Dr. Richard Cordero

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August 11, 2003

Ms. Roseann B. MacKechnie
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square, Room 1802
New York, NY 10007

Re: Lodging a complaint under 28 U.S.C. §372(c)(1)

Dear Ms. MacKechnie,

I hereby respectfully submit to you a complaint under 28 U.S.C. §372(c)(1) concerning the Hon. John C. Ninfo, II, United States Bankruptcy Judge at the Bankruptcy Court for the Western District of New York. Judge Ninfo has engaged in conduct prejudicial to the effective and expeditious administration of the business of the court. This is manifest in his mismanagement of a case in which I am a defendant pro se, namely, In re Premier Van Lines, Inc., docket no. 02-2230. The facts speak for themselves, for although this case was filed in September 2002, that is, 11 months ago, Judge Ninfo has:

1. failed to require even initial disclosure under Rule 26(a) F.R.Civ.P.;
2. failed to order the parties to hold a Rule 26(f) conference;
3. failed to demand a Rule 26(f) report;
4. failed to hold a Rule 16(b) F.R.Civ.P. scheduling conference;
5. failed to issue a Rule 16(b) scheduling order;
6. failed to demand compliance with his first discovery order, issued orally at a pre-trial conference held last January 10 at the instigation of an assistant U.S. trustee, by not requiring the plaintiff or his attorney as little as to choose, as required by his order, one of the six dates that, pursuant to the order, I proposed for carrying out his order that I travel to Rochester to conduct an inspection at the plaintiff's warehouse in Avon; and
7. failed to insure execution by the plaintiff and his attorney of its second and last discovery order issued orally at a hearing last April 23, while I was required to travel and did travel to Rochester and then to Avon on May 19 to conduct the inspection.

As a result of Judge Ninfo's inexcusable inaction, this case has made no progress since it was filed. Nor will it make any for a very long time given that a trial date is nowhere in sight. On the contrary, at a hearing on June 25, Judge Ninfo announced that I will have to travel to Rochester a day in October and another in November to attend a hearing with the other parties – all of whom are locals- where we will deal with the motions that I have filed -including an application that I made as far back as last December 26 and that at his instigation I resubmitted on June 7- but that the Judge failed to decide at the hearings on May 21, June 25, and July 2. Then, after the hearings in October and November, I will be required to travel to Rochester for further hearings to be held once a months for seven to eight months!

The confirmation that this case has gone nowhere since it was filed last September comes from Judge Ninfo himself. In his order of July 15 he states that when we meet in October for the

first "discrete hearing" –a designation that I have failed to find in the F.R.Bankuptcy P. or the F.R.Civ.P.- we will begin by examining the plaintiff's complaint, thereby acknowledging that we will not have inched beyond the first pleading by the time the case will be in its 13th month.

Nor will those "discrete hearings" achieve much, for the Judge has not scheduled any discovery or meeting of the parties whatsoever between now and the October meeting. He has left that up to the parties. However, Judge Ninfo knows that the parties cannot meet or conduct discovery on their own without the court's intervention. The proof of this statement is implicit in the above list, items 6 and 7, which shows that even when Judge Ninfo issued not one, but two discovery orders, the plaintiff disregarded them. Not only that, but the Judge has also spared the plaintiff any sanctions, even after I had complied with his orders to my detriment and requested those sanctions and even when Judge Ninfo himself requested that I write a separate motion for sanctions and submit it to him.

Nor has the Judge imposed any adverse consequences on a party defaulted by his own Clerk of Court or on the trustee that submitted false statements to him. Hence, the Judge has let the local parties know that they have nothing to fear from him if they fail to comply with a discovery request, particularly from me. By contrast, Judge Ninfo has let everybody know, particularly me, that he would impose dire sanctions on me if I failed to comply. Thus, at the April 23 hearing, when the plaintiff wanted to get the inspection at his warehouse over with to be able to clear his warehouse to sell it and remain in sunny Florida care free, the Judge ordered me to travel to Rochester to conduct the inspection within the following four weeks or he would order the property said to belong to me removed at my expense to any other warehouse in Ontario, that is, whether in another county or another country, it did not matter to him.

By now it may have appeared to you too that Judge Ninfo is not impartial. Indeed, underlying the Judge's inaction is the graver problem of his bias and prejudice against me. Not only he, but also court officers in both the bankruptcy and the district court have revealed their partiality by participating in a series of acts of disregard of facts, rules, and the law aimed at one clear objective: to derail my appeals from decisions that the Judge has taken for the protection of the local parties and to the detriment of my legal rights. There are too many of those acts and they are too precisely targeted on me alone for them to be coincidental. Rather, they form a pattern of intentional and coordinated wrongful activity.

Hence, the even graver issue that needs to be addressed is whether Judge Ninfo's conduct has been prejudicial to the effective and expeditious administration of court business because it forms part of a pattern of intentional and coordinated conduct engaged in by both the Judge and other court officers to achieve an unlawful objective for their benefit and that of third parties and consistently to my detriment. The evidence that justifies this query is set forth in detail in the accompanying Statement of Facts, which is followed with a copy of Judge Ninfo's July 15 order. To expedite the determination of this complaint, I am providing in triplicate them, this letter, as well as an appendix with most items in the record, to which I refer frequently in the Statement.

I trust that you sense the serious implications of this matter and, pursuant to §(c)(2), will promptly transmit this complaint to the chief judge of this circuit, the Hon. John M. Walker, Jr. Meantime, I look forward to receiving your acknowledgment of receipt of this complaint and, thanking you in advance, remain,

yours sincerely,

Dr. Richard Cordero

APPENDIX: COMPLAINT FORM

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

COMPLAINT AGAINST JUDICIAL OFFICER UNDER 28 U.S.C. § 372(c)

INSTRUCTIONS:

(a) All questions on this form must be answered.

(b) A separate complaint form must be filled out for each judicial officer complained against.

(c) Submit the correct number of copies of this form and the statement of facts. For a complaint against:

a court of appeals judge -- original and 3 copies
a district court judge or magistrate judge -- original and 4 copies
a bankruptcy judge -- original and 5 copies

(For further information see Rule 2(e)).

(d) Service on the judicial officer will be made by the Clerk's office. (For further information See Rule 3(a)(1)).

(e) Mail this form, the statement of facts and the appropriate number of copies to the Clerk, United States Court of Appeals, United States Courthouse, 40 Foley Square, New York, New York 10007.

1. Complainant's name: Dr. Richard Cordero

Address: 59 Crescent Street
Brooklyn, NY 11208-1515

Daytime telephone (with area code): ( ) 718-827-9521

2. Judge or magistrate judge complained about:

Name: Hon. John C. Ninfo, II

Court: U.S. Bankruptcy Court for the Western District of New York

3. **Does this complaint concern the behavior of the judge or magistrate judge in a particular lawsuit or lawsuits?**

[X] Yes [ ] No

If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court: Bankruptcy Court for the Western District of NY

Docket number: 02-2230

Docket numbers of any appeals to the Second Circuit:

03-5023

Did a lawyer represent you?

[ ] Yes [X] No

If "yes" give the name, address, and telephone number of your lawyer:

4. **Have you previously filed any complaints of judicial misconduct or disability against any judge or magistrate judge?**

[ ] Yes [X] No

If "Yes," give the docket number of each complaint.

5. **You should attach a statement of facts on which your complaint is based, see rule 2(b), and**

EITHER

(1) check the box and sign the form. You do not need a notary public if you check this box.

[X] *I declare under penalty of perjury that:*

(i) I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint and attached statement of facts are true and correct to the best of my knowledge.

Dr. Richard Cordero
(signature)

Executed on August 11, 2003
(date)

OR

(2) check the box below and sign this form in the presence of a notary public;

[ ] I swear (affirm) that--

(i) I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and

Blank

Dr. Richard Cordero

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STATEMENT OF FACTS

in support of a complaint under
28 U.S.C. §372(c)(1)
submitted on
August 11, 2003,
to
The Clerk of Court
of the
Court of Appeals for the Second Circuit*

concerning

The Hon. John C. Ninfo, II, U.S. Bankruptcy Judge
and
other court officers

at the U.S. Bankruptcy Court and the U.S. District Court
for the Western District of New York

by
Dr. Richard Cordero

1. The Hon. John C. Ninfo, II, United States Bankruptcy Judge at the Bankruptcy Court for the Western District of New York. (hereinafter referred to as the court or this court), has engaged in conduct prejudicial to the effective and expeditious administration of the business of the court. Moreover, he and other court officers at both the U.S. Bankruptcy Court and the U.S. District Court for the same district have participated in a series of events of disregard of facts, rules, and law so

*Dr. Cordero's letter of August 11, 2003, to Clerk of Court Roseann B. MacKechnie forms an integral part of this complaint. [C:1 above]

consistently injurious to Dr. Richard Cordero as to form a pattern of non-coincidental, intentional, and coordinated wrongful activity from which a reasonable person can infer their bias and prejudice against Dr. Cordero. The latter is the only pro se defendant and non-local –he lives in New York City, hundreds of miles away from the court and the other parties in Rochester- in adversary proceeding In re Premier Van Lines, Inc., docket no. 02-2230.

2. Systematically the court has aligned itself with the interests of parties to Premier adverse to Dr. Cordero. Sua sponte it has become their advocate, whether they were absent from the court because in default, as in Debtor David Palmer's case, or they were in court and very much capable of defending their interests themselves, as in the cases of Trustee Kenneth Gordon, Plaintiff James Pfuntner, and his attorney, David MacKnight, Esq.

3. By taking no action against them, the court has mismanaged this adversary proceeding so that 11 months after its filing in September 2002, it has failed to move it along the procedural stages provided for by the Federal Rules of Bankruptcy Procedure (F.R.Bkr.P.) and the Federal Rules of Civil Procedure (F.R.Civ.P.). Far from having set a trial date, it has not even scheduled discovery, but instead has announced a series of monthly hearings that will stretch out for 9 to 10 months beginning with the "discrete hearing" set for next October. There is no legal justification for the court to have followed this course of inaction and

to devise such a plan for future inefficient activity leading nowhere except to causing further waste of time, effort, and money and inflicting tremendous amount of aggravation on Dr. Cordero, the party that has challenged the court on appeal. So what has motivated the court? Have it and other court officers proceeded in an intentional and coordinated way to inflict on Dr. Cordero the waste and aggravation that they already have?

I. Issues presented

a) Whether the court's conduct has been prejudicial to the effective and expeditious administration of court business; and

b) Whether its conduct forms part of a pattern of intentional and coordinated conduct engaged in by both the Judge and other court officers to achieve an unlawful objective for their benefit and that of third parties and to the detriment of non-local pro se party Dr. Cordero.

4. The evidence that justifies this query is set forth in detail below. The facts are stated chronologically in connection with each of three parties followed by the presentation of the latest statements of the court. Its July 15 order is found at page 55 below. Also, this Statement makes reference to its documentary evidence in the form of items on the record. To facilitate their consultation so as to expedite the review and determination of this complaint, those items and most of the record are collected in a separate appendix. Reference here to an item there bears the form (A-#), where # is the page number. The appendix contains a

comprehensive table of contents. Its Part A is organized chronologically and its Part B chronologically around certain parties, as is this Statement.

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II. Statement of facts illustrating a pattern of non-coincidental, intentional, and coordinated acts of the court and other court officers from which a reasonable person can infer their bias and prejudice against Dr. Cordero

A. The court has tolerated Trustee Gordon's submission to it of false statements as well as defamatory statements about Dr. Cordero

5. Dr. Cordero, who resides in New York City, entrusted his household and professional property, valuable in itself and cherished to him, to a Rochester, NY, moving and storage company in August 1993. From then on he paid storage and insurance fees. In early January 2002 he contacted Mr. David Palmer, the owner of the company storing his property, Premier Van Lines, to inquire about his property. Mr. Palmer and his attorney, Raymond Stilwell, Esq., assured him that it was safe and in his warehouse at Jefferson-Henrietta, in Rochester (A-18). Only months later, after Mr. Palmer disappeared, did his assurances reveal themselves as lies, for not only had his company gone bankrupt –Debtor Premier-, but it was already in liquidation. Moreover, Dr. Cordero's property was not found in that warehouse and its whereabouts were unknown.

6. In search of his property in storage with Premier, Dr. Cordero was referred to Kenneth Gordon, Esq., the trustee appointed for its liquidation. The Trustee had failed to give Dr. Cordero notice of the liquidation although the storage contract

was an income-producing asset of the Debtor. Worse still, the Trustee did not provide Dr. Cordero with any information about his property and merely bounced him back to the same parties that had referred Dr. Cordero to him (A-16, 17).

7. Eventually Dr. Cordero found out from third parties (A-48, 49;109, ftnts-5-8; 352) that Mr. Palmer had left Dr. Cordero's property at a warehouse in Avon, NY, owned by Mr. James Pfuntner. However, the latter refused to release his property lest Trustee Gordon sue him and he too referred Dr. Cordero to the Trustee. This time not only did the Trustee fail to provide any information or assistance in retrieving his property, but in a letter of September 23, 2002, improper in its tone and unjustified in its content, he also enjoined Dr. Cordero not to contact him or his office anymore (A-1).

8. Dr. Cordero applied to this court, to which the Premier case had been assigned, for a review of the Trustee's performance and fitness to serve (A-7).

9. In an attempt to dissuade the court from undertaking that review, Trustee Gordon submitted to it false statements as well as statements disparaging of the character and competence of Dr. Cordero. The latter brought this matter to the court's attention (A-32, 41). However, the court did not even try to ascertain whether the Trustee had made such false representations in violation of Rule 9011(b)(3) F.R.Bkr.P.. Instead, it satisfied itself with just passing Dr. Cordero's application to the Trustee's supervisor, an assistant U.S. Trustee (A-29), who was not even

requested and who had no obligation to report back to the court.

10. By so doing, the court failed in its duty to ensure respect for the conduct of business before it by an officer of the court and a federal appointee, such as Trustee Gordon, and to maintain the integrity and fairness of proceedings for the protection of injured parties, such as Dr. Cordero. The court's handling of Dr. Cordero's application to review Trustee Gordon's performance, even before they had become parties to this adversary proceeding, would turn out to be its first of a long series of manifestations of bias and prejudice in favor of Trustee Gordon and other parties and against Dr. Cordero.

1. The court dismissed Dr. Cordero's counterclaims against the Trustee before any discovery, which would have shown how it tolerated the Trustee's negligent and reckless liquidation of the Debtor for a year, and disregarded the legal standards applicable to a 12(b)(6) motion

11. In October 2002, Mr. Pfuntner served the papers for this adversary proceeding on several defendants, including Trustee Gordon and Dr. Cordero.

12. Dr. Cordero, appearing pro se, cross-claimed against the Trustee (A-70, 83, 88), who moved to dismiss (A-135). Before discovery had even begun or any initial disclosure had been provided by the other parties –only Dr. Cordero had disclosed numerous documents with his pleadings (A-11, 45, 62, 90, 123, 414)- and before any conference of parties or pre-trial conference under Rules 26(f) and 16

F.R.Civ.P., respectively, had taken place, the court summarily dismissed the cross-claims at the hearing on December 18, 2002. To do so, it disregarded the genuine issues of material fact at stake as well as the other standards applicable to motions under Rule 12(b)(6) F.R.Civ.P., both of which Dr. Cordero had brought to its attention (A-143).

2. The court excused Trustee Gordon's defamatory and false statements as merely "part of the Trustee just trying to resolve these issues", thereby condoning the Trustee's use of falsehood and showing gross indifference to its injurious effect on Dr. Cordero

13. At the December 18 hearing, the court excused the Trustee in open court when it stated that:

> I'm going to grant the Trustee's motion and I'm going to dismiss your cross claims. First of all, with respect to the defamation, quite frankly, these are the kind of things that happen all the time, Dr. Cordero, in Bankruptcy court…it's all part of the Trustee just trying to resolve these issues. (Transcript, pp.10-11; A-274-275)

14. Thereby the court approved of the use of defamation and falsehood by an officer of the court trying to avoid review of his performance. By thus sparing Trustee Gordon's reputation as trustee at the expense of Dr. Cordero's, the court justified any reasonable observer in questioning its impartiality. Moreover, by blatantly showing its lack of ethical qualms about such conduct, the court also laid the foundation for the question whether it had likewise approved the Trustee's

negligent and reckless liquidation of Premier, which would have been exposed by allowing discovery. In the same vein, the court's approval of falsehood as a means 'to resolve issues' warrants the question of what means it would allow court officers to use to resolve matters at issue, such as its own reputation.

3. The court disregarded the Trustee's admission that Dr. Cordero's motion to extend time to file notice of appeal had been timely filed and, surprisingly finding that it had been untimely filed, denied it

15. The order dismissing Dr. Cordero's crossclaims was entered on December 30, 2002, and mailed from Rochester (A-151). Upon its arrival in New York City after the New Year's holiday, Dr. Cordero timely mailed the notice of appeal on Thursday, January 9, 2003 (A-153). It was filed in the bankruptcy court the following Monday, January 13. The Trustee moved in district court to dismiss it as untimely filed; (A-156).

16. Dr. Cordero timely mailed a motion to extend time to file the notice under Rule 8002(c)(2) F.R.Bkr.P. Although Trustee Gordon himself acknowledged on page 2 of his brief in apposition that the motion had been timely filed on January 29 (A-235), the court surprisingly found that it had been untimely filed on January 30!

17. Trustee Gordon checked the filing date of the motion to extend just as he had checked that of the notice of appeal: to escape accountability through a timely-mailed/untimely-filed technical gap. He would hardly have made a mistake on

such a critical matter. Nevertheless, the court disregarded the factual discrepancy without even so much as wondering how it could have come about, let alone ordering an investigation into whether somebody and, if so, who, had changed the filing date and on whose order. The foundation for this query is provided by evidence of how court officers mishandled docket entries and the record for Dr. Cordero's cases (paras. 31 and 97 below). Instead, the court rushed to deny the motion to extend, which could have led to the review of its erroneous and wrongful dismissal of Dr. Cordero's cross-claims.

4. The court reporter tried to avoid submitting the transcript and submitted it only over two and half months later and only after Dr. Cordero repeatedly requested it

18. To appeal from the court's dismissal of his cross-claims, Dr. Cordero contacted Court Reporter Mary Dianetti on January 8, 2003, to request the transcript of the December 18 hearing. After checking her notes, she called back and told Dr. Cordero that there could be some 27 pages and take 10 days to be ready. Dr. Cordero agreed and requested the transcript (A-261).

19. It was March 10 when Court Reporter Dianetti finally picked up the phone and answered a call from Dr. Cordero asking for the transcript. After telling an untenable excuse, she said that she would have the 15 pages ready for…"You said that it would be around 27?!," exclaimed Dr. Cordero. She told another

implausible excuse after which she promised to have everything in two days ‘and you want it from the moment you came in on the phone.’ What an extraordinary comment! She implied that there had been an exchange between the court and Trustee Gordon before Dr. Cordero had been put on speakerphone and she was not supposed to include it in the transcript (A-283, 286).

20. There is further evidence supporting the implication of Reporter Dianetti’s comment and giving rise to the concern that at hearings and meetings where Dr. Cordero is a participant the court engages in exchanges with parties in Dr. Cordero’s absence. Thus, on many occasions the court has cut off abruptly the phone communication with Dr. Cordero, in contravention of the norms of civility and of its duty to afford all parties the same opportunity to be heard and hear it.

21. It is most unlikely that without announcing that the hearing or meeting was adjourned or striking its gavel, but simply by just pressing the speakerphone button to hang up unceremoniously on Dr. Cordero, the court brought thereby the hearing or meeting to its conclusion and the parties in the room just turned on their heels and left. What is not only likely but in fact certain is that by so doing, the court, whether by design or in effect, prevented Dr. Cordero from bringing up any further subjects, even subjects that he had explicitly stated earlier in the hearing that he wanted to discuss; and denied him the opportunity to raise objections for the record. Would the court have given by such conduct to any

reasonable person at the opposite end of the phone line cause for offense and the appearance of partiality and unfairness?

22. The confirmation that Reporter Dianetti was not acting on her own in avoiding the submission of the transcript was provided by the fact that the transcript was not sent on March 12, the date on her certificate. Indeed, it was filed two weeks later on March 26 (A-453, entry 71), a significant date, namely, that of the hearing of one of Dr. Cordero's motions concerning Trustee Gordon (A-246; 452, entries 60, 70). Somebody wanted to know what Dr. Cordero had to say before allowing the transcript to be sent to him. Thus, the transcript reached him only on March 28.

23. The Court Reporter never explained why she failed to comply with her obligations under either 28 U.S.C. §753(b) on "promptly" delivering the transcript "to the party or judge" –was she even the one who sent it to the party?- or Rule 8007(a) F.R.Bkr.P. on asking for an extension.

24. Reporter Dianetti also claims that because Dr. Cordero was on speakerphone, she had difficulty understanding what he said. As a result, the transcription of his speech has many "unintelligible" notations and passages so that it is difficult to make out what he said. If she or the court speakerphone regularly garbled what the person on speakerphone said, it is hard to imagine that either would last long in use. But no imagination is needed, only an objective assessment of the facts and the applicable legal provisions, to ask whether the Reporter was told to

disregard Dr. Cordero's request for the transcript; and when she could no longer do so, to garble his speech and submit her transcript to a higher-up court officer to be vetted before mailing a final version to Dr. Cordero. When a court officer or officers so handle a transcript, which is a critical paper for a party to ask on appeal for review of a court's decision, an objective observer can reasonably question in what other wrongful conduct that denies a party's right to fair and impartial proceedings they would engage to protect themselves.

B. The bankruptcy and the district courts denied Dr. Cordero's application for default judgment although for a sum certain by disregarding the plain language of applicable legal provisions as well as critical facts

25. Dr. Cordero joined as third party defendant Mr. Palmer, who lied to him about his property's safety and whereabouts while taking in his storage and insurance fees for years. Mr. Palmer, as president of the Debtor (A-433, entries 13, 12), was already under the bankruptcy court's jurisdiction. Nonetheless, he failed to answer Dr. Cordero's summons and complaint (A-70). Hence, Dr. Cordero timely applied under Rule 55 F.R.Civ.P. for default judgment for a sum certain (A-290, 294) on December 26, 2002. But nothing happened for over a month during which Dr. Cordero had no oral or written response from the court to his application.

26. Dr. Cordero called to find out. He was informed by Case Administrator Karen

Tacy that the court had withheld his application until the inspection of his property in storage because it was premature to speak of damages. Dr. Cordero indicated that he was not asking for damages, but rather for default judgment as a result of Mr. Palmer's failure to appear. Ms. Tacy said that Dr. Cordero could write to the court if he wanted.

27. Dr. Cordero wrote to the court on January 30, 2003, to request that the court either grant his application or explain its denial (A-302).

28. Only on February 4, did the court take action, or Clerk of Court Paul Warren, or Clerk Tacy, for that matter. In addition, when Dr. Cordero received a copy of the papers file by the court, what he read was astonishing!

1. The Bankruptcy Clerk of Court and the Case Administrator disregarded their obligations in the handling of the default application

29. Clerk Paul Warren had an unconditional obligation under Rule 55 F.R.Civ.P.: "**the clerk shall enter** the party's default," (emphasis added) upon receiving Dr. Cordero's application of December 26, 2002 (A-290). Yet, it was only on February 4, 41 days later and only at Dr. Cordero's instigation (A-303), that the clerk entered default, that is, certified a fact that was such when he received the application, namely, that Mr. Palmer had been served but had failed to answer. The Clerk lacked any legal justification for his delay. He had to certify the fact of

default to the court so that the latter could take further action on the application. It was certainly not for the Clerk to wait until the court took action.

30. It is not by coincidence that Clerk Warren entered default on February 4, the date on the bankruptcy court's Recommendation to the district court (A-306). Thereby the Recommendation appeared to have been made as soon as default had been entered. It also gave the appearance that Clerk Warren was taking orders in disregard of his duty.

31. Likewise, his deputy, Case Administrator Karen Tacy (kt), failed to enter on the docket (EOD) Dr. Cordero's application upon receiving it. Where did she keep it until entering it out of sequence on "EOD 02/04/03" (A-450 et seq., docket entries 51, 46, 49, 50, 52, 53)? Until then, the docket gave no legal notice to the world that Dr. Cordero had applied for default judgment against Mr. Palmer. Does the docket, with its arbitrary entry placement, numbering, and untimeliness, give the appearance of manipulation or rather the evidence of it?

32. It is highly unlikely that Clerk Warren, Case Administrator Tacy, and Court Reporter Dianetti were acting on their own. Who coordinated their acts in detriment of Dr. Cordero and for what benefit?

2. The court disregarded the available evidence in order to prejudge a happy ending to Dr. Cordero's property search

33. In its Recommendation to the district court, the bankruptcy court characterized the default judgment application as premature because it boldly forecast that:

> 6. …within the next month the Avon Containers will be opened in the presence of Cordero, at which point it may be determined that Cordero has incurred no loss or damages, because all of the Cordero Property is accounted for and in the same condition as when delivered for storage in 1993. (A-306)

34. The court wrote that on February 4, but the inspection did not take place until more than 3 three months later on May 19; it was not even possible to open all containers; the failure to enable the opening of another container led to the assumption that other property had been lost; and the single container that was opened showed that property had been damaged; (paras. 62 below et seq.).

35. What a totally wrong forecast! Why would the court cast aside all judicial restraint to make it? Because it was in fact a biased prejudgment. It sprang from the court's need to find a pretext to deny the application. Such denial was pushed through by the court disregarding the provisions of Rule 55, which squarely supported the application since it was for judgment for Mr. Palmer's default, not for damage to Dr. Cordero's property; Mr. Palmer had been found in default by Clerk of Court Warren (A-303); and it requested a sum certain. .

36. What is more, for its biased prejudgment, the court not only totally lacked evidentiary support, but it also disregarded contradicting evidence available. Indeed, the storage containers with Dr. Cordero's property were said to have been left behind by Mr. Palmer in the warehouse of Mr. Pfuntner. The latter had written in his complaint that property had been removed from his warehouse premises without his authorization and at night (A-24). Moreover, the warehouse had been closed down and remained out of business for about a year. Nobody was there paying to control temperature, humidity, pests, or thieves. Thus, Dr. Cordero' property could also have been stolen or damaged.

37. Forming an opinion without sufficient knowledge or examination, let alone disregarding the only evidence available, is called prejudice. From a court that forms anticipatory judgments, a reasonable person would not expect to receive fair and impartial treatment, much less a fair trial because at trial the prejudiced court could abuse its authority to show that its prejudgments were right.

3. The court prejudged issues of liability, before any discovery or discussion of the applicable legal standards, to further protect Mr. Palmer at the expense of Dr. Cordero

38. In the same vein, the court cast doubt on the recoverability of "moving, storage, and insurance fees…especially since a portion of [those] fees were [sic] paid prior to when Premier became responsible for the storage of the

Cordero Property"; (A-307). On what evidence did the court make up its mind on the issue of responsibility, which is at the heart of the liability of other parties to Dr. Cordero? The court has never requested disclosure of, not to mention scheduled discovery or held an evidentiary hearing on, the storage contract, or the terms of succession or acquisition between storage companies, or storage industry practices, or regulatory requirements on that industry.

39. Such a leaning of the mind before considering pertinent evidence is called bias. From such a biased court, a reasonable person would not expect impartiality toward a litigant such as Dr. Cordero, who as pro se may be deemed the weakest among the parties; as the only non-local, and that for hundreds of miles, may be considered expendable; and to top it off has challenged the court on appeal.

4. The court alleged in its Recommendation that it had suggested to Dr. Cordero to delay the application, but that is a pretense factually incorrect and utterly implausible

40. The court also protected itself by excusing any delay in making its recommendation to the district court. So it stated in its Recommendation that:

> 10. The Bankruptcy Court suggested to Cordero that the Default Judgment be held until after the opening of the Avon Containers… (A-307)

41. However, that suggestion was never made. Moreover, Dr. Cordero would have had absolutely no motive to accept it if ever made: Under Rule 55 an application

for default judgment for a sum certain against a defaulted defendant is not dependent on proving damages. It is based on the defendant's failure to heed the stark warning in the summons (A-21) that if he fails to respond, he will be deemed to consent to entry of judgment against him for the relief demanded. Why would a reasonable person, such as Dr. Cordero, ever put at risk his acquired right to default judgment in exchange for aleatory damages that could not legally be higher than the sum certain of the judgment applied for? What fairness would a disinterested observer fully informed of the facts underlying this case expect from a court that to excuse its errors puts out such kind of untenable pretense?

C. The district court repeatedly disregarded the outcome-determinative fact that the application was for a sum certain

42. The district court, the Hon. David G. Larimer presiding, accepted the bankruptcy court's Recommendation and in its order of March 11, 2003, denied entry of default judgment. Its stated ground therefor was that:

> [Dr. Cordero] must still establish his entitlement to damages since the matter **does not involve a sum certain** [so that] it may be necessary for [sic] an inquest concerning damages before judgment is appropriate…the Bankruptcy Court is the proper forum for conducting [that] inquest. (emphasis added; A-339)

43. What an astonishing statement!, for in order to make it, the district court had to disregard five papers stating that the application for default judgment did involve a sum certain:

1) Dr. Cordero's Affidavit of Amount Due; (A-294);
2) the Order to Transmit Record and Recommendation; (A-295);
3) the Attachment to the Recommendation; (A-305);
4) Dr. Cordero's March 2 motion to enter default judgment; (A-314, 327) and
5) Dr. Cordero's March 19 motion for rehearing re implied denial of the earlier motion (A-342, 344-para.6).

44. The district court made it easy for itself to disregard Dr. Cordero's statement of sum certain, for it utterly disregarded his two motions that argued that point, among others.

45. After the district court denied without discussion and, thus, by implication, the first motion of March 2 (A-314), Dr. Cordero moved that court for a rehearing (A-342) so that it would correct its outcome-determinative error since the matter did involve a sum certain. However, the district court did not discuss that point or any other at all. Thereby it failed to make any effort to be seen if only undoing its previous injustice, or at least to show a sense of institutional obligation of reciprocity toward the requester of justice, a quid pro quo for his good faith effort and investment of countless hours researching, writing, and revising his motions. It curtly denied the motion "in all respects" period! (A-350).

46. Also with no discussion, the district court disregarded Dr. Cordero's contention that when Mr. Palmer failed to appear and Dr. Cordero applied for default judgment for a sum certain his entitlement to it became perfect pursuant to the

plain language of Rule 55.

47. By making such a critical mistake of fact and choosing to proceed so expediently, the district court gave rise to the reasonable inference that it did not even read Dr. Cordero's motions, thereby denying him the opportunity to be heard, particularly since there was no oral argument. Instead, it satisfied itself with just one party's statements, namely the bankruptcy court's Recommendation. If so, it ruled on the basis of what amounted to the ex parte approach of the bankruptcy court located downstairs in the same building. It merely rubberstamped the bankruptcy court's conclusion…after mistranscribing its content, a quick job that did justice to nobody. Would such conduct give to an objective observer the appearance of unfairness toward Dr. Cordero and partiality in favor of the colleague court?

1. The district court disregarded Rule 55 to impose on Dr. Cordero the obligation to prove damages at an "inquest" and dispensed with sound judgment by characterizing the bankruptcy court as the "proper forum" to conduct it despite its prejudgment and bias

48. The equities of this case show that Mr. Palmer had such dirty hands that he did not even dare come to court to answer Dr. Cordero's complaint. Yet, both courts spared him the consequences of his default and instead weighed down Dr. Cordero's shoulders with the contrary-to-law burden of proving damages at an inquest. The latter necessarily would have to be conducted by the bankruptcy

court playing the roles of the missing defendant, its expert witness, the jury, and the judge. For a court to conduct an inquest under such circumstances would offend our adversarial system of justice, and all the more so because this court has demonstrated to have already prejudged the issues at stake and its outcome. Would an objective observer reasonably expect the bankruptcy court to conduct a fair and impartial inquest or the district court to review with any degree of care its findings and conclusions?

2. The bankruptcy court asked Dr. Cordero to resubmit the default judgment application only to deny the same application again by alleging that Dr. Cordero had not proved how he had arrived at the amount claimed or that he had served Mr. Palmer properly, issues that it knew about for six or more months

49. Pursuant to court order, Dr. Cordero flew to Rochester on May 19 and inspected the storage containers said to hold his stored property at Mr. Pfuntner's warehouse in Avon. At a hearing on May 21, he reported on the damage to and loss of property of his. Thereupon, the court sua sponte asked Dr. Cordero to resubmit his application for default judgment against Mr. Palmer. Dr. Cordero resubmitted the same application and noticed it for June 25 (A-472, 483).

50. At that hearing, the court surprised Dr. Cordero and how! The court alleged that it could not grant the application because Dr. Cordero had not proved how he had arrived at the sum claimed. Yet, that was the exact sum certain that he had

claimed back on December 26, 2002! (A-294) So why did the court ask Dr. Cordero to resubmit the application if it was not prepared to grant it anyway? But this was not all.

51. At a hearing the following week, on July 2, Dr. Cordero brought up again his application for default judgment. The court not only repeated that Dr. Cordero would have to prove damages, but also stated that he had to prove that he had properly served Mr. Palmer because it was not convinced that service on the latter had been proper. What an astonishing requirement and how arbitrary!

52. Dr. Cordero served Mr. Palmer's attorney of record, David Stilwell, Esq.; the court has done likewise (A-449, entries 25, 29); Dr. Cordero certified service on him to Clerk of Court Warren (A-99) and the service was entered on "EOD 11/ 21/02" (A-448, between entries 13 and 14); Dr. Cordero served the application on both Mr. Palmer and Mr. Stilwell on December 26 (A-296). What is more, Clerk Warren defaulted Mr. Palmer on February 4, 2003, (A-479), thus certifying that Mr. Palmer was served but failed to respond. Hence, with no foundation whatsoever, the court cast doubt on the default entered by its own Clerk of Court.

53. Likewise, with no justification it disregarded Rule 60(b), which provides an avenue for a defaulted party to contest a default judgment. Instead of recommending the entry of such judgment under Rule 55 and allowing Mr. Palmer to invoke 60(b) to challenge service if he dare enter an appearance in

court, the court volunteered as Mr. Palmer's advocate in absentia. In so doing, the court betrayed any pretense of impartiality. Would a reasonable person consider that for the court to protect precisely the clearly undeserving party, the one with dirty hands, it had to be motivated by bias and prejudice against Dr. Cordero or could it have been guided by some other interest?

3. The court intentionally misled Dr. Cordero into thinking that it had in good faith asked him to resubmit with the intent to grant the application

54. If the court entertained any doubts about the validity of the claim or proper service although it had had the opportunity to examine those issues for six and eight months, respectively, it lacked any justification for asking Dr. Cordero to resubmit the application? If its doubts had not been dispelled or allayed, why take the initiative to ask Dr. Cordero to resubmit, particularly without disclosing any remaining doubts and alerting him to the need to dispel them? By so doing, it must have known that it would raise in him reasonable expectations that it would grant the application. It could also foresee the reasonable consequences of springing on him untenable grounds for denial: It would inevitably disappoint those expectations and do so all the more acutely for having put him through unnecessary work. It follows that the court intentionally inflicted emotional distress on Dr. Cordero by taking him for a fool! Would a reasonable person trust this court at all, let alone trust it to be fair and impartial in subsequent judicial proceedings?

D. The bankruptcy court has allowed Mr. Pfuntner and Mr. MacKnight to violate two discovery orders and submit disingenuous and false statements while charging Dr. Cordero with burdensome obligations

1. After the court issued the first order and Dr. Cordero complied with it to his detriment, it allowed Mr. Pfuntner and Mr. MacKnight to ignore it for months

55. On December 10, 2002, Assistant U.S Trustee Kathleen Dunivin Schmitt requested a status conference for January 8 (A-358). At the only meeting ever in this adversary proceeding, a pre-trial conference held on January 10, the court orally issued only one onerous order: Dr. Cordero must travel from NY City to Rochester and to Avon to inspect the storage containers that bear labels with his name at Plaintiff Pfuntner's warehouse. Dr. Cordero had to submit three dates therefor. The court stated that within two days of receiving them, it would inform him of the most convenient date for the other parties. Dr. Cordero submitted not three, but rather six stretching over a three week period by letter of January 29 to the court and the parties (A-365, 368). Nonetheless, the court neither answered it nor informed Dr. Cordero of the most convenient date.

56. Dr. Cordero asked why at a hearing on February 12, 2003. The court said that it was waiting to hear from Mr. Pfuntner's attorney, Mr. MacKnight, who had attended the pre-trial conference and agreed to the inspection. The court took no action and the six dates elapsed. But Dr. Cordero had to keep those six dates open

on his calendar for no good at all and to his detriment.

2. When Mr. Pfuntner needed the inspection, Mr. MacKnight approached ex part the court, which changed the terms of the first order

57. However, the time came when Mr. Pfuntner wanted to get the inspection over with to clear his warehouse, sell it, and be in Florida worry-free to carry on his business there. Out of the blue he called Dr. Cordero on March 25 and proposed three consecutive dates in one week. When Dr. Cordero asked whether he had taken the necessary preparatory measures discussed in his January 29 letter, Mr. Pfuntner claimed not even to have seen the letter.

58. Thereupon, Mr. MacKnight contacted the court on March 25 or 26 ex parte –in violation of Rule 9003(a) F.R.Bkr.P. Reportedly the court stated that it would not be available for the inspection and that setting it up was a matter for Dr. Cordero and Mr. Pfuntner to agree mutually. (A-372)

3. The court required that Dr. Cordero travel to Rochester to discuss measures on how to travel to Rochester

59. Dr. Cordero raised a motion on April 3 to ascertain this change of the terms of the court's first order and insure that the necessary transportation and inspection measures were taken beforehand; (A-378). The court received the motion on April 7, and on that very same day, (A-454, entries 75 and 76) thus, without even

waiting for a responsive brief from Mr. MacKnight, whose position it must already have known, the court wrote to Dr. Cordero denying his request to appear by phone at the hearing –as Dr. Cordero had on four previous occasions- and requiring that he travel to Rochester to attend a hearing in person to discuss measures to travel to Rochester; (A-386). That this was an illogical pretext is obvious and that it was arbitrary is shown by the fact that thereafter the court allowed Dr. Cordero to appear four more times by phone. Unable to travel to Rochester shortly after that surprising requirement, Dr. Cordero had to withdraw his motion; (A-394).

4. The court showed no concern for the disingenuous motion that Mr. MacKnight submitted to it and that Dr. Cordero complained about in detail, whereby the court failed to safeguard the integrity of judicial proceedings

60. Then Mr. MacKnight raised his own motion on April 10; (A-389). Therein he was so disingenuous that, for example, he pretended that Mr. Pfuntner had only sued in interpleader and should be declared not liable to any party, while concealing the fact that Trustee Gordon and the Bank had stated in writing, even before the case had started, that they laid no claim to any stored property (A-63, 66,) . So there were no conflicting claims and no basis for interpleader at all. Mr. MacKnight also pretended that Mr. Pfuntner had abstained from bringing that motion before "as an accommodation to the parties", while holding back that

it was Mr. Pfuntner, as plaintiff, who had sued them to begin with even without knowing whether they had any property in his warehouse, but simply because their names were on labels affixed to storage containers (A-364)…some 'accommodation'! Mr. MacKnight also withheld the fact that now it suited Mr. Pfuntner to drop the case and skip to sunny Florida, so that he was in reality maneuvering to strip the parties of their claims against him through the expedient of a summary judgment while leaving them holding the bag of thousands of dollars in legal fees and shouldering the burden of an enormous waste of time, effort, and tremendous aggravation. Dr. Cordero analyzed in detail for the court Mr. MacKnight's mendacity and lack of candor, to no avail; (A-400; cf. 379 et seq.).

61. Although the court has an obligation under Rule 56(g) to sanction a party proceeding in bad faith, it disregarded Mr. MacKnight's disingenuousness, just as it had shown no concern for Trustee Gordon's false statements submitted to it. How much commitment to fairness and impartiality would a reasonable person expect from a court that exhibits such 'anything goes' standard for the admission of dishonest statements? If that is what it allows outside officers of the court to get away with, what will it allow or ask in-house court officers to engage in?

5. The court issued at Mr. Pfuntner's instigation its second order imposing on Dr. Cordero an onerous obligation that it never imposed on any of the other parties and then allowed Mr. Pfuntner and Mr. MacKnight to flagrantly disobey it as they did the first one

62. Nor did the court impose on Mr. Pfuntner or Mr. MacKnight any sanctions, as requested by Dr. Cordero, for having disobeyed the first discovery order. On the contrary, as Mr. Pfuntner wanted, the court ordered Dr. Cordero to carry out the inspection within four weeks or it would order the containers bearing labels with his name removed at his expense from Mr. Pfuntner's warehouse to any other anywhere in Ontario, that is, whether in another county or another country.

63. Pursuant to the second court order, Dr. Cordero went all the way to Rochester and on to Avon on May 19 to inspect at Mr. Pfunter's warehouse the containers said to hold his property. However, not only did both Mr. Pfunter and his warehouse manager fail even to attend, but they had also failed to take any of the necessary preparatory measures discussed since January 10 and which Mr. MacKnight had assured the court at the April 23 hearing had been or would be taken care of before the inspection.

64. At a hearing on May 21, Dr. Cordero reported to the court on Mr. Pfuntner's and Mr. MacKnight's failures concerning the inspection and on the damage to and loss of property of his. Once more the court did not impose any sanctions on Mr.

Pfuntner or Mr. MacKnight for their disobedience of the second discovery order and merely preserved the status quo.

6. The court asked Dr. Cordero to submit a motion for sanctions and compensation only to deny granting it even without Mr. Pfuntner and Mr. MacKnight responding or otherwise objecting to it

65. But the court was not going to make it nearly that easy for Dr. Cordero. At that May 21 hearing Dr. Cordero asked for sanctions against and compensation from Mr. Pfuntner and Mr. MacKnight for having violated to his detriment both discovery orders. The court asked that he submit a written motion. Dr. Cordero noted that he had already done so. The court said that he should do so in a separate motion and that in asking him to do so the court was trying to help him.

66. Dr. Cordero wrote a motion on June 6 for sanctions and compensation under Rules 37 and 34 F.R.Civ.P., made applicable in adversary proceedings by Rules 7037 and 7034 F.R.Bkr.P., respectively, to be imposed on Mr. Pfuntner and Mr. MacKnight. It was not only a legal document that set out in detail the facts and the applicable legal standards, but also a professionally prepared statement of account with exhibits to demonstrate the massive effort and time that Dr. Cordero had to invest to comply with the two discovery orders and deal with the non-compliance of the other parties. To prove compensable work and its value, it contained an itemized list more than two pages long by way of a bill as well as a

statement of rates and what is more, it provided more than 125 pages of documents to support the bill.

67. All in all the motion had more than 150 pages in which Dr. Cordero also argued why sanctions were warranted too: Neither Mr. Pfuntner, Mr. MacKnight, nor the warehouse manager attended the inspection and none of the necessary preparatory measures were taken. Worse still, they engaged in a series of bad faith maneuvers to cause Dr. Cordero not to attend the inspection, in which case they would ask the court to find him to have disobeyed the order and to order his property removed at his expense from Mr. Pfuntner's warehouse; and if Dr. Cordero nevertheless did attend, to make him responsible for the failure of the inspection, for the fact is that Mr. Pfuntner never intended for the inspection to take place. It was all a sham!

68. Yet, Mr. Pfuntner and Mr. MacKnight had nothing to worry about. So much so that they did not even care to submit a brief in opposition to Dr. Cordero's motion for sanctions and compensation. Mr. MacKnight did not even object to it at its hearing on June 25. The court did it for them at the outset, volunteering to advocate their interests just as it had advocated Mr. Palmer's to deny Dr. Cordero's application for default judgment.

7. The court's trivial grounds for denying the motion showed that it did not in good faith ask Dr. Cordero to submit it, for it never intended to grant it

69. The court refused to grant the motion. It alleged that Dr. Cordero had not presented the tickets for transportation –although they amount to less than 1% of the total- and that he had not proved that he could use Mr. MacKnight's hourly rate –even though that is the legally accepted lodestar method for calculating attorney's fees-. But these were just thinly veiled pretexts. The justification for that statement is that the court did not even impose any of the non-monetary sanctions. It simply was determined to protect Mr. Pfuntner and Mr. MacKnight from any form of punishment for having violated two of its own orders, its obligation to safeguard the integrity of the judicial process notwithstanding.

70. The court was equally determined to expose Dr. Cordero to any form of grief available. Thus, it denied the motion without giving any consideration to where the equities lay between complying and non-complying parties with respect to its orders; or to applying a balancing test to the moral imperative of compensating the complying party and the need to identify a just measuring rod for the protection of the non-complying parties required to compensate; or to the notion of substantial compliance when proving a bill for compensation; let alone the applicable legal standards for imposing sanctions. Even a court's intent can be inferred from its acts: Once more, this court had simply raised Dr. Cordero's

expectations when requiring him to submit this motion because 'I'm trying to help you here', while it only intended to dash them after putting him through a tremendous amount of extra work. The court intentionally inflicted emotional distress on Dr. Cordero since it again took him for a fool! Is this not the way for a court to impress upon a reasonable person the appearance of so intense prejudice and gross unfairness as to amount to injurious spite?

E. The court has decided after 11 months of having failed to comply with even the basic case management requirements, that starting on the 13th month it will build up a record over the next nine to ten months during which it will maximize the transactional cost for Dr. Cordero, who at the end of it all will lose anyway

71. The June 25 hearing was noticed by Dr. Cordero to consider his motion for sanctions and compensation as well as his default judgment application. However, the court had its own agenda and did not allow Dr. Cordero to discuss them first. Instead, it came up with the allegation that it could hardly understand Dr. Cordero on speakerphone, that the court reporter also had problems understanding him, and that he would have to come to Rochester to attend hearings in person; that the piecemeal approach and series of motions were not getting the case anywhere and that it had to set a day in October and another in November for all the parties to meet and discuss all claims and motions, and then it would meet with the parties once a month for 7 or 8 months until this matter could be solved.

72. Dr. Cordero protested that such a way of handling this case was not speedy and certainly not inexpensive for him, the only non-local party, who would have to travel every month from as far as New York City, so that it was contrary to Rules 1 F.R.Civ.P. and 1001 F.R.Bkr.P.

73. The court replied that Dr. Cordero had chosen to file cross-claims and now he had to handle this matter that way; that he could have chosen to sue in state court, but instead had sued there, and that all Mr. Pfuntner wanted was to decide who was the owner of the property; that instead Dr. Cordero had claimed $14,000, but the ensuing cost to the court and all the parties could not be justified; that the series of meetings was necessary to start building a record for appeal so that eventually this matter could go to Judge Larimer.

74. The court's statements are mind-boggling by their blatant bias and prejudice as well as disregard of the facts and the law. To begin with, it is just inexcusable that the court, which has been doing this work for over 30 years (A-276), has mismanaged this case for eleven months since September 2002, so that it has:

    1. failed to require even initial disclosure under Rule 26(a);
    2. failed to order the parties to hold a Rule 26(f) conference;
    3. failed to demand a Rule 26(f) report;
    4. failed to hold a Rule 16(b) scheduling conference;
    5. failed to issue a Rule 16(b) scheduling order;

6. failed to demand compliance with its first discovery order by not requiring Mr. MacKnight as little as to choose one of Dr. Cordero's six proposed dates for the Rochester trip and inspection;
7. failed to insure execution by Mr. Pfuntner and Mr. MacKnight of its second and last discovery order.

75. It is only now that the court wants to 'start building a record'…what a damning admission that it has not built anything for almost a year! However, it wants to build it at Dr. Cordero's expense by requiring him to travel monthly to Rochester for an unjustifiably long period of seven to eight months after the initial hearings next October and November. This is not so much an admission of incompetence as it is an attempt to further rattle Dr. Cordero and maximize the transactional cost to him in terms of money, time, and effort, just as the court put Dr. Cordero through the extra work of resubmitting the default judgment application (paras. 49 above et seq.) and writing a separate sanctions and compensation motion (paras. 65 above et seq.) only to deny both of them on already known or newly concocted grounds.

1. The court will in fact begin in October, not with the trial, but with its series of hearings, or rather "discrete hearings", whatever those are

76. At the June 25 hearing to the court proposed a slate of dates for the first hearings in October and November and asked the parties to state their choice at a hearing the following week.

77. At the July 2 hearing, Dr. Cordero again objected to the dragged-out series of hearings. The court said that the dates were for choosing the start of trial. Nevertheless, Dr. Cordero withheld his choice in protest.

78. But the court has just issued an order dated July 15 (page 55 below) where there is no longer any mention of a trial date. The dates in October and November are for something that the court designates as "discrete hearings". Dr. Cordero has been unable so far to find in either the F.R.Bkr.P. or the F.R.Civ.P. any provision for "discrete hearings", much less an explanation of how they differ from a plain 'hearing'. Therefore, he has no idea of how to prepare for a "discrete hearing".

79. Anyway the point is this: There is no trial, just the series of hearings announced by the court at the June 25 hearing, which will be dragged out for seven to eight months after those in October and November. There is every reason to believe that the court will in fact drag out this series that long, for it stated in the order that at the "discrete hearings" it will begin with Plaintiff Pfuntner's complaint. Thereby it admitted by implication that after more than a year of mismanagement the court has not gotten this case past the opening pleading. Given the totality of circumstances relating to the way the court has treated Dr. Cordero, would an objective observer reasonably fear that by beginning at that elemental stage of the case, the court will certainly have enough time to teach Dr. Cordero a few lessons of what it entails for a non-local pro se to come into its court and question the

way it does business with Trustee Gordon or the other locals?

2. The court is so determined to make Dr. Cordero lose that at a hearing it stated that it will require him to prove beyond a reasonable doubt the evidence in support of his motions

80. At the July 2 hearing Dr. Cordero protested the court's denial of his motion for sanctions and compensation and his default judgment application. The court said that if he wanted, he could present his evidence for his motions in October. However, it warned him that he would have to present his evidence properly, that it was not enough to have evidence, but that it also had to be properly presented to meet the burden of proof beyond a reasonable doubt, and that on television sometimes the prosecutor has the evidence but he does not meet the burden of reasonable doubt and he ends losing his case, and that likewise at trial Dr. Cordero would have to be prepared to meet that burden of proof.

81. What an astonishing statement! It was intended to shock Dr. Cordero and it did shock him with the full impact of its warning: It did not matter if he persisted in pursuing his motions, the court would hold the bar so high that the he would be found to have failed to clear it. It was not just a warning; it was the announcement of the court's decision at the end of trial, the one still sine die!

82. But the shock was even greater when Dr. Cordero, a pro se litigant, realized that he could not be required to play the role of a prosecutor, that this is an adversary

proceeding and as such a civil matter, not a criminal case. Upon further research and analysis, Dr. Cordero became aware of the fact that to prove something beyond a reasonable doubt is the highest of three standards of proof, and that there are two lower ones applied to civil matters, namely proof by a preponderance of the evidence and the one requiring clear and convincing evidence. Moreover, there is no compelling reason why Dr. Cordero should not be allowed to prove his claims against the other parties by a preponderance of the evidence, the lowest standard. The court's warning was just intended to further rattle Dr. Cordero and intentionally inflict on him even more emotional distress by frustrating him with the awareness of the futility of his effort. There is further evidence supporting this statement.

3. The court latched on to Mr. MacKnight's allegation that he might not have understood Dr. Cordero and that it might be due to his appearances by phone so as to justify its denial of further phone appearances that it nevertheless continues to allow in other cases

83. It was Mr. MacKnight who in a paper dated June 20 alleged that:

> The undersigned has been unable to fully understand all Cordero's presentations when he appears by telephone means, though the undersigned believes though is by no means certain that he has understood the substance of Cordero's arguments. [sic] (A-489)

84. From this passage it becomes apparent that the source of Mr. MacKnight's inability to understand does not reside in Dr. Cordero, regardless of how he

appears in court. Nonetheless, the court rallied to Mr. MacKnight's side and picked up his objection to make it its own. Requiring Dr. Cordero to appear in person in court will run up his expenses excessively and wreak havoc with his calendar, for the court will require him to be in court at 9:30 a.m. so that he will have to leave NY City on Tuesday and stay at a hotel in order to be in court on time the next morning…and maybe until the following day! (page 60 below)

85. Indeed, the court's objective at the end of this dragged-out process is not to achieve a just and equitable solution to the controversy among the parties. Rather, it already knows that the record will be that of a case so unsatisfactorily decided that it will be appealed; it even knows that the appeal will land in Judge Larimer's hands. Could an objective observer who knew how receptive Judge Larimer was to the court's recommendation to deny Dr. Cordero's default judgment application (paras. 42 above et seq.) reasonably infer from the court's comment that the court was letting Dr. Cordero know that he could be as dissatisfied with its rulings and object as much as he liked, an appeal would again get him nowhere?; and thus, that Dr. Cordero is doomed to lose, they will make sure of it?

4. The court blames Dr. Cordero for being required now to travel to Rochester monthly because he chose to sue and to do so in federal rather than state court, whereby the court disregards the law and the facts and penalizes Dr. Cordero for exercising his rights

86. The court blames Dr. Cordero for having to travel now to Rochester monthly since he chose to sue in federal court. This statement flies in the face of the facts. To begin with, Mr. Palmer had the bankruptcy and liquidation of his company, Premier, dealt with in federal court under federal law. Then Mr. Pfuntner brought his adversary proceeding in federal court under federal law. He sued not only Dr. Cordero, but also Trustee Gordon, a federal appointee, and other parties; (A-21).

87. Contrary to the court's misstatement, Mr. Pfuntner did not only want to determine who owned what in his warehouse. He also sued for administrative and storage fees, and liens. Mr. MacKnight demanded in the Cover Sheet $20,000 and asked in the complaint for indemnification "together with the reason [sic] attorneys fees [sic] and other expense for bringing this proceeding"; (A-27).

88. What is more, no two parties were adverse claimants to the same property in Mr. Pfuntner's warehouse. Far from it, Trustee Gordon and the Bank have stated that they either ask that Dr. Cordero "have access to and repossession of [his] assets" or 'have no objection to his obtaining his belongings' (A-1, 69). Thus, Mr. Pfuntner's claim in interpleader is bogus. All Mr. Pfuntner wanted was to

recoup somehow the lease fees that Mr. Palmer owes him. Hence, he sued everybody around, even the Hockey Club, which stated not to have any property in the warehouse at all, but whose name Mr. Pfuntner found on a label (A-364).

89. If Dr. Cordero had filed his counter-, cross-, and third-party claims in state court, he would still have had to travel to Rochester, so what difference does it make whether he has to travel to Rochester to attend proceedings in a state court in Rochester or in a federal court in Rochester? If Dr. Cordero had filed his claims in state court, whether in New York City or in Rochester, Mr. Pfuntner and the other parties could have removed them to federal court under 28 U.S.C. §1452(a) if only for reasons of judicial economy, assuming that the state court had agreed to exercise jurisdiction at all given that property of the Premier estate was involved, e.g. the storage containers and vehicles, over which the federal court has exclusive jurisdiction under 28 U.S.C. §1334(e).

5. The court already discounted one of Dr. Cordero's claim against one party and ignores his other claims against the other parties

90. The court asserted that Dr. Cordero sued for $14, 000. This amount is only one item of Dr. Cordero's claim against only one party, namely, Mr. Palmer. The total amount of that claim appears in Dr. Cordero's application for default judgment against that party, to wit, $24,032.08 (A-294). The reason for the court asserting that the claim is only $14,000 is that in its Recommendation of February 4, 2003,

for the district court to deny the application, the court cast doubt on the recoverability of "moving, storage, and insurance fees" (para. 38 above; A-307), never mind that to do so it had to indulge in a prejudgment before having the benefit of disclosure, discovery, or a defendant given that Mr. Palmer has not showed up to challenge either the claim or the application.

91. Since that February 4 prejudgment, the court's prejudice against Dr. Cordero has intensified to the point that now the court has definitely discounted the amount in controversy (page 57 below), although it legally remains valid until disposition of the claim at trial or on appeal. What is more, the court has already dismissed Dr. Cordero's claims against the other parties, for example, the claim for $100,000 against Trustee Gordon for defamation and the claim for the Trustee's reckless and negligent liquidation of Premier, claims that the court dismissed but that are on appeal and can be reinstated, unless the court presumes to prejudge the decision of the Court of Appeals for the Second Circuit. Likewise, the court's prejudice has already dismissed Dr. Cordero's claims against Mr. Dworkin, Jefferson Henrietta Associates, Mr. Delano, and the Bank for their fraudulent, reckless, or negligent conduct in connection with Dr. Cordero's property as well as those for breach of contract, not to mention the request for punitive damages (A-70). And why would the court ignore Dr. Cordero's claims against Mr. MacKnight's client, Mr. Pfuntner, for compensation, among other things, for

denying his right to access, inspect, remove, and enjoy his property? (A-56)

92. This set of facts begs the question whether a court that reduces a party's claim to a minimal expression even before a trial date is anywhere in the horizon and loses sight altogether of other claims can give the appearance of either impartiality or knowing what it is talking about. Would an objective observer reasonably question whether the court twists the facts because due to incompetence it ignores even the basic elements of a case that has been before it for almost a year or rather because its bias and prejudice against Dr. Cordero prompt it to make any statements, however ill-considered or contrary to the facts, so long as they may harm or rattle Dr. Cordero? Is it not quite illogical for the court, on the one hand, to blame Dr. Cordero for having run up excessive costs for the court and the parties given that his claim is only for $14,000, and on the other hand, to drag out this case for the next 9 to 10 months?

6. The court gave short notice to Dr. Cordero that he had to appear in person, the cost to him notwithstanding, to argue his motion for sanctions for the submission to it of false representations by Mr. MacKnight -who had not bothered even to file a response-, thus causing Dr. Cordero to withdraw the motion

93. There must be no doubt that the court intends to maximize Dr. Cordero's transactional cost of prosecuting this case: On June 5 Mr. MacKnight submitted representations to the court concerning Dr. Cordero's conduct of the inspection;

(A-495). Whereas Mr. MacKnight did not attend, Dr. Cordero did and he knows those representations to be objectively false. After the appropriate request for Mr. MacKnight to correct them and the lapse of the safe heaven period under Rule 9011 F.R.Bkr.P., Dr. Cordero moved for sanctions on July 21; (A-498). Mr. MacKnight must have received from the court such an unambiguous signal that he need not be afraid of the court imposing any sanctions requested by Dr. Cordero that again he did not even bother to oppose the motion.

94. Instead, the court had Case Administrator Karen Tacy call Dr. Cordero near noon on Thursday, July 31, to let him know that it had denied his request to appear by phone and that if he did not appear in person, it would deny his July 21 motion; otherwise, he could contact all the parties to try to obtain their consent to its postponement until the hearing in October.

95. The court waited until only 6 days before the return date of August 6 to let him know, though it could have made up its mind and let him know as soon as it received it (para. 59 above). Moreover, it knows, because Dr. Cordero has brought it to its attention, that Mr. MacKnight has ignored almost all his letters and phone calls (A-402 et seq.), and has even challenged the validity of Mr. Pfuntner's written agreement to the May 19 inspection. Dr. Cordero could not risk being left waiting by Mr. MacKnight only to play into his hands given the foreseeable consequences. He withdrew the motion and renoticed it for October; (A-505).

96. To appear in person would have cost Dr. Cordero an enormous amount of money, for he would have had to buy flight and hotel tickets at the highest, spot price and cut to pieces two weekdays on very short notice. And what for? To be in court at 9:30 a.m. for a 15 to 20 minutes hearing. Would an objective person who knew about the court's indifference to the submission of falsehood to it have expected the court to give more importance to imposing sanctions for the sake of the court's integrity than to denying them to make Dr. Cordero's trip for naught in order to keep wearing him down financially and emotionally?

F. Bankruptcy and district court officers to whom Dr. Cordero sent originals of his Redesignation of Items on the Record and Statement of Issues on Appeal neither docketed nor forwarded this paper to the Court of Appeals, thereby creating the risk of the appeal being thrown out for non-compliance with an appeal requirement

97. Dr. Cordero knew that to perfect his appeal to the Court of Appeals he had to comply with Rule 6(b)(2)(B)(i) and (iii) F.R.A.P. by submitting his Redesignation of Items on the Record and Statement of Issues on Appeal. He was also aware of the suspected manipulation of the filing date of his motion to extend time to file the notice of appeal, which so surprisingly prevented him from refiling his notice of appeal to the district court (paras. 15 above et seq.). Therefore, he wanted to make sure of mailing his Redesignation and Statement to the right court. To that end, he phoned both Bankruptcy Case Administrator Karen Tacy and District

Appeals Clerk Margaret (Peggy) Ghysel. Both told him that his original Designation and Statement file submitted in January 2003 (A-ii: 1-152) was back in bankruptcy court; hence, he was supposed to send his Redesignation and Statement to the bankruptcy court, which would combine both for transmission to the district court, upstairs in the same building.

98. But just to be extra safe, Dr. Cordero mailed on May 5 an original of the Redesignation and Statement to each of the court clerks. What is more, he sent one attached to a cover letter to District Clerk Rodney Early; (A-469).

99. It is apposite to note that in the letter to Mr. Early, Dr. Cordero pointed out a mistake, that is, that in the district court's acknowledgement of the notice of appeal to the Court of Appeals, the district court had referred to each of Dr. Cordero's actions against Trustee Gordon and Mr. Palmer as Cordero v. Palmer. Was it by pure accident that the mistake used the name Palmer, who disappeared and cannot be found now, rather than that of Gordon, who can easily be located?

100. The district court transferred the record on May 19 to the Court of Appeals. The latter, in turn, acknowledged the filing of the appeal by letter to Dr. Cordero. When he received it on May 24, imagine his shock when he found out that the Court's docket showed no entry for his Redesignation and Statement! (A-467) Worse still, he checked the bankruptcy and the district court's dockets and neither had entered it or even the letter to District Clerk Early! (A-455, 459, 463)

101. Dr. Cordero scrambled to send a copy of his May 5 Redesignation and Statement to Appeals Court Clerk Roseann MacKechnie; (A-468). Even as late as June 2, her Deputy, Mr. Robert Rodriguez, confirmed to Dr. Cordero that the Court had received no Redesignation and Statement or docket entry for it from either the bankruptcy or the district court. Dr. Cordero had to call both lower courts to make sure that they would enter this paper on their respective dockets. As to the May 5 letter to District Clerk Early, the Court of Appeals docket carries an entry only as of May 28 that it was received; (A-470).

102. The excuse that these court officers gave as well as their superiors, Bankruptcy Clerk Paul Warren and District Deputy Rachel Bandych, that they just did not know how to handle a Redesignation and Statement, is simply untenable. Dr. Cordero's appeal cannot be the first one ever from those courts to the Court of Appeals; those officers must know that they are supposed to record every event in their cases by entering each in their dockets; and **'**certify and send the Redesignation and Statement to the circuit clerk,' as required under Rule 6(b)(2)(B). Actually, it was a ridiculous excuse!

103. No reasonable person can believe that these omissions in both courts were merely coincidental accidents. They furthered the same objective of preventing Dr. Cordero from appealing. The officers must have known that the failure to submit the Redesignation and Statement would have been imputed to Dr. Cordero and

could have caused the Court to strike his appeal. But there is more.

1. Court officers also failed to docket or forward the March 27 orders, which are the main ones appealed from, thus putting at risk the determination of timeliness of Dr. Cordero's appeal to the Court of Appeals

104. Rules 4(a)(1)(A) and 28(a)(C) F.R.A.P. consider jurisdictionally important that the dates of the orders appealed from and the notice of appeal establish the appeal's timeliness. This justifies the question whether the following omissions could have derailed Dr. Cordero's appeal to the Court and, if so, whether they were intentional.

105. Indeed, as of last May 19, the bankruptcy court docket no. 02-2230 for the adversary proceeding Pfuntner v. Gordon et al did not carry an entry for the district court's March 27 denial "in all respects" of Dr. Cordero's motion for reconsideration in Cordero v. Gordon. By contrast, it did carry such an entry for the district court's denial, also of March 27, of Dr. Cordero's motion for reconsideration in Cordero v. Palmer (A-454, entry-69, 453-66).

106. Also on May 19, the district court certified the record on appeal to the Court of Appeals, but it failed to send to the Court copies of either of the March 27 decisions that Dr. Cordero is appealing from and which are necessary to determine his appeal's timeliness. The fact is that the Court's docket for this case

as of July 7, 2003 (A-470), did not have entries for copies of either of the March 27 decisions, although it carried entries for the earlier decisions of March 11 and 12 that Dr. Cordero had moved the district court to reconsider. However, Dr. Cordero's notice of appeal to the Court (A-429) made it clear that the March 27 orders were the main orders from which he was appealing (A-211, 350) since it is from them that the timeliness of his notice of appeal would be determined. Dr. Cordero discussed this matter with Deputy Appeals Court Clerk Rodriguez on July 15 and sent him copies of both March 27 ; (A-507)

107. Is this further evidence that bankruptcy and district court officers, in general, enter in their dockets and send to the Court of Appeals just the notices and papers that they want and, in particular, that their failure to enter and send Dr. Cordero's Re-designation of Items and Statement of Issues was intentionally calculated to adversely affect his appeal? If those court officers dare tamper with the record that they must submit to the Court, what will they not pull in their own courts on a black-listed pro se party living hundreds of miles away? This evidence justifies the question whether they manipulated the filing date of Dr. Cordero's motion to extend time to file notice of appeal (paras. 15 above et seq.) so as to bar his appeal from the court's dismissal of his cross-claims against Trustee Gordon. If so, what did they have to gain from it and on whose orders did they do it?

III. Relief requested

108. Dr. Cordero respectfully requests that:

a) this complaint be reviewed and determined promptly;

b) he be spared further bias and prejudice at the hands of the court and court officers at the Bankruptcy and District Courts for the Western District, with all that such abuse entails in terms of additional waste of time, effort, and money, as well as even more emotional distress;

c) to that end, and under 28 U.S.C. §1412, which provides as follows;

> A district court may transfer a case or proceeding under title 11 to a district court for another district, **in the interest of justice** or for the convenience of the parties; (emphasis added).

this case be removed to the District Court for the Northern District of New York, held at Albany, which is at about the same distance from all parties;

d) he be granted any other relief that is just and fair.

Respectfully submitted,
under penalty of perjury,

on August 11, 2003,

Dr. Richard Cordero

Dr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208
tel. (718) 827-9521

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE:

PREMIER VAN LINES, INC.,

CASE NO. 01-20692

Debtor.

JAMES PFUNTNER,

Plaintiff,

vs. A.P. NO. 02-2230

KENNETH W. GORDON, as Trustee,
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

WHEREAS, on September 27, 2002, James Pfuntner ("Pfuntner") commenced an adversary proceeding against Kenneth W. Gordon, Esq., as trustee ("Gordon"), Richard Cordero ("Cordero"), Rochester Americans Hockey Club, Inc. ("Rochester Hockey") and M&T Bank ("M&T") (the "Adversary Proceeding"); and

WHEREAS, the Adversary Proceeding sought to have the Court determine: (1) the rights of the various parties, if any, in property (the "Stored Property") which Premier Van Lines, Inc. (the "Debtor") had stored, pursuant to a lease (the "Lease") with Pfuntner at his property at 2140 Sacket Road, Avon, New York ("Sacket Road"); (2) that Pfuntner had no liability, or that he should otherwise be indemnified for any adverse claims to the Stored Property; (3) that the unpaid monthly rental due under the Lease, or reasonable storage charges for the Stored Property, be paid by the Debtor to Pfuntner as Chapter 11 and 7 administrative expenses; (4) that the Court vacate the automatic stay so as to permit Pfuntner to: (a) evict the Debtor and those claiming under the Debtor from Sacket Road in New York State Court; (b) remove the goods left at Sacket Road by the third parties; and (c) collect from those responsible such fair use and occupancy fees as may be determined by a New York State Court; and (5) various other requests for relief; and

WHEREAS, in this non-core proceeding, in November 2002, Cordero filed an Answer and Counterclaim, and Crossclaims against David Palmer ("Palmer"), the principal shareholder of the Debtor, Gordon, Pfuntner, David Dworkin ("Dworkin"), the owner or manager of the Jefferson-Henrietta Warehouse formerly utilized by the Debtor, and David Delano ("Delano"), an officer of M&T Bank, which held a security interest in the personal property assets of the Debtor; and

WHEREAS, on December 23, 2002, this Court granted Gordon's Motion to Dismiss Cordero's Crossclaims against him, which was appealed to and affirmed by the United States District Court for the Western District of New York (the "District Court"), and is now

on appeal to the United States Court of Appeals for the Second Circuit; and

WHEREAS, on February 4, 2003, for various reasons, including that Cordero had failed to provide satisfactory evidence that would demonstrate that he had incurred damages of $14,000.00, the Bankruptcy Court recommended to the District Court in this non-core matter that the default judgment requested by Cordero not be entered against Palmer; and

WHEREAS, in March 2003, the District Court determined that it was not appropriate to enter a default judgment in favor of Cordero and against Palmer, and referred Cordero's request for a default judgment back to the Bankruptcy Court for a determination of damages; and

WHEREAS, a trip by Cordero to Sacket Road did not result in: (1) a satisfactory inspection of all of the property stored by the Debtor at Sacket Road, including the property of Cordero that was at one time stored with the Debtor; (2) the ability of Cordero to fully determine whether there was any damage to his stored property, and, if there was, whether any of the various entities that had stored his property for him over approximately the last ten years might be responsible for any such damage, and if so, which entities; (3) Cordero's ability to remove his stored property; and (4) this matter being satisfactorily resolved by all of the interested parties; and

WHEREAS, as a result of: (1) Pfuntner and his representatives having failed to take the necessary steps for Cordero to accomplish at least the first three of the items set forth in the preceding paragraph; and (2) the Court advising Cordero that it would

entertain a motion for reasonable reimbursement in connection with his trip to Sacket Road, in June 2003, Cordero filed a motion for sanctions and compensation to be paid by Pfuntner and his attorney (the "Sanction Motion"); and

WHEREAS, the Sanction Motion included: (1) a request for compensation for Cordero at the rate of $250.00 per hour for the hours he spent on various matters involved in the Adversary Proceeding, including preparing and researching the Sanction Motion; and (2) the reimbursement of undocumented travel expenses, for a total request of $36,075.00; and

WHEREAS, in connection with the Sanction Motion, Cordero's only justification for requesting compensation for his time at $250.00 per hour is that Pfuntner advised him that this was the amount he paid his attorney, however, there is no proof of that in the record, and there is no other justification in the record for compensating a *pro se* litigant at that rate, so that the compensation issue and the undocumented expenses will be the subject of inquiry at the upcoming hearings; and

WHEREAS, the Court, in recently reviewing Cordero's renewed motion for a default judgment against Palmer, has focused on the Affidavit of Service of the Crossclaim, which does not indicate that Palmer was properly personally served by mail in accordance with the Federal Rules of Civil Procedure, so that this service issue will be the subject of inquiry at the upcoming hearings; and

WHEREAS, although the Court has allowed Cordero to appear by telephone in connection with a number of pretrial proceedings and motions in this Adversary Proceeding, in the Court's opinion few of

those telephone appearances have resulted in an accurate and comprehensive record; and

WHEREAS, the Court believes that setting this Adversary Proceeding down for discrete hearing dates in October and November, when the Court will not have any other matters before it and Cordero can appear in person, will: (1) afford the interested parties a sufficient amount of time to meet and negotiate to determine whether this matter, which should be able to be settled, can be settled without the need for further hearings and proceedings; (2) complete any discovery which they believe may be required; (3) afford Cordero, who has represented himself *pro se* in this Adversary Proceeding, the opportunity to consult with an attorney: (a) to discuss substantive legal, factual and other relevant matters involved in the Adversary Proceeding; and (b) to advise him how to properly prepare and present evidence at the upcoming hearings should Cordero continue to elect not to be represented by counsel; (4) afford the parties sufficient time to finally complete an inspection of the Stored Property at Sacket Road, and attempt to assess: (a) the ownership of the Property; (b) any damages to the Property; and (c) whether any parties to the Adversary Proceeding are responsible for any such damage; and (5) afford the Court the opportunity to focus more fully on this non-core Adversary Proceeding so that at the discreet hearings it can make the necessary findings, conclusions and rulings, based upon a full and complete record, that will finalize the matter; and, therefore,

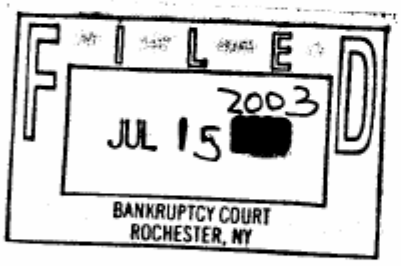
For the above reasons, and in order to: (1) ensure that there is a full and complete record created in this Adversary Proceeding; and (2) ensure that the Court can effectively manage the numerous issues that have been raised and assist the parties in concluding

the matter, this matter, and all related hearings, motions and proceedings, are set down for a discrete hearing at 9:30 a.m. in the Rochester Courtroom on October 16, 2003, at which time the Court will address the matters chronologically as they have appeared in connection with this Adversary Proceeding, beginning with Pfuntner's Complaint and proceeding forward, and if necessary, continue the hearing at any available times on October 17, 2003, a Chapter 13 day for the Court, and if necessary for further hearings on November 14, 2003 at 9:30 a.m. in the Rochester Courtroom.

SO ORDERED.

DATED: July 15, 2003

HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE



ITEMS IN THE RECORD*

accompanying

The Statement of Facts

submitted in support of a complaint under

28 U.S.C. §372(c)(1)

on

August 11, 2003

to

The Clerk of Court

of

THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

concerning

The Hon. John C. Ninfo, II

U.S. Bankruptcy Judge

and

other court officers

at

The U.S. Bankruptcy Court and the U.S. District Court
for the Western District of New York

by and for

Dr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208
tel. (718) 827-9521

*See Note on ToEC last page.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 CENTRE STREET
New York, New York 10007
212-857-8500

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

August 25, 2003

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

RE: Judicial Conduct Complaint

Dear Dr. Cordero:

This letter is to acknowledge receipt of your correspondence dated August 11, 2003, received in the Office of the Clerk.

To the extent that your correspondence is intended to be a judicial conduct complaint, it is being returned to you because of the following reasons: (i) no complaint form and (ii) statement of facts exceeds allowable length (limited to five (5) pages [see Rule 2(b)];

For your convenience, I enclose a copy of the *Official Complaint Form* and a copy of the *Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers Under 28 U.S.C. § 351 (formerly known as § 372(c))*.

Please keep in mind that non-compliance with the rules will delay the filing and processing of your submission since documents that fail to comply will be returned.

Sincerely,

Roseann B. MacKechnie, Clerk

By: Patricia C. Allen
Deputy Clerk

Enclosures

C:62 CA2 Clerk Allen returning on 8/25/3 due to improper form Dr. Cordero's §372(c)(1) complaint v Judge Ninfo

Dr. Richard Cordero

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

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August 11, 2003

STATEMENT OF FACTS

in support of a complaint under 28 U.S.C. §351 submitted to the Court of Appeals for the Second Circuit concerning the Hon. John C. Ninfo, II, U.S. Bankruptcy Judge and other court officers at the U.S. Bankruptcy Court and the U.S. District Court for the Western District of New York

I. The court's failure to move the case along its procedural stages

The conduct of the Hon. John C. Ninfo, II, is the subject of this complaint because it has been prejudicial to the effective and expeditious administration of the court's business. This is the result of his mismanagement of an adversary proceeding, namely, Pfuntner v. Trustee Kenneth Gordon, et al., dkt. no. 02-2230, which derived from bankruptcy case In re Premier Van Lines, Inc., dkt. no. 01-20692; the complainant, Dr. Richard Cordero, is a defendant pro se and the only non-local party in the former. The facts speak for themselves, for although the adversary proceeding was filed in September 2002, that is, 11 months ago, Judge Ninfo has:

1. failed to require even initial disclosure under Rule 26(a) F.R.Civ.P.;
2. failed to order the parties to hold a Rule 26(f) conference;
3. failed to demand a Rule 26(f) report;
4. failed to hold a Rule 16(b) F.R.Civ.P. scheduling conference;
5. failed to issue a Rule 16(b) scheduling order;
6. failed to demand compliance with his first discovery order of January 10, 2003, from Plaintiff Pfuntner and his attorney, David MacKnight, Esq.; thereafter, the Judge allowed the ordered inspection of property to be delayed for months; (E-29[1])and
7. failed to ensure execution by the Plaintiff and his attorney of his second and last discovery order issued orally at a hearing last April 23 and concerning the same inspection, while Dr. Cordero was required to travel and did travel to Rochester and then to Avon on May 19 to conduct that inspection. (E-33)

Nor will this case make any progress for a very long time given that a trial date is nowhere in sight. On the contrary, at a hearing on June 25, Judge Ninfo announced that Dr. Cordero will have to travel to Rochester (E-42) in October and again in November to attend hearings with the local parties. At the first hearing they will deal with the motions that Dr. Cordero has filed -including an application that he made as far back as last December 26 and that at Judge Ninfo's instigation Dr. Cordero resubmitted on June 16 (A-472)- but that the Judge failed to decide at the hearings on May 21, June 25, and July 2. At those hearings Dr. Cordero will be required to prove his evidence beyond a reasonable doubt. Thereafter he will be required to travel to Rochester for further monthly hearings for seven to eight months! (E-37)

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[1] This Statement is supported by documents in two separate volumes, namely, one titled Items in the Record, referred to as A-#, where # stands for the page number, and another titled Exhibits accompanying the Statement of Facts, referred to as E-#.

The confirmation that this case has gone nowhere since it was filed in September 2002 comes from the Judge himself. In his order of July 15 he states that at next October's first "discrete hearing" –a designation that Dr. Cordero cannot find in the F.R.Bkr.P. or F.R.Civ.P.- the Judge will begin by examining the plaintiff's complaint, thereby acknowledging that he will not have moved the case beyond the first pleading by the time it will be in its 13th month! (E-60)

Nor will those "discrete hearings" achieve much, for the Judge has not scheduled any discovery or meeting of the parties whatsoever between now and the October "discrete hearing". He has left that up to the parties. However, Judge Ninfo knows that the parties cannot meet or conduct discovery on their own without the court's intervention. The proof of this statement is implicit in the above list, items 6 and 7, which shows that even when Judge Ninfo issued not one, but two discovery orders, the plaintiff disregarded them. Not only that, but the Judge has also spared Plaintiff Pfuntner and Mr. MacKnight any sanctions, even after Dr. Cordero had complied with the Judge's orders to his detriment by spending time, money, and effort, and requested those sanctions and even when Judge Ninfo himself requested that Dr. Cordero write a separate motion for sanctions and submit it to him (E-34).

Nor has Judge Ninfo imposed any adverse consequences on a party defaulted by his own Clerk of Court (E-17) or on the Trustee for submitting false statements to him (E-9). Hence, the Judge has let the local parties know that they have nothing to fear from him if they fail to comply with a discovery request, particularly one made by Dr. Cordero. By contrast, Judge Ninfo has let everybody know, particularly Dr. Cordero, that he would impose dire sanctions on him if he failed to comply (E-33). Thus, at the April 23 hearing, when Plaintiff Pfuntner wanted to get the inspection at his warehouse over with to be able to clear his warehouse to sell it and remain in sunny Florida care free, the Judge ordered Dr. Cordero to travel to Rochester to conduct the inspection within the following four weeks or he would order the property said to belong to Dr. Cordero removed at his expense to any other warehouse in Ontario, that is, whether in another county or another country, the Judge could not care less where.

By now it may have become evident that Judge Ninfo is neither fair nor impartial. Indeed, underlying the Judge's inaction is the graver problem of his bias and prejudice against Dr. Cordero. Not only he, but also court officers in both the bankruptcy and the district court have revealed their partiality by participating in a series of acts of disregard of facts, rules, and the law aimed at one clear objective: to derail Dr. Cordero's appeals from decisions that the Judge has taken for the protection of local parties and to the detriment of Dr. Cordero's legal rights. There are too many of those acts and they are too precisely targeted on Dr. Cordero alone for them to be coincidental. Rather, they form a pattern of intentional and coordinated wrongful activity. (E-9) The relationship between Judge Ninfo's prejudicial and dilatory management of the case and his bias and prejudice toward Dr. Cordero is so close that a detailed description of the latter is necessary for a fuller understanding of the motives for the former.

II. Judge Ninfo's bias and prejudice toward Dr. Cordero explain his prejudicial management of the case

A. Judge Ninfo's summary dismissal of Dr. Cordero's cross-claims against Trustee Gordon

In March 2001, Judge Ninfo was assigned the bankruptcy case of Premier Van Lines, a moving and storage company owned by Mr. David Palmer. In December 2001, Trustee Kenneth Gordon was appointed to liquidate Premier. His performance was so negligent and reckless that

he failed to realize from the docket that Mr. James Pfuntner owned a warehouse in which Premier had stored property of his clients, such as Dr. Cordero. Nor did he examine Premier's business records, to which he had a key and access. (A-45, 46; 108, ftnts-5-8; 352) As a result, he failed to discover the income-producing storage contracts that belonged to the estate; consequently, he also failed to notify Dr. Cordero of his liquidation of Premier. Meantime, Dr. Cordero was looking for his property for unrelated reasons, but he could not find it. Finally, he learned that Premier was in liquidation and that his property might have been left behind by Premier at Mr. James Pfuntner's warehouse. He was referred to the Trustee to find out how to retrieve it. But the Trustee would not give Dr. Cordero any information at all and even enjoined him not to contact his office any more. (A-16, 17, 1, 2)

Dr. Cordero found out that Judge Ninfo was supervising the liquidation and requested that he review Trustee Gordon's performance and fitness to serve as trustee. (A-7, 8) The Judge, however, took no action other than pass the complaint on to the Trustee's supervisor at the U.S. Trustee local office, located in the same federal building as the court. (A-29) The supervisor conducted a pro-forma check on Supervisee Gordon that was as superficial as it was severely flawed. (A-53, 107) Nor did Judge Ninfo take action when the Trustee submitted to him false statements and statements defamatory of Dr. Cordero to persuade him not to undertake the review of his performance requested by Dr. Cordero. (A-19, 38)

Then Mr. Pfuntner brought his adversary proceeding against the Trustee, Dr. Cordero, and others. (A-21) Dr. Cordero cross-claimed against the Trustee (A-70, 83, 88), who countered with a Rule 12(b)(6) motion to dismiss (A-135, 143). The hearing of the motion took place on December 18, almost three months after the adversary proceeding was brought. Without having held any meeting of the parties or required any disclosure, let alone any discovery, Judge Ninfo summarily dismissed Dr. Cordero's cross-claims with no regard to the legitimate questions of material fact regarding the Trustee's negligence and recklessness in liquidating Premier (E-11). Indeed, Judge Ninfo even excused Trustee Gordon's defamatory and false statements as merely "part of the Trustee just trying to resolve these issues", (A-275, E-12) thus condoning the Trustee's use of falsehood and showing gross indifference to its injurious effect on Dr. Cordero.

That dismissal constituted the first of a long series of similar events of disregard of facts, law, and rules in which Judge Ninfo as well as other court officers at both the bankruptcy and the district court have participated, all to the detriment of Dr. Cordero and aimed at one objective: to prevent his appeal, for if the dismissal were reversed and the cross-claims reinstated, discovery could establish how Judge Ninfo had failed to realize or had knowingly tolerated Trustee Gordon's negligent and reckless liquidation of Premier. (E-11) From then on, Judge Ninfo and the other court officers have manifested bias and prejudice in dealing with Dr. Cordero. (E-13)

B. The Court Reporter tries to avoid submitting the transcript of the hearing

As part of his appeal of the court's dismissal of his cross-claims against the Trustee, Dr. Cordero contacted the court reporter, Mary Dianetti, on January 8, 2003, to request that she make a transcript of the December 18 hearing of dismissal. Rather than submit it within the 10 days that she said she would, Court Reporter Dianetti tried to avoid submitting the transcript and submitted it only over two and half months later, on March 26, and only after Dr. Cordero repeatedly requested her to do so. (E-14, A-261)

C. The Clerk of Court and the Case Administrator disregarded their obligations in handling Dr. Cordero's application for default judgment against the Debtor's Owner

Dr. Cordero timely submitted on December 26, 2002, an application to enter default judgment against third-party defendant David Palmer. (A-290) Case Administrator Karen Tacy, failed to enter the application in the docket; for his part, Bankruptcy Clerk of Court Paul Warren, failed to certify the default of the defendant. (E-18) When a month passed by without Dr. Cordero hearing anything from the court on his application, he called to find out. Case Administrator Tacy told him that his application was being held by Judge Ninfo in chambers. Dr. had to write to him to request that he either enter default judgment or explain why he refused to do so. (A-302) Only on the day the Judge wrote his Recommendation on the application to the district court, that is February 4, 2003, did both court officers carry out their obligations, belatedly certifying default (A-303) and entering the application in the docket (A-450, entry 51).

The tenor of Judge Ninfo's February 4 Recommendation was for the district court to deny entry of default judgment. (A-306) The Judge disregarded the plain language of the applicable legal provision, that is, Rule 55 F.R.Civ.P., (A-318) whose requirements Dr. Cordero had met, for the defendant had been by then defaulted by Clerk of Court Warren (A-303) and the application was for a sum certain (A-294). Instead, Judge Ninfo boldly prejudged the condition in which Dr. Cordero would eventually find his property after an inspection that was sine die. To indulge in his prejudgment, he disregarded the available evidence submitted by the owner himself of the warehouse where the property was which pointed to the property's likely loss or theft. (E-20) When months later the property was finally inspected, it had to be concluded that some was damaged and other had been lost. To further protect Mr. Palmer, the one with dirty hands for having failed to appear, Judge Ninfo prejudged issues of liability before he had allowed any discovery whatsoever or even any discussion of the applicable legal standards or the facts necessary to determine who was liable to whom for what. (E-21) To protect itself, the court alleged in its Recommendation that it had suggested to Dr. Cordero to delay the application until the inspection took place, but that is a pretense factually incorrect and utterly implausible. (E-22)

D. District Court David Larimer accepted the Recommendation by disregarding the applicable legal standard, misstating an outcome-determinative fact, and imposing an obligation contrary to law

The Hon. David G. Larimer, U.S. District Judge, received the Recommendation from his colleague Judge Ninfo, located downstairs in the same building, and accepted it. To do so, he repeatedly disregarded the outcome-determinative fact under Rule 55 that the application was for a sum certain (E-23), to the point of writing that "the matter does not involve a sum certain". (A-339) Then he imposed on Dr. Cordero the obligation to prove damages at an "inquest", whereby he totally disregarded the fact that damages have nothing to do with a Rule 55 application for default judgment, where liability is predicated on defendant's failure to appear. Likewise, Judge Larimer dispensed with sound judgment by characterizing the bankruptcy court as the "proper forum" to conduct the "inquest", despite Colleague Ninfo's prejudgment and bias. (E-25)

After the inspection showed that Dr. Cordero's property was damaged or lost, Judge Ninfo took the initiative to ask Dr. Cordero to resubmit his default judgment application. He submitted the same application and the Judge again denied it! The Judge alleged that Dr. Cordero had not proved how he had arrived at the amount claimed, an issue known to the Judge for six months but that he did not raise when asking to resubmit; and that Dr. Cordero had not served

Mr. Palmer properly, an issue that Judge Ninfo had no basis in law or fact to raise since the Court of Clerk had certified Mr. Palmer's default and Dr. Cordero had served Mr. Palmer's attorney of record. (E-26) Judge Ninfo had never intended to grant the application. (E-28)

E. Judge Ninfo has allowed Mr. Pfuntner and Mr. MacKnight to violate his two discovery orders while forcing Dr. Cordero to comply or face severe and costly consequences

Judge Ninfo has allowed Mr. Pfuntner and Mr. MacKnight to violate two discovery orders and submit disingenuous and false statements while charging Dr. Cordero with burdensome obligations. (E-29) Thus, after issuing the first order and Dr. Cordero complying with it to his detriment, the Judge allowed Mr. Pfuntner and Mr. MacKnight to ignore it for months. However, when Mr. Pfuntner needed the inspection, Mr. MacKnight approached ex parte the Judge, who changed the terms of the first order without giving Dr. Cordero notice or opportunity to be heard. (E-30) Instead, Judge Ninfo required that Dr. Cordero travel to Rochester to discuss measures on how to travel to Rochester. (E-30) In the same vein, the Judge showed no concern for Mr. MacKnight's disingenuous motion and ignored Dr. Cordero's complaint about it (E-31), thus failing to safeguard the integrity of the judicial process.

F. Court officers have disregarded even their obligations toward the Court of Appeals

Court officers at both the bankruptcy and the district court have not hesitated to disregard rules and law to the detriment of Dr. Cordero even in the face of their obligations to the Court of Appeals for the Second Circuit. Thus, although Dr. Cordero had sent to each of the clerks of those courts originals of his Redesignation of Items on the Record and Statement of Issues on Appeal neither docketed nor forwarded this paper to the Court of Appeals. (E-49) Thereby they created the risk of the appeal being thrown out for non-compliance with an appeal requirement that in all likelihood would be imputed to Dr. Cordero. Similarly, they failed to docket or forward the March 27 orders, which are the main ones appealed from, thus putting at risk the determination of timeliness of Dr. Cordero's appeal to the Court of Appeals. (E-52)

III. The issues presented

There can be no doubt that Judge Ninfo's conduct, which has failed to make any progress other than in harassing Dr. Cordero with bias and prejudice, constitutes "conduct prejudicial to the effective and expeditious administration of the business of the courts". Actually, his conduct raises even graver issues that should also be submitted to a special committee to investigate:

Whether Judge Ninfo summarily dismissed Dr. Cordero's cross-claims against the Trustee and subsequently prevented the adversary proceeding from making any progress to prevent discovery that would have revealed how he failed to oversee the Trustee or tolerated his negligent and reckless liquidation of Premier and the disappearance of Debtor's Owner Palmer;

Whether Judge Ninfo affirmatively recruited, or created the atmosphere of disregard of law and fact that led, other court officers to engage in a series of acts forming a pattern of non-coincidental, intentional, and coordinated conduct aimed at achieving an unlawful objective for their benefit and that of third parties and to the detriment of non-local pro se party Dr. Cordero.

Respectfully submitted, under penalty of perjury, on
August 11, 2003, and, after being reformatted, on August 27, 2003

Dr. Richard Cordero

COMPLAINT FORM

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

COMPLAINT AGAINST JUDICIAL OFFICER
UNDER 28 U.S.C. § 351 et. seq.

INSTRUCTIONS:

(a) All questions on this form must be answered.

(b) A separate complaint form must be filled out for each judicial officer complained against.

(c) Submit the correct number of copies of this form and the statement of facts. For a complaint against:

a court of appeals judge -- original and 3 copies
a district court judge or magistrate judge -- original and 4 copies
a bankruptcy judge -- original and 5 copies

(For further information see Rule 2(e)).

(d) Service on the judicial officer will be made by the Clerk's Office. (For further information See Rule 3(a)(1)).

(e) Mail this form, the statement of facts and the appropriate number of copies to the Clerk, United States Court of Appeals, Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, NY 10007.

1. **Complainant's Name:** Dr. Richard Cordero

Address: 59 Crescent Street
Brooklyn, NY 11208-1515

Daytime Telephone No. (include area code): (718) 827-9521

2. **Judge or magistrate judge complained about:**

Name: Hon. John C. Ninfo, II

Court: U.S. Bankruptcy Court for the Western District of New York

3. **Does this complaint concern the behavior of the judge or magistrate judge in a particular lawsuit or lawsuits?**

[ ] Yes [ ] No

If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court: U.S. Bankruptcy Court for the Western District of New York

Docket number: 02-2230, derived from 01-20692

Docket numbers of any appeals to the Second Circuit:

03-5023

Did a lawyer represent you?

[ ] Yes [ ] No

If "yes" give the name, address, and telephone number of your lawyer:

4. **Have you previously filed any complaints of judicial misconduct or disability against any judge or magistrate judge?**

[ ] Yes [ ] No

If "Yes," give the docket number of each complaint.

5. **You should attach a statement of facts on which your complaint is based, see rule 2(b), and**

EITHER

(1) **check the box and sign the form. You do not need a notary public if you check this box.**

[ ] I declare under penalty of perjury that:

(i) **I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and**

(2) **The statements made in this complaint and attached statement of facts are true and correct to the best of my knowledge.**

Dr. Richard Cordero

(signature)

Executed on August 27, 2003

(date)

OR

(2) check the box below and sign this form in the presence of a notary public;

[ ] I swear (affirm) that--

(i) **I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and**

Sept. 3, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 CENTRE STREET
New York, New York 10007
212-857-8500

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

September 2, 2003

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

Re: *Judicial Conduct Complaint*

Dear Dr. Cordero:

This letter is to acknowledge receipt of your complaint.

I await the submissin of your conformed exhibits. The exhibits you submitted includes material not mentioned in the Statement of Facts. Rule 2(d) states that "Documents such as excerpts from transcripts may be submitted as evidence of the behavior complained about; if they are, **the statement of facts** should refer to the specific pages in the documents on which relevant material appears.

Please keep in mind that non-compliance with the rules will delay the filing and processing of your submission.

Sincerely,

Roseann B. MacKechnie, Clerk

By: Patricia C. Allen
Patricia C. Allen
Deputy Clerk

EXHIBITS

accompanying

The Statement of Facts

submitted in support of a complaint under

28 U.S.C. §351

on

August 11, 2003

to

THE COURT OF APPEALS
FOR
THE SECOND CIRCUIT

concerning

The Hon. John C. Ninfo, II

U.S. Bankruptcy Judge

and

other court officers

at

The U.S. Bankruptcy Court and the U.S. District Court
for the Western District of New York

by

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208
tel. (718) 827-9521

Sept 10, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall United States Courthouse
40 Centre Street
New York, N.Y. 10007

John M. Walker, Jr.
Chief Judge

Roseann B. MacKechnie
Clerk of Court

September 2, 2003

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

Re: Judicial Conduct Complaint, 03-8547

Dear Dr. Cordero:

We hereby acknowledge receipt of your complaint, dated August 27, 2003, received in this office on August 28, 2003.

The complaint has been filed under the above-captioned number and will be processed pursuant to the *Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers Under 28 USC § 351.*

You will be notified by letter once a decision has been filed.

Sincerely,

Roseann B. MacKechnie, Clerk

By: Patricia Chin-Allen
Patricia Chin-Allen, Deputy Clerk

Clerk Allen's acknowledgment of 9/2/3 of Dr. Cordero's complaint v J Ninfo & notice of filing it as 03-8547 C:73

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RULES OF THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT GOVERNING COMPLAINTS AGAINST JUDICIAL OFFICERS UNDER 28 U.S.C. § 351 et. seq.

Preface to the Rules

Section 351 et. seq. of Title 28 of the United States Code provides a way for any person to complain about a federal judge or magistrate judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." It also permits the judicial councils of the circuits to adopt rules for the consideration of these complaints. These rules have been adopted under that authority.

Complaints are filed with the clerk of the court of appeals on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, another judge will make this decision; see Rule 18(e).)

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under § 351. The chief judge may also conclude the complaint proceeding if the problem has been corrected or if intervening events have made action on the complaint unnecessary. If the complaint is not disposed of in any of these ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the judicial council of the circuit, which decides what action, if any, should be taken. The judicial council is a body that consists of the chief judge and six other judges of the court of appeals and the chief judge of each of the district courts within the Second Circuit.

The rules provide, in some circumstances, for review of decisions of the chief judge or the judicial council.

Chapter I: Filing a Complaint

RULE 1. WHEN TO USE THE COMPLAINT PROCEDURE

(a) The Purpose of the Procedure. The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges or magistrate judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties.

The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.

(b) What May be Complained About. The law authorizes complaints about judges or magistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or who are "unable to discharge all the duties of office by reason of mental or physical disability."

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" does not include making wrong decisions -- even very wrong decisions -- in the course of hearings, trials, or appeals. It does not include conduct engaged in by a judicial officer prior to appointment to the bench. The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

"Mental or physical disability" may include temporary conditions as well as permanent disability.

(c) Who May be Complained About. The complaint procedure applies to judges of the United States courts of appeals, judges of the United States district courts, judges of United States bankruptcy courts, and United States magistrate judges. These rules apply, in particular, only to judges of the Court of Appeals for the Second Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit. The circuit includes Connecticut, New York and Vermont.

Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be satisfactorily resolved at lower levels, it may be referred to the chief judge of the court in which the official is employed. The circuit executive, whose address is United States Courthouse, Foley Square, New York, New York 10007, is sometimes able to provide assistance in resolving such complaints. All complaints must be submitted in writing.

(d) Time for Filing. Complaints should be filed promptly. A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

(e) Limitations on Use of the Procedure. The complaint procedure is not intended to

provide a means of obtaining review of a judge's or magistrate judge's decision or ruling in a case. The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that.

The complaint procedure may not be used to have a judge or magistrate judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge or magistrate judge too long. A petition for mandamus can sometimes be used for that purpose.

RULE 2. HOW TO FILE A COMPLAINT

(a) Form. Complaints should be filed on the official form for filing complaints in the Second Circuit, which is reproduced in the appendix to these rules. Forms may be obtained by writing or telephoning the clerk of the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, New York 10007 (telephone (212) 857-8702). Forms may be picked up in person at the office of the clerk of the court of appeals or any district court or bankruptcy court within the circuit.

(b) Statement of Facts. A statement should be attached to the complaint form, setting forth with particularity the facts upon which the claim of misconduct or disability is based. The statement should not be longer than five pages (five sides), and the paper size should not be larger than the paper the form is printed on. Normally, the statement of facts will include –

(1) A statement of what occurred;
(2) The time and place of the occurrence or occurrences;
(3) Any other information that would assist an investigator in checking the facts, such as the presence of a court reporter or other witness and their names and addresses.

(c) Legibility. Complaints should be typewritten if possible. If not typewritten, they must be legible.

(d) Submission of Documents. Documents such as excerpts from transcripts may be submitted as evidence of the behavior complained about; if they are, the statement of facts should refer to the specific pages in the documents on which relevant material appears.

(e) Number of Copies. If the complaint is about a judge of the court of appeals, an original plus three copies of the complaint form and the statement of facts must be filed; if it is about a district judge or magistrate judge, an original plus four copies must be filed; if it is about a bankruptcy judge, an original plus five copies must be filed. One copy of any supporting transcripts, exhibits, or other documents is sufficient. A separate complaint, with the required number of copies, must be filed with respect to each judge or magistrate judge complained about.

(f) Signature and Oath. The form must be signed by the complainant and the truth of the statements verified in writing under oath. As an alternative to taking an oath, the complainant may declare under penalty of perjury that the statements are true. The complainant's address must also be provided.

(g) Where to File. Complaints should be sent to

Clerk of Court
United States Court of Appeals
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability."

(h) No Fee Required. There is no filing fee for complaints of misconduct or disability.

RULE 3. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A COMPLAINT

(a) Receipt of Complaint in Proper Form.

(1) Upon receipt of a complaint against a judge or magistrate judge

filed in proper form under these rules, the clerk of the court will open a file, assign a docket number, and acknowledge receipt of the complaint. The clerk will promptly send copies of the complaint to the chief judge of the circuit (or the judge authorized to act as chief judge under rule 18(e)) and to the judge or magistrate judge whose conduct is the subject of the complaint. The original of the complaint will be retained by the clerk.

(2) If a district judge or magistrate judge is complained about, the clerk will also send a copy of the complaint to the chief judge of the district court in which the judge or magistrate judge holds appointment. If a bankruptcy judge is complained about, the clerk will send copies to the chief judges of the district court and the bankruptcy court. However, if the chief judge of a district court or bankruptcy court is a subject of the complaint, the chief judge's copy will be sent to the judge eligible to become the next chief judge of such court.

(b) Receipt of Complaint About Official Other Than a Judge or Magistrate Judge of the Second Circuit. If the clerk receives a complaint about an official other than a judge or magistrate judge of the Second Circuit, the clerk will not accept the complaint for filing, and will so advise the complainant.

(c) Receipt of Complaint Not in Proper Form. If the clerk receives a complaint against a judge or magistrate judge of this circuit that uses a complaint form but does not comply with the requirements of Rule 2, the clerk will normally not accept the complaint for filing and will advise the complainant of the appropriate procedures. If a complaint against a judge or magistrate judge is received in letter form, the clerk will normally not accept the letter for filing as a complaint, will advise the writer of the right to file a formal complaint under these rules, and will enclose a copy of these rules and the accompanying forms.

Chapter II: Review of a Complaint By the Chief Judge

RULE 4. REVIEW BY THE CHIEF JUDGE

(a) Purpose of Chief Judge's Review. When a complaint in proper form is sent to the chief judge by the clerk's office, the chief judge will review the complaint to determine whether it should be (1) dismissed, (2) concluded on the ground that corrective action has been taken, (3) concluded because intervening events have made action on the complaint no longer necessary, or (4) referred to a special committee.

(b) Inquiry by Chief Judge. In determining what action to take, the chief judge, with such assistance as may be appropriate, may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge or magistrate judge whose conduct is complained of to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the judge or magistrate judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any material matter that is reasonably in dispute.

(c) Dismissal. A complaint will be dismissed if the chief judge concludes --

(1) that the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(2) that the complaint is directly related to the merits of a decision or procedural ruling;

(3) that the complaint is frivolous, a term that includes making charges that are wholly unsupported or have been ruled on in previous complaints by the same complainant; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) Corrective Action. The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events.

(e) Appointment of Special Committee. If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee, constituted as provided in Rule 9, to investigate the complaint and make recommendations to the judicial council. However, ordinarily a special committee will not be appointed until the judge or magistrate judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, separate complaints may be joined and assigned to a single special committee.

(f) Notice of Chief Judge's Action.

(1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken or because intervening events have made action on the complaint unnecessary, the chief judge will prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. The memorandum will not include the name of the complainant or of the judge or magistrate judge whose conduct was complained of. The order and the supporting memorandum, which may be incorporated in one document, will be filed and provided to the complainant, the judge or magistrate judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). The complainant will be notified of the right to petition the judicial council for review of the decision and of the deadline for filing a petition.

(2) If a special committee is appointed, the chief judge will notify the complainant, the judge or magistrate judge whose conduct is complained of, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2) that the matter has been referred, and will inform them of the membership of the committee.

(g) Report to Judicial Council. The chief judge will from time to time report to the judicial council of the circuit on actions taken under this rule.

CHAPTER III: Review of Chief Judge's Disposition of a Complaint

RULE 5. PETITION FOR REVIEW OF CHIEF JUDGE'S DISPOSITION

If the chief judge dismisses a complaint or concludes the proceeding on the ground that corrective action has been taken or that intervening events have made action unnecessary, a petition for review may be addressed to the judicial council of the circuit. The judicial council may deny the petition for review, or grant the petition and either return the matter to the chief judge for further action or, in exceptional cases, take other appropriate action.

RULE 6. HOW TO PETITION FOR REVIEW OF A DISPOSITION BY THE CHIEF JUDGE

(a) Time. A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter to the complainant transmitting the chief judge's order.

(b) Form. A petition should be in the form of a letter, addressed to the clerk of the court of appeals, beginning "I hereby petition the judicial council for review of the chief judge's order. . ." There is no need to enclose a copy of the original complaint.

(c) Legibility. Petitions should be typewritten if possible. If not typewritten, they must be legible.

(d) Number of Copies. Only an original is required.

(e) Statement of Grounds for Petition. The letter should set forth a brief statement of the reasons why the petitioner believes that the chief judge should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the circuit council considering the petition.

(f) Signature. The letter must be signed by the complainant.

(g) Where to File. Petition letters should be sent to

Clerk of Court
United States Court of Appeals
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

The envelope should be marked "Misconduct Petition" or "Disability Petition."

(h) No Fee Required. There is no fee for filing a petition under this procedure.

RULE 7. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A PETITION FOR REVIEW

(a) Receipt of Timely Petition in Proper Form. Upon receipt of a petition for review filed within the time allowed and in proper form under these rules, the clerk of the court of appeals will acknowledge receipt of the petition. The clerk will promptly cause to be sent to each member of the judicial council, except for any member disqualified under rule 18, copies of (1) the complaint form and statement of facts, (2) any response filed by the judge or magistrate judge, (3) any record of information received by the chief judge in connection with the chief judge's consideration of the complaint, (4) the chief judge's order disposing of the complaint, (5) any memorandum in support of the chief judge's order, (6) the petition for review, (7) any other documents in the files of the clerk that appear to the circuit executive to be relevant and material to the petition or a list of such documents, (8) a list of any documents in the clerk's files that are not being sent because they are not considered by the circuit executive relevant and material, (9) a ballot that conforms with Rule

8(a). The clerk will also send the same materials, except for the ballot, to the circuit executive and the judge or magistrate judge whose conduct is at issue, except that materials previously sent to a person may be omitted.

(b) Receipt of Untimely Petition. The clerk will not accept for filing a petition that is received after the deadline set forth in Rule 6(a), and will so advise the complainant.

(c) Receipt of Timely Petition Not in Proper Form. Upon receipt of a petition filed within the time allowed but not in proper form under these rules (including a document that is ambiguous about whether a petition for review is intended), the clerk will acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraph (a) of this rule. If the deficiencies are not corrected, the clerk will reject the petition, and will so advise the complainant.

RULE 8. REVIEW BY THE JUDICIAL COUNCIL OF A CHIEF JUDGE'S ORDER

(a) Review Panel. The Chief Judge shall designate six members of the judicial council (other than the chief judge) to serve as a review panel. A review panel shall be composed of three circuit judges and three district judges. Membership on the review panel shall be changed after four months so that all members of the council shall serve on a review panel once each year. A review panel shall act for the judicial council on all petitions for review of a chief judge's dismissal order, except those petitions referred to the full membership of the council pursuant to Rule 8(b).

(b) Mail Ballot. Each member of the review panel to whom a ballot was sent will return a signed ballot, or otherwise communicate the member's vote, to the chief judge by the return date listed on the ballot. The ballot form will provide opportunities to vote to (1) deny the petition for review, or (2) refer the petition to the full membership of the judicial council. The form will also provide an opportunity for members to indicate that they have disqualified themselves from participating in consideration of the petition.

Any member of the review panel voting to refer the petition to the full membership of the judicial council, or after such referral, any council member voting to place the petition on the agenda of a meeting of the judicial council shall send a brief statement of reasons to all members of the council.

The petition for review shall be referred to the full membership of the judicial council upon the vote of any member of the review panel and shall be placed on the agenda of a council meeting upon the votes of at least two members of the council; otherwise, the petition for review will be denied.

Upon referral of a petition to the full membership of the judicial council, the clerk shall send to each member of the council not then serving on the review panel the materials specified in Rule 7(a).

(c) Availability of Documents. Upon request, the clerk will make available to any member of the judicial council or to the judge or magistrate judge complained about any document from the files that was not sent to the council members pursuant to Rule 7(a).

(d) Quorum and Voting. If a petition is placed on the agenda of a meeting of the judicial council, a majority of council members eligible to participate (see Rule 18(b)) shall constitute a quorum and is required for any effective council action.

(e) Rights of Judge or Magistrate Judge Complained About.

(1) At any time after the filing of a petition for review by a complainant, the judge or magistrate judge complained about may file, and before the judicial council makes any decision unfavorable to the judge or magistrate judge will be invited to file, a written response with the clerk of the court of appeals. The clerk will promptly distribute copies of the response to each member of the judicial council who is not disqualified and to the complainant. The judge or magistrate judge may not communicate with council members individually about the matter, either orally or in writing.

(2) The judge or magistrate judge complained about will be provided with copies of any communications that may be addressed to the members of the judicial council by the complainant.

(f) Notice of Council Decision.

(1) The order of the judicial council, together with any accompanying memorandum in support of the order, will be filed and provided to the complainant, the judge or magistrate judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2).

(2) If the decision is unfavorable to the complainant, the complainant will be notified that the law provides for no further review of the decision.

(3) A memorandum supporting a council order will not include the name of the complainant or the judge or magistrate judge whose conduct was complained of. If the order of the council denies a petition for review of the chief judge's disposition, a supporting memorandum will be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation.

Chapter IV: Investigation and Recommendation By Special Committee

RULE 9. APPOINTMENT OF SPECIAL COMMITTEE

(a) Membership. A special committee appointed pursuant to rule 4(e) will consist of the chief judge of the circuit and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee will be from districts other than the district of the judge or magistrate judge complained about.

(b) Presiding officer. At the time of appointing the committee, the chief judge will designate one of its members (who may be the chief judge) as the presiding officer. When designating another member of the committee as the presiding officer, the chief judge may also delegate to such member the authority to direct the clerk of the court of appeals to issue subpoenas related to proceedings of the committee.

(c) Bankruptcy Judge or Magistrate Judge as Adviser. If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief judge may designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an adviser to the committee. The chief judge will designate such an adviser if, within ten days of notification of the appointment of the committee, the bankruptcy judge or magistrate judge complained about requests that an adviser be designated. The adviser will be from a district other than the district of the judge or magistrate judge complained about. The adviser will not vote but will have the other privileges of a member of the committee.

(d) Provision of Documents. The chief judge will send to each other member of the committee and to the adviser, if any, copies of (1) the complaint form and statement of facts, and (2) any other documents on file pertaining to the complaint (or to that portion of the complaint referred to the special committee).

(e) Continuing Qualification of Committee Members. A member of a special committee who was qualified at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief judge, circuit judge, or district judge, as the case may be, but only if the member continues to hold office under article III, section 1, of the Constitution of the United States.

(f) Inability of Committee Member to Complete Service. If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge of the circuit will determine whether to appoint a replacement member, either a circuit or district judge as the case may be. However, no special committee appointed under these rules will function with only a single member, and the quorum and voting requirements for a two-member committee will be applied as if the committee had three members.

RULE 10. CONDUCT OF AN INVESTIGATION

(a) Extent and Methods to be Determined by Committee. Each special committee will determine the extent of the investigation and the methods of conducting it that are appropriate in the light of the allegations of the complaint. If, in the course of the investigation, the committee develops reason to believe that the judge or magistrate judge may be engaged in misconduct that is beyond the scope of the complaint, the committee may, with written notice to the judge or magistrate judge, expand the scope of the investigation to encompass such misconduct.

(b) Criminal Matters. If the complaint alleges criminal conduct on the part of a judge or magistrate judge, or in the event that the committee becomes aware of possible criminal conduct, the committee will consult with the appropriate prosecuting authorities to the extent permitted by 28 U.S.C. § 351 et. seq. in an effort to avoid compromising any criminal investigation. However, the committee will make its own determination about the timing of its activities, having in mind the importance of ensuring the proper administration of the business of the courts.

(c) Staff. The committee may arrange for staff assistance in the conduct of the investigation. It may use existing staff of the judicial branch or may arrange, through the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

(d) Delegation. The committee may delegate duties in its discretion to subcommittees, to staff members, to individual committee members, or to an adviser designated under Rule 9(c). The authority to exercise the committee's subpoena powers may be delegated only to the presiding officer. In the case of failure to comply with such subpoena, the judicial council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

(e) Report. The committee will file with the judicial council a comprehensive report of its investigation, including findings of the investigation and the committee's recommendations for council action. Any findings adverse to the judge or magistrate judge will be based on evidence in the record. The report will be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held pursuant to rule 11.

(f) Voting. All actions of the committee will be by vote of a majority of all of the members of the committee.

RULE 11. CONDUCT OF HEARINGS BY SPECIAL COMMITTEE

(a) Purpose of Hearings. The committee may hold hearings to take testimony and receive other evidence, to hear arguments, or both. If the committee is investigating allegations against more than one judge or magistrate judge it may, in its discretion, hold joint hearings or separate hearings.

(b) Notice to Judge or Magistrate Judge Complained About. The judge or magistrate judge complained about will be given adequate notice in writing of any hearing held, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The judge or magistrate judge may at any time suggest additional witnesses to the committee.

(c) Committee Witnesses. All persons who are believed to have substantial information to offer will be called as committee witnesses. Such witnesses may include the complainant and the judge or magistrate judge complained about. The witnesses will be questioned by committee members, staff, or both. The judge or magistrate judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel.

(d) Witnesses Called by the Judge or Magistrate Judge. The judge or magistrate judge complained about may also call witnesses and may examine them personally or through counsel. Such witnesses may also be examined by committee members, staff, or both.

(e) Witness Fees. Witness fees will be paid as provided in 28 U.S.C. § 1821.

(f) Rules of Evidence; Oath. The Federal Rules of Evidence will apply to any evidentiary hearing except to the extent that departures from the adversarial format of a trial make them inappropriate. All testimony taken at such a hearing will be given under oath or affirmation.

(g) Record and Transcript. A record and transcript will be made of any hearing held.

RULE 12. RIGHTS OF JUDGE OR MAGISTRATE JUDGE IN INVESTIGATION

(a) Notice. The judge or magistrate judge complained about is entitled to written notice of the investigation (rule 4(f)(2)), to written notice of expansion of the scope of an investigation (rule 10(a)), and to thirty days written notice of any hearing (rule 11(b)).

(b) Presentation of Evidence. The judge or magistrate judge is entitled to a hearing, and has the right to present evidence and to compel the attendance of witnesses and the production of documents at the hearing. Upon request of the judge or magistrate judge, the chief judge or a designee will direct the clerk of the court of appeals to issue a subpoena in accordance with 28 U.S.C. § 332(d)(1).

(c) Presentation of Argument. The judge or magistrate judge may submit written argument to the special committee at any time, and will be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(d) Attendance at Hearings. The judge or magistrate judge will have the right to attend any hearing held by the special committee and to receive copies of the transcript and any documents introduced, as well as to receive copies of any written arguments submitted by the complainant to the committee.

(e) Receipt of Committee's Report. The judge or magistrate judge will have the right to receive the report of the special committee at the time it is filed with the judicial council.

(f) Representation by Counsel. The judge or magistrate judge may be represented by counsel in the exercise of any of the rights enumerated in this rule. The costs of such representation may be borne by the United States as provided in rule 14(h).

RULE 13. RIGHTS OF COMPLAINANT IN INVESTIGATION

(a) Notice. The complainant is entitled to written notice of the investigation as provided in rule 4(f)(2). Upon the filing of the special committee's report to the judicial council, the complainant will be notified that the report has been

filed and is before the council for decision. The Judicial Council may, in its discretion release the special committee's report to the complainant.

(b) Opportunity to Provide Evidence. The complainant is entitled to be interviewed by a representative of the committee. If it is believed that the complainant has substantial information to offer, the complainant will be called as a witness at a hearing.

(c) Presentation of Argument. The complainant may submit written argument to the special committee. In the discretion of the special committee, the complainant may be permitted to offer oral argument.

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

Chapter V: Judicial Council Consideration of Recommendations of Special Committee

RULE 14. ACTION BY JUDICIAL COUNCIL

(a) Purpose of Judicial Council Consideration. After receipt of a report of a special committee, the judicial council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that intervening events make action unnecessary, refer the complaint to the Judicial Conference of the United States, or order corrective action.

(b) Basis of Council Action. Subject to the rights of the judge or magistrate judge to submit argument to the council as provided in rule 15(a), the council may take action on the basis of the report of the special committee and the record of any hearings held. If the council finds that the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee or (2) conduct such additional investigation as it deems appropriate.

(c) Dismissal. The council will dismiss a complaint if it concludes –

(1) that the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(2) that the complaint is directly related to the merits of a decision or procedural ruling;

(3) that the facts on which the complaint is based have not been demonstrated; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) Conclusion of the Proceeding on the Basis of Corrective Action Taken. The council will conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint, or that intervening events make such action unnecessary.

(e) Referral to Judicial Conference of the United States. The judicial council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council's recommendations for action. It is required to refer such a complaint to the Judicial Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct –

(1) that might constitute grounds for impeachment; or

(2) that, in the interest of justice, is not amenable to resolution by the judicial council.

(f) Order of Corrective Action. If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the judicial council will take such other action as is authorized by law to assure the effective and expeditious administration of the business of the courts.

(g) Combination of Actions. Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

(h) Recommendation About Fees. If the complaint has been finally dismissed, the judicial council, upon request of the judicial officer, shall consider whether to recommend that the Director of the Administrative Office reimburse the judicial officer for attorney's fees and expenses.

(i) Notice of Action of Judicial Council. Council action will be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order will be accompanied by a memorandum, which may be incorporated into one document, setting forth the factual determinations on which it is based and the reasons for the council action. The memorandum will not include the name of the complainant or of the judge or magistrate judge whose conduct was complained about. The order and the supporting memorandum will be filed and provided to the complainant, the judge or magistrate judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge or magistrate judge will be notified of any right to seek review of the judicial council's decision by the Judicial Conference of the United States and of the procedure for filing a petition for review.

(j) Public Availability of Council Action. Materials related to the council's action will be made public at the time and in the manner set forth in rule 17.

RULE 15. PROCEDURES FOR JUDICIAL COUNCIL CONSIDERATION OF A SPECIAL COMMITTEE'S REPORT

(a) Rights of Judge or Magistrate Judge Complained About. Within ten days after the filing of the report of a special committee, the judge or magistrate judge complained about may address a written response to all of the members of the judicial council. The judge or magistrate judge will also be given an opportunity to present oral argument to the council, personally or through counsel. The judge or magistrate judge may not communicate with council

members individually about the matter, either orally or in writing, except as the judicial council has authorized one or more of its members to engage in such communications on its behalf.

(b) Conduct of Additional Investigation by the Council. If the judicial council decides to conduct additional investigation, the judge or magistrate judge complained about will be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in rules 10 through 13 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony to avoid unnecessary repetition of testimony presented before the special committee.

(c) Quorum and Voting. A majority of council members eligible to participate (see Rule 18(b)) shall constitute a quorum and is required for any effective council action, except that, in accordance with 28 U.S.C. § 152(e), a decision to remove a bankruptcy judge from office requires a majority of all the members of the council.

Chapter VI: Miscellaneous Rules

RULE 16. CONFIDENTIALITY

(a) General Rule. Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge, magistrate judge, or employee of the judicial branch or any person who records or transcribes testimony except in accordance with these rules.

(b) Files. All files related to complaints of misconduct or disability, whether maintained by the clerk, the chief judge, members of a special committee, members of the judicial council, or staff, and whether or not the complaint was accepted for filing, will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

(c) Disclosure of Memoranda of Reasons. Memoranda supporting orders of the chief judge or the judicial council, and dissenting opinions or separate

statements of members of the council, may contain such information and exhibits as the authors deem appropriate.

(d) Availability to Judicial Conference. If a complaint is referred under rule 14(e) to the Judicial Conference of the United States, the clerk will provide the Judicial Conference with copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the Judicial Conference or its Committee to Review Circuit Council Conduct and Disability Orders, in connection with their consideration of a referred complaint or a petition under 28 U.S.C. § 355 for review of a council order, the clerk will furnish any other records related to the investigation.

(e) Availability to District Court. If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 14(f)(3), the clerk will provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the chief judge of the district court, the judicial council may authorize release of any other records relating to the investigation.

(f) Impeachment Proceedings. The judicial council may release to the legislative branch any materials that are believed necessary to an impeachment investigation of a judge or a trial on articles of impeachment.

(g) Consent of Judge or Magistrate Judge Complained About. Any materials from the files may be disclosed to any person upon the written consent of both the judge or magistrate judge complained about and the chief judge of the circuit. The chief judge may require that the identity of the complainant be shielded in any materials disclosed.

(h) Disclosure by Judicial Council in Special Circumstances. The judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that the council concludes that such disclosure is justified by special circumstances and is not prohibited by 28 U.S.C. § 355.

(i) Disclosure of Identity by Judge or Magistrate Judge Complained About. Nothing in this rule will preclude the judge or magistrate judge complained about from acknowledging that such judge is the judge or magistrate judge

referred to in documents made public pursuant to rule 17.

RULE 17. PUBLIC AVAILABILITY OF DECISIONS

(a) General Rule. A docket-sheet record of orders of the chief judge and the judicial council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the judicial council will be made public when final action on the complaint has been taken and is no longer subject to review.

(1) If the complaint is finally disposed of without appointment of a special committee or of it is disposed of by council order dismissing the complaint for reasons other than mootness, or because intervening events have made action on the complaint unnecessary, the publicly available materials will not disclose the name of the judge or magistrate judge complained about without such judge's consent.

(2) If the complaint is finally disposed of by censure or reprimand by means of private communication, the publicly available materials will not disclose either the name of the judge or magistrate judge complained about or the text of the reprimand.

(3) If the complaint is finally disposed of by any other action taken pursuant to rule 14(d) or (f) except dismissal because intervening events have made action on the complaint unnecessary, the text of the dispositive order will be included in the materials made public, and the name of the judge or magistrate judge will be disclosed.

(4) If the complaint is dismissed as moot at any time after the appointment of a special committee, the judicial council will determine whether the name of the judge or magistrate judge is to be disclosed.

(5) The name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure.

(b) Manner of Making Public. The records referred to in paragraph (a) will be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals at the United States Courthouse, Foley Square, New York, New York 10007. The clerk will send copies of the publicly available materials to the Administrative Office of the United States Courts, Office of the General Counsel, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20544, where such materials will also be available for public inspection. In cases in which memoranda appear to have precedential value, the chief judge may cause them to be published.

(c) Decisions of Judicial Conference Standing Committee. To the extent consistent with the policy of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, opinions of that committee about complaints arising from this circuit will also be made available to the public in the office of the clerk of the court of appeals.

(d) Special Rule for Decisions of Judicial Council. When the judicial council has taken final action on the basis of a report of a special committee, and no petition for review has been filed with the Judicial Conference within thirty days of the council's action, the materials referred to in paragraph (a) will be made public in accordance with this rule as if there were no further right of review.

(e) Complaints Referred to the Judicial Conference of the United States. If a complaint is referred to the Judicial Conference of the United States pursuant to rule 14(e), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

RULE 18. DISQUALIFICATION

(a) Complainant. If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. If the complaint is filed by a judge, or identified by the chief judge pursuant to 28 U.S.C. § 351(a), that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant.

(b) Judge Complained About. A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a judge or magistrate judge who is complained about. This subsection shall not apply where a complainant files complaints against a majority of the members of the judicial council, in which event, the council members, including those complained against, may refer the complaints, with or without a recommendation for appropriate action, to the Judicial Conference of the United States or to the judicial council of another circuit, or may take other appropriate action, including disposition of the complaints on their merits.

(c) Member of Special Committee Not Disqualified. A member of the judicial council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

(d) Judge or Magistrate Judge Under Investigation. Upon appointment of a special committee, the judge or magistrate judge complained about will automatically be disqualified from serving on (1) any special committee appointed under Rule 4(e), (2) the judicial council of the circuit, (3) the Judicial Conference of the United States, and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings regarding the complaint are finally terminated, with no further right of review. The proceedings will be deemed terminated thirty days after the final action of the judicial council if no petition for review has at that time been filed with the Judicial Conference.

(e) Substitute for Chief Judge. If the chief judge of the circuit is disqualified or otherwise unable to participate in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge eligible to become the next chief judge of the circuit.

RULE 19. WITHDRAWAL OF COMPLAINTS AND PETITIONS FOR REVIEW

(a) Complaint Pending Before Chief Judge. A complaint that is before the chief judge for a decision under rule 4 may be withdrawn by the complainant with the consent of the chief judge.

(b) Complaint Pending Before Special Committee or Judicial Council. After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both (1) the judge or magistrate judge complained about and (2) the special committee (before its report has been filed) or the judicial council.

(c) Petition for Review of Chief Judge's Disposition. A petition to the judicial council for review of the chief judge's disposition of a complaint may be withdrawn by the petitioner at any time before the judicial council acts on the petition.

RULE 19A. ABUSE OF THE COMPLAINT PROCEDURE

If a complainant files vexatious, harassing, or scurrilous complaints, or otherwise abuses the complaint procedure, the council, after affording the complainant an opportunity to respond in writing, may restrict or impose conditions upon the complainant's use of the complaint procedure. Any restrictions or conditions imposed upon a complainant shall be reconsidered by the council periodically.

RULE 20. AVAILABILITY OF OTHER PROCEDURES

The availability of the complaint procedure under these rules and 28 U.S.C. § 351 et. seq. will not preclude the chief judge of the circuit or the judicial council of the circuit from considering any information that may come to their attention suggesting that a judge or magistrate judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge all the duties of office by reason of disability.

RULE 21. AVAILABILITY OF RULES AND FORMS

These rules and copies of the complaint form prescribed by rule 2 will be available without charge in the office of the clerk of the court of appeals, United States Courthouse, Foley Square, New York, New York 10007, and in each office of the clerk of a district court or bankruptcy court within this circuit.

RULE 21A. NO IMPLICATION OF CONSTITUTIONALITY

The adoption of these rules shall not be construed as indicating any views with respect to the constitutionality of 28 U.S.C. § 351 et. seq. or any action taken hereunder.

RULE 22. EFFECTIVE DATE

These rules apply to complaints filed on or after November 2, 2002. The handling of complaint filed before that date will be governed by the rules previously in effect.

RULE 23. ADVISORY COMMITTEE

The advisory committee appointed by the Court of Appeals for the Second Circuit for the study of rules of practice and internal operating procedures shall also constitute the advisory committee for the study of these rules, as provided by 28 U.S.C. § 2077(b), and shall make any appropriate recommendations to the circuit judicial council concerning these rules.

COMPLAINT FORM

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

COMPLAINT AGAINST JUDICIAL OFFICER
UNDER 28 U.S.C. § 351 et. seq.

INSTRUCTIONS:

(a) All questions on this form must be answered.

(b) A separate complaint form must be filled out for each judicial officer complained against.

(c) Submit the correct number of copies of this form and the statement of facts. For a complaint against:

a court of appeals judge -- original and 3 copies
a district court judge or magistrate judge -- original and 4 copies
a bankruptcy judge -- original and 5 copies

(For further information see Rule 2(e)).

(d) Service on the judicial officer will be made by the Clerk's Office. (For further information See Rule 3(a)(1)).

(e) Mail this form, the statement of facts and the appropriate number of copies to the Clerk, United States Court of Appeals, Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, NY 10007.

1. Complainant's Name: _____

Address: _____

_____

Daytime Telephone No. (include area code): _____

2. Judge or magistrate judge complained about:

Name: _____

Court: _____

3. Does this complaint concern the behavior of the judge or magistrate judge in a particular lawsuit or lawsuits?

[ ] Yes [ ] No

If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court: _____

Docket number: _____

Docket numbers of any appeals to the Second Circuit:

_____

Did a lawyer represent you?

[ ] Yes [ ] No

If "yes" give the name, address, and telephone number of your lawyer:

4. Have you previously filed any complaints of judicial misconduct or disability against <u>any</u> judge or magistrate judge?

[ ] Yes [ ] No

If "Yes," give the docket number of each complaint.

5. You should attach a statement of facts on which your complaint is based, see rule 2(b), and

EITHER

(1) check the box and sign the form. You do not need a notary public if you check this box.

[ ] I declare under penalty of perjury that:

(i) I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint and attached statement of facts are true and correct to the best of my knowledge.

_____
(signature)

Executed on _____
(date)

OR

(2) check the box below and sign this form in the presence of a notary public;

[ ] I swear (affirm) that--

(i) I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and

(3) The statements made in this complaint and attached statement of facts are true and correct to the best of my knowledge.

_____
(signature)

Executed on _____
(date)

Sworn and subscribed to before me
this ____ day of _____200_.

_____
(Notary Public)

My commission expires: _____

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

February 2, 2004

Hon. John M. Walker, Jr.
Chief Judge
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square, Room 1802
New York, NY 10007

Re: Judicial conduct complaint 03-8547

Dear Chief Judge,

In August 2003, I filed a judicial conduct complaint under 28 U.S.C. §§372 and 351 concerning the Hon. John C. Ninfo, II, U.S. Bankruptcy Judge and other court officers at the U.S. Bankruptcy Court and the U.S. District Court for the Western District of New York. Your Clerk of Court, Ms. Roseann B. MacKechnie, through her Deputy, Ms. Patricia Chin-Allen, acknowledged the filing of it by letter of September 2, 2003. To date I have not been notified of any decision that you may have taken in this matter.

I respectfully point out that Rule 3(a) of the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers 28 U.S.C. §351 et seq., provides, among other things, that "The clerk will **promptly** send copies of the complaint to the chief judge of the circuit…" (emphasis added). Likewise, Rule 4(e) provides that "If the complaint is not dismissed or concluded, the chief judge will **promptly** appoint a special committee" (emphasis added). For its part, Rule 7(a) requires that "The clerk will **promptly** cause to be sent to each member of the judicial council" (emphasis added) copies of certain documents for deciding the complainant's petition for review. The tenor of the Rules is that action will be taken expeditiously.

Indeed, this follows from the provisions of the law itself. Thus, 28 U.S.C. 372(c)(1) provides that "In the interests of the effective and **expeditious** administration of the business of the courts…the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint" (emphasis added). In the same vein, (c)(2) states that "Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall **promptly** transmit such complaint to the chief judge of the circuit…" (emphasis added). More to the point, (c)(3) provides that "After **expeditiously** reviewing a complaint, the chief judge, by written order stating his reasons, may- (A) dismiss the complaint…(B) conclude the proceedings…The chief judge shall transmit copies of his written order to the complainant." (emphasis added). What is more, (c)(3) requires that "If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall **promptly**- (A) appoint…a special committee to investigate…(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and (C) provide written notice to the complainant and the judge…of the action taken under this paragraph" (emphasis added).

Despite these provisions in law and rules requiring prompt and expeditious action, this is the seventh month since the filing of my complaint but no notice of any action taken has been given to me or perhaps not action has been taken at all. Therefore, with all due respect I request that you let me know whether any action has been taken concerning my complaint and, if so, which, in order that I may proceed according to the pertinent legal provisions.

In the context of the misconduct complained about, I hereby update the evidence thereof through incorporation by reference of my brief of November 3, 2003, case 03-5023, supplementing the evidence of bias against me on the part of Judge Ninfo. This Court granted leave to file this brief by order of November 13, 2004.

Similarly, in that complaint I submitted that the special committee should investigate whether Judge Ninfo affirmatively recruited, or created the atmosphere of disregard of law and fact that led, other court officers to engage in a series of acts forming a pattern of non-coincidental, intentional, and coordinated conduct aimed at achieving an unlawful objective for their benefit and that of third parties and to my detriment, the only non-local pro se party. To buttress the need for that investigation, I point out that since December 10, 2003, I have requested from the clerk's office of Judge Ninfo's court copies of key financial and payment documents relating Premier Van Lines, which must exist since they concern the accounts of the debtor and the payment of fees out of estate funds and are mentioned in entries of docket no. 01-20692. Yet, till this day the clerk has not found them and has certainly not made them available to me.

1. The court order authorizing payment of fees to Trustee Kenneth Gordon's attorney, William Brueckner, Esq., and stating the amount thereof; cf. docket entry no. 72.
2. The court order authorizing payment of fees to Auctioneer Roy Teitsworth and stating the amount thereof; cf. docket entry no. 97.
3. The financial statements concerning Premier prepared by Bonadio & Co., accountants, for which Bonadio was paid fees; cf. docket entries no. 90, 83, 82, 79, 78, 49, 30, 29, 27, 26, 22, and 16.
4. The statement of M&T Bank of the proceeds of its auction of assets of Premier's estate on which it held a lien as security for its loan to Premier; the application of the proceeds to set off that loan; and the proceeds' remaining balance and disposition; cf. docket entry no. 89.
5. The information provided to comply with the order described in entry no. 71 and with the minutes described in entry no. 70.
6. The Final report and account referred to in entry no. 67 and ordered to be filed in entry no. 62.

A court that cannot account for the way it handles money to compensate its appointees and make key decisions concerning the estate calls for an investigation guided by the principle of "follow the money" in order to determine whether it "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts".

Sincerely,

Dr. Richard Cordero

Cc: Letter of acknowledgment from Clerks MacKechnie and Chin-Allen; and order granting the motion to update evidence of bias.

Sept 10, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall United States Courthouse
40 Centre Street
New York, N.Y. 10007

John M. Walker, Jr.
Chief Judge

Roseann B. MacKechnie
Clerk of Court

September 2, 2003

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

Re: Judicial Conduct Complaint, 03-8547

Dear Dr. Cordero:

We hereby acknowledge receipt of your complaint, dated August 27, 2003, received in this office on August 28, 2003.

The complaint has been filed under the above-captioned number and will be processed pursuant to the *Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers Under 28 USC § 351.*

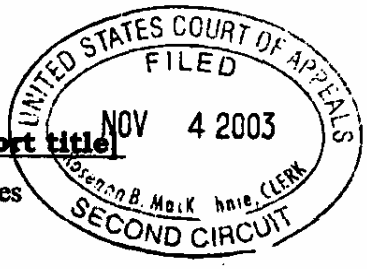
You will be notified by letter once a decision has been filed.

Sincerely,

Roseann B. MacKechnie, Clerk

By: Patricia Chin-Allen
Patricia Chin-Allen, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
MOTION INFORMATION STATEMENT



Caption [use short title]

Docket Number(s): 03-5023

In re: Premier Van Lines

Motion for: Leave to introduce an updating supplement on the issue of the (WDNY) Bankruptcy Court's bias against Petitioner Dr. Richard Cordero evidenced in its order of October 23, 2003, denying Dr. Cordero's request for a jury trial, which Dr. Cordero submitted to and is under consideration by this Court of Appeals

Statement of relief sought:

That this Court:

1) admit into evidence that court's October 23 decision as an extension of the same nucleus of operative facts evidencing bias against Appellant Dr. Cordero and which were submitted on appeal to this Court together with the substantive issues to which those facts give rise;

2) review that decision together with that court's July 15 decision already submitted and decide whether the court's vested interest in not allowing a jury to consider its participation in a pattern of non-coincidental, intentional, and coordinated wrongful activity makes it a party with an interest in the outcome of Dr. Cordero's request for a jury trial and disqualifies it from being impartial in its denial of the request; and

3) grant any other proper and just relief.

MOVING PARTY: Dr. Richard Cordero
Petitioner Pro Se
59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; corderoric@yahoo.com

OPPOSSING PARTY: Hon. John C. Ninfo, II
US Court House
100 State Street
Rochester, NY 14614
tel. (585) 263-3148

Court-Judge/Agency appealed from: Hon. John C. Ninfo, II

Has consent of opposing counsel:
A. been sought? No respondent known

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Is oral argument requested? Yes

Has argument date of appeal been set? No

Signature of Moving Petitioner Pro Se:

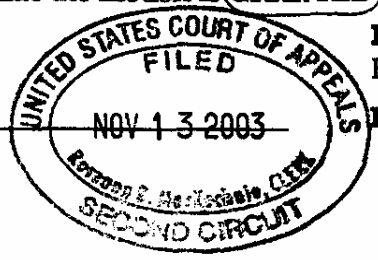
Dr. Richard Cordero

Has service been effected? Yes; proof is attached

Date: October 31, 2003

ORDER

IT IS HEREBY ORDERED that the motion is **GRANTED** [illegible].



FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: 11-13-03

By:
By: Ana Vargas
Calendar Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 CENTRE STREET
New York, New York 10007
212-857-8500

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

February 4, 2004

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

Re: *Judicial Conduct Complaint, 03-8547*

Dear Dr. Cordero:

This letter is to acknowledge receipt of your letter, with attachments, dated February 2, 2004, addressed to Chief Judge John M. Walker, Jr.

I am returning your documents to you. A decision has not been made in the above-reference matter. You will be notified by letter when a decision has been made.

Sincerely,
Roseann B. MacKechnie, Clerk

By: Patricia C. Allen
Patricia C. Allen, Deputy Clerk

Enclosures

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

February 11, 2004

Madam Justice Ginsburg
The Supreme Court of the United States
U.S. Supreme Court Building, 1 First Street, N.E.
Washington, D.C. 20543

Dear Madam Justice,

On August 11, 2003, I submitted to the Court of Appeals for the Second Circuit a complaint based on detailed evidence of judicial misconduct on the part of U.S. Bankruptcy Judge John C. Ninfo and other court officers in the Bankruptcy and District Courts for the Western District of New York. The specific instances of systematic disregard of the law, rules, and facts were so numerous, so protective of the local parties and injurious to me alone, the only non-local and pro se party, as to form a pattern of non-coincidental, intentional, and coordinated acts of wrongdoing. Receipt of the complaint was acknowledged on September 2; it was assigned docket no. 03-8547. Although the provisions of law governing such complaints, that is, 28 U.S.C. §§372 and 351, and the implementing rules of this Circuit require 'prompt and expeditious' action on the part of the chief judge and its notification to the complainant, it is the seventh month since submission but I have yet to be informed of what action, if any, has been taken.

What is more, on February 2, I wrote to the Hon. Chief Judge John M. Walker, Jr., to inquire about the status of the complaint and to update it with a description of subsequent events further evidencing wrongdoing. To my astonishment, the original and all the copies that I submitted were returned to me immediately on February 4. One can hardly fathom the reason for the inapplicability to a judicial misconduct complaint already in its seventh month after submission of the basic principles of our legal system of the right to petition and the obligation to update information, which is incorporated in the federal rules of procedure. Nor can one fail to be shocked by the fact that precisely a complaint charging disregard of the law and rules is dealt with by disregarding the law and rules requiring that it be handled 'promptly and expeditiously'. Nobody is above the law; on the contrary, the higher one's position, the more important it is to set the proper example of respect for the law and its objectives.

There is still more. The pattern of wrongdoing has materialized in more than 10 decisions adopted by the bankruptcy and district courts, which I challenged in an appeal bearing docket no. 03-5023. One of the appeal's three separate grounds is that such misconduct has tainted those decisions with bias and prejudice against me and denied me due process. Yet, the order dismissing my appeal, adopted by a panel including the Chief Judge, does not even discuss that pattern, let alone protect me on remand from further targeted misconduct and systemic wrongdoing that have already caused me enormous expenditure of time, effort, and money as well as unbearable aggravation. Where the procedural mechanics of jurisdiction are allowed to defeat the courts' reason for existence, namely, to dispense justice through fair and impartial process, then there is every justification for escalating the misconduct complaint to the next body authorized to entertain it. It is not reasonable to expect that a complainant should wait sine die just to find out the status of his complaint despite the evidence that it is not being dealt with and that he is being left to fend for himself at the wrongful hands of those that treat him with disregard for law, rules, and facts.

Therefore, I am respectfully addressing myself to you as the justice with supervisory responsibilities for this Circuit, and to the members of the Judicial Council of this Circuit, to request that you consider the documents attached hereto and bring my complaint and its handling so far to the attention of the Council so that it may launch an investigation of the judges complained-about and I be notified thereof. Meantime, I look forward to hearing from you and remain,

sincerely yours,

Dr. Richard Cordero

C:110 Dr. Cordero's request of 2/11/4 to 2nd Cir Justice Ginsburg for Judicial Council to investigate §351 complaint

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

[Sample of letters to members of the Judicial Council, 2nd Cir.] February 13, 2004

The Hon. Dennis Jacobs
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square, Room 1802
New York, NY 10007

Dear Judge Jacobs,

On August 11, 2003, I submitted to the Court of Appeals for the Second Circuit a complaint based on detailed evidence of judicial misconduct on the part of U.S. Bankruptcy Judge John C. Ninfo and other court officers in the Bankruptcy and District Courts for the Western District of New York. The specific instances of disregard of the law, rules, and facts were so numerous, so protective of the local parties and injurious to me alone, the only non-local and pro se party, as to form a pattern of non-coincidental, intentional, and coordinated acts of wrongdoing. Receipt of the complaint was acknowledged on September 2; it was assigned docket no. 03-8547. Although the provisions of law governing such complaints, that is, 28 U.S.C. §§372 and 351, and the implementing rules of this Circuit require 'prompt and expeditious' action on the part of the chief judge and its notification to the complainant, it is the seventh month since submission but I have yet to be informed of what action, if any, has been taken.

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There is still more. The pattern of wrongdoing has materialized in more than 10 decisions adopted by the bankruptcy and district courts, which I challenged in an appeal bearing docket no. 03-5023. One of the appeal's three separate grounds is that such misconduct has tainted those decisions with bias and prejudice against me and denied me due process. Yet, the order dismissing my appeal, adopted by a panel including the Chief Judge, does not even discuss that pattern, let alone protect me on remand from further targeted misconduct and systemic wrongdoing that have already caused me enormous expenditure of time, effort, and money as well as unbearable aggravation. Where the procedural mechanics of jurisdiction are allowed to defeat the courts' reason for existence, namely, to dispense justice through fair and impartial process, then there is every justification for escalating the misconduct complaint to the next body authorized to entertain it. It is not reasonable to expect that a complainant should wait sine die just to find out the status of his complaint despite the evidence that it is not being dealt with and that he is being left to fend for himself at the wrongful hands of those that treat him with disregard for law, rules, and facts.

Therefore, I am respectfully addressing myself to you as member of the Judicial Council of this Circuit and to Justice Ginsburg, as the justice with supervisory responsibilities for this Circuit, to request that you consider the documents attached hereto and bring my complaint and its handling so far to the attention of the Council so that it may launch an investigation of the judges complained-about and I be notified thereof. Meantime, I look forward to hearing from you and remain,

sincerely yours,

Dr. Richard Cordero

List of Members of the Judicial Council of the Second Circuit

to whom the letters of February 11 and 13, 2004, were individually addressed
requesting that they cause the Council to investigate
the misconduct complaint against Judge John C. Ninfo, II, WBNY
and its handling by Chief Judge John M. Walker, Jr., CA2

by

Dr. Richard Cordero

Madam Justice **Ginsburg**
Circuit Justice for the Second Circuit
The **Supreme Court** of the United States
1 First Street, N.E.
Washington, D.C. 20543
tel. (202) 479-3000

Circuit Judges

Judge Jose A. Cabranes, CA2
Judge Guido Calabresi, CA2
Judge Dennis Jacobs, CA2
Judge Rosemary S. Pooler, CA2
Judge Chester J. Straub, CA2
Judge Robert D. Sack., CA2

U.S. Court of Appeals
for the Second Circuit
Member of the Judicial Council
40 Foley Square
New York, NY 10007-1561
tel. (212) 857-8500

District judges

The Hon. Frederick J. **Scullin**, Jr.
U.S. District Court, NDNY
Member of the Judicial Council
445 Broadway, Suite 330
Albany, NY 12207
tel. (518) 257-1661

The Hon. Edward R. **Korman**
U.S. District Court, EDNY
Member of the Judicial Council
75 Clinton Street
Brooklyn, NY 11201
tel. (718) 330-2188

The Hon. Michael B. **Mukasey**
U.S. District Court, SDNY
Alexander Hamilton Custom House
Member of the Judicial Council
One Bowling Green
New York, NY 10004-1408
tel. (212) 805-0136

The Hon. Robert N. **Chatigny**
U.S. District Court, District of **Connecticut**
Richard C. Lee U.S. Courthouse
Member of the Judicial Council
141 Church Street
New Haven, Ct 06510
tel. (203) 773-2140

The Hon. William **Sessions**, III
U.S. District Court, District of **Vermont**
Member of the Judicial Council
P.O. Box 928
Burlington, VT 05402-0928
tel. (802) 951-6350

Table of Exhibits

accompanying the letters of February 11 and 13, 2004
sent to members of the Judicial Council, 2nd Cir.,
requesting that they cause the Council to investigate
the misconduct complaint against Judge John C. Ninfo, II, WBNY
and its handling by Chief Judge John M. Walker, Jr., CA2
by
Dr. Richard Cordero

I. Statement of the Complaint

II. DOCUMENTS SUPPORTING THE COMPLAINT (FROM THE APPENDIX IN *IN RE PREMIER VAN* ET AL., 03-5023, CA2)

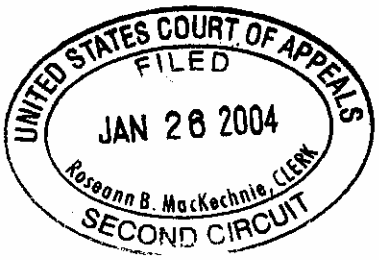
[A-# in A folder]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 26th day of January , two thousand and four.



PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. James L. Oakes,
Hon. Robert A. Katzmann,
Circuit Judges.

----------X

IN RE: PREMIER VAN LINES, INC.,
Debtor.

----------X

RICHARD CORDERO,
Third-Party-Plaintiff-Appellant,

v.

No. 03-5023

KENNETH W. GORDON, ESQ.,
Trustee-Appellee,

DAVID PALMER,
Third-Party-Defendant-Appellee.

----------X

APPEARING FOR APPELLANT: Richard Cordero, Brooklyn, NY

APPEARING FOR APPELLEES: Kenneth W. Gordon, Esq., Gordon & Schaal, LLP, Rochester, New York

Appeal from orders of the United States District Court for the Western District of New York (David G. Larimer, District Judge).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal from orders of the District Court is **DISMISSED.**

Third-party-plaintiff-appellant Richard Cordero appeals from two interlocutory orders issued by the district court. In one of the orders, the district court (1) denied Cordero's motion for default judgment against appellee David Palmer, whom Cordero had joined as a third party in an adversary proceeding within the bankruptcy proceedings commenced by Premier Van Lines, and (2) remanded to the bankruptcy court for further proceedings. In the second order, the district court affirmed the bankruptcy court's dismissal of a cross-claim asserted by Cordero against bankruptcy trustee Kenneth Gordon. The adversary proceedings remain pending before the bankruptcy court at the present time.

Having carefully considered all of Cordero's arguments on appeal, including those raised in the supplemental brief he filed following oral argument, we conclude that we lack jurisdiction to consider the merits of Cordero's claims because the orders he seeks to appeal are non-final and non-appealable.

Pursuant to § 158(d) of the Bankruptcy Act, 28 U.S.C. § 158(d), this court has jurisdiction to review a district court's order in a bankruptcy case only if that order is "final." See In re Prudential Lines, Inc., 59 F.3d 327, 331 (2d Cir. 1995). The first order Cordero seeks to appeal is not final within the meaning of § 158(d) because the district court remanded Cordero's motion for a default judgment to the bankruptcy court for further proceedings. See In re Prudential Lines, 59 F.3d at 331 ("This court has adopted the prevailing view that courts of appeals lack jurisdiction over appeals from orders of district courts remanding for significant further proceedings in bankruptcy courts.") (internal quotation marks omitted). The second order Cordero seeks to appeal is also not final because, in the bankruptcy context, the dismissal of a single cross-claim asserted within a larger adversary proceeding is not a final, appealable order. Id. at 332.

Finally, insofar as Cordero seeks the bankruptcy judge's recusal, to move the proceedings to a different judicial district, or to appeal the bankruptcy court's orders denying Cordero's recusal and removal motions and his belated motion for an extension

of time in which to file a notice of appeal, these claims challenge decisions issued by the bankruptcy court that have not been reviewed by the district court. Pursuant to § 158(d), the jurisdiction of the court of appeals in bankruptcy actions is limited to review of final decisions emanating from the district court. See In re Fugazy Express, Inc., 982 F.2d 769, 774-75 (2d Cir. 1992) (this court lacks jurisdiction over appeals taken from non-final orders originating in the bankruptcy court). Contrary to Cordero's assertions in his supplemental brief, this limitation is unaffected by the provisions of 28 U.S.C. § 455(a). Cf. In re Smith, 317 F.3d 918, 923 (9th Cir. 2002) (reviewing district court's affirmance of bankruptcy judge's denial of motion to recuse). Accordingly, we lack jurisdiction over these claims as well.

For the reasons set forth above, Cordero's appeal is **DISMISSED** for lack of jurisdiction.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr
Lucille Carr, Deputy Clerk

Docket no. 03-5023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR PANEL REHEARING
AND
HEARING EN BANC

In re Premier Van et al.

Richard Cordero,
Cross and Third party plaintiff-Appellant
v.
Kenneth Gordon,
Cross defendant-Appellee
and (no. 03-cv-6021L, WDNY)
David Palmer,
Third party defendant-Appellee
(no. 03-MBK-6001L, WDNY)

Dr. Richard Cordero respectfully petitions that this Court's order of January 26, 2004, (Appendix=A-842, infra) dismissing his appeal from orders issued by the U.S. Bankruptcy and District Courts for the Western District of NY be reviewed by the panel and in banc on the following factual and legal considerations:

I. Why this Court should hear this petition en banc

1. This petition should be heard an banc because: There is abundant material evidence that judges, administrative personnel, and attorneys in the bankruptcy and district courts in Rochester have disregarded the law, rules, and facts so repeatedly and consistently to the detriment of Dr. Cordero, the sole non-local

party, who resides in New York City, and the benefit of the local ones in Rochester as to form a pattern of non-coincidental, intentional, and coordinated acts of wrongdoing and of bias against him (A-674, infra).

2. The resulting abuse and that yet to be heaped on remand on Dr. Cordero, a pro se litigant, can wear him down until he is forced to quit his pursuit of justice (para. 22, infra). The reality that everybody has a breaking point should be factored in by every member of this Court when deciding whether to hear this appeal. It was dismissed on the procedural ground that the appealed orders lack finality. Under these circumstance, the Supreme Court would depart from a requirement of strict finality "when observance of it would practically defeat the right to any review at all," *Cobbledick v. United States,* 60 S.Ct. 540, 540-41, 309 U.S. 323, 324-25, 84 L.Ed. 783, 784-85 (1940). Hence, Dr. Cordero appeals to the commitment to justice and professional responsibility of the Court's members to review this case so that they may relieve him of so much abuse and ensure that he has his day in a court whose integrity affords him just and fair process.

3. If doing justice to one person were not enough to intervene, then this Court should do so to ensure just and fair process for all similarly situated current and future litigants and to protect the trust of the public at large in the circuit's judicial system that this Court is charged with protecting (A-813, infra). Resolving conflicts of law among panels or circuits cannot be a more important ground for a hearing en banc than safeguarding the integrity of the judicial process while

aligning itself with Supreme Court pronouncements. Without honest court officers, the judicial process becomes a shell game where the law and its rules are moved around, not by respect for legality and a sense of justice, but rather by deceit, self-gain, and prejudice. To which are you committed?

II. The appealed order dismissing a cross-claim against Trustee Gordon is not just that of the bankruptcy court, but is also the subsequent order of the district court holding that Dr. Cordero's appeal from that dismissal was, although timely mailed, untimely filed, which is a conclusion of law that cannot possibly be affected by any pending proceedings in either court, so that the order is final and appealable

4. Bankruptcy Judge John C. Ninfo, II, dismissed (A-151) the cross-claims against Trustee Kenneth Gordon (A-83) on the latter's Rule 12(b)(6) FRCP motion, while disregarding the genuine issues of material fact that Dr. Cordero had raised (Opening Brief=OpBr-38). This dismissal is final, just as is the dismissal of a complaint unless leave to amend is explicitly granted. *Elfenbein v. Gulf & Western Industries, Inc.*, 90 F.2d 445, 448 n. 1 (2d Cir. 1978).

5. Dr. Cordero appealed to the district court (A-153), but the Trustee moved to dismiss alleging the untimeliness of the filing of the appeal notice, never mind that it was timely mailed. Dr. Cordero moved the district court twice to uphold his appeal (A-158, 205). Twice it dismissed it (A-200, 211). Likewise, twice he appealed to the bankruptcy court to grant his timely mailed motion to extend time to file notice to appeal (A-214, 246). Twice the bankruptcy court denied relief (A-

240, 259), alleging that the motion too had been untimely filed, although even Trustee Gordon had admitted that it had been timely *filed* (OpBr-11).

6. Consequently, there is no possibility in law whereby Dr. Cordero could for a fifth time appeal the issue of timelines to either court. Nor is it possible, let alone likely, that either will sua sponte revise their decisions and reverse themselves. As the bankruptcy put it, 'the district court order establishing that Dr. Cordero's appeal was untimely' "is the law of the case" (A-260). Thus, res judicata prevents any such appeal or sua sponte reversal. Similarly, it is not possible for Dr. Cordero, well over a year after the entry in 2002 of the underlying order dismissing his cross-claims, to move the bankruptcy court to review it and reinstate them; nor could that court sua sponte review it and reverse itself.

7. Due to these orders, Trustee Gordon is beyond Dr. Cordero's reach in this case, and since the Trustee settled with the other parties, he is no longer a litigating party. No pending proceedings in the courts below could ever change the legal relation between Dr. Cordero and the Trustee. Each order is final because it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment", *Catlin v. United States*, 65 S.Ct. 631, 633, 324 U.S. 229, 233, 89 L.Ed. 911 (1945). Their legal relation can only change if this Court reviews either or both of those orders and determines that they are tainted by bias against Dr. Cordero (OpBr-9, 54); and that they are unlawful because the bankruptcy court disregarded the law applicable to a 12(b)(6) motion (OpBr-10, 38) and to

defamation (OpBr-38); and both courts disregarded the Bankruptcy Rules, such as 9006(e) complete-on-mailing and (f) three-additional-days (OpBr-25). What else could possibly be necessary to make an order final and appealable to this Court?

8. This Court can reach the bankruptcy court order (A-151) dismissing the cross-claims because 1) it was included in the notice of appeal to this Court (A-429), and 2) in *In re Bell*, 223 F.3d 203, 209 (2d Cir. 2000*)* it stated that in an appeal from a district court's review of a bankruptcy court ruling, the Court's review of the bankruptcy court is "independent and plenary." Thus, through its review of the district court order dismissing the appeal for untimeliness, the Court can reach the underlying bankruptcy court order dismissing the cross-claims.

III. The district court order remanding to the bankruptcy court the application for default judgment is:

1) final because the further proceedings ordered by the district court were in fact ordered by the bankruptcy court on April 23 and undertaken on May 19, 2003, and

2) appealable because such proceedings were ordered in disregard of the express provisions of Rule 55 FRCP and without any other legal foundation, an issue of law raised on appeal to, and rehearing in, the district court, and reviewable by this Court since the unlawful obligation imposed on Dr. Cordero to participate in the proceedings and the grounds for it cannot possibly be changed by future developments in those courts

9. Dr. Cordero brought third party claims against Mr. David Palmer, the owner of the moving and storage company Premier Van Lines, for having lost his stored property, concealed that fact, and committed insurance fraud (A-78, 87, 88).

Although he was already under the bankruptcy court's jurisdiction as an applicant for bankruptcy, Mr. Palmer failed to answer. Dr. Cordero timely applied for default judgment for a sum certain under Rule 55 FRCP. (A-290, 294) Yet, the court belatedly (A-302) recommended to the district court (A-306) that the default judgment application be denied and that Dr. Cordero be required to inspect his property to prove damages, in total disregard of Rule 55 and without citing any legal basis whatsoever for imposing that obligation on him (OpBr-13).

10. Dr. Cordero submitted to the district court a motion presenting factual and legal grounds why it should dismiss the recommendation and enter default judgment (A-314). However, District Judge David Larimer accepted the recommendation without even acknowledging his motion and required that he "still establish his entitlement to damages since the matter does not involve a sum certain" (A-339). But it did involve a sum certain! (A-294) By making this gross mistake of fact, the district court undercut its own rationale for requiring that Dr. Cordero demonstrate his entitlement in "an inquest concerning damages" to be conducted by the bankruptcy court. Moreover, it cited no statutory or regulatory provision or any case law whatsoever as source of its power to impose that obligation on Dr. Cordero in contravention of Rule 55, which it did not even mention (OpBr-13).

11. Dr. Cordero discussed that outcome-determinative mistake of fact and lack of legal grounds in a motion for rehearing (A-342; cf. OpBr-16). In disposing of it, the district court not only failed to mention, let alone correct, its mistake, or to

provide any legal grounds, but it also failed to provide any opinion at all, just a lazy and perfunctory "The motion is in all respects denied." (A-350; cf. A-211, 205; Reply Brief=ReBr-19) That is all that was deemed necessary between judges that so blatantly disregard law, rules, and facts (OpBr-9-C; 48-53). They have carved their own judicial fiefdom of Rochester out of the territory of this circuit (A-780, infra), where they lord it over attorneys and parties by replacing the laws of Congress with the law of the locals, based on close personal relations and the fear of retaliation against those who challenge their distribution of favorable and unfavorable decisions (A-804.IV, infra).

12. Although the bankruptcy court recommended to the district court that Dr. Cordero's property in storage be inspected to determine damage, it allowed its first order of inspection to be disobeyed with impunity by Plaintiff James Pfuntner and his Attorney David MacKnight to the detriment of Dr. Cordero and without providing him any of his requested compensation or sanctions (OpBr-18). As a result, the inspection did not take place.

13. Then precisely at the instigation of Mr. Pfuntner and his attorney, it ordered at a hearing on April 23, 2003, that Dr. Cordero travel to Rochester to inspect his property, which Mr. Pfuntner said had been left in his warehouse by his former lessee, Mr. Palmer, the owner of the storage company Premier. Although this inspection was the "inquest" for whose conduct by the bankruptcy court the district court denied Dr. Cordero's application for default judgment against Mr. Palmer

and remanded, the bankruptcy court allowed this order to be disobeyed too: None of the necessary preparatory measures were taken (A-365) and neither Mr. Pfuntner, nor his attorney or storage manager even showed up at the inspection. Yet, Dr. Cordero did travel to Rochester and the warehouse on May 19, 2003.

14. At a hearing on May 21 attended by Mr. Pfuntner's attorney, Dr. Cordero reported on the inspection. It had to be concluded that some of his property was damaged and other had been lost (Mandamus Brief-34; Mandamus Appendix= MandA-522-H). Yet, the biased bankruptcy court neither sanctioned the locals that showed but contempt for its orders nor had them compensate Dr. Cordero.

15. It follows that as a matter of fact, the further proceedings for which the case was remanded by the district to the bankruptcy court took place; and as a matter of law, they should never have taken place because requiring them and compelling Dr. Cordero's participation violated Rule 55 FRCP and neither of those courts offered any other legal grounds whatsoever for denying his default judgment application and imposing such requirements. No number of further proceedings will undo the consequences and cancel the implications of the district and bankruptcy rulings. Both must be considered final and appealable (A-821, infra).

16. How could it be said that this Court was dedicated to dispensing justice if it concerns itself with just operating the mechanics of procedure by delivering Dr. Cordero back into the hands of the district and bankruptcy courts for them to injure him with their bias and deprive him of his rights under the law, the sum

certain he sued for, and his emotional wellbeing? Meanwhile, those courts have continued protecting Mr. Palmer, another local party, even after he was defaulted by the Clerk of Court (MandA-479). Thus, he has been allowed to stay away from the proceedings despite being under the bankruptcy court's jurisdiction, whereby he shows nothing but contempt for judicial process. With whom do the equities lie? The procedure of final rulings should not be rolled out if it also allows biased courts to crush Dr. Cordero, for it also crushes the sense of equity that must make this Court recoil at the injustice of this situation. Rather than deliver him to them for further abuse, this Court should take jurisdiction of their rulings to establish that they wronged him and prevent them from doing so again by removing the case to a court unrelated to the parties and unfamiliar with the case.

IV. Bankruptcy court orders were appealed for lack of impartiality and disregard for law, rules, and facts to the district court, which was requested to withdraw the case from the bankruptcy court but refused to do so, whereby the district court did review those orders and the issue of bias so that its order of denial is final and appealable to this Court

17. The legal grounds and factual evidence of partiality and disregard for legality on which the district court was requested (A-342, 314) to withdraw the case from the bankruptcy court were swept away with a mere "denied in all respects" without discussion by a district court's order (A-350), one among those appealed to this Court. Hence, Dr. Cordero went back to the bankruptcy court and invoked those

grounds and evidence to request that it disqualify itself under 28 U.S.C. §455(a) (A-674, infra). The bankruptcy court denied the motion too.

18. Consequently, there was no justification either in practice or in logic to resubmit the substance of those grounds and evidence in order to appeal that denial to the district court. How counterintuitive it is to expect that what Dr. Cordero's initial attack on the bankruptcy court could not move the district court to do, the bankruptcy court's own subsequent defense, if appealed to its defending district court, would cause the latter to disqualify the bankruptcy court and remand the case! A reasonable person is expected to use common sense.

19. That reasoning is particularly pertinent because the district court was requested not once, but twice (A-331, 348) to withdraw the case from the bankruptcy court to itself under 28 U.S.C. §157(d) "for cause shown". Yet, it did not even acknowledge the request, let alone discuss it in its "denied in all respect" fiat or its earlier perfunctory order predicated on an outcome-determinative mistake of fact (para. 10, 11, supra). Thus, it would be counterintuitive to expect that if Dr. Cordero appealed to such district court the bankruptcy court's refusal to disqualify itself and remove the case to another district, the district court would roll up its sleeves and write a meaningful opinion to affirm, not to mention reverse, a decision concerning contentions by Dr. Cordero that it has disregarded twice before. And what a waste of judicial resources!, and of Dr. Cordero's time, effort, and money. Does he matter?

20. The counterintuitive nature of this expectation is also supported by practical considerations: The district court showed the same lack of impartiality toward Dr. Cordero and the same disregard for law, rules, and facts that the bankruptcy court had showed so that their conduct formed a pattern of non-coincidental, intentional, and coordinated acts of wrongdoing (OpBr-9, 54; ReBr-19). A reasonable person, upon whose conduct the law is predicated, may rightly assume that if after the bankruptcy court refused to recuse itself and remove, Dr. Cordero had appealed to the district court, the latter could not reasonably have been expected to condemn the bankruptcy court, for in so doing it would have inevitably indicted itself; and what could conceivably be even riskier, it would have betrayed its coordination with the bankruptcy court. For that too, an appeal that endangered those vested interests would have been a wasteful exercise in futility.

21. There is no justification in practice for this Court to require a litigant to engage in such futility and endure the tremendous aggravation concomitant with it. The unreflective insistence on procedure should not be allowed to defeat substance and establish itself as the sole guiding principle of judicial action, the adverse consequences to those who appeal for justice to the courts notwithstanding. On the contrary, the Supreme Court sets the rationale for pursuing the objective of justice ahead of operating the mechanics of procedure: “There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a

losing party would be irreparably injured if review were unavailing"; *Republic Natural Gas Co. v. Oklahoma,* 68 U.S. 972, 976, 334 S.Ct. 62, 68, 92 L.Ed.2d 1212, 1219 (1948). Those words are squarely applicable here.

22. Dr. Cordero was drawn into this Rochester case as the only non-local defendant. He must prosecute it pro se because a Rochester attorney would hardly risk, for the sake of a one-time non-local client, antagonizing the judges and officers of the fiefdom of Rochester and it would cost him a fortune that he does not have to hire an NYC attorney. So he performs all his painstakingly conscientious legal research and writing at the expense of an enormous amount of time, money, and effort. Under those circumstances, when courts drag this case out, either intentionally to wear him down or unwittingly by subordinating justice to its procedure, they inflict on him irreparable injury. This effect must be taken into account in deciding whether to hear this appeal because determining finality requires a balancing test applied to several considerations, "the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other", *Dickinson v. Petroleum Conversion Corp.,* 70 S.Ct. 322, 324, 338 U.S. 507, 511, 94 L.Ed. (1950).

23. Preventing anymore irreparable injury to Dr. Cordero and ensuring the integrity of its circuit's judicial system are grounds for the Court to take jurisdiction of this appeal by using the inherent power that emanates from the potent rationale behind its diversity of citizenship jurisdiction: the fear that state courts may be partial

toward state litigants and against out-of-state ones, thus skewing the process and denying justice to all its participants as well as detracting from the public's trust in the system of justice. Here that fear has materialized in federal courts that favor the locals at the expense of the sole non-local who dared challenge them.

24. Whether the cause of lack of impartiality is diversity of locality or personal animus and self-gain, it has the same injurious effect on the administration of justice. Section 455(a) combats it by imposing the obligation on a judge to disqualify himself whenever "his impartiality might be reasonably questioned". The Supreme Court has interpreted this language to mean that for disqualification under §455(a) it suffices that there be a situation "creating an appearance of impropriety"; *Liljeberg,* 486 U.S. 847, at 859-60, para. 1, supra.

25. Given the high stakes, to wit, a just and fair process, §455(a) sets a very low threshold for its applicability: not proof, not even evidence, just 'a reasonable question'. Yet, Dr. Cordero has presented a pattern of disregard of laws, rules, and facts so consistently injurious to him and protective of the local parties as to prove the bias against him of both courts and court officers therein. So why would this Court set the triggering point for its intervention at such high levels as an appeal by Dr. Cordero from the bankruptcy to the district court despite the pro-forma character and futility of that exercise under the circumstances?

26. Intervening only at such injury-causing high level contradicts the principle that the Court recognized in *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1097 (2d Cir. 1992), of avoidance of the hardship that appellant would sustain if review was delayed. Requiring an intervening appeal to the district court is most unwarranted here because the bankruptcy court, who decided not to disqualify itself as requested by Dr. Cordero, submitted sua sponte its decision to this Court on November 19, 2003, whereby it in practice requested its review by the Court.

27. Instead of reviewing it, the Court dismissed Dr. Cordero's appeal. Thereby it has exposed him to more blatant bias from the bankruptcy court and its partner in coordinated acts of wrongdoing, the district court (ReBr-19). Indeed, it is reasonable to fear that those courts will interpret the Court's turning down the opportunity, offered on that November 19 'platter', to review the decision refusing recusal as its condonation of their conduct. Will this Court leave Dr. Cordero even more vulnerable to more and graver irreparable injury from prejudiced courts that disregard legality while applying the law of the locals?

28. This interpretation is all the more likely because to support its refusal to take jurisdiction of Dr. Cordero's appeal and its requirement that he first appeal from the bankruptcy to the district court, this Court could find no stronger precedent than a non-binding decision from another circuit, namely, *In re Smith*, 317 F.3d 918, 923 (9th Cir. 2002). Its value is even weaker because Dr. Cordero already submitted to the district court grounds and evidence for disqualifying the

bankruptcy court and withdrawing the case, but it disregarded them. Thus, it already had its opportunity to review the matter. Now it is this Court's turn.

v. Relief sought

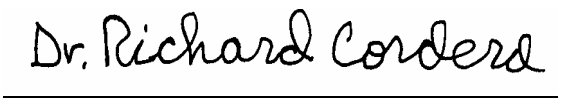
29. Dr. Cordero respectfully requests that this Court:

a. take jurisdiction of this appeal, vacate the orders tainted by bias or illegality, and "in the interest of justice" remove this case under 28 U.S.C. §1412 to a court that can presumably conduct a just and fair jury trial and is roughly equidistant from all parties, such as the U.S. district court in Albany;

b. launch, with the assistance of the FBI (A-805, infra), a full investigation of the lords of the fiefdom of Rochester and their vassals, guided by the principle 'follow the money' of bankruptcy estates and professional persons fees (11 U.S.C. §§326-331), and intended to bring them back into the fold of legality;

c. award Dr. Cordero costs and attorney's fees and all other just compensation.

Respectfully submitted under penalty of perjury,



March 10, 2004

59 Crescent Street
Brooklyn, NY 11208

Dr. Richard Cordero
Petitioner Pro Se
tel. (718) 827-9521

CASES

STATUTES

ENTRIES from the Appendix [A-# in A folder]

a. Motion of August 8, 2003, for Bankruptcy Judge John C. Ninfo, II, to recuse himself and remove the case ..... A-674 [A:674]

b. Motion of November 3, 2003,for leave to file an updating supplement of evidence of bias..... A-768 [A:801]

c. Outline of oral argument delivered by Dr. Cordero on December 11, 2003..... A-803 [A:837]

d. Motion of December 28, 2003, for leave to brief the issue of jurisdiction..... A-810 [A:844]

e. Order of January 26, 2004, of the Court of Appeals for the Second Circuit dismissing the appeal ..... A-842 [A:876]

[Opening Brief=A:1301; Reply Brief=A:1511; Mandamus Brief=A:615]

Proof of Service

I, Dr. Richard Cordero, hereby certify under penalty of perjury that I served by fax or United States Postal Service on the following parties copies of my petition for panel rehearing and hearing en banc:

Kenneth W. Gordon, Esq.
Chapter 7 Trustee
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United States District Court
District of Connecticut
450 MAIN STREET
HARTFORD, CONNECTICUT 06103-9998

CHAMBERS OF
ROBERT N. CHATIGNY
CHIEF JUDGE

(860) 240-3659

March 1, 2004

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

Re: Judicial Conduct Complaint, 03-8547

Dear Dr. Cordero,

This will acknowledge receipt of your recent submission directed to me in my capacity as a member of the Second Circuit Judicial Council. You request that I bring your complaint of judicial misconduct and its handling so far to the attention of the Council, that an investigation be launched, and that you be kept informed.

The Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers make no provision for the action you request. The Rules provide that complaints of judicial misconduct are to be reviewed in the first instance by the chief judge of the circuit. If the chief judge is disqualified from acting, the duties of the chief judge under the Rules are to be assigned to the circuit judge eligible to become the next chief judge. The initial disposition of a complaint by the chief judge (or his substitute) is subject to review by the Council as a whole pursuant to a petition filed in accordance with the procedure set forth in Chapter III of the Rules.

The Rules appear to make no provision for requests for expedited handling of complaints. However, if you would like to make such a request, I believe it should be directed to Chief Judge Walker.

Very truly yours,

Robert N. Chatigny

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
MICHAEL B. MUKASEY
CHIEF JUDGE

PHONE
(212) 805-0234

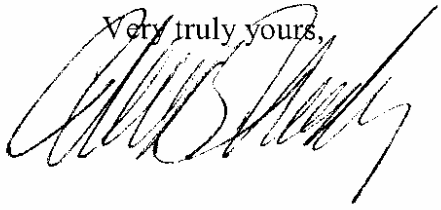
March 2, 2004

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

Dear Dr. Cordero:

I have your letter of February 13, 2004. The letter appears to state that you have filed a complaint of judicial misconduct and that you are not satisfied with the result. That is not a reason to bring this matter before the Judicial Council, and I have neither the authority nor the inclination to act further with respect to it.

Very truly yours,



C:140 Dis J Mukasey's letter of 3/2/4 to Dr. Cordero stating mistakenly a result of the complaint has been reached

Sample of letters sent individually and personalized to the following members of the Judicial Council:

Madam Justice Ginsburg
Circuit Justice

Circuit Judges
The Hon. Jose A. Cabranes
The Hon. Dennis Jacobs
The Hon. Guido Calabresi
The Hon. Rosemary S. Pooler

District Judges
The Hon. Chester J. Straub
Hon. Frederick J. Scullin, Jr.
The Hon. Edward R. Korman
The Hon. William Sessions, III

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

March 22, 2004

The Hon. Jose A. Cabranes
Circuit Judge
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square, Room 1802
New York, NY 10007

Dear Judge Cabranes,

Last February 13, I sent you, in your capacity as member of the Judicial Council of the Second Circuit, a letter concerning a judicial complaint that I lodged under 28 U.S.C. §351 with this Court and about which to date, in the eighth month since, I have not been notified of any action taken at all.

That letter, a copy of which is attached hereto, was bound with copies of all pertinent documents, 80 of them in over 200 pages. I turned the bound file on February 13 into the hands of Deputy Clerk Ms. Harris at the Take-in Office in Room 1803 for transmission to you.

However, I have yet to receive any acknowledgement of receipt, not to mention any substantive response. Therefore, I would be most indebted to you if you would kindly let me know whether my letter and accompanying documents reached you and, if so, by when I can expect to receive a reply from you.

Looking forward to hearing from you,

sincerely,

Dr. Richard Cordero

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 CENTRE STREET
New York, New York 10007
212-857-8500

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

March 29, 2004

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

Re: *Judicial Conduct Complaint*

Dear Mr. Cordero:

Your letters of March 22, 2004, addressed to Judge Calabresi and Judge Straub relating to Judicial Conduct Complaint 03-8547 have been forwarded to this office.

Please be advised that the matter is under consideration. You will be notified as soon as a decision is made.

Very truly yours,

Roseann B. MacKechnie

cc: Honorable Guido Calabresi
Honorable Chester J. Straub

SECOND JUDICIAL CIRCUIT OF THE UNITED STATES
UNITED STATES COURTHOUSE
40 FOLEY SQUARE-ROOM 2904
NEW YORK, NEW YORK 10007
(212) 857-8700 PHONE
(212) 857-8680 FACSIMILE

JOHN M. WALKER, JR.
CHIEF JUDGE

KAREN GREVE MILTON
CIRCUIT EXECUTIVE

March 30, 2004

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

Re: Judicial Conduct Complaint, #03-8547

Dear Dr. Cordero:

In my capacity of Secretary to the Judicial Council, I am responding to your inquiries dated March 22, 2004 to some members of the Judicial Council. I have reviewed the above referenced docket number. The matter is pending before the Court. You will receive a copy of the order in due course. In the meantime, kindly direct any future questions to me as it is inappropriate for the members of the Council to correspond regarding pending litigation.

I trust this information is of assistance to you.

Very truly yours,

Karen Greve Milton
Circuit Executive

KGM/jdk
cc: Members of the Judicial Council
Roseann B. MacKechnie, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood United States Courthouse
40 Centre Street
New York, N.Y. 10007
212-857-8500

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

June 8, 2004

Mr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208

Re: Judicial Conduct Complaint, Docket No. 03-8547

Dear Mr. Cordero:

Enclosed is a copy of the Order, filed June 8, 2004, dismissing your judicial conduct complaint.

Pursuant to Rule 5 of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers Under 28 USC § 351, you have the right to petition the judicial council for review of this decision.

A petition for review should be in the form of a letter, addressed to the clerk of the court of appeals, beginning "I hereby petition the judicial council for review of the chief judge's order . . . "

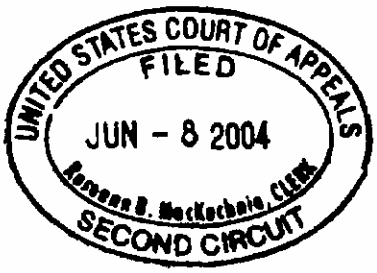
The petition for review must be received in the Clerk's Office **no later than July 9, 2004.**

Very truly yours,
Roseann B. MacKechnie, Clerk of Court

By: Patricia Chin-Allen
Patricia Chin-Allen, Deputy Clerk

ORIGINAL

JUDICIAL COUNCIL OF THE
SECOND CIRCUIT



----------X

In re:
CHARGE OF JUDICIAL MISCONDUCT

Docket No. 03-8547

----------X

Dennis Jacobs, Acting Chief Judge:

On August 28, 2003, Complainant filed a complaint with the Clerk's Office of the U.S. Court of Appeals for the Second Circuit, pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act, 28 U.S.C. § 351 (formerly § 372(c)) (the "Act") and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers (the "Local Rules"), charging a Bankruptcy Court Judge (the "Judge") of this Circuit with misconduct.

Background

A review of the docket sheet in this case indicates that in September 2002, Complainant, in addition to several others, was named as a defendant in an adversary proceeding in Bankruptcy Court. After his cross-claims against the trustee were dismissed in December 2002, Complainant filed a motion for default judgment as well as a notice of appeal. In February 2003, the Bankruptcy Court denied a motion for an extension of time to file the notice of appeal, and in March 2003, the District Court granted a motion by the trustee to dismiss the appeal. Since that time, Complainant has filed numerous motions, including a motion for reconsideration, a renewed motion for default judgment,

a motion for sanctions, and a motion to recuse. The motion for reconsideration was denied, and it appears from the docket sheet that hearings were scheduled on the other motions. One was conducted in October 2003, after which Complainant's motion for recusal was denied. In addition, the Second Circuit recently denied Complainant's related mandamus petition.

Allegations

The Statement of Facts recites that the Judge "fail[ed] to move the case along its procedural stages." Specifically, Complainant alleges that the Judge failed to hold conferences, issue orders, schedule discovery, rule on motions, "impose[] consequences on a [defaulted] party;" and that the Judge took no action on Complainant's request that the judge review the trustee's performance and fitness to serve. Complainant also alleges that the Judge dismissed his cross-claims "with no regard to the legitimate questions of material fact regarding the [t]rustee's negligence and recklessness[.] Indeed, [the Judge] even excused [the trustee's] defamatory and false statements . . . thus condoning the [t]rustee's use of falsehood and showing gross indifference to its injurious effect on [Complainant]." He also asserts that the Judge has exhibited "bias and prejudice against" him and that the Judge allowed the other parties "to violate two discovery orders and submit disingenuous and false statements while charging [Complainant] with burdensome obligations." He adds that the District Court Judge, who is not named on the complaint form, "totally disregarded the fact that the damages have nothing to do with a Rule 55 application for default judgment where liability is predicated on defendant's failure to appear."

The Statement of Facts further alleges that: the Trustee's performance was "negligent and reckless; the court reporter "tried to avoid submitting the transcript"; the "Clerk of Court and Case

Administrator disregarded their obligations in handling [Complainant's] application for default judgment"; and that the court officers made efforts to "derail" Complainant's appeals "to the detriment of [his] legal rights."

Disposition

Complainant has failed to provide evidence of any conduct "prejudicial to the effective and expeditious administration of the business of the courts." *See* Local Rules 1(b) and 4(c)(1).

Complainant's statements concerning the treatment of motions, the handling of scheduling matters, and various rulings amount to a challenge to the merits of a decision or a procedural ruling. However, "[t]he complaint procedure is not intended to provide a means of obtaining a review of a judge's or magistrate's decision or ruling in a case. The judicial council of this circuit . . . does not have the power to change a decision or ruling. Only a court can do that." Local Rule 1(e); *see* Local Rule 1(b) (the Act does not cover "wrong decisions - even very wrong decisions - in the course of hearings, trials or appeals"). Allegations relating to the merits of the case must be pursued through normal appellate procedures. Similarly, a judicial misconduct complaint may not be used to force the Bankruptcy Judge to rule on Complainant's motions or other aspects of the case. *See* Local Rule 1(e).

Complainant's allegations of bias and prejudice are unsupported and therefore rejected as frivolous. *See* 28 U.S.C. § 352(b)(1)(A)(iii); Local Rule 4(c)(3).

Finally, to the extent that the complaint relies on the conduct or inaction of the trustee, the court reporter, the Clerk, the Case Administrator, or court officers, it is rejected. The Act applies only to judges of the United States courts of appeals, district courts, and bankruptcy courts, as well as

United States magistrate judges. *See* Local Rule 1(c).

For the reasons stated above, the complaint is dismissed. The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.

DENNIS JACOBS
Acting Chief Judge

Signed: New York, New York
June 8, 2004

(ORDER LIST: 546 U.S.)

WEDNESDAY, FEBRUARY 1, 2006

ORDER

It is ordered that the following allotment be made of the Chief Justice and the Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42 and that such allotment be entered of record, effective February 1, 2006.

For the District of Columbia Circuit, John G. Roberts, Jr., Chief Justice,

For the First Circuit, David H. Souter, Associate Justice,

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice,

For the Third Circuit, David H. Souter, Associate Justice,

For the Fourth Circuit, John G. Roberts, Jr., Chief Justice,

For the Fifth Circuit, Antonin Scalia, Associate Justice,

For the Sixth Circuit, John Paul Stevens, Associate Justice,

For the Seventh Circuit, John Paul Stevens, Associate Justice,

For the Eighth Circuit, Samuel A. Alito, Jr., Associate Justice,

For the Ninth Circuit, Anthony M. Kennedy, Associate Justice,

For the Tenth Circuit, Stephen Breyer, Associate Justice,

For the Eleventh Circuit, Clarence Thomas, Associate Justice,

For the Federal Circuit, John G. Roberts, Jr., Chief Justice.

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[C:150-168 reserved]

Docket no. 03-5023

UNITED STATES COURT OF APPEALS
FOR
THE SECOND CIRCUIT

Richard Cordero,
Cross and Third party plaintiff-Appellant

v.

Kenneth Gordon,
Cross defendant-Appellee
and (no. 03-cv-6021L)

David Palmer,
Third party defendant-Appellee
(no. 03-MBK-6001L)

Appeal
from the
United States District Court
for the Western District of New York

Opening brief and addendum
for and by

Dr. Richard Cordero
Appellant pro se
59 Crescent Street
Brooklyn, NY 11208
tel. (718) 827-9521

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Docket no. 03-5023

United States Court of Appeals

for

the Second Circuit

Richard Cordero,
Cross and Third party plaintiff-Appellant

v.

OPENING BRIEF OF APPELLANT PRO SE RICHARD CORDERO

Kenneth Gordon,
Cross defendant-Appellee
and (no. 03-cv-6021L)

David Palmer,
Third party defendant-Appellee
(no. 03-MBK-6001L)

I. Preliminary Statement

The two orders appealed from were issued on March 27, 2003, (SPA-9&19, below) by the Hon. David G. Larimer, U.S. District Judge of the U.S. District Court for the Western District of New York. Underlying them were an order entered on December 30, 2002, (SPA-1) and a recommendation of February 4, 2003, (SPA-11-15) for an order submitted to the District Court by the Hon. John C. Ninfo, II, U.S. Bankruptcy Judge of the U.S. Bankruptcy Court for the Western District of New York.

Part 1. BRIEF

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2. Federal Rules of Civil Procedure

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Part 2. SPECIAL APPENDIX (SPA-)

I. Orders appealed from and notices of appeal

A. *Cordero v.* ***Gordon*** (dismissal of cross-claims between defendants in *Pfuntner v. Gordon et al*, adversary proceeding, dkt. no. 02-2230, derived from *In re Premier Van Lines*, dkt. no. 01-20692, in the U.S. Bankruptcy Court, WBNY)

B. *Cordero v.* ***Palmer*** (denial of default judgment application by third party claimant-defendant against third party defendant as in A. *Pfuntner v. Gordon et al*, adversary proceeding, dkt. no. 02-2230, derived from *In re Premier Van Lines*, dkt. no. 01-20692)

II. Dockets

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(in a separate volume)

SUMMARY

IV. Jurisdictional Statement

A. Jurisdiction of the district court

1. Within a bankruptcy case (dkt. no.01-20692), an adversary proceeding was filed in bankruptcy court by a non-party to this appeal. The court ordered Dr. Cordero's cross-claims against Trustee Kenneth Gordon dismissed (SPA-1). Dr. Cordero appealed to the district court (SPA-3) under 28 U.S.C. §158(a) (SPA-85).
2. In that adversary proceeding, Dr. Cordero, as a third party plaintiff, applied to the bankruptcy court for default judgment against Third-party defendant David Palmer (SPA-10). The court ordered the application transmitted to the district court (SPA-11) pursuant to P.L. 98-353 (The Bankruptcy Amendments and Federal Judgeship Act of 1984). It made its recommendation thereon to the district court (SPA-11-15) under 28 U.S.C. §157(c)(1). Dr. Cordero moved in district court on March 2, under Rule 8011(a) F.R.Bkr.P. to enter default judgment and withdraw the adversary proceeding under 28 U.S.C. §157(d) (SPA-85).

B. Basis of appellate jurisdiction

3. This appeal from the two district court's orders of March 27 (SPA-9&19), is founded on 28 U.S.C. §§158(d) and 1291 (SPA-84), both of which apply to bankruptcy appeals, *Connecticut National Bank v. Germain, 112 S.Ct. 1146, 503 U.S. 249, 117 L.Ed.2d 391 (1992).*

C. Filing dates and timeliness of the appeal

4. The motions for rehearing in *Cordero v. Gordon* and *Cordero v. Palmer* were both denied by the district court on March 27, 2003 (SPA-9&19). From that date began to run under Rule 6(b)(2)(A) F.R.A.P. (SPA-81) the 30 days provided under Rule 4(a)(1)(A) F.R.A.P. (SPA-80) for filing a notice of appeal to the circuit court. That notice was timely filed on April 25, 2003 (SPA-21).

D. Appeal from final orders

5. The district court's March 27 order in *Cordero v. Gordon* (SPA-9) was final in dismissing Dr. Cordero's notice of appeal and, consequently, his cross-claims against Trustee Gordon.
6. The March 27 order in *Cordero v. Palmer* (SPA-19) was final in denying Dr. Cordero's right to default judgment for a sum certain against Defaulted party Palmer and stating that the bankruptcy court should conduct an inquest in which Dr. Cordero would be required to demonstrate damages as a precondition to his recovery of an uncertain sum.

V. Statement of Issues Presented for Review

A. In Cordero v. Gordon

7. Do the complete-on-mailing and the three-additional-days provisions of Rule 9006(e) and (f) F.R.Bkr.P, respectively (SPA-69), apply to Rule 8002 F.R.Bkr.P.

so that a notice of appeal timely mailed just as a motion to extend time to appeal timely mailed must be considered also timely filed even after the conclusion of the 10-day period or the 30-day period, respectively?

8. Did the court err when before any discovery whatsoever it summarily dismissed the cross-claims against Trustee Gordon of defamation as well as negligence and reckless performance as trustee, whereby the court failed to apply the standards for determining the legal sufficiency of the complaint, which though written by a pro se litigant it did not liberally construe, and went on to pass judgment on the merits while disregarding the genuine issues of material fact raised by the complaint?

B. In *Cordero v. Palmer*

9. Did the district court err in disregarding the objective and outcome determinative fact under Rule 55 F.R.Civ.P. (SPA-76) that the default judgment applied for was for a sum certain and instead imposed on Dr. Cordero the obligation to demonstrate recoverable loss although such obligation is not only nowhere to be found in Rule 55, but also contradicts its clear language of automaticity of entry of default judgment for a sum certain where a defendant has been found in default for failure to appear?

C. As to court officers at the district and the bankruptcy courts

10. Does the participation of bankruptcy and district court officers in a series of events of disregard of facts, procedural rules, and the law that consistently affect Dr. Cordero to his detriment and cannot be explained away as mere coincidences, but instead form a pattern of intentional and coordinated activity, create in the mind of a reasonable person the appearance of bias and prejudice sufficient to raise the justified expectation that Dr. Cordero will likewise not get an impartial and fair trial by those officers in those courts so as to warrant the removal of the case to a neutral court, such as the District Court for the Northern District of New York?

VI. Statement of the Case

11. The bankruptcy case of a moving and storage company spawned an adversary proceeding in bankruptcy court, where Dr. Cordero, a former client of the company, was named, together with the trustee, Kenneth Gordon, Esq., and others, defendant. Appearing pro se, Dr. Cordero cross-claimed to recover damages from Trustee Gordon for defamation as well as negligent and reckless performance as trustee. The Trustee moved to dismiss and the court summarily dismissed the cross-claims before disclosure or discovery had taken place and

although other parties' similar claims were allowed to stand. Dr. Cordero timely mailed his notice of appeal, but on the Trustee's motion, the District Court dismissed it as untimely filed.

12. Dr. Cordero served the Debtor's owner, Mr. David Palmer, with a summons and a third party complaint, but he failed to answer. Dr. Cordero timely applied on December 26, 2002, for default judgment for a sum certain. Only belatedly and upon Dr. Cordero's request to take action, did the bankruptcy court make a recommendation on February 4, 2003, namely, that the district court not enter default judgment because 'Cordero has failed to demonstrate any loss and upon inspection it may be determined that his property is in the same condition as when delivered for storage in 1993.' Dr. Cordero moved the district court to enter default judgment despite the bankruptcy court's prejudgment of the case. Making no reference to that motion, the district court accepted the recommendation because Dr. Cordero "must still establish his entitlement to damages since this matter does not involve a sum certain." Dr. Cordero moved the district court to correct its mistake since the application did involve a sum certain. The district court summarily denied the motion.

VII. Statement of Facts

A. In search for his property in storage, Dr. Cordero is repeatedly referred to Trustee Gordon, who provides no information and to avoid a review of his performance and fitness to serve, files false and defamatory statements about Dr. Cordero with the court and his U.S. trustee supervisor

13. A client –here Appellant Dr. Cordero- who resides in NY City, had entrusted his household and professional property, valuable in itself and cherished to him, to a Rochester, NY, moving and storage company in August 1993 and since then paid its storage and insurance fees. In early January 2002 he contacted Mr. David Palmer, the owner of the company storing his property, Premier Van Lines, to inquire about it. Mr. Palmer and his attorney assured him that his property was safe and in his warehouse at Jefferson-Henrietta, in Rochester (A-18). Only months later, after Mr. Palmer disappeared, did his assurances reveal themselves as lies, for not only had his company gone bankrupt –Debtor Premier-, but it was already in liquidation. Moreover, Dr. Cordero's property was not found in that warehouse and its whereabouts were unknown.

14. In search for his property, Dr. Cordero was referred to the Chapter 7 trustee– here Appellee Trustee Gordon– (A-39). The Trustee had failed to give Dr. Cordero notice of the liquidation although the storage contract was an income-producing asset of the Debtor. Worse still, the Trustee did not provide Dr. Cordero with any

information about his property and merely bounced him back to the same parties that had referred Dr. Cordero to him (A-16,17).

15. Eventually Dr. Cordero found out from third parties (A-48,49;109, ftnts-5-8;352) that Mr. Palmer had left Dr. Cordero's property at a warehouse in Avon, NY, owned by Mr. James Pfuntner. However, the latter refused to release his property lest Trustee Gordon sue him and he too referred Dr. Cordero to the Trustee. This time not only did the Trustee fail to provide any information or assistance in retrieving his property, but even enjoined Dr. Cordero not to contact him or his office anymore (A-1).

16. Dr. Cordero applied to the bankruptcy judge in charge of the bankruptcy case, the Hon. John C. Ninfo, II, for a review of the Trustee's performance and fitness to serve (A-7). The judge took no action save to refer the application to the Trustee's supervisor, an assistant U.S. Trustee (A-29).

17. Subsequently, in October 2002, Mr. Pfuntner brought an adversary proceeding (A-21,22) against Trustee Gordon, Dr. Cordero, and others. Dr. Cordero, appearing pro se, cross-claimed against the Trustee (A-70,83,88); who moved to dismiss (A-135). Before discovery had even begun or any initial disclosure had been provided by the other parties -Dr. Cordero provided numerous documents with his pleadings (A-11,45,62,90,123,414)- and before any meeting whatsoever, the judge dismissed the cross-claims by order entered on December 30, 2002 and

mailed from Rochester (SPA-1).

18. Upon its arrival in New York City after the New Year's holiday, Dr. Cordero timely mailed the notice of appeal on Thursday, January 9, 2003 (SPA-3). It was filed in the bankruptcy court the following Monday, January 13. The Trustee moved to dismiss it as untimely filed (A-156) and the district court dismissed it (SPA-6,9).

B. David Palmer abandons Dr. Cordero's property and defrauds him of the fees; then fails to answer Dr. Cordero's complaint; yet, the courts deny Dr. Cordero's application for default judgment although for a sum certain, prejudge a happy ending to his property search, and impose on him a Rule 55-extraneous duty to demonstrate loss.

19. Dr. Cordero joined as third party defendant Mr. Palmer, who lied to him about his property's safety and whereabouts while taking in his storage and insurance fees. Mr. Palmer, as Debtor (SPA-25-entry-13,12), was already under the bankruptcy court's jurisdiction, yet failed to answer the complaint of Dr. Cordero, who timely applied under Rule 55 F.R.Civ.P. for default judgment for a sum certain (SPA-12;A-294). But disregarding Rule 55, never mind the equities between the two parties, both courts denied Dr. Cordero and spared Mr. Palmer default judgment under circumstances that have created the appearance of bias and prejudice, as shown next.

C. Bankruptcy and district court officers have participated in a series of events of disregard of facts, rules, and law so consistently injurious to Dr. Cordero as to form a pattern of non-coincidental, intentional, and coordinated acts from which a reasonable person can infer their bias and prejudice and can fear their determination not to give him a fair and impartial trial

1. The bankruptcy court excused Trustee Gordon's defamatory statements as merely **"part of the Trustee just trying to resolve these issues"**

20. Trustee Gordon submitted statements, some false and others disparaging of Dr. Cordero's character, to the bankruptcy court in his attempt to dissuade it from undertaking the review of his performance and fitness as trustee requested by Dr. Cordero. The latter brought this to the court's attention (A-32,41). Far from showing any concern for the integrity and fairness of proceedings, the court did not even try to ascertain whether Trustee Gordon had made false representations to the court in violation of Rule 9011(b)(3) F.R.Bkr.P.

21. On the contrary, it excused the Trustee in open court when at the hearing of the motion to dismiss it stated that:

> "I'm going to grant the Trustee's motion and I'm going to dismiss your cross claims. First of all, with respect to the defamation, quite frankly, these are the kind of things that happen all the time, Dr. Cordero, in Bankruptcy court…it's all part of the Trustee just trying to resolve these issues." (A-274-275)

22. When the court approves of the use of defamation by an officer of the court trying to avoid review, what will it use itself to avoid having its rulings reversed on appeal? How much fairness would an objective observer expect that court to show the appellant?

2. The court disregarded facts and the law concerning genuine issues of material fact when dismissing Dr. Cordero's cross-claims of negligence and recklessness against Trustee Gordon

23. It was Mr. Pfuntner, not Dr. Cordero, who first sued Trustee Gordon claiming that:

> "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," (A-24)

24. Does it get any more negligent and reckless than that? While the Trustee denied the allegation, it raised an issue of fact to be determined at trial. So how could the court disregard similar genuine issues of material fact raised by Dr. Cordero's cross-claims of negligence and reckless performance as trustee and before any discovery or meeting whatsoever merely dismiss them, thereby disregarding the legal standard for determining a motion to dismiss?

3. The court disregarded the Trustee's admission that Dr. Cordero's motion to extend time to file notice of appeal had been timely filed, and surprisingly finding that it had been untimely filed, denied it

25. After Dr. Cordero timely mailed his notice of appeal and Trustee Gordon moved to dismiss it as untimely filed, Dr. Cordero timely mailed a motion to extend time to file the notice. Although Trustee Gordon himself acknowledge in his brief in apposition that the motion had been timely filed on January 29 (A-235), the judge surprisingly found that it had been untimely filed on January 30. Trustee Gordon checked the filing date of the motion to extend just as he had checked that of the notice of appeal: to escape accountability through a timely-mailed/untimely-filed technical gap. He would hardly make a mistake on such a critical matter. Thus, who changed the filing date and on whose orders?[1] Why did the court disregard the factual discrepancy and rush to deny the motion? Do court officers manipulate the docket to attain their objectives? There is evidence that they do (paras.36 below).

4. The court reporter tries to avoid submitting the transcript

26. To appeal from the court's dismissal of his cross-claims, Dr. Cordero contacted Court Reporter Mary Dianetti on January 8, 2003, to request the transcript of the

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[1] Dr. Cordero stands ready to submit to the Court of Appeals upon its request an affidavit containing more facts and analysis on this issue.

hearing. After checking her notes, she called back and told Dr. Cordero that there could be some 27 pages and take 10 days to be ready. Dr. Cordero agreed and requested the transcript (A-261).

27. It was March 10 when Court Reporter Dianetti finally picked up the phone and answered a call from Dr. Cordero asking for the transcript. After telling an untenable excuse, she said that she would have the 15 pages ready for…"You said that it would be around 27?!" She told another implausible excuse after which she promised to have everything in two days 'and you want it from the moment you came in on the phone.' What an extraordinary comment! She implied that there had been an exchange between the court and Trustee Gordon before Dr. Cordero had been put on speakerphone and she was not supposed to include it in the transcript (A-283,286).

28. The confirmation that she was not acting on her own was provided by the fact that the transcript was not sent on March 12, the date on her certificate (A-282). Indeed, it reached Dr. Cordero only on March 28 and was filed only on March 26 (SPA-45, entry 71), a significant date, namely, that of the hearing of one of Dr. Cordero's motions concerning Trustee Gordon. Somebody wanted to know what Dr. Cordero had to say before allowing the transcript to be sent.

29. The Court Reporter never explained why she failed to comply with her obligations under either 28 U.S.C. §753(b) (SPA-86) on "promptly" delivering

the transcript "to the party or judge" –certainly she did not send it to the party- or Rule 8007(a) F.R.Bkr.P. (SPA-65) on asking for an extension.

30. Reporter Dianetti also claims that because Dr. Cordero was on speakerphone, she had difficulty understanding what he said. As a result, the transcription of his speech has many "unintelligible" spots and it is difficult to make out what he said. If she or the court speakerphone regularly garbled what the person on speakerphone said, would either last long in use? Or was she told to disregard Dr. Cordero's request for the transcript; and when she could no longer do so, to garble his speech and submit her transcript for vetting by a higher-up court officer before mailing a final version to Dr. Cordero? Do you trust court officers that so handle, or allow such handling of, transcripts? Does this give you the appearance of fairness and impartiality?

5. The bankruptcy court disregarded facts and prejudged issues to deny Dr. Cordero's application for default judgment

31. The bankruptcy court recommended denial of the default judgment application by prejudging that upon inspection Dr. Cordero would find his property in the same condition as he had delivered it for storage 10 years earlier in 1993 (SPA-13). For that bold assumption it not only totally lacked evidentiary support, but it also disregarded contradicting evidence available. Indeed, as shown in subsection 2 above, Mr. Pfuntner had written that property had been removed without his

authorization and at night from his warehouse premises. Moreover, the warehouse had been closed down and remained out of business for about a year. Nobody was there paying to control temperature, humidity, pests, or thieves. Thus, Dr. Cordero' property could also have been stolen or damaged. Forming an opinion without sufficient knowledge or examination, let alone disregarding the only evidence available, is called prejudice. From one who forms anticipatory judgments, would you expect to receive fair treatment or rather rationalizing statements that he was right?

32. Moreover, the court dispensed with even the appearance of impartiality by casting doubt on the recoverability of "moving, storage, and insurance fees …especially since a portion of [those] fees were [sic] paid prior to when Premier became responsible for the storage of the Cordero Property," (SPA-14). How can the court prejudge the issue of responsibility, which is at the heart of the liability of other parties to Dr. Cordero, since it has never requested disclosure of, let alone held an evidentiary hearing on, the storage contract, or the terms of succession or acquisition between storage companies, or storage industry practices, or regulatory requirements on that industry? Such a leaning of the mind before considering pertinent evidence is called bias. Would you expect impartiality if appearing as a pro se litigant in Dr. Cordero's shoes before a biased court?

33. The court also protected itself by excusing its delay in making its recommendation to the district court. So it stated in paragraph "10. The Bankruptcy Court suggested to Cordero that the Default Judgment be held until after the opening of the Avon Containers…" (SPA-14). But that suggestion was never made and Dr. Cordero would have had absolutely no motive to accept it if ever made. What else would the court dare say to avoid review on appeal?

6. The Bankruptcy Clerk and the Case Administrator disregarded their obligations in the handling of the default application

34. Clerk Paul Warren had an unconditional obligation under Rule 55 F.R.Civ.P.: "**the clerk shall enter** the party's default," (emphasis added; SPA-76 upon receiving Dr. Cordero's application of December 26, 2002 (SPA-10). Yet, it was only on February 4, 41 later and only at Dr. Cordero's instigation (SPA-15), that the clerk entered default, that is, certified a fact that was such when he received the application, namely, that Mr. Palmer had been served but had failed to answer. The Clerk lacked any legal justification for his delay.

35. It is not by coincidence that he entered default on February 4, when the bankruptcy court made its recommendation to the district court. Thereby the recommendation appeared to have been made as soon as default had been

entered.[2] It also gave the appearance that Clerk Warren was taking orders in disregard of his duty.

36. Likewise, his deputy, Case Administrator Karen Tacy (kt), failed to enter on the docket (EOD) Dr. Cordero's application upon receiving it. Where did she keep it until entering it out of sequence on "EOD 02/04/03" (SPA-42-entry-51;43-entries-46,49,50,52,53). Until then, the docket gave no legal notice to the world that Dr. Cordero had applied for default judgment against Mr. Palmer.[3] Does the docket, with its arbitrary entry placement, numbering, and untimeliness, give the appearance of manipulation or rather the evidence of it? (25 above).

37. It is highly unlikely that Clerk Warren, Case Administrator Tacy, and Court Reporter Dianetti were acting on their own. Who coordinated their acts in detriment of Dr. Cordero and for what benefit?

7. The district court repeatedly disregarded an outcome-determinative fact and the rules to deny the application for default judgment

38. The district court accepted the recommendation and in its March 11 order denied entry of default judgment on the grounds that it did not involve a sum certain (SPA-16). To do so, it disregarded five papers stating that it did involve a sum certain:

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[2]. See footnote 1.

[3] See footnote 1.

1) the Affidavit of Amount Due (A-294);

2) the Order to Transmit Record and Recommendation (SPA-12);

3) the Attachment to the Recommendation (SPA-14);

4) the March 2 motion to enter default judgment (A-314,327), and

5) the motion for rehearing re implied denial of the earlier motion (A-342,344-para.6).

39. Dr. Cordero moved the district court to enter default judgment notwithstanding such prejudgment of the outcome of a still sine die inspection (A-314). The district court did not acknowledge that motion in any way whatsoever, but instead accepted the bankruptcy court's recommendation. Moreover, it stated that Dr. Cordero "must still establish his entitlement to damages since the matter does not involve a sum certain [so that] it may be necessary for [sic] an inquest concerning damages before judgment is appropriate…the Bankruptcy Court is the proper forum for conducting [that] inquest," (SPA-16).

40. Dr. Cordero moved the district court for a rehearing (A-342) of his motion, denied by implication, so that it would correct its outcome-determinative error because the matter did involve a sum certain and because when Mr. Palmer failed to appear and Dr. Cordero applied for default judgment for a sum certain his entitlement to it became perfect pursuant to the plain language of Rule 55.

Likewise, a bankruptcy court that showed such prejudgment could not be the "proper forum" to conduct any inquest (A-342). The district court curtly denied the motion "in all respects," (SPA-19). From a district court merely rubberstamps the bankruptcy court's recommendation without paying attention to its facts, let alone reading papers submitted by a pro se litigant who spent countless hours researching, writing, and revising, would you expect the painstaking effort necessary to deliver justice?

8. The bankruptcy court disregarded Mr. Pfuntner's and his attorney's contempt for two orders, reversed its order on their ex-parte approach, showed again no concern for disingenuous submissions to it, but targeted Dr. Cordero for strict discovery orders

41. At the only meeting ever held in the adversary proceeding, the pre-trial conference on January 10, 2003, the court orally issued only one onerous discovery order: Dr. Cordero must travel from New York City to Rochester and to Avon to inspect at Plaintiff Pfuntner's warehouse the storage containers that bear labels with his name. Dr. Cordero had to submit three dates therefor. The court stated that within two days of receiving them, it would inform him of the most convenient date for the other parties. Dr. Cordero submitted not three, but rather six by letter of January 29 to the court and the parties (A-365,368). Nonetheless, the court never answered it or informed Dr. Cordero of the most convenient date.

42. Dr. Cordero asked why at a hearing on February 12, 2003. The court said that it was waiting to hear from Mr. Pfuntner's attorney, David MacKnight, Esq., who had attended the pre-trial conference and agreed to the inspection. The court took no action and the six dates elapsed.

43. However, when Mr. Pfuntner wanted to get the inspection over with to clear and sell his warehouse and be in Florida worry-free, Mr. MacKnight contacted the court on March 25 or 26 ex parte –in violation of Rule 9003(a) F.R.Bkr.P. (A-372). Reportedly the court stated that it would not be available for the inspection and that setting it up was a matter for Dr. Cordero and Mr. Pfuntner to agree mutually.

44. Dr. Cordero raised a motion on April 3 to ascertain this reversal of the court's position and insure that the necessary transportation and inspection measures were taken (A-378). On April 7, the same day of receiving the motion (SPA-46-entries-75,76) and thus, without even waiting for a responsive brief from Mr. MacKnight, the court wrote to Dr. Cordero denying his request to appear by telephone at the hearing–as he had on four previous occasions- and requiring that Dr. Cordero travel to Rochester to attend a hearing in person to discuss measures to travel to Rochester (A-386).

45. Then Mr. MacKnight raised a motion (A-389). It was so disingenuous that, for example, it was titled "Motion to Discharge Plaintiff from Any

Liability…" and asked for relief under Rule 56 F.R.Civ.P. without ever stating that it wanted summary judgment while pretending that Plaintiff had not brought that motion before "as an accommodation to the parties." Yet, it was Plaintiff who sued parties even without knowing whether they had any property in his warehouse, nothing more than their names on labels (A-364). Dr. Cordero analyzed in detail the motion's mendacity and lack of candor (A-400). Despite its obligations under Rule 56(g) (SPA-78) to sanction a party proceeding in bad faith, the court disregarded Mr. MacKnight's disingenuousness, just as it had shown no concern for Trustee Gordon's false statements submitted to it. How much commitment to fairness and impartiality would you expect from a court that exhibits such 'anything goes' standard for the admission of dishonest statements? If that is what it allows outside officers of the court to get away with, what will it allow or ask in-house court officers to engage in?

46. Nor did the court impose on Plaintiff Pfuntner and Mr. MacKnight any sanctions, as requested by Dr. Cordero, for having disobeyed the first discovery order. On the contrary, as Mr. Pfuntner wanted, the court order Dr. Cordero to carry out the inspection within four weeks or it would order the containers bearing labels with his name removed at his expense to any other warehouse anywhere in Ontario, that is, whether in another county or another country.

9. The bankruptcy court's determination not to move the case forward

47. Although the adversary proceeding was filed on September 27, 2002, the court has failed to comply with Rule 16(b) F.R.Civ.P., (SPA-75) which provides that it "shall…enter a scheduling order…" When the court disregard its procedural obligations and allows a case to linger for lack of management, would you expect it to care much for your rights as a pro se litigant who lives hundreds of miles away?

VIII. Summary of the Argument

A. Timely mailing and filing of the notice of appeal

48. Dr. Cordero's timely mailed notice of appeal from the dismissal of his cross-claims against Trustee Gordon should be deemed timely filed in bankruptcy court pursuant to the coherent and consistent scheme generated by the plain language of the Bankruptcy Rules for time-limited notices and papers. The scheme provides thus:

    1) under Rule 9006(f), (SPA-69) when a notice sent by mail triggers a period of time in which to respond with a notice or paper, that period is extended by three days in order to compensate for the time lost during the mail transit of the triggering notice or paper so that the responder may have more time to better prepare his response;

2) under Rule 9006(e), (SPA-69), when that notice or paper is mailed, its service is complete; and

3) since these provisions are found in Part IX-General Provision, and consequently are applicable to the whole Bankruptcy Code and Rules, they take precedence over the filing-within-filing-period exception of Rule 8008(a), (SPA-66), which applies narrowly to some papers served on the district court or the bankruptcy appellate panel, not the bankruptcy court, where the notice of appeal must be filed under Rule 8002 (SPA-64).

B. Failure to apply the legal standards for a dismissal motion

49. Dr. Cordero's cross-claims against Trustee Gordon for defamation as well as negligent and reckless liquidation of Debtor Premier were dismissed without the court applying the legal standards for adjudicating a motion under Rule 12(b)(6) F.R.Civ.P., (SPA-90). Thereunder it should have considered only the legal sufficiency of the complaint –and done so liberally since it was submitted by a pro se litigant- taking its allegations as true and examining them in the light most favorable to the non-movant.

50. Far from it and despite the fact that no discovery had occurred, the court conducted a trial on the merits in light of its own experience on the bench, applied its own notions of defamation rather than the standard of what a reasonable

person would consider injurious to the reputation of another person, and disregarded genuine issues of material fact concerning the Trustee's negligent and reckless liquidation raised not only by Dr. Cordero, but also by the Plaintiff. Given such triable issues of fact, the court could not have dismissed the cross-claims as a matter of law under Rule 56 F.R.Civ.P.

C. Default judgment denied after compliance with statutory requirements

51. Dr. Cordero timely applied for default judgment for a sum certain against Mr. Palmer, whose default was entered by the court clerk. Thereby all the requirements under Rule 55 were fulfilled. Nevertheless, the bankruptcy court recommended that the application be denied and that Dr. Cordero be required to demonstrate his loss. That requirement has no basis in law, for it contradicts the Rule's plain language, and negates the purpose of the warning in the summons.
52. Moreover, the equities favored Dr. Cordero, who had been defrauded by Mr. Palmer. By contrast, the latter, as the Debtor's owner, was already under the court's jurisdiction, having invoked his right under the bankruptcy law only to evade his obligation thereunder to answer a complaint. In addition, Mr. Palmer had a remedy at law under Rule 60(b), (SPA-78) to set aside the judgment. Under those circumstances, there was no justification for the court to become its advocate.

53. Nor can a court interpret and apply a legal provision in a way that contradicts its plain language and defeats the reasonable expectations to which it gives rise. That would amount to usurping Congress' legislative role and depriving people of notice of what the law requires in order to be entitled to its rights.

54. The district court based its acceptance of the recommendation on the clearly erroneous fact that the application did not involve a sum certain. In addition, it charged the bankruptcy court with conducting an inquest into damages. In an adversarial system and a default case where the defendant has not appeared by choice rather than by membership in a class to be protected by the courts, no court can conduct an inquest, which would require it to play multiple conflicting roles; least of all a court that has prejudged the outcome of the inquest, for it cannot be the proper forum to conduct it fairly and impartiality.

D. Court officers' pattern of bias requires removal to impartial court

55. :Both the bankruptcy and the district court together with court clerks, court assistants, and the court reporter have participated in such a long series of events of disregard of facts, law, and rules that so consistently work to the detriment of Dr. Cordero, the pro se litigant that lives hundreds of miles away, that such events cannot be explained as mere coincidence. Rather they must form a pattern of intentional and coordinated wrongdoing. Hard evidence is not legally required to

create the appearance of partiality that in the minds of reasonable persons gives rise to the inference of the court officials' bias and prejudice toward Dr. Cordero. That is enough to warrant recusal.

56. However, given the participation of so many court officers and the coordinated nature of their wrongdoing, disqualification must encompass not only the judges, but also the other court officers; otherwise the reasonable fear of unfair and prejudicial administrative treatment could not be eliminated. Thus, this case should be removed to an impartial district court, such as that of the Northern District of New York.

IX. The Argument

A. The notice of appeal from the dismissal of the cross-claims against Trustee Gordon was timely mailed and should have been deemed timely filed

1. The Supreme Court requires the respect of the plain language of a consistent and coherent statutory scheme such as that formed by the rules on notice of appeal

57. The U.S. Supreme Court stated 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."

58. 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),* :

> "[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."

59. 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 F.R.Bkr.P as well as them and those of the F.R.Civ.P. as forming a whole, as a scheme. Dr. Cordero read them so and reasonably relied on their scheme. This is it:

> 2. Service of notice of appeal under Rule 8002(a) is complete on mailing under Rule 9006(e) and timely if timely mailed although filed by the bankruptcy clerk subsequently

60. Part IX of the F.R.Bkr.P. is titled General Provisions and contains rules of general applicability. Thus, they apply to the rules of Part VIII, which is titled Appeals to District Court or Bankruptcy Appellate Panel. Therein included is Rule 8002(a) with its ten-day period for filing a notice of appeal.

61. The Advisory Committee confirms this plain language scope of application in its Note to Rule 9006(a) (SPA-67)

> "This rule is an adaptation of Rule 6 F.R.Civ.P. It governs the time for acts to be done and proceedings to be had in cases under the [Bankruptcy] Code and any litigation arising therein."

62. Just as Rule 6 covers all Civil Rules, so does rule 9006 with respect to all Bankruptcy Rules. Hence, not only Part IX, but also specifically Rule 9006 and its computation of time provisions apply to Rule 8002 and its ten-day period to give notice of appeal.

63. One of those provisions is found in 9006(e). It provides that "service of…a notice by mail is complete on mailing," (SPA-69).

64. The bankruptcy court entered its order dismissing Dr. Cordero's cross-claims against Trustee Gordon on December 30, 2002. In turn, Dr. Cordero mailed his notice of appeal on January 9, 2003. Consequently, the service of that notice was complete on that day. It should also be deemed timely filed on that day.

65. To consider a timely mailed notice of appeal also timely filed is consistent and coherent with Rule 8002(a). This is so because it provides "if a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, [their clerks] 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." Hence, a notice can be deemed filed in the bankruptcy court on a date prior to the date of actual filing by the bankruptcy clerk.

3. The three additional days provision of Rule 9006(f) applies to the notice of appeal

66. There is also Rule 9006(f), which provides that 'when there is a right to do an act within a prescribed time and the paper is served by mail, "three days **shall** be added to the prescribed period,"' (emphasis added; SPA-69)

67. The right here in question is that under Rule 8001(a) Appeal as of right. It is to be exercised, pursuant to Rule 8002(a), within 10 days from the entry of the order appealed from.

68. When the order arrived in New York City after the holiday, Dr. Cordero undisputedly mailed his notice timely on Thursday, January 9, 2003. It is submitted that pursuant to the plain language of Rule 9006(e), his mailing of the notice of appeal completed service on that date.

69. What is more, because the dismissal order had been "served by mail," Rule 9006(f) had added three days to the prescribed ten-day period to appeal from it, to January 12. But since that was a Sunday, under Rule 9006(a) 'the act to be done of filing the notice ran until the end of the next day.' Consequently, by operation of that rule too, Dr. Cordero's notice was also timely filed on Monday, January 13.

4. A coherent and consistent construction of R.9006(a) and (f) does not allow their application to time-from-service provisions but not to time-from-entry-of-order ones

70. This result fulfills Rule 9006(f)'s purpose, which flows from its heading "Additional time after service by mail." It is to compensate a party for time lost in transit when a paper is "served by mail" so that a shorter time does not prejudice the party in the exercise of its right "within the prescribed period" by comparison with a party that is served personally.

71. This purpose is consistent with the broadly worded method of Rule 9006(a) 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," (emphasis added).

72. Hence, the three additional days provision of 9006(f) applies also to periods that begin to run from the entry of an order, for what matters under it is not whether the paper is entered or served, but rather whether it has been mailed and, thus, time has been lost for which the recipient must be compensated.

73. The inclusion of Rule 8002's ten-day period within the scope of application of Rule 9006(a), (e), and (f) is compelled by the fact that it is not expressly excluded. Indeed, when Rule 9006 wanted to exclude totally or partially any Rule, it did so expressly, as in "(b)(2), Enlargement not permitted," "(b)(3), Enlargement limited," and "(c)(2) Reduction not permitted." It should

be noted that both (b)(3) and (c)(2) make express reference to Rule 8002.

74. Therefore, it would be neither coherent nor consistent to restrict the application of Rule 9006 to other Rules, including 8002, when 9006 expressly provides therefor, and even exclude those Rules altogether from subdivisions (e) and (f) when 9006 does not require to do that 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).*

75. From this analysis flows the conclusion that Rule 9006 applies to every Rule 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."

5. Rule 8002(a)'s ten-day period benefits from Rule 9006(f)'s three-additional-days to avoid penalizing parties that must prepare their notice of appeal

76. That Rule 8002(a) must be within Rule 9006(f)'s scope flows from their purpose and plain language. Thus, the Advisory Committee Note for Rule 9006 states that:

> "This rule is an adaptation of Rule 6 F.R.Civ.P. It governs the time for acts to be done and proceedings to be had in **cases** under the Code and **any** litigation arising therein (emphasis added).

77. In turn, Rule 6 states in its Note for the 1985 Amendment (SPA-74) that parties "should not be penalized" when they cannot file because of factors, such as weather conditions or non-business days, that reduce their time to act within a prescribed period. The extension of time is needed because:

> **"...**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).

78. Such is Rule 8002(a), whose ten day period for filing the notice of appeal cannot be enlarged. Under it the factor that can cause 'acute hardship' is the one dealt with by Rule 9006(f), to with, that the notice triggering the running of a prescribed period has been served by mail, thereby shortening the party's time within which to prepare to act. To compensate for the lost time, 9006(f) adds

three days.

79. That Advisory Committee Note makes it quite clear how the 8002(a) notice of appeal comes within the purview of the 9006(f) three-additional-days provision, which is intended in particular for 1) rules with ten-day periods; 2) with no possibility of enlargement at the court's discretion; 3) yet subject to being reduced to as few as 5 working days; and 4) concerning appeals for new trial or 5) to alter or amend judgment.

80. Dr. Cordero, a pro se appellant, was filing a notice of appeal for the first time ever. He had less than 5 working days before the 10-day period, triggered by the entry of the dismissal order on December 30 and including the New Year's Day, ran out on Thursday, January 9. But before he could prepare to act, the order had to arrive in the mail from Rochester. 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 acute hardship it would have been if Dr. Cordero had had to mail the notice from New York City so that it would arrive back in Rochester by Thursday the 9th?

6. Since the notice of appeal is to be filed in the bankruptcy court, not the district court or BAP, it is deemed filed when mailed so that the 8008(a) filing-within-filing-period exception is not applicable to it

81. Part IX General Provisions does not contain the notion that a notice must be filed

strictly within the period for filing. It comes from a subdivision of Rule 8008

> "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)

82. Wait a moment! The notice of appeal is not "required or permitted to be filed with **the clerk of the district court or the clerk of the bankruptcy appellate panel,**" as follows from the last sentence of Rule 8002(a), which considers it a mistake to do so. The filing-within-filing-period requirement of Rule 8008(a) is an exception!

83. Indeed, if the general rule of the F.R.Bkr.P. were 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?

84. The limited scope of application of the filing-within-filing-period exception is underscored by the fact that it contains an exception within itself: "except that briefs are deemed filed on the day of mailing." As an exception, it must be construed restrictively and applied only when a Rule expressly calls therefor;

otherwise, the exception would gut one of F.R.Bkr.P. "Part IX-General Provisions," namely "Rule 9006. Time." Hence, its provisions on time computation, complete-on-mailing, and three-additional-days are the ones applicable to a notice of appeal from a bankruptcy court order, which is to be both mailed to and filed in bankruptcy court.

85. This exception is further weakened by scooping out of it another exception. Thus, the Advisory Committee Notes state for Rule 8008 as a whole, rather than just its exception, that, "This rule is an adaptation of F.R.App.P. Rule 25." Appellate Rule 25 further narrows the exception by applying the complete-on-mailing provision to the filing of appendixes. Its Notes for 1967 Adoption 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).

86. That's the rationale for the provision's limited scope: It reduces the necessary time for adequate research and writing as well as 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 produce 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 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. Under those circumstances, does it sound fair to brand such appeals "superfluous" and sanction counsel for having filed them?

87. Consequently, the ten-day period for filing the notice of appeal with the bankruptcy court under Rule 8002 is not subject to the filing-within-filing-period exception, which applies only to filing with the district court or bankruptcy appellate panel under Rule 8008(a). Instead, it is subject to and benefits from the complete-on-mailing and three-additional-days provisions of Rule 9006, which the Supreme Court in *Pioneer* recognized to be "a general rule" in the bankruptcy context. Since Dr. Cordero mailed his notice within the 10-day period, its filing thereafter by the bankruptcy clerk should have been deemed timely.

7. On the same grounds as well as on factual and equitable grounds, the motion to extend time to file the notice of appeal should have been found timely

88. This Court of Appeals stated in *In re Bell*, *225 F.3d 203*, *209 (2d Cir. 2000)*, that in an appeal from a district court's review of a bankruptcy court ruling, the Court of Appeals' review of the bankruptcy court is "independent and plenary."

89. Thus, the Court should review the order of the bankruptcy court of February 18, 2003 (SPA-9a,22) denying Dr. Cordero's motion to extend the time to file notice

of appeal under Rule 8002(c)(2).

90. Dr. Cordero raised that motion timely on January 27 (A-214) and in addition in the bankruptcy court, not in the district court, he reasonably applied to it both the complete-on-mailing and the three-additional-days provisions of Rule 9006(e) and (f), respectively. Thus, as a matter of law based on the grounds discussed above for the notice of appeal, it should have been held timely filed too.

91. But also as a matter of fact, for even the opposing party, Trustee Gordon, admitted in his brief in opposition to the extension that Dr. Cordero's motion had been timely filed on January 29 (A-235).

92. Yet, the bankruptcy court surprisingly found it to have been filed on January 30, and thereby untimely by one day (SPA-9a). However, the discrepancy between the Trustee's admission against his legal interest and an unreliable docket,[4] created factual doubt that the court should have resolved on equitable grounds in favor of granting the extension, thereby upholding 1) the courts' policy of adjudicating controversies on the merits, and 2) parties' substantial right in having their day in court rather than dismissing both controversies and parties on procedural considerations.

93. This Court has an additional equitable ground to set aside the finding that the filing occurred on January 30, namely, that as part of the pattern of court officers'

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[4] See footnote 1.

disregard for facts, law, and rules laid out in para.-20 et seq. above, that finding is suspect and must not stand because "refusal to take such action appears to the court inconsistent with substantial justice," as provided under Rule 61 F.R.Civ.P., applicable under Rule 9005 F.R.Bkr.P.

94. Applying that principle is particularly pertinent in the case of pro se litigants because as this Court has stated:

> "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).*

95. This is all the more pertinent in the case of Dr. Cordero because if he "fail[ed] to follow a rule of procedure [it] was a mistake made in good faith" since he relied on the plain language of the Rules and the coherent and consistent scheme that they form and showed respect for the court and the Rules by timely mailing both the notice of appeal and the motion to extend. Hence, the Court should hold that the mistake was made through excusable neglect; otherwise, to

dismiss his notice and deny the motion would frustrate his reasonable expectation, which "would bring about an unfair result;" *Enron Oil, id, at 96*.

B. The court disregarded the standards of law applicable to Trustee Gordon's motion to dismiss Dr. Cordero's cross-claims for defamation as well as negligent and reckless performance as trustee

96. In response to Dr. Cordero cross-claims, Trustee Gordon claimed that even if true, "such claims are not legally sufficient and must be dismissed" (A-137), and the bankruptcy court dismissed them (SPA-1).

97. Whether this dismissal under Rule 12(b)(6) F.R.Civ.P. was improper is reviewed de novo by this Court, *O'Brien v. Alexander, 101 F.3d 1479 (2d Cir. 1996)* and it will affirm it "only if it appears **beyond doubt** that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief" (emphasis added) *Legnani v. Alitalia Linee Aeree Italiane, S.P.A. 274 F.3d 683 (2d Cir. 2001).*

98. Citing *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, the O'Brien Court recognized that the standard for deciding a 12(b)(6) motion is that the factual allegations contained in the complaint are accepted as true and all permissible inferences are drawn in plaintiff's favor.

99. The emphasis added to **"beyond doubt"** is particularly important because it highlights how little the plaintiff is required to show at that early stage of the

proceeding in order to survive a motion to dismiss. Consequently, this Court has stated that a claim must not be dismissed merely because the trial court doubts the plaintiff's allegations or suspects that the pleader will ultimately not prevail at trial, *Leather v. Eyck, 180 F3d. 420, 423, n.5 (2d Cir. 1999)*.

1. The claim of defamation

100. Dismissal in a case of defamation is particularly inappropriate because any alleged privilege against an action in defamation is defeated by a showing of malice and a defamatory motive, which are elements involving state of mind. Without development of the facts through discovery, state-of-mind cases are unsuitable for a 12(b)(6) motion to dismiss, *Pryor v. National Collegiate Athletic Ass'n, 299 F3d. 548, 565 (3d Cir. 2002)*.

101. For the reasons discussed **above** (para**.-30),** Court Reporter Dianetti's transcription of Dr. Cordero's statements at the hearing of the dismissal motion is "unintelligible" (SPA-262). By contrast, her transcription of the court's statements is comprehensible and readily reveal that the court made no effort whatsoever to apply these standards before it opened with its conclusion that "First of all, I'm going to grant the Trustee's motion and I'm going to dismiss your cross claims" (A-274), in bulk fashion, before any analysis.

102. What the court stated in its next breath is even more indefensible, for it constitutes the denial of the fundamental purpose of a system of law:

> First of all, with respect to the defamation, quite frankly, these are the kind of things that happen all the time, Dr. Cordero, in Bankruptcy court.

103. UNBELIEVABLE! A judge that says that because everybody makes defamatory statements, another one does not make any difference so the plaintiff just has to take it and be dismissed. What kind of legal system would we have, not to mention the society we would end up with, if just because everybody commits torts, the courts need not take action to provide redress to a victim?

104. The court's statement is all the more reprehensible because here Trustee Gordon made defamatory statements about…you!, the reader, here in New York City, inquiring about the property that you left in storage hundreds of miles away in Rochester, and for which you have paid fees, including insurance, for almost 10 years, but you are lied to by the people that are supposed to store your property, for it turns out that they do not even know where it is, so they send you to the Trustee, who throws you back at them, and when you find your property through your efforts in another warehouse, the owner will not release it because the Trustee can sue him and he tells you to go get it from the Trustee, except that the Trustee won't even take your calls or answer your letters, and on the third time you call to record a message or ask the secretary, he sends you a letter improper in its tone and unjustified in its content that enjoins you not to call his office any

more and to fend for yourself, so you ask the judge, the one overseeing the Trustee's liquidation of the one who took your money and lost your property, to review the Trustee's performance and fitness as trustee, only to find out that the Trustee writes to the court alleging that you have made more "more than 20 telephone calls" to the Trustee's staff, and you became "very angry" and "belligerent," "became more demanding and demeaning to [the Trustee's] staff" because due to your "poor understanding" you just don't get it that the Trustee has nothing to do with your property, "Accordingly, [the Trustee] do not think that it is necessary for the Court to take any action on [your] application," and the Trustee then sends copies of that description about you to his supervisor at the U.S. Trustee and to other professionals in Rochester.

105. What is your state of mind now? Would you agree with the Court of Appeals that such description of you

> "**may** "induce an evil opinion of [you] in the minds of right-thinking persons," *Dillon v. City of New York, 261 A.D.2d 34, at 38, 704 N.Y.S.2d 1, at 5 (1st Dep't 1999)…*and are therefore **capable** of a defamatory meaning," *Albert v. Loksen, dkt. no. 99-7520 (2d Cir. February 2, 2001)*?, (emphasis added).

106. If you just "may" prove that, then you must survive the dismissal motion given that:

> "the court need only determine that the contested statements "are reasonably susceptible of defamatory connotation." If any defamatory construction is possible, it is a question of fact for the jury whether the statements were understood as defamatory. *Purgess v. Sharrock, 33 F.3d 134, 140 (2d Cir. 1994)," Albert,* id.

107. But the court failed to apply that legal standard…or any acceptable standard since it instead condoned the Trustee's submission to it of defamatory and false statements intended to dissuade it and the his supervisor from reviewing his conduct because "it's all part really of the Trustee just trying to resolve these issues," (A-11,lines-10-12).

2. Negligence and reckless performance as trustee

108. In deciding a 12(b)(6) motion, "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims," *Scheuer v. Rhodes. 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).*

109. Here it was all the more necessary for the court to allow discovery precisely because the Trustee, who was appointed in December 2001, to liquidate Premier, the moving and storage company, had failed even to identify the contracts between Premier and its clients as income-producing assets of the estate, which

for him to liquidate, he had to inform the clients. Moreover, when the other parties referred Dr. Cordero to the Trustee, the latter provided no information and limited himself to volleying him back to them by his letters of June 10 and September 23, 2002 (A-16,1).

110. Therefore, it was contrary to the facts for the court to state that "the paper work that I read indicated to me he gave you a heads up on that very early on," (A-278,lines-7-8). What paperwork? Is the court referring to the Trustee's letter of June 10 (A-16), sent six months after his appointment and only because Dr. Cordero had called the Trustee, left messages for him, and then wrote asking him to provide the information?

111. Then the court goes on to make an astonishing statement:

> "Here I think you had warning that you need to get real proactive about this, not necessarily from a distance. It would have been nice if you had someone on board here in Rochester for a couple of days really kind of seeing this thing through…" (A-278,lines 18-23).

112. This statement is astonishing because it flies in the face of the facts. Indeed, for all those months during which Mr. Palmer, Premier's owner, and Mr. Dworkin, the manager/owner of the Jefferson-Henrietta warehouse used by Mr. Palmer, lied to Dr. Cordero about his property being safe in that warehouse without ever mentioning that Premier was bankrupt, let alone in liquidation, and once Mr.

Dworkin referred Dr. Cordero to M&T Bank's David Delano and the latter assured Dr. Cordero that he had seen containers with his name in the Jefferson-Henrietta warehouse, what reason was there in the court's mind for Dr. Cordero to go to Rochester? Likewise, after Mr. Dworkin and Mr. Delano referred Dr. Cordero to the Trustee, but the latter would neither take his calls nor answer his letters, what was Dr. Cordero supposed to do in Rochester? And once these characters admitted that they did not know where Dr. Cordero's property was, how did the court expect Dr. Cordero to look for it by going to Rochester?

113. The court's blaming Dr. Cordero for not having gone to Rochester or hire a lawyer there is most astonishing because it knows that the containers labeled with his name were found not even in Rochester, but rather in a close down warehouse in Avon. Its owner is Mr. James Pfuntner, known to the court since…(SPA-26-entry 19)…

114. Does this sound like the discussion of the court's legal standard for deciding a 12(b)(6) motion to dismiss? Of course not!, for the court was instead conducting a trial, one in which Dr. Cordero would not be allowed to engage in discovery or present evidence on issues like:

    1) Why Trustee Gordon failed to perform his duties? Under 11 U.S.C. §704(4), he had to "investigate the financial affairs of the debtor." For its part, the U.S. Trustee Manual, Chapter 7 Case

Administration, §2-2.2.1 requires that "A trustee must also ensure 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, such as income-producing contracts. Was the Trustee negligent in not locating them, and if he did, was he reckless in abandoning them to Jefferson-Henrietta Associates (SPA-17,18;34-entry-98), in not liquidating them for the creditors' benefit, and in not contacting Dr. Cordero, a contractual party and "party in interest"?

2) 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). Was the Trustee negligent or reckless in qualifying Premier as an asset case, only to end up issuing a No Distribution Report? (SPA-31-entries-70-71;34-entries-95,98;36-entry-107;

3) Was Trustee Gordon negligent or reckless in failing to examine Premier's docket (SPA-26-entry-19), which would have led him to discover Premier's use of Mr. Pfuntner's warehouse, and in failing to examine

Premier's records, whereby he would have found out -as did Mr. Carter of Champion (A-48,49;109, ftnts-5-8;352)- that Premier had assets in Mr. Pfuntner's warehouse, including containers covered by storage contracts, such as Dr. Cordero's?

115. In light of these and other genuine issues of material fact, the bankruptcy court could not properly have converted the 12(b)(6) motion into one for summary judgment under Rule 56 F.R.Civ.P., (SPA-90,77) nor did it apply any law whatsoever to justify rendering judgment for the Trustee as a matter of law, *White v. ABCO Engineering Corp., 221 F.3d 293 (2d Cir. 2000)*. Was it for having failed to realize or having tolerated Trustee Gordon's negligence and recklessness that the court dismissed the cross-claims against him, has not required disclosure, and has failed to issue a 16(b) scheduling order, thus leaving the case without management for 10 months?

116. As this Court has stated, in a motion to dismiss, the 'court's clear focus is on the pleadings, not the evidence submitted;'[5] *Manning v. Utilities Mut. Ins, Co., Inc., 254 F.3d 387 (2d Cir. 2001)*. It reviews the dismissal *de novo, Weeks v. New York State (Div. of Parole), 273 F.3d 76 (2d Cir. 2001)*, and not only does it construe the complaint liberally in the light most favorable to the plaintiff, *Connolly v.*

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[5] None in this case since discovery had not even started and till this day the court has issued no scheduling order.

McCall, 254 F.3d 36 (2d Cir. 2001), but in the case of a pro se litigant, as is Dr. Cordero, this Court also 'applies "a more flexible standard to evaluate the complaint's sufficiency than it would when reviewing a complaint submitted by counsel,"' *Lerman v. Board of Elections, 232 F.3d 135, certiorari denied NYS Bd. of Elections v. Lerman, 121 S.Ct. 2520, 533 U.S. 915, 150 L.Ed.2d 692 (2d Cir. 2000*).

117. It is respectfully submitted that Dr. Cordero's complaint would have been found sufficient if the lower court had 'merely assessed it for the "legal feasibility"' of the claim that Trustee Gordon had been negligent and reckless in liquidating Premier, instead of improperly using the occasion "to assay the weight of the evidence which might be offered in support thereof," *Sims v. Artuz, 230 F.3d 14 (2d Cir. 2000)*.

118. The likelihood of establishing the Trustee's negligence and recklessness is all the greater in light of his comment in his memorandum opposing the motion to extend time to appeal (A-238), that, "As the Court is aware, the sum total of compensation to be paid to the Trustee in this case is $60.00." There it is! Trustee Gordon had no financial incentive to do his job…nor did he have any sense of duty! What does it reveal about the court, which he knows from his prior appearance before it, that he deemed the court would excuse his hack job on Premier if only it were reminded that he would be paid little, even though he

himself qualified Premier as an asset case?

C. Palmer, owner of the bankrupt Debtor in liquidation, was served, but failed to appear, yet the application for default judgment for a sum certain was denied

1. The coherent and consistent scheme for taking default judgment

119. Rules 7004 F.R.Bkr.P. and 4 F.R.Civ.P. (SPA-64,71) provides that the summons must inform the defendant that his "failure to [appear and defend] **will result** in a judgment by default against" him (emphasis added).

120. The summons issued by the bankruptcy court bore this boldface warning across the page:

> **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** (emphasis added)

121. For their part, Rules 7055 F.R.Bkr.P. and 55 F.R.Civ.P., (SPA-64,76) provide that if a party fails to appear and that fact is established, "the clerk **shall** enter the party's default" (emphasis added). Moreover, "[w]hen the plaintiff's claim against the defendant is for a sum certain…" and the plaintiff submits an "affidavit of the amount due [the clerk] shall enter judgment for that amount."

122. Only "In all other cases," that is, when the amount is not "for a sum

certain or for a sum which can by computation be made certain," or when the defendant has appeared in the action, would the clerk be unable to enter judgment or carry it into effect. For those cases, Rule 55(b)(2) provides that "the **party entitled** to a judgment by default shall apply to the court therefor," (emphasis added).

123. What is in question is not the plaintiff's entitlement to default judgment, but rather the clerk's ability to enter or carry it into effect because he cannot make the sum certain even by computation. But if the fact of defendant's non-appearance is established and the sum of the judgment is certain, the request for default judgment never gets to the court. The clerk has no margin for discretion, for he "shall enter judgment for that amount."

124. If a non-appearing party has been defaulted, only he can reach the court to oppose default judgment. There he can either show good cause for setting aside the entry of default under Rule 55(c) or, if default judgment has already been entered, contest it under Rule 60(b) (SPA-77).

125. A non-appearing party does not automatically become a member of a class, such as that of infants or incompetent persons, requiring the protection of the court against entry of default judgment. Such party knew that his non-appearance "will result in a judgment by default" and 'he is deemed to have consented to its entry.' By contrast, the plaintiff is "the party entitled to [that] judgment"

against him.

126. Congress chose to approve this coherent and consistent scheme in plain language; 28 U.S.C. §§2074(a) and 2075 (SPA-87). Hence in the words of the Supreme Court in Ron Pair Enterprises, para.-58 above, there is "no need for a court to inquire beyond the plain language of the statute."

2. The legal scheme for default judgment does not allow a court to thwart a plaintiff's right to default judgment for a sum certain with the requirement that he demonstrate damages

127. Therefore, once the plaintiff has fulfilled his obligations as expressed by the plain language of the law, he is entitled to the right that the law has promised him. A court has no power to frustrate his reasonable expectation to his entitlement by substituting itself for Congress in order to unfairly surprise him with an additional obligation of which he received no notice. While the law holds that ignorance of the law is no excuse, the converse is that knowledge of the law and compliance with it is sufficient to obtain the benefit of the law. A court cannot require knowledge of jurisprudence too, much less of that which distorts the scheme of the law.

128. Mr. Palmer failed to answer. Dr. Cordero applied for default judgment against him on December 26, 2002, for the sum certain of $24,032.08 (A-294). Bankruptcy Clerk Paul Warren, though belatedly, entered his default on February

4, 2003. Under the plain language of that warning in the summons and the terms of Rule 55, all the requirements for the vesting in Dr. Cordero of his right to default judgment against Mr. Palmer were met.

129. Yet, the bankruptcy court, without citing any legal basis whatsoever, recommended to the district court that it not enter default judgment, but rather,

> "since Cordero has failed to demonstrate that he has incurred the loss for which he requests a Default Judgment, in this Court's opinion, the entry of the Default Judgment would be premature," (SPA-14-para.-9).

130. The District Court accepted the recommendation and compounded the disregard of the law by disregarding the fact that the application was for a sum certain:

> "Even if the adverse party failed to appear or answer, third-party plaintiff must still establish his entitlement to damages since the matter does not involve a sum certain" (SPA-16).

131. However, this reason for denying default judgment implicitly contains the grounds for its grant: If the matter involved a sum certain, the plaintiff would have established his entitlement to damages. Well, it is for a sum certain! The court's finding is clearly erroneous and prejudicial, for it is outcome determinative. It constitutes a reviewable abuse of discretion under *Sussman v.*

Bank of Israel, 56 F.3d 450, 456 (2d Cir.), cert. denied, 516 U.S. 916 (1995).

132. Moreover, the requirement that Dr. Cordero demonstrate damages is a question of law, which, even if mixed with facts, this Court reviews *de novo, Davis v. NYV Housing Authority, 278 F.3d 64, certiorari denied 122 S.Ct. 2357 (2d Cir. 2002).*

3. The equities are in favor of Dr. Cordero obtaining default judgment against Mr. Palmer

133. In this case there are also equitable grounds for enforcing the plain language of the law in favor of Dr. Cordero. For one thing, Mr. Palmer has dirty hands for not appearing in bankruptcy court, under whose jurisdiction he is since he sought its protection under the Bankruptcy Code (SPA-24-entry-3;25-entries-12-13) and where he was represented by counsel, Raymond Stilwell, Esq. (SPA-23). Mr. Palmer lied to Dr. Cordero about the safety and whereabouts of his property, which he abandoned, although he kept cashing his storage fees and defrauded him of his insurance fees by providing no insurance coverage. He concealed from Dr. Cordero that Premier was bankrupt and, in fact, already in liquidation, thereby depriving him of an opportunity to take care of his property as appropriate; then, he disappeared. Why should the courts spare him default judgment by denying it to Dr. Cordero, who has complied with all legal requirements for it? This Court can reach this question on review because, as it stated in *In re Nextwave Personal Communications, Inc., 200 F.3d 43, 50 (2d Cir. 1999),* "Our review of the

district court's decision affirming the bankruptcy court orders is plenary."

4. There is no legal basis for the district court to require an inquest into damages nor the procedural set up or practical means for the bankruptcy court to conduct it

134. The district court invoked no basis in law for its appointment of the bankruptcy court to conduct an inquest into damages. There can hardly be any. Indeed, ours is an adversarial system of justice and this is a civil proceeding for default judgment in bankruptcy court, where by definition there is no defendant, no prosecutor, and no jury. Nor is there a written statement on how to conduct the inquest or what standard of 'demonstration' Dr. Cordero must meet, which deprives him of his constitutional right to notice of what the government and its officers require of him and those similarly situated.

135. In practice, with what means would Dr. Cordero prove damages? The court has for the ten months of this case failed to require the parties to provide even initial disclosure –Dr. Cordero disclosed numerous documents with his pleadings and motions- and has not issued even a Rule 16(b) scheduling order for discovery (SPA-75), only two oral orders requiring Dr. Cordero to travel to Rochester to inspect storage containers, while allowing Mr. Pfuntner not to comply with them.

136. When examining whatever it is that Dr. Cordero may be required to submit, the bankruptcy court would have but two choices: approve it, that is, if he can lay his

hands on the required evidence; or question it, in which case the court plays simultaneously the roles of opposing counsel, defendant's expert witness, regulator that makes and applies rules and standards as it goes, fact finder, and judge. That is an impossible role for a court to play efficiently, let alone for these two lower courts to perform impartially and fairly in light of the bias and prejudice with which they have so far treated Dr. Cordero (para.-20 above) The legal basis for freeing him from further abuse at their hands is discussed next.

D. The court officers' pattern of intentional and coordinated acts supporting the reasonable inference of bias and prejudice warrants removal to an impartial court, such as the district court for the Northern District of New York

137. Public confidence in those that administer justice is the essence of a system of justice. Thus, this Court has adopted the test of objective appearance of bias and prejudice: Whether "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal." *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992).

138. If this objective test for judicial disqualification is met, recusal of the judge is mandated under 28 U.S.C. §455(a), which requires disqualification "in any proceeding in which [the judge's] impartiality **might** reasonably be questioned" (emphasis added; SPA-86). It follows that to disqualify a

judge, an opinion based on reason, not certainty based on hard evidence of partiality, is all that is required and what provides the objectivity element of the test. This is so because, as the Supreme Court has put it, "[t]he goal of section 455(a) is to avoid even the appearance of partiality…to a reasonable person…even though no actual partiality exists because the judge…is pure in heart and incorruptible," *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988).*

139. The Supreme Court's construction derives from the legislative intent for §455(a), which Congress adopted on the grounds that "Litigants ought not have to face a judge where there is a reasonable question of impartiality," S. Rep. No. 93-419, at 5 (1973); H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. Thus, Congress provided for recusal when there is ""reasonable fear" that the judge will not be impartial, id.

140. The test is reasonably easy to meet because more important than keeping the judge in question on the bench is preserving the trust of the public in the system of justice. Whether the judge is aware of his bias or prejudice is immaterial given that "[s]cienter is not an element of a violation of §455(a)," since the "advancement of the purpose of the provision -- to promote public confidence in the integrity of the judicial process -- does not

depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg,* at 859-60.

141. The facts stated in 20 above are apt to raise the inference of lack of impartiality and fairness, which is at the heart of justice. Moreover, a reasonable person can well doubt the coincidental nature of such a long series of instances of disregard of facts, law, and rules of procedure, all of which consistently harm Dr. Cordero and spare the other parties of the consequences of their wrongful acts. If these court officers had through mere incompetence failed to proceed according to fact and law, then all the parties would have shared and shared alike the negative and positive impact of their mistakes.

142. The sharing here has been in the bias and prejudice shown by the bankruptcy judge, the court reporter, the clerk of court, the district judge, and even the assistant clerks. Indeed, the latter's participation in one event cannot possibly, let alone reasonably, be explained away by coincidence. Judge for yourself:

143. Dr. Cordero knew that to perfect this appeal, he had to comply with Rule 6(b)(2)(B)(i) F.R.A.P. (SPA-81) (SPA-81) by submitting his Redesignation of Items on the Record and Statement of Issues on Appeal. He was also aware of the suspected manipulation of the filing date of his motion to extend time to file the notice of appeal, which so conveniently prevented him from refilling his notice of

appeal to the district court (para.-23 above). Therefore, he wanted to make sure of mailing his Redesignation and Statement to the right court. To that end, he phoned both Bankruptcy Case Administrator Karen Tacy and District Appeals Clerk Margaret (Peggy) Ghysel. Both told him that his original Designation and Statement submitted back in January (A-ii;1-152) was back in bankruptcy court; hence, his Redesignation and Statement was supposed to be sent to the bankruptcy court, which would combine both for transmission to the district court, upstairs in the same building.

144. But just to be extra safe, Dr. Cordero mailed on May 5 an original of the Redesignation and Statement to each of the court clerks. What is more, he sent one attached to a letter to District Clerk Rodney Early (SPA-61).

145. It is apposite to note that in the letter to Mr. Early, Dr. Cordero pointed out a mistake, that is, that in the district court's acknowledgement of his notice of appeal to this Court, the district court had referred to each of Dr. Cordero's actions against Trustee Gordon and Mr. Palmer as *Cordero v. Palmer*. (Was it by pure accident that the mistake used the name Palmer, who disappeared and cannot be found now, rather than that of Gordon, who can easily be located?)

146. Imagine the shock when Dr. Cordero found out on May 24 that the Court of Appeals docket for his appeal, the record of which the district court had transferred to it on May 19, showed no entry for his Redesignation and Statement.

Worse still, he checked the lower courts' dockets and neither had entered it or even the letter to Clerk Early (SPA-47,55)! He scrambled to send a copy to Appeals Court Clerk Roseann MacKechnie (SPA-60). Even as late as June 2, her Deputy, Mr. Robert Rodriguez, confirmed to Dr. Cordero that the Court had received no Redesignation and Statement or docket entry for it from either the bankruptcy or district courts. Dr. Cordero had to call both lower courts to make sure that they would enter this paper on their respective dockets. His May 5 letter to Clerk Early was entered only on May 28 (SPA-62).

147. The excuse that these court officers gave as well as their superiors, Bankruptcy Clerk Paul Warren and District Deputy Rachel Bandych, that they just did not know how to handle a Redesignation and Statement, is simply untenable. Dr. Cordero's appeal cannot be the first one ever from those courts to this Court; those officers must know that they are supposed to record every event in their cases by entering each in their dockets; and **'**certify and send the Redesignation and Statement to the circuit clerk,' as required under Rule 6(b)(2)(B) (SPA-81). Actually, it was a ridiculous excuse!

148. No reasonable person can believe that these omissions in both courts were merely coincidental accidents. They furthered the same objective of preventing Dr. Cordero from appealing. The officers must have known that the failure to submit the Redesignation and Statement would have been imputed to Dr. Cordero and

could have caused this Court to strike his appeal.

149. But there is more. Rules 4(a)(1)(A) and 28(a)(C) F.R.A.P. (SPA-80,82) consider jurisdictionally important that the dates of the orders appealed from and the notice of appeal establish the appeal's timeliness. This justifies the question whether the following omissions could have derailed Dr. Cordero's appeal to this court and, if so, whether they were intentional. Indeed, as of last May 19, the bankruptcy court docket no. 02-2230 for the adversary proceeding Pfuntner v. Gordon et al did not carry an entry for the district court's March 27 denial "in all respects" of Dr. Cordero's motion for reconsideration in Cordero v. Gordon. By contrast, it carries such an entry for the district court's denial, also of March 27, of Dr. Cordero motion for reconsideration in *Cordero v. Palmer* (SPA-46-entries-69,66). Also on May 19, the district court certified the record on appeal, but did it fail to send copies of either of the March 27 decisions that Dr. Cordero is appealing from and which determine his appeal's timeliness? The fact is that this Court's docket for this case, no. 03-5023, as of July 7, 2003 (SPA-62), does not have entries for copies of either of the March 27 decisions, although it carries entries for the earlier decisions of March 11 and 12 that Dr. Cordero had moved the district court to reconsider. However, Dr. Cordero's notice of appeal to this Court (SPA-21) makes clear that the March 27 orders are the principal orders that he is appealing from (SPA-9,19).

150. Is this evidence that the bankruptcy and district court officers enter in their dockets and send to this Court just the notices and papers that they want? Does this show how they could have manipulated the filing date of Dr. Cordero's motion to extend time to file notice of appeal (para.-25 above) and omit entering and sending his Redesignation of Items and Statement of Issues (para.-143 above)? If those court officers dare tamper with the record that they must submit to the Court of Appeals, what will they not pull in their own courts on a black-listed pro se party living hundreds of miles away? Will you let them get away with it?

X. Relief sought

151. …if not, you may grant what Dr. Cordero respectfully requests of this Court:

1) To open an investigation into these court officers' pattern of coordinated and abusive conduct in order to determine the officers' impact on this case in particular and on their cases in general and then deal with them in a way that will enhance public confidence in those courts and our system of justice;

2) To transfer this case to another court unrelated to the parties in this case, unfamiliar with the officers in these two courts, and at a distance from all of them, such as the District Court for the Northern District of New York;

which can pick up the case at almost its beginning where it has lingered without management since its filing back in September 2002;

3) To vacate the dismissal of Dr. Cordero's cross-claims against Trustee Gordon and of his notice of appeal from that dismissal, and allow those claims to proceed to discovery and trial; otherwise, to vacate the denial of Dr. Cordero's motion to extend time to file notice of appeal and grant it so that the notice may be filed in the court of transfer;
4) To grant Dr. Cordero's application for default judgment against David Palmer;
5) To grant Dr. Cordero any other relief that to the Court may appear just and fair.

XI. Certificate of Compliance with Rule 32(a) F.R.A.P.

A. Type-volume limitation

This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because it contains 13,990 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

B. Typeface and type style requirements

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point normal Times New Roman with quotes in 14 point normal Bookman.

Respectfully submitted on July 9, 2003, Dr. Richard Cordero

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