# Dr. Richard Cordero

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March 30, 2004

Re: The facts, implications, and requests concerning the DeLano chapter 13 bankruptcy petition, docket no. 04-20280 WDNY

To: U.S. Trustee for Region 2 Deirdre A. Martini
Assistant U.S. Trustee Kathleen Dunivin Schmitt, Esq.
Chapter 13 Trustee George M. Reiber
James Weidman, Esq., attorney for the Chapter 13 Trustee
Christopher K. Werner, Esq., attorney for the Debtors

From: Dr. Richard Cordero, creditor

On March 8, 2004, the meeting of creditors concerning the Chapter 13 bankruptcy petition filed by David G. DeLano and Mary Ann DeLano took place in Rochester, NY. It was followed by the hearing on confirmation of plans. I traveled from New York City to Rochester and attended both. This memorandum contains a statement of facts describing what occurred at those two events, their legal implications, and the requests that I am making based on them.

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# I. The meeting of creditors and the hearing on confirmation of plans on March 8 in Rochester

## A. Attorney Weidman adjourned the meeting of creditors unlawfully, arbitrarily, and suspiciously

1. After being named a defendant in James Pfuntner v. Trustee Kenneth Gordon et al., filed in the U.S. Bankruptcy Court for the Western District of New York –docket no. 02-2230-, Dr. Richard Cordero impleaded Mr. David DeLano. On January 27, 2004, Mr. DeLano filed for bankruptcy under Chapter 13 of the Bankruptcy Code –docket no. 04-20280- a most amazing event, for Mr. DeLano has been a bank loan officer for 15 years! As such, he must be held to have acquired and possess superior knowledge about how to retain creditworthiness and ability to repay loans. Yet, he and his wife owe $98,092 to 18 credit card issuers and a mortgage of $77,084, but despite all that borrowed money their equity in their house is only $21,415 and the value of their declared tangible personal property is only $9,945, although their household income in 2002 was $91,655 and in 2003 $108,586. What is more, Mr. DeLano is still a loan officer of Manufacturers & Traders Trust Bank. What did a veteran loan officer still on the job, and as such an expert in good standing with his employer, do with all that income so that now he claims to have so little to show for it as to warrant a discharge of his debts in bankruptcy? Both these circumstances and figures beg examination under strict scrutiny.

2. Dr. Cordero received notice of the meeting of creditors required under 11 U.S.C. §341. The business of the meeting includes "the examination of the debtor under oath…", pursuant to Rule 2003(b)(1) FRBkrP. After oral and video presentations to those in the room, the Standing Chapter 13 Trustee, George Reiber, Esq., took with him the majority of the attendees and left there his attorney, James Weidman, Esq., with 11 people, including Dr. Cordero, who were parties in some three cases. The first case that Mr. Weidman called involved a couple of debtors with their attorney and no creditors; he finished with them in some 12 minutes.

3. Then Mr. Weidman called and dealt at his table with Mr. DeLano, his wife, and their attorney, Christopher Werner, Esq. The attorney for both Mr. DeLano and M&T Bank in the Pfuntner v. Trustee Gordon case, Michael Beyma, Esq., remained in the audience. For some eight minutes Mr. Weidman asked questions of the DeLanos. Then he asked whether there was any creditor in the audience. Dr. Cordero identified himself and stated his desire to examine the debtors. Mr. Weidman asked Dr. Cordero to fill out an appearance form and to state what he objected to. Dr. Cordero submitted the form as well as copies to him and Mr. Werner of his Objection of March 4, 2004, to Confirmation of the Chapter 13 Plan of Debt Repayment (hereinafter referred to as his written objections). No sooner had Dr. Cordero asked Mr. DeLano to state his occupation than Mr. Weidman asked Dr. Cordero whether he had any evidence that the DeLanos had committed fraud. Dr. Cordero indicated that he was not raising any accusation of fraud; rather, he was interested in establishing the good faith of a bankruptcy petition by a bank loan officer. Dr. Cordero asked Mr. DeLano how long he had worked in that capacity. He said 15 years.

4. In rapid succession, Mr. Weidman asked some three times Dr. Cordero to state his evidence of fraud. Dr. Cordero had to insist that Mr. Weidman take notice that he was not alleging fraud. Mr. Weidman asked Dr. Cordero to indicate where he was heading with his line of questioning. Dr. Cordero answered that he deemed it warranted to subject to strict scrutiny a bankruptcy

petition by a bank loan expert, particularly since the figures that the DeLanos had provided in their schedules did not match up. Mr. Weidman claimed that there was no time for such questions and put an end to the examination! It was just 1:59 p.m. or so and the next meeting, the hearing on confirmation of plans before the Hon. John C. Ninfo, II, was not scheduled to begin until 3:30. To no avail Dr. Cordero objected that he had a statutory right to examine the DeLanos and had traveled to Rochester from New York City for that sole purpose. After the five participants in the DeLano case left, only Mr. Weidman and three other persons, including an attorney, remained in the room.

5. After going to the Office of the U.S. Trustee (para. 32, below), Dr. Cordero went to the courtroom. Mr. Reiber, the Chapter 13 trustee, was there with the other group of debtors. When he finished, Dr. Cordero tried to tell him what had happened. But he said that he had just been informed that a TV had fallen to the floor and that, although no person had been hurt, he had to take care of that emergency. Dr. Cordero managed to give him a copy of his written objections.

## B. At the hearing, Mr. Weidman showed that he had made up his mind about the DeLanos' good faith without regard for the objections of Dr. Cordero, who asked for his recusal

6. Judge Ninfo arrived in the courtroom late. He apologized and then started the confirmation hearing. Mr. Reiber and his attorney, Mr. Weidman, were at their table. When the DeLano case came up, Mr. Reiber indicated that an objection had been filed so that the plan could not be confirmed and the meeting of creditors had been adjourned to April 26. Judge Ninfo took notice of that and was about to move on to the next case when Dr. Cordero stood up in the gallery and asked to be heard as a creditor of the DeLanos. He brought to the Judge's attention that Mr. Weidman had prevented him from examining the Debtors by cutting him off after only his second question upon the allegation that there was no time even though aside from those in the DeLano case, only an attorney and two other persons remained in the room.

7. Judge Ninfo opened his response by saying that Dr. Cordero would not like what he had to say; that he had read Dr. Cordero's objections; that Dr. Cordero interpreted the law very strictly, as he had the right to do, but he had again missed the local practice; that he should have called to find out what that practice was and, if he had done so, he would have learned that the trustee would not allow a creditor to go on asking questions until 8 in the evening, particularly when he had a room full of people.

8. Dr. Cordero protested because he had the right to rely on the law and the notice of the meeting of creditors stating that the meeting's purpose was for the creditors to examine the debtors. He also protested to the Judge not keeping his comments in proportion with the facts since Dr. Cordero had not asked questions for hours, but had been cut off by Mr. Weidman after two questions in a room with only two other persons.

9. Judge Ninfo said that Dr. Cordero should have done Mr. Weidman the courtesy of giving him his written objections in advance so that Mr. Weidman could determine how long he would need. Dr. Cordero protested because he was not legally required to do so, but instead had the right to file his objections at any time before confirmation of the plan and could not be expected to disclose his objections beforehand so as to allow the debtors to prepare their answers with their attorney.

10. Dr. Cordero added that Mr. Weidman's conduct raised questions because Mr. Weidman kept asking him what evidence he had that the DeLanos had committed fraud despite his having answered the first time that he was not accusing the DeLanos of fraud, whereby Mr. Weidman showed an interest in finding out how much Dr. Cordero already knew about fraud committed by the DeLanos before he, Mr. Weidman, would let them answer any further questions. Dr. Cordero said that Mr. Weidman had put him under examination although he was certainly not the one to be examined at the meeting, but rather the DeLanos were; and added that Mr. Weidman had caused him irreparable damage by depriving him of his right to examine the Debtors before they knew his objections and could rehearse their answers.

11. Yet, Judge Ninfo came to Mr. Weidman's defense and once more said that Dr. Cordero applied the law too strictly and ignored the local practice.

## II. Mr. Weidman has become the target of an investigation and rendered himself liable to Dr. Cordero

12. Mr. Weidman cut off Dr. Cordero after the latter had asked only two questions of Mr. DeLano and none of Ms. DeLano. Thereby Mr. Weidman frustrated the very purpose for which the Code provides for a meeting of creditors, which is the examination of the debtor by the creditors. Thus, he acted unlawfully as contrary to the law. Since he neither invoked nor had any legal rule or principle as justification for his conduct, he acted arbitrarily. Likewise, by putting an end to the meeting right after cutting off Dr. Cordero even though there was no other creditor and thus, nobody else was asking for time to examine the DeLanos so that there was no need to allocate time among creditors, but instead there was ample time for the meeting to continue, Mr. Weidman acted capriciously for there was no need in practice for his conduct.

13. Mr. Weidman knew that the adverse impact of his conduct on Dr. Cordero was all the more severe because Dr. Cordero made him aware at the meeting that he had come all the way to Rochester from New York City to participate in the examination of the DeLanos pursuant to the official notice of meeting of creditors that Dr. Cordero had received. Therefore, Mr. Weidman knowingly wasted Dr. Cordero's effort, time, and money. Now he must compensate Dr. Cordero therefor.

14. Moreover, since Mr. Weidman asked Dr. Cordero to state his objections and adjourned the meeting after the latter had answered and provided him and the DeLanos with copies of his written objections, he caused Dr. Cordero the irretrievable loss of the opportunity to obtain from the DeLanos spontaneous answers before knowing his objections and having time to prepare their statements and take other measures in light of the objections. By so doing, Mr. Weidman has caused Dr. Cordero irreparable harm, for which he is now liable to Dr. Cordero.

15. By the same token, Mr. Weidman has rendered the task of obtaining candid and truthful information all the more difficult because now other steps are required to compensate for the lack of spontaneity in the DeLanos' answers at any future examination. Dr. Cordero holds Mr. Weidman liable to compensate him for his extra work in taking those steps.

16. Mr. Weidman is the attorney for the trustee and one who vetted the DeLano's petition. As such, he is knowledgeable about the purpose of a meeting of creditors under the Bankruptcy Code and about the petition's details and merits. He should have known that he could not so flagrant-

ly impede the examination of the DeLanos and get away with it without raising suspicion.

17. To be sure, he has raised suspicion. Why was he so insistent in finding out how much Dr. Cordero already knew about the DeLanos having committed fraud in submitting their bankruptcy petition? Why did he not believe Dr. Cordero's answer that he, Dr. Cordero, was not accusing the DeLanos of any fraud, but rather assume that Dr. Cordero nevertheless knew something about fraud committed by the DeLanos which he, Mr. Weidman, needed to know before allowing the DeLanos to answer Dr. Cordero's questions? Whom was Mr. Weidman protecting, the DeLanos or himself, from what and why?

18. Having raised suspicion, Mr. Weidman must now be investigated. Only thus can the integrity of the U.S. Trustee Program be safeguarded and any doubts about the legality and truthfulness of any future proceeding or information provided in this case be put to rest.

## III. Trustee Reiber's vested interest in his attorney being found blameless requires his recusal from this case

19. Mr. Weidman works for Trustee Reiber as his attorney. But he is not just outside counsel retained by the Trustee to assist him only in the specific case of the DeLanos. Rather, Mr. Weidman's name appears on the Trustee's letterhead and in a subordinate position. This indicates an organic and continuous relationship between them as members of the same office and in a principal-agent relation. What one knows is imputed to the other. By the same token, access by one to the files of the other is presumed, for why would there be any need for secrecy between members of the same office, especially where their relation is protected by attorney-client privilege? Moreover, Mr. Weidman is Trustee Reiber's supervisee whenever he substitutes for the Trustee, as when he replaces the latter as the presiding officer at a meeting of creditors.

20. Therefore, Trustee Reiber has a vested interest in Mr. Weidman not being found to have engaged in any unlawful, arbitrary, and capricious conduct or to have entered into an improper relation with the DeLanos. Indeed, if Mr. Weidman were to be found at fault, it would have a negative impact on Trustee Reiber, for they are in a principal-agent relation. Worse still, it could call into question any case in which both have worked together. That could put Trustee Reiber's continued standing in the Trustee Program in jeopardy. (cf. 11 U.S.C. §324(b))

21. The fact is that on March 8 Trustee Reiber jumped to Mr. Weidman's defense, saying, without first having investigated his conduct, that Mr. Weidman had acted properly in putting an end to the meeting of creditors as he did. Yet, Mr. Weidman cutting off a creditor after the latter had asked his second question and then adjourning the meeting altogether upon the objectively untenable allegation of lack of time constituted prima facie evidence that something was amiss. It should have given Trustee Reiber pause, even cause for concern, and yes, the urge to investigate. Dr. Cordero protested and Trustee Reiber responded that he knew Mr. Weidman and trusted him.

22. That is precisely a disqualifying response because it means that Trustee Reiber implicitly trusts his attorney. Any investigation that he may conduct would start off with the assumption that Mr. Weidman did nothing wrong and competently reviewed and handled the DeLanos' petition. Thus, from the beginning, the Trustee would be investigating his attorney while having a

preconceived idea of his conclusion at the end of the investigation. What is more, the assumption could in the Trustee's eyes render the investigation of Mr. Weidman so pointless, for what is there to investigate if one already knows what happened?, as to dissuade the Trustee from conducting any investigation at all.

23. Thus, to avoid investigating his attorney-supervisee or to investigate him without repercussions, Trustee Reiber would be more likely than not to confirm the statement that Mr. Weidman made in open court during the hearing on confirmation of plans, to wit, that he, Mr. Weidman, had spoken with the DeLanos and their attorney and had found that they had filed their petition in good faith. Dr. Cordero protested immediately in open court by pointing out that Mr. Weidman -who neither mentioned Dr. Cordero nor the written objections that he had tendered to Mr. Weidman earlier at the meeting of creditors- had already reached a conclusion precisely on what in any petition constitutes a key issue, which had been put in controversy by the objections: Whether the petition had been submitted in good faith. (cf. 11 U.S.C. §1325(a)(3))

24. Could Trustee Reiber now conclude that the DeLanos did not act in good faith without thereby indicting his attorney-supervisee's rush to judgment and his competency in vetting the debtors' petition? No, he could not. Consequently, the Trustee has a vested interest in not finding fault with his attorney so as to avoid calling into question their relation and making himself a target of an investigation. This will compromise his objectivity, prevent him from being thorough, and impair the validity of his conclusions and process of investigation of both Mr. Weidman and the DeLanos, that is, if the Trustee investigates any of them at all.

25. If the DeLano's attorney works for the DeLanos, and Mr. Weidman protects the DeLanos, and Trustee Reiber defends Mr. Weidman, and both dismiss out of hand a creditor's objections, and the U.S. Trustee keeps in place her trustee even though linked to suspicious circumstances, who looks after the creditor as the representative of the estate (cf. 11 U.S.C. §323(a))?

26. Just as Dr. Cordero called for Mr. Weidman to recuse himself for jumping to a conclusion in favor of the DeLanos, he calls for Trustee Reiber to recuse himself for jumping to a conclusion in favor of his attorney-supervisee.

## A. Trustee Reiber's legal duty to come forward with any information about bankruptcy fraud or abuse and the risk of failing to do so

27. If Trustee Reiber refuses to recuse himself and is allowed to remain in the case, Dr. Cordero gives notice that he may challenge the Trustee's every act and omission at any step of the way.

28. In this context, Trustee Reiber must consider that he is a lawyer and a trustee in the U.S. Trustee Program and, as such, an officer of the court and a federal appointee. He has a duty to report bankruptcy fraud or abuse to, among others, the FBI; and he himself said in his introduction at the March 8 meeting of creditors that he does report it, whereby he intended to create a reliance interest in his honesty. Every time he appears in court, files a paper in the case, or conducts business as usual with a party in interest, he is representing that he is acting truthfully and conducting the case in good faith and according to law.

29. By contrast, imagine a person similarly situated who knew that bankruptcy fraud or abuse had been committed in a case or had a reasonable basis to suspect that it had. It could also be that

she, through the exercise of due diligence and care as such court officer and federal appointee, would have found out but for her decision to engage in willful ignorance to preserve plausible denial. Imagine further that she failed to come forward and report what she knew or should have known to, among others, the FBI. Under those circumstances, if she continued to appear in court, file papers in the case, or conduct business as usual with a party in interest, she would render herself liable to criminal charges for the continuing commission, in addition to dereliction of duty, of perjury, obstruction of justice, and engaging in a cover up; and would also lay herself open to civil suits for fraud in the inducement to continue dealing with her and for the intentional infliction of material loss and emotion distress since a person is deemed to intend the reasonable consequences of her acts.

30. One thing is clear: Doing nothing when one has a duty to take a certain action, and doing as usual when one has a duty to do otherwise, compound an initial offense and breed a host of dire consequences, which could be avoided if that offense were timely pled down or negotiated away.

31. Dr. Cordero relies on Trustee Reiber's bid for trust in his honesty and expects him to do what is his legal and moral duty: recuse himself and report what he knows.

## IV. Trustee Schmitt's decision to keep Trustee Reiber on the DeLano case leaves the pall of suspicion hanging over the case and, given her questionable handling of the complaint about Trustee Kenneth Gordon, raises more questions about her conduct

32. After Mr. Weidman's unlawful adjournment of the meeting of creditors on March 8, Dr. Cordero went to see Assistant U.S. Trustee Kathleen Dunivin Schmitt in the Office of the U.S. Trustee on the same floor. Nobody was there and he waited. When Paralegal Stephanie Becker arrived, he asked to speak with Trustee Schmitt, but Ms. Becker said that she was not available. Dr. Cordero told her what had happened and left with her a copy of his written objections for Trustee Schmitt.

33. The following day, Trustee Schmitt and Dr. Cordero spoke on the phone. He related the events of the previous day. He also said that Trustee Reiber had told him after the hearing that he would ask the DeLanos' attorney, Mr. Werner, whether he would allow his clients and, if so, under what conditions, to meet with Dr. Cordero for the latter to question them. Dr. Cordero indicated that Mr. Werner is in no position to grant or deny permission for his clients to meet with Dr. Cordero, let alone set conditions for the meeting, since the examination of the debtor by the creditors is a step in the bankruptcy process provided for by law. Trustee Schmitt agreed with Dr. Cordero and said that it was unfortunate for Trustee Reiber to have put it in those terms.

34. Dr. Cordero requested that she disqualify both Mr. Weidman and Trustee Reiber from the DeLano case and appoint a trustee unrelated to them, unfamiliar with case, and capable of conducting an independent investigation of their conduct in this case and of the financial affairs of the DeLanos. Trustee Schmitt indicated that she could appoint a trustee from Buffalo.

35. However, in her letter of March 11 to Dr. Cordero, Trustee Schmitt wrote that "I have had an opportunity to review your concerns with the United States Trustee for Region 2, Deirdre A. Martini, and she concurs with me that this case should be handled by the Chapter 13 trustee, George Reiber, personally". The word "concurs" means that Trustee Schmitt proposed to Trustee Martini to keep Trustee Reiber on the case.

36. For Trustee Schmitt to agree with Dr. Cordero in principle to do something but then propose the opposite to her boss is certainly not the way to build trust. Moreover, stating that Trustee Reiber will handle the case "personally" does not mean that Mr. Weidman will not continue helping him with it, much less that he has been prohibited from having further contact with the DeLanos and their attorney. Nor does the statement "that this case should be handled by…trustee…Reiber" contain any implicit obligation for him to investigate anybody or anything.

37. Even if it did, it would not mean much. The foundation for this statement is the way Trustee Schmitt handled an investigation when she was officially asked to investigate another of her trustees.

## A. Trustee Schmitt's quick-job inquiry of Trustee Kenneth Gordon is precedent for what little, if anything, she would now ask Trustee Reiber to investigate and how low her standards of acceptable performance would be

38. Indeed, two years ago Dr. Cordero was looking for his property in storage with Premier Van Lines, and was given the round-around by its owner, David Palmer, and others who were doing business with Mr. Palmer. After the latter disappeared, the others eventually disclosed to Dr. Cordero that Mr. Palmer had filed under Chapter 11 for bankruptcy on behalf of Premier and that the company was already in Chapter 7 liquidation. They referred Dr. Cordero to the Chapter 7 trustee in the case, Kenneth Gordon, Esq., for information on how to locate and retrieve his property. However, Trustee Gordon refused to provide such information, instead made false and defamatory statements about Dr. Cordero, and merely referred him back to the same people that had referred him to Trustee Gordon.

39. Dr. Cordero complained to Judge Ninfo, before whom Mr. Palmer's petition was pending, and requested a review of Trustee Gordon's performance and fitness to serve as trustee. The judge referred the matter to Trustee Schmitt for a "thorough inquiry". However, what she actually conducted was only a quick 'contact': a communication exercise limited in its scope to two people and in its depth to uncritically accepting at face value what she was told.

40. Dr. Cordero appealed Trustee Schmitt's supervisory opinion of October 22, 2002, to her hierarchical superior at the time, Carolyn S. Schwartz, U.S. Trustee for Region 2, to whom he sent a detailed critical analysis of the opinion against the background of facts supported by documentary evidence. It is dated November 25, 2002. It must be in the files now under the supervision of Trustee Schwartz's successor, Ms. Deirdre A. Martini, who is referred to it by its incorporation herein. It is also available as entry no. 19 in docket no. 02-2230, Pfuntner v. Trustee Gordon et al.

41. On that occasion, a complaint about one of her trustees was officially and spontaneously referred by a federal judge for a "thorough inquiry" to Trustee Schmitt. Nevertheless, she

conducted instead a "substandard investigation…infirm with mistakes of fact and inadequate coverage of the issues raised", as stated in Dr. Cordero's accompanying letter to Trustee Schwartz. Consequently, it is counterintuitive to think that this time, at the instigation of just a creditor, particularly one who complained about her, Trustee Schmitt will ask a third party, Trustee Reiber, to investigate yet another party, Mr. Weidman, in his relation to still others, the DeLano Debtors, and that she will see to it that her trustee's investigation rises to the level of a "thorough inquiry". Hence the need to entrust this investigation to a trustee unrelated to them, unfamiliar with the case, and capable of proceeding independently to whatever results a thorough inquiry may lead. What did Trustee Schmitt tell Trustee Martini to get her to "concur" with her that there was no need to replace Trustee Reiber at all?

## V. Trustee Reiber failed to be evenhanded by proposing dates for the adjourned meeting to Mr. Werner but not to Dr. Cordero, although he was going to send a letter to Dr. Cordero and Trustee Schmitt was going to request him to do so

42. On Friday, March 12, Trustee Reiber called Dr. Cordero to let him know that he had spoken with Mr. Werner and that the latter had agreed to a meeting where Dr. Cordero could examine the DeLanos. Dr. Cordero told the Trustee that the meeting had to be just as the meeting of creditors which was to have been held on March 8. The Trustee just said that he would send Dr. Cordero a letter on the subject.

43. Dr. Cordero received no letter from the Trustee in the following week. When Trustee Schmitt and Dr. Cordero spoke again on Tuesday, March 23, upon her return from training, she mentioned that Trustee Reiber had sent Dr. Cordero a letter. When Dr. Cordero said that he had received none, she said that she would ask him to send or resend the letter in question.

44. On Saturday, March 27, Dr. Cordero received a letter from Trustee Reiber together with a copy of a letter from Mr. Werner to the Trustee dated March 19. Mr. Werner wanted to let the Trustee know the dates that were agreeable to him from among those that the Trustee had proposed to him for the adjourned meeting of creditors.

45. How come Trustee Reiber did not propose them at the same time to Dr. Cordero? Proceeding this way does not show evenhandedness in Trustee Reiber's treatment of Mr. Werner and Dr. Cordero. The latter is put at a disadvantage by having to play catch up or, to avoid being put in that position, he is forced to second-guess the Trustee all the time.

46. Nor is it reassuring if Trustee Schmitt failed to ask Trustee Reiber to send or resend that letter to Dr. Cordero, or if she did ask him to do so, but failed to prevail upon him to do so, for if Trustee Reiber can disregard such a request, what other requests or advice from Trustee Schmitt can he disregard too?

47. In addition to that procedural impropriety, there are substantive reasons why the adjourned meeting cannot take place on any of the dates agreeable to Mr. Werner. Nor can it be limited to an hour given the circumstances.

# VI. Why the adjourned meeting to examine the DeLanos can neither be limited to an hour nor take place until financial statements for "the covered period" have been sought, obtained, and analyzed

48. There is no justification in law or in fact to further protect the DeLanos from examination by limiting the time therefor, let alone limiting it to less than the time available at the initial meeting. On the contrary, there are solid grounds for providing for an examination without any limit on its duration:

    a) The bankruptcy of a 15 year bank loan officer is in itself highly suspicious and warrants strict scrutiny.

    b) Such suspicion is heightened by the incongruous information that the DeLanos provided in their Schedules. (cf. para. 1 above)

    c) Written objections have been filed that lay out detailed reasons, supported by numerical computations, for examining the DeLanos in depth.

    d) The DeLanos have benefited from Mr. Weidman unlawfully preventing Dr. Cordero from examining them at the March 8 meeting. As a result, they have unduly had the opportunity to examine his written objections for weeks and prepare their answers accordingly.

    e) Since the spontaneity of the DeLanos' answers to specific objections has been lost irretrievably, the loss must at least be partially compensated for by an examination that in addition to eliciting their answers, tests their candor and accuracy.

49. Just as the DeLanos have had extra time to prepare their answers to the written objections, it is necessary that Dr. Cordero obtain relevant financial documents to prepare his testing questions. Among those documents are the monthly credit card statements referred to in his written objections. Those statements are indispensable to construct the timeline of debt accumulation and the nature of its composition, as explained in the objections. Hence, the DeLanos must make the statements available to Dr. Cordero, particularly since they received them and, given their nature of financial documents, have had a legal obligation to save them for a certain number of years.

50. To begin with, the DeLanos must provide the monthly statements that the 18 credit card issuers to whom they owe money have furnished them for the period during which they have accumulated their debt to them. The DeLanos describe the beginning of that period in their Schedule F thus: "1990 and prior card purchases". This period, stretching from whenever the first of those "prior card purchases" took place to date, is referred to hereinafter as "the covered period".

51. If those statements are not provided by the DeLanos because they refuse to provide those that they have or request those that they are missing, then they should be obtained by the trustee, whether it is one assigned by Trustee Schmitt to conduct a thorough independent investigation, or failing that and Trustee Reiber's recusal, then Trustee Reiber.

## A. The trustee has the obligation to obtain financial documents

52. Obtaining those statements and other financial documents is the trustee's legal obligation under 11 U.S.C. §1302(b)(1). By reference, that section makes applicable §704(4), which provides that the trustee has the duty "to investigate the financial affairs of the debtor". Additionally, B.C. §§1302(b)(1) and 704(7) require him to "furnish such information concerning the estate and the estate's administration as is requested by a party in interest".

53. Before investigating anything, Mr. Weidman and Trustee Reiber had a due diligence duty to examine carefully the DeLanos' bankruptcy petition itself. Had they vetted their Schedules, they would have detected the suspicious figures therein and raised objections of their own (cf. para. 1 above, and Dr. Cordero's written objections). If so, Mr. Weidman would hardly have been so "flustered" –as Trustee Schmitt put it- by Dr. Cordero's questions, for he would already have asked them of the DeLanos and heard their answers. He and Trustee Reiber failed to do so. That failure does not recommend them to conduct any investigation of the DeLanos, much less justifies letting Trustee Reiber investigate Mr. Weidman.

54. Moreover, if Trustee Reiber does remain on the case, then at the very least he must perform his legal duty to investigate the DeLanos; otherwise, he would provide another reason to be replaced by a trustee that is more careful in vetting bankruptcy petitions that fall on his lap and that is willing to stand up and go out to search for pertinent documents. No trustee can earn his or her percentage fee by just rubberstamping a petition.

## B. Mr. DeLano, with his 15 year experience as a loan officer, is better equipped to search for documents pertaining to his financial affairs

55. In the same vein, Mr. DeLano has no reason whatsoever for refusing to obtain pertinent documents and thereby force Dr. Cordero to do his work. As a bank loan officer for 15 years, Mr. DeLano knows that he has a legal obligation to keep financial documents for a certain number of years. In so far as he does not have documents for the period not covered by that obligation, Mr. DeLano:

    a) has a veteran's experience in obtaining financial documents;

    b) must be assumed to have knowledge of how to operate the mechanisms for obtaining statements from banks; and

    c) must be assumed to have what can prove a most valuable resource, namely, personal contacts in those banks who can help him to approve and expedite the retrieval of those statements.

56. Mr. DeLano is in no position to complain about the amount of work involved in obtaining those statements. He is presumed to have known, not only as a prospective debtor assisted by an attorney in the decision whether to file, but also as a bank loan officer involved with debtors who have filed for bankruptcy, what would be required of him to support his petition. Indeed, Mr. DeLano was the M&T Bank loan officer handling the account of Mr. David Palmer, to whom M&T extended a loan to run his company, Premier Van Lines, Inc., and who filed for bankruptcy, leaving Mr. DeLano with the task, among others, to recover and liquidate the assets in which M&T had a security interest. M&T was another of the defendants named in Pfuntner

v. Trustee Gordon et al. In addition, if Mr. DeLano was capable of juggling 18 credit cards at present and who knows how many others in covered the period since before 1990, then he must juggle the tasks of retrieving their statements. The magnitude of the problem and the degree of its difficulty are of his own making.

57. Consequently, the DeLanos' financial documents, starting with the credit card statements, must be obtained in order to check their petition and prepare for their examination. If Mr. DeLano or the trustee place the work of obtaining them on the shoulders of Dr. Cordero, he will do it because the statements are necessary. But he gives notice that he will seek compensation from them therefor because to his detriment they would have failed to fulfill their obligation and failed despite their being superbly better qualified to do the work involved.

## C. Dr. Cordero must not be burdened with the document search so as to hinder his examination of the DeLanos or deprive him of evidence

58. Neither law nor rule lays on creditors the obligation to investigate the debtor's financial affairs or search for documents. Thus, the work of obtaining them in this case cannot arbitrarily be offloaded on Dr. Cordero.

59. This is particularly so here because the DeLanos have provided only the institutional names of the 18 credit card issuers and their respective addresses and account numbers, but not the names of any persons in the departments handling the accounts. Therefore, if a subpoena were sent to, let's say, Bank of America, it could take weeks before it was processed and then landed in the hands of the person, or series of persons, or committee that could find out whether the statements were available and, if so, how many the Bank would release, whether it would charge a special fee for statements older than a certain number of years, etc. Searching for the phone numbers of those 18 issuers, where none has been provided, and tracking down whomever is dealing with the subpoena or with the retrieval and reproduction of the statements at that point in time will require a lot of time-consuming work.

60. Yet, that work must be done and it must be a trustee, not Dr. Cordero, who does it. If the trustee were to fail to do that too, on what basis would he or the bankruptcy judge decide whether the DeLano's bankruptcy petition had been submitted in good faith and, if so, whether it provided for the just and fair allocation of benefits and burdens among debtors and creditors? The mere self-serving information provided by debtors in their Schedules can hardly have been the only basis on which Congress intended trustees to apply its Bankruptcy Code, run the Trustee Program, or allow debtors to extricate themselves from their debts. Nor did Congress intend creditors to be left to fend for themselves when searching for financial documents on which to determine whether irresponsible debtors had taken their money or incur liability to them and were now seeking to leave them holding a bag of worthless IOUs and enforcement proof judgments.

## D. The time necessary to obtain financial statements requires the adjournment of the meeting

61. In any event, whether it is the trustee, the DeLanos, Dr. Cordero, or anybody else who search for just those statements, let alone for any other financial documents that checking the former

may reveal as necessary, that work will take time. When Dr. Cordero discussed this issue with Trustee Schmitt, she agreed that it was necessary to obtain those statements and indicated that at the very least it would take 20 days to begin receiving them. Hence, that calls for the meeting of creditors adjourned to April 26 to be postponed until the documents have been obtained and analyzed, and of necessity discards any date in between proposed by Trustee Reiber and agreed to by Mr. Werner.

# VII. Trustee Martini is given notice of the facts and high stakes in this case so that she may be held fully accountable for the decisions that she makes

## A. Trustee Martini's mind was bent on "closure" from the moment Dr. Cordero tried to open a conversation with her

62. Dr. Cordero called Trustee Martini on March 16, and was told that she was not in her office, so he left a message on her voice mail explaining the situation and asking that she call him. Having failed to receive a return call, he called her the next day and was told again that she was not in her office. He left another voice mail for her and recorded a message for her assistant, Ms. Desire Crawford. About 10 minutes later Trustee Martini called him back.

63. After Dr. Cordero explained the situation, Trustee Martini said right away that she had already made up her mind and was not going to change her decision by bringing in another trustee to replace Trustee Reiber. Dr. Cordero asked why and she replied that she was the Trustee for Region 2 covering New York, Connecticut, and Vermont and did not have to give any explanation for her actions and that if I Dr. Cordero did not like it, he could consult an attorney and pursue his remedies. Dr. Cordero asked whether he was right in feeling antagonism toward him on her part. She denied it and said that she wanted him to stop calling her office.

64. Dr. Cordero said that he had called her office only twice. She said that he had spoken with Ms. Crawford, to which he replied that he had only left one message on Ms. Crawford's voice mail. Dr. Cordero asked again why she had that antagonist attitude toward him. She said that she wanted closure for this matter. Dr. Cordero pointed out that their current conversation was the first time ever that they had spoke. She said that she wanted "closure" for this matter and repeated that she had made her decision and that if Dr. Cordero did not like it, he could get himself a lawyer and take it from there.

65. Trustee Martini wanted "closure" on a matter that she had never before discussed with Dr. Cordero. She had already closed her mind on the matter and also made up her mind as to Dr. Cordero. What or who was the source of her decidedly antagonistic attitude toward him or whether she needed any external source whatsoever to trigger such attitude, is not known. But one thing is certain: from a public servant, not to mention a professional, one presumably educated, a member of the public is entitled to expect an open-minded and serviceable attitude. Instead, Trustee Martini decided an important matter without any input from that member of the public and was not even interested in listening to, let alone finding out, his account of the facts or his opinion thereon.

66. A person in a position of authority, to whom power has been entrusted to make decisions that

affect other people's interests, owes it to the public whom she is appointed to serve, and all the more so to a party in interest, not to be easily swayed to any position by her own prejudices or anybody else's talk, but rather to be temperamentally capable of dispassionate and unbiased approach; sufficiently curious and energetic to ask herself questions and go out to find the answers; and intellectually disciplined enough to wait until all the facts have been gathered before taking the next step of engaging in their objective analysis, evaluation, and selection as the basis for forming a reasoned and balanced judgment. By these standards, Trustee Martini's attitude was shockingly disappointing.

67. Therefore, let this detailed memorandum provide Trustee Martini with Dr. Cordero's statement of facts and position on the issues. It deprives her of the argument that she did not know about this case anything more than what Trustee Schmitt chose to tell her so that she simply 'concurred', as Trustee Schmitt put it, with what the latter suggested she do.

## B. The stakes are high because the attorney of a trustee has acted unlawfully, arbitrarily, and suspiciously, yet the U.S. Trustee has allowed them to remain on the case, thus condoning their conduct

68. In any event, Trustee Martini should have recognized that at stake in this case is the integrity of the Trustee Program in the Western District of New York and should have wanted to know what is going on in this case and in that District. That the stakes are quite high should become obvious from the fact that a trustee's attorney, Mr. Weidman, one described as "experienced" by Trustee Schmitt herself in her March 23 conversation with Dr. Cordero, has made an unlawful and arbitrary decision while engaging in suspicious conduct.

69. As a matter of fact Trustee Schmitt has not asked Trustee Reiber to investigate Mr. Weidman. Even if she had, he could as a practical matter not do so because just as it is elemental that a person cannot investigate himself objectively and zealously, Principal Reiber cannot investigate Agent Weidman impartially and thoroughly. He has an inherent bias toward exonerating his agent rather than render himself liable for his acts and omissions through respondeat superior.

70. By leaving Trustee Reiber in charge of the DeLano case, Trustee Schmitt has ensured that nobody will have to know the true motives and objectives for Mr. Weidman acting unlawfully and arbitrarily: Was he on a folly of his own on March 8 or in line with his particular relation to the DeLanos? Has he acted the same way on other occasions when in the same mood or in similar relation to other debtors? Was he performing a task normally assigned to him or engaging in a routine practice of both office members? If Trustee Schmitt is not interested in asking these and many others questions, Trustee Martini should be because the integrity of the Trustee Program rides on their answers.

71. Nor has Trustee Schmitt required Trustee Reiber to investigate anybody or anything else. He only has to conduct personally the next examination of the DeLanos. In a two-person office where he is the principal this is a meaningless requirement, unless it means that now he has an excuse for protecting personally his vested interest in nothing coming out of Mr. Weidman's unlawful and arbitrary conduct at the first meeting. Since Trustee Schmitt has allowed him to continue with the case as if nothing had happened, she has in practice condoned such unlawful and arbitrary conduct.

72. This lax approach to the law is not an exception made for Trustee Reiber by Trustee Schmitt, for she does not enforce on her other trustees either the legal requirement that they "investigate the financial affairs of the debtor" or 'furnish creditors with the documents that they request'. In this vein, Trustee Schmitt stated to Dr. Cordero that in her experience, trustees do not investigate debtors' financial affairs. Although Dr. Cordero protested that such omission is in clear violation of the duties that Congress imposed on trustees, she was not willing to require of Trustee Reiber to investigate the DeLanos. Far from it, her position is that if Dr. Cordero wants to investigate them, he has to do it himself, whether by asking the DeLanos to cooperate and voluntarily provide financial statements, or by using subpoenas. Not even she will provide anything but token cooperation given that out of the 18 credit card issuers to whom the DeLanos owe money, she would look up in her files the addresses of only five of them. Why does Trustee Schmitt not only not have the DeLanos, let alone her trustee or his attorney, investigated, and not investigate the DeLanos herself, but also not want even to cooperate except pro forma in Dr. Cordero's investigation of them?

## C. Trustee Reiber's 3,909 *open* cases point to why he could find it difficult to investigate the financial affairs of debtors or furnish requested information to a party in interest and beg the question why he has been allowed to take on so many

73. Pacer, the court electronic document retrieval service, sheds light on why trustees may be quite unwilling and unable to spend time investigating anything. When queried with the name George Reiber, Trustee, it returns this message at https://ecf.nywb.uscourts.gov/cgi-bin/login.pl: "This person is a party in 13250 cases." When queried again about open cases, Pacer comes back at https://ecf.nywb.uscourts.gov/cgi-bin/login.pl?601512709478669-L_916_0-1 with 119 billable pages that end thus:

| | | | | | | |
|---|---|---|---|---|---|---|
| 2-04-21295-JCN | bk | 13 | William J. Hastings and Carolyn M. Hastings | Ninfo Reiber | *Filed:* 04/01/2004 | *Office:* Rochester<br>*Asset:* Yes<br>*Fee:* Paid<br>*County:* 2-Monroe |

Total number of cases: 3909

Open cases only

**PACER Service Center**

74. Trustee Reiber has 3,909 *open* cases at present! This is not just a huge abstract figure. Right there are the real cases, in flesh and blood, as it were, for Pacer personalizes each one of them with the debtors' names; and each has a throbbing heart: a hyperlink that can call that case to step up to the window for examination. What is more, they are in good health since Pacer indicates that, with the exception of fewer than 44, they are asset cases. This means that Trustee Reiber has taken care to "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), as provided under §2-2.1. of the Trustee Manual. "Meaningful" under the DeLanos' plan is 22 cents on the dollar with no interest accruing during the repayment period. No doubt, avoiding 78 cents on the dollar as well as interest is even more meaningful to the DeLanos. By the same token, that means that the Trustee has taken care of his fee, which is paid as a percentage of what the debtor pays (28 U.S.C. §586(e)(1)(B)).

75. Given that a trustee's fee compensation is computed as a percentage of a base, it is in his interest to increase the base by having debtors pay more so that his percentage fee may in turn be a proportionally higher amount. Increasing the base could require ascertaining the veracity of the figures in the schedules of the debtors as well as investigating any indicia that they have squirreled away assets for a rainbow post-discharge life. Such investigation, however, takes time, effort, and money. Worse yet from the perspective of the trustee's economic interest, an investigation can result in a debtor's debt repayment plan not being confirmed and, thus, in no stream of percentage fees flowing to the trustee. (11 U.S.C. §§1326(a)(2) and (b)(2))

76. The alternative is obvious: Never mind investigating, not even patently suspicious cases, just take in as many cases as you can and make up in the total of small easy fees from a huge number of cases what you could have made by taking your percentage fee of the assets that you sweated to recover. Of necessity, such a scheme redounds to the creditors' detriment since fewer assets are brought into the estate and distributed to them. When the trustee takes it easy, the creditors take a heavy loss, whether by receiving less on the dollar or by spending a lot of money, effort, and time investigating the debtor just to get what was owed them to begin with. Could U.S. Trustees have contributed to the development of such an income maximizing mentality and implementing scheme by failing to demand that trustees perform their duty under the law, which requires them "to investigate the financial affairs of the debtor" and to "furnish such information concerning the estate and the estate's administration as is requested by a party in interest"? (para. 52 above)

77. This income maximizing scheme has a natural and perverse consequence: As it becomes known that trustees have no time but rather an economic disincentive to investigate the financial affairs of debtors, ever more debtors with ever less deserving cases for relief under the Bankruptcy Code go ahead and file their petitions. What is worse, as people not even with debt problems yet catch on to how easy it is to get a petition rubberstamped, they have every incentive to live it up by binging on their credit as if there were no repayment day, for they know there is none, just a bankruptcy petition waiting to be filed.

78. These dynamics could appear to explain why Mr. Weidman said in open court that he had met with the DeLanos and their lawyer and found their petition to be in good faith and why the DeLanos filed it at all, despite Mr. DeLano being a 15-year loan officer, who carries more than $98,000 in debt on 18 credit cards at the national average of 16% interest rate, unless it is at the more than 23% delinquent rate, and does not even consolidate and refinance his household debt despite some currently available loan rates at historically low levels. Instead, he and his wife take $10,000 out of their pension fund and lend it to their son, who becomes unable to repay it, and the date of the loan is not stated anywhere in the petition. What were they thinking!?

79. Trustee Martini is in a position to find out. Moreover, if she wants to be seen to be a zealous steward of the integrity of the Trustee Program, she must find out. She has been provided herein with enough credible evidence that something is amiss in the Western District of New York to warrant her conduct of an investigation of the WDNY trustees in general and of this case in

particular. She can no longer limit herself to 'concurring' with one of her assistants in the target area, but must make her own decision. Whatever Trustee Martini decides to do, she will be held publicly accountable for it.

# VIII. Dr. Cordero's requests

80. Therefore, Dr. Cordero requests as follows:

a) That Trustee Schmitt and Trustee Reiber (or the trustee replacing him):

**1)** postpone setting the date for Dr. Cordero to examine the DeLanos until after the necessary financial documents have been sought, obtained and analyzed;

**2)** suspend the meeting of creditors adjourned to April 26 until after 1) above and Dr. Cordero has examined the DeLanos;

**3)** with respect to each of the 18 credit card issuers listed as creditors by the DeLanos in Schedule F, provide Dr. Cordero with the name, address, and phone number of a contact person with the necessary authority and knowledge to handle a request for documents concerning the pertinent account whose number the DeLanos also listed;

b) That the DeLanos provide the trustees and Dr. Cordero with copies of:

**1)** the monthly statements of the credit cards listed in Schedule F since their date of issuance to date;

**2)** the monthly statements of each other card issued to the DeLanos, whether by a bank or any retailer of goods or services, during the covered period;

**3)** current credit bureau reports issued by Equifax, Trans Union, and Experian, and copies of any other such report that the DeLanos have received during the covered period;

**4)** all the documents supporting the statement that Mr. DeLano made under oath to Mr. Weidman at the March 8 meeting of creditors to the effect that the DeLanos had incurred most of their credit card debts when Mr. DeLano lost his job in 1989 and had to take a deep pay cut subsequently;

**5)** each of the DeLanos' annual income during the covered period;

**6)** all the documents pertaining to the loan to the DeLanos' son;

**7)** the information requested in a)3), above

c) That Trustee Reiber and Mr. Weidman recuse themselves from this case and ceased having any further contact, whether directly or indirectly and regardless of at whose initiative, with the DeLanos, their son, or their current or future attorneys;

d) That Trustee Reiber:

**1)** if he remains in charge of this case, whether alone or with Mr. Weidman, perform his duty "to investigate the financial affairs of the [DeLano] debtor" and 'furnish such information as is requested by Dr. Cordero' in a)3) above;

**2)** take note that Dr. Cordero makes the request in d)1), above:

i. without giving up his request that Trustee Reiber and Mr. Weidman recuse themselves from this case or be disqualified, and hence,

ii. without prejudice to his right to challenge either or both remaining on this case and their performance of any aspect of their work in that capacity, including their desinterestedness and objectivity in such performance;

**3)** send Dr. Cordero the letter that he told him on Friday, March 12, he was going to send him; that, according to Trustee Schmitt, he told her he had sent Dr. Cordero; and that Trustee Schmitt told Dr. Cordero she would ask him to send or resend;

**4)** send Dr. Cordero originals of any letters that he, Trustee Reiber, addresses to him and copies of any letters that he sends other parties in interest, and of any notice or documents that he is required to send creditors under Rule 2002(g) FRBkrP, as Dr. Cordero already requested in paragraph 30 of his written objections, which he personally served on Trustee Reiber and Mr. Weidman on March 8;

e) That Mr. Weidman jointly and severally with Trustee Reiber as his principal compensate Dr. Cordero in the amount of $1,500 for having wasted his time, effort, and money on March 8 when Mr. Weidman prevented him from examining the DeLanos at the meeting of creditors although he knew that was the sole purpose of Dr. Cordero traveling from New York City to Rochester; and that this amount be without prejudice to Dr. Cordero's right to compensation from Mr. Weidman and/or Trustee Reiber on other grounds;

f) That Trustee Schmitt:

**1)** recuse both Trustee Reiber and Mr. Weidman from this case;

**2)** require that they immediately transfer to her all their files, records, and notes on the case and have no more contacts with the DeLanos, their son, or their current or future attorneys, and have nothing else to do with this case except to be subject to examination on it;

**3)** appoint a trustee for the DeLano case who is:

i. unrelated professionally, financially, socially, and in any other compromising way to the DeLanos, their son, their attorneys, Trustee Reiber, and Mr. Weidman;

ii. unfamiliar with the case; and

iii. capable of conducting an independent and thorough investigation of the DeLanos' financial affairs, of the DeLanos' relation with Mr. Weidman and Trustee Reiber; and of Mr. Weidman's motives and objectives in conducting the March 8 meeting as he did;

**4)** require whomever is in charge of the case "to investigate the financial affairs of" the Delano Debtors and make the documents obtained as well as his or her findings and conclusions available to Dr. Cordero; and 'furnish Dr. Cordero with the information requested' in a)3) and b), above;

**5)** take the initiative in obtaining the DeLanos' financial documents listed in b)1-6), above, and make them available to the trustee and Dr. Cordero;

**6)** require Mr. Weidman and Trustee Reiber to compensate Dr. Cordero as requested in e), above;

g) That Trustee Martini:

**1)** rescind the decision to keep Trustee Reiber on the DeLano case and appoint a replacement as described in f)3), above;

**2)** launch an investigation of the trustees of the Western District of New York, in general, and of this case, in particular, to be guided by the principle *Follow the money!* from the estates and the debtors to wherever it goes and whomever it ends up with, to determine:

i. whether and, if so, with what consequences for the integrity of the Trustee Program and respect for the law, trustees pursue an income maximizing scheme whereby they take in as many cases as possible with disregard for ascertaining through investigation of the debtors' financial affairs the good faith of their petitions and the fairness of their repayment plans;

ii. if so, why trustees are allowed to give priority to the pursuit of their economic interests instead of being required to perform their duty to "investigate the financial affairs of the debtor" and "furnish such information concerning the estate and the estate's administration as is requested by a party in interest";

**3)** notify the appropriate United States attorney as provided under 28 U.S.C. §586(a)(3)(F), of the matters described in this memorandum in general and in g)2)i2)ii., above, in particular, so that such United States attorney may conduct his or her own investigation and contribute to ensuring the total independence of action and judgment of any officer called upon to replace Trustee Reiber.

81. Dr. Cordero intends to find the answers to those queries. His track record for more than two years now in defending his rights in and outside court shows that he has the necessary staying power to attain that objective. Bit by bit a picture of what is going on in Rochester and elsewhere is being puzzled together. Eventually that picture will become explicit enough to shock the sense of fair play and legality of public officers in high positions and private personalities that shape public opinion. They will bring their power and pressure to bear down on anybody that has engaged in wrongdoing, in covering it up, and in injuring a person who initially just wanted to find his property in storage. When that breakthrough comes to happen, that person, Dr. Cordero, will hold liable each and every individual and institution that have trampled on his rights and caused him such an enormous waste of effort, time, and money and inflicted on him such a tremendous amount of emotional distress to the point of effectively disrupting his life. When that day comes, will you be seen in the picture or indicting it from the outside?

Dr. Richard Cordero

March 30, 2004

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

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re: David G. DeLano and Mary Ann DeLano

Chapter 13
Case no: 04-20280

# NOTICE OF MOTION
## FOR A DECLARATION OF THE MODE OF COMPUTING THE TIMELINESS OF AN OBJECTION TO A CLAIM OF EXEMPTIONS AND FOR A WRITTEN STATEMENT ON AND OF LOCAL PRACTICE

PLEASE TAKE NOTICE, that Dr. Richard Cordero on submission moves this Court at the United States Courthouse on 100 State Street, Rochester, New York, 14614, for declaratory judgment to be issued on April 21, 2004, or as soon as the next possible motion date, establishing unambiguously I. the mode under Rule 4003(b) FRBkrP for computing the timeliness of an objection to a claim of exemptions and II. what authoritative value the court accords to "local practice" relative to that of laws and rules, and for a written statement of such "local practice".

## I. The period for filing objections to a claim of exemptions under Rule 4003(b) runs from the conclusion of the meeting of creditors after taking into account all adjournments

1. Rule 4003(b) FRBkrP provides that objections to a claim of exemptions can be filed within 30 days after the conclusion of the meeting of creditors. Such meeting in the above-captioned DeLano case was held on March 8, 2004, in Rochester, NY., and presided by James Weidman, Esq., attorney for Chapter 13 Trustee George Reiber. However, although the meeting's very purpose was to examine the DeLanos, it was frustrated when Mr. Weidman cut off Dr. Richard Cordero, the only creditor present, after the latter had asked only two questions of the DeLanos. Therefore, far from the meeting having concluded on that occasion, it can hardly be said to have started yet.
2. In any event, the meeting was adjourned to April 26 by both Mr. Weidman at the meeting of creditors and Trustee Reiber at the hearing on confirmation of plans held in this court later that day. Consequently, the meeting did not conclude on March 8 and, as a result, the 30-day period for filing objections to a claim of exemptions has not begun to run.
3. Nevertheless, Dr. Cordero files now his objection to the DeLanos' claim to exemptions in order

to be on the safe side of timeliness. While indisputably on that side, he seeks a ruling establishing explicitly that the point in time under Rule 4003(b) from which the 30-day period begins to run is the conclusion of the meeting as extended by any adjournment and that the conclusion must be expressly announced by the trustee or the court giving notice thereof.

## II. Recent statements of the court undermine the reasonable expectation that it will give effect to even clear statutory language rather than disregard it in favor of "local practice"

### A. Dr. Cordero's uncontradicted statement of facts to the court in Mr. Weidman's presence

4. Although the language of Rule 4003(b) is clear and case law has confirmed its clarity beyond doubt, the explicit expression of its construction in a ruling by this court is necessary because the court has recently given additional evidence that it will disregard even clear, unambiguous statutory language in favor of what it calls "local practice".

5. Indeed, on March 8, Dr. Cordero stated in open court, the Hon. John C. Ninfo, II, presiding, that after he had asked only two questions of the DeLanos at the meeting of creditors earlier that afternoon, Mr. Weidman, who presided it, cut him off and immediately thereafter adjourned it. Mr. Weidman alleged to justify his action that there was no more time to continue the meeting.

6. However, Mr. Weidman's allegation was objectively untenable:

   a) He ended the meeting of the DeLanos at around 1:59p.m.;

   b) Dr. Cordero was the only creditor of the DeLanos present;

   c) the hearing on confirmation of plans would not start until 3:30p.m. in the courtroom downstairs in the same building;

   d) after those on the DeLano case left the meeting of creditors room, Mr. Weidman was left with just one lawyer and two other persons;

   e) judging by the amount of time that he spent on the two previous cases, he could have disposed of that third one in 10 to 15 minutes and there would still have been plenty of time for the DeLano meeting to continue.

7. When Dr. Cordero related these facts to the court, Mr. Weidman was in the courtroom at Trustee Reiber's table and did not contradict Dr. Cordero's account. The latter can be easily corroborated, of course, since the meeting of creditors was taped recorded.

8. However, the court opened its response by saying that Dr. Cordero would not like what it had to say; that it had read Dr. Cordero's objections; that Dr. Cordero interpreted the law very strictly, as he had the right to do, but he had again missed the local practice; that he should have called to find out what that practice was and, if he had done so, he would have learned that the trustee would not allow a creditor to go on asking questions until 8 in the evening, particularly when he had a room full of people.

9. Dr. Cordero protested because he had the right to rely on the law and the notice of the meeting of creditors stating that the meeting's purpose was for the creditors to examine the debtors. He

also protested to the Judge not keeping his comments in proportion with the facts since Dr. Cordero had not asked questions for hours, but had been cut off by Mr. Weidman after two questions in a room with only two other persons.

10. Judge Ninfo said that Dr. Cordero should have done Mr. Weidman the courtesy of giving him his written objections in advance so that Mr. Weidman could determine how long he would need. Dr. Cordero protested because he was not legally required to do so, but instead had the right to file his objections at any time before confirmation of the plan and could not be expected to disclose his objections beforehand so as to allow the debtors to prepare their answers with their attorney.

11. Dr. Cordero added that Mr. Weidman's conduct raised questions because Mr. Weidman kept asking him what evidence he had that the DeLanos had committed fraud despite his having answered the first time that he was not accusing the DeLanos of fraud, whereby Mr. Weidman showed an interest in finding out how much Dr. Cordero already knew about fraud committed by the DeLanos before he, Mr. Weidman, would let them answer any further questions. Dr. Cordero said that Mr. Weidman had put him under examination although he was certainly not the one to be examined at the meeting, but rather the DeLanos were; and added that Mr. Weidman had caused him irreparable damage by depriving him of his right to examine the Debtors before they knew his objections and could rehearse their answers.

12. Yet, Judge Ninfo came to the defense of Mr. Weidman and once more said that Dr. Cordero applied the law too strictly and ignored the local practice.

### B. The court impermissibly gave precedence to "local practice" over law and rule

13. At no point did the court recognize that the unambiguous purpose of 11 U.S.C. §§341 and 343 is precisely to examine the creditors. Two questions asked by the sole creditor present, particularly one that traveled all the way from New York City to Rochester in order to examine the debtors and who specifically pointed that fact to Mr. Weidman, do not constitute an examination. There can be no doubt that Mr. Weidman conducted himself unlawfully, arbitrarily, and suspiciously.

14. Yet, the court came to Mr. Weidman's defense and raised "local practice" as his shield. In so doing, the court also wielded "local practice" as a sword to cut down the law of Congress. With the same swing of "local practice" it defeated Dr. Cordero's reasonable expectation that an act of Congress constitutes the law of the land. As such, federal laws and rules must be applied the same way and to the same full extent in New York City, Rochester, Los Angeles, Miami, and Alaska, without suffering any diminution through any unsuspectingly unsheathed and treacherously stabbing unwritten inconsistent "local practice".

### C. The court's advice that Dr. Cordero should call to find out what the "local practice" provides is unlawful, impracticable, and meaningless in practice

15. Fortunately, the court understood how such "local practice" in the hands of an arbitrary officer could make short shrift of Non-local Dr. Cordero's reliance interest, and after thinking quickly, provided the necessary advice: Dr. Cordero should call to find out what the "local practice" is

rather than just read the law and rely on it strictly.

16. What an astonishing statement for a federal judge to make!, for it is antithetical to the very essence of a system of justice that in order to curb abuse of power is based on notice given in advance and opportunity to be heard, not tidbits of local knowledge that to forestall unfair surprise one must ferret out on a hit and miss basis. Ironically, the setting in which Judge Ninfo expressly confirmed the supremacy in his court of "local practice" over legality was a hearing; and the occasion on which such "local practice" had trampled underfoot the law was a meeting of creditors convened through judicial notice.

17. Moreover, Judge Ninfo's advice to a non-local party to call to find out what the "local practice" is detracts from the reflection of analytical capacity that a judge must demonstrate to be effective and respected in his position, for how impracticable and meaningless in practice it is!

    a) Whom was Dr. Cordero supposed to call to obtain all the details of "local practice"? Had he called a clerk of court and asked that she tell him all there is about "local practice", would she not have jumped and said, "Ah!, you mean the local rules. You can download them from the Internet or I can send you a hardcopy in the m…" "No! no! I mean "local practice", you know, the unpublished, unwritten local tricks that lawyers in Rochester know can invalidate national law." Would the baffled clerk not think that Dr. Cordero was low on something in the head and try to get rid of him by repeating once more that clerks are not allowed to give legal advice and that he should hire local counsel to find out whatever he meant by "local practice"?

    b) Should Dr. Cordero call opposing counsel and ask that he be fair with him and level the field by spending his time sharing with Dr. Cordero the secrets of "local practice"?

    c) Or should Dr. Cordero call the trustee and ask him the seemingly ridiculous question whether "local practice" would allow him to ask more than two questions at the meeting of creditors if he was the only creditor present?

    d) So finally Dr. Cordero resigns himself and calls a Rochester attorney, Jimmy, who advertises his specialty as "local practice", and tells him that although he can read law books and in fact he is said to read the law, no wrongly, but just strictly, he is still missing what really matters in a Rochester court, not the law, but rather the knowledge of the initiated in unwritten "local practice". Jimmy's eyes roll up and down wondering what this self-styled doctor, most likely a sheep veterinarian, can possibly mean until he blushes a little and tells Dr. Cordero, "You had me going with that euphemism. Sure!, You can hire me to teach you real good the unwrittable dirty secrets of how things get cookin' in our local court. You can't get closer 'local' than that…unless you also want 'practice', buts that gonna cost you an arm and a leg too."

    e) And it comes to happen that one day Dr. Cordero is in court and hears it said that Rule 4003(b) provides that…but Dr. Cordero jauntily springs to his feet, "Forget'a 'bout it!, Judge, 'cause Jimmy told me whats tis meaning in "local practice": that the 30 day period begins to run from the date stated in the notice of meeting of creditors, no matter what happens on that occasion." Will the court say, "Now you are talking, Dr. Cordero! If Jimmy told you what the "local practice" is and you relied on it, then that's the end of it. I have no choice but to enforce it, you know, I am not one to disappoint your reasonable reliance. What else did Jimmy tell you?"

18. Oh! stop this nonsense! This is a memorandum of law, not a five cent skitch! Yet, the above statements lay out the implications of what a federal judge said in open court and for the record. And it was no joke then either, for on the basis of that "local practice" all the enormous effort that Dr. Cordero made to educate himself about the law and rules of bankruptcy in order to analyze a petition and write a five-page statement of objections meticulously supported by cited legal provisions and all the time and effort that he spent traveling to Rochester were rendered meaningless because the judge said that it was perfectly OK in "local practice" for the trustee's attorney to put an end to the debtors' examination after the second question by the sole creditor present if the attorney had no time to lose before the debtors might blurt out something.

19. No doubt, this is a very serious matter. Its logical and grave consequence is that if §§341 and 343 do not mean what they say because "local practice" says that they mean something else, then one must wonder what Rule 4003(b) really means. When must a non-local file his objection to a claim of exemptions in order to have a chance at its being considered timely? What does the rest of the Code and the Rules mean? Why bother at all researching the law when in the end the court will not hesitate to unfairly surprise a non-local by doing whatever it says "local practice" is? By proceeding thus, the court has created an untenable situation of legal uncertainty and arbitrariness.

20. But it has confirmed with certainty how it proceeds: Judge Ninfo conducts the court's business, not as a federal judicial officer sworn to uphold the Constitution and apply the laws of the United States, but rather as the Lord of the Fiefdom of Rochester, one carved out of the territory of applicability of the acts of Congress, whose laws and rules he disregards just as he stretches the facts out of proportion. For how much longer?

## III. Relief requested:

21. Therefore, Dr. Cordero respectfully request that:

    a) the DeLanos' claim of exemptions not be granted;

    b) the grant of such claim not be considered, if at all, until the issue of the good faith of their bankruptcy petition has been conclusively established;

    c) the court expressly state that under Rule 4003(b) the 30-day period within which to object to a claim of exemptions does not begin to run until the meeting of creditors, after all its adjournments, is formally announced as concluded by the trustee or the court and notice thereof is timely given to the parties in interest;

    d) the court explicitly recognize that:

        1) "local practice" is absolutely powerless to invalidate a provision of law or a rule, whether it be an act of Congress or a rule of any of the Federal Rules of Procedure or Evidence or a state law or rule;

        2) it will never give such "local practice" precedence over any such act or rule in any proceeding before it;

        3) it will not allow "local practice" to be used to confer on a local party an advantage over a non-local party;

e) send Dr. Cordero a written statement of "local practice" not inconsistent with any law or rule and which it suggests that if at all possible and cost-effective Dr. Cordero observe when participating in proceedings before it.

March 31, 2004

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