dr. Cordero raised in the Rejoinder and Application for a Determination dealt with the letter that Trustee Gordon had sent to Judge Ninfo on October 1, which the Judge referred to Assistant Schmitt on October 8. Hence, whatever 'contact' Assistant Schmitt established with the Trustee from that moment on could not have dealt with the issues raised for the first time in the Rejoinder, which she would only receive and read later either on October 18 or 21.

12. Since Assistant Schmitt permitted herself only a quick reading 'contact' with Dr. Cordero's Applications, she failed to pick up not only key issues, but also related issues raised in them as well as important points in the evidence discussed there. Thus, as shown below, in her letter she even made mistakes of facts and missed even points implicit in her own statements. What is more, she failed to grasp that each Application for a Determination indeed requested that specific determinations be made, which required specific findings, concerning Trustee Gordon's performance and fitness to serve as such.

13. In brief, from the content and quality of Assistant Schmitt's letter of October 22, one may reasonably deduct that her 'contact' with Trustee Gordon may have consisted in dashing a note requesting comments on the Applications or perhaps in just picking up the phone for a friendly conversation, merely to hear what the Trustee had to say. After all, she stated in her letter that "we have talked with Mr. Gordon…," but not that she wrote to him or he to her, and that she understood something "from speaking with David Mac-Knight," the only other third-party "contacted." By either means, her 'contact' was nothing probing or inquisitional, let alone critical or confrontational. Actually, it only led to that good-natured reminder for the Trustee to always be courteous. Then Assistant Schmitt liquidated the 'contact' with a letter to Dr. Cordero. This was hardly a "thorough inquiry."

1. Failure to press the Trustee on Debtor's assets and files not looked up

14. It was prominently set out in Dr. Cordero's Applications[4] that Trustee Gordon failed to find out that Premier, the Debtor, which operated out of the Jefferson-Henrietta warehouse,[5] also had assets stored elsewhere, namely, in the Avon warehouse.[6] Trustee Gordon should have found

[4] See the Statements of Facts in the original Application of September 27, 2002, as well as section I.a. of the second one, the Rejoinder of October 14, 2002.

[5] Thus, the Jefferson-Henrietta warehouse has the same address as Premier; see footnote 3, above. It is owned by Jefferson Henrietta Associates, at 415 Park Avenue, Rochester, NY 14607; tel. (585) 442-8820; fax (585) 473-3555.

[6] The Avon warehouse is located at 2140 Sackett Road, Avon, NY 14414. It is owned by Mr. James Pfuntner, tel. (585) 738-3105, the Plaintiff in the Adversarial Proceeding No. 02-2230.

those assets just as did Mr. Christopher Carter, the owner of Champion,[7] after he bought Premier's assets, which contained its business files, from their lienholder, M&T Bank[8]. Indisputably this was a failure, for a Chapter 7 trustee is duty bound under 11 U.S.C. §704(4) to "investigate the financial affairs of the debtor," and under §2-2.2.1 of the Trustee Manual, Chapter 7 Case Administration, "A trustee must also ensure that a debtor surrenders non-exempt property of the estate to the trustee, and that records and books are properly turned over to the trustee." One obvious use of those "records and books" is to find out where debtor's assets may be located.

15. Yet, Assistant Schmitt wrote in her letter, "Unfortunately, it is not uncommon for debtors to keep incomplete books and records. As a result, trustees frequently must learn of potential assets through outside sources." She missed the point! There was no need to look for outside sources. It would have sufficed to look in the inside sources, namely, the business files inside Premier's office inside the Jefferson-Henrietta warehouse. Trustee Gordon had access to that office given that, according to the manager/owner of that warehouse, Mr. David Dworkin,[9] it was Trustee Gordon who gave Mr. Dworkin the key to that office.

16. Assistant Schmitt failed to inquire why Trustee Gordon did not look into those business files, although he had the same reason to do so as Champion's Mr. Carter, to wit, Dr. Cordero had informed the Trustee that he was looking for his property in storage with Debtor Premier, who was in the storage business. Did Assistant Schmitt even wonder whether still more Premier's assets are out there waiting to be discovered by a go-getter trustee?

2. Failure to notice that Debtor did not cease operating as a business

16. Assistant Schmitt wrote as follows in her Supervisory Opinion of October 22:

> "By way of background, we learned that the case originally was filed as a chapter

---

[7] Christopher Carter, cellphone (585) 820-4645, owner of Champion Moving & Storage, located at 795 Beahan Road, Rochester, NY 14624; tel. (585) 235-3500; fax (585) 235-2105.

[8] M&T Bank is Manufacturers & Traders Trust Bank, at 255 East Avenue, Rochester, NY 14604. It holds a general lien on all Debtor Premier's assets, known at the time to be only at the Jefferson-Henrietta warehouse. These assets consisted of storage containers, each of which was packed with the property belonging presumably to a single Premier customer, and office equipment, including business files. M&T Bank sold these assets at an auction, but not the property in the storage containers, to Champion. Since the Bank officer in charge of Premier, Assistant Vice President David Delano, tel. (585) 258-8475; (800) 724-2440, had said to have seen containers labeled Cordero, he referred Dr. Cordero to Champion. Dr. Cordero requested Mr. Carter to let him know the condition of his belongings.

However, Mr. Carter informed him that no storage container bore his name. Then Mr. Carter looked in Premier's business files and found that Premier had assets, including storage containers, in the Avon warehouse. He informed M&T Bank thereof. In turn, the attorney for M&T Bank, Michael J. Beyma, Esq., tel. (585)-258-2890, at Underberg & Kessler, LLP, 1800 Chase Square, Rochester, NY 14604, tel. (585) 258-2800, fax (585) 258-282, informed Dr. Cordero of this by letter with copy to Trustee Gordon.

[9] David Dworkin, manager of the Jefferson-Henrietta warehouse and of Simply Storage, tel. (585) 442-8820; officer also of LLD Enterprises, tel. (585) 244-3575; fax 716-647-3555.

> 11. In chapter 11, the debtor generally retains possession of the estate and continues to operate the business as a debtor-in-possession while it attempts to formulate a plan of reorganization. As a result, it is not surprising that Premier Van Lines continued to bill and collect fees for items it held in its storage facilities while it was attempting to reorganize. The case later was converted to one under chapter 7 **on December 20, 2001. At this point, the debtor ceased operating as a business** and a chapter 7 trustee was appointed to liquidate any assets of the estate and distribute any proceeds therefrom according to a scheme of distribution set forth in 11 U.S.C. §726," (emphasis added).

17. Assistant Schmitt failed to pick up that in Dr. Cordero's Rejoinder, section I.a., as well as in the first paragraph of Dr. Cordero's initial Application for a Determination, Dr. Cordero stated that neither the owner of Debtor Premier, Mr. David Palmer, nor the lessor of the Jefferson-Henrietta warehouse out of which Premier operated, Mr. David Dworkin, let alone Trustee Gordon, gave him notice that Premier was either in reorganization or liquidation. On the contrary, for months after that conversion in December 2001, Mr. Palmer and Mr. Dworkin assured Dr. Cordero repeatedly that his property was safe and even billed him for its storage as if the business were a going concern.
18. Yet, Assistant Schmitt affirms that, "…on December 20, 2001. At this point, the debtor ceased operating as a business." In what way? The Applications complained about Premier not having ceased operating as such. Since Assistant Schmitt failed to grasp the facts, it is unlikely that she investigated what was doing 'the chapter 7 trustee appointed to liquidate any assets,' who allowed the Debtor and his lessor to continue doing business as if nothing had happened. Was Assistant Schmitt just copying what she read in the docket or simply repeating what she heard through her phone 'contact' with the Trustee without checking it with what she should have read in the Applications?

3. Failure to understand who the parties and their relations are

19. Then Assistant Schmitt went on to write:

> "We learned from the chapter 7 trustee that on April 16, 2002, he **wrote to M&T Bank, in care of Mr. David Dworkin**, informing them that he did not plan to administer **any items being stored by the debtor** as he had determined that these stored items were not property of the bankruptcy estate. He further stated that if any **rental issues** arose, that M&T Bank should handle them directly. I understand that a copy of this letter was sent to you on June 10, 2002 after the trustee learned of your difficulties in trying to locate and retrieve your property," (emphasis added).

20. In this paragraph Assistant Schmitt really messes up. The Trustee did not write to M&T Bank, which is the lienholder, he wrote to Mr. Dworkin, who is not in care of the Bank at all, but rather is the lessor at the Jefferson-Henrietta warehouse. Assistant Schmitt should never ever have made this mistake. To beginning with, she should have asked Trustee Gordon to send her a copy of his April 16 letter as well as of any other that he claimed to have written and sent…and then she should have asked Mr. Dworkin for a copy of it too. However, Assistant Schmitt did not even need to wait for the copies to arrive. She only had to pay attention to what had already been submitted to her by Dr. Cordero: A copy of that April 16 letter is found on page 11 of the original Application and on page 9 of the Rejoinder (pages 56 and 38, respectively, of this Appeal). But this is not the end of Assistant Schmitt's shaky grasp of facts.

4. Failure to understand the facts of the case: assets and storage containers

21. Assistant Schmitt also failed to pick up the crucial difference between the two sets of "any items stored by the debtor." On the one hand are the storage containers and office equipment belonging to Debtor Premier and on which M&T Bank had a lien. On the other hand is the property of Premier's customers stored inside those storage containers. Contrary to the tenor of Assistant Schmitt's letter, the storage containers and office equipment "stored by the debtor" most certainly ***were*** "property of the bankruptcy estate." That is precisely why M&T Bank had a lien on them!

5. Failure to grasp difference between "rental issues" and renters' property

22. Nor did Assistant Schmitt grasp the issue that concerned Dr. Cordero, let alone its importance: It was not, as she put it, "rental issues," such as the amount of 'rent' or whom to pay it to, but rather a fundamentally more important one, namely, the whereabouts and condition of his property. Even today that fundamental question has not been answered conclusively and Dr. Cordero is still searching for his property, not to mention wondering about its condition.
23. Moreover, what Trustee Gordon actually wrote in his April 16 letter was this: "Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank." It would be kinder to Assistant Schmitt to assume that she failed to read that letter than to assume that she could not perceive the difference between "rental issues" and "issues renters may have," and all the more so if she read Dr. Cordero's Applications at all and picked up the saga of his search for his property.

6. Failure to find out why wait 4 months to instruct holder of estate assets

24. Assistant Schmitt also failed to pick up the critical nature of another issue. As she put it, it was "December 20, 2001. At this point, the debtor ceased operating as a business and a chapter 7 trustee was appointed to liquidate any assets." How come it was not until four months later, on April 16, that the appointed Trustee informed by letter Mr. Dworkin, the person physically holding in his warehouse both types of Debtor's assets, what the Trustee intended to do with them? Did Assistant Schmitt investigate how the Trustee had discharged his duty during all that time? Did she find out how he expected the Debtor or Mr. Dworkin to handle those assets

during all that time, not to mention how he thought the assets he was in charge of liquidating had actually been handled?

7. Failure to find out whether Trustee protected estate assets

25. Assistant Schmitt could also have wondered whether the assets were still there at all after so many months. But it appears that she disregarded the notion that assets of a bankrupt company fare as well as the candy of a busted piñata. The facts are these: The Debtor's Attorney, Mr. Raymond Stilwell,[10] Mr. Dworkin, and M&T Bank Assistant Vice President David Delano wrote or said that Dr. Cordero's property was in the Jefferson-Henrietta warehouse. But now it is no longer there. Where did it go? Did Assistant Schmitt investigate whether Trustee Gordon took appropriate protective measures on behalf of the Debtor's assets while he was making up his mind how to handle them?

8. Failure to find out why Trustee gave the estate's storage fees to M&T Bank

26. Evidently Assistant Schmitt also failed to grasp the implications of the Trustee's statement: "He further stated that if any rental issues arose, that M&T Bank should handle them." What about those issues being handled by Mr. Dworkin, whose warehouse was being occupied by the Debtor's assets? Did Assistant Schmitt find out why the Trustee should give to a party, whether M&T Bank or Mr. Dworkin, the income from storage fees that belonged to the estate? And why give them forever?! No wonder the Trustee stated in his Answer that he was going to issue a No Distribution Report. This issue was raised in section III. of the Rejoinder, but it would seem that Assistant Schmitt's reading contact with it did not reach that far.

9. Failure to inquire into No Distribution Report and Premier as asset case

27. There is another reason why Assistant Schmitt should have inquired into Trustee Gordon's justification for issuing a No Distribution Report: More Premier's assets were discovered in the Avon warehouse…thanks not to the Trustee's efforts, but rather to Champion's Mr. Carter. If there was nothing to distribute and the conversion to a Chapter 7 case occurred, according to Assistant Schmitt, on December 20, 2001, she should have inquired into whether the Trustee discharged his duty under §2-2.1. of the Trustee Manual, which requires that "the trustee should consider whether sufficient funds will be generated to make a meaningful distribution to creditors, **prior to administering the case as an asset case;**" (emphasis added). Did Assistant Schmitt at least wonder what the Trustee had been administering for 10 months although, according to him, the known assets in the Jefferson-Henrietta warehouse would generate nothing to distribute?

---

[10] Raymond Stilwell, Esq., at Adair, Kaul, Murphy, Axelrod & Santoro, LLP, 300 Linden Oaks, Suite 220, Rochester, NY 14625-2883; tel. (585) 248-3800; fax (585) 248-4961.

10. Failure to analyze instruction for Dworkin to refer customers to M&T Bank

28. If Assistant Schmitt had analyzed critically the Trustee's instruction to Mr. Dworkin to refer Premier's customers, "renters," to M&T Bank, she would have picked up a key problem that it posed: How would those customers know that they needed to get in touch with somebody about their property? She would not have missed the question had she checked that instruction against the stated facts in Dr. Cordero's Applications: Nobody, including Trustee Gordon, gave him notice that Premier was either in bankruptcy reorganization or liquidation. On the contrary, he had been assured repeatedly by Mr. Palmer, the Debtor Premier's owner, and by Mr. Dworkin, his lessor at the Jefferson-Henrietta warehouse, that his property was safe; and he was even being billed for its storage. Therefore, how would Dr. Cordero, just as the other Premier's customers, become aware that "rental issues arose"?…such as that minor one, that their property was nowhere to be found!

11. Failure to visualize the blamable referral to just "M&T Bank"

29. Had Assistant Schmitt been conducting a "thorough inquiry," then her inquisitive approach would have led her to ask for a copy of Trustee Gordon's April 16 letter or to look it up in Dr. Cordero's Applications. There she would have found that the Trustee had written: "Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank. M&T Bank is represented by Mike Beyma and Tim Johnson of Underberg & Kessler, LLP."

30. That's it! No address of M&T Bank. Did the Trustee expect Premier's customers, who had placed their property in storage precisely because they had to leave Rochester, perhaps for New York City, or California, or Japan, or Timbuktu, to inquire about their property by writing a letter and mailing it in an envelope addressed to just 'M&T Bank'? Were they supposed to phone the Bank and ask its address? How? The Trustee did not even write the Bank's phone number! Were the customers supposed to look it up in their *local* yellow pages, e.g. the San Francisco phonebook!? Were they to call directory assistance? The Trustee did not even spring the full name of the Bank!: Manufacturers & Traders Trust Bank. And once the customers somehow conjured up the address or phone number, to whom would they address their questions? The Bank has thousands and thousands of employees! 'No, no, the customers were supposed to address themselves to

31. Mr. Beyma or Mr. Johnson at Underberg & Kessler.' But how? Again, the Trustee did not state their address or phone number either! In any event, how would the Bank's lawyers know where the property of Premier's customers was and in what condition? Why would they care…if the Trustee managing the estate didn't?

32. 'Well, let's see…the customers were supposed to phone Premier.' But Premier's phone number is not stated on its invoices!, let alone the Trustee's letter What is more, Premier's phone had been disconnected!! "No further information is available on this number," stated the recording. 'Then have the customers write to Premier.' And who was going to open the letter? Mr. Palmer, Premier's owner, was nowhere to be seen. Even today, his lawyer, Mr. Stilwell, will not even disclose his whereabouts, not even to M&T Bank holding a judgment against Mr. Palmer. Was it Mr. Dworkin who would open the letter?, and answer it too? What did the Trustee think was the incentive for Mr. Dworkin to take upon himself that task? Because he was running Premier? But remember, Assistant Schmitt said that Premier had ceased business

upon going into liquidation in December 2001, and the Trustee's letter is dated April 16, 2002, so Premier should have been by then not only dead, but also way past the autopsy. Never mind, imagine that somehow, which you have to figure out yourself, you stumbled upon Mr. Dworkin…you would have been no better off anyway: Mr. Dworkin did not know either!…or so he said.

33. So you are on your own, hundreds of miles from your property, even thousands of miles away, perhaps in another continent, and you have to find out who knows about your property, which is so valuable to you that you did not throw or give it away when you moved from Rochester, but rather you packed it carefully for long term storage and paid the fees month after month, year after year. Yet, nobody knows where it is. But take heart, hallelujah!, for the Trustee hath come with the saving suggestion of his letter of June 10, 2002: 'Hire a lawyer to look for it.' What?! From hundreds of miles, half a continent away, from the other side of the world? Is he serious? Wouldn't he, as trustee, be precisely the first person that such lawyer would expect to obtain information from? Do you, reader, feel the human element? Put yourself in Dr. Cordero's place Do you feel the futility of your efforts, the sheer frustration of it all, the waste of money, the huge investment of time, the sense of outrage at knowing that the one person who knew all this information, Trustee Kenneth Gordon, did not care to write down a complete address, at least the full name, not even a phone number, let alone take the initiative to give you notice? His was an even quicker job of a letter!

34. And Assistant Schmitt did not pick any of this up. Is not noticing or tolerating this conduct by the trustees under her supervision her idea of "ensuring the prompt, competent, and complete administration of chapter 7 cases"…by people that cannot even write a complete address?

12. Failure to recognize Premier's customers as creditors of Premier

35. Assistant Schmitt wrote that, "The trustee in a chapter 7 estate represents the creditors of that estate, not clients or customers of the debtor, unless, of course, those clients are owed funds."

36. Where in Bankruptcy Code did Assistant Schmitt get the notion that clients and customers are in principle not creditors? If it was not from Trustee Gordon, it certainly was not from the Code. Far from it, 11 U.S.C. §101(10) provides that "'creditor' means- (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor…(15) "entity" includes person, estate, trust, governmental unit, and United States trustee:" Hence, Premier's customers are creditors who instead of being owed funds, are owed the property that Premier was keeping in storage for them. They too were entitled to notice of Bankruptcy proceedings so that they could file their claims. Yet, Dr. Cordero, as a Premier creditor, was never given such notice and thus, was not included in the matrix.

13. Failure to notice the Trustee's reluctance to provide information

37. Assistant Schmitt also failed to pick up another issue that Dr. Cordero brought up in his Applications, namely, Trustee Gordon's reluctance to respond to Dr. Cordero's request for information. So she wrote, "I understand that a copy of this letter [of April 16] was sent to you on June 10, 2002 after the trustee learned of your difficulties in trying to locate and retrieve your property."

38. It took almost a month to get that letter from Trustee Gordon!, and only after Dr. Cordero called several times, then wrote to him a reminder, then called again. What is more, or rather less, is that for all information that the Trustee deigned to provide in his cover letter to Dr. Cordero was that, "I suggest that you retain counsel to investigate what has happened to your property."

40. Two copies of that June 10 cover letter were among the exhibits that Dr. Cordero sent to Assistant Schmitt. Did she read it? If so, did she not consider that this 'suggestion' revealed the Trustee's unjustifiable unwillingness to share information, coming as it did from the trustee that was supposed to have been working for almost six months to liquidate Premier's assets, including storage containers holding Dr. Cordero's property? Was that all the information that Trustee Gordon had gathered in all that time? If he had more but chose to provide nothing but grossly inadequate information, why did Assistant Schmitt not state that Trustee Gordon had failed in his duty to furnish Dr. Cordero with information? And the Trustee did have such duty!

14. Failure to recognize the Trustee's duty to inform and his breach of it

39. Section 704(7) of 11 U.S.C. includes among the duties of trustees that they must, "unless the court orders otherwise, furnish such information concerning the estate and the estate administration as is requested by a party in interest." Note that this duty extends to any "party in interest," so that one need not even have to be a creditor to invoke the benefit of that duty. Owners of property in the hands of a debtor whose business reason is precisely the storage of such property definitely qualify as parties in interest.

40. Nonetheless, Trustee Gordon wrote to Dr. Cordero on September 23, 2002, thus: "I have directed my staff to receive and accept no more telephone calls from you regarding this subject.…I trust that you will not be contacting my office again." What triggered this refusal to deal with Dr. Cordero was that he called the Trustee after being referred to him by the owner of the Avon warehouse, Mr. James Pfuntner,[11] who refused to let Dr. Cordero take his property found there lest the Trustee sue Mr. Pfuntner for disposing of assets of Debtor Premier. Yet, the Trustee would not take or return Dr. Cordero's phone call or answer his letter.

41. Therefore, Assistant Schmitt failed to recognize that it was a breach of his duty as trustee for Trustee Gordon to be reluctant and even refuse to provide information about the case and his administration of it to Dr. Cordero, although he was referred to the Trustee by one party after the other, including their attorneys, who had stated that the Trustee could provide him with information and assistance in locating his property.

15. Failure to recognize the Trustee's duty to assist in locating property

42. Assistant Schmitt wrote, "[T]he trustee had no legal responsibility to locate the assets belonging to the debtor's customers and clients and to negotiate their return to them."

---

[11] James Pfuntner, (585) 738-3105, owner of the Avon warehouse; also an officer of Western Empire Truck Sale, 2926 West Main Street, Caledonia, NY 14423; tel. (585) 538-2200.

43. Far from this, Section 704 of 11 U.S.C. states the opposite when setting forth the first duty of the trustee: "(1) 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 the parties in interest." It should also be remarked here that the law does not limit to creditors the benefit of this duty, but rather extends it to all "parties in interest."

44. Once more, Assistant Schmitt missed the point: The property of the clients was held in storage containers belonging to Debtor Premier and thus, constituting assets of the estate. By locating the property held and owed by Premier to its clients, the Trustee would also have found assets of the estate in the form of storage containers and maybe other types of assets. That is precisely what happened when Champion's Mr. Carter looked for Dr. Cordero's property and found other assets of Premier in the Avon warehouse. Assistant Schmitt failed to pick up how this event indicted the performance of Trustee Gordon, for he not only had the same opportunity as Mr. Carter to locate those assets and property, but also the duty to do so.

16. Failure to listen attentively and question the Trustee's words

45. Assistant Schmitt failed to approach Trustee Gordon's statements inquisitively. So she wrote, "I understand that a copy of this letter was sent to you on June 10, 2002 after the trustee learned of your difficulties in trying to locate and retrieve your property." The underlying tenor of these words is that the Trustee told Assistant Schmitt that, after learning from Dr. Cordero of his property-search difficulties, the Trustee responded promptly by sending him the requested information right away…and she just believed him!

46. It is clear that Assistant Schmitt did not hear the clash between those words and what Dr. Cordero wrote in his Applications. There he complained loudly that he had to call the Trustee several times in the first part of May 2002 before the Trustee finally took his call, and that then he had to write to him to remind him of the letter that the Trustee had said he would send Dr. Cordero, and that then Dr. Cordero even had to call again the Trustee to ask whether he would answer the letter, and that when the Trustee finally, on June 10, 2002, answered the letter, it was just to "suggest that you retain counsel…." Assistant Schmitt may not have asked herself, not to mention the Trustee, about his tardiness in responding if she was not inquiring into his performance, but rather just listening to his story.

17. Failure to pick up the inconsistency between Trustee's words and actions

47. Assistant Schmitt wrote: "I do understand, however, that early on in the case, the chapter 7 trustee made repeated requests to counsel for the debtor to provide a list of all customers who currently were storing items with the debtor. Counsel failed to provide such a list."

48. However, Assistant Schmitt failed to pick up the inconsistency between what Trustee Gordon said there that he did and what he actually did when he learned about Dr. Cordero. The latter was one of those customers that would have been on the requested list of Premier's customers. What did the Trustee do for him? After a month of Dr. Cordero trying to obtain a written statement concerning his property held by Debtor Premier, the Trustee wrote, "I suggest that you retain counsel to investigate what has happened to your property," and clipped his letter to that to Mr. Dworkin of April 16, wherein he bounced Premier's customers from Mr. Dworkin

to yet another third-party, i.e. M&T Bank. Did Assistant Schmitt grasp the inconsistency: Why would the Trustee ask repeatedly for that list if he was so unwilling to do anything for those that would be on it? The evidence points to Assistant Schmitt just listening and then repeating uncritically what she was told during her 'contact' with Trustee Gordon.

18. Failure to pick up inconsistency in her own actions

49. Assistant Schmitt failed to pick up her own inconsistency in action. Why did she not call the counsel for Debtor Premier, Mr. Stilwell, to ask him for copies of the letters in which the Trustee claimed to have asked him for the list of Premier's customers? Those letters must exist given that Assistant Schmitt wrote that, "Mr. Gordon states that generally, it is his policy to correspond with parties via mail rather than telephone." She should have been very interested in knowing the exact dates when the Trustee wrote to Attorney Stilwell asking for that list and what he stated he wanted it for.

50. Moreover, why did she not call Attorney Stilwell although she wrote that she "contacted…the attorney for the party who is now believed to be in possession of your belongings," that is, Attorney David MacKnight.[12] No doubt, Assistant Schmitt could also have asked Trustee Gordon to send her copies of those letters…but then she would have sounded in her 'contact' with the Trustee as if she had been conducting a "thorough inquiry," which, of course, was not the case, for it was just a friendly communication to hear his story, which needed no corroboration since the Trustee was to be taken at his word.

19. Failure to pick up indicia of Trustee's need to be prompted into action

51. As a result of Dr. Cordero's repeated requests for information from Trustee Gordon, the Trustee finally wrote to him on June 10, 2002. Three days later, according to Assistant Schmitt, "On June 13, 2002, the chapter 7 trustee filed a formal Notice of his intent to abandon all assets of Premier Van Lines…." Likewise, as a result of Dr. Cordero's letter followed up with phone calls, which the Trustee would neither take nor return, the Trustee finally sent him a letter on September 23. Three days letter, according to Assistant Schmitt, "on September 26, 2002, the trustee filed a Notice of his intent to abandon unscheduled assets of the debtor recently learned to have been located in Avon, New York." Was this pure coincidence or was Trustee Gordon finally taking some action in the Premier case because Dr. Cordero's requests were operating as reminders for the Trustee that he had to do something about that case?

52. In this context, a comparison of reaction time raises questions about Trustee Gordon's handling of this case.

    1) As early as July 23, Dr. Cordero called Mr. Christopher Carter at Champion to ask him about his property. Mr. Carter told him that it was not among Debtor Premier's storage containers that he had collected at the Jefferson-Henrietta warehouse; then he promised to look into the matter.

---

[12] David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604; tel. (585) 454-5650, fax (585)454-6525.

2) On July 29, Dr. Cordero called Mr. Carter again, who said that he had found in Premier's files that Dr. Cordero's property might be in a warehouse in Avon.

3) On July 30, at Dr. Cordero's instigation, Mr. Carter wrote about it to Mr. Vince Pusateri[13] at M&T Bank, which held a lien on all Premier's storage containers.

4) On August 1, M&T Bank wrote to Dr. Cordero to let him know that his property was likely in Avon.

5) On August 7, Dr. Cordero faxed a letter to M&T Bank's attorney, Michael Beyma,[14] requesting confirmation of the whereabouts of his property.

6) On August 9, M&T Bank appears to have conducted a physical inspection of the Avon warehouse.

7) On August 12, Mr. David Delano, the M&T Bank officer in charge of the Premier case, called Dr. Cordero to let him know that storage containers with labels bearing his name had been found in the Avon warehouse.

8) On August 15, Attorney Beyma confirmed this by letter to Dr. Cordero with copy to the Trustee.

9) Not until September 26, almost a month and a half later and only after Dr. Cordero's letter and phone calls and finally the Trustee's letter of September 23, did the Trustee file his Notice of intent to abandon the newly found property. What was Trustee Gordon doing in the meantime?

53. There is no evidence that Assistant Schmitt asked that question. Nor that she asked whether Trustee Gordon actually went to the warehouse in Avon for a physical inspection of not only the storage containers, but also all the other assets of Debtor Premier found there. Did she ask why the Trustee was abandoning that property just as he had abandoned, six months after the conversion to Chapter 7 on December 20, 2001, Premier's assets at the Jefferson-Henrietta warehouse? What did Assistant Schmitt actually ask of the Trustee during her friendly 'contact' with him?

20. Failure to wonder 'What has Trustee Gordon been doing?!'

54. If Trustee Gordon:

1) does not, as a policy, take or return phone calls;

2) and does not, as a matter of practice, promptly and usefully correspond with parties via mail;

3) and does not even write complete addresses or phone numbers;

4) and does not concern himself with "rental issues" of the Debtor's customers;

5) and does not "administer any items being stored by the debtor;"

[13] Vince Pusateri, Vice President, tel. (716) 258-8472, at M&T Bank in Rochester.

[14] Michael J. Beyma, Esq., tel. (585)-258-2890, at Underberg & Kessler, LLP, 1800 Chase Square, Rochester, NY 14604; tel. (585)-258-2800; fax (585) 258-2821; attorney for M&T Bank.

6) and does not exercise “control over” but rather abandons Debtor’s assets in the main place of business;
7) and does not examine the “records and books” in the Debtor’s business equipment;
8) and does not “locate” the property of Debtor’s customers;
9) and does not “notify” Debtor’s customers “of the progress of the case;”
10) and does not find on his own Debtor’s assets elsewhere;
11) and does not convert into cash but rather abandons assets found by others;
12) and does not have anything for the creditors except a No Distribution Report;
13) does not want even his staff “to receive and accept [any] more telephone calls from [a Debtor’s customer, Dr. Cordero] regarding this subject”;

did Assistant Schmitt wonder what really Trustee Gordon does as a chapter 7 trustee? Did she not wonder what the “significant efforts” that the Trustee claimed to have made in this case could possibly have been? Had she conducted a “thorough inquiry,” would she have found evidence of Trustee Gordon’s significant inactivity?

21. Failure to deal with the issues of untruthfulness and defamation

55. Assistant Schmitt also failed to grasp the serious professional and legal implications of the two other main issues of Dr. Cordero’s Application to her: Whether Trustee Gordon made untruthful statements to the Court and the U.S. Trustee and whether he cast aspersions on Dr. Cordero’s conduct, character, and competence so as to belittle him and persuade the Court and the U.S. Trustee that “it is not necessary…to take any action on Dr. Cordero’s application” (see the Trustee’s letter of October 1, 2002) for a review of his performance and fitness as trustee. Assistant Schmitt dealt with these two issues by ‘thoroughly’ liquidating them in a single paragraph:

> “Concerning your comments that all parties who appear before the court are officers of that court and must conduct themselves with “honesty and candor,” we couldn’t agree more. To that extent we have talked with Mr. Gordon about the need to maintain the highest level of professionalism as he administers bankruptcy cases and reminded him that he and his staff must remain courteous during all exchanges with the public, even when frustrated. We also reiterated that he and his staff must respond courteously and timely either by telephone or in writing to questions posed. Mr. Gordon states that generally, it is his policy to correspond with parties via mail rather than telephone.”

56. Is this the best Assistant Schmitt can come up with by way of thoughtful analysis of the evidence and the reflective discussion of either of these two issues? They could give rise to charges that could get a lawyer disbarred or held liable for defamation. Did she ever consider, as Dr. Cordero requested, asking Trustee Gordon to provide proof of his impugnment of Dr.

Cordero, such as affidavits from his staff regarding what he alleged that they told him about Dr. Cordero? Far from it, Assistant Schmitt found Trustee Gordon's behavior deserving of not even a slap on the wrist, just a reminder to remain professional and always be a good courteous boy. She must be kidding!

22. Failure to realize the inadequacy of a mere chatty supervisory 'contact'

57. To conduct at a professionally acceptable standard an investigative exercise into concrete charges concerning her supervisee, Assistant Schmitt would have had to read closely Dr. Cordero's Applications; notice and pursue the three main issues of claimed "significant efforts," untruthful statements, and impugnment of Dr. Cordero; examine critically the Trustee's story; request as a matter of course supporting documents; and interview independent third-parties in a position to corroborate or refute his averments. Then to adequately "respond to the inquiry" that she sensed she had been asked to con-duct, Assistant Schmitt would have had to conclude the 'contact' that she actually con-ducted by making concrete findings and reaching the specific determinations requested.

58. There is no evidence that any of this happened any where near to a passing, let alone adequate, degree. From the beginning, Assistant Schmitt should have known that her quick reading 'contact' with the Applications and her friendly 'contact' with Trustee Gordon, and just one other party could not possibly amount to the requested "thorough inquiry" into her supervisee's performance and fitness to serve. She should have realized that Trustee Gordon would not simply give up and confess to his many failings just because she asked him for his story. The inadequacy of her 'contact' should certainly have become obvious as the evidence began to pile up that the Trustee's performance consisted overwhelmingly of what he did not do rather than what he did do. At least she should have shown awareness that the object of her exercise was to reach the requested determinations and should have concluded with them. Instead, she wrote: "We appreciate your correspondence and trust that this information will be of assistance to you."

59. No! no! no! It was not to obtain "information" that the Court had forwarded to Assistant Schmitt the first Application of Dr. Cordero and that he had submitted to her his Rejoinder. Rather, it was for her to make the specific determinations clearly identified as such and listed in each of the two Applications. Did Assistant Schmitt provide as a result of a "thorough inquiry" any new "information" that determined whether Trustee Gordon's performance was competent and he was fit to serve as such in the Premier case? No, of course not.

60. Hence, both the "thorough inquiry" and the requested determinations remain to be made. But not by Assistant Schmitt, for she foreclosed the possibility of having anything else to do with this matter when, without inviting Dr. Cordero's comments, she remanded the case to whence it had come to her, the Court, thus: "Finally, to the extent you disagree with the legal position taken by Mr. Gordon, you should resolve that issue(s) in court."

61. Before going back to the Court, an appeal from her "information" lies with the hierarchical superior of Assistant Schmitt.

D. Relief requested

62. Consequently, through this appeal, Dr. Cordero requests that, on the basis of the facts, arguments, and exhibits contained herein and his two Applications, copies of which are attached hereto, the United States Trustee launch a "thorough inquiry" in order to determine whether Kenneth Gordon, Esq., as trustee of Premier Van Lines and in his dealings with Dr. Cordero:

    1) failed to recognize that customers of Debtor Premier, who had entrusted it with their property for storage for a fee, are parties to these bankruptcy proceedings and should have been informed of such proceedings just as creditors of Premier were entitled to;

    2) failed to provide Dr. Cordero -and perhaps others similarly situated- with adequate information upon being referred to the Trustee:

        a) by lienholder M&T Bank and Dr. Cordero requested such information from the Trustee in mid-May and June 2002;

        b) by Mr. Pfuntner and Dr. Cordero requested it from him in August and September 2002;

    3) fails in his basic duty of fairness as a fiduciary by having refused specifically to communicate with Dr. Cordero and by explicitly enjoining him not to contact his office again, although the Trustee has provided other parties with information concerning Dr. Cordero;

    4) failed to take measures to protect the assets of Premier in the Jefferson-Henrietta warehouse and prevent that assets once affirmed and seen to be there can now no longer be found;

    5) failed to locate other Premier's assets, just as Champion's Mr. Carter did in Mr. Pfuntner's warehouse in Avon, and take such prompt and adequate action as to render unnecessary his being sued by Mr. Pfuntner, which has resulted in Premier's customers being dragged into Mr. Pfuntner's adversarial proceeding and their property there being frozen;

    6) failed to make "significant efforts" to discharge his duties competently;

    7) made untruthful statements to the Court and the U.S. Trustee;

    8) cast aspersions on Dr. Cordero's character, conduct, and competence; and

    9) is not fit to continue as trustee in the Premier case.

63. Similarly, Dr. Cordero requests also that the United States Trustee determine whether Assistant Schmitt:

    10) failed to conduct the "thorough inquiry" expected of her as well as an adequate investigative exercise regarding the matter within the scope of her supervisory duty submitted to her by the Court and a party in interest; and

    11) failed to discharge her supervisory duty "of ensuring the prompt, competent, and

complete administration of" the Premier case assigned to Trustee Gordon.

Date: November 25, 2002

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208

Dr. Richard Cordero
tel. (718) 827-9521

Cc: The Honorable Judge John C. Ninfo, II
Assistant Kathleen Dunivin Schmitt
Kenneth Gordon, Esq., Trustee

U.S. Department of Justice

Office of the United States Trustee
Western District of New York

100 State Street, Suite 609
Rochester, New York

(585) 263-5706
FAX (585) 263-5862

October 22, 2002

Dr. Richard Cordero, Esquire
59 Cresent Street
Brooklyn, NY 11208-1515

Re: Premier Van Lines

Dear Dr. Cordero:

This is in further response to your letter to the Court dated September 27, 2002, and to this Office dated October 14, 2002, concerning the Premier Van Lines chapter 7 bankruptcy case. I understand from your letter that you are concerned that despite numerous phone calls made to various parties, including the chapter 7 trustee in this case, you have been unsuccessful in regaining possession of items that you had paid to store with the debtor.

As you are aware, the United States Trustee Program is a component of the Department of Justice that supervises the administration of bankruptcy cases and trustees. In order to respond to your inquiry, we contacted the chapter 7 trustee, the attorney for the party who is now believed to be in possession of your belongings, and reviewed the docket and papers in this case.

By way of background, we learned that the case originally was filed as a chapter 11. In chapter 11, the debtor generally retains possession of the estate and continues to operate the business as a debtor-in-possession while it attempts to formulate a plan of reorganization. As a result, it is not surprising that Premier Van Lines continued to bill and collect fees for items it held in its storage facilities while it was attempting to reorganize. The case later was converted to one under chapter 7 on December 20, 2001. At this point, the debtor ceased operating as a business and a chapter 7 trustee was appointed to liquidate any assets of the estate and distribute any proceeds therefrom according to a scheme of distribution set forth in 11 U.S.C. § 726.

We learned from the chapter 7 trustee that on April 16, 2002, he wrote to M&T Bank, in care of Mr. David Dworkin, informing them that he did not plan to administer any items being stored by the debtor as he had determined that these stored items were not property of the bankruptcy estate. He further stated that if any rental issues arose, that M&T Bank should handle them directly. I understand that a copy of this letter was sent to you on June 10, 2002 after the trustee learned of your difficulties in trying to locate and retrieve your property.

On June 13, 2002, the chapter 7 trustee filed a formal Notice of his intent to abandon all assets of Premier Van Lines, which was served on all creditors. In addition, on September 26,

2002, the trustee filed a Notice of his intent to abandon unscheduled assets of the debtor recently learned to have been located in Avon, New York. Apparently, the trustee was unaware of these "assets" as they had not been listed on the debtor's schedules or disclosed at the meeting of creditors. We further understand that on September 23, 2002, the trustee sent a second letter to you further explaining his position that your stored items were not property of the bankruptcy estate and that he had no right or control over them.

It would appear that most of the difficulties you encountered in trying to obtain your property were not a result of the chapter 7 trustee's diligence, but rather involved the debtor's failure to inform its customers about its progress in the bankruptcy case and to carefully and fully identify where it had stored certain items. Although, we are unable to comment fully on your particular issue because of a lack of jurisdiction, we can say that the debtor should have kept proper books and records while in chapter 11, and it should have identified on the Schedules and Statement of Financial Affairs where assets were located, and where it kept all of its books and records. In this case, it did not. As noted earlier, the schedules do not reflect the property kept at the Avon location and the Statement of Financial Affairs do not identify this location as an additional place where records were maintained. Unfortunately, it is not uncommon for debtors to keep incomplete books and records. As a result, trustees frequently must learn of potential assets through outside sources.

We understand from the docket, your letter, and from speaking with David MacKnight that pending before the bankruptcy court is a Complaint to determine, inter alia, what property stored at the Avon location belongs to whom. To that end, although we are prohibited from providing you with legal advice, and strongly suggest that you consult with a lawyer to understand what legal rights you may have, a letter to the court specifically outlining what items you had stored with the debtor may be appropriate at this time.

With regard to your concern that the trustee failed to notify you regarding the progress of the case and to help you locate your property, our review does not indicate any deviation from applicable law and procedure. The trustee in a chapter 7 estate represents the creditor's of that estate, not clients or customers of the debtor, unless, of course, those clients are owed funds. As such, the trustee had no legal responsibility to locate the assets belonging to the debtor's customers and clients and to negotiate their return to them. I do understand, however, that early on in the case, the chapter 7 trustee made repeated requests to counsel for the debtor to provide a list of all customers who currently were storing items with the debtor. Counsel failed to provide such a list.

Concerning your comments that all parties who appear before the court are officers of that court and must conduct themselves with "honesty and candor," we couldn't agree more. To that extent we have talked with Mr. Gordon about the need to maintain the highest level of professionalism as he administers bankruptcy cases and reminded him that he and his staff must remain courteous during all exchanges with the public, even when frustrated. We also reiterated that he and his staff must respond courteously and timely either by telephone or in writing to questions posed. Mr. Gordon states that generally, it is his policy to correspond with parties via mail rather than telephone.

Finally, to the extent you disagree with the legal position taken by Mr. Gordon, you should resolve that issue(s) in court.

We appreciate your correspondence and trust that this information will be of assistance to you.

Sincerely yours,

Kathleen Dunivin Schmitt
Assistant United States Trustee

cc: The Honorable John C. Ninfo, II
Kenneth Gordon, Esquire

U.S. Department of Justice

Office of the United States Trustee
Western District of New York

100 State Street, Suite 609
Rochester, New York

(585) 263-5706
FAX (585) 263-5862

October 8, 2002

Dr. Richard Cordero, Esquire
59 Cresent Street
Brooklyn, NY 11208-1515

Re: Premier Van Lines

Dear Dr. Cordero:

I am writing to you in response to your letter to the Court dated September 27, 2002, concerning the chapter 7 trustee, Mr. Kenneth Gordon, in the above referenced case. The United States Trustee Program is a component of the Department of Justice that supervises the administration of bankruptcy cases and trustees.

As part of our investigation into this matter, we have contacted Mr. Gordon for response. Our office will contact you as information is received and reviewed.

The concerns raised in your letter are appreciated. The United States Trustee encourages active involvement by parties to promote efficient and appropriate case administration.

Please let me know if I may be of further assistance.

Very truly yours,

Kathleen Dunivin Schmitt
Assistant United States Trustee

United States Bankruptcy Court
Western District of New York
1400 UNITED STATES COURTHOUSE
ROCHESTER, NEW YORK 14614

Hon. John C. Ninfo, II
CHIEF UNITED STATES
BANKRUPTCY JUDGE

October 8, 2002

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

Re: Premier Van Lines, Inc.
Case No:. 01-20692

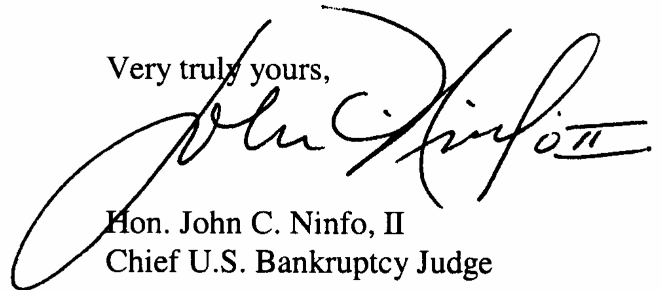
Dr. Cordero:

By copy of this letter the Court acknowledges receipt of your correspondence, dated September 27, 2002, in which you request the Court to make a determination as to whether the Chapter 7 Trustee, Ken Gordon, Esq., is satisfactorily administering the above-referenced bankruptcy estate. Such a determination, however, is not appropriate for the Court to make at this time.

The appointment of a Chapter 7 trustee is a function of the Department of Justice, Office of the United States Trustee, and the supervision of the Chapter 7 trustee remains in the province of that office. Accordingly, any concerns that you may have regarding Mr. Gordon's capacity as the Chapter 7 trustee in this case should first be addressed to Kathleen Dunivin Schmitt, Esq., Assistant United States Trustee, 100 State Street, Room 6090, Rochester, New York 14614.

I am confident that Ms. Schmitt will make thorough inquiry and assist you in reconciling this matter. Thank you for your continued patience.

Very truly yours,



Hon. John C. Ninfo, II
Chief U.S. Bankruptcy Judge

JCN/ams

cc: Kathleen Dunivin Schmitt, Asst. U.S. Trustee
Kenneth W. Gordon, Chapter 7 Trustee

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

October 1, 2002

Hon. John C. Ninfo, II
U.S. Bankruptcy Justice
100 State Street
Rochester, New York 14614

Re: Premier Van Lines, Inc.
Case No.: 01-20692
Chapter 7

Dear Judge Ninfo:

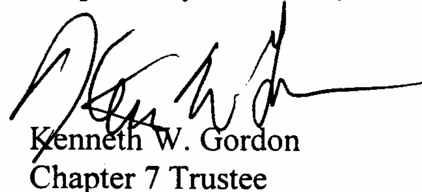
Please accept this letter as my response to the application made by Richard Cordero dated September 27, 2002 in the above-referenced matter in which he seeks my removal as Trustee. This converted Chapter 11 filing involves a corporation which provided both moving and storage services for its customers. Since conversion of this case to Chapter 7, I have undertaken significant efforts to identify assets to be liquidated for the benefit of creditors. Unfortunately, I have discovered that the assets of the corporation which remained upon conversion are insubstantial or otherwise liened in amounts exceeding the value of the assets. Accordingly, I am in the process of abandoning the remainder of the assets of the corporation and will shortly be filing a No Distribution Report.

Richard Cordero is apparently a former customer of Premier Van Lines whose possessions were stored by the company. It has been my position consistently since my appointment as Trustee in this case that the property owned by customers of Premier Van Lines and stored by it was not property of the bankruptcy estate for administration. Moreover, as the Court is aware, I have not sought to operate the corporation under Chapter 7. Accordingly, I have instructed my staff to advise former customers of Premier Van Lines that items stored with Premier Van Lines were not property of the bankruptcy estate, were not to be administered by me and could be accessed by contacting either the landlord from whom Premier Van Lines rented its facilities or the attorney's for M&T Bank who held a lien on the assets of Premier Van Lines. Mr. Cordero was so advised when he contacted my office in the early spring of 2002. In fact, my staff has received more than 20 telephone calls from Mr. Cordero and my staff has advised me that he has been belligerent in his conversations with them. I spoke myself with Mr. Cordero on at least one occasion to reemphasize

the fact that I did not have possession nor control of his assets and that he would need to seek recovery through the landlord or M&T's attorneys. I wrote to the landlord of the Jefferson Road facility in April of 2002 and later provided a copy of that letter to Mr. Cordero. Copies of my letters dated April 16, 2002 and June 10, 2002 are enclosed herewith. Mr. Cordero continued to contact my office throughout the summer of 2002 and in the face of my staff's consistent message to him that we did not control nor have possession of his assets, he became more demanding and demeaning to my staff. After a final telephone call from Mr. Cordero on September 23, 2002 during which time he became very angry at my staff, I wrote to Mr. Cordero again to advise him of my position with respect to his assets and to insist he no longer contact my office regarding reacquisition of his assets. A copy of my September 23, 2002 letter is also enclosed herewith.

I have tried to explain to Mr. Cordero that I am not his attorney and that he should seek his own legal representation if he is having difficulty reacquiring his assets. Apparently, he has chosen not to seek his own legal counsel. I believe he either fails or refuses to understand the limited role that I play as Trustee in a Chapter 7 proceeding and that poor understanding has given rise to his current application. As I will soon be issuing a No Distribution Report, this case will be closed and my duties as Trustee will come to an end. Accordingly, I do not believe that it is necessary for the Court to take any action on Mr. Cordero's application. However, should the Court desire to calendar this matter, please let me know so that I may appear in Court and answer any questions that the Court may have regarding this matter.

Respectfully submitted,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/brs
Enclosure

pc: Kathleen Dunivin Schmitt, Esq.
Richard Cordero
David MacKnight, Esq.
Michael Beyma, Esq.
Ray Stilwell, Esq.

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

September 23, 2002

Richard Cordero
59 Crescent Street
Brooklyn, New York 11208-1515

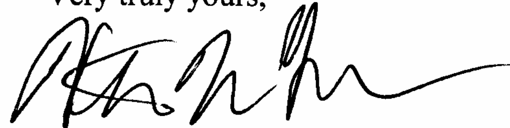
Re: Premier Van Lines, Inc.
Case No.: 01-20692
Chapter 7

Dear Mr. Cordero:

You have repeatedly contacted my office regarding the property you stored with the debtor Premier Van Lines, Inc. prior to its filing for bankruptcy. I have repeatedly advised you that I do not possess nor control any property which was stored by customers of Premier Van Lines. Assets that were stored by customers of Premier Van Lines are not property of the bankruptcy estate and I have no right nor have I asserted any control over those assets. From the latest communications I have read which have been sent to you by the attorneys for James Pfunter and M&T Bank, it appears as if your property is located at the Sackett Road warehouse in Avon, New York. I have advised all concerned in this case that you should be allowed along with any other former customer of Premier Van Lines to have access to and repossession of your assets.

Further efforts by you to acquire your assets through my office are pointless. Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again.

Very truly yours,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/brs

pc: David D. MacKnight, Esq.
Michael Beyma, Esq.
Ray Stilwell, Esq.

Lacy, Katzen, Ryen & Mittleman, LLP

DAVID D. MacKNIGHT, ESQ.
dmacknight@lacykatzen.com

December 5, 2002

Honorable John C. Ninfo, II
United States Bankruptcy Judge
100 State Street
Rochester, New York 14614

Re: Premier Van Lines, Inc.
Bankruptcy No.: B01-20692
Pfunter vs. Gordon as trustee, et al
AP No.: 02-2230

Dear Judge Ninfo:

Dr. Cordero's latest pleading certainly has cast a different light on events. When the court sets a pretrial conference, it might be helpful to have the Trustee provide a listing from the Debtor's records of whose property Debtor placed in the Henrietta location and whose property Debtor placed in the Avon property. It would also be helpful if the Trustee provided the Debtor's listing or inventory of what it received from, stored for, and released to each of its customers with property stored at the Avon property. It would probably be helpful for Dr. Cordero to provide a copy of the inventory, packing list, or receipt Debtor provided to him when it accepted his goods for storage. It would also seem appropriate for M&T Bank to provide a bill of sale listing what it sold to Champion, as well as Champion providing a schedule of what it removed from the two locations.

Absent records it seem unlikely that a pretrial will advance matters to the point that those who have stored property with Debtor can be identified, the property each customer stored can be identified, customers and their property can be reunited, and Mr. Pfunter's warehouse can be emptied.

The Granite Building – 130 East Main Street – Rochester, NY 14604-1686 – Tel. 585-454-5650 – Fax 585-454-6525
www.lacykatzen.com

Bankruptcy and Debtor Relief • Civil and Criminal Litigation • Collection & Creditor Services • Corporate Banking and Business Law
Divorce and Family Law • Employment Law • Estates, Trusts and Elder Law Services • Municipal Law
Personal Injury and Wrongful Death • Real Estate Services • Wills & Estate Planning

Dr. Cordero certainly has a point when he suggests that Debtor's management, and those who billed him for storage and insurancing his property should be able to shed light on matters.

Very truly yours,

David D. MacKnight

DDM/cc
Cc: Client
Michael Beyma, Esq.
Dr. Richard Cordero
Kenneth Gordon, Esq.
Ray Stilwell, Esq.
David Dworkin
Jefferson Henrietta Associates
United States Trustee

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

JAMES PFUNTER,

Plaintiff,

vs.

KENNETH W. GORDON, AS TRUSTEE IN BANKRUPTCY FOR PREMIER VAN LINES, INC., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. AND M&T BANK,

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN, DAVID DELANO AND JEFFERSON HENRIETTA ASSOCIATES,

Third Party Defendants

Chapter 7
Case No: 01-20692

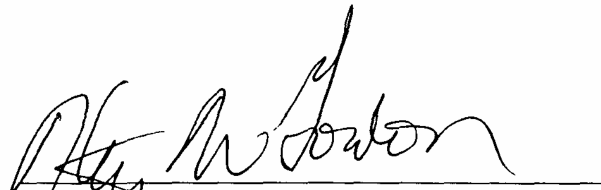
AP No.: 02-2230

NOTICE OF MOTION TO DISMISS CROSS-CLAIM AGAINST TRUSTEE IN AN ADVERSARY PROCEEDING

SIRS:

PLEASE TAKE NOTICE, that the Trustee, Kenneth W. Gordon, will move this Court at 1550 U.S. Courthouse, 100 State Street, Rochester, New York, 14614 on the 18th day of December, 2002, at 9:30 a.m. on that day, or as soon thereafter as counsel can be heard, for an Order to Dismiss pursuant to Bankruptcy Rule 7012 the Cross-Claims Against the Trustee in the above Adversary Proceeding made by Richard Cordero against Kenneth W. Gordon, Chapter 7 Trustee for Premier Van Lines, Inc. (Case No: 01-20692).

Dated: December 5, 2002



Kenneth W. Gordon
Chapter 7 Trustee
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

TO: Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614

Dr. Richard Cordero, Esq.
59 Crescent Street
Brooklyn, New York 11208-1515

Raymond Stilwell, Esq.
Attorney for Debtor
300 Linden Oaks, Suite 220
Rochester, New York 14625

David D. MacKnight, Esq.
Attorney for Plaintiff
130 East Main Street
Rochester, NY 14604-1686

Mike Beyma, Esq.
Attorney for M&T Bank and David Delano
1800 Chase Square
Rochester, New York 14604

Rochester Americans Hockey Club
Office of the President
100 Exchange Blvd.
Rochester, New York 14614

David Palmer
1829 Middle Road
Rush, New York 14543

Jefferson Henrietta Associates
415 Park Avenue
Rochester, New York 14607

David Dworkin
415 Park Avenue
Rochester, New York 14607

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PREMIER VAN LINES, INC,

Debtor.

Chapter 7

Case No: 01-20692

JAMES PFUNTER,

Plaintiff,

A.P. No.: 02-2230

vs.

KENNETH W. GORDON, AS TRUSTEE IN BANKRUPTCY FOR PREMIER VAN LINES, INC., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. and M&T BANK,

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN, DAVID DELANO and JEFFERSON HENRIETTA ASSOCIATES,

Third Party Defendants.

TRUSTEE'S AFFIRMATION IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIM

KENNETH W. GORDON affirms under penalties of perjury as follows:

1. I am the Chapter 7 Trustee appointed and designated as such in the above-referenced proceeding. The above-referenced bankruptcy case was commenced as a Chapter 11 case on March

5, 2001. The Chapter 11 proceeding was converted to Chapter 7 on December 20, 2001. I was appointed as Trustee on December 28, 2001.

2. The instant Adversary Proceeding was commenced by James Pfunter through his attorney David MacKnight to seek a declaration of the Court to determine who had the right to possess certain property in Mr. Pfunter's possession and the conditions under which delivery of such property was to be made.

3. Upon information and belief, Richard Cordero was a former customer of the debtor who stored items of personal property with the debtor. Based upon the pleadings and proceedings in this matter, it would appear as if some or all of Mr. Cordero's property was stored by debtor at a facility and on property owned by Mr. Pfunter.

4. Mr. Cordero has filed and served upon the parties an Answer to Mr. Pfunter's Complaint and a Third Party Complaint alleging Cross-Claims including Cross-Claims against me as Trustee. A copy of Mr. Cordero's Amended Answer with Cross-Claims is annexed hereto as Exhibit A. From a review of the Third Party Complaint with Cross-Claims, it would appear as if the allegations set forth in the Cross-Claims against the Trustee are identical in the two separate documents and thus a copy of the Third Party Summons and Complaint is not annexed hereto.

5. This Affirmation is made in support of a Motion to Dismiss the Cross-Claims made by Mr. Cordero against the Trustee.

6. Mr. Cordero's claims against the Trustee fall into two broad categories. First, in paragraphs 76 through 80, Mr. Cordero claims that the Trustee acted recklessly and negligently in failing to notify former customers of the debtor of the location of the stored personal property of such customers and in failing to administer such property and safeguard such property presumably as

as assets of the bankruptcy estate. Second, in paragraphs 81 through 90, Mr. Cordero complains that the Trustee has defamed him in two letters that were sent by the Trustee in connection with the bankruptcy proceeding. For the reasons set forth below, it is respectfully submitted even accepting the allegations of Mr. Cordero's claims as true, such claims are not legally sufficient and must be dismissed against the Trustee.

DEFAMATION CLAIM

7. Mr. Cordero alleges in paragraphs 36 and 37 that the Trustee sent to him a letter dated September 23, 2002 in response to Mr. Cordero's inquiries to the Trustee's office regarding the whereabouts and status of his personal property which he stored with the debtor. Mr. Cordero complains that the statements made by the Trustee in that letter were defamatory in nature. A copy of said letter was annexed to Mr. Cordero's Amended Answer with Cross-Claims and can be found near the end of Exhibit A annexed hereto.

8. Mr. Cordero alleges in paragraphs 41 and 42 that the Trustee wrote to the Court on October 1, 2002 in response to Mr. Cordero's complaint to the Court regarding the Trustee. A copy of the October 1, 2002 letter is also attached to Mr. Cordero's Amended Answer with Cross-Claims and can be found at the end of Exhibit A annexed hereto.

9. In paragraphs 81 through 90, Mr. Cordero alleges that the statements in the September 23, 2002 and October 1, 2002 letters were defamatory.

10. Assuming for the purposes of this Motion that the factual allegations set forth in Mr. Cordero's Amended Answer and Cross-Claim are true, they allege that defamatory statements were made in two letters by the Trustee which were both sent in connection with the bankruptcy proceeding in which the Trustee was appointed. Both letters directly addressed the issues raised by

Mr. Cordero and both related to matters which Mr. Cordero has alleged are involved in the administration of the bankruptcy proceeding.

11. It is well established under New York law that statements made in letters related to legal proceedings cannot form the basis of a defamation complaint unless made for the sole purpose of defamation with express malice. As the Supreme Court, Appellate Division, Third Department summarized in Grasso vs. Mathew, 164 AD2d 476, 479 (3rd Dept. 1990):

> In the context of a legal proceeding, statements by parties and their attorneys are absolutely privileged, if, by any view or under any circumstances, they are pertinent to the litigation (Martirano vs. Frost, 25 NY2d 505, 507). No action for defamation exists unless the statement is so obviously impertinent as not to admit discussion of pertinence, and so needlessly defamatory as to warrant the inference of express malice and a motivation solely to defame (supra, 508). The absolute privilege embraces anything that may possibly or palpably be relative or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability (Dachowitz vs. Kranis, 61 AD2d 783). This test of pertinency is extremely liberal (Klein vs. McGauley, 29 AD2d 418, 420) and encompasses both words and writings (Youmans vs. Smith, 153 NY 214, 219), including correspondence between litigating parties and unsolicited offers of settlement (Klein vs. McGauley, supra at 420) which is the situation here.

12. Taking each of Mr. Cordero's factual allegations in the Cross-Claims as true, he alleges simply that he was defamed in correspondence by the Trustee and that the correspondence was clearly relevant to and in the context of bankruptcy proceedings. As such, the statements made in the correspondence by the Trustee were absolutely privileged and thus no action for defamation exists.

NEGLIGENCE AND RECKLESSNESS CLAIMS

13. Mr. Cordero alleges in paragraph 19 and 21 that the Trustee advised him that the debtor's business was not being operated by the Trustee and that information about Mr. Cordero's personal

property should be obtained by either contacting the landlord in possession of the property or from the lender who held a blanket security interest on all of the debtor's assets. In paragraphs 76 through 80, Mr. Cordero complains that the Trustee failed to locate Mr. Cordero's personal property and failed to notify Mr. Cordero of the whereabouts of Mr. Corder's personal property which was stored with the debtor. Mr. Cordero complains that the Trustee negligently or recklessly performed his duties as Trustee.

14. Assuming the allegations of fact made by Mr. Cordero are true, the "duties" which Mr. Cordero complains were performed negligently or recklessly are outside of the scope of the duties enumerated in the Bankruptcy Code to be performed by a Chapter 7 Trustee. Such duties are set forth in 11 U.S.C. §704. Those duties include collecting, safe guarding and accounting for property of the estate. Those duties do not include taking possession or control of property and items which were owned by third parties and do not constitute property of the estate.

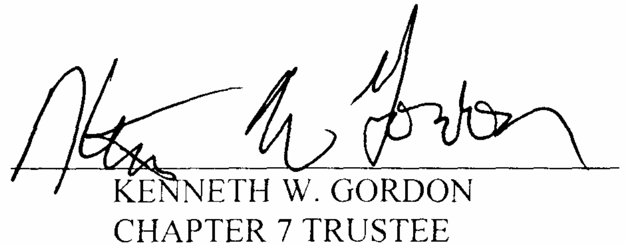
15. It is hornbook law that property held by the debtor under a bailment contract is not property of the estate. Collier's Bankruptcy §541.06 (1)(a). Under a bailment contract, the bailor or principal retains ownership of the property and if the agent or bailee files for bankruptcy, the debtor's estate does not acquire an ownership interest in the property but rather the bailor or principal is entitled to recover the property.

16. It is clear from the claims made by Mr. Cordero that he asserts his right to recover his property. There is no allegation nor is there any dispute that Mr. Cordero's personal property never became property of the debtor's estate. The relief sought by Mr. Cordero as it relates to his personal property as set forth in paragraphs 93 though 98 clearly seeks relief which is outside the scope of the duties of a Chapter 7 Trustee.

17. Thus, even if the factual allegations in the Cross-Claims are deemed true, the duties and the obligations which Mr. Cordero seeks to impose on the Trustee are outside the scope of those duties defined under 11 U.S.C §704. As such, Mr. Cordero's Cross-Claims against the Trustee for recklessness and negligence in performing the Trustee's duties failed to state a cause of action.

WHEREFORE, it is respectfully requested that the Cross-Claims of Mr. Cordero against the Trustee be dismissed and that such other and further relief be granted by the Court as is deemed just and proper.

Dated: Rochester, New York
December 5, 2002



KENNETH W. GORDON
CHAPTER 7 TRUSTEE

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

December 10, 2002

Att.: Mr. Todd Stickle, Deputy Clerk
Mr. Paul R. Warren [tel. 585-263-3148]
Clerk of the Bankruptcy Court
United States Bankruptcy Court
1220 US Court House
100 State Street
Rochester, NY 14614

Re: Request for deferment of Trustee's motion set for December 18
Adversarial proceeding, case no. 02-2230

Dear Mr. Warren,

Please find herewith my memorandum in opposition to Trustee Kenneth Gordon's motion to dismiss. It is set to be heard on Wednesday, December 18, 2002. For the reasons that I have laid out, I am requesting that its hearing be deferred until trial.

Therefore, I kindly request that you bring it at your earliest convenience to Judge Ninfo's attention so that he may be able to consider it and let me know his ruling ahead of time. If need be, you might wish to call me at (718)827-9521.

Looking forward to hearing from you, I remain,

yours sincerely,

Dr. Richard Cordero

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

December 10, 2002

Hon. Judge John C. Ninfo, II
United States Bankruptcy Court
1220 US Court House
100 State Street
Rochester, NY 14614

Re: Request for deferment of Trustee's motion set for December 18
Adversarial proceeding, case no. 02-2230

Dear Judge Ninfo,

Please find attached hereto my memorandum in opposition to Trustee Kenneth Gordon's motion to dismiss. For the reasons that I set forth therein, I am requesting that its hearing be deferred until trial.

Since the motion is set for next Wednesday, December 18, 2002, I kindly request that you let me know in advance whether you will order such deferment. If need be, you might wish to have your ruling communicated to me by phone at (718) 827-9521.

Looking forward to hearing from you, I remain,

yours sincerely,

Dr. Richard Cordero

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK, Defendants

Adversary proceeding no. 02-2230

RICHARD CORDERO, Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES, Third party defendants

CORDERO'S MEMORANDUM IN OPPOSITION TO THE TRUSTEE'S MOTION TO DISMISS CROSS-CLAIMS

Dr. Richard Cordero affirms under penalty of perjury the following:

1. Dr. Cordero, co-defendant, opposes the hearing of Trustee Kenneth Gordon' motion on December 18, 2002, on grounds of hardship, lack of urgency, non-dispositive legal grounds invoked, and need for discovery; and submits that its consideration should be deferred until trial, or in the alternative, until the time when Dr. Cordero may have to attend a pre-trial conference.

Table of Contents

I. Hardship and lack of urgency 144

II. Non-dispositive legal grounds and need for discovery 145

A. The Claim of Defamation 145

B. The Claim of Recklessness or Negligence 148

III. Order sought 149

****

I. Hardship and lack of urgency

2. Dr. Cordero lives hundreds of miles from the Court. For him to travel thereto to oppose this motion, let alone every motion that any other party may file, would be enormously costly in terms of money and time as well as severely disruptive of his normal activities given that he would have to start his trip the day before and possibly return the following day, all of which would be inordinately disproportionate to the cost and inconvenience that it would entail or the benefit that it would produce for any parties living in or near Rochester to go to court to argue their motions at this early stage of the proceedings.
3. The Court is justified in protecting Dr. Cordero from such hardship because both Rule 1001 of the Federal Rules of Bankruptcy Procedure and Rule 1 of the Federal Rules of Civil Procedure provide that their 'rules must be construed and administered "to secure the just, speedy, and inexpensive determination of every action" and proceeding.'
4. By deferring the hearing of this and any such motions until trial, when Dr. Cordero will have to travel to Rochester, the Court will be achieving the aim of making their disposition as inexpensive as possible.
5. It will also be doing so justly by allowing a party -pro se to boot- adequate time to prepare and a reasonable opportunity to present his arguments without the heightened stress of having scrambled to travel to Rochester on such a short notice, particularly at a time significantly worsened by the additional aggravating circumstances of the New York City Metropolitan Transit Authority general strike announced to begin on Monday, December 16, which is likely to turn simply getting to and from the airport or train or bus station into a hassle or even a downright chaotic experience.
6. With such deferment, the Court will not be detracting from a speedy determination of this action because regardless of its ruling, both the Trustee and Dr. Cordero will still remain parties to the action.
7. What is more, not only both of them but also other parties will continue litigating issues germane to those raised by the Trustee's motion. This point is supported by the letter to the Court of the Plaintiff's attorney, David MacKnight, Esq., dated December 5, 2002, where he points out that "Dr. Cordero's latest pleading" - the one stating cross-claims and third party complaints- "certainly has cast a different light on events." As a result, now Mr. MacKnight too

considers important to obtain additional information from the Trustee.

8. Mr. MacKnight's statements point to the need for discovery, just as Dr. Cordero does below. Hence, not only is there no urgency to consider now the dismissal of the cross-claims against the Trustee, but it would also be premature to do so before discovery.

II. Non-dispositive legal grounds and need for discovery

9. At the time of the hearing of Trustee Gordon's motion to dismiss, Dr. Cordero will argue in greater detail upon adequate research and among other things, the following:

A. The Claim of Defamation

10. Trustee Gordon argues against the cross-claim of defamation that his defense is provided by *Grasso vs. Mathew*, 164 AD2d 476, 479 (3rd Dept. 1990), which he cites as stating that, "In the context of a legal proceeding, statements by parties and their attorneys are absolutely privileged,…."
11. However, Trustee Gordon's invocation of *Grasso* is inapplicable because neither Dr. Cordero's initial statements to the Court nor the Trustee's defamatory statements in response thereto were made by 'parties to a legal proceeding.'
12. Moreover, the statements did not remain between "parties and their attorneys," but rather were published by the Trustee to the Court, to an Assistant United States Trustee, and to other people.
13. Indeed, Dr. Cordero was never a party to Debtor Premier Van Lines' bankruptcy case no. No: 01-20692.
14. What is more, the Trustee never even gave Dr. Cordero notice of that bankruptcy proceeding, not deeming him to be a party entitled thereto, let alone a creditor in such case.
15. Far from it, in response to Dr. Cordero's request for information useful to locate and retrieve his property held in storage by the Debtor, Trustee Gordon sent Dr. Cordero a copy of his letter of April 16, 2002, to Mr. David Dworkin,[1] the owner/manager of the Jefferson-Henrietta

[1] David Dworkin, manager of the Jefferson-Henrietta warehouse and of Simply Storage, tel. (585) 442-8820; officer also of LLD Enterprises, tel. (585) 244-3575; fax 716-647-3555.

warehouse[2] used by the Debtor for his storage business. In that letter, the Trustee wrote to Mr. Dworkin, "Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank." Thereby the Trustee gave Dr. Cordero notice that he considered Dr. Cordero to be just a 'renter' whose problems were none of the Trustee's concerns and were to be handled by third parties.

16. So unappealably the Trustee considered Dr. Cordero not to be any of his concern, let alone a party to the bankruptcy case, that in his cover letter to Dr. Cordero of June 10, 2002, accompanying that April 16 letter to Mr. Dworkin, the Trustee did not even care to provide either the address or phone number of M&T Bank, not even the Bank's full name, or the phone number of Mr. Dworkin, none of which were stated in the April 16 letter either. Thereby the Trustee clearly revealed his attitude that 'let non-party Dr. Cordero fend for himself;' and if the Trustee's failure to provide even that basic information to Dr. Cordero, who lives hundreds of miles away, causes him enormous waste of time, effort, money, and aggravation and further deprives him of the enjoyment of his property…'may that be the problem of non-party Dr. Cordero!'

17. To make that attitude absolutely clear, Trustee Gordon went as far as to state in his letter of September 23, 2002, to Dr. Cordero that, "I have directed my staff to receive and accept no more telephone calls from you regarding this subject," and to enjoin him 'not to contact my office again.' No doubt, the Trustee did not want to have anything to do whatsoever with non-party Dr. Cordero.

18. Likewise, on September 23, 2002, when Trustee Gordon wrote his first letter with defamatory statements and published it to people other than Dr. Cordero; on September 27, 2002, when Dr. Cordero sent to the Hon. Judge John C. Ninfo, II, his Statement of Facts and Application for a Determination; and on October 1, 2002, when Trustee Gordon sent Judge Ninfo a response to that Application, which response contained more defamatory statements, neither Dr. Cordero nor Trustee Gordon could possibly have been a party to Mr. James Pfuntner's Adversarial Proceeding, case No: 02-2230, which had not yet been even filed.

19. Even after the Adversarial Proceeding was filed on October 3, 2002, and named both Dr. Cordero and Trustee Gordon defendants, Judge Ninfo in his letter to Dr. Cordero of October 8,

[2] Thus, the Jefferson-Henrietta warehouse has the same address as Premier. It is owned by Jefferson Henrietta Associates, at 415 Park Avenue, Rochester, NY 14607; tel. (585) 442-8820; fax (585) 473-3555.

2002, declined to take action on Dr. Cordero's Application because, "Such a determination, however, is not appropriate for the Court to make at this time." Hence, Judge Ninfo referred it to Assistant United States Trustee Kathleen Dunivin Schmitt, Esq., for her, as supervisor of Trustee Gordon within the Office of the United States Trustee to "make thorough inquiry and assist you in reconciling this matter." Thereby, Judge Ninfo indicated that he did not consider Dr. Cordero's Application to be a matter for determination in the context of either the bankruptcy case or the Adversarial Proceeding.

20. Moreover, the *Grasso* case cited by Trustee Gordon states that the privilege is not applicable if "the statement is…so needlessly defamatory as to warrant the inference of express malice and a motivation solely to defame."
21. To the extent that *Grasso* might be applicable at all, Trustee Gordon's 'malice and sole defamatory motivation' can only be ascertained after adequate discovery has shown whether he made those defamatory statements in order to disparage Dr. Cordero and gain support for his view that "Accordingly, I do not believe that it is necessary for the Court [and Assistant Schmitt to whom he copied his October 1 letter] to take any action on Dr. Cordero's application" for a review of Trustee Gordon's performance and fitness as trustee.
22. Malice and defamatory motivation concern the state of mind of the defendant and a claim that puts them in issue in a succinct plaintiff's notice pleading is not suitable for dismissal before the development of the facts through discovery, and thus solely on defendant's allegation that "no action for defamation exits," that is, a 12(b)(6) motion; see the Trustee's paragraph 12 and *Pryor v. National Collegiate Athletic Association*, 288 F.3d 548, 565 (3d Cir. 2002).
23. This 'state of mind' point is particularly pertinent in this case because only discovery will make it possible to ascertain whether Trustee Gordon made false statements to both the Court and the United States Trustee in his effort to dissuade them from taking any action on Dr. Cordero's application in order to insulate himself from scrutiny and obtain the personal benefit of remaining as trustee. The finding that the Trustee, although an officer of the court and a sworn federal appointee, went as far as to make such false statements, would indicate his malice and sole defamatory motivation in his statements about Dr. Cordero.

B. The Claim of Recklessness or Negligence

24. In his defense against the cross-claim of recklessly or negligently handling the liquidation of Premier Van Lines under Chapter 7 as its trustee, Trustee Gordon alleges in paragraph 17 that "the duties and the obligations which Mr. Cordero seeks to impose on the Trustee are outside the scope of those duties defined under 11 U.S.C. §704."
25. A Chapter 7 trustee is duty bound under 11 U.S.C. §704(4) to "investigate the financial affairs of the debtor."
26. Trustee Gordon failed to perform that duty when he failed to examine, either competently or at all, the Debtor's business files, which were in Premier's office inside the Jefferson-Henrietta warehouse. Trustee Gordon had access to those files given that, according to the manager/owner of that warehouse, Mr. Dworkin, it was Trustee Gordon who gave Mr. Dworkin the key to that office.
27. Trustee Gordon had a duty to examine those files. Under §2-2.2.1 of the Trustee Manual, Chapter 7 Case Administration, "A trustee must also ensure that a debtor surrenders non-exempt property of the estate to the trustee, and that records and books are properly turned over to the trustee." One obvious use of those "records and books" is to find out where debtor's assets may be located.
28. Had the Trustee examined those business files, he would have found out that Premier, the Debtor, which operated out of the Jefferson-Henrietta warehouse, also had assets stored elsewhere, namely, in the Avon warehouse.[3] Trustee Gordon should have found those assets just as did Mr. Christopher Carter, the owner of Champion,[4] after he bought Premier's assets, which contained its business files, from their lienholder, M&T Bank[5].

---

[3] The Avon warehouse is located at 2140 Sackett Road, Avon, NY 14414. It is owned by Mr. James Pfuntner, tel. (585) 738-3105, the Plaintiff in the Adversarial Proceeding No. 02-2230.

[4] Christopher Carter, cellphone (585) 820-4645, owner of Champion Moving & Storage, located at 795 Beahan Road, Rochester, NY 14624; tel. (585) 235-3500; fax (585) 235-2105.

[5] M&T Bank is Manufacturers & Traders Trust Bank, at 255 East Avenue, Rochester, NY 14604. It holds a general lien on all Debtor Premier's assets, known at the time to be only at the Jefferson-Henrietta warehouse. These assets consisted of storage containers, each of which was packed with the property belonging presumably to a single Premier customer, and office equipment, including business files. M&T Bank sold these assets at an auction, but not the property in the storage containers, to Champion. Since the Bank officer in charge of Premier, Assistant Vice President David Delano, tel. (585) 258-8475; (800) 724-2440, had said to have seen containers labeled Cordero, he referred Dr. Cordero to Champion. Dr. Cordero requested Mr. Carter to let him know the condition of his belongings. However, Mr. Carter informed him that no storage container bore his name. Then Mr. Carter looked in Premier's

29. Had the Trustee found the Debtor's assets in the Avon warehouse, which were undoubtedly part the estate and which included storage containers, he would have found the property of Premier's clients, such as Dr. Cordero, held in those storage containers. His failure to perform that duty has decisively frustrated Dr. Cordero's effort to locate and retrieve his property and given rise to a substantial part of the issues forming the Adversarial Proceeding.
30. Therefore, the Trustee errs when he argues in paragraph 14 that his "duties do not include taking possession or control of property and items which were owned by third parties and do not constitute property of the estate." The Debtor's customers, such as Dr. Cordero, were not just third parties: They were and are "parties in interest" whom the Trustee had to protect within the scope of his duties as trustee for the Debtor.
31. Thus, 11 U.S.C. §704 sets forth as the first duty of the trustee: "(1) 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 the parties in interest."
32. By failing to locate the property held and owed by the Debtor to its clients, the Trustee also failed to find assets of the estate in the form of storage containers and maybe other types of assets. The proof of this statement is that when Champion's Mr. Carter looked for Dr. Cordero's property, he did find other assets of the Debtor in the Avon warehouse.
33. The result of this failure of Trustee Gordon to take into account "the best interest of the parties in interest" has led to these Adversarial Proceedings in which so many parties are now embroiled and has prevented the Trustee from closing the estate up to now and will continue preventing him from doing so for the foreseeable future.
34. Once more, only discovery will allow a determination of the full extent of Trustee Gordon's failure to perform his duties and his liability for the harm that he has caused to the parties that have ended up dragged into this proceeding.

III. Order sought

35. Therefore, considering that:
    a) Dr. Cordero, who lives hundreds of miles from the Court, will be put to substantial

business files and found that Premier had assets, including storage containers, in the Avon warehouse. He informed M&T Bank thereof. In turn, the attorney for M&T Bank, Michael J. Beyma, Esq., tel. (585)-258-2890, at Underberg & Kessler, LLP, 1800 Chase Square, Rochester, NY 14604, tel. (585) 258-2800, fax (585) 258-282, informed Dr. Cordero of this by letter with copy to Trustee Gordon.

expense and caused significant hardship disproportionately greater than that which might be experienced by any party living in or near Rochester were he required to attend the Court to oppose this or any similar motions;

b) The law invoked by Trustee Gordon does not support his position;

c) There are significant issues of fact that need to be ascertained through discovery;

36. Dr. Cordero respectfully requests that the Court order that:

a) In particular, the motion made by Trustee Kenneth Gordon will be heard at trial;

b) In general, motions affecting Dr. Cordero will be heard at trial;

c) In the alternative, such motions will be heard at the time that Dr. Cordero may have to travel to Rochester to attend the pre-trial conference.

37. Dr. Cordero requests that the Court award him reasonable attorney's fees, court costs, and the expense concomitant with handling such motions hundreds of miles from his home, together with such other relief as may seem just and proper.

Dated: December 10, 2002 — Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208

Dr. Richard Cordero
tel. (718) 827-9521

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

Chapter 7
Case No: 01-20692

AP No.: 02-2230

JAMES PFUNTER,

Plaintiff,

vs.

KENNETH W. GORDON, AS TRUSTEE IN BANKRUPTCY FOR PREMIER VAN LINES, INC., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. AND M&T BANK,

Defendants.

ORDER TO DISMISS CROSS-CLAIM AGAINST TRUSTEE IN AN ADVERSARY PROCEEDING

TAKE NOTICE OF THE ENTRY OF THIS ORDER ON 12/30/02
PAUL R. WARREN, CLERK
U.S. BANKRUPTCY COURT
BY: [signature]
Deputy Clerk
DATE: 12/30/02

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN, DAVID DELANO AND JEFFERSON HENRIETTA ASSOCIATES,

Third Party Defendants

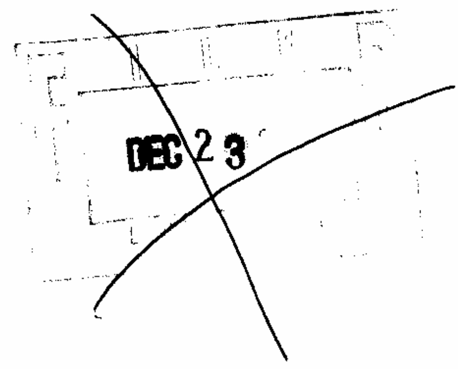
The Chapter 7 Trustee, Kenneth W. Gordon, having moved this Court by Notice of Motion dated December 5, 2002 for an Order dismissing cross-claims against the trustee and having submitted to the Court his affirmation dated December 5, 2002 in support of the motion and upon hearing the Chapter 7 Trustee, Kenneth W. Gordon, in support of the Trustee's Motion and Dr. Richard Cordero, having submitted his Affirmation with attached exhibits dated December 10, 2002 in opposition to the Trustee's motion and upon hearing Dr. Cordero in opposition to the motion and the Court having reviewed that all papers and proceedings had herein, and after due deliberation it is hereby

ORDERED, that the Trustee's Motion to Dismiss Cross-Claims Against the Trustee is granted and that Dr. Cordero's cross-claims against the Trustee are hereby dismissed.

SO ORDERED THIS _____
DAY OF ______________, 200__.
12/23/02

HONORABLE JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

DEC 2 3



UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC. — Debtor

Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK, Defendants

Adversary proceeding no. 02-2230

RICHARD CORDERO, Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES, Third party defendants

CORDERO'S NOTICE OF APPEAL from ORDER OF DISMISSAL OF HIS CROSS-CLAIMS AGAINST TRUSTEE GORDON

NOTICE OF APPEAL

Dr. Richard Cordero, co-defendant, appeals under 28 U.S.C. § 158(a) from the order of the Hon. Judge John C. Ninfo, II, granting Trustee Kenneth Gordon's motion to dismiss Dr. Cordero's cross-claims against him, which was entered in this adversary proceeding on December 30, 2002.

The names, addresses, and telephone numbers of Trustee Gordon -there is no information about any attorney representing him- and of the other parties to the Chapter 7 case and the adversary proceeding are as follows:

Kenneth W. Gordon, Esq., Appellee
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070

Premier Van Lines, Inc, Debtor,
Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800

David Palmer, Third-party defendant,
1829 Middle Road
Rush, New York 14543
last attorney known:
Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800

James Pfuntner, Plaintiff,
David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650

Rochester Americans Hockey Club, Co-defendant
Office of the President
100 Exchange Blvd.
Rochester, New York 14614
(phone number or attorney not known)

M&T Bank, Co-defendant and
David Delano, Third-party defendant,
Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890

David Dworkin and
Jefferson Henrietta Associates, Third-party defendants,
Karl S. Essler, Esq.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706

Together with this Notice, Dr. Cordero is filing attached hereto a separate Statement of Election to state that he elects the district court as the body to hear this appeal. Ten copies of that Statement and of this Notice are enclosed.

Payment of the prescribed $105 filing fee is attached hereto.

Dated: January 9, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Appellant Dr. Richard Cordero
Dr. Richard Cordero
tel. (718) 827-9521

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court.
(Added Aug. 1, 1991; and amended Mar. 1995; Oct. 1, 1997.)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor	Chapter 7 bankruptcy case no. 01-20692
JAMES PFUNTNER, Plaintiff -vs- KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK, Defendants	Adversary proceeding no. 02-2230 **CORDERO'S STATEMENT OF ELECTION**
RICHARD CORDERO, Third party plaintiff -vs- DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES, Third party defendants	

STATEMENT OF ELECTION

Dr. Richard Cordero, appellant, hereby states, pursuant to 28 U.S.C. §158(c)(1)(A), his election to have the district court hear his appeal from the order of the Hon. Judge John C. Ninfo, II, granting the motion brought by Kenneth Gordon, Esq., Trustee, to dismiss Dr. Cordero's cross-claims against him, which was entered on December 30, 2002.

Dated: January 9, 2003 Appellant Dr. Richard Cordero [signature]

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718) 827-9521

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

JAMES PFUNTER,

Plaintiff,

vs.

ROCHESTER AMERICANS
HOCKEY CLUB, INC. AND M&T BANK,

Defendants and

RICHARD CORDERO, Co-defendant/Appellant and

KENNETH W. GORDON, AS TRUSTEE IN
BANKRUPTCY FOR PREMIER VAN LINES, INC., Co-defendant/Appellee.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN,
DAVID DELANO AND JEFFERSON HENRIETTA
ASSOCIATES,

Third Party Defendants

03-CV-6021L

APPELLEE'S STATEMENT IN SUPPORT OF MOTION TO DISMISS APPEAL FROM BANKRUPTCY COURT

KENNETH W. GORDON affirms under penalties of perjury as follows:

1. I am the Chapter 7 Trustee appointed and designated as such in the above-referenced proceeding. I make this affirmation in support of my motion to dismiss Richard Cordero's appeal of the Order of Hon. John C. Ninfo, II dismissing Richard Cordero's claims against the Trustee.

2. The order appealed from was entered in the Bankruptcy Court Clerk's Office on the 30th day of December 2002. A copy of the Order is attached hereto as Exhibit A.

3. Pursuant to Bankruptcy Rule 8002, the Notice of Appeal needed to be filed with the clerk

"within 10 days of the date of the entry of the ... order ... appealed from."

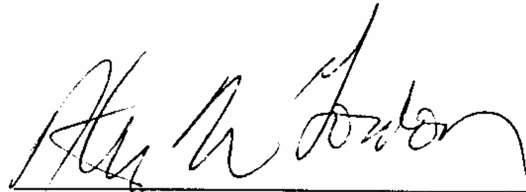
4. The ten day period to file the Notice of Appeal expired on January 9, 2003.

5. Richard Cordero's notice of appeal was filed with the clerk on January 13, 2003. A copy of the Notice of Appeal is annexed hereto as Exhibit B.

6. The Notice of Appeal was not timely filed and it is respectfully submitted that the appeal should be dismissed. Failure to file the Notice of Appeal timely constitutes a jurisdictional defect.

WHEREFORE, it is respectfully requested that appeal of Richard Cordero be dismissed and that such other and further relief be granted by the Court as is deemed just and proper.

Dated: Rochester, New York
January 15, 2003



KENNETH W. GORDON
CHAPTER 7 TRUSTEE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff — Adversary proceeding no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK

Defendants

RICHARD CORDERO,

Defendant, Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, and JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

RICHARD CORDERO

Appellant — case no. 03cv6021L

-vs-

KENNETH W. GORDON,

Appellee

CORDERO'S BRIEF IN OPPOSITION TO TRUSTEE'S MOTION TO DISMISS

Dr. Richard Cordero affirms under penalty of perjury the following:

1. Dr. Cordero, pro se appellant, opposes Appellee Kenneth Gordon' motion to dismiss because, contrary to his allegation, the notice of appeal was timely filed since at the hearing of the motion to dismiss Dr. Cordero's cross-claims against Appellee Gordon, Dr. Cordero gave notice in open court that he would appeal the bankruptcy court judge's ruling to grant the motion, which was entered by the clerk of the bankruptcy court on December 30, 2002, and the notice was mailed on January 9, 2003, and thus, within the period prescribed under Rules 8002(a) and 9006 of the Federal Rules of Bankruptcy Procedure (FRBkrP)

2. In the alternative, if the notice of appeal, though timely mailed, which is undisputed, were to be found not timely filed, the court can exercise its equitable and discretionary powers to achieve its first and ultimate objective of dispensing justice by upholding the superiority of Appellant Dr. Cordero's substantial right of to have his day in court to seek redress, as oppose to allowing Appellee Gordon take advantage of the technicality of a timely mailed-untimely filed gap to avoid having to face responsibility in court for having defamed Dr. Cordero and performed negligently and recklessly as trustee.
3. Likewise, the court should apply a balancing test to the relative impact of denying or granting the motion to dismiss, which test will reveal the gross disproportionality of the prejudice to the relative prejudice that the parties would
4. Likewise, the court should weigh through a balancing test the equities that the conduct of the parties has given rise to, which test will reveal the gross disproportionality of the relative prejudice that the parties will sustain if the motion to dismiss is granted or denied.
5. Thus, if the motion to dismiss is granted, Pro se Appellant will not only be unable to obtain redress for the wrongs that Appellee has done onto him, but will also suffer the impairment of his defense against the plaintiff in the Adversary Proceeding that has yet to begin discovery in bankruptcy court; while if the motion to dismiss is denied, Appellee Trustee Gordon will only have to defend against Dr. Cordero just as he will have to defend against similar and related claims of the plaintiff in the Adversary Proceeding below.
6. In light of a reasonable construction of the rules of procedure in question and of the equity considerations at play, the court should exercise its equitable and discretionary powers to achieve substantial justice and fairness by not allowing that the filing four days after a timely mailing may cause such disproportionate prejudice on a pro se party seeking redress from a trustee who in spite of his status already comes into court with dirty hands, and to that end the court should deny the motion to dismiss.

TABLE OF CONTENTS

I. Statement of Facts 160

II. Consistent & coherent construction of rules on notice of appeal 164

A. R.8002 allows for valid filing even if mistaken and delayed 164

B. Rules of Construction of the Rules of Procedure and the Supreme Court 165

C. The general rules for computing time applicable to notice of appeal 165
D. R.9006's broad scope of application 166
E. Period of service by mail extended by three days 166
F. A clerk can and did serve a notice subject to the three additional days rule..... 167
G. Purpose of R.9006(f) is to compensate for time lost when "served by mail".... 168
H. Entry of order can't be coherently and consistently excluded from R.9006(f). 168
I. Lost time compensated to avoid hardship due to too short a time to prepare.. 169
J. R. 8002(a) provides for notice to be deemed filed prior to when received....... 172
K. Notice to be filed in the bankruptcy court, not the district court or BAP.......... 172
L. Exceptional character of the filed-upon-receipt provision in R.8008(a).......... 173
M. Reasons for limiting scope of exceptional filed-upon-receipt provision........... 173
N. General rule for R.8002 v. exception in R.8008(a) 174

III. Equities of curing harmless error
to preserve substantial right and prevent prejudice 175

A. The court's power and the parties' rights 175
B. Giving priority to a substantial right over procedure 176
C. Weighing the relative prejudice sustained by the parties 176
D. Appellee Gordon's grab with Dirty Hands at promptitude from others 177
E. Weighing the equities of excusable neglect for achieving substantial justice ... 179

IV. Order sought 180

V. Table of Exhibits 181

****

I. Statement of Facts

7. Looking for his property in storage, Dr. Cordero found out that the storage company storing it, Premier, had gone bankrupt and was in liquidation. He was referred to its trustee, Mr. Kenneth Gordon, Esq. Dr. Cordero contacted the Trustee, since it appeared reasonable that the trustee liquidating the company that had Dr. Cordero's property under an income-generating contract would know where that property was. Far from assisting him in locating property related to a estate asset contract, Trustee Gordon did not even provide Dr. Cordero with information about

it, but rather bounced him back to one of persons that Dr. Cordero had already contact, to whom he had abandoned Premier' assets.

8. It took Dr. Cordero months to find out that his property was in another warehouse owned by Mr. James Pfuntner. However, the latter refused to release Dr. Cordero's property lest Trustee Gordon sue him for disposing of estate property, and referred Dr. Cordero back to Trustee Gordon.
9. Dr. Cordero tried to contact Trustee Gordon, but once more, as at the earlier attempt, the Trustee would not take his calls or return them or reply to his recorded message or his letter. Dr. Cordero called Trustee Gordon a third time, but he would not take his call. Far from it, he sent Dr. Cordero a letter dated September 23, 2002, in which he made false and defamatory allegations and enjoined him not to contact his office again; and sent copies of it to the lawyers of parties involved in the liquidation, including the lawyer for Mr. Pfuntner, to whom he had abandoned Premier's assets found in his warehouse, where Dr. Cordero's property was allegedly also found.
10. Dr. Cordero wrote on September 27, 2002, to the bankruptcy judge supervising the liquidation case, namely the Hon. John C. Ninfo, II. He complained that the Trustee, among other things, did not notify him of the liquidation of Premier, did not search for, let alone find, other Premier assets, such as Dr. Cordero's property under an income-generating storage contract, abandoned Premier assets found by others at Mr. Pfuntner's warehouse, enjoined him not to contact his office despite both Mr. Pfuntner' refusal to release the property to Dr. Cordero and referring him to the Trustee, and to top it off, had made false and defamatory statements about Dr. Cordero and published them to other parties. Dr. Cordero applied for the Judge to review the Trustee's performance and fitness to serve as trustee.
11. Trustee Gordon wrote a responsive letter, dated October 1, 2002, to the Judge in which he cast aspersions on Dr. Cordero's conduct, character, and competence so as to belittle him and persuade the Court as well as his supervisor, Assistant United States Trustee Kathleen Dunivin Schmitt, to whom he copied the letter, that "it is not necessary for the Court to take any action on Dr. Cordero's application" for a review of his performance and fitness as trustee.
12. Judge Ninfo referred the Application to Assistant Schmitt. Dr. Cordero sent directly to her a Rejoinder and Application for a Determination. The matter is now under review at the Executive Office for United States Trustees.
13. A few days later, Mr. Pfuntner filed the Adversary Proceedings 02-2230, in which he named

Trustee Gordon, other parties, and Dr. Cordero as defendants. Dr. Cordero cross-claimed against the Trustee for defamation and negligent and reckless performance as trustee. The Trustee moved to have those cross-claims dismissed. He invoked no better grounds than that even if he defamed Dr. Cordero, he had a privilege under New York State law that immunized him from a defamation lawsuit –is this an ethical defense for a trustee, 'I did it and you can't touch me!'?-, and that looking for Dr. Cordero's property was out of the scope of his duties.

14. Judge Ninfo granted the motion 1) even though discovery in the Adversary Proceeding had not even started; 2) despite the fact that the litigation of Mr. Pfuntner's claims as well as of other counterclaims, cross-claims, and third party claims would necessarily bring into question Trustee Gordon's performance; 3) notwithstanding the resulting impairment or preclusion while still at the starting line of Dr. Cordero's defenses to Mr. Pfuntner's claims; 4) disregarding the submission to the court by Trustee Gordon, an officer of the court and federal appointee, of false statements to obtain the personal benefit of avoiding a review of his performance and fitness as trustee; and 5) and not only without support in, but even contrary to, the facts and the evidence presented by Dr. Cordero, which went unchallenged by the Trustee himself.

15. At the hearing of the motion to dismiss and after granting it, Judge Ninfo told Dr. Cordero that he could appeal if he wanted. Dr. Cordero, who is appearing pro se and has never practiced as a lawyer, asked how he would obtain the papers necessary to file an appeal. Judge Ninfo said that Dr. Cordero would receive all the instructions later on. Dr. Cordero reasonably relied thereon since he had already received other instructions, such as the local rules and those for preparing third party summons as well as third party summons forms. Moreover, shortly after the hearing he also received the instructions for taking default judgment and for choosing among pre-trial options.

16. The order of dismissal was entered on December 30, 2002, and was mailed from Rochester to Dr. Cordero in New York City, where he lives. However, there were no instructions or forms of appeal accompanying the notice of the order. Therefore, Dr. Cordero had to call the Bankruptcy Court and asked for those instructions. Case Administrator Karen Tacy remembered that Judge Ninfo had referred to such instructions in open court at the hearing because she was there. She told Dr. Cordero that she thought that what the Judge had meant was appeal forms. Then she said that she would send them to Dr. Cordero by mail since the Bankruptcy Court neither accepts nor sends papers by fax.

17. Upon receipt of the forms, Dr. Cordero worked on them. It should be noted here that Dr.

Cordero is learning from books the intricacies of procedure under the rules applicable nationwide to all United States courts and the local rules adopted in the Western District. He checks and double checks every step and then checks once more in order to comply with all the requirements. Even so, Dr. Cordero mailed the notice of appeal within the required 10 days of the entry of the order, on Thursday, January 9, 2003. It was filed by the clerk of the bankruptcy court on Monday, January 13.

18. Thereupon, Trustee Gordon, filed a motion to dismiss the appeal alleging that the notice had been untimely filed, whereby by exploiting the technicality of the timely mailed-untimely filed gap he tries to avoid facing responsibility in court for his false and defamatory statements and his negligent and reckless performance as a trustee. Will the court let him get away with it?
19. Dr. Cordero would not. On January 27, 2003, he timely moved under Rule 8002(c)(2)for an extension of the time to file his notice of appeal. The hearing of the motion before Judge is scheduled for Wednesday, February 12, 2003.
20. In his Memorandum of Law in Opposition to Cordero's Motion to Extend Time to Appeal, Trustee Gordon unwittingly provides the motive for having handled Premier's liquidation negligently and recklessly: "As the Court is aware, the sum total of compensation to be paid to the Trustee in this case is $60.00." He had no financial incentive to do his job…nor did he have a sense of duty!
21. Yet, it is way too 'untimely' for Trustee Gordon to complain that there is too little money in his job, particularly after having abandoned all Premier assets everywhere. Under §2-2.1. of the United States Trustee Manual, he had the duty to determine that right at the beginning: "the trustee should consider whether sufficient funds will be generated to make a meaningful distribution to creditors, **prior to administering the case as an asset case;**" (emphasis added). Only in Trustee Gordon's mind is it a defense to imply that he has no higher concern than getting paid, and if the money is not there, he will disregard his duties as a trustee and will feel no sense of responsibility toward the creditors and other parties in interest…'may they fend for themselves!'
22. If the law were not sufficient to find that the notice of appeal was not only timely mailed, but also timely filed, would the equities suffice in the eyes of the District Court to use its discretion to ensure that such a person as Trustee Gordon does not wiggle himself from facing responsibility for his acts and attitudes?
23. For a broader background to the Statement of Facts, see the Appendix. [A:#]

II. Consistent & coherent construction of rules on notice of appeal

A. R.8002 allows for valid filing even if mistaken and delayed

24. FRBkrP Rule 8002 bears the heading "Time for Filing Notice of Appeal" and provides thus:

> "Rule 8002(a) Ten-day period
> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from."

25. The Rule also makes it clear that the clerk it refers to is the clerk of the bankruptcy court. Thus, the last sentence provides that:

> "Rule 8002(a)…If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted."

26. It also follows from that provision that there is nothing sacrosanct about filing with the bankruptcy clerk within ten days. The filing is not invalid even if the notice of appeal is filed with either of two wrong clerks in either of two wrong courts.

27. Nor is there a practical imperative that commands that the filing be strictly within the ten-day period. Legal uncertainty notwithstanding, parties cannot absolutely rely on checking the docket on the tenth day and seeing no entry of a notice of appeal filed by the clerk. They must still take into account the possibility that the notice may have been entered mistakenly but validly in either of two other courts. What is more, there is no time limit by which they can be absolutely certain, for the Rule does not require of any given party to discover the mistake by a certain time, or transmit the mistakenly filed notice by a certain time, or that the transmitted notice reach the bankruptcy clerk by a certain time, not even that such clerk enter the transmitted notice of appeal on the docket by a certain time. Nor can any party complain if the appellant mistakenly filed his notice with the clerk of the bankruptcy appellate panel, who mistakenly transmitted it to the clerk of the district court, who mistakenly sent it back to the panel clerk, who then transmitted it to the bankruptcy clerk, who mistakenly refused to file it because it mistakenly had the wrong heading for the bankruptcy appellate court or did not reach him within ten days. Whenever the clerk of the bankruptcy court gets it and files it, and if the parties are still checking the docket, then they will finally learn that in fact notice of appeal was given.

28. Does a provision that allows for such delays and so much legal uncertainty for unlimited time convey even the impression that filing within the ten day period is of such paramount importance for the system or the administration of justice that if an appellant, such as Dr. Cordero, timely mails the notice within the period, addressed to the right court, and the right clerk correctly files it but does so when he receives it after the period, the appellant should nevertheless be deprived of his substantial right to appeal? Of course not! That right is all the more substantial here, for it is to appeal from the dismissal of cross-claims before any discovery had taken place in the Adversary Proceeding in which they were brought. It is an appeal for the right to have one's day in court!

B. Rules of Construction of the Rules of Procedure and the Supreme Court

29. A construction of Rule 8002(a) that disregarded timely mailing in order to give precedence to filing within the ten-day period at the expense of the substantial right to appeal would not only be unjustifiable and senseless, but also transgress against the fundamental rule of construction of the Rules of both bankruptcy and civil procedure:

> "FRBkrP Rule 1001. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."
>
> "FRCivP Rule 1001. These rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

30. To construe the ten-day period rule justly one must read it together with the other rules of the FRBkrP and the FRCivP Such a reading is mandated by the Supreme Court of the United States. Precisely in a bankruptcy case, namely, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), the Court stated the following rule of statutory construction: "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." There is such a coherent and consistent scheme of Rules for the construction of what a timely notice of appeal is. It is based on the Rules' plain language.

C. The general rules for computing time applicable to notice of appeal

31. FRBkrP, Part IX is titled General Provisions, and contains rules of general applicability to the other rules. Thus, its rules are applicable to the rules of Part VIII generally, which is titled Appeals to District Court or Bankruptcy Appellate Panel, including Rule 8002 and its ten-day

period for filing a notice of appeal. Consequently, Rule 8002 is subject to the application of Rule 9006, which provides as follows:

> ”Rule 9006 Time
> (a) Computation
> In computing **any period** of time prescribed or allowed by **these rules** or by the Federal **Rules of Civil Procedure** made applicable by these rules, by the **local rules**, by **order of court**, or by **any applicable statute**, the day of the **act, event, or default** from which the designated period of time begins to run shall not be included.…” (emphasis added)

32. In fact, the Supreme Court stated so much in its landmark case in the area of timely filing under the Bankruptcy Code, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 13 S.Ct. 1489, 509 U.S. 380, 123 L.Ed.2d 74 (1993): “Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules.”

D. R.9006’s broad scope of application

33. The plain language of the Rule makes clear its intent to have its method of computing time applied broadly. The Advisory Committee too makes this clear in its Note for subdivision (a): “This rule…governs the time for acts to be done and proceedings to be had in cases under the Code and any litigation arising therein.” No doubt, the rule’s scope is all acts, including an appealable order and an appeal from it, and the rule’s purpose is to explain how to compute the time for such acts.
34. Rule 9006 further provides specific methods for computing time. They include the following:

> “Rule 9006(e) Service of process and service of any paper other than process or of notice by mail is complete on mailing.”

35. Dr. Cordero timely mailed his notice of appeal on Thursday, January 9, 2003. Therefore, pursuant to the plain language of Rule 9006(e), his service of notice of appeal was complete on that date.

E. Period of service by mail extended by three days

36. The fact that the notice of appeal arrived at the bankruptcy court and was filed by the clerk of the bankruptcy court on Monday, January 13, does not detract from the timeliness of Dr. Cordero’s filing.
37. Indeed, Rule 9006(f) can extend the time for filing the notice of appeal by three days. It

provides thus:

> "Rule 9006(f) When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail…, three days shall be added to the prescribed period."

38. a. The right here in question is that provided under Rule 8001(a) Appeal as of right. The time prescribed by Rule 8002(a) is within ten days of the order appealed from, which in the instant case began to run on December 31, the day after the order of dismissal of the cross-claims was entered in the bankruptcy court. The ten-day period ran until Thursday, January 9, which Appellee Gordon admits to be so.

39. However, the notice of entry was served by the clerk of the bankruptcy court by mail. Consequently, three days were added to the ten-day period for giving notice of appeal. That additional time made Sunday, January 12, the last day for giving such notice. For such a case, the second sentence of Rule 9006(a) provides that:

> "Rule 9006(a)…The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday,…in which event the period runs until the end of the next day which is not one of the aforementioned days."

40. Therefore, Monday, January 13, was the last day for giving notice of appeal, even by mailing it. Four days before that last day Dr. Cordero actually gave notice of appeal by mail, on Thursday, January 9, which is all the more reason to deem his notice timely filed.

F. A clerk can and did serve a notice subject to the three additional days rule

41. a. That a clerk of court can 'serve' a paper generally and that the clerk of the bankruptcy court can 'serve' a notice of entry of order is absolutely indisputable. Rule 9022 states so:

> "Rule 9022 Notice of Judgment or Order
> B. Judgment or order of bankruptcy judge.
> Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) FRCivP on the contesting parties and on other entities as the court directs"

    b. In turn, Rule 5(b) FRCivP provides, among other things, the following:

> "FRCivP Rule 5(b)(2)(B) Mailing a copy to the last known address of the

person served. Service by mail is complete on mailing."

42. a. That the clerk of the bankruptcy court gave Dr. Cordero notice of the entry of the order of dismissal of his cross-claim is undeniable. His very own rubberstamp affixed to the order reads thus:

"TAKE NOTICE OF THE ENTRY
OF THIS ORDER ON 12/30/02
PAUL R. WARREN, CLERK
U.S. BANKRUPTCY COURT

b. Therefore, the clerk served notice of the order of dismissal on Dr. Cordero. By so doing, he triggered the provisions of Rule 9006(f) and extended the prescribed ten-day period for Dr. Cordero to give notice of appeal by three additional days. This allows the court to deem Dr. Cordero's timely mailed notice of appeal to have been timely filed

G. Purpose of R.9006(f) is to compensate for time lost when "served by mail"

43. The applicability of the three additional day rule of subdivision (f) of R.9006 to the ten-day period for filing notice of appeal of R.8002(a) becomes patent in light of the purpose of the subdivision.

44. To begin with, the title of subdivision (f) is Additional time after **service by mail** (emphasis added). Likewise, that phrase in its context reads "after service of a notice or other paper …**served by mail**," (emphasis added). This plain language reasonably indicates that the purpose of subdivision (f) is to compensate a party that must do an act for the time lost because the notice or paper alerting it to the need to act was **"served by mail."** What is at stake is the time that the party should have to act within a prescribed period, not the nature of the event from which the period begins to run.

H. Entry of order can't be coherently and consistently excluded from R.9006(f)

45. Therefore, it would be incorrect to pluck out of context the phrase in Rule 9006(f) "after service of a notice or other paper" to make it mean that the Rule's application is limited to rules providing that their prescribed periods run from service of notice or paper to the exclusion of any other type of event, such as the date of entry of an order.

46. For one thing, the purpose of the broadly worded Rule 9006 is to offer a method for computing "**any** period of time prescribed or allowed", and that regardless of the nature of "the **act, event, or default** from which the designated period of time begins to run." Hence, the entry of the

order of dismissal can mark the beginning of a period subject to the three additional days rule.

47. Only arbitrarily could one exclude from the scope of subdivision (f) the prescribed period of ten days within which to appeal on the grounds that it runs from the entry of the order appealed from. To do so, one would have to disregard the fact that the Rule's plain language makes no such expressed exclusion. But if so, the Supreme Court's requirement that a statutory scheme be construed in a coherent and consistent way would demand that one remove the notice of appeal period be altogether from the scope of the entire Rule 9006, for nowhere in its text does it expressly include periods that run from orders, or the entry of an order, let alone from the entry of an appealable order, not to mention an order to dismiss. It only expressly states "**act, event, or default.**"

48. That would be unwarranted by a coherent and consistent reading of Rule 9006. When that rule wants to exclude any Rule from its scope of application, it does so expressly, as in (b)(2), (b)(3), and (c)(2). It should be noted that both (b)(3) and (c)(2) make express reference to Rule 8002 on time for filing notice of appeal. Hence, it would be neither coherent nor consistent to limit the application of Rule 9006 when it expressly provides therefor, and even exclude it altogether from its subdivision (f) when it makes no express reference to it at all. As the Supreme Court observed: "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another;" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994).

49. From this analysis flows the conclusion that Rule 9006 includes everything that it does not exclude expressly. This proposition too is consistent with the statement of the Supreme Court in Pioneer, footnote 4: "The time-computation and time-extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted."

I. Lost time compensated to avoid hardship due to too short a time to prepare

50. The reason why Rule 8002 must be within the scope of the three additional days rule of Rule 9006(f) flows from their purpose and plain language. Thus, the Advisory Committee Note for Rule 9006 (a) states that, "This rule is an adaptation of Rule 6 FRCivP" In turn, Rule 6 carries the following explanatory note that reveals its purpose:

"FRCivP Rule 6, 1985 Amendment

> Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. **Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so**. (emphasis added)
>
> The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, **parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions**. This **hardship** would be **especially acute in the case of Rules** 50(b) [Renewing Motion for Judgment After Trial; Alternative Motion for New Trial] and (c)(2) [New Trial Motion], 52(b) [on motion for the court to amend its findings], and 59(b), (d), and (e) [on motions for new trial and to alter or amend judgment], **which may not be enlarged** at the discretion of the court...." (emphasis added)

51. That explanatory note makes obvious the purpose of Rule 9006 of not penalizing parties that cannot file because of factors, such as weather conditions or non-business days, that reduce their time to do so. To that end, its subdivision (f) adds the factor that the notice on the running of a prescribed period has been served by mail, thereby shortening the party's time to prepare. To compensate for the loss time it adds three days.
52. It should now be easy to appreciate how applicable that explanatory note is, given the similarity of the factors mentioned, to Rule 8002 on notice of appeal at issue here. Thus, it expresses particular concern about rules with ten-day periods; with no possibility of enlargement at the court's discretion; yet subject to being reduced to as few as 5 working days; and concerning appeals for new trial or to alter or amend judgment.
53. In the instant case, the notice of the entry of the dismissal order and the notice of appeal had to travel between Rochester and New York City. The appeal instructions promised by the judge were not even accompanying the notice of entry when it arrived on Thursday, January 2, 2003. Yet, it was reasonable for Dr. Cordero to expect to receive these instructions, for others had been sent to him, such as the local rules and those for preparing third party summons, or were sent to him after the hearing, such as those for taking default judgment or for choosing among pre-trial options.
54. Dr. Cordero called the bankruptcy court to inquire about the instructions and forms. However, a

clerk stated that there were no such appeal instructions, only forms, and said that they would be sent by mail since the bankruptcy court neither accepts nor sends papers by fax. Obviously, they are not in a rush to receive or send anything. And for good reason too, since there are absolutely no legal grounds in the FRBkrP or in practical considerations for notice of appeal to be considered always an emergency matter that must be prepared and dashed out even within hours of the receipt of the order to be appealed from.

55. Hence, Dr. Cordero, a pro se appellant filing a notice of appeal for the first time ever, had less than 5 working days before the 10-day period ran out on Thursday, January 9, to prepare and mail the notice. No doubt this constituted the kind of acute hardship that Rule 6 intends to prevent and that Rule 9006(f) lessens by adding three days to the prescribed period. How much more of an unreasonable hardship it would have been if Dr. Cordero had had to mail the appeal forms, which in any event he did not yet have, so that they arrived back in Rochester by Thursday the 9th?

56. Consequently, at law and under the circumstances, he should be deemed to have, not only timely mailed, but also timely filed, the notice of appeal. This result derives from the plain language and purpose of the Rules. They allow for a reasonable construction that integrates them into a coherent and consistent scheme. Thus, Rule 9006(f), quoted above, can now be restated as follows:

> *"Rule 9006(f) When there is a right to appeal or requirement to file notice of appeal or undertake some proceedings within a prescribed period of 10 days after service of a notice of entry of an order dismissing cross-claims or other paper and the notice or paper other than process is served by mail by the clerk of the bankruptcy clerk from Rochester to New York City on December 30…, three days shall be added to the prescribed period ending on January 9 to extend it until January 12, which if a Sunday, the period shall be extended until Monday, January 13, so as to lessen the acute hardship of too short a time to prepare experienced by a pro se appellant and not penalize his substantial right to appeal for a new trial or judgment."*

57. If thanks to the application of Rule 9006(f)'s three additional days rule to Rule 8002(a)'s ten-day period it would have been timely for notice of appeal to be mailed by Dr. Cordero even on the 13th, then it was all the more timely for the notice to be both timely mailed four days earlier on Thursday the 9th and received and filed by the clerk of the bankruptcy court on the 13th.

J. R. 8002(a) provides for notice to be deemed filed prior to when received

58. It is totally consistent and coherent with Rule 8002(a) to deem a notice of appeal filed in the bankruptcy court on a date prior to the date of actual filing by the bankruptcy clerk. The plain language of the Rule provides therefor:

> "Rule 8002(a)…If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted."

59. Therefore, it is totally coherent and consistent with itself to construe its requirement:

> "Rule 8002(a) Ten-day period
> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from;"

coherently and consistently with the requirement:

> "Rule 9006(e) Time of service
> Service…of any paper…or of notice by mail is complete on mailing;"

to mean that the date of mailing of a notice of appeal can be deemed the date of filing by the clerk of the bankruptcy court.

K. Notice to be filed in the bankruptcy court, not the district court or BAP

60. If the rule in the FRBkrP is that service is complete on mailing and filing can be deemed to occur on a date prior to the actual filing date, then where does the notion come from that a notice must be filed strictly within the period for filing? It comes from a provision found in Rule 8008(a)

> "Rule 8008(a) Papers required or permitted to be filed with **the clerk of the district court or the clerk of the bankruptcy appellate panel** may be filed by mail addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs are deemed filed on the day of mailing." (emphasis added)

61. The phrase "by mail addressed to the clerk" means unequivocally "by mail addressed to the 'clerk of the district court or the clerk of the bankruptcy appellate panel'" This is so because, as seen in the quote above, the very sentence that contains that phrase ends thus: "except that briefs are deemed filed on the day of mailing." Those briefs are only filed with either the clerk of the

district court or the clerk of the bankruptcy appellate panel, as follows from Rule 8009 on filing appellate briefs in a district court or with a bankruptcy appellate panel.

62. Wait a moment! This filed-upon-receipt provision applies to papers filed in district court and with the bankruptcy appellate panel. The notice of appeal is neither required nor permitted to be filed with either the clerk of the district court or the clerk of the bankruptcy appellate panel, as follows from the last sentence of Rule 8002(a), quoted above, which considers it a mistake to do so. The filed-upon-receipt provision found in Rule 8008(a) is an exception!

L. Exceptional character of the filed-upon-receipt provision in R.8008(a)

63. Indeed, if it were the general rule of the FRBkrP that the timeliness of a filing was determined by whether the clerk received and docketed a notice or paper within the fixed filing time, then it would be superfluous for Rule 8008(a) to restate the obvious, for how else could it be?

64. The limited usefulness and consequent narrow scope of application of the filed-upon-receipt provision in Rule 8008(a) is underscored by the fact that it contains an exception within itself in order to allow the application of the general rule. As quoted above, it provides thus: "except that briefs are deemed filed on the day of mailing."

65. No doubt, by its own plain language, the filed-upon-receipt provision is an exception, limited in scope to the filing of only some papers and only in district court or with the bankruptcy appellate panel. As such, it must be construed restrictively and applied only when a Rule expressly calls therefor; otherwise, the exception would gut the general rule.

66. What is more, the provision's exception is further weakened by scooping out of it another exception. Thus, for Rule 8008 as a whole, rather than just that particular provision in it, the Advisory Committee Notes state that, "This rule is an adaptation of FRAppP Rule 25." Appellate Rule 25 further narrows the exception with another exception that applies the complete-on-mailing general rule to appendixes. Its Notes provide the rationale that supports the rule of general applicability: "An exception is made in the case of briefs **and appendices** in order to afford the parties the maximum time for their preparation," (emphasis added).

M. Reasons for limiting scope of exceptional filed-upon-receipt provision

67. There is the rationale for the provision's limited scope: It reduces the necessary time for adequate research and writing as well as for sound decision making. All that for no good reason at all. Hasty

filings under the duress of time constraints unjustified by law or practice only lead to rushing out appeals that are ill considered by both counsel and client and that end up clogging the judicial system. That can certainly not be the intent of the judges that administer that system or of the drafters in the Judicial Conference and Advisory Committee, let alone Congress, which would have to provide more funds to run a system overwhelmed by appeals filed just to beat the clock.

68. Moreover the exceptional filed-upon-receipt provision reduces the margin of timeliness by interjecting into the filing process an intermediary, namely the U.S. Postal Service or a commercial carrier, which following its own steps and timetable under its own internal and external constraints, finally delivers another of millions of packages to the clerk of court, who then must get to it and file it.

69. Because of its narrower margin of timeliness, the exceptional provision forces the filing party to avoid guessing and increase the safety margin by mailing the papers well ahead of time; otherwise, that party must resort to mailing them by overnight or express mail, which is much more costly and as such, contrary to the stated aim of the both FRBkrP Rule 1001 and FRCivP Rule 1 that their 'rules must be construed and administered "to secure the just, speedy, and **inexpensive** determination of every action" and proceeding;' (emphasis added).

70. Conversely, maximum time for preparing briefs and appendices allows for better research and writing as well as a more reflective process. This not only benefits the filing party, but also the court and the opposing party. No doubt, better prepared legal papers result in a greater good for the administration of the judicial system and the dispensation of justice. This greater good should be sought at every opportunity through the application of the complete-on-mailing general rule to serving and filing papers as well as by curing any harmless error in order to achieve such greater good.

N. General rule for R.8002 v. exception in R.8008(a)

71. If the exceptional filed-upon-receipt provision is to be read coherently and consistently with the rest of the Rules, then by contrast to it the general rule must be that, 'A notice or other paper required or permitted to be filed with the clerk of the **bankruptcy court** may be filed by mail addressed to the bankruptcy clerk and is deemed filed on mailing." This conclusion is coherent and consistent with both the FRBkrP –Rules 7005 and 9006(e)- and the FRCivP –Rule 5(b)(2)(B), made applicable to adversary proceedings by Rule 7005- which provide that service

is complete on mailing.

72. Hence, the exceptional filed-upon-receipt provision in Rule 8008(a) does not apply to the filing of the notice of appeal, which is provided for under Rules 8001 and 8002, which in turn are governed by the broad Rule 9006 and its computation of time rules of general applicability, as stated in Pioneer.

73. That's it! The period for filing the notice of appeal can be added three days because the notice is to be filed in the bankruptcy court. That is the general rule of the Bankruptcy Rules generally intended for application in bankruptcy court. By contrast, when a paper is to be filed in a district court or with a bankruptcy appellate panel an exceptional provision is stated expressly to require filing within the fixed prescribed period, but only in some cases.

III. Equities of curing harmless error to preserve substantial right and prevent prejudice

A. The court's power and the parties' rights

74. It is not as an exception, but rather under a rule, set out in FRBkrP Rule 9005, that the court has ample power to cure any omission. What is more, under FRCivP Rule 61 it even has the obligation to disregard any error that does not affect the parties' substantial rights:

> "FRBkrP Rule 9005 Harmless Error
>
> Rule 61 FRCivP applies in cases under the Code. When appropriate, the court may order the correction of any error or defect or the cure of any omission which does not affect substantial error."
>
> "FRCivP Rule 61. Harmless Error
>
> The court at every stage of the proceeding **must** disregard any error or defect in the proceeding which does not affect the substantial rights of the parties;" (emphasis added).

75. The substantial rights at stake in the instant case are the following:
    a. For Dr. Cordero it is the substantial right to appeal for his day in court after he, as a pro se appellant, reasonably relied on the plain language of, and substantially complied with, both the bankruptcy and civil procedure rules.
    b. For Appellee Gordon it is the right to avoid legal action by claiming that the notice of appeal was untimely filed on Monday, January 13, although timely mailed on Thursday, January 9, 2003.

B. Giving priority to a substantial right over procedure

76. The right for a person to have his day in court so that he may seek justice and the court may dispense justice constitutes a substantial right that the court must safeguard through any coherent and consistent interpretation of the law.

77. By contrast, the procedure for a court to be seized of an action so that it may resolve it is just that, a procedure. The fact that an act, such as filing, triggers a provision that confers jurisdiction for a court to hear a case does not by itself determine how the period for undertaking such act is to be computed. Therefore, the complete-on-mailing rule can be applied to the provision for giving notice of appeal.

78. Calling a filing provision jurisdictional does not confer upon it such greater weight that it should tip the scale of justice in its favor when weighed on a balancing test against the substantial right to resort to that court. To reject this proposition would mean that the mechanism for perfecting an appeal takes precedence over the right to appeal itself. This should be held unacceptable, for it inverts the importance of rights relative to the procedure to secure them by turning observance of the procedure for running the courts into the objective of the system of justice while making the people and their right to have their claims resolved by those courts subservient to the procedure. Such a result defies reason and frustrates the courts' mission of securing justice. The right to take an appeal, particularly in a case like this, where the notice was mailed timely, should have priority over the right to be informed about it.

79. While Dr. Cordero is reasonable enough not to propose that the rules of procedure be dispensed with when a litigant appears pro se, he respectfully submits that if substantive law recognizes the right of any person to assert a claim in court by himself, then the rules of procedure should be interpreted so as to allow the effective exercise of that right.

C. Weighing the relative prejudice sustained by the parties

80. On a balancing test the prejudice to be redressed or prevented is this:

    a. that sustained by Dr. Cordero through Appellee Gordon's defamatory statements and his negligent and reckless performance as trustee, further aggravated by the error of the bankruptcy court, which dismissed Dr. Cordero's cross-claims even before any discovery had taken place in the Adversary Proceeding no. 02-2230, commenced by Plaintiff James Pfuntner, in which the latter as well as other defendants, cross-

defendants, and third-party defendants will be able to take discovery of, and assert, the same or similar defenses and claims against Appellee Gordon, who will have to face them anyway, while Dr. Cordero will have to confront those parties after having been stripped at the outset of his defenses and claims.

b. that which Appellee Gordon could sustain by losing the opportunity to exploit the technicality of the timely mailed-untimely filed gap and thereby having to stand in court to face the legal consequences of his wrongdoing.

D. Appellee Gordon's grab with Dirty Hands at promptitude from others

81. For Appellee Gordon that would not be a prejudice, but rather his deserts. As long ago as in his letter of October 1, 2002 to Judge Ninfo, he stated that he would "soon be issuing a No Distribution Report"…how else could it be since he abandoned the Debtor's assets in the Jefferson–Henrietta warehouse, failed to look in the Debtor's business files to find any others elsewhere, and when third parties did find others, abandoned them too. Since the Appellee had already washed his hands of liquidating the Debtor, whether the notice of appeal was timely mailed on January 9th or timely filed on the 13th has absolutely no prejudicial impact on his work as trustee. He is attacking the filing's timeliness just for the personal benefit of escaping responsibility in court for his wrongdoing.

82. In so doing, Appellee Gordon has the cheek to demand of both Dr. Cordero and the courts that he be given notice with promptitude about whether he has to face an appeal. Yet, he has shown such contempt for promptitude when it was his duty to perform promptly on behalf of others.

83. Indeed, although Appellee Gordon was appointed Chapter 7 trustee of Debtor storage company Premier Van Lines in December 2001, and had access to all its business files, he never contacted Dr. Cordero, even though Dr. Cordero's storage contract, still in force, with the Debtor was an income-generating asset of the estate. Therefore, Appellee Gordon could not properly liquidate the Debtor without adequately disposing of that contract and, for that matter, of all similar still income-generating contracts between the Debtor and its customers.

84. Likewise, after months of searching for his stored property Dr. Cordero was referred to Trustee Gordon. He had to call the Trustee several times in the first part of May 2002 before the Trustee finally took his call, the first and only time ever that the Trustee deigned to talk to party-in-interest Dr. Cordero. Although the Trustee agreed to send Dr. Cordero a letter stating the details of the

bankruptcy and current status of the storage company, he failed to do so. Dr. Cordero had to write to Trustee Gordon to remind him of the letter and request that he send it. But not even that was enough for the Trustee to respond. So Dr. Cordero had to call him again to ask whether he would answer the letter. Trustee Gordon neither took the call nor returned it. It was only by a cover letter dated June 10, 2002, that the Trustee answered to state the obvious, that is, that he was sending attached thereto a copy of his April 16 letter to the landlord of the warehouse used by the Debtor, followed by a short, I-can't-care-less,-fend-for-yourself: "I suggest that you retain counsel to investigate what has happened to your property." For that useless response, Dr. Cordero was made to wait a month. If after working on the case for six months that was all the Trustee had to say, how much had he worked?

85. That letter, dated April 16, 2002, was more incriminating of Trustee Gordon's tardiness than responsive to Dr. Cordero's request, for it simply stated that he would "not be renting or controlling the storage units or any of the assets at the Jefferson Road location [of the warehouse used by the Debtor]. Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank [the lienholder]." It took four months since his appointment as trustee for Trustee Gordon to inform a key party in interest, the landlord in possession of the Debtor's assets, that he, the trustee, was washing his hands of those assets! What was Trustee Gordon expecting the landlord to do in the meantime with the Debtor's assets in his warehouse, since the Debtor had disappeared long ago? Did the Trustee take prompt action to secure those assets?

86. When other parties affected by the bankruptcy kept referring Dr. Cordero back to Trustee Gordon, Dr. Cordero faxed him a letter on August 26, 2002. There was no feedback. So Dr. Cordero had to call Trustee Gordon's office. But the Trustee would neither take nor return his calls, even though Dr. Cordero left messages on his answering machine and with his secretary. When the Trustee finally responded, it was almost a month later in a letter dated September 23, 2002, where he not only made defamatory statements that he published to other parties, but also issued an injunction to wash his hands of Dr. Cordero by stating this:

> "Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank

which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again."

87. Trustee Gordon has neither justification at law nor merits in equity to demand a degree of promptitude that he never showed others although he has an official duty to communicate with them in order to attain his trustee's "primary goals of ensuring the prompt, competent, and complete administration of chapter 7 cases," as provided under United States Trustee Manual, Chapter 7 Case Administration §2.1.1, adopted by the Department of Justice and its United States Trustee Program.

88. Wash he may, but to no avail, for tardiness and unresponsiveness are the dirt still stuck to Appellee Gordon's hands. He only affronts both Dr. Cordero and the district court when he comes into it with such dirty hands to ask that the appeal from the dismissal of the cross-claims against him be dismissed because notice of the appeal, instead of being filed by the clerk of the bankruptcy court on Thursday, January 9, was filed two business days later, on Monday, January 13, 2003. He is outrageous!

E. Weighing the equities of excusable neglect for achieving substantial justice

89. If Dr. Cordero, despite his good faith best efforts to comply with the Rules, made a mistake in the interpretation of those for filing a timely notice of appeal, it was only through excusable neglect. The Supreme Court has concluded that "determining what sorts of neglect will be considered 'excusable,'…is at bottom an equitable [determination], taking account of all relevant circumstances surrounding the party's omission;" .*Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498.

90. The Court identified some factors to guide this determination:

    1. "the danger of prejudice to the debtor": here the Debtor, whose assets Trustee Gordon already abandoned, would not be affected at all if the Trustee's motion to dismiss is denied and he is required to answer in court for his defamatory statements about Dr. Cordero and untruthful submissions to the court as well as his negligent and reckless performance as trustee, particularly since the Trustee will in any event have to defend against other parties in Adversary Proceeding 02-2230;
    2. "the length of the delay and its potential impact on judicial proceedings": if the notice of appeal is found subject to the application of the general rules of complete-on-mailing and three additional days under Rule 9006(e) and (f), Dr. Cordero's timely mailing was

timely filed and there was no delay; otherwise, there was a 4-day filing delay; which neither had nor will have any impact on the bankruptcy case or the Adversary Proceeding;

3. "the reason for the delay, including whether it was within the reasonable control of the movant": Dr. Cordero reasonably relied on the plain language of the Rules and their coherent and consistent construction; and just as he had received other instructions and forms, he reasonably expected to receive those for filing appeals that Judge Ninfo had said at the hearing would be sent to him with the order of dismissal; but there were no instructions and the forms were sent by mail, all of which was beyond his control;
4. "whether the movant acted in good faith": Dr. Cordero, a pro se appellant, exercised due diligence in following the Rules and as a matter of fact did mail the notice of appeal timely; if he somehow failed to meet the timely filing requirement, it was in spite of his best efforts.

91. *In re Pioneer* the Court stated that "erecting a rigid barrier against late filings attributable in any degree to the movant's negligence…is irreconcilable with our cases assigning a more flexible meaning to "excusable neglect"…[which] is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant."
92. In light of a) a consistent and coherent construction of the rules on notice of appeal, b) the court's obligation under the Rules to safeguard substantial rights by curing harmless error, and c) the equities of the situation where a pro se Appellant timely mailed the notice and an Appellee is seeking with dirty hands to fetch a technicality to escape facing the consequences of having wronged others, Dr. Cordero respectfully submits that the court should deny the motion to dismiss and allow Dr. Cordero to have his day in court, for "refusal to take such action appears to the court inconsistent with substantial justice," FRCivP Rule 61.

IV. Order sought

93. Appellant respectfully requests that the district court:
    a) find that the notice of appeal was timely given by Appellant Dr. Cordero and filed by the bankruptcy court clerk;
    b) deny Appellee Gordon's motion to dismiss the appeal;
    c) in the event of denying the motion and requiring an appellate brief, extend the period

under Rule 8009(a)(1) for Dr. Cordero to serve and file it because by the time he receives the notice of the order and considering how early thereafter he would have to mail it, he would have fewer than 10 days to research and write the brief, which he, a pro se appellant, has never written before, so that it would take him a considerable amount of time and effort to accomplish that task adequately;

d) in the event of requiring oral argument, allow Dr. Cordero to present his arguments by phone given the hardship in terms of cost and time that requiring his appearance in person would cause;

e) in the event of granting the motion to dismiss, order the clerk of the Bankruptcy Court for the Western District of New York, Paul R. Warren, to refund to Dr. Cordero the $105 fee for filing the appeal, for if the clerk knew that the notice was untimely, he could not take the money, and if he did not know, although he is a lawyer specialized in applying day in and day out the filing rules of the FRBkrP, why should Dr. Cordero, a pro se appellant, be held to a higher standard?; and order that the fee be applied toward the fee for filing an appeal to the Court of Appeals for the 2nd Circuit; and

f) award Dr. Cordero reasonable attorney's fees and the reimbursement of all expenses that he may incur concomitant with handling this motion hundreds of miles from his home, together with such other relief as may seem just and proper.

V. Table of Exhibits

1) Att. **Stilwell**'s letter of **May 30**, 2002, **to** Dr. Cordero ....[A:18]

2) Trustee **Gordon**'s letter of **June 10**, 2002, **to** Dr. **Cordero** ....[A:16]

3) Trustee **Gordon**'s letter of **April 16**, 2002, **to** Manager **Dworkin** ....[A:17]

4) Letter of Christopher **Carter**, owner of Champion Moving & Storage, of **July 30**, 2002, **to** Dr. **Cordero** ....[A:45]

5) Mr. **Carter**'s letter of **July 30**, 2002, **to** Vince Pusateri, **Vice President** of **M&T Bank**, general lienholder against Premier Van Lines ....[A:46]

6) Att. **Beyma**'s letter of **August 1**, 2002, **to** Dr. **Cordero** ....[A:352]

7) Trustee **Gordon**'s letter of **September 23**, 2002, **to** Dr. **Cordero** ....[A:13]

8) Dr. **Cordero**'s letter of **September 27**, 2002, **to** Judge **Ninfo** ....[A:7]

9) Dr. **Cordero**'s Statement of Facts and Application for a Determination of **September 27**, 2002, **to** Judge **Ninfo** .... [A:8]

10) Dr. **Cordero**'s letter of **September 27**, 2002, **to** Trustee **Gordon** .... [A:2]

11) Trustee **Gordon**'s letter of **October 1**, 2002, **to** Judge **Ninfo** and others .... [A:19]

12) Judge **Ninfo**'s order, entered on **December 30**, 2002, to **dismiss cross-claim** against Trustee Gordon .... [A:151]

Certification of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that at the same time I mailed to the District Court my brief in opposition to Appellee Kenneth Gordon's motion to dismiss my appeal from the Bankruptcy Court for the Western District of New York, I also mailed copies thereof on the following parties:

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dated: February 12, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Appellant Dr. Richard Cordero
Dr. Richard Cordero
tel. (718) 827-9521

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC.,
Debtor

Chapter 7 bankruptcy
case no. 01-20692

JAMES PFUNTNER,
Plaintiff

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK,
Defendants

Adversary proceeding
no. 02-2230

CORDERO'S DESIGNATION OF ITEMS IN THE RECORD AND STATEMENT OF ISSUES ON APPEAL

RICHARD CORDERO
Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES,
Third party defendants

Dr. Richard Cordero states under penalty of perjury as follows:

I. Designation of Items in the Record

Dr. Cordero, appellant, designates the following items as part of the record on appeal:

page of the accompanying volume of copies of the items

1. Trustee Kenneth **Gordon**'s letter of **September 23**, 2002, **to** Dr. Richard **Cordero**, with copy to Judge John C. Ninfo, II, United States Bankruptcy Judge for the Western District of New York, and others 1
2. Dr. Richard **Cordero**'s letter of **September 27**, 2002, **to** Kenneth **Gordon**, Esq., Chapter 7 Trustee 2
3. Letter of Dr. Richard **Cordero**, of **September 27**, 2002, **to** the Hon. Judge John C. **Ninfo**, II 7

4. Dr. Richard **Cordero's Statement of Facts and Application** for a Determination of **September 27**, 2002, **to** Judge John C. **Ninfo**, II 8

Table of Exhibits 11

1) Dr. Richard **Cordero** letter of **September 27**, 2002, **to** Trustee Kenneth **Gordon** 11

2) Trustee Kenneth **Gordon**'s letter of **September 23**, 2002, **to** Dr. Richard **Cordero** 13

3) Letter of David **MacKnight**, Esq., attorney for James Pfuntner, plaintiff in the Adversary Proceeding, case no. 02-2230, of **September 19**, 2002, **to** Dr. Richard **Cordero** 14

4) Dr. Richard **Cordero**'s letter of **August 26**, 2002, **to** David **MacKnight**, Esq. 15

5) Trustee Kenneth **Gordon**'s letter of **June 10**, 2002, **to** Dr. Richard **Cordero** 16

6) Trustee Kenneth **Gordon**'s letter of **April 16**, 2002, **to** David **Dworkin**, manager/owner of the Jefferson-Henrietta warehouse 17

7) Letter of Raymond **Stilwell**, Esq., attorney for Premier Van Lines, Debtor in the Chapter 7 bankruptcy case no. 01-20692, of **May 30,** 2002, **to** Dr. Richard **Cordero** 18

5. Trustee Kenneth **Gordon's letter of October 1**, 2002, to Judge John C. Ninfo, II, and others 19

6. James **Pfuntner's Summons and Complaint** of October 4, 2002, in Adversary Proceeding No: 02-2230 21

7. Letter of Judge John C. **Ninfo**, II, of **October 8**, 2002, **to** Dr. Richard **Cordero** 29

8. Letter of Kathleen Dunivin **Schmitt**, Esq., Assistant United States Trustee, of **October 8**, 2002, **to** Dr. Richard **Cordero** 30

9. Trustee Kenneth **Gordon's Answer** of **October 9**, 2002, in Adversary Proceeding no. 02-0223 31

10. Dr. Richard **Cordero**'s letter of **October 14**, 2002, **to** Judge John C. **Ninfo**, II 32

11. Letter of Dr. Richard **Cordero**, of **October 14**, 2002, **to** Assistant United Stated Trustee Kathleen Dunivin **Schmitt** 37

12. Dr. Richard **Cordero's Rejoinder** and Application for a Determination of **October 14**, 2002, **to** Assistant U.S. Trustee Kathleen Dunivin **Schmitt** 38

I. Trustee Gordon's "significant efforts" as Premier's trustee 38

a. **The facts of Trustee Gordon's performance** 39

b. Questions to assess Trustee Gordon's "significant efforts" 40

II. Whether the Trustee's statements to Court & U.S. Trustee are true 41

III. The understanding of Trustee Gordon's role 42

IV. Request for review of Trustee Gordon's performance and fitness 43

V. Table of Exhibits 45

1) Trustee Kenneth **Gordon's letter of April 16**, 2002, **to** David **Dworkin**, manager/ owner of the Jefferson-Henrietta warehouse 45

2) Letter of Raymond **Stilwell**, Esq., attorney for Premier Van Lines, Inc., Debtor in the Chapter 7 bankruptcy case no. 01-20692, of **May 30**, 2002, **to** Dr. Richard **Cordero** 46

3) Trustee Kenneth **Gordon's letter of June 10**, 2002, **to** Dr. Richard **Cordero** 47

4) Letter of Christopher **Carter**, owner of **Champion** Moving & Storage, Inc., of **July 30**, 2002, **to** Dr. Richard **Cordero** 48

5) Christopher **Carter's letter** of **July 30**, 2002, **to** Vince **Pusateri**, Vice President **of M&T Bank**, general lienholder against Premier Van Lines, Inc., debtor 49

6) Letter of David **MacKnight**, Esq., attorney for James Pfuntner, plaintiff in the Adversary Proceeding, case no. 02-2230, of **September 19**, 2002, **to** Dr. Richard **Cordero** 50

7) Trustee Kenneth **Gordon**'s letter of **September 23**, 2002, **to** Dr. Richard **Cordero** 51

8) Trustee Kenneth **Gordon**'s **Answer** in the Adversary Proceeding no. 02-2230, of **October 9**, 2002 52

13. Assistant U.S. **Trustee** Kathleen Dunivin **Schmitt**'s letter of **October 22**, 2002, **to** Dr. Richard **Cordero**, with copy to Judge John C. Ninfo, II, and to Trustee Kenneth Gordon 53

14. Dr. Richard **Cordero**'s **Answer** and Counterclaim of **November 1**, 2002, in Adversary Proceeding no. 02-0223 56

Answer 56

Statement of Counterclaims 60

Relief 61

Table of Exhibits [not included above] 62

1) Letter of Michael **Beyma**, Esq., attorney for M&T Bank, of **August 15**, 2002, **to** Dr. Richard **Cordero** 63

2) Dr. Richard **Cordero**'s letter of **October 7**, 2002, **to** David **MacKnight**, Esq., attorney for Plaintiff James Pfuntner 67

3) Dr. Richard **Cordero**'s letter of **October 17**, 2002, **to** Plaintiff James **Pfuntner**....68

15. Dr. Richard **Cordero's Amended Answer** with Cross-claims of **November 20**, 2002.... 70

Statement of Facts.... 72

Statement of Claims 78

A. David Palmer.... **78**

B. David Dworkin **79**

C. Jefferson Henrietta Associates **81**

D. David Delano.... **82**

E. M&T Bank **83**

F. Trustee Kenneth Gordon **83**

Statement of Relief.... 87

A. All cross-defendants and third-party defendants **87**

B. David Palmer, David Dworkin, and Jefferson Henrietta Associates **88**

C. Trustee Kenneth Gordon **88**

Table of Exhibits.... 90

1) Letter of David **Dworkin**, owner/manager of Jefferson Henrietta Associates, of **March 1**, 2002, **to** Dr. Richard **Cordero**....90

2) **Bill for storage** and insurance from **Jefferson Henrietta** Associates of **March 7**, 2002, **to** Dr. Richard **Cordero**....91

3) David **Dworkin**'s letter of **April 25**, 2002, **to** Dr. Richard **Cordero**....92

4) Trustee Kenneth **Gordon**'s letter of **April 16**, 2002, **to** David **Dworkin**....93

5) Trustee Kenneth **Gordon**'s letter of **June 10**, 20002, **to** Dr. Richard **Cordero**....94

6) Letter of Raymond **Stilwell**, Esq., attorney for Premier Van Lines, Debtor in the Chapter 7 bankruptcy case no. 01-20692, of **May 30**, 2002, **to** Dr. Richard **Cordero** 95

7) Letter of Michael **Beyma**, Esq., attorney for M&T Bank, of **August 28**, 2002, **to** Dr. Richard **Cordero** 96

8) Letter of David **MacKnight**, Esq., attorney for James Pfuntner,

plaintiff in the Adversary Proceeding, case no. 02-2230, of **September 19**, 2002, **to** Dr. Richard **Cordero**....97

9) Trustee Kenneth **Gordon**'s letter of **September 23**, 2002, **to** Dr. Richard **Cordero**....98

10) Trustee Kenneth **Gordon**'s letter of **October 1**, 2002, **to** Judge John C. **Ninfo**, II....99

16. Dr. Richard **Cordero**'s letter of **November 25**, 2002, **to** Carolyn S. Schwartz, United States **Trustee for Region 2**....101

17. Dr. Richard **Cordero's Appeal**, of **November 25, 2002**, against a Supervisory Opinion of Assistant U.S. Trustee Kathleen Dunivin Schmitt **to** United States **Trustee** Carolyn S. **Schwartz** with copy to Judge John C. Ninfo, II, and to Trustee Kenneth Gordon. 102

A. PROCEDURAL BACKGROUND 102

B. STANDARDS OF REVIEW AND THOROUGH INQUIRY 103

C. QUICK CONTACT CONDUCTED INSTEAD OF THOROUGH INQUIRY.....107

1. Failure to press the Trustee on Debtor's assets and files not looked up....108

2. Failure to notice that Debtor did not cease operating as a business....110

3. Failure to understand who the parties and their relations are....110

4. Failure to understand the facts of the case: assets and storage containers....111

5. Failure to grasp difference between "rental issues" and renters' property....111

6. Failure to find out why wait 4 months to instruct holder of estate assets....112

7. Failure to find out whether Trustee protected estate assets....112

8. Failure to find out why Trustee gave the estate's storage fees to M&T Bank....112

9. Failure to inquire into no distribution report and Premier as asset case....113

10. Failure to analyze instruction for Dworkin to refer customers to....113

11. Failure to visualize the blamable referral to just "M&T Bank"....113

12. Failure to recognize Premier's customers as creditors of Premier....115

13. Failure to notice the Trustee's reluctance to provide information....115

14. Failure to recognize the Trustee's duty to inform and his breach of it....115

15. Failure to recognize the Trustee's duty to assist in locating property....116

16. Failure to listen attentively and question the Trustee's words 117

17. Failure to pick up the inconsistency between Trustee's words and actions 117

18. Failure to pick up inconsistency in her own actions 117

19. Failure to pick up indicia of Trustee's need to be prompted into action 118

20. Failure to wonder 'what has Trustee Gordon been doing?!' 119

21. Failure to deal with the issues of untruthfulness and defamation 120

22. Failure to realize the inadequacy of a mere chatty supervisory 'contact' 120

D. RELIEF REQUESTED 121

E. EXHIBITS 123

18. Letter of David **MacKnight**, Esq., attorney for Plaintiff James Pfuntner, of **December 5, 2002**, **to** Judge **Ninfo** C. Ninfo, II 131

19. Notice of **Motion to Dismiss** Cross-claim against Trustee in Adversary Proceeding, of December 5, 2002 133

20. **Trustee's Affirmation** in Support of **Motion to Dismiss** Cross-claim, of December 5, 2002 135

    Defamation Claim 137

    Negligence and Recklessness Claims 138

21. Dr. Richard **Cordero**'s letter of **December 10, 2002**, **to** Judge John C. **Ninfo**, II 142

22. Dr. Richard **Cordero's Memorandum in Opposition** to the Trustee's Motion to Dismiss, of **December 10**, 2002 143

    I. Hardship and lack of urgency 143

    II. Non-dispositive legal grounds and need for discovery 145

        A. The Claim of Defamation 145

        B. The Claim of Recklessness or Negligence 148

    III. Order Sought 150

23. Order of Judge John C. **Ninfo**, II, to **Dismiss** Cross-claim against Trustee in an Adversary Proceeding, entered on **December 30**, 2002 151

24. Dr. Richard **Cordero**'s **Notice of Appeal** 153

25. **Transcript of the Hearing** of Trustee Gordon's Motion to Dismiss held on December 18, 2002 .... (to be added upon its completion by the court reporter)

II. Issues on Appeal

1. A customer –Appellant- of a storage company in liquidation –Debtor- was never contacted by its Chapter 7 trustee –Appellee-. Although third parties referred the customer, seeking to locate his stored property, to the trustee, the later referred the customer back to them, gave him no assistance, and even enjoined him not to contact him, the trustee, anymore. The customer applied to the bankruptcy judge for a review of the trustee's performance and fitness to serve; the judge referred the application to the trustee's supervisor at the U.S. Trustee. In an effort to dissuade them from reviewing him, the trustee, a lawyer, submitted to the judge, to his supervisor, and to others false and defamatory statements about the customer. Subsequently, an adversary proceeding was instituted by one of the third parties and the customer cross-claimed against the trustee, who moved to dismiss. The issue is that the court erred by applying its own notion of defamation to dismiss the defamation claim rather than apply the standard whether a reasonable person could have understood the trustee's statements as defamatory.
2. The court also erred in summarily dismissing the claim without the genuine questions of fact being determined through discovery whether:
    a) the trustee proceeded with malice and a defamatory motivation, thereby losing any privilege against a defamation claim; and
    b) the trustee submitted false statements, whereby through its indifference to the submission of falsehood the court deprived the customer-appellant for the remainder of the adversarial proceeding of the assurance of a forum that values integrity and proceeds evenhandedly, requiring truth of the appellant and not permitting the lawyer-trustee to commit perjury.
3. Likewise, the court erred in dismissing the claim of the trustee's negligent and reckless performance by reaching a conclusion not only lacking any foundation in the only evidence available, which was not even challenged by the Appellee, but also contradicted by it, and despite the fact that the remainder of the adversarial proceeding will engage in yet to begin discovery of, and be decided on, that and similar evidence.

III. Outline of the Argument

A. Appellee Gordon's Defamatory and False Statements

4. The court erred in not holding to be inapplicable as a matter of fact or pre-empted by the United States Constitution the privilege against a defamation claim provided by New York state case

law for statements made *"in the context of a legal proceeding"* which Appellee Gordon invoked to insulate himself from a defamation cross-claim despite the fact that:

a) At the time the Appellee made the defamatory statements there was no legal proceeding to which Appellant was a party, or for that matter, to which Appellee was a party since the Adversary Proceeding had not even been filed.

b) The instant case did not come to the Court under diversity of jurisdiction to be determined under New York state law, but rather was filed in federal court under a federal jurisdictional provision, to be determined under federal law, namely the Bankruptcy Code, and the Appellee, as trustee, is a federal appointee, so that federal statutory and case law should have been applied to determine whether Appellee had made defamatory and false statements.

c) The United States Constitution, particularly its First Amendment, as interpreted by the United States Supreme Court, should have been applied to pre-empt the state case law invoked because the First Amendment affords a constitutional right against defamation where, as in the instant case, both the Appellant and the Appellee are private persons, neither is a media publisher, and the defamatory statements relate to private concerns rather than public matters so that they do not warrant public exposition.

5. If the privilege provided by New York state case law was applicable at all, then its exception deprived Appellee of any protection against a defamation claim because it was with *"malice and sole defamatory motivation"* that Appellee made defamatory and false statements to the court and his supervisor at the U.S. Trustee in his letters of September 23 and October 1, 2002, in an effort to disparage Appellant-Dr. Cordero and gain support for his view that, "Accordingly, I do not believe that it is necessary for the Court [and his U.S. Trustee supervisor to whom Appellee copied his October 1 letter] to take any action on Dr. Cordero's application" for a review of Trustee-Appellee's performance and fitness to serve as trustee of Debtor-Premier van Lines.

a) The evidence that Appellant submitted to the court created genuine questions of material fact as to whether the Appellee's state of mind was infected with *"malice and sole defamatory motivation"* when making the defamatory and false statements. These questions could only be determined through discovery, not on the basis of Appellant's notice pleading and Appellee's self-serving affirmation in support of his motion to

dismiss or the hearing. Discovery was required because the questions were material, for the answer to them could have affected the outcome of the suit. Hence, the court erred in not applying the appropriate standard to decide the motion by disregarding questions of material fact and summarily dismiss the defamation cross-claim without allowing that issue to be developed through discovery.

b) The courts of the State of New York never intended to grant a privilege –which like any other privilege is meant to be construed restrictively- so as to enable an officer of the court to knowingly submit to a court defamatory and false statements with the intent to secure the personal benefit of evading review of his performance by the court and his supervisory authority and prevent his removal as trustee.

c) The proper standard for determining whether a statement is defamatory is, not the judge's personal notion of what is defamatory, but rather whether a reasonable person would understand the wording of the statement and the tenor of the writing containing it under the circumstances of its issue to expose someone to ridicule, to prejudice their reputation in their trade, business, or profession, or to injure an attorney in his or her professional capacity by imputing incompetence or lack of candor.

6. Appellant submitted to the court an application for the review of the performance and fitness to serve as trustee of trustee-Appellee, who is an officer of the court and a federal appointee. The court deemed the application serious enough to refer it to the U.S. Trustee for the trustee's supervisor there to conduct a *"thorough inquiry."* Yet, the court dismissed summarily without discovery the genuine question of material fact whether the trustee had submitted to both it and the U.S. Trustee false statements to dissuade them from reviewing his performance and fitness to serve. In so doing, the court erred by not applying the appropriate standard for deciding a motion to dismiss, for it disregarded questions of fact the answer to which could have affected the outcome of the suit.

7. By showing such indifference to the submission of falsehood, the court:

a) minimized the seriousness of perjury;

b) gave rise to the expectation of impunity that encourages the subsequent submission of more false statements;

c) failed to enforce the cannons of ethics that aim at ensuring the integrity of the judicial process with whose conduct the court is entrusted;

d) deprived Appellant of his right to a fair and evenhanded trial because while he proceeds under the constraints of the cannons of ethics, the Appellee is allowed to breach them; and

e) generally diminished the public's confidence in the court's commitment to dispensing justice based on the truth.

8. The court failed to take the evidence in the light most favorable to the party opposing the motion, the Appellant, for if it had assumed, as Appellant claimed, that the Appellee had submitted false statements to it for the personal benefit of evading review, it could not reasonably without allowing discovery merely ignore such evidence, disregard the genuine questions of fact thereby posed, and allow the Appellee to proceed without imposing sanctions for the grave act of willfully making false statements to the court.

B. Appellee Gordon's Reckless and Negligent Performance

9. The Appellant's second cross-claim was that Appellee, a bankruptcy trustee, handled recklessly and negligently and to Appellant's detriment the as yet incomplete liquidation of the estate of a Debtor-storage company which was storing Appellant's property. The evidence brought to the court's attention, which the Appellee did not even attempt to refute or explain away, includes that the Appellee, as trustee in charge of liquidating the Debtor:

1) does not "administer any items being stored by the debtor;"
2) and does not exercise "control over" but rather abandons Debtor's assets in the main place of business;
3) and does not liquidate for the benefit of creditors and other parties in interest the storage contracts between the Debtor and its customers, which are still generating income;
4) and does not demand any consideration or counterpart from the third parties to whom he abandons Debtor's assets, including storage containers and machines and office equipment as well as income generating contracts,
5) and does not inventory those assets;
6) and does not require the authorization of the Debtor's customers for the removal of their property from the Debtor's main place of business;
7) and does not monitor the removal of that property to yet another party;
8) and does not concern himself with "rental issues" of the Debtor's customers;
9) and does not "locate" the property of Debtor's customers anywhere;

10) and does not examine the "records and books" in the Debtor's business files;
11) and does not find on his own Debtor's assets elsewhere;
12) and does not convert into cash but rather abandons Debtor's assets found by others;
13) and does not have anything for the creditors except a No Distribution Report;
14) and does not "notify" Debtor's customers "of the progress of the case;"
15) and does not, as a policy, take or return phone calls;
16) and does not, as a matter of practice, promptly and usefully correspond with parties via mail;
17) and does not even write complete addresses or phone numbers of the third party to whom he refers Dr. Cordero to avoid giving him any information about his property or the Debtor;
18) and does not want even his staff "to receive and accept [any] more telephone calls from you [Dr. Cordero] regarding this subject."

10. That was the evidence available to the court and it stood unchallenged by the Appellee. Moreover, the court failed to require the Appellee to substantiate his self-serving claim –made to the court itself and to his supervisor at the U.S. Trustee to dissuade them from reviewing his performance and fitness to serve as trustee, as requested by Appellant- that "I have undertaken **significant efforts** to identify assets to be liquidated for the benefit of creditors;" (emphasis added).
11. By granting the motion to dismiss without allowing discovery of whatever else the Appellee could possibly have done as trustee that might have constituted his alleged "significant efforts," the court made a ruling not only unsupported by the evidence available, but also contradicted by it.
12. Furthermore, the court erred in not applying the appropriate standard for deciding a motion to dismiss, for without allowing discovery, it disregarded genuine questions of material fact concerning the compelling evidence of the trustee's failures in performance, particularly since due in part to such failures a third party brought against Appellee this Adversary Proceeding, case 02-2230, in the first place.
13. The court failed to take Appellant's evidence in the light most favorable to him as the party opposing the motion, for had it assumed that the Trustee had failed to perform, as Appellant claimed, and lacking any additional evidence to the contrary, it lacked any reasonable basis for assuming that the Trustee had nevertheless performed so well as to escape even the scrutiny of discovery.
14. The court also lacked foundation in law for dismissing the cross-claim of reckless and negligent performance as trustee, for the provisions of law that the Appellant brought to its attention state certain duties of trustees which the Appellee clearly failed to fulfill and gave rise to genuine

questions of fact as to whether Appellee had failed to fulfill other duties as well.

15. Moreover, the court erred in not treating Appellant evenhandedly when it dismissed summarily his reckless and negligent cross-claim against the Appellant while allowing the Plaintiff's claims, based on the same nucleus of operative facts, to stand and proceed to discovery. Thereby the court also impaired Appellant's defense against Plaintiff's claims against him and deprived him of his right to obtain compensation from Appellant on the same or similar grounds on which the Plaintiff's case may be decided.

Dated: January 23, 2003 Appellant Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718) 827-9521

Certificate of Service

I, Dr. Richard Cordero, Appellant, hereby certify that on January 24, 2003, I served on the following parties the Designation of Items for the Record and Statement of Issues to perfect the appeal from the order of dismissal of my cross-claims against Kenneth Gordon, Esq., Appellee.

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706

Dated: January 25, 2003 Appellant Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718) 827-9521

Blank

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

February 25, 2003

Honorable David G. Larimer
United States District Court
1360 U.S. Courthouse
100 State Street
Rochester, New York 14614

RE: Motion to Dismiss Appeal
Cordero v. Gordon
03-CV-6021L

Dear Judge Larimer:

Enclosed please find my prior brief to Bankruptcy Court regarding the untimeliness of the Notice of Appeal and the Order Denying Dr. Cordero's Motion to Extend Time. I submit the enclosed regarding my pending motion to dismiss Dr. Cordero's appeal.

Respectfully submitted,

Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem
Enclosures

p.c. Dr. Richard Cordero

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD CORDERO,

Appellant,

DECISION AND ORDER

v.

03-CV-6021L

KENNETH W. GORDON, ESQ.,

Appellee.

Richard Cordero ("Cordero") appeals from an order of United States Bankruptcy Judge John C. Ninfo, II, entered December 30, 2002. Cordero filed a notice of appeal on January 13, 2003.

The Trustee-Appellee moved to dismiss the appeal by Cordero on the grounds that it is untimely, having been filed more than ten days after entry of the order appealed from (Dkt. #2). Appellant, Cordero, submitted a brief in opposition to the motion to dismiss (Dkt. #6).

The motion to dismiss is granted. Rule 8002(a) of the Federal Rules of Bankruptcy Procedure provides that a "notice of appeal shall be filed with the clerk within 10 days of the date of entry of the judgment, order, or decree appealed from." Cordero's notice of appeal was therefore filed three days too late.

There are no other provisions in the Bankruptcy Rules that will excuse this untimeliness. Rule 8002(c) provides that "[t]he *bankruptcy* judge may extend the time for filing the notice of appeal" in certain circumstances (emphasis added), but it gives the district court no power to extend the ten-day period of subsection (a). *See In re Bond*, 254 F.3d 669, 675 n. 3 (7th Cir. 2001) (even if appellant had requested extension of time from district court, she would have been in

#7

error, since Rule 8002(c) only allows the bankruptcy court to grant extensions of time for filing notice of appeal). In addition, Cordero did not move for an extension in the bankruptcy court within the time for doing so under subsection (c), so that provision could not apply in any event.

Rule 9006, dealing with computation of prescribed time periods, also does not help Cordero. First, although there were four weekend days and one federal holiday (New Year's Day) in the period between the entry of Judge Ninfo's order and the time that Cordero filed his notice of appeal, those days were not excluded from the ten-day period of Rule 8002(a). Rule 9006(a) states that Saturdays, Sundays, and legal holidays are excluded from computation only "[w]hen the period of time prescribed or allowed is less than 8 days." Since Rule 8002(a) sets forth a ten-day period, this provision of Rule 9006(a) is inapplicable.[1] *Williams v. EMC Mortgage Corp.*, 216 F.3d 1295, 1297 (11th Cir. 2000).

Rule 9006(b) also provides for enlargement of prescribed time periods in certain circumstances, but it expressly states that "[t]he court may enlarge the time for taking action under Rule[] ... 8002 ... only to the extent and under the conditions stated in [that] rule[]." As stated, Cordero failed to meet the conditions for obtaining an extension of time under Rule 8002.

Subsection (f) of Rule 9006 provides for an automatic three-day extension in certain cases, but that provision applies only when a time period begins running from the date of service of an order or judgment. The ten-day period in Rule 8002(a) for appealing an order of the bankruptcy court is not such a period, however, since it begins to run from the time of *entry* of the judgment, *not* service. *See In re Arbuckle*, 988 F.2d 29, 31 (5th Cir. 1993).

Finally, the fact that Cordero may have mailed the notice of appeal before the ten days had

---

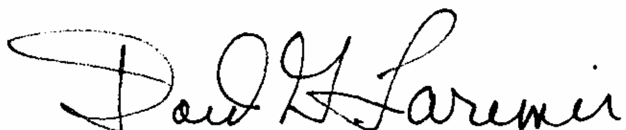
[1]I also note that Rule 9006(a) states that if the last day of a prescribed time period falls on a Saturday, a Sunday, or a legal holiday, "the period runs until the end of the next day which is not one of the aforementioned days." Here, the ten-day period of Rule 8002(a) expired on Tuesday, January 10, which was not a holiday.

expired is inconsequential. "[A] notice of appeal is filed as of the date it is actually received [by the court], not as of the date it is mailed." *Id.* (quoting *Matter of Robinson*, 640 F.2d 737, 738 (5th Cir. 1981)). Cordero's notice of appeal was received and filed by the court thirteen days after the entry of the bankruptcy court's order, and it is therefore untimely.

CONCLUSION

The Trustee's motion to dismiss the appeal (Docket #2) is granted, and the appeal is dismissed.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 12, 2003.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff — Adversary proceeding no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee for Premier Van Lines, Inc., ROCHESTER AMERICANS HOCKEY CLUB, INC., M&T BANK, and RICHARD CORDERO,

Defendants

RICHARD CORDERO,

Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, and JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

RICHARD CORDERO, Appellant — case no. 03cv6021L

-vs-

KENNETH W. GORDON, Appellee

NOTICE OF MOTION FOR REHEARING OF GRANT OF TRUSTEE'S MOTION TO DISMISS NOTICE OF APPEAL

Madam or Sir,

PLEASE TAKE NOTICE, that Dr. Richard Cordero, pro se appellant, will move this Court at 1550 United States Courthouse on 100 State Street, Rochester, New York, 14614, at ______on ________________, 2003, pursuant to Rules 8015 and 9026 of the Federal Rules of Bankruptcy Procedure for a rehearing concerning its grant of Trustee Kenneth Gordon's motion to dismiss Dr. Cordero's appeal from the bankruptcy court's dismissal of the cross-claims against the Trustee.

Dated: March 20, 2003

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718) 827-9521

Affirmation of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that I have mailed to the following parties a copy of my notice of motion for a rehearing by the District Court concerning its grant of Trustee Kenneth Gordon's motion to dismiss my appeal from the bankruptcy court's dismissal of my cross-claims against him:

Mr. David Palmer
1829 Middle Road
Rush, New York 14543

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dr. Richard Cordero

Dated: March 20, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718) 827-9521

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff — Adversary proceeding no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee for Premier Van Lines, Inc., ROCHESTER AMERICANS HOCKEY CLUB, INC., M&T BANK, and RICHARD CORDERO,

Defendants

RICHARD CORDERO,

Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, and JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

RICHARD CORDERO, Appellant — case no. 03cv6021L

-vs-

KENNETH W. GORDON, Appellee

CORDERO'S BRIEF IN SUPPORT OF MOTION FOR REHEARING OF GRANT OF TRUSTEE'S MOTION TO DISMISS APPEAL

Dr. Richard Cordero affirms under penalty of perjury the following:

1. Dr. Cordero, pro se appellant, moves under Rules 8015 of the Federal Rules of Bankruptcy Procedure (FRBkrP) for a rehearing of the District Court's grant of Appellee Kenneth Gordon' motion to dismiss his appeal from the bankruptcy court's dismissal of the cross-claims against the Trustee on grounds that the District Court failed to take into account material factual, legal, and equitable issues raised in Dr. Cordero's brief in opposition dated February 12, 2003.

2. Dr. Cordero also invokes FRBkrP Rule 9026 Objections Unnecessary, which makes applicable Rule 46 of the Federal Rules of Civil Procedure –FRCivP- so as to "make[ ] known to the court the action which [Dr. Cordero] desires the court to take or [his] objection to the action of the court and the grounds therefor."

3. The District Court failed to consider, let alone exercise, its equitable and discretionary powers to achieve its first and ultimate objective of dispensing justice by upholding the superiority of Appellant Dr. Cordero's substantial right to have his day in court to seek redress, as oppose to allowing Appellee Gordon take advantage of the technicality of a timely mailed-untimely filed gap to avoid having to face responsibility in court for having defamed Dr. Cordero and performed negligently and recklessly as trustee.

4. In so doing, the District Court also failed to give any weight to the fact that Dr. Cordero is a pro se litigant and that toward such class of litigants it has a duty to interpret procedural rules so as to make effective in practice the right to appear in court.

5. The District Court did not give any consideration to the statement of the Supreme Court in its landmark case in the area of timely filing under the Bankruptcy Code, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 13 S.Ct. 1489, 509 U.S. 380, 123 L.Ed.2d 74 (1993), that "Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules."

6. Nor did it consider the Supreme Court in another bankruptcy case, namely, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), where the Court stated the rule of statutory construction that "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."

7. Had the District Court considered these statements, it could have found that the Bankruptcy Code does have a scheme for computation of time which is based on the general applicability of Rule 9006(e) and (f) to all other time provisions, including Rule 8002. Such a comprehensive scheme, as laid out in pages 7 et seq. of Dr. Cordero's brief in opposition, cannot reasonably be defeated by plucking out of Rule 9006(f) the phrase "a prescribed period after service of a notice" to have it mean that it applies only to provisions concerning time with

reference to service rather than to filing. Had the Code and the Rules wanted to make that distinction, it would have done so explicitly, as it did in the particular case of Rule 8008(a).

8. Moreover, the meaningful phrase of Rule 9006(f) is not just "a prescribed period after service of a notice," but rather it must be completed with its phrase "the notice or paper…**is served by mail.**" When both phrases are read as part of a whole, the meaning of the Rule becomes evident: It is intended to compensate for time wasted while the notice or paper is in transit in the mail. Thus, if the notice or paper is delivered by hand, there is no need for the three additional days and the Rule does not apply. By the same token, those that cannot file papers by hand because, as Dr. Cordero, live hundreds of miles away from the filing office, should not be penalized and forced to rush the preparation of their papers and scramble to mail them by costly express mail.

9. The District Court also preferred a mechanical application of rules rather than a just one that is not only intended to secure the ultimate objective of the courts, which is to dispense justice, but that is also mandated by FRBkrP Rule 1001 itself, which provides: "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."

10. It can hardly be just to deny his day in court to

1) a pro se litigant,
2) who made such a good faith effort to comply with the rules that he did mail the notice of appeal timely,
3) after making an enormous effort to learn and reasonably construe the applicable Rules,
4) in order to appeal from the baffling dismissal by the bankruptcy court of his cross-claims even before any disclosure or discovery whatsoever had taken place,
5) just as the court ignored the false statements that the Trustee submitted to it in an effort to avoid a review of his performance and fitness to serve as trustee for the Debtor in this Adversary Proceeding,
6) while the court allows other parties to assert the same or similar claims and defenses

7) in the context of this baffling case where the court has required only Dr. Cordero to take steps toward discovery, to wit, the inspection of his property, but not even from the Plaintiff, who would reasonably be expected to establish his claims by taking steps toward the same discovery.

11. Indeed, the pertinence to this motion of this issue of the inspection of Dr. Cordero's property and the circumstance surrounding it becomes apparent in Dr. Cordero's accompanying motion for a rehearing of the District Court's adoption of the bankruptcy court's recommendation to deny his application for default judgment against Mr. David Palmer. These two motions read together provide a picture marred with blotches of troubling questions. They warrant that the claims and applications put forward by Dr. Cordero be allowed to come to court so that some answers, and perhaps some justice, may emerge from this case.

Relief sought

12. Therefore, Dr. Cordero respectfully requests that the District Court:

1) take notice of his objection to the narrow grounds on which it granted Trustee Gordon's motion to dismiss his appeal from the bankruptcy court's order dismissing his cross-claims against the Trustee;

2) take into consideration the broader equitable, factual, and legal aspects of his brief in opposition to such motion;

3) vacate its order granting that motion and allow the appeal to go forward;

4) in the event of denying this motion, certify for appeal to the Court of Appeals for the Second Circuit the issue of the applicability of Rule 9006(e) and (f) to Rule 8002 and the equitable and factual grounds raised in support of allowing Dr. Cordero to bring his cross-claims to court on appeal.

Dated: March 20, 2003

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718) 827-9521

Affirmation of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that I have mailed to the following parties a copy of my notice of motion for a rehearing by the District Court concerning its grant of Trustee Kenneth Gordon's motion to dismiss my appeal from the bankruptcy court's dismissal of my cross-claims against him:

Mr. David Palmer
1829 Middle Road
Rush, New York 14543

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dated: March 20, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718) 827-9521

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

March 24, 2003

Honorable David G. Larimer
United States District Court
1360 U.S. Courthouse
100 State Street
Rochester, New York 14614

RE: Notice of Motion for Rehearing of Grant
of Trustee's Motion to Dismiss Appeal
Cordero v. Gordon
03-CV-6021L
Premier Van Lines, Inc.
Case No: 01-20692

Dear Judge Larimer:

Please be advised that I received Dr. Cordero's Motion for Rehearing with respect to the above-referenced matter and will rely on my previous submission.

Respectfully submitted,

Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem

p.c. Dr. Richard Cordero

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED

03 MAR 27 PM 4:25

U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER

RICHARD CORDERO,

Appellant,

DECISION AND ORDER

v.

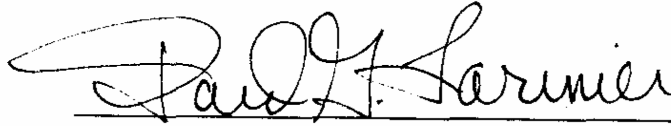
03-CV-6021L

KENNETH W. GORDON, ESQ.,

Appellee.

Richard Cordero moves for a rehearing or reconsideration of this Court's Decision and Order entered March 12, 2003 (Dkt. #7). The motion is in all respects denied.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 27, 2003.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff
-vs-
KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK, Defendants

Adversary proceeding no. 02-2230

RICHARD CORDERO, Third party plaintiff
-vs-
DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES, Third party defendants

NOTICE OF MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

Madam or Sir,

PLEASE TAKE NOTICE, that Dr. Richard Cordero will move this Court at the United States Courthouse on 100 State Street, Rochester, New York, 14614, at 9:30 a.m. on February 12, 2003, or as soon thereafter as he can be heard, pursuant to Rule 8002(c)(2) of the Federal Rules of Bankruptcy Procedure for an extension of the time for filing a notice to appeal from the order of dismissal, entered on December 30, 2002, of his cross-claims against Kenneth Gordon, Trustee, in Adversary Proceeding no. 02-2230

Dated: January 27, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718) 827-9521

Certificate of Service

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dated: January 27, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718) 827-9521

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC.,
Debtor

Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER,
Plaintiff

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK,
Defendants

Adversary proceeding no. 02-2230

RICHARD CORDERO,
Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES,
Third party defendants

CORDERO'S AFFIRMATION IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

Dr. Richard Cordero affirms under penalties of perjury as follows:

1. Dr. Cordero mailed to the Bankruptcy Court on Thursday, January 9, 2003, a notice of appeal from the order of dismissal, entered on December 30, 2002, of his cross-claims against Kenneth Gordon, Trustee, in Adversary Proceeding no. 02-2230. Thus, the notice was timely since it was mailed within the ten-day period prescribed under Rule 8002(a) of the Federal Rules of Bankruptcy Procedure (FRBkrP).
2. The Appellee, Trustee Kenneth Gordon, acknowledges that the order to dismiss the cross-claims was entered in the Bankruptcy Court on December 30, 2002, but has moved to dismiss the appeal as untimely alleging that '[p]ursuant to Bankruptcy Rule 8002, the Notice of Appeal needed to be filed with the clerk "within 10 days of the date of the entry of the…order… appealed from,'" which "period…expired on January 9, 2003," but "the notice of appeal was

filed with the clerk on January 13, 2003;" (Trustee Gordon's motion to dismiss, para. 2-5)

3. Dr. Cordero affirms, for the reasons stated below, that his notice of appeal was timely. However, if in spite of his best effort to timely give such notice and his good faith interpretation of the applicable Bankruptcy Rules for so doing, the notice was nevertheless untimely, it was due to excusable neglect. Therefore, he requests an extension of the time for filing and invokes therefore the provisions of FRBkrP Rule 8002(c)(2), which reads in pertinent part as follows:

> "Rule 8002(c)(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect."

4. Since 20 days after the expiration of the time for filing the notice on January 9, have not gone by, this motion is timely.

Table of Contents

A. Notice to be filed with Bankruptcy, not District, court clerk 215
B. No rush for filing either justified or possible 219
C. Curing harmless error to preserve substantial right of appeal 220
D. General mailbox vs. exceptional receipt-based filing rule 221
E. Appellee Gordon' seeks with Dirty Hands promptness 222
F. Order sought 224
G. Table of Exhibits 224

****

A. Notice to be filed with Bankruptcy, not District, court clerk

5. Rule 8002 makes it clear that the notice of appeal has to be filed with the clerk of the bankruptcy court. Thus, the last sentence of Rule 8002(a) provides that:

> "Rule 8002(a)…If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on

> which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted."

6. Rule 9006 provides the way of computing time prescribed or allowed by the Federal Rules of Bankruptcy Procedure. Thus, it is applicable to the rules of Part VIII generally, including Rule 8002 on filing the notice of appeal. Subdivision (e) of Rule 9006 states as follows:

> "Rule 9006(e) Service of process and service of any paper other than process or of notice by mail is complete on mailing."

7. Dr. Cordero mailed his notice of appeal on Thursday, January 9, 2003. Therefore, under Rule 9006(e), his service of notice of appeal was complete on that date.
8. The fact that the notice of appeal arrived at the Bankruptcy Court and was filed by the clerk of the Bankruptcy Court on Monday, January 13, does not detract from the timeliness of the filing by Dr. Cordero.
9. a. It is Rule 8008(a) that states that filing is timely when the papers are received rather than when they are mailed. However, by its own explicit terms, that rule applies to filings with the district court or the bankruptcy appellate panel, whereas the notice of appeal is required to be filed with the clerk of the bankruptcy court. The rule's own wording is clear on this point.

> "Rule 8008(a) Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs are deemed filed on the day of mailing."

b. The notice of appeal is neither required nor permitted to be filed with either the clerk of the district court or the clerk of the bankruptcy panel, as follows from the last sentence of Rule 8002(a), quoted in paragraph 5 above, which considers it a mistake to do so.

c. The phrase "by mail addressed to the clerk" means unequivocally "by mail addressed to the 'clerk of the district court or the clerk of the bankruptcy appellate panel'" This is so because, as seen in the quote above, the very sentence that contains that phrase ends thus: "except that briefs are deemed filed on the day of mailing." Those briefs are only filed with either the clerk of the district court or the clerk of the bankruptcy appellate panel, as follows from Rule 8009 on filing appellate briefs with the district court or the bankruptcy appellate panel.

d. Therefore, Rule 8008(a) does not apply to the filing of the notice of appeal, which instead is governed by Rules 8001 and 8002, both of which are subject to the general provisions for computation of time of Rule 9006, under which "notice by mail is complete on mailing," as was Dr. Cordero's notice of appeal, mailed on January 9.

10. What is more, Rule 9006(f) can extend the time for filing the notice of appeal by three days. It provides thus:

> "Rule 9006(f) When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail…, three days shall be added to the prescribed period."

11. a. The right here in question is that provided under Rule 8001(a) Appeal as of right. The time prescribed is 10 days, which in the instant case began to run on December 31, the day after the order of dismissal of the cross-claims was entered. The ten-day period ran until Thursday, January 9, which Appellee Gordon admits to be so. Since that notice of entry was served by the clerk of the bankruptcy court by mail, three days were added to the ten-day period for giving notice of appeal. That additional time made Sunday, January 12, the last day for giving such notice. However, the second sentence of Rule 9006(a) provides that:

> "Rule 9006(a)…The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday,…in which event the period runs until the end of the next day which is not one of the aforementioned days."

b. Therefore, Monday, January 13, was the last day for giving notice of appeal, even by mailing it; that is four days after Dr. Cordero actually gave notice of appeal by mail, on Thursday, January 9.

12. That a clerk of court can 'serve' a paper generally and that the clerk of the bankruptcy court can 'serve' a notice of entry of order is absolutely indisputable. Rule 9022 states so:

> "Rule 9022 Notice of Judgment or Order
> b. Judgment or order of bankruptcy judge.
> Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) F.R.Civ.P. on the contesting parties and on other entities as the court directs"

In turn, Rule 5(b) FRCivP provides, among other things, the following:

> FRCivP "Rule 5(b)(2)(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing."

13. a. That the clerk of the bankruptcy court gave Dr. Cordero 'notice' of the entry of the order of dismissal of his cross-claim is undeniable. His very own rubberstamp affixed to the order reads thus:

"TAKE NOTICE OF THE ENTRY
OF THIS ORDER ON 12/30/02
PAUL R. WARREN, CLERK
U.S. BANKRUPTCY COURT

b. Therefore, the clerk served notice of the order of dismissal on Dr. Cordero. By so doing, he triggered the provisions of Rule 9006(f) Additional time after service by mail.

14. That Rule, quoted in paragraph 10 above, can now be restated as follows:

> "Rule 9006(f) When there is a right *to appeal* or requirement to *give notice of appeal* or undertake some proceedings within a prescribed period *of 10 days* after service of a notice *of entry of an order dismissing claims* or other paper and the notice or paper other than process is served by mail *by the clerk of the bankruptcy clerk on December 30…*, three days shall be added to the prescribed period *ending on January 9 to extend it until January 12, which if a Sunday, the period shall be extended until Monday, January 13."*

15. It follows that if it would have been timely for notice of appeal to be given by Dr. Cordero, even by mail, on the 13th, then it was all the more so timely for the notice to be both received and filed by the clerk of the bankruptcy court on that day.

16. The fact that Bankruptcy Clerk Paul R. Warren did file Dr. Cordero's notice of appeal on that day and bill his credit card for the filing fee of $105 is evidence that he and his staff deemed the notice to have been timely given.

17. This was the only reasonable interpretation. Indeed, Clerk Warren mailed the notice of dismissal on Monday, December 30 from Rochester. It arrived in New York City, hundreds of miles away, on Thursday, January 2. Had Dr. Cordero been required to file it so that it was actually received back in Rochester by January 9, he would have had to mail it on Monday the 6th so that it could be safely assumed that it would arrive in Rochester by Thursday the 9th. That would have reduced the time for preparing all the notice of appeal forms to less than two weekdays…right in the period of New Year holidays to boot! Why the rush?

B. No rush for filing either justified or possible

18. There are absolutely no legal grounds in the Federal Rules of Bankruptcy Procedure or in practical considerations for notice of appeal to have to be dashed out within hours of the receipt of the order to be appealed from. On the contrary, such a hasty filing of appeals under the duress of artificial time constraints unjustified by law or practice only leads to rushing out appeals that are ill considered by both counsel and client and that end up clogging the judicial system. That can certainly not be the intent of the judges that administer that system nor of the drafters in the Judicial Conference and Advisory Committee, let alone Congress, which would have to provide more funds to run a system overwhelmed by appeals filed just to beat the clock.

19. What is more, it would have been materially impossible for Dr. Cordero to file in such haste because the appeal forms to file were not mailed to him together with the notice of dismissal. Yet, the transcript of the hearing of the motion to dismiss will show that the Hon. Judge John C. Ninfo, II, after ruling to dismiss the cross-claims, told Dr. Cordero that he could appeal if he wanted. Dr. Cordero then asked how he would obtain the papers necessary to file an appeal and Judge Ninfo said that Dr. Cordero would receive all the instructions later on. However, there were no instructions or forms of appeal accompanying the notice of dismissal. Therefore, Dr. Cordero had to call the Bankruptcy Court and asked for those instructions. Case Administrator Karen Tacy remembered that the Judge had referred to such instructions in open court at the hearing because she was there. She told Dr. Cordero that she thought that what the Judge had meant was appeal forms. Then she said that she would send them to Dr. Cordero by mail since the Bankruptcy Court neither accepts nor sends papers by fax.

20. Upon receipt of the forms, Dr. Cordero began to work on them. It should be noted here that Dr. Cordero is appearing pro se, has never worked as a practicing lawyer, and is learning from books the intricacies of procedure under the rules applicable nationwide to all United States courts and the local rules adopted in the Western District. He checks and double checks every step and then checks once again in order to comply with all the requirements. Paying all that painstaking attention to detail to insure compliance takes a heavy toll on Dr. Cordero’s time and requires him to make an enormous amount of effort. If he made a mistake, it was certainly due to excusable neglect.

21. While Dr. Cordero is reasonable enough not to propose that the rules of procedure be dispensed with when a litigant appears pro se, he respectfully submits that if substantive law recognizes

the right of any person to assert a claim in court by himself, then the rules of procedure should be interpreted so as to allow the effective exercise of that right. That is all the more reasonable in a case like this where Appellee Gordon, with sufficient legal and procedural experience to have received a federal appointment as trustee, knew from the day of the hearing that the grant of his motion to dismiss would be appealed from.

C. Curing harmless error to preserve substantial right of appeal

22. Consequently, whether the notice of appeal was filed on Thursday, January 9, or on Monday, January 13, does not prejudice Appellee Gordon's right or his means to defend the grant of his motion on appeal in any way whatsoever. If Dr. Cordero made a mistake in the interpretation of the rules for filing a timely notice of appeal, the court can order its correction by applying Rule 80029(c)(2) as well as drawing on the power that Rule 9005 provides it to that end. This rule makes applicable the Harmless Error provision of FRCivP Rule 61, which provides that:

    > FRCivP "Rule 61. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

23. It can hardly be affirmed that for a party such as Appellee Gordon to have a notice of appeal found untimely filed rather than timely mailed so that he can escape facing the legal consequences of his defamatory statements and his reckless and negligent performance of his duties as trustee constitutes a more substantial right than for Dr. Cordero to have his day in court to assert his right to be treated decently and competently by, of all people, an officer of the court and a federal appointee. On a balancing test there can be no question as to which right the court should consider substantial and protect so that procedure is observed in a way not "inconsistent with substantial justice," as Rule 61 itself requires.

24. It is undisputed that the notice of appeal was timely mailed within the prescribed 10-day period and that the filing party, Dr. Cordero, made his best faith effort to comply with filing rules under the circumstances. On that basis, substantial justice can be justifiably done by finding that there was substantial compliance with those rules so that the substantial rights of the parties are preserved by ruling that, if error there was, if was due to excusable neglect and that it can be cured by extending the time to file the notice of appeal.

D. General mailbox vs. exceptional receipt-based filing rule

25. Indeed, whether a notice of appeal is considered timely on its being mailed by a party or received by a clerk of court is hardly the kind of difference in circumstances that should determine whether a party may exercise the substantial right to have his day in court. This is particular so since the rule of general applicability of both the FRBkrP –Rules 7005 and 9006(e)- and the FRCivP –Rule 5(b)(2)(B), made applicable to adversary proceedings by Rule 7005- provide that service is complete upon mailing. Completion conditioned upon receipt by the clerk within the time prescribed for filing is the exception, applicable only under Rule 8008(a) to appeal cases and only to papers filed with the district court or the bankruptcy appellate court. As an exception, it should be construed restrictively, especially since even that exception has its own exception, which covers briefs on appeals so that the general rule applies to make them deemed filed on the day of mailing.
26. The fact is that receipt-based completion of filing lacks any rationale in the Advisory Committee Notes. This is hardly surprising. In practical terms it decidedly affords less legal certainty to consider filing of papers made by mail to be complete after a third entity which is not even a party, namely the U.S. Postal Service or a commercial carrier, has been introduced into the filing process and, following its own steps and timetable under its own internal and external constraints, finally delivers another of millions of packages to the clerk of court, who then must get to it to file it.
27. For Rule 8008 as a whole, rather than just that particular provision in it, the Notes state that "This rule is an adaptation of Rule 25 F.R.App.P." That Appellate Rule 25 only expands the exception to the exception by extending the filing-complete-by-mailing rule to appendixes. Its Notes provide a rationale, and its is for the benefit of the rule of general applicability: "An exception is made in the case of briefs and appendices in order to afford the parties the maximum time for their preparation."
28. Such maximum time allows for better research and writing as well as a more reflective process. This not only benefits the filing party, but also the court and the opposing party. No doubt, better prepared legal papers result in a greater good for the administration of the judicial system and the dispensation of justice. This greater good should be sought at every opportunity through the application of the mailbox rule to filing and service of papers as well as by curing excusable neglect in order to achieve such greater good.
29. Conversely, the receipt-based completion of filing curtails this good for no stated reason at all.

Because it diminishes the legal certainty of when the intermediary carriers will deliver the papers, it forces the filing party to avoid guessing and increase the safety margin by mailing the papers well ahead of time; otherwise, that party must resort to mailing them by overnight, express mail, which is much more costly and as such, contrary to the stated aim of the both FRBkrP Rule 1001 and FRCivP Rule 1 that their 'rules must be construed and administered "to secure the just, speedy, and **inexpensive** determination of every action" and proceeding;' (emphasis added).

30. Consequently, Dr. Cordero urges that the court, to find excusable neglect in the instant case, should take into account the rationale for the filing-complete-upon-mailing rule and construe the receipt-based filing rule restrictively. Without doing so, the ten-day period of Rule 8002(a) for filing notice of appeal would be, as stated above, unacceptably diminished at both ends, first by the mailing of the order of dismissal from Rochester to New York City and then by the mailing of the notice of appeal from New York City to Rochester, and that precisely in the New Year holiday period and without having received the expected appeal instructions or the necessary appeal forms.

E. Appellee Gordon' seeks with Dirty Hands promptness

31. By contrast, for Appellee Gordon to demand of other people promptitude in providing a response in the context of his work as trustee and to require of Dr. Cordero in particular that he respond with celerity for the benefit of Appellee Gordon is simply an affront. Indeed, although Appellee Gordon was appointed trustee of the bankrupt storage company Premier Van Lines, the Debtor, in December 2001, and he had access to all its business files, he never contacted Dr. Cordero, even though Dr. Cordero's storage contract, still in force, with the Debtor was an asset of it and therefore, Appellee Gordon could not properly liquidate the Debtor without adequately disposing of that contract and, for that matter, of all similar still income-generating contracts between the Debtor and its customers.

32. Likewise, when after months of searching for his stored property Dr. Cordero was referred to Trustee Gordon, Dr. Cordero had to call the Trustee several times in the first part of May 2002 before the Trustee finally took his call, the first and only time ever that the Trustee deigned to talk to party-in-interest Dr. Cordero. Although the Trustee agreed to send Dr. Cordero a letter stating the details of the bankruptcy and current status of the storage company, he failed to do

so. Dr. Cordero had to write to Trustee Gordon to remind him of the letter and request that he send it. But not even that was enough for the Trustee to respond. So Dr. Cordero had to call him again to ask whether he would answer the letter. Trustee Gordon neither took the call nor returned it. It was only by a cover letter dated June 10, 2002, that the Trustee answered to state the obvious, that is, that he was sending attached thereto a copy of his letter to the landlord of the warehouse used by the Debtor, followed by a short, I-can't-care-less,-fend-for-yourself sentence: "I suggest that you retain counsel to investigate what has happened to your property." For that useless response, Dr. Cordero was made to wait a month.

33. The attached letter, dated April 16, 2002, was more incriminating of Trustee Gordon's tardiness than responsive to Dr. Cordero's request, for it simply stated that he would "not be renting or controlling the storage units or any of the assets at the Jefferson Road location [of the warehouse used by the Debtor]. Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank [the lienholder]." It took four months since his appointment as trustee for Trustee Gordon to inform a key party in interest, the landlord in possession of the Debtor's assets, that he, the trustee, was washing his hands of those assets!

34. When other parties affected by the bankruptcy kept referring Dr. Cordero back to Trustee Gordon, Dr. Cordero faxed him a letter on August 26, 2002. There was no feedback. So Dr. Cordero had to call Trustee Gordon's office. But the Trustee would neither take nor return his calls, even though Dr. Cordero left messages on his answering machine and with his secretary. When the Trustee finally responded, it was almost a month later in a letter dated September 23, 2002, where he not only made defamatory statements that he published to other parties, but also issued the injunction to wash his hands of Dr. Cordero by stating this:

> "Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again."

35. Wash he may, but to no avail, for tardiness and unresponsiveness are the dirt still stuck to the hands of Appellee Gordon. Yet, he has the cheek to go to the District Court with such dirty hands to ask that the appeal from the dismissal of the cross-claims against him be dismissed

because notice of the appeal, instead of being filed by the clerk of the Bankruptcy Court on Thursday, January 9, 2003, was filed two business days later, on Monday, January 13. That is an affront!

36. Trustee Gordon has neither justification in law nor merits in equity to use the court to impose on another party a degree of promptitude that he never showed others although he had an official duty to communicate with them in order to attain his trustee's "primary goals of ensuring the prompt, competent, and complete administration of chapter 7 cases."[1]

F. Order sought

37. Therefore, Dr. Cordero respectfully requests that the court:
    a. grant this request for an extension to file the notice of appeal in question;
    b. in the event of requiring oral argument, allow Dr. Cordero to present his arguments by phone given the hardship in terms of cost and time that requiring his appearance in person would cause; and
    c. award Dr. Cordero any other relief as may seem just and proper.

G. Table of Exhibits

1. Judge **Ninfo**'s order to **dismiss cross-claim** against Trustee Gordon entered on **December 30**, 2002 .... [A:151]
2. Trustee **Gordon**'s statement of **January 15**, 2003, in District Court in support of motion to **dismiss appeal** from Bankruptcy Court .... [A:156]
3. Trustee **Gordon**'s letter of **June 10**, 2002, **to** Dr. **Cordero** .... [A:16]
4. Trustee **Gordon**'s letter of **April 16**, 2002, **to Dworkin**, manager/ owner of the Jefferson-Henrietta warehouse .... [A:17]
5. Trustee **Gordon**'s letter of **September 23**, 2002, **to** Dr. **Cordero** .... [A:13]

Dated: January 27, 2003

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718) 827-9521

[1] United States Trustee Manual, Chapter 7 Case Administration §2.1.1, adopted by the Department of Justice and its United States Trustee Program.

Certificate of Service

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Dated: January 27, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718) 827-9521

Blank

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PREMIER VAN LINES, INC,

Debtor.

Chapter 7

Case No: 01-20692

JAMES PFUNTER,

Plaintiff,

A.P. No.: 02-2230

vs.

KENNETH W. GORDON, AS TRUSTEE IN BANKRUPTCY FOR PREMIER VAN LINES, INC., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. and M&T BANK,

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN, DAVID DELANO and JEFFERSON HENRIETTA ASSOCIATES,

Third Party Defendants.

TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO CORDERO'S MOTION TO EXTEND TIME FOR APPEAL

PROCEDURAL HISTORY

By Notice of Motion dated December 5, 2002, the Trustee, Kenneth W. Gordon (hereafter "Trustee"), sought dismissal of the cross-claims asserted by Richard Cordero (hereafter "Cordero") against the Trustee. The motion to dismiss was opposed in writing by Cordero's submission to the Court dated December 10, 2002. Argument on the motion was heard by Bankruptcy Court on December 18, 2002. The Court ruled from the bench on December 18, 2002 that Cordero's cross-claims against the Trustee would be dismissed.

On December 23, 2002, Bankruptcy Court (Hon. John C. Ninfo, II), granted the Trustee's motion to dismiss the cross-claims against the Trustee alleged by Cordero. The Order dismissing the cross-claims was entered in the Bankruptcy Court Clerk's Office on December 30, 2002, and notice of its entry together with the Order itself was mailed to Cordero and the Trustee. Cordero filed a Notice of Appeal with the Bankruptcy Court Clerk on January 13, 2003, fourteen days after the entry of the Order appealed from. The Trustee has pending before the United States District Court for the Western District of New York a motion to dismiss the appeal as untimely. District Court (Larimer, J.) has issued a motion scheduling order requiring any responding papers to be filed with District Court no later than February 14, 2003. On January 29, 2003, Cordero filed the instant motion to extend time for the filing of his Notice of Appeal.

THE TIME LIMITS OF 8002 MUST BE STRICTLY APPLIED

Bankruptcy Rule 8002(a) provides that "[t]he notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." It is well settled that the ten day rule is jurisdictional and requires strict compliance with its terms. Twins Roller Corp. v. Roxy Roller Rink Joint Venture, 70 B.R. 308, 310 (USDC SDNY 1987). Strict adherence to the ten day requirement serves the dual purpose of assuring prompt appellate review and providing a definite point at which, in the absence of a notice of appeal, litigation will come to and end. In re Mowers, 160 B.R. 720, 724 (USBC NDNY 1993). Cordero's notice of appeal was filed fourteen days after the Order appealed from was entered. As such, it was filed late. Cordero's argument to the Court that it should excuse his late filing of his Notice of Appeal simply on general public policy grounds by not strictly applying the ten day rule flies in the face of established precedent.

Cordero argues also that permission to file late should be allowed because of "excusable neglect." While Cordero never details for the Court what constitutes the "excusable neglect" he attempts to rely on, it is clear from Cordero's papers that he acknowledges having received notice of the entry of the Court's Order by January 2, 2003, a full week before his Notice of Appeal was due to be filed. Instead of taking steps to timely file his Notice of Appeal by January 9, 2003, Cordero chose to mail his Notice of Appeal to the Court on January 9, 2003 which resulted in its filing on January 13, 2003. Cordero offers as excuses for his late filing the following: 1) Mailing the Notice of Appeal on January 9, 2003 was sufficient; 2) Rule 9006 extended his time to file the Notice of Appeal because the Order was mailed to him; 3) he was mistaken or ignorant as a pro se debtor as to how the ten day rule applied; 4) the Clerk's office did not provide him with forms and instructions; 5) no prejudice would result to the Trustee.

CORDERO OFFERS NO ACCEPTABLE "EXCUSABLE NEGLECT"

Bankruptcy Rule 8002(c)(2) allows the Court on a showing of "excusable neglect" to extend the time within which to file a notice of appeal. "Case law from the Second Circuit reveals that the 'excusable neglect' standard under 8002(c) is strict and must be narrowly applied. [citations omitted] The standard is summarized as follows:

> The requirement of a timely notice of appeal is 'mandatory and jurisdictional.' ... [A] finding of 'excusable neglect' must be based on either acts of someone other than appellant or his or her counsel, or some extraordinary event. ...

[citations omitted]." In re Mowers, supra. at 725.

Delay caused by the U.S. mail, whether in sending the Order or in filing the notice of appeal, does not constitute "excusable neglect." In re Schmidt, 34 B.R. 284, 286 (USBC MN 1983). Cordero argues that the mere mailing of the notice of appeal on the last day to file it made it timely. Acceptance of Cordero's argument would be tantamount to judicially amending Rule 8002(a) by inserting 'mailed to' for 'filed.' See, In re Schmidt, supra. Cordero also argues that his filing late by mail should be excused by the fact that the Order appealed from was mailed to him by the clerk's office. "The fact that the order is served by mail does not entitle the parties to any additional time." Id. See also, In re Sanders, 59 B.R. 414, 416 (USDC MT, 1986).

Cordero's professed ignorance or mistake as a pro se debtor is equally unavailing as "excusable neglect." The fact that a party is pursuing a matter pro se does not constitute excusable neglect under Bankruptcy Rule 8002. In re Ghosh, 47 B.R. 374, 375 (USDC EDNY 1984). The standard for determining "excusable neglect" is strict and must be applied narrowly. Id. Even if the Court were not to narrowly apply the "excusable neglect" provisions and instead adopted a more liberal standard looking at the totality of the circumstances (see e.g., In re HML.II, Inc., 234 B.R. 67, 71-72 (USBAP 6th Cir. 1999)), Cordero's proffered excuse would not

merit extension of time for his filing of the notice of appeal. Under Bankruptcy Rule 8002, it is well established that the misreading, ignorance or misinterpretation of a procedural rule does not constitute "excusable neglect" for the purpose of allowing a late filed notice of appeal under Rule 8002. Id.

Cordero admits he received the Order appealed from on January 2, 2003, a full week before his appellate rights expired. He chose to mail the notice of appeal to the Court, and then did not even mail the notice of appeal until January 9, 2003, the day on which his right of appeal expired. He could have had no reasonable expectation that his notice of appeal would be timely filed. His complaint that the clerk's office did not provide him with instructions or forms to file his appeal are of no moment as there is neither a statutory duty nor any case law that would suggest that the clerk's office was in any way obligated to provide him such documents or information. Moreover, by Cordero's own admission, he knew on December 18, 2002, when the Court issued its decision from the bench, that he intended to appeal. Cordero simply failed to follow the requirements of the Bankruptcy Rules, and now he seeks to blame others for his failure. Cordero offers no extraordinary circumstances to excuse his neglect for his late filing, and it would appear that the causes of his late filing were all within his control.

In the absence of any facts that would constitute "excusable neglect", Cordero instead suggests to the Court that a late filing should be allowed because no prejudice would result to the Trustee. Lack of prejudice alone would be insufficient to allow the late filing, but, moreover there would in fact be substantial continued prejudice to the Trustee if the late filing were allowed. The underlying Chapter 7 proceeding is a "no asset" case in which the estate has no funds to pay creditors and no funds to pay for administrative expenses incurred by the Trustee. As the Court is aware, the sum total of compensation to be paid to the Trustee in this case is

$60.00.

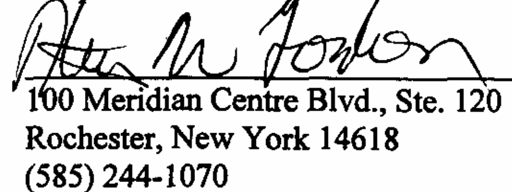
Rule 8002(a) exists in part to bring finality to litigation. To allow Cordero to continue to proceed with the untimely appeal would prejudice the Trustee by causing the continued expenditure of time and money without any hope of recovering the expenses through the estate. Conversely, it is hard to understand how Cordero has truly been prejudiced by the dismissal of his claims against the Trustee. Cordero's professed goal in his efforts throughout this case has been to recover his assets from the debtor. That goal has been preserved and arrangements are now being made between Cordero and the landlord in possession of Cordero's property for the inspection and return of the property to Cordero. If the equities are to be weighed by the Court, the scales should tip in favor of the Trustee on the issue of prejudice.

CONCLUSION

Cordero has failed to demonstrate any "excusable neglect" under Rule 8002 that would compel the Court to extend his time to file his notice of appeal. Accordingly, Cordero's motion should be denied.

DATED: Rochester, New York
February 5, 2003

KENNETH W. GORDON
Chapter 7 Trustee



100 Meridian Centre Blvd., Ste. 120
Rochester, New York 14618
(585) 244-1070

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

Chapter 7
Case No: 01-20692

AP No.: 02-2230

JAMES PFUNTER,

Plaintiff,

vs.

BANKRUPTCY FOR PREMIER VAN LINES, INC., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. AND M&T BANK,

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN, DAVID DELANO AND JEFFERSON HENRIETTA ASSOCIATES,

Third Party Defendants

ORDER DENYING CORDERO'S MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

TAKE NOTICE OF THE ENTRY OF THIS ORDER ON 2/18/03
PAUL R. WARREN, CLERK
U.S. BANKRUPTCY COURT
BY: [signature]
Deputy Clerk
DATE: 2/18/03

Richard Cordero, having moved this Court by Notice of Motion dated January 27, 2003 for an extension of time under Bankruptcy Rule 8002(c)(2) to file his Notice of Appeal of this Court's Order dismissing his cross-claims against the Trustee, and Richard Cordero having submitted in support thereof his affirmation dated January 27, 2003, and the Trustee having submitted in opposition to the motion a Memorandum of Law dated February 5, 2003, and this matter having come on before the Court on February 12, 2003, and Richard Cordero having appeared in support telephonically and Kenneth W. Gordon having appeared in opposition, and the Court having reviewed all of the papers and proceeding had herein the Court hereby:

FINDINGS OF FACT AND CONCLUSION OF LAW

1. Finds and determines that the last date to file the Notice of Appeal of the Order dismissing Cordero's crossclaims against the Trustee was January 9, 2003;

2. Finds and determines that the Notice of Appeal was filed in the Bankruptcy Court Clerk's Office on January 13, 2003, and thereby was not timely filed;

3. Finds and determines that the Notice of Appeal was placed in the U.S. mail by Richard Cordero on January 9, 2003;

4. Finds and determines that the provisions of Bankruptcy Rules 9006(e) and 9006(f) do not apply to extend the time limited for filing of the Notice of Appeal under Bankruptcy Rule 8002(a);

5. Finds and determines that the last date for Richard Cordero to file a motion seeking an extension under Bankruptcy Rule 8002(c)(2) of his time to file his Notice of Appeal was January 29, 2003;

6. Finds and determines that the instant motion by Richard Cordero seeking an extension under Bankruptcy Rule 8002(c)(2) of his time to file his Notice of Appeal was not filed with the Bankruptcy Court Clerk until January 30, 2003 and was therefor not timely filed.

7. A motion to dismiss the Appeal is pending in the District Court

IT IS HEREBY ORDERED, based on the above findings of fact and conclusions of law, that Richard Cordero's motion, seeking an extension under Bankruptcy Rule 8002(c)(2) of his time to file his Notice of Appeal of this Court's Order dismissing his cross-claims against the Trustee, is hereby denied.

Dated: February 18, 2003

Hon. John C. Ninfo, II
Bankruptcy Court Judge

RECEIVED
FEB 18 2003
BANKRUPTCY COURT
ROCHESTER, NY

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor

Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK,

Defendants

RICHARD CORDERO,

Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

Adversary proceeding no. 02-2230

AMENDED
NOTICE OF MOTION FOR RELIEF FROM ORDER DENYING MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

Madam or Sir,

PLEASE TAKE NOTICE that the Court has requested the amendment of the date for Dr. Richard Cordero to move pursuant to Rule 8002(b)(4) of the Federal Rules of Bankruptcy Procedure for relief under Rule 9024 from the order entered on February 18, 2003, denying the motion for extension of time for filing a notice to appeal from the order of dismissal of his cross-claims against Kenneth Gordon, Trustee, in Adversary Proceeding no. 02-2230. The original date was March 12, 2003. Now it is at 9:30 a.m. on **March 26, 2003**, or as soon thereafter as he can be heard at the United States Courthouse on 100 State Street, Rochester, New York, 14614,

Dated: March 6, 2003

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718)827-9521

Certificate of Service

I, Dr. Richard Cordero, certify that on 6 instant, I sent a copy of the accompanying Amended notice of motion for relief from order denying motion to extend time to file notice of appeal to the following parties:

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dr. Richard Cordero

Dated: March 6, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718)827-9521

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER,
Plaintiff

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK,
Defendants

RICHARD CORDERO
Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

Adversary proceeding no. 02-2230

NOTICE OF MOTION FOR RELIEF FROM ORDER DENYING MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

Madam or Sir,

PLEASE TAKE NOTICE, that Dr. Richard Cordero will move this Court at the United States Courthouse on 100 State Street, Rochester, New York, 14614, at 9:30 a.m. on March 12, 2003, or as soon thereafter as he can be heard, pursuant to Rule 8002(b)(4) of the Federal Rules of Bankruptcy Procedure for relief under Rule 9024 from the order entered on February 18, 2003, denying the motion for extension of time for filing a notice to appeal from the order of dismissal of his cross-claims against Kenneth Gordon, Trustee, in Adversary Proceeding no. 02-2230.

Dated: February 26, 2003

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero
tel. (718)827-9521

Certificate of Service

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dated: February 26, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718)827-9521

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK, Defendants

Adversary proceeding no. 02-2230

RICHARD CORDERO, Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, JEFFERSON HENRIETTA ASSOCIATES, Third party defendants

CORDERO'S AFFIRMATION IN SUPPORT OF MOTION FOR RELIEF FROM ORDER DENYING MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

Dr. Richard Cordero affirms under penalties of perjury as follows:

1. Rule 8002(b)(4) of the FRBkrP provides that a motion under Rule 9024 may be made before filing an appeal from an order. In turn, Rule 9024 provides that "Rule 60 F.R.Civ.P. applies in cases under the Code." For its part, Rule 60 provides as follows:

> FRCivP "Rule 60. Relief From Judgment or Order
>
> …
>
> (b) Mistakes; Inadvertence; Excusable Neglect: Newly Discovered Evidence; Fraud, Etc. On motion and upon **such terms as are just**, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) **mistake**, **inadvertence**, **surprise**, or **excusable neglect**; (2) newly discovered evidence which by **due diligence** could not have been discovered in time to move for a new trial under Rule 59(b); …; or (6)

> **any other reason** justifying relief from the operation of the judgment….;" (emphasis added).

2. Dr. Cordero submits that on the grounds listed and discussed below it is **"just"** for the court to grant relief from its order of February 18, 2003, denying his motion to extend time to file notice of appeal, a motion that he timely mailed on January 27.

TABLE OF CONTENTS

A. The issue of law concerning the determination of timeliness.................... 247
B. The issue of fact establishing the timely filing of the motion 249
C. Preference for deciding cases on merits rather than technicality............. 250
D. Pro se parties are afforded extra leeway to meet procedural rules............ 251
E. Missing filing deadline is no jurisdictional bar to granting relief 252
F. Filing flexibility and benefit of doubts for movant for relief....................... 253
G. Relief requested 255
H. Table of Exhibits.. 255

****

A. The issue of law concerning the determination of timeliness

3. The issue of law is that FRBkrP Rules 9006(e) and (f) –the complete-on-mailing and the three additional days rules, respectively- are applicable to the mailing and filing of both the motion to extend time to file notice of appeal and to the other motions and the notice of appeal under Rule 8002. That was the issue that gave rise to the need and provided the basis for Dr. Cordero's motion to extend time.
4. Indeed, Dr. Cordero had relied on the applicability of Rules 9006(e) and (f) to Rule 8002 when giving notice of appeal from the court's order dismissing Dr. Cordero's cross-claims against Trustee Kenneth Gordon, Esq., which was entered on December 30, 2002. He timely mailed the notice on Thursday, January 9, 2003, only to receive subsequently the negative **"surprise"** of Trustee Gordon's motion in district court to dismiss the appeal alleging that the notice had been untimely filed on Monday, January 13, 2003.

5. The issue had not yet been resolved in district court, where Dr. Cordero has asserted it, when he timely mailed the motion to extend time in bankruptcy court reasonably relying on the applicability to it of Rules 9006(e) and (f). Hence, Dr. Cordero was taken by **"surprise"** when the court denied it on the grounds that it was untimely filed.
6. That the **"surprise"** was genuine follows from Dr. Cordero's reasonable and solid basis for his conviction about the applicability of Rule 9006 to Rule 8002: The Supreme Court of the United States stated so much in its landmark case in the area of timely filing under the Bankruptcy Code, that is, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 13 S.Ct. 1489, 509 U.S. 380, 123 L.Ed.2d 74 (1993):

> "Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules."

7. Likewise, the Supreme Court stated the following rule of statutory construction precisely in another bankruptcy case, namely, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), the Court:

> "[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."

8. There is such a coherent and consistent scheme of Rules for the construction of what a timely notice of appeal is. It is based on the Rules' plain language. To justly construe the periods for mailing and filing, one must read the rules of the FRBkrP as well as them and those of the FRCivP as part of a whole, as a scheme. Dr. Cordero read them so and reasonably relied on their scheme. The basis for his reasonable reading and reliance thereon is discussed in his brief to the district court, which is hereby incorporated by reference, especially section II on the consistent and coherent construction of the rules of procedure as mandated by the Supreme Court.
9. Dr. Cordero, a pro se litigant, should not be unfairly surprised twice on the same legal issue as to which he did not have judicial notice that he had to do what there was "no need for a court" itself to do, that is, "to inquire beyond the plain language of the statute" to conclude against the tenor of its provisions that a timely mailed notice or motion would not be deemed timely filed by operation of the complete-on-mailing and the three additional days rules. If in spite of proceeding with due diligence to ascertain the applicable law it was a **"mistake"** for Dr.

Cordero to reasonably rely on 'the coherent and consistent statutory scheme' of the rules of procedure that supports the applicability of Rule 9006 to Rule 8002, then it was due to his **"inadvertence…or excusable neglect."**

10. Therefore, it is **"just"** that the court should relieve Dr. Cordero from the order denying his motion to extend time, as requested in the Relief requested, below.

B. The issue of fact establishing the timely filing of the motion

11. The fact that Dr. Cordero timely filed his motion to extend time was acknowledged even by the opposing party. Indeed, Trustee Gordon wrote on page 2 of his Memorandum of Law in Opposition to Cordero's Motion to Extend Time for Appeal:

> "On January 29, 2003, Cordero filed the instant motion to extend time for the filing of his Notice of Appeal."

12. Since the order appealed from was entered on December 30, 2002, and the ten-day period for filing notice of appeal under 8002(a) ran until January 9, 2003, the 20 days for filing a motion to extend time under 8002(c)(2) included January 29. Hence, the motion was timely filed, as stated by the Trustee. He filed his Memorandum in Opposition on February 5, and thus had enough time to ascertain when Dr. Cordero's motion that he was opposing had been filed. By his own admission, it had been timely filed.

13. Trustee Gordon's admission is all the more relevant because he had already shown to be the kind of lawyer, and a trustee to boot, overly anxious to take advantage of a technicality, to wit, the timely mailed-untimely filed gap, as a means to avoid facing legal responsibility in court for his acts and many omissions rather than defend his name and reputation by litigating a case on the merits. It was on those grounds that he moved on district court to dismiss Dr. Cordero's appeal from the order dismissing his cross-claims against the Trustee. Had Dr. Cordero's timely mailed motion to extend time been untimely filed, the Trustee's past behavior gives rise to the reasonable assumption that he would again have latched on to that technicality in order to forestall the reversal of the dismissal order and thereby escape having to stand trial on the cross-claims.

14. Understandably enough, the court's statement at the hearing of the motion on February 12, that Dr. Cordero's motion was untimely because filed on January 30th came as nothing short of a shocking **"surprise"** to Dr. Cordero. Similarly, the court's ignoring his objection that Trustee

Gordon had stated that the motion had been filed on the 29th, was without a doubt a baffling **"surprise."** And when the court abruptly cut off its telephonic connection with Dr. Cordero as the latter was expressly preserving his objection to the court's denial of his motion as untimely filed, that was most certainly a disturbing **"surprise".**

15. On the contrary, the court should have been intrigued by the factual discrepancy between the Trustee's acknowledgment of the timely filing of Dr. Cordero's motion and whatever source it used as grounds for finding it untimely filed, particularly since both the Trustee and the court may well have relied on the same source, that is, the docket. After properly investigating this discrepancy, the court should have made a finding on whether and, if so, how and who, had made a **"mistake"** concerning the dates of filing, so critical an issue of fact that the motion was denied on grounds of its untimely filing.
16. Therefore, it is only **"just"** that the court should relieve Dr. Cordero from the order denying his motion to extend time, as requested in the Relief requested, below.

C. Preference for deciding cases on merits rather than technicality

17. In determining why it is **"just"** to relieve Dr. Cordero from the order denying his motion to extend time to file a notice of appeal, it should be kept in mind that it was a necessary response to Trustee Gordon's motion to have Dr. Cordero's appeal to the district court dismissed. Therefore, the two mutually exclusive interests at stake here are these: On the one hand is the Trustee's flight to a timely mailed-untimely filed gap to escape standing trial on substantive grounds for his wrongdoing; on the other hand is Dr. Cordero's efforts to preserve his right to his day in court so that he may assert his cross-claims against the Trustee, which were dismissed even before any discovery had even begun in the Adversary Proceeding.
18. It is submitted that the court should undertake a balancing test to ascertain which of the two interests is the substantial one. In so doing, it should apply the weighing standard that the courts in the Second Circuit have unambiguously adopted for identifying the heavier substance: They have expressed their marked preference for resolving disputes on the merits; *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95 (2d Cir. 1993); Cody v. Mello, 59 F.3d 13, 15 (2d Cir. 1995); *Sony Corp. v. Elm State Elecs., Inc.*, 800 F.2d 317, 320 (2d Cir. 1986); *Rymsbran Continental Corp. v. Euclid Hall Housing Development Fund Co., Inc. (In re Rymsbran Continental Corp.)*, 177

B.R. 163, 168 (E.D.N.Y. 1995); *In re Interco Systems, Inc.*, 185 B.R. 447, 454 (Bankr. W.D.N.Y. 1995); *In Re Mario C. Rodríguez,* 283 B.R. 112; 2001 Bankr. LEXIS 1020; 46 Collier Bankr. Cas. 2d (MB) 1383 (Bankr. E.D.N.Y. 2001).

19. By comparison with the substance of this standard, the procedural technicality of the timely mailed-untimely filed gap as a means to avoid liability has precisely the light weight of empty space framed by a superficial reading of statutory provisions. For the evidence and arguments leading to this conclusion, see section II. Consistent and coherent construction of rules on notice of appeal, in the herein incorporated brief of Dr. Cordero.

D. Pro se parties are afforded extra leeway to meet procedural rules

20. The fundamental purpose of the courts is to dispense justice through the adjudication of controversies between competing interests. In running a system of justice courts are not supposed to function as the sponsoring organization of a competitive show of who wants to be the genius in the intricacies of procedure. Parties should not be cast out of court with hardball questions made of a tangle of technicalities. While procedure is necessary to facilitate the orderly administration of the system, its rules must be applied with common sense to insure the proper dispensation of justice. The Court of the Second Circuit has recognized these axioms, which are all the more evident when a pro se litigant applies to the courts for justice. The Court has clearly enounced a principle that flows therefrom:

> "A party appearing without counsel is afforded extra leeway in meeting the procedural rules governing litigation, and trial judges must make some effort to protect a party so appearing from waiving a right to be heard because of his or her lack of legal knowledge." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993)
>
> "…pro se litigants are afforded some latitude in meeting the rules governing litigation," *Moates v. Barkley,* 147 F. 3d 207, 209 (2d Cir.1998).

21. Such is the importance of the principle that pro se parties deserve to be protected through the flexible application of procedural rules rather than the rigid insistence on formalistic enforcement of rules as rituals, that it carries over into the substantive field. Thus, the Supreme Court has stated that, "the allegations of the pro se complaint…we hold to less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner,* 404 U.S. 519, 521 (1972) (per curiam). The Second Circuit has likewise upheld the importance of this principle by

prescribing "the liberality to be given to pro se pleadings," *McPherson v. Coombe*, No. 98-2635, 1999 WL 235771, at 2 (2d Cir. Apr. 22, 1999).

22. When applying this principle to the instant case in order to provide **"just"** relief, attention should be paid to the fact that the notice of appeal and the motion to extend time to file it, both of which deserve the court's protection of the "right to be heard," were timely mailed. They can also be found timely filed by application of the complete-on-mailing and the three additional days rules of Rule 9006, which, as the Supreme Court stated in *Pioneer*, see above, is a general rule that applies to all the other rules.

E. Missing filing deadline is no jurisdictional bar to granting relief

23. Even if filing provisions were to be considered jurisdictional, nothing in the rules of procedure exempts them from the application of Rule 9006; nor do they require that in the application of anything deemed jurisdictional pro se litigants no be "afforded extra leeway."
24. What is more, missing a filing deadline cannot be a jurisdictional defect of such insurmountable magnitude that it irreparably dooms the standing of the deadline-missing party to obtain relief and assert his legal claims and defenses. This proposition necessarily flows from a coherent and consistent construction of the statutory scheme.
25. Indeed, FRBkrP Rules 7055 and 9024 make applicable FRCivP Rules 55 and 60, respectively. The latter pair of rules provide that a party that has missed all filing deadlines, for example, because it has never appeared and has never filed a response or replied to a discovery request, can be found in default and penalized by the entry of judgment against it. Yet, that very same party can appear *out of the blue* in court within a whole year to request relief from the default judgment so that it may then start filing an answer and responding to discovery requests. Far from dismissing the party's relief request because by missing filing deadlines the party has irremediably deprived the court of jurisdiction, the court can entertain the request and even grant it under the conditions set out in Rule 60.
26. Now, if this is the relief that the court can grant an already defaulted party that may never have appeared or filed anything, how much stronger can the court's jurisdictional power be to grant relief to a party, such as Dr. Cordero, who not only has appeared, and has done so pro se, but has shown respect for the court and proceeded with due diligence to find out, learn, and comply

with its rules of procedure?…so much so that he did meet the mailing deadlines for both the notice of appeal and the motion to extend time to file it!

27. Not only can a court grant a request for such relief, but in the instant case the court deems that it has jurisdictional authority to do so sua sponte. Indeed, for reasons that Dr. Cordero cannot fathom and thus, objects to, the court has recommended that Dr. Cordero's application for judgment by default against third party defendant David Palmer be denied. Yet, Mr. Palmer has only shown utter contempt for the court, where after benefiting from its protection under the Bankruptcy Code, he has never appeared to answer the claims against him in the Adversary Proceeding.

28. Nevertheless, the court did not deem that Mr. Palmer's total failure in procedural compliance deprived it of jurisdiction to advocate on its own initiative the interests of a defaulted party – default was entered by the clerk, but for equally incomprehensible reasons, belatedly-. In this vein, the court has recommended that Mr. Palmer not be held liable, although the summons warned him that he would be if he failed to answer the compliant, but rather be spared the sum certain applied for against him until any damage to Dr. Cordero's property might be established, even though neither the court nor the parties have even seen that property, just somebody claimed to have seen a label bearing Dr. Cordero's name slapped on a storage container, and even the party in possession of that container is unwilling or unable to show it, despite the court request that it do so.

29. Consequently, if the court does not lose its jurisdiction when a party does not appear or mail anything at all, let alone file anything, then it can certainly not lose it when a party, such as Dr. Cordero, appears, mails everything timely, even files the motion to extend timely by the own admission of the opposing party, but then is said to have missed that filing by one single day and the notice to appeal, timely mailed on Thursday, January 9, but filed on Monday the 13th, by four days. It could hardly be because of a jurisdictional bar that the court could not grant the timely mailed and admittedly timely filed motion to extend time.

F. Filing flexibility and benefit of doubts for movant for relief

30. The reasonableness of applying the flexibility intrinsic in the notion of "extra leeway" to whatever may be deemed jurisdictional becomes apparent through the use of the balancing test: What should weigh heavier in administering justice, that a pro se litigant be afforded the

opportunity to have his claims heard in court or that a timetable be rigidly adhered to by keeping closed the doors to the courtroom to a litigant that has already entered the courtyard?

31. But even Trustee Gordon admits that Dr. Cordero was already inside the courtroom since his motion to extend time had been timely filed on January 29. The Trustee's admission casts doubts on the correctness of the court record that it was untimely filed on the 30th. Such doubt can only heighten the need and justification for affording the pro se litigant extra leeway, particularly since the Second Circuit has expressed the view that "all doubts are to be resolved in favor of the party seeking relief, thus increasing the likelihood that disputes will be resolved on their merits;" *Pecarsky v. Galaxiworld Com Ltd.*, 249 F. 3d 167, (2d Cir. 2001); cf. *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980).

32. What is certain is that Dr. Cordero deserves the benefit of the doubt given that he proceeded with due diligence to comply with all procedural rules reasonably construed as forming a coherent and consistent scheme. So much so that as a matter of fact he did timely mail both the notice of appeal and the extension of time to file it. Hence, in his favor militate the equities as to both his conduct and his purpose of securing his right to litigate on the merits. As the Second Circuit put it in the context of granting relief under Rule 60:

> "Other equitable factors that may be considered include whether the failure to follow a rule of procedure was a mistake made in good faith and whether the entry of default would bring about an unfair result." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993).

33. In the instant case the result of not granting relief is tantamount to another dismissal of Dr. Cordero's cross-claims against Trustee Gordon. However, the Second Circuit has recognized that "dismissal is a harsh remedy to be utilized only in extreme situations," *Cody v. Mello*, 59 F.3d 13, 15 (2d Cir. 1995); *Colon v. Mack*, No. 94-2335, slip op. at 4423, 4427 (2d Cir. May 25, 1995) (quoting *Jackson v. City of New York*, 22 F.3d 71, 75 (2d Cir. 1994) (quoting *Harding v. Federal Reserve Bank of New York*, 707 F.2d 46, 50 (2d Cir. 1983) (quoting *Theilmann v. Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972)))). The rationale for this is also clear:

> "[S]trong public policy considerations counsel that courts should, when possible, resolve disputes on the merits rather than on technical pleading deficiencies," *Mason Tenders v. M & M Contracting & Consulting*, 193 F.R.D. 112, 2000 U.S. Dist. LEXIS 205, 45 Fed. R. Serv. 3d (Callaghan) 1263.

34. It can hardly be an extreme situation where a party, to secure his day in court, timely mails his papers reasonably counting on the application of the complete-on-mailing and the three additional days rules, but the papers are deemed to have arrived a weekend or one day late just because of the refusal to apply those rules. The only thing extreme in this situation is the disproportionality between such insignificant untimeliness, which does not prejudice anybody at all, and the forfeiture of the right of appeal to have one's day in court! Extreme is also the dismissal of Dr. Cordero's cross-claims against Trustee Gordon even before discovery had begun and despite the genuine issue of material fact attending them.

G. Relief requested

35. Therefore, Dr. Cordero respectfully requests that the court:
    a. vacate the order denying his motion to extend time to file notice of appeal;
    b. grant such motion for extension of time;
    c. in the event of denying this motion, issue declaratory judgment to the effect that the instant motion is appealable under FRBkrP Rule 8002(b)(4) as an amendment to the previously filed notice of appeal, for the dismissal of which a motion is pending in district court, and that the filing of such amended notice will not require an additional fee;
    d. should the court require oral argument, allow Dr. Cordero to present his arguments by phone given the hardship in terms of cost and time that requiring his appearance in person would cause; and
    e. award Dr. Cordero any other relief as may seem just and proper.

H. Table of Exhibits

1. Dr. Cordero' brief of **February 12**, 2003, in District Court **opposing** Trustee Gordon's **motion to dismiss** the timely mailed but allegedly untimely filed notice of appeal ....[A:158]
    I. Statement of facts .... [A:160]
    II. Consistent & coherent construction of rules on notice of appeal .... [A:164]
    III. Equities of curing harmless error to preserve substantial right and prevent prejudice .... [A:175]
    IV. Order sought.. [A:180]

V. Table of Exhibits .... [A:181]

2. Trustee Gordon's memorandum of law of February 5, 2003, in Bankruptcy Court opposing Dr. Cordero's motion to extend time to appeal .... [A:234]

Certificate of Service

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
Gordon & Schaal, LLP
100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618
tel. (585) 244-1070
fax (585) 244-1085

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800
fax (585) 248-4961

David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650
fax (585) 454-6525

Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890
fax (585) 258-2821

Karl S. Essler, Esq.
Fix Spindelman Brovitz & Goldman, P.C.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660
fax (585) 232-4791

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dated: February 26, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718)827-9521

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

March 3, 2003

Hon. John C. Ninfo, II
U.S. Bankruptcy Court
100 State Street, Room 1400
Rochester, NY 14614

Re: Premier VanLines, Inc.
Case No. 01-20692
Cordero v. Gordon
AP No. 02-2230

Dear Judge Ninfo:

I have received from Richard Cordero a motion seeking relief from your judgement denying him an extension of time to file his notice of appeal. I am sending you this letter to note my opposition to his motion and to ask the court to refer to my prior submission which included case law addressing the arguments raised by the present motion.

As to my statement in my prior memorandum of law that I believed Dr. Cordero's motion for an extension of time was filed on December 29, 2002, you have correctly noted that I was in error. My statement in my memorandum of law was based upon my presumption that Dr. Cordero timely filed his motion. Apparently, he did not.

I will be present in court on March 12th at 9:30 a.m. to answer any questions that the court may have of me regarding the present motion.

Respectfully submitted,

Kenneth W. Gordon

KWG/kkg
pc: Dr. Richard Cordero
U.S. Trustee's Office

Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

April 2, 2003

Honorable John C. Ninfo, II
United States Bankruptcy Court
1220 U.S. Courthouse
100 State Street
Rochester, New York 14614

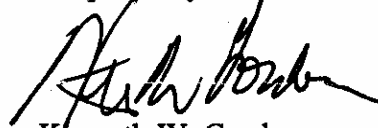
RE: Premier Van Lines, Inc.
Case No: 01-20692
AP No: 02-2230
Chapter 7

Dear Judge Ninfo:

Enclosed please find the original plus two additional copies of the proposed Order Denying Cordero's Motion For Relief From Order Denying Motion to Extend Time to File Notice of Appeal with respect to the above-referenced bankruptcy estate. If the proposed Order meets with your approval, please sign the Order and have a copy placed in my trustee's folder.

Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem
Enclosures
p.c. w/ encl: Dr. Richard Cordero
Kathleen Dunivin Schmitt, Asst. U.S. Trustee
Raymond Stilwell, Esq.
David D. MacKnight, Esq.
Michael J. Beyma, Esq.
Rochester Americans Hockey Club
David Palmer
Jefferson Henrietta Associates
David Dworkin

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

JAMES PFUNTER,

Plaintiff,

vs.

KENNETH W. GORDON, AS TRUSTEE IN BANKRUPTCY FOR PREMIER VAN LINES, INC., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC. AND M&T BANK,

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN, DAVID DELANO AND JEFFERSON HENRIETTA ASSOCIATES,

Third Party Defendants

Chapter 7
Case No: 01-20692

AP No.: 02-2230

ORDER DENYING CORDERO'S MOTION FOR RELIEF FROM ORDER DENYING MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

TAKE NOTICE OF THE ENTRY OF THIS ORDER ON 4/7/03
PAUL R. WARREN, CLERK
U.S. BANKRUPTCY COURT
BY: [signature]
Deputy Clerk
DATE: 4/7/03

Richard Cordero, having moved this Court by an Amended Notice of Motion dated March 6, 2003 for an Order pursuant to Federal Rules of Bankruptcy Procedure 9024 for relief from the Order entered on February 18, 2003, denying the motion for extension of time for filing a notice to appeal from the order of dismissal of his cross-claims against Kenneth W. Gordon, Trustee in the above-referenced adversary proceeding; and Richard Cordero having submitted in support thereof his affirmation dated February 26, 2003, and the Trustee having submitted in opposition to the motion a letter dated March 3, 2003 referring the Court to his Memorandum of Law dated February 5, 2003, and this matter having come on before the Court on March 26, 2003, and

Richard Cordero having appeared in support telephonically and Deborah K. Schaal having appeared in opposition on behalf of Kenneth W. Gordon; and the Court having reviewed all of the papers and proceeding had herein, the Court, in reliance upon its findings of fact and conclusion of law incorporated into its Order entered on February 18, 2003, and upon the further

FINDINGS OF FACT AND CONCLUSION OF LAW

1. Finds and determines that the Trustee's apparent mistaken statement in his Memorandum of Law regarding the date that Richard Cordero's motion was filed is irrelevant under Rule 9006 ;

2. Finds and determines that the Order of District Court dated March 2, 2003 is the law of the case establishing that Richard Cordero's appeal was not timely filed.

IT IS HEREBY ORDERED, based on the above findings of fact and conclusions of law, that Richard Cordero's motion for relief from the Order dated February 18, 2003 denying his motion for extension of time for filing a notice to appeal is hereby denied.

Dated: April 4, 2003

HONORABLE JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE