



U.S. Department of Justice

Office of the United States Trustee  
Western District of New York

100 State Street, Suite 609  
Rochester, New York

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

October 8, 2002

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

Re: Premier Van Lines

Dear Dr. Cordero:

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

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

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

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

Very truly yours,

Kathleen Dunivin Schmitt  
Assistant United States Trustee

**Dr. Richard Cordero, Esq.**

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

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

October 14, 2002

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

tel. 585-263-5706; fax. 585-263-5862

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

Dear Ms. Schmitt,

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

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

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

I look forward to hearing from you and remain,

yours sincerely,

*Dr. Richard Cordero*

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

**Dr. Richard Cordero, Esq.**

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October 14, 2002

**REJOINDER**  
and  
**APPLICATION FOR A DETERMINATION**

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

Submitted by: Dr. Richard Cordero, Esq.

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

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

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

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

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

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

<sup>3</sup> Premier Van Lines, 900 Jefferson Road, Rochester, NY 14623.

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

#### **a. The facts of Trustee Gordon's performance**

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

"Please be advised that M&T Bank has a blanket lien against the assets of Premier Van Lines. As the Chapter 7 Trustee, I will not be renting or controlling the storage units or any of the assets at the Jefferson Road location. Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank..."
7. It was not Trustee Gordon, but rather Mr. Dworkin who in March had referred me to M&T Bank.<sup>8</sup> I had to find out on my own who were the officers in charge of the Premier case. They turned out to be Mr. Vince Pusateri,<sup>9</sup> and Mr. David Delano.<sup>10</sup> Mr. Delano told me that he had seen containers with my name at Mr. Dworkin's warehouse. After being bandied between these parties and by them to yet other parties, I found out that M&T Bank had sold the Premier's assets stored at Mr. Dworkin's warehouse to Champion Moving & Storage.<sup>11</sup>
8. Champion's owner is Mr. Christopher Carter.<sup>12</sup> He informed M&T Bank and me by letter of July

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<sup>4</sup> Avon warehouse, located at 2140 Sackett Road, Avon, NY 14414.

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

<sup>6</sup> David Palmer, tel. (585) 292-9530, owner of the now bankrupt Premier Van Lines.

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

<sup>8</sup> M&T Bank, Manufacturers & Traders Trust Bank, 255 East Avenue, Rochester, NY 14604.

<sup>9</sup> Vince Pusateri, M&T Bank Vice President in Rochester, tel. (716) 258-8472.

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

<sup>11</sup> Champion Moving & Storage, 795 Beahan Road, Rochester, NY 14624, tel. (585) 235-3500; fax (585) 235-2105.

<sup>12</sup> Christopher Carter, cellphone (585) 820-4645, owner of Champion; see footnote above.

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

9. The ensuing search discovered that not only at least one storage container there is said to bear my name, but that other assets belonging to Premier are also at that warehouse in Avon owned by Mr. Pfuntner; see footnotes 4 and 5 above. The latter has acknowledged that there is property belonging to me in his warehouse, but refused to state its condition. In addition, he claimed that he wanted compensation for storage and that if he let me take my property, the Trustee could sue him.
10. Mr. Pfuntner's lawyer is Mr. David MacKnight.<sup>13</sup> The latter has not answered any of my letters to provide me the requested information concerning the number of containers with property of mine and the condition of such property. Nor has he taken or returned any of my calls. However, Mr. MacKnight sent me a letter dated September 19, 2002, stating that:

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

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

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

12. Did Trustee Gordon ever look at the Premier business files at Mr. Dworkin's warehouse, which would have allowed him to discover that Premier had assets at the Avon warehouse, just as Mr. Carter of Champion did? Where else did Trustee Gordon, or for that matter any trustee, look for assets of the debtor when he does not look at the debtor's business files?
13. If Trustee Gordon did not look at those files, why did he not do so given that with due diligence he would have found out that, as Mr. Dworkin told me, Premier had also rented office space at the Dworkin's warehouse and had his office equipment and cabinets there?
14. If Trustee Gordon did look at those files and that enabled him to write to Mr. Dworkin on April 16 that, "I will not be renting or controlling the storage units or any of the assets at the Jefferson Road" warehouse, that is, Mr. Dworkin's, why did he not notify the Premier clients with property in Premier's storage containers? Without notifying them, Trustee Gordon could not properly dispose of Premier's assets. Indeed, professional experience or common sense would have told Trustee Gordon that such Premier clients would want to have their property back or know its whereabouts. Therefore, they had claims on Premier, but would run into difficulty with Premier creditors, including those that had possession or control of Premier's containers and assets stored elsewhere. The correctness of this elemental reasoning is shown by Mr. Pfuntner's refusal to release Premier's assets in the Avon warehouse, including the property of Premier customers stored in Premier's storage containers.

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

15. Trustee Gordon wrote to me on September 23, 2002, that, "From the latest communications I have read which have been sent to you by the attorneys for James Pfunter [sic] and M&T Bank, it appears as if your property is located at the Sackett Road warehouse in Avon, New York." Did Trustee Gordon try to ascertain with due diligence what other Premier assets were at that Avon warehouse? Or did he just wait until receiving the summons and complaint of Mr. Pfunter's lawsuit against him et al?
16. That suit shows that Trustee Gordon made a gross mistake in his way of handling this case, which he thus expressed in his October 1 Answer to the Court and the U.S. Trustee: "It has been my position consistently since my appointment as Trustee in this case that the property owned by customers of Premier Van Lines and stored by it was not property of the bankruptcy estate for administration." With that statement, the disposition of Premier's assets, including containers with customers' property, is not solved as if by magic. Far from it! Now Trustee Gordon is facing a lawsuit. Therefore, how can the Trustee affirm in that same letter that, "this case will be closed and my duties as Trustee will come to an end. Accordingly, I do not believe that it is necessary for the Court to take any action on Mr. Cordero's application." Are bankruptcy cases closed when the trustee is sued?
17. Since Trustee Gordon abandoned Premier assets at Mr. Dworkin's warehouse, failed to identify other Premier assets elsewhere, and after third parties without his help found more such assets at the Avon warehouse, satisfied himself with "it appears as if your property is" there, to what were Trustee Gordon's "significant efforts" addressed and what were their results? Can another trustee find other Premier assets by making "efforts" to that end, particularly "significant" ones, which could avoid issuing a No Distribution Report?

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

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

"In fact, my staff has received more than 20 telephone calls from Mr. Cordero and my staff has advised me that he has been belligerent in his conversations with them..."

"Mr. Cordero continued to contact my office throughout the summer of 2002 and in the face of my staff's consistent message to him that we did not control nor have possession of his assets, he became more demanding and demeaning to my staff..."

"After a final telephone call from Mr. Cordero on September 23, 2002 during which time he became very angry at my staff, I wrote to Mr. Cordero again to advise him of my position with respect to his assets and to insist he no longer contact my office regarding reacquisition of his assets."

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

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

20. By the same token, both the Court and the U.S. Trustee must require that officers that have been sworn to uphold the law make truthful declarations before them. The insistence that this requirement be satisfied is indispensable for the application of the law and the administration of justice. Likewise, ethical considerations requiring that lawyers conduct themselves with honesty and candor are predicated on lawyers being truthful.
21. Therefore, let Trustee Gordon present the evidence supporting his statements. It should be very easy for him to do so. To begin with, he says that "In fact" his staff has received more than 20 calls from me. Thus, he must have a record keeping system for phone calls whereby incoming calls are logged, whether manually or electronically. Such systems do exist and they make it possible to bill clients for the time that the staff spent answering phone calls pertaining to their cases. Anyway, since Trustee Gordon asserts as a matter of his own knowledge that it is a "fact," then he can prove it. Let him do so.
22. By contrast, in the second part of the sentence, Trustee Gordon relies on hearsay to impugn my conduct and move the Court to favor him: "my staff has advised me that he has been belligerent... became more demanding and demeaning to my staff... became very angry at my staff." These are categorical statements. No reasonable person would have any doubt as to what constitutes such conduct. Hence, the Trustee's staff should easily state the details that describe such conduct, particularly since the Trustee submits as a "fact" that his staff received more than 20 of my calls. Let Trustee Gordon provide, not hearsay, but rather affidavits from his staff to substantiate his statements. Let him also describe in an affidavit of his own the tenor of our phone conversation, for he acknowledges that we spoke on the phone "on at least one occasion."
23. Meantime, the degree of Trustee Gordon's due care in preparing his statements and of their reliability can begin to be assessed when he writes thus:

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

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

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

### **III. The understanding of Trustee Gordon’s role**

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

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

26. If Trustee Gordon’s role were so unambiguously understandable, there should be no reason for Lawyer David MacKnight, who represents Mr. Pfuntner, the Avon warehouse owner, to be suing him “to determine the obligations and duties of the Trustee...,” or for Mr. Pfuntner both to refuse to release my property in Premier’s storage containers for fear that the Trustee may sue him and to refer me to the Trustee. Nor would there be any reason for Lawyer Raymond Stilwell,<sup>14</sup> who represents Mr. Palmer, the owner of Premier, to have engaged in conduct objected to by the Trustee, as shown in Mr. Stilwell’s letter of last May 30. Nor would Lawyer Michael Beyma,<sup>15</sup> who represents M&T Bank, have referred me to the Trustee, just as did M&T Bank Vice President Vince Pusateri and Assistant Vice President David Delano. Nor would Lawyers MacKnight and Beyma feel compelled to copy the Trustee to letters that they wrote to me. Likewise, there should have been no need for the Trustee to write to Mr. Dworkin, in whose warehouse Premier had leased storage and office space, in April 2002, four months after the conversion of the case from Chapter 11 to Chapter 7, to let him know what the Trustee would be or not be renting or controlling and how Mr. Dworkin should handle Premier clients. Nor would Mr. Dworkin too deem it necessary to refer me to the trustee for Premier.
27. Is it because Trustee Gordon understands his role as being so limited that he is issuing a No Distribution Report? After all, he gave Lawyer Stilwell to understand, as the latter stated in his May 30 letter, “Our understanding was that the landlord of the 900 Jefferson Road premises, with the trustee’s knowledge, had assumed responsibility for, and the right to rentals concerning, the stored belongings.” Why did Trustee Gordon let one creditor, Mr. Dworkin, keep running the Premier as if it still were an ongoing business and without distributing its income?

### **IV. Request for review of Trustee Gordon’s performance and fitness**

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

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

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



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

Sincerely,

*Dr. Richard Cordero*

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

### TABLE OF EXHIBITS

- a. Trustee **Gordon's** letter of **April 16, 2002, to Dworkin**, manager/owner of the Jefferson-Henrietta warehouse ..... [A:17]
- b. Letter of Raymond **Stilwell**, Esq., attorney for Premier Van Lines, of **May 30, 2002, to Dr. Cordero** ..... [A:18]
- c. Trustee **Gordon's** letter of **June 10, 2002, to Dr. Cordero** with copy of his April 16 letter to Warehouser David **Dworkin**, manager/owner of the Jefferson Henrietta Associates' warehouse where Premier rented space to store the storage containers holding the property of its clients..... [A:16]
- d. Letter of **July 30, 2002**, of Christopher **Carter** -owner of Champion Moving & Storage, Inc., which bought storage containers of Bankrupt Premier Van Lines sold by Lienholder M&T Bank- **to Dr.**

<b>Cordero</b> stating that his stored property is in a warehouse in Avon, NY.....	[A:45]
e. Christopher <b>Carter</b> 's letter of <b>July 30, 2002, to Vince Pusateri</b> , Vice President of M&T Bank, general lienholder against Bankrupt Borrower Premier Van Lines, Inc., stating that his company did not receive containers with property of Dr. Cordero among the containers bought from M&T Bank.....	[A:46]
1) <b>Bill of sale</b> from M&T Bank for Mr. Carter to sign to acknowledge receipt of containers bought from M&T, which liquidated its lien on them after Premier bought them with an M&T loan and subsequently went bankrupt.....	[A:47]
2) <b>List of former Premier clients</b> whose property was allegedly in storage containers sold by M&T Bank to Champion's Mr. Carter, who received no containers with Dr. Cordero's name so he did not sign the acknowledgment.....	[A:48]
3) <b>Premier Van Lines' invoice</b> of September 26, 2000, for storage of Dr. Cordero's property.....	[A:49]
f. Att. <b>MacKnight</b> 's letter of <b>September 19, 2002, to Dr. Cordero</b> .....	[A:14]
g. Trustee <b>Gordon</b> 's letter of <b>September 23, 2002, to Dr. Cordero</b> .....	[A:1]
h. Trustee <b>Gordon</b> 's <b>Answer of October 9, 2002, to Plaintiff Pfuntner's complaint</b> .....	[A:31]

**Dr. Richard Cordero**

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59 Crescent Street  
Brooklyn, NY 11208-1515  
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November 25, 2002

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

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

Dear Ms. Schwartz,

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

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

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

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

Yours sincerely,

*Dr. Richard Cordero*

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

November 25, 2002

## **APPEAL**

against a supervisory opinion of

**Kathleen Dunivin Schmitt**

**Assistant United States Trustee**

USTP Region 2

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

Submitted:

By: Dr. Richard Cordero, Esq.

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

### **A. Procedural Background**

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

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

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

<sup>3</sup> Premier Van Lines, Inc., 900 Jefferson Road, Rochester, NY 14623.

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

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

## **B. Standards of review and "thorough inquiry"**

3. Title 28 of the United States Code provides in §586(a), that the United States Trustee must supervise the actions of trustees in the performance of their responsibilities. In turn, the United States Trustee Manual adopted by the Department of Justice and its United States Trustee Program states in §2.1.1. of Chapter 7 Case Administration that the actions of the United States Trustee are guided by "the primary goals of ensuring the prompt, competent, and complete administration of chapter 7 cases."
4. The exercise in which these principles would have guided the determination of Trustee Gordon's competence of performance and fitness to serve as applied for by Dr. Cordero was named by Judge Ninfo when he referred to Assistant Schmitt Dr. Cordero's initial Application. In his referral letter of October 8, Judge Ninfo wrote, "I am confident that Ms. Schmitt will make thorough inquiry and assist you in reconciling this matter."
5. A "thorough inquiry" is an investigative exercise that entails, at a minimum, reading closely the terms of the problem to the point of mastering its key issues, names, and relations; choosing evaluating standards and formulating the specific questions on which to focus the exercise; requesting documentary evidence and interviewing third-parties for independent corroboration of what is alleged to have been done as well as to unearth what was embarrassing or incriminating enough not to have been even mentioned; asking all along tough whys, hows, and whens about the relevant acts and omissions; and finally reaching concrete findings and conclusive value judgments in which the specific questions of the inquiry are determined. Alas!, there is no evidence that this is the kind of exercise that Assistant Schmitt undertook.

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## C. Quick contact conducted instead of “thorough inquiry”

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

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

11. It should be noted that the issues that Dr. Cordero raised in the Rejoinder and Application for a Determination dealt with the letter that Trustee Gordon had sent to Judge Ninfo on October 1, which the Judge referred to Assistant Schmitt on October 8. Hence, whatever 'contact' Assistant Schmitt established with the Trustee from that moment on could not have dealt with the issues raised for the first time in the Rejoinder, which she would only receive and read later either on October 18 or 21.
12. Since Assistant Schmitt permitted herself only a quick reading 'contact' with Dr. Cordero's Applications, she failed to pick up not only key issues, but also related issues raised in them as well as important points in the evidence discussed there. Thus, as shown below, in her letter she even made mistakes of facts and missed even points implicit in her own statements. What is more, she failed to grasp that each Application for a Determination indeed requested that specific determinations be made, which required specific findings, concerning Trustee Gordon's performance and fitness to serve as such.
13. In brief, from the content and quality of Assistant Schmitt's letter of October 22, one may reasonably deduct that her 'contact' with Trustee Gordon may have consisted in dashing a note requesting comments on the Applications or perhaps in just picking up the phone for a friendly conversation, merely to hear what the Trustee had to say. After all, she stated in her letter that "we have talked with Mr. Gordon...", but not that she wrote to him or he to her, and that she understood something "from speaking with David Mac-Knight," the only other third-party "contacted." By either means, her 'contact' was nothing probing or inquisitorial, let alone critical or confrontational. Actually, it only led to that good-natured reminder for the Trustee to always be courteous. Then Assistant Schmitt liquidated the 'contact' with a letter to Dr. Cordero. This was hardly a "thorough inquiry."

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

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

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

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

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

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

15. Yet, Assistant Schmitt wrote in her letter, "Unfortunately, it is not uncommon for debtors to keep incomplete books and records. As a result, trustees frequently must learn of potential assets through outside sources." She missed the point! There was no need to look for outside sources. It would have sufficed to look in the inside sources, namely, the business files inside Premier's office inside the Jefferson-Henrietta warehouse. Trustee Gordon had access to that office given that, according to the manager/owner of that warehouse, Mr. David Dworkin,<sup>9</sup> it was Trustee Gordon who gave Mr. Dworkin the key to that office.
16. Assistant Schmitt failed to inquire why Trustee Gordon did not look into those business files, although he had the same reason to do so as Champion's Mr. Carter, to wit, Dr. Cordero had informed the Trustee that he was looking for his property in storage with Debtor Premier, who was in the storage business. Did Assistant Schmitt even wonder whether still more Premier's assets are out there waiting to be discovered by a go-getter trustee?

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

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

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

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

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

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

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

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

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

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

19. Then Assistant Schmitt went on to write:

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

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

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

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

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

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

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

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

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

### **7. Failure to find out whether Trustee protected estate assets**

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

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

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

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

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

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

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

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

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

29. Had Assistant Schmitt been conducting a "thorough inquiry," then her inquisitive approach would have led her to ask for a copy of Trustee Gordon's April 16 letter or to look it up in Dr. Cordero's Applications. There she would have found that the Trustee had written: "Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank. M&T Bank is represented by Mike Beyma and Tim Johnson of Underberg & Kessler, LLP."
30. That's it! No address of M&T Bank. Did the Trustee expect Premier's customers, who had placed their property in storage precisely because they had to leave Rochester, perhaps for New York City, or California, or Japan, or Timbuktu, to inquire about their property by writing a letter and mailing it in an envelope addressed to just 'M&T Bank'? Were they supposed to phone the Bank and ask its address? How? The Trustee did not even write the Bank's phone number! Were the customers supposed to look it up in their *local* yellow pages, e.g. the San Francisco phonebook!? Were they to call directory assistance? The Trustee did not even spring the full name of the Bank!: Manufacturers & Traders Trust Bank. And once the customers somehow conjured up the address or phone number, to whom would they address their questions? The Bank has thousands and thousands of employees! 'No, no, the customers were supposed to address themselves to
31. Mr. Beyma or Mr. Johnson at Underberg & Kessler.' But how? Again, the Trustee did not state their address or phone number either! In any event, how would the Bank's lawyers know where the property of Premier's customers was and in what condition? Why would they care...if the Trustee managing the estate didn't?
32. 'Well, let's see...the customers were supposed to phone Premier.' But Premier's phone number is not stated on its invoices!, let alone the Trustee's letter. What is more, Premier's phone had been disconnected!! "No further information is available on this number," stated the recording. 'Then have the customers write to Premier.' And who was going to open the letter? Mr. Palmer, Premier's owner, was nowhere to be seen. Even today, his lawyer, Mr. Stilwell, will not even disclose his whereabouts, not even to M&T Bank holding a judgment against Mr. Palmer. Was it Mr. Dworkin who would open the letter?, and answer it too? What did the Trustee think was the incentive for Mr. Dworkin to take upon himself that task? Because he was running Premier? But remember, Assistant Schmitt said that Premier had ceased business

upon going into liquidation in December 2001, and the Trustee's letter is dated April 16, 2002, so Premier should have been by then not only dead, but also way past the autopsy. Never mind, imagine that somehow, which you have to figure out yourself, you stumbled upon Mr. Dworkin...you would have been no better off anyway: Mr. Dworkin did not know either!...or so he said.

33. So you are on your own, hundreds of miles from your property, even thousands of miles away, perhaps in another continent, and you have to find out who knows about your property, which is so valuable to you that you did not throw or give it away when you moved from Rochester, but rather you packed it carefully for long term storage and paid the fees month after month, year after year. Yet, nobody knows where it is. But take heart, hallelujah!, for the Trustee hath come with the saving suggestion of his letter of June 10, 2002: 'Hire a lawyer to look for it.' What?! From hundreds of miles, half a continent away, from the other side of the world? Is he serious? Wouldn't he, as trustee, be precisely the first person that such lawyer would expect to obtain information from? Do you, reader, feel the human element? Put yourself in Dr. Cordero's place Do you feel the futility of your efforts, the sheer frustration of it all, the waste of money, the huge investment of time, the sense of outrage at knowing that the one person who knew all this information, Trustee Kenneth Gordon, did not care to write down a complete address, at least the full name, not even a phone number, let alone take the initiative to give you notice? His was an even quicker job of a letter!
34. And Assistant Schmitt did not pick any of this up. Is not noticing or tolerating this conduct by the trustees under her supervision her idea of "ensuring the prompt, competent, and complete administration of chapter 7 cases"...by people that cannot even write a complete address?

## **12. Failure to recognize Premier's customers as creditors of Premier**

35. Assistant Schmitt wrote that, "The trustee in a chapter 7 estate represents the creditors of that estate, not clients or customers of the debtor, unless, of course, those clients are owed funds."
36. Where in Bankruptcy Code did Assistant Schmitt get the notion that clients and customers are in principle not creditors? If it was not from Trustee Gordon, it certainly was not from the Code. Far from it, 11 U.S.C. §101(10) provides that "'creditor' means- (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor...(15) "entity" includes person, estate, trust, governmental unit, and United States trustee." Hence, Premier's customers are creditors who instead of being owed funds, are owed the property that Premier was keeping in storage for them. They too were entitled to notice of Bankruptcy proceedings so that they could file their claims. Yet, Dr. Cordero, as a Premier creditor, was never given such notice and thus, was not included in the matrix.

## **13. Failure to notice the Trustee's reluctance to provide information**

37. Assistant Schmitt also failed to pick up another issue that Dr. Cordero brought up in his Applications, namely, Trustee Gordon's reluctance to respond to Dr. Cordero's request for information. So she wrote, "I understand that a copy of this letter [of April 16] was sent to you on June 10, 2002 after the trustee learned of your difficulties in trying to locate and retrieve your property."



38. It took almost a month to get that letter from Trustee Gordon!, and only after Dr. Cordero called several times, then wrote to him a reminder, then called again. What is more, or rather less, is that for all information that the Trustee deigned to provide in his cover letter to Dr. Cordero was that, "I suggest that you retain counsel to investigate what has happened to your property."
40. Two copies of that June 10 cover letter were among the exhibits that Dr. Cordero sent to Assistant Schmitt. Did she read it? If so, did she not consider that this 'suggestion' revealed the Trustee's unjustifiable unwillingness to share information, coming as it did from the trustee that was supposed to have been working for almost six months to liquidate Premier's assets, including storage containers holding Dr. Cordero's property? Was that all the information that Trustee Gordon had gathered in all that time? If he had more but chose to provide nothing but grossly inadequate information, why did Assistant Schmitt not state that Trustee Gordon had failed in his duty to furnish Dr. Cordero with information? And the Trustee did have such duty!

#### **14. Failure to recognize the Trustee's duty to inform and his breach of it**

39. Section 704(7) of 11 U.S.C. includes among the duties of trustees that they must, "unless the court orders otherwise, furnish such information concerning the estate and the estate administration as is requested by a party in interest." Note that this duty extends to any "party in interest," so that one need not even have to be a creditor to invoke the benefit of that duty. Owners of property in the hands of a debtor whose business reason is precisely the storage of such property definitely qualify as parties in interest.
40. Nonetheless, Trustee Gordon wrote to Dr. Cordero on September 23, 2002, thus: "I have directed my staff to receive and accept no more telephone calls from you regarding this subject....I trust that you will not be contacting my office again." What triggered this refusal to deal with Dr. Cordero was that he called the Trustee after being referred to him by the owner of the Avon warehouse, Mr. James Pfuntner,<sup>11</sup> who refused to let Dr. Cordero take his property found there lest the Trustee sue Mr. Pfuntner for disposing of assets of Debtor Premier. Yet, the Trustee would not take or return Dr. Cordero's phone call or answer his letter.
41. Therefore, Assistant Schmitt failed to recognize that it was a breach of his duty as trustee for Trustee Gordon to be reluctant and even refuse to provide information about the case and his administration of it to Dr. Cordero, although he was referred to the Trustee by one party after the other, including their attorneys, who had stated that the Trustee could provide him with information and assistance in locating his property.

#### **15. Failure to recognize the Trustee's duty to assist in locating property**

42. Assistant Schmitt wrote, "[T]he trustee had no legal responsibility to locate the assets belonging to the debtor's customers and clients and to negotiate their return to them."

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<sup>11</sup> James Pfuntner, (585) 738-3105, owner of the Avon warehouse; also an officer of Western Empire Truck Sale, 2926 West Main Street, Caledonia, NY 14423; tel. (585) 538-2200.

43. Far from this, Section 704 of 11 U.S.C. states the opposite when setting forth the first duty of the trustee: "(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of the parties in interest." It should also be remarked here that the law does not limit it to creditors the benefit of this duty, but rather extends it to all "parties in interest."
44. Once more, Assistant Schmitt missed the point: The property of the clients was held in storage containers belonging to Debtor Premier and thus, constituting assets of the estate. By locating the property held and owed by Premier to its clients, the Trustee would also have found assets of the estate in the form of storage containers and maybe other types of assets. That is precisely what happened when Champion's Mr. Carter looked for Dr. Cordero's property and found other assets of Premier in the Avon warehouse. Assistant Schmitt failed to pick up how this event indicted the performance of Trustee Gordon, for he not only had the same opportunity as Mr. Carter to locate those assets and property, but also the duty to do so.

### **16. Failure to listen attentively and question the Trustee's words**

45. Assistant Schmitt failed to approach Trustee Gordon's statements inquisitively. So she wrote, "I understand that a copy of this letter was sent to you on June 10, 2002 after the trustee learned of your difficulties in trying to locate and retrieve your property." The underlying tenor of these words is that the Trustee told Assistant Schmitt that, after learning from Dr. Cordero of his property-search difficulties, the Trustee responded promptly by sending him the requested information right away...and she just believed him!
46. It is clear that Assistant Schmitt did not hear the clash between those words and what Dr. Cordero wrote in his Applications. There he complained loudly that he had to call the Trustee several times in the first part of May 2002 before the Trustee finally took his call, and that then he had to write to him to remind him of the letter that the Trustee had said he would send Dr. Cordero, and that then Dr. Cordero even had to call again the Trustee to ask whether he would answer the letter, and that when the Trustee finally, on June 10, 2002, answered the letter, it was just to "suggest that you retain counsel..." Assistant Schmitt may not have asked herself, not to mention the Trustee, about his tardiness in responding if she was not inquiring into his performance, but rather just listening to his story.

### **17. Failure to pick up the inconsistency between Trustee's words and actions**

47. Assistant Schmitt wrote: "I do understand, however, that early on in the case, the chapter 7 trustee made repeated requests to counsel for the debtor to provide a list of all customers who currently were storing items with the debtor. Counsel failed to provide such a list."
48. However, Assistant Schmitt failed to pick up the inconsistency between what Trustee Gordon said there that he did and what he actually did when he learned about Dr. Cordero. The latter was one of those customers that would have been on the requested list of Premier's customers. What did the Trustee do for him? After a month of Dr. Cordero trying to obtain a written statement concerning his property held by Debtor Premier, the Trustee wrote, "I suggest that you retain counsel to investigate what has happened to your property," and clipped his letter to that to Mr. Dworkin of April 16, wherein he bounced Premier's customers from Mr. Dworkin

to yet another third-party, i.e. M&T Bank. Did Assistant Schmitt grasp the inconsistency: Why would the Trustee ask repeatedly for that list if he was so unwilling to do anything for those that would be on it? The evidence points to Assistant Schmitt just listening and then repeating uncritically what she was told during her 'contact' with Trustee Gordon.

### **18. Failure to pick up inconsistency in her own actions**

49. Assistant Schmitt failed to pick up her own inconsistency in action. Why did she not call the counsel for Debtor Premier, Mr. Stilwell, to ask him for copies of the letters in which the Trustee claimed to have asked him for the list of Premier's customers? Those letters must exist given that Assistant Schmitt wrote that, "Mr. Gordon states that generally, it is his policy to correspond with parties via mail rather than telephone." She should have been very interested in knowing the exact dates when the Trustee wrote to Attorney Stilwell asking for that list and what he stated he wanted it for.
50. Moreover, why did she not call Attorney Stilwell although she wrote that she "contacted...the attorney for the party who is now believed to be in possession of your belongings," that is, Attorney David MacKnight.<sup>12</sup> No doubt, Assistant Schmitt could also have asked Trustee Gordon to send her copies of those letters...but then she would have so ended in her 'contact' with the Trustee as if she had been conducting a "thorough inquiry," which, of course, was not the case, for it was just a friendly communication to hear his story, which needed no corroboration since the Trustee was to be taken at his word.

### **19. Failure to pick up indicia of Trustee's need to be prompted into action**

51. As a result of Dr. Cordero's repeated requests for information from Trustee Gordon, the Trustee finally wrote to him on June 10, 2002. Three days later, according to Assistant Schmitt, "On June 13, 2002, the chapter 7 trustee filed a formal Notice of his intent to abandon all assets of Premier Van Lines..." Likewise, as a result of Dr. Cordero's letter followed up with phone calls, which the Trustee would neither take nor return, the Trustee finally sent him a letter on September 23. Three days later, according to Assistant Schmitt, "on September 26, 2002, the trustee filed a Notice of his intent to abandon unscheduled assets of the debtor recently learned to have been located in Avon, New York." Was this pure coincidence or was Trustee Gordon finally taking some action in the Premier case because Dr. Cordero's requests were operating as reminders for the Trustee that he had to do something about that case?
52. In this context, a comparison of reaction time raises questions about Trustee Gordon's handling of this case.
  - 1) As early as July 23, Dr. Cordero called Mr. Christopher Carter at Champion to ask him about his property. Mr. Carter told him that it was not among Debtor Premier's storage containers that he had collected at the Jefferson-Henrietta warehouse; then he promised to look into the matter.

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<sup>12</sup> David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604; tel. (585) 454-5650, fax (585)454-6525.

- 2) On July 29, Dr. Cordero called Mr. Carter again, who said that he had found in Premier's files that Dr. Cordero's property might be in a warehouse in Avon.
  - 3) On July 30, at Dr. Cordero's instigation, Mr. Carter wrote about it to Mr. Vince Pusateri<sup>13</sup> at M&T Bank, which held a lien on all Premier's storage containers.
  - 4) On August 1, M&T Bank wrote to Dr. Cordero to let him know that his property was likely in Avon.
  - 5) On August 7, Dr. Cordero faxed a letter to M&T Bank's attorney, Michael Beyma,<sup>14</sup> requesting confirmation of the whereabouts of his property.
  - 6) On August 9, M&T Bank appears to have conducted a physical inspection of the Avon warehouse.
  - 7) On August 12, Mr. David Delano, the M&T Bank officer in charge of the Premier case, called Dr. Cordero to let him know that storage containers with labels bearing his name had been found in the Avon warehouse.
  - 8) On August 15, Attorney Beyma confirmed this by letter to Dr. Cordero with copy to the Trustee.
  - 9) Not until September 26, almost a month and a half later and only after Dr. Cordero's letter and phone calls and finally the Trustee's letter of September 23, did the Trustee file his Notice of intent to abandon the newly found property. What was Trustee Gordon doing in the meantime?
53. There is no evidence that Assistant Schmitt asked that question. Nor that she asked whether Trustee Gordon actually went to the warehouse in Avon for a physical inspection of not only the storage containers, but also all the other assets of Debtor Premier found there. Did she ask why the Trustee was abandoning that property just as he had abandoned, six months after the conversion to Chapter 7 on December 20, 2001, Premier's assets at the Jefferson-Henrietta warehouse? What did Assistant Schmitt actually ask of the Trustee during her friendly 'contact' with him?

## **20. Failure to wonder 'What has Trustee Gordon been doing?'**

54. If Trustee Gordon:

- 1) does not, as a policy, take or return phone calls;
- 2) and does not, as a matter of practice, promptly and usefully correspond with parties via mail;
- 3) and does not even write complete addresses or phone numbers;
- 4) and does not concern himself with "rental issues" of the Debtor's customers;
- 5) and does not "administer any items being stored by the debtor;"

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<sup>13</sup> Vince Pusateri, Vice President, tel. (716) 258-8472, at M&T Bank in Rochester.

<sup>14</sup> Michael J. Beyma, Esq., tel. (585)-258-2890, at Underberg & Kesler, LLP, 1800 Chase Square, Rochester, NY 14604; tel. (585)-258-2800; fax (585) 258-2821; attorney for M&T Bank.

- 6) and does not exercise “control over” but rather abandons Debtor’s assets in the main place of business;
- 7) and does not examine the “records and books” in the Debtor’s business equipment;
- 8) and does not “locate” the property of Debtor’s customers;
- 9) and does not “notify” Debtor’s customers “of the progress of the case;”
- 10) and does not find on his own Debtor’s assets elsewhere;
- 11) and does not convert into cash but rather abandons assets found by others;
- 12) and does not have anything for the creditors except a No Distribution Report;
- 13) does not want even his staff “to receive and accept [any] more telephone calls from [a Debtor’s customer, Dr. Cordero] regarding this subject”;

did Assistant Schmitt wonder what really Trustee Gordon does as a chapter 7 trustee? Did she not wonder what the “significant efforts” that the Trustee claimed to have made in this case could possibly have been? Had she conducted a “thorough inquiry,” would she have found evidence of Trustee Gordon’s significant inactivity?

## **21. Failure to deal with the issues of untruthfulness and defamation**

55. Assistant Schmitt also failed to grasp the serious professional and legal implications of the two other main issues of Dr. Cordero’s Application to her: Whether Trustee Gordon made untruthful statements to the Court and the U.S. Trustee and whether he cast aspersions on Dr. Cordero’s conduct, character, and competence so as to belittle him and persuade the Court and the U.S. Trustee that “it is not necessary...to take any action on Dr. Cordero’s application” (see the Trustee’s letter of October 1, 2002) for a review of his performance and fitness as trustee. Assistant Schmitt dealt with these two issues by ‘thoroughly’ liquidating them in a single paragraph:

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

56. Is this the best Assistant Schmitt can come up with by way of thoughtful analysis of the evidence and the reflective discussion of either of these two issues? They could give rise to charges that could get a lawyer disbarred or held liable for defamation. Did she ever consider, as Dr. Cordero requested, asking Trustee Gordon to provide proof of his impugning of Dr.

Cordero, such as affidavits from his staff regarding what he alleged that they told him about Dr. Cordero? Far from it, Assistant Schmitt found Trustee Gordon's behavior deserving of not even a slap on the wrist, just a reminder to remain professional and always be a good courteous boy. She must be kidding!

## **22. Failure to realize the inadequacy of a mere chatty supervisory 'contact'**

57. To conduct at a professionally acceptable standard an investigative exercise into concrete charges concerning her supervisee, Assistant Schmitt would have had to read closely Dr. Cordero's Applications; notice and pursue the three main issues of claimed "significant efforts," untruthful statements, and impugment of Dr. Cordero; examine critically the Trustee's story; request as a matter of course supporting documents; and interview independent third-parties in a position to corroborate or refute his averments. Then to adequately "respond to the inquiry" that she sensed she had been asked to conduct, Assistant Schmitt would have had to conclude the 'contact' that she actually conducted by making concrete findings and reaching the specific determinations requested.
58. There is no evidence that any of this happened anywhere near to a passing, let alone adequate, degree. From the beginning, Assistant Schmitt should have known that her quick reading 'contact' with the Applications and her friendly 'contact' with Trustee Gordon, and just one other party could not possibly amount to the requested "thorough inquiry" into her supervisee's performance and fitness to serve. She should have realized that Trustee Gordon would not simply give up and confess to his many failings just because she asked him for his story. The inadequacy of her 'contact' should certainly have become obvious as the evidence began to pile up that the Trustee's performance consisted overwhelmingly of what he did not do rather than what he did do. At least she should have shown awareness that the object of her exercise was to reach the requested determinations and should have concluded with them. Instead, she wrote: "We appreciate your correspondence and trust that this information will be of assistance to you."
59. No! no! no! It was not to obtain "information" that the Court had forwarded to Assistant Schmitt the first Application of Dr. Cordero and that he had submitted to her his Rejoinder. Rather, it was for her to make the specific determinations clearly identified as such and listed in each of the two Applications. Did Assistant Schmitt provide as a result of a "thorough inquiry" any new "information" that determined whether Trustee Gordon's performance was competent and he was fit to serve as such in the Premier case? No, of course not.
60. Hence, both the "thorough inquiry" and the requested determinations remain to be made. But not by Assistant Schmitt, for she foreclosed the possibility of having anything else to do with this matter when, without inviting Dr. Cordero's comments, she remanded the case to whence it had come to her, the Court, thus: "Finally, to the extent you disagree with the legal position taken by Mr. Gordon, you should resolve that issue(s) in court."
61. Before going back to the Court, an appeal from her "information" lies with the hierarchical superior of Assistant Schmitt.

## D. Relief requested

62. Consequently, through this appeal, Dr. Cordero requests that, on the basis of the facts, arguments, and exhibits contained herein and his two Applications, copies of which are attached hereto, the United States Trustee launch a “thorough inquiry” in order to determine whether Kenneth Gordon, Esq., as trustee of Premier Van Lines and in his dealings with Dr. Cordero:
- 1) failed to recognize that customers of Debtor Premier, who had entrusted it with their property for storage for a fee, are parties to these bankruptcy proceedings and should have been informed of such proceedings just as creditors of Premier were entitled to;
  - 2) failed to provide Dr. Cordero -and perhaps others similarly situated- with adequate information upon being referred to the Trustee:
    - a) by lienholder M&T Bank and Dr. Cordero requested such information from the Trustee in mid-May and June 2002;
    - b) by Mr. Pfuntner and Dr. Cordero requested it from him in August and September 2002;
  - 3) fails in his basic duty of fairness as a fiduciary by having refused specifically to communicate with Dr. Cordero and by explicitly enjoining him not to contact his office again, although the Trustee has provided other parties with information concerning Dr. Cordero;
  - 4) failed to take measures to protect the assets of Premier in the Jefferson-Henrietta warehouse and prevent that assets once affirmed and seen to be there can now no longer be found;
  - 5) failed to locate other Premier’s assets, just as Champion’s Mr. Carter did in Mr. Pfuntner’s warehouse in Avon, and take such prompt and adequate action as to render unnecessary his being sued by Mr. Pfuntner, which has resulted in Premier’s customers being dragged into Mr. Pfuntner’s adversarial proceeding and their property there being frozen;
  - 6) failed to make “significant efforts” to discharge his duties competently;
  - 7) made untruthful statements to the Court and the U.S. Trustee;
  - 8) cast aspersions on Dr. Cordero’s character, conduct, and competence; and
  - 9) is not fit to continue as trustee in the Premier case.
63. Similarly, Dr. Cordero requests also that the United States Trustee determine whether Assistant Schmitt:
- 10) failed to conduct the “thorough inquiry” expected of her as well as an adequate investigative exercise regarding the matter within the scope of her supervisory duty submitted to her by the Court and a party in interest; and
  - 11) failed to discharge her supervisory duty “of ensuring the prompt, competent, and

complete administration of" the Premier case assigned to Trustee Gordon.

Date: November 25, 2002  
59 Crescent Street  
Brooklyn, NY 11208

*Dr. Richard Cordero*

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

Cc: The Honorable Judge John C. Ninfo, II  
Assistant Kathleen Dunivin Schmitt  
Kenneth Gordon, Esq., Trustee





U.S. Department of Justice

Office of the United States Trustee  
Western District of New York

100 State Street, Suite 609  
Rochester, New York

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

October 22, 2002

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

Re: Premier Van Lines

Dear Dr. Cordero:

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

A handwritten signature in black ink, appearing to read "Kathleen D. Schmitt". The signature is fluid and cursive, with a large initial "K" and a stylized "D".

Kathleen Dunivin Schmitt  
Assistant United States Trustee

cc: The Honorable John C. Ninfo, II  
Kenneth Gordon, Esquire



U.S. Department of Justice

Office of the United States Trustee  
Western District of New York

100 State Street, Suite 609  
Rochester, New York

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

October 8, 2002

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

Re: Premier Van Lines

Dear Dr. Cordero:

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

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

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

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

Very truly yours,

A handwritten signature in black ink that reads "Kathleen Dunivin Schmitt".

Kathleen Dunivin Schmitt  
Assistant United States Trustee

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

In Re:

PREMIER VAN LINES, INC.

Debtor

JAMES PFUNTER

Plaintiff

v.

KENNETH GORDON, et al.

Defendant.

Case No. 01-20692  
Chapter 7

Adversary Proceeding  
Case No. 02-02-2230

**ORDER SETTING MATTER IN FOR STATUS CONFERENCE/PRETRIAL HEARING**

The Court having held a hearing on January 8, 2003 and based on the representations and statements of counsel, and pursuant to its powers under 11 U.S.C. § 105(d)(2)(B), it is hereby:

**ORDERED**, that the Motion is GRANTED; and it is further

**ORDERED**, that on \_\_\_\_\_, 200\_\_ at \_\_\_\_\_m.,

the Court will schedule the above referenced case for a status conference and pretrial hearing.

This \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
John C. Ninfo, II,  
Chief United States Bankruptcy Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of December, 2002, the Request for Status

Conference was mailed via first class mail, prepaid to:

David MacKnight, Esquire  
130 East Main Street  
Rochester, NY 14604

Ken Gordon, Esquire  
100 Meridian Centre Blvd., Suite 120  
Rochester, NY 14618

Michael Beyma, Esquire  
1800 Lincoln First Tower  
Rochester, NY 14604

Dr. Richard Cordero  
58 Cresent Street  
Brooklyn, NY 11208

Kathleen D. Schmitt

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

IN RE:

PREMIER VAN LINES, INC,

Debtor

JAMES PFUNTER,

Plaintiff,

vs.

KENNETH W. GORDON, AS TRUSTEE IN  
BANKRUPTCY FOR PREMIER VAN LINES, INC.,  
RICHARD CORDERO, ROCHESTER AMERICANS  
HOCKEY CLUB, INC. AND M&T BANK,

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN,  
DAVID DELANO AND JEFFERSON HENRIETTA  
ASSOCIATES,

Third Party Defendants

Chapter 7

Case No: 01-20692

AP No.: 02-2230

**ORDER TO  
DISMISS CROSS-CLAIM  
AGAINST TRUSTEE IN  
AN ADVERSARY  
PROCEEDING**

TAKE NOTICE OF THE ENTRY  
OF THIS ORDER ON 12/30/02  
PAUL R. WARREN, CLERK  
U.S. BANKRUPTCY COURT

BY: [Signature]  
Deputy Clerk

DATE: 12/30/02

The Chapter 7 Trustee, Kenneth W. Gordon, having moved this Court by Notice of Motion dated December 5, 2002 for an Order dismissing cross-claims against the trustee and having submitted to the Court his affirmation dated December 5, 2002 in support of the motion and upon hearing the Chapter 7 Trustee, Kenneth W. Gordon, in support of the Trustee's Motion and Dr. Richard Cordero, having submitted his Affirmation with attached exhibits dated December 10, 2002 in opposition to the Trustee's motion and upon hearing Dr. Cordero in opposition to the motion and the Court having reviewed that all papers and proceedings had herein, and after due deliberation it is hereby

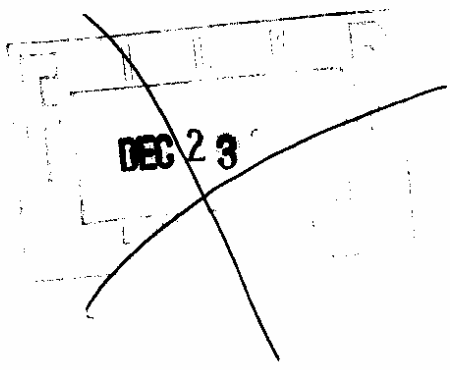
**ORDERED**, that the Trustee's Motion to Dismiss Cross-Claims Against the Trustee is granted and that Dr. Cordero's cross-claims against the Trustee are hereby dismissed.

SO ORDERED THIS \_\_\_\_\_  
DAY OF \_\_\_\_\_, 200\_\_\_\_.  
12/23/02



HONORABLE JOHN C. NINFO, II  
U.S. BANKRUPTCY JUDGE

DEC 23







U.S. Department of Justice

Office of the United States Trustee  
*Districts of New York, Connecticut and Vermont*

33 Whitehall Street  
Twenty-first Floor  
New York, New York 10004

(212) 510-0500  
Fax: (212) 668-2255

January 9, 2003

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

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

Dear Dr. Cordero:

Thank you for your letter dated November 25, 2002. I have reviewed the material you submitted regarding chapter 7 trustee, Ken Gordon; Assistant United States Trustee, Kathleen Schmitt; and the administration of Premier Van Lines, a case originally filed as a chapter 11, reorganization, and later converted to a chapter 7 liquidation. This letter is in response to that letter and to the conversations you have had with my staff.

I have reviewed the letter that you received from Ms. Schmitt dated October 22, 2002 and the information upon which she relied. Although this letter appears to address many of your concerns, I understand that you remain frustrated with: 1) Mr. Gordon's determination that your possessions stored by the debtor are not property of the estate and 2) Ms. Schmitt's determination that Mr. Gordon performed his duties as chapter 7 trustee adequately in this case. While I appreciate your concerns, I concur with the conclusions reached by Mr. Gordon and Ms. Schmitt. We understand that the Bankruptcy Court reached a similar conclusion with regard to Mr. Gordon in December of this year when it dismissed your counterclaim and ruled that Mr. Gordon was not negligent in his administration of this bankruptcy estate. Based on the information provided by you and by the trustee, it is clear that your belongings are not and were never property of the estate.

The docket and case file reflect that Mr. Gordon took several actions to preserve and locate assets of the estate and to require the debtor to disclose information. Specifically, we would note that upon receiving this case, Mr. Gordon sent someone to the debtor's business location listed on the schedules to change the locks. In addition, a staff member went through the business records with the debtor, seized the small amount of cash in the register, along with books and records containing information on accounts receivable. These books were then reviewed for both assets and a customer list without success. The trustee also conducted multiple meetings of creditors in an attempt to have the debtor provide complete information on his schedules and statement of financial affairs. For instance, we learned that the debtor failed to indicate on his schedules that the majority of the assets of the estate were subject to a lien. The trustee learned this after a second meeting of creditors.

Dr. Richard Cordero  
January 9, 2003  
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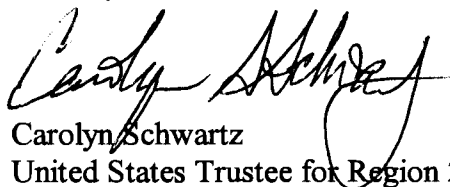
Similarly, when the trustee learned of storage trailers in Avon, New York, which trailers were not listed on the schedules, the trustee moved to sell the trailers<sup>1/2</sup> only to learn that they also had liens on them. Mr. Gordon's actions all were noticed and docketed. Any party objecting to his conclusions could have appealed those determinations. No one chose to do so.

In conclusion, it appears that your main complaint is not with Mr. Gordon or Ms. Schmitt, but rather with the principal(s) of the debtor, Premier Van Lines, for not informing you and the chapter 7 trustee about their business affairs and the location of your belongings. While I am sympathetic to your problem, the Department of Justice is unable to comment on how best to reclaim your belongings because this issue lies outside of our jurisdiction. It does appear, however, that there may be avenues that you may pursue in the state court and we urge you to consult with your attorney to discuss these issues.

Finally, with regard to the alleged defamation, I understand that the Bankruptcy Court ruled that Mr. Gordon did not defame you and has dismissed your claim. If you disagree with the determination of the Court, you may wish to consult with an attorney to determine what rights are available to you.

Again, we appreciate you bringing these matters to our attention and trust that this information may be of service.

Sincerely,



Carolyn Schwartz  
United States Trustee for Region 2

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<sup>1/2</sup>The trustee did not notice an intent to sell the contents of the trailer, as these items were determined not to be property of the estate.

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