UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor	Chapter 7 bankruptcy case no. 01-20692
JAMES PFUNTNER, Plaintiff -vs- KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK Defendants	Adversary proceeding no. 02-2230 CORDERO'S AMENDED ANSWER
RICHARD CORDERO Cross- and Third-party Plaintiff -vs- KENNETH W. GORDON and M&T BANK Cross-defendants	WITH CROSSCLAIMS AND
DAVID PALMER, DAVID DWORKIN, DAVID DELANO, and JEFFERSON HENRIETTA ASSOCIATES Third party defendants	THIRD-PARTY CLAIMS

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

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

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

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

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

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

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

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

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

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

TABLE OF CONTENTS

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I. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. STATEMENT OF CLAIMS

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

A. David Palmer

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

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

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

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

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

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

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

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

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

B. David Dworkin

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

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

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

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

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

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

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

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

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

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

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

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

C. Jefferson Henrietta Associates

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

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

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

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

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

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

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

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

D. David Delano

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

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

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

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

E. M&T Bank

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

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

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

F. Trustee Kenneth Gordon

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. STATEMENT OF RELIEF SOUGHT

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

92. Dr. Cordero respectfully requests that the Court:

A. All cross-defendants and third-party defendants

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

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

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

paid since his property went into storage in August 1993;

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

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

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

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

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

C. Trustee Kenneth Gordon

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

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

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

of such statements;

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

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

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

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

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

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

IV. Table of Exhibits

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

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

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

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

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

8) Att. **MacKnight**'s letter of **September 19**, 2002,**to** Dr. **Cordero** stating that he will soon be receiving Mr. Pfuntner's **summons and complaint** .....[A:14]

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

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

Dated: November 21, 2002

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208

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

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

JAMES PFUNTER,

Plaintiff,

vs.

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

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

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

Third Party Defendants

Chapter 7
Case No: 01-20692

AP No.: 02-2230

NOTICE OF MOTION TO DISMISS CROSS-CLAIM AGAINST TRUSTEE IN AN ADVERSARY PROCEEDING

SIRS:

PLEASE TAKE NOTICE, that the Trustee, Kenneth W. Gordon, will move this Court at 1550 U.S. Courthouse, 100 State Street, Rochester, New York, 14614 on the 18th day of December, 2002, at 9:30 a.m. on that day, or as soon thereafter as counsel can be heard, for an Order to Dismiss pursuant to Bankruptcy Rule 7012 the Cross-Claims Against the Trustee in the above Adversary Proceeding made by Richard Cordero against Kenneth W. Gordon, Chapter 7 Trustee for Premier Van Lines, Inc. (Case No: 01-20692).

Dated: December 5, 2002

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

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

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

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

David D. MacKnight, Esq.
Attorney for Plaintiff
130 East Main Street
Rochester, NY 14604-1686

Mike Beyma, Esq.
Attorney for M&T Bank and David Delano
1800 Chase Square
Rochester, New York 14604

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

David Palmer
1829 Middle Road
Rush, New York 14543

Jefferson Henrietta Associates
415 Park Avenue
Rochester, New York 14607

David Dworkin
415 Park Avenue
Rochester, New York 14607

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PREMIER VAN LINES, INC,

Debtor.

Chapter 7

Case No: 01-20692

JAMES PFUNTER,

Plaintiff,

A.P. No.: 02-2230

vs.

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

Defendants.

RICHARD CORDERO,

Third Party Plaintiff,

TRUSTEE'S AFFIRMATION IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIM

vs.

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

Third Party Defendants.

KENNETH W. GORDON affirms under penalties of perjury as follows:

1. I am the Chapter 7 Trustee appointed and designated as such in the above-referenced proceeding. The above-referenced bankruptcy case was commenced as a Chapter 11 case on March

5, 2001. The Chapter 11 proceeding was converted to Chapter 7 on December 20, 2001. I was appointed as Trustee on December 28, 2001.

2. The instant Adversary Proceeding was commenced by James Pfunter through his attorney David MacKnight to seek a declaration of the Court to determine who had the right to possess certain property in Mr. Pfunter's possession and the conditions under which delivery of such property was to be made.

3. Upon information and belief, Richard Cordero was a former customer of the debtor who stored items of personal property with the debtor. Based upon the pleadings and proceedings in this matter, it would appear as if some or all of Mr. Cordero's property was stored by debtor at a facility and on property owned by Mr. Pfunter.

4. Mr. Cordero has filed and served upon the parties an Answer to Mr. Pfunter's Complaint and a Third Party Complaint alleging Cross-Claims including Cross-Claims against me as Trustee. A copy of Mr. Cordero's Amended Answer with Cross-Claims is annexed hereto as Exhibit A. From a review of the Third Party Complaint with Cross-Claims, it would appear as if the allegations set forth in the Cross-Claims against the Trustee are identical in the two separate documents and thus a copy of the Third Party Summons and Complaint is not annexed hereto.

5. This Affirmation is made in support of a Motion to Dismiss the Cross-Claims made by Mr. Cordero against the Trustee.

6. Mr. Cordero's claims against the Trustee fall into two broad categories. First, in paragraphs 76 through 80, Mr. Cordero claims that the Trustee acted recklessly and negligently in failing to notify former customers of the debtor of the location of the stored personal property of such customers and in failing to administer such property and safeguard such property presumably as

as assets of the bankruptcy estate. Second, in paragraphs 81 through 90, Mr. Cordero complains that the Trustee has defamed him in two letters that were sent by the Trustee in connection with the bankruptcy proceeding. For the reasons set forth below, it is respectfully submitted even accepting the allegations of Mr. Cordero's claims as true, such claims are not legally sufficient and must be dismissed against the Trustee.

DEFAMATION CLAIM

7. Mr. Cordero alleges in paragraphs 36 and 37 that the Trustee sent to him a letter dated September 23, 2002 in response to Mr. Cordero's inquiries to the Trustee's office regarding the whereabouts and status of his personal property which he stored with the debtor. Mr. Cordero complains that the statements made by the Trustee in that letter were defamatory in nature. A copy of said letter was annexed to Mr. Cordero's Amended Answer with Cross-Claims and can be found near the end of Exhibit A annexed hereto.

8. Mr. Cordero alleges in paragraphs 41 and 42 that the Trustee wrote to the Court on October 1, 2002 in response to Mr. Cordero's complaint to the Court regarding the Trustee. A copy of the October 1, 2002 letter is also attached to Mr. Cordero's Amended Answer with Cross-Claims and can be found at the end of Exhibit A annexed hereto.

9. In paragraphs 81 through 90, Mr. Cordero alleges that the statements in the September 23, 2002 and October 1, 2002 letters were defamatory.

10. Assuming for the purposes of this Motion that the factual allegations set forth in Mr. Cordero's Amended Answer and Cross-Claim are true, they allege that defamatory statements were made in two letters by the Trustee which were both sent in connection with the bankruptcy proceeding in which the Trustee was appointed. Both letters directly addressed the issues raised by

Mr. Cordero and both related to matters which Mr. Cordero has alleged are involved in the administration of the bankruptcy proceeding.

11. It is well established under New York law that statements made in letters related to legal proceedings cannot form the basis of a defamation complaint unless made for the sole purpose of defamation with express malice. As the Supreme Court, Appellate Division, Third Department summarized in Grasso vs. Mathew, 164 AD2d 476, 479 (3rd Dept. 1990):

> In the context of a legal proceeding, statements by parties and their attorneys are absolutely privileged, if, by any view or under any circumstances, they are pertinent to the litigation (Martirano vs. Frost, 25 NY2d 505, 507). No action for defamation exists unless the statement is so obviously impertinent as not to admit discussion of pertinence, and so needlessly defamatory as to warrant the inference of express malice and a motivation solely to defame (supra, 508). The absolute privilege embraces anything that may possibly or palpably be relative or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability (Dachowitz vs. Kranis, 61 AD2d 783). This test of pertinency is extremely liberal (Klein vs. McGauley, 29 AD2d 418, 420) and encompasses both words and writings (Youmans vs. Smith, 153 NY 214, 219), including correspondence between litigating parties and unsolicited offers of settlement (Klein vs. McGauley, supra at 420) which is the situation here.

12. Taking each of Mr. Cordero's factual allegations in the Cross-Claims as true, he alleges simply that he was defamed in correspondence by the Trustee and that the correspondence was clearly relevant to and in the context of bankruptcy proceedings. As such, the statements made in the correspondence by the Trustee were absolutely privileged and thus no action for defamation exists.

NEGLIGENCE AND RECKLESSNESS CLAIMS

13. Mr. Cordero alleges in paragraph 19 and 21 that the Trustee advised him that the debtor's business was not being operated by the Trustee and that information about Mr. Cordero's personal

property should be obtained by either contacting the landlord in possession of the property or from the lender who held a blanket security interest on all of the debtor's assets. In paragraphs 76 through 80, Mr. Cordero complains that the Trustee failed to locate Mr. Cordero's personal property and failed to notify Mr. Cordero of the whereabouts of Mr. Corder's personal property which was stored with the debtor. Mr. Cordero complains that the Trustee negligently or recklessly performed his duties as Trustee.

14. Assuming the allegations of fact made by Mr. Cordero are true, the "duties" which Mr. Cordero complains were performed negligently or recklessly are outside of the scope of the duties enumerated in the Bankruptcy Code to be performed by a Chapter 7 Trustee. Such duties are set forth in 11 U.S.C. §704. Those duties include collecting, safe guarding and accounting for property of the estate. Those duties do not include taking possession or control of property and items which were owned by third parties and do not constitute property of the estate.

15. It is hornbook law that property held by the debtor under a bailment contract is not property of the estate. Collier's Bankruptcy §541.06 (1)(a). Under a bailment contract, the bailor or principal retains ownership of the property and if the agent or bailee files for bankruptcy, the debtor's estate does not acquire an ownership interest in the property but rather the bailor or principal is entitled to recover the property.

16. It is clear from the claims made by Mr. Cordero that he asserts his right to recover his property. There is no allegation nor is there any dispute that Mr. Cordero's personal property never became property of the debtor's estate. The relief sought by Mr. Cordero as it relates to his personal property as set forth in paragraphs 93 though 98 clearly seeks relief which is outside the scope of the duties of a Chapter 7 Trustee.

17. Thus, even if the factual allegations in the Cross-Claims are deemed true, the duties and the obligations which Mr. Cordero seeks to impose on the Trustee are outside the scope of those duties defined under 11 U.S.C §704. As such, Mr. Cordero's Cross-Claims against the Trustee for recklessness and negligence in performing the Trustee's duties failed to state a cause of action.

WHEREFORE, it is respectfully requested that the Cross-Claims of Mr. Cordero against the Trustee be dismissed and that such other and further relief be granted by the Court as is deemed just and proper.

Dated: Rochester, New York
December 5, 2002

KENNETH W. GORDON
CHAPTER 7 TRUSTEE

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: _____ 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

DEC 23

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC. — Chapter 7 bankruptcy case no. 01-20692

Debtor

JAMES PFUNTNER, — Adversary proceeding no. 02-2230

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

CORDERO'S NOTICE OF APPEAL from ORDER OF DISMISSAL OF HIS CROSS-CLAIMS AGAINST TRUSTEE GORDON

RICHARD CORDERO

Third party plaintiff

-vs-

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

Third party defendants

NOTICE OF APPEAL

Dr. Richard Cordero, co-defendant, appeals under 28 U.S.C. § 158(a) from the order of the Hon. Judge John C. Ninfo, II, granting Trustee Kenneth Gordon's motion to dismiss Dr. Cordero's cross-claims against him, which was entered in this adversary proceeding on December 30, 2002.

The names, addresses, and telephone numbers of Trustee Gordon -there is no information about any attorney representing him- and of the other parties to the Chapter 7 case and the adversary proceeding are as follows:

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

Premier Van Lines, Inc, Debtor,
Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800

David Palmer, Third-party defendant,
1829 Middle Road
Rush, New York 14543
last attorney known:
Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
Rochester, NY 14625-2883
tel. (585) 248-3800

James Pfuntner, Plaintiff,
David D. MacKnight, Esq.
Lacy, Katzen, Ryen & Mittleman, LLP
130 East Main Street
Rochester, New York 14604-1686
tel. (585) 454-5650

Rochester Americans Hockey Club,
Co-defendant
Office of the President
100 Exchange Blvd.
Rochester, New York 14614
(phone number or attorney not known)

M&T Bank, Co-defendant and
David Delano, Third-party defendant,
Michael J. Beyma, Esq.
Underberg & Kessler, LLP
1800 Chase Square
Rochester, NY 14604
tel. (585) 258-2890

David Dworkin and
Jefferson Henrietta Associates, Third-party defendants,
Karl S. Essler, Esq.
2 State Street, Suite 1400
Rochester, NY 14614
tel. (585) 232-1660

Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706

Together with this Notice, Dr. Cordero is filing attached hereto a separate Statement of Election to state that he elects the district court as the body to hear this appeal. Ten copies of that Statement and of this Notice are enclosed.

Payment of the prescribed $105 filing fee is attached hereto.

Dated: January 9, 2003 Appellant Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

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

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. *§* 158(c), to have the appeal heard by the district court.
(Added Aug. 1, 1991; and amended Mar. 1995; Oct. 1, 1997.)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Chapter 7 bankruptcy
case no. 01-20692

Debtor

JAMES PFUNTNER, Adversary proceeding
no. 02-2230

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,

CORDERO'S STATEMENT OF ELECTION

Defendants

RICHARD CORDERO,

Third party plaintiff

-vs-

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

Third party defendants

STATEMENT OF ELECTION

Dr. Richard Cordero, appellant, hereby states, pursuant to 28 U.S.C. §158(c)(1)(A), his election to have the district court hear his appeal from the order of the Hon. Judge John C. Ninfo, II, granting the motion brought by Kenneth Gordon, Esq., Trustee, to dismiss Dr. Cordero's cross-claims against him, which was entered on December 30, 2002.

Dated: January 9, 2003

Appellant Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

JAMES PFUNTER,

Plaintiff,

vs.

ROCHESTER AMERICANS
HOCKEY CLUB, INC. AND M&T BANK,

Defendants and

RICHARD CORDERO, Co-defendant/Appellant and

KENNETH W. GORDON, AS TRUSTEE IN
BANKRUPTCY FOR PREMIER VAN LINES, INC., Co-defendant/Appellee.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

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

Third Party Defendants

03-CV-6021L

APPELLEE'S STATEMENT IN SUPPORT OF MOTION TO DISMISS APPEAL FROM BANKRUPTCY COURT

KENNETH W. GORDON affirms under penalties of perjury as follows:

1. I am the Chapter 7 Trustee appointed and designated as such in the above-referenced proceeding. I make this affirmation in support of my motion to dismiss Richard Cordero's appeal of the Order of Hon. John C. Ninfo, II dismissing Richard Cordero's claims against the Trustee.

2. The order appealed from was entered in the Bankruptcy Court Clerk's Office on the 30th day of December 2002. A copy of the Order is attached hereto as Exhibit A.

3. Pursuant to Bankruptcy Rule 8002, the Notice of Appeal needed to be filed with the clerk

"within 10 days of the date of the entry of the ... order ... appealed from."

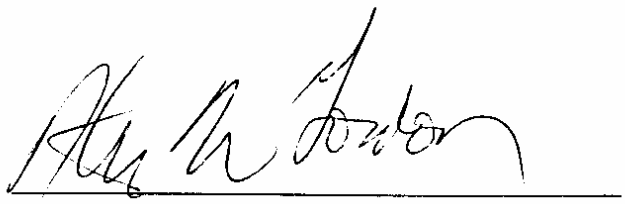
4. The ten day period to file the Notice of Appeal expired on January 9, 2003.

5. Richard Cordero's notice of appeal was filed with the clerk on January 13, 2003. A copy of the Notice of Appeal is annexed hereto as Exhibit B.

6. The Notice of Appeal was not timely filed and it is respectfully submitted that the appeal should be dismissed. Failure to file the Notice of Appeal timely constitutes a jurisdictional defect.

WHEREFORE, it is respectfully requested that appeal of Richard Cordero be dismissed and that such other and further relief be granted by the Court as is deemed just and proper.

Dated: Rochester, New York
January 15, 2003



KENNETH W. GORDON
CHAPTER 7 TRUSTEE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor	Chapter 7 bankruptcy case no. 01-20692
JAMES PFUNTNER, Plaintiff -vs- KENNETH W. GORDON, as Trustee in Bankruptcy for Premier Van Lines, Inc., RICHARD CORDERO, ROCHESTER AMERICANS HOCKEY CLUB, INC., and M&T BANK Defendants	Adversary proceeding no. 02-2230
RICHARD CORDERO, Defendant, Third party plaintiff -vs- DAVID PALMER, DAVID DWORKIN, DAVID DELANO, and JEFFERSON HENRIETTA ASSOCIATES, Third party defendants	
RICHARD CORDERO Appellant -vs- KENNETH W. GORDON, Appellee	case no. 03cv6021L **CORDERO'S BRIEF IN OPPOSITION TO TRUSTEE'S MOTION TO DISMISS**

Dr. Richard Cordero affirms under penalty of perjury the following:

1. Dr. Cordero, pro se appellant, opposes Appellee Kenneth Gordon' motion to dismiss because, contrary to his allegation, the notice of appeal was timely filed since at the hearing of the motion to dismiss Dr. Cordero's cross-claims against Appellee Gordon, Dr. Cordero gave notice in open court that he would appeal the bankruptcy court judge's ruling to grant the motion, which was entered by the clerk of the bankruptcy court on December 30, 2002, and the notice was mailed on January 9, 2003, and thus, within the period prescribed under Rules 8002(a) and 9006 of the Federal Rules of Bankruptcy Procedure (FRBkrP)

2. In the alternative, if the notice of appeal, though timely mailed, which is undisputed, were to be found not timely filed, the court can exercise its equitable and discretionary powers to achieve its first and ultimate objective of dispensing justice by upholding the superiority of Appellant Dr. Cordero's substantial right of to have his day in court to seek redress, as oppose to allowing Appellee Gordon take advantage of the technicality of a timely mailed-untimely filed gap to avoid having to face responsibility in court for having defamed Dr. Cordero and performed negligently and recklessly as trustee.
3. Likewise, the court should apply a balancing test to the relative impact of denying or granting the motion to dismiss, which test will reveal the gross disproportionality of the prejudice to the relative prejudice that the parties would
4. Likewise, the court should weigh through a balancing test the equities that the conduct of the parties has given rise to, which test will reveal the gross disproportionality of the relative prejudice that the parties will sustain if the motion to dismiss is granted or denied.
5. Thus, if the motion to dismiss is granted, Pro se Appellant will not only be unable to obtain redress for the wrongs that Appellee has done onto him, but will also suffer the impairment of his defense against the plaintiff in the Adversary Proceeding that has yet to begin discovery in bankruptcy court; while if the motion to dismiss is denied, Appellee Trustee Gordon will only have to defend against Dr. Cordero just as he will have to defend against similar and related claims of the plaintiff in the Adversary Proceeding below.
6. In light of a reasonable construction of the rules of procedure in question and of the equity considerations at play, the court should exercise its equitable and discretionary powers to achieve substantial justice and fairness by not allowing that the filing four days after a timely mailing may cause such disproportionate prejudice on a pro se party seeking redress from a trustee who in spite of his status already comes into court with dirty hands, and to that end the court should deny the motion to dismiss.

TABLE OF CONTENTS

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I. Statement of Facts

7. Looking for his property in storage, Dr. Cordero found out that the storage company storing it, Premier, had gone bankrupt and was in liquidation. He was referred to its trustee, Mr. Kenneth Gordon, Esq. Dr. Cordero contacted the Trustee, since it appeared reasonable that the trustee liquidating the company that had Dr. Cordero's property under an income-generating contract would know where that property was. Far from assisting him in locating property related to a estate asset contract, Trustee Gordon did not even provide Dr. Cordero with information about

it, but rather bounced him back to one of persons that Dr. Cordero had already contact, to whom he had abandoned Premier' assets.

8. It took Dr. Cordero months to find out that his property was in another warehouse owned by Mr. James Pfuntner. However, the latter refused to release Dr. Cordero's property lest Trustee Gordon sue him for disposing of estate property, and referred Dr. Cordero back to Trustee Gordon.
9. Dr. Cordero tried to contact Trustee Gordon, but once more, as at the earlier attempt, the Trustee would not take his calls or return them or reply to his recorded message or his letter. Dr. Cordero called Trustee Gordon a third time, but he would not take his call. Far from it, he sent Dr. Cordero a letter dated September 23, 2002, in which he made false and defamatory allegations and enjoined him not to contact his office again; and sent copies of it to the lawyers of parties involved in the liquidation, including the lawyer for Mr. Pfuntner, to whom he had abandoned Premier's assets found in his warehouse, where Dr. Cordero's property was allegedly also found.
10. Dr. Cordero wrote on September 27, 2002, to the bankruptcy judge supervising the liquidation case, namely the Hon. John C. Ninfo, II. He complained that the Trustee, among other things, did not notify him of the liquidation of Premier, did not search for, let alone find, other Premier assets, such as Dr. Cordero's property under an income-generating storage contract, abandoned Premier assets found by others at Mr. Pfuntner's warehouse, enjoined him not to contact his office despite both Mr. Pfuntner' refusal to release the property to Dr. Cordero and referring him to the Trustee, and to top it off, had made false and defamatory statements about Dr. Cordero and published them to other parties. Dr. Cordero applied for the Judge to review the Trustee's performance and fitness to serve as trustee.
11. Trustee Gordon wrote a responsive letter, dated October 1, 2002, to the Judge in which he cast aspersions on Dr. Cordero's conduct, character, and competence so as to belittle him and persuade the Court as well as his supervisor, Assistant United States Trustee Kathleen Dunivin Schmitt, to whom he copied the letter, that "it is not necessary for the Court to take any action on Dr. Cordero's application" for a review of his performance and fitness as trustee.
12. Judge Ninfo referred the Application to Assistant Schmitt. Dr. Cordero sent directly to her a Rejoinder and Application for a Determination. The matter is now under review at the Executive Office for United States Trustees.
13. A few days later, Mr. Pfuntner filed the Adversary Proceedings 02-2230, in which he named

Trustee Gordon, other parties, and Dr. Cordero as defendants. Dr. Cordero cross-claimed against the Trustee for defamation and negligent and reckless performance as trustee. The Trustee moved to have those cross-claims dismissed. He invoked no better grounds than that even if he defamed Dr. Cordero, he had a privilege under New York State law that immunized him from a defamation lawsuit –is this an ethical defense for a trustee, 'I did it and you can't touch me!'?-, and that looking for Dr. Cordero's property was out of the scope of his duties.

14. Judge Ninfo granted the motion 1) even though discovery in the Adversary Proceeding had not even started; 2) despite the fact that the litigation of Mr. Pfuntner's claims as well as of other counterclaims, cross-claims, and third party claims would necessarily bring into question Trustee Gordon's performance; 3) notwithstanding the resulting impairment or preclusion while still at the starting line of Dr. Cordero's defenses to Mr. Pfuntner's claims; 4) disregarding the submission to the court by Trustee Gordon, an officer of the court and federal appointee, of false statements to obtain the personal benefit of avoiding a review of his performance and fitness as trustee; and 5) and not only without support in, but even contrary to, the facts and the evidence presented by Dr. Cordero, which went unchallenged by the Trustee himself.
15. At the hearing of the motion to dismiss and after granting it, Judge Ninfo told Dr. Cordero that he could appeal if he wanted. Dr. Cordero, who is appearing pro se and has never practiced as a lawyer, asked how he would obtain the papers necessary to file an appeal. Judge Ninfo said that Dr. Cordero would receive all the instructions later on. Dr. Cordero reasonably relied thereon since he had already received other instructions, such as the local rules and those for preparing third party summons as well as third party summons forms. Moreover, shortly after the hearing he also received the instructions for taking default judgment and for choosing among pre-trial options.
16. The order of dismissal was entered on December 30, 2002, and was mailed from Rochester to Dr. Cordero in New York City, where he lives. However, there were no instructions or forms of appeal accompanying the notice of the order. Therefore, Dr. Cordero had to call the Bankruptcy Court and asked for those instructions. Case Administrator Karen Tacy remembered that Judge Ninfo had referred to such instructions in open court at the hearing because she was there. She told Dr. Cordero that she thought that what the Judge had meant was appeal forms. Then she said that she would send them to Dr. Cordero by mail since the Bankruptcy Court neither accepts nor sends papers by fax.
17. Upon receipt of the forms, Dr. Cordero worked on them. It should be noted here that Dr.

Cordero is learning from books the intricacies of procedure under the rules applicable nationwide to all United States courts and the local rules adopted in the Western District. He checks and double checks every step and then checks once more in order to comply with all the requirements. Even so, Dr. Cordero mailed the notice of appeal within the required 10 days of the entry of the order, on Thursday, January 9, 2003. It was filed by the clerk of the bankruptcy court on Monday, January 13.

18. Thereupon, Trustee Gordon, filed a motion to dismiss the appeal alleging that the notice had been untimely filed, whereby by exploiting the technicality of the timely mailed-untimely filed gap he tries to avoid facing responsibility in court for his false and defamatory statements and his negligent and reckless performance as a trustee. Will the court let him get away with it?
19. Dr. Cordero would not. On January 27, 2003, he timely moved under Rule 8002(c)(2)for an extension of the time to file his notice of appeal. The hearing of the motion before Judge is scheduled for Wednesday, February 12, 2003.
20. In his Memorandum of Law in Opposition to Cordero's Motion to Extend Time to Appeal, Trustee Gordon unwittingly provides the motive for having handled Premier's liquidation negligently and recklessly: "As the Court is aware, the sum total of compensation to be paid to the Trustee in this case is $60.00." He had no financial incentive to do his job…nor did he have a sense of duty!
21. Yet, it is way too 'untimely' for Trustee Gordon to complain that there is too little money in his job, particularly after having abandoned all Premier assets everywhere. Under §2-2.1. of the United States Trustee Manual, he had the duty to determine that right at the beginning: "the trustee should consider whether sufficient funds will be generated to make a meaningful distribution to creditors, **prior to administering the case as an asset case;**" (emphasis added). Only in Trustee Gordon's mind is it a defense to imply that he has no higher concern than getting paid, and if the money is not there, he will disregard his duties as a trustee and will feel no sense of responsibility toward the creditors and other parties in interest…'may they fend for themselves!'
22. If the law were not sufficient to find that the notice of appeal was not only timely mailed, but also timely filed, would the equities suffice in the eyes of the District Court to use its discretion to ensure that such a person as Trustee Gordon does not wiggle himself from facing responsibility for his acts and attitudes?
23. For a broader background to the Statement of Facts, see the Appendix. [A:#]

II. Consistent & coherent construction of rules on notice of appeal

A. R.8002 allows for valid filing even if mistaken and delayed

24. FRBkrP Rule 8002 bears the heading "Time for Filing Notice of Appeal" and provides thus:

> "Rule 8002(a) Ten-day period
>
> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from."

25. The Rule also makes it clear that the clerk it refers to is the clerk of the bankruptcy court. Thus, the last sentence provides that:

> "Rule 8002(a)…If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted."

26. It also follows from that provision that there is nothing sacrosanct about filing with the bankruptcy clerk within ten days. The filing is not invalid even if the notice of appeal is filed with either of two wrong clerks in either of two wrong courts.

27. Nor is there a practical imperative that commands that the filing be strictly within the ten-day period. Legal uncertainty notwithstanding, parties cannot absolutely rely on checking the docket on the tenth day and seeing no entry of a notice of appeal filed by the clerk. They must still take into account the possibility that the notice may have been entered mistakenly but validly in either of two other courts. What is more, there is no time limit by which they can be absolutely certain, for the Rule does not require of any given party to discover the mistake by a certain time, or transmit the mistakenly filed notice by a certain time, or that the transmitted notice reach the bankruptcy clerk by a certain time, not even that such clerk enter the transmitted notice of appeal on the docket by a certain time. Nor can any party complain if the appellant mistakenly filed his notice with the clerk of the bankruptcy appellate panel, who mistakenly transmitted it to the clerk of the district court, who mistakenly sent it back to the panel clerk, who then transmitted it to the bankruptcy clerk, who mistakenly refused to file it because it mistakenly had the wrong heading for the bankruptcy appellate court or did not reach him within ten days. Whenever the clerk of the bankruptcy court gets it and files it, and if the parties are still checking the docket, then they will finally learn that in fact notice of appeal was given.

28. Does a provision that allows for such delays and so much legal uncertainty for unlimited time convey even the impression that filing within the ten day period is of such paramount importance for the system or the administration of justice that if an appellant, such as Dr. Cordero, timely mails the notice within the period, addressed to the right court, and the right clerk correctly files it but does so when he receives it after the period, the appellant should nevertheless be deprived of his substantial right to appeal? Of course not! That right is all the more substantial here, for it is to appeal from the dismissal of cross-claims before any discovery had taken place in the Adversary Proceeding in which they were brought. It is an appeal for the right to have one's day in court!

B. Rules of Construction of the Rules of Procedure and the Supreme Court

29. A construction of Rule 8002(a) that disregarded timely mailing in order to give precedence to filing within the ten-day period at the expense of the substantial right to appeal would not only be unjustifiable and senseless, but also transgress against the fundamental rule of construction of the Rules of both bankruptcy and civil procedure:

> "FRBkrP Rule 1001. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."
>
> "FRCivP Rule 1001. These rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

30. To construe the ten-day period rule justly one must read it together with the other rules of the FRBkrP and the FRCivP Such a reading is mandated by the Supreme Court of the United States. Precisely in a bankruptcy case, namely, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), the Court stated the following rule of statutory construction: "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." There is such a coherent and consistent scheme of Rules for the construction of what a timely notice of appeal is. It is based on the Rules' plain language.

C. The general rules for computing time applicable to notice of appeal

31. FRBkrP, Part IX is titled General Provisions, and contains rules of general applicability to the other rules. Thus, its rules are applicable to the rules of Part VIII generally, which is titled Appeals to District Court or Bankruptcy Appellate Panel, including Rule 8002 and its ten-day

period for filing a notice of appeal. Consequently, Rule 8002 is subject to the application of Rule 9006, which provides as follows:

> "Rule 9006 Time
>
> (a) Computation
>
> In computing **any period** of time prescribed or allowed by **these rules** or by the Federal **Rules of Civil Procedure** made applicable by these rules, by the **local rules**, by **order of court**, or by **any applicable statute**, the day of the **act, event, or default** from which the designated period of time begins to run shall not be included…." (emphasis added)

32. In fact, the Supreme Court stated so much in its landmark case in the area of timely filing under the Bankruptcy Code, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 13 S.Ct. 1489, 509 U.S. 380, 123 L.Ed.2d 74 (1993): "Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules."

D. R.9006's broad scope of application

33. The plain language of the Rule makes clear its intent to have its method of computing time applied broadly. The Advisory Committee too makes this clear in its Note for subdivision (a): "This rule…governs the time for acts to be done and proceedings to be had in cases under the Code and any litigation arising therein." No doubt, the rule's scope is all acts, including an appealable order and an appeal from it, and the rule's purpose is to explain how to compute the time for such acts.
34. Rule 9006 further provides specific methods for computing time. They include the following:

> "Rule 9006(e) Service of process and service of any paper other than process or of notice by mail is complete on mailing."

35. Dr. Cordero timely mailed his notice of appeal on Thursday, January 9, 2003. Therefore, pursuant to the plain language of Rule 9006(e), his service of notice of appeal was complete on that date.

E. Period of service by mail extended by three days

36. The fact that the notice of appeal arrived at the bankruptcy court and was filed by the clerk of the bankruptcy court on Monday, January 13, does not detract from the timeliness of Dr. Cordero's filing.
37. Indeed, Rule 9006(f) can extend the time for filing the notice of appeal by three days. It

provides thus:

> "Rule 9006(f) When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail…, three days shall be added to the prescribed period."

38. a. The right here in question is that provided under Rule 8001(a) Appeal as of right. The time prescribed by Rule 8002(a) is within ten days of the order appealed from, which in the instant case began to run on December 31, the day after the order of dismissal of the cross-claims was entered in the bankruptcy court. The ten-day period ran until Thursday, January 9, which Appellee Gordon admits to be so.

39. However, the notice of entry was served by the clerk of the bankruptcy court by mail. Consequently, three days were added to the ten-day period for giving notice of appeal. That additional time made Sunday, January 12, the last day for giving such notice. For such a case, the second sentence of Rule 9006(a) provides that:

> "Rule 9006(a)…The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday,…in which event the period runs until the end of the next day which is not one of the aforementioned days."

40. Therefore, Monday, January 13, was the last day for giving notice of appeal, even by mailing it. Four days before that last day Dr. Cordero actually gave notice of appeal by mail, on Thursday, January 9, which is all the more reason to deem his notice timely filed.

F. A clerk can and did serve a notice subject to the three additional days rule

41. a. That a clerk of court can 'serve' a paper generally and that the clerk of the bankruptcy court can 'serve' a notice of entry of order is absolutely indisputable. Rule 9022 states so:

> "Rule 9022 Notice of Judgment or Order
>
> B. Judgment or order of bankruptcy judge.
>
> Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) FRCivP on the contesting parties and on other entities as the court directs"

b. In turn, Rule 5(b) FRCivP provides, among other things, the following:

> "FRCivP Rule 5(b)(2)(B) Mailing a copy to the last known address of the

person served. Service by mail is complete on mailing."

42. a. That the clerk of the bankruptcy court gave Dr. Cordero notice of the entry of the order of dismissal of his cross-claim is undeniable. His very own rubberstamp affixed to the order reads thus:

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

b. Therefore, the clerk served notice of the order of dismissal on Dr. Cordero. By so doing, he triggered the provisions of Rule 9006(f) and extended the prescribed ten-day period for Dr. Cordero to give notice of appeal by three additional days. This allows the court to deem Dr. Cordero's timely mailed notice of appeal to have been timely filed

G. Purpose of R.9006(f) is to compensate for time lost when "served by mail"

43. The applicability of the three additional day rule of subdivision (f) of R.9006 to the ten-day period for filing notice of appeal of R.8002(a) becomes patent in light of the purpose of the subdivision.

44. To begin with, the title of subdivision (f) is Additional time after **service by mail** (emphasis added). Likewise, that phrase in its context reads "after service of a notice or other paper …**served by mail**," (emphasis added). This plain language reasonably indicates that the purpose of subdivision (f) is to compensate a party that must do an act for the time lost because the notice or paper alerting it to the need to act was **"served by mail."** What is at stake is the time that the party should have to act within a prescribed period, not the nature of the event from which the period begins to run.

H. Entry of order can't be coherently and consistently excluded from R.9006(f)

45. Therefore, it would be incorrect to pluck out of context the phrase in Rule 9006(f) "after service of a notice or other paper" to make it mean that the Rule's application is limited to rules providing that their prescribed periods run from service of notice or paper to the exclusion of any other type of event, such as the date of entry of an order.

46. For one thing, the purpose of the broadly worded Rule 9006 is to offer a method for computing "**any** period of time prescribed or allowed", and that regardless of the nature of "the **act, event, or default** from which the designated period of time begins to run." Hence, the entry of the

order of dismissal can mark the beginning of a period subject to the three additional days rule.

47. Only arbitrarily could one exclude from the scope of subdivision (f) the prescribed period of ten days within which to appeal on the grounds that it runs from the entry of the order appealed from. To do so, one would have to disregard the fact that the Rule's plain language makes no such expressed exclusion. But if so, the Supreme Court's requirement that a statutory scheme be construed in a coherent and consistent way would demand that one remove the notice of appeal period be altogether from the scope of the entire Rule 9006, for nowhere in its text does it expressly include periods that run from orders, or the entry of an order, let alone from the entry of an appealable order, not to mention an order to dismiss. It only expressly states "**act, event, or default."**

48. That would be unwarranted by a coherent and consistent reading of Rule 9006. When that rule wants to exclude any Rule from its scope of application, it does so expressly, as in (b)(2), (b)(3), and (c)(2). It should be noted that both (b)(3) and (c)(2) make express reference to Rule 8002 on time for filing notice of appeal. Hence, it would be neither coherent nor consistent to limit the application of Rule 9006 when it expressly provides therefor, and even exclude it altogether from its subdivision (f) when it makes no express reference to it at all. As the Supreme Court observed: "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another;" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994).

49. From this analysis flows the conclusion that Rule 9006 includes everything that it does not exclude expressly. This proposition too is consistent with the statement of the Supreme Court in Pioneer, footnote 4: "The time-computation and time-extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted."

I. Lost time compensated to avoid hardship due to too short a time to prepare

50. The reason why Rule 8002 must be within the scope of the three additional days rule of Rule 9006(f) flows from their purpose and plain language. Thus, the Advisory Committee Note for Rule 9006 (a) states that, "This rule is an adaptation of Rule 6 FRCivP" In turn, Rule 6 carries the following explanatory note that reveals its purpose:

> "FRCivP Rule 6, 1985 Amendment

> Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. **Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so**. (emphasis added)
>
> The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, **parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions**. This **hardship** would be **especially acute in the case of Rules** 50(b) [Renewing Motion for Judgment After Trial; Alternative Motion for New Trial] and (c)(2) [New Trial Motion], 52(b) [on motion for the court to amend its findings], and 59(b), (d), and (e) [on motions for new trial and to alter or amend judgment], **which may not be enlarged** at the discretion of the court.…" (emphasis added)

51. That explanatory note makes obvious the purpose of Rule 9006 of not penalizing parties that cannot file because of factors, such as weather conditions or non-business days, that reduce their time to do so. To that end, its subdivision (f) adds the factor that the notice on the running of a prescribed period has been served by mail, thereby shortening the party's time to prepare. To compensate for the loss time it adds three days.
52. It should now be easy to appreciate how applicable that explanatory note is, given the similarity of the factors mentioned, to Rule 8002 on notice of appeal at issue here. Thus, it expresses particular concern about rules with ten-day periods; with no possibility of enlargement at the court's discretion; yet subject to being reduced to as few as 5 working days; and concerning appeals for new trial or to alter or amend judgment.
53. In the instant case, the notice of the entry of the dismissal order and the notice of appeal had to travel between Rochester and New York City. The appeal instructions promised by the judge were not even accompanying the notice of entry when it arrived on Thursday, January 2, 2003. Yet, it was reasonable for Dr. Cordero to expect to receive these instructions, for others had been sent to him, such as the local rules and those for preparing third party summons, or were sent to him after the hearing, such as those for taking default judgment or for choosing among pre-trial options.
54. Dr. Cordero called the bankruptcy court to inquire about the instructions and forms. However, a

clerk stated that there were no such appeal instructions, only forms, and said that they would be sent by mail since the bankruptcy court neither accepts nor sends papers by fax. Obviously, they are not in a rush to receive or send anything. And for good reason too, since there are absolutely no legal grounds in the FRBkrP or in practical considerations for notice of appeal to be considered always an emergency matter that must be prepared and dashed out even within hours of the receipt of the order to be appealed from.

55. Hence, Dr. Cordero, a pro se appellant filing a notice of appeal for the first time ever, had less than 5 working days before the 10-day period ran out on Thursday, January 9, to prepare and mail the notice. No doubt this constituted the kind of acute hardship that Rule 6 intends to prevent and that Rule 9006(f) lessens by adding three days to the prescribed period. How much more of an unreasonable hardship it would have been if Dr. Cordero had had to mail the appeal forms, which in any event he did not yet have, so that they arrived back in Rochester by Thursday the 9th?

56. Consequently, at law and under the circumstances, he should be deemed to have, not only timely mailed, but also timely filed, the notice of appeal. This result derives from the plain language and purpose of the Rules. They allow for a reasonable construction that integrates them into a coherent and consistent scheme. Thus, Rule 9006(f), quoted above, can now be restated as follows:

> *"Rule 9006(f) When there is a right to appeal or requirement to file notice of appeal or undertake some proceedings within a prescribed period of 10 days after service of a notice of entry of an order dismissing cross-claims or other paper and the notice or paper other than process is served by mail by the clerk of the bankruptcy clerk from Rochester to New York City on December 30…, three days shall be added to the prescribed period ending on January 9 to extend it until January 12, which if a Sunday, the period shall be extended until Monday, January 13, so as to lessen the acute hardship of too short a time to prepare experienced by a pro se appellant and not penalize his substantial right to appeal for a new trial or judgment."*

57. If thanks to the application of Rule 9006(f)'s three additional days rule to Rule 8002(a)'s ten-day period it would have been timely for notice of appeal to be mailed by Dr. Cordero even on the 13th, then it was all the more timely for the notice to be both timely mailed four days earlier on Thursday the 9th and received and filed by the clerk of the bankruptcy court on the 13th.

J. R. 8002(a) provides for notice to be deemed filed prior to when received

58. It is totally consistent and coherent with Rule 8002(a) to deem a notice of appeal filed in the bankruptcy court on a date prior to the date of actual filing by the bankruptcy clerk. The plain language of the Rule provides therefor:

> "Rule 8002(a)…If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted."

59. Therefore, it is totally coherent and consistent with itself to construe its requirement:

> "Rule 8002(a) Ten-day period
> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from;"

coherently and consistently with the requirement:

> "Rule 9006(e) Time of service
> Service…of any paper…or of notice by mail is complete on mailing;"

to mean that the date of mailing of a notice of appeal can be deemed the date of filing by the clerk of the bankruptcy court.

K. Notice to be filed in the bankruptcy court, not the district court or BAP

60. If the rule in the FRBkrP is that service is complete on mailing and filing can be deemed to occur on a date prior to the actual filing date, then where does the notion come from that a notice must be filed strictly within the period for filing? It comes from a provision found in Rule 8008(a)

> "Rule 8008(a) Papers required or permitted to be filed with **the clerk of the district court or the clerk of the bankruptcy appellate panel** may be filed by mail addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs are deemed filed on the day of mailing." (emphasis added)

61. The phrase "by mail addressed to the clerk" means unequivocally "by mail addressed to the 'clerk of the district court or the clerk of the bankruptcy appellate panel'" This is so because, as seen in the quote above, the very sentence that contains that phrase ends thus: "except that briefs are deemed filed on the day of mailing." Those briefs are only filed with either the clerk of the

district court or the clerk of the bankruptcy appellate panel, as follows from Rule 8009 on filing appellate briefs in a district court or with a bankruptcy appellate panel.

62. Wait a moment! This filed-upon-receipt provision applies to papers filed in district court and with the bankruptcy appellate panel. The notice of appeal is neither required nor permitted to be filed with either the clerk of the district court or the clerk of the bankruptcy appellate panel, as follows from the last sentence of Rule 8002(a), quoted above, which considers it a mistake to do so. The filed-upon-receipt provision found in Rule 8008(a) is an exception!

L. Exceptional character of the filed-upon-receipt provision in R.8008(a)

63. Indeed, if it were the general rule of the FRBkrP that the timeliness of a filing was determined by whether the clerk received and docketed a notice or paper within the fixed filing time, then it would be superfluous for Rule 8008(a) to restate the obvious, for how else could it be?
64. The limited usefulness and consequent narrow scope of application of the filed-upon-receipt provision in Rule 8008(a) is underscored by the fact that it contains an exception within itself in order to allow the application of the general rule. As quoted above, it provides thus: "except that briefs are deemed filed on the day of mailing."
65. No doubt, by its own plain language, the filed-upon-receipt provision is an exception, limited in scope to the filing of only some papers and only in district court or with the bankruptcy appellate panel. As such, it must be construed restrictively and applied only when a Rule expressly calls therefor; otherwise, the exception would gut the general rule.
66. What is more, the provision's exception is further weakened by scooping out of it another exception. Thus, for Rule 8008 as a whole, rather than just that particular provision in it, the Advisory Committee Notes state that, "This rule is an adaptation of FRAppP Rule 25." Appellate Rule 25 further narrows the exception with another exception that applies the complete-on-mailing general rule to appendixes. Its Notes provide the rationale that supports the rule of general applicability: "An exception is made in the case of briefs **and appendices** in order to afford the parties the maximum time for their preparation," (emphasis added).

M. Reasons for limiting scope of exceptional filed-upon-receipt provision

67. There is the rationale for the provision's limited scope: It reduces the necessary time for adequate research and writing as well as for sound decision making. All that for no good reason at all. Hasty

filings under the duress of time constraints unjustified by law or practice only lead to rushing out appeals that are ill considered by both counsel and client and that end up clogging the judicial system. That can certainly not be the intent of the judges that administer that system or of the drafters in the Judicial Conference and Advisory Committee, let alone Congress, which would have to provide more funds to run a system overwhelmed by appeals filed just to beat the clock.

68. Moreover the exceptional filed-upon-receipt provision reduces the margin of timeliness by interjecting into the filing process an intermediary, namely the U.S. Postal Service or a commercial carrier, which following its own steps and timetable under its own internal and external constraints, finally delivers another of millions of packages to the clerk of court, who then must get to it and file it.

69. Because of its narrower margin of timeliness, the exceptional provision forces the filing party to avoid guessing and increase the safety margin by mailing the papers well ahead of time; otherwise, that party must resort to mailing them by overnight or express mail, which is much more costly and as such, contrary to the stated aim of the both FRBkrP Rule 1001 and FRCivP Rule 1 that their 'rules must be construed and administered "to secure the just, speedy, and **inexpensive** determination of every action" and proceeding;' (emphasis added).

70. Conversely, maximum time for preparing briefs and appendices allows for better research and writing as well as a more reflective process. This not only benefits the filing party, but also the court and the opposing party. No doubt, better prepared legal papers result in a greater good for the administration of the judicial system and the dispensation of justice. This greater good should be sought at every opportunity through the application of the complete-on-mailing general rule to serving and filing papers as well as by curing any harmless error in order to achieve such greater good.

N. General rule for R.8002 v. exception in R.8008(a)

71. If the exceptional filed-upon-receipt provision is to be read coherently and consistently with the rest of the Rules, then by contrast to it the general rule must be that, 'A notice or other paper required or permitted to be filed with the clerk of the **bankruptcy court** may be filed by mail addressed to the bankruptcy clerk and is deemed filed on mailing." This conclusion is coherent and consistent with both the FRBkrP –Rules 7005 and 9006(e)- and the FRCivP –Rule 5(b)(2)(B), made applicable to adversary proceedings by Rule 7005- which provide that service

is complete on mailing.

72. Hence, the exceptional filed-upon-receipt provision in Rule 8008(a) does not apply to the filing of the notice of appeal, which is provided for under Rules 8001 and 8002, which in turn are governed by the broad Rule 9006 and its computation of time rules of general applicability, as stated in Pioneer.

73. That's it! The period for filing the notice of appeal can be added three days because the notice is to be filed in the bankruptcy court. That is the general rule of the Bankruptcy Rules generally intended for application in bankruptcy court. By contrast, when a paper is to be filed in a district court or with a bankruptcy appellate panel an exceptional provision is stated expressly to require filing within the fixed prescribed period, but only in some cases.

III. Equities of curing harmless error to preserve substantial right and prevent prejudice

A. The court's power and the parties' rights

74. It is not as an exception, but rather under a rule, set out in FRBkrP Rule 9005, that the court has ample power to cure any omission. What is more, under FRCivP Rule 61 it even has the obligation to disregard any error that does not affect the parties' substantial rights:

> "FRBkrP Rule 9005 Harmless Error
>
> Rule 61 FRCivP applies in cases under the Code. When appropriate, the court may order the correction of any error or defect or the cure of any omission which does not affect substantial error."
>
> "FRCivP Rule 61. Harmless Error
>
> The court at every stage of the proceeding **must** disregard any error or defect in the proceeding which does not affect the substantial rights of the parties;" (emphasis added).

75. The substantial rights at stake in the instant case are the following:

    a. For Dr. Cordero it is the substantial right to appeal for his day in court after he, as a pro se appellant, reasonably relied on the plain language of, and substantially complied with, both the bankruptcy and civil procedure rules.

    b. For Appellee Gordon it is the right to avoid legal action by claiming that the notice of appeal was untimely filed on Monday, January 13, although timely mailed on Thursday, January 9, 2003.

B. Giving priority to a substantial right over procedure

76. The right for a person to have his day in court so that he may seek justice and the court may dispense justice constitutes a substantial right that the court must safeguard through any coherent and consistent interpretation of the law.
77. By contrast, the procedure for a court to be seized of an action so that it may resolve it is just that, a procedure. The fact that an act, such as filing, triggers a provision that confers jurisdiction for a court to hear a case does not by itself determine how the period for undertaking such act is to be computed. Therefore, the complete-on-mailing rule can be applied to the provision for giving notice of appeal.
78. Calling a filing provision jurisdictional does not confer upon it such greater weight that it should tip the scale of justice in its favor when weighed on a balancing test against the substantial right to resort to that court. To reject this proposition would mean that the mechanism for perfecting an appeal takes precedence over the right to appeal itself. This should be held unacceptable, for it inverts the importance of rights relative to the procedure to secure them by turning observance of the procedure for running the courts into the objective of the system of justice while making the people and their right to have their claims resolved by those courts subservient to the procedure. Such a result defies reason and frustrates the courts' mission of securing justice. The right to take an appeal, particularly in a case like this, where the notice was mailed timely, should have priority over the right to be informed about it.
79. While Dr. Cordero is reasonable enough not to propose that the rules of procedure be dispensed with when a litigant appears pro se, he respectfully submits that if substantive law recognizes the right of any person to assert a claim in court by himself, then the rules of procedure should be interpreted so as to allow the effective exercise of that right.

C. Weighing the relative prejudice sustained by the parties

80. On a balancing test the prejudice to be redressed or prevented is this:
    a. that sustained by Dr. Cordero through Appellee Gordon's defamatory statements and his negligent and reckless performance as trustee, further aggravated by the error of the bankruptcy court, which dismissed Dr. Cordero's cross-claims even before any discovery had taken place in the Adversary Proceeding no. 02-2230, commenced by Plaintiff James Pfuntner, in which the latter as well as other defendants, cross-

defendants, and third-party defendants will be able to take discovery of, and assert, the same or similar defenses and claims against Appellee Gordon, who will have to face them anyway, while Dr. Cordero will have to confront those parties after having been stripped at the outset of his defenses and claims.

b. that which Appellee Gordon could sustain by losing the opportunity to exploit the technicality of the timely mailed-untimely filed gap and thereby having to stand in court to face the legal consequences of his wrongdoing.

D. Appellee Gordon's grab with Dirty Hands at promptitude from others

81. For Appellee Gordon that would not be a prejudice, but rather his deserts. As long ago as in his letter of October 1, 2002 to Judge Ninfo, he stated that he would "soon be issuing a No Distribution Report"…how else could it be since he abandoned the Debtor's assets in the Jefferson–Henrietta warehouse, failed to look in the Debtor's business files to find any others elsewhere, and when third parties did find others, abandoned them too. Since the Appellee had already washed his hands of liquidating the Debtor, whether the notice of appeal was timely mailed on January 9th or timely filed on the 13th has absolutely no prejudicial impact on his work as trustee. He is attacking the filing's timeliness just for the personal benefit of escaping responsibility in court for his wrongdoing.

82. In so doing, Appellee Gordon has the cheek to demand of both Dr. Cordero and the courts that he be given notice with promptitude about whether he has to face an appeal. Yet, he has shown such contempt for promptitude when it was his duty to perform promptly on behalf of others.

83. Indeed, although Appellee Gordon was appointed Chapter 7 trustee of Debtor storage company Premier Van Lines in December 2001, and had access to all its business files, he never contacted Dr. Cordero, even though Dr. Cordero's storage contract, still in force, with the Debtor was an income-generating asset of the estate. Therefore, Appellee Gordon could not properly liquidate the Debtor without adequately disposing of that contract and, for that matter, of all similar still income-generating contracts between the Debtor and its customers.

84. Likewise, after months of searching for his stored property Dr. Cordero was referred to Trustee Gordon. He had to call the Trustee several times in the first part of May 2002 before the Trustee finally took his call, the first and only time ever that the Trustee deigned to talk to party-in-interest Dr. Cordero. Although the Trustee agreed to send Dr. Cordero a letter stating the details of the

bankruptcy and current status of the storage company, he failed to do so. Dr. Cordero had to write to Trustee Gordon to remind him of the letter and request that he send it. But not even that was enough for the Trustee to respond. So Dr. Cordero had to call him again to ask whether he would answer the letter. Trustee Gordon neither took the call nor returned it. It was only by a cover letter dated June 10, 2002, that the Trustee answered to state the obvious, that is, that he was sending attached thereto a copy of his April 16 letter to the landlord of the warehouse used by the Debtor, followed by a short, I-can't-care-less,-fend-for-yourself: "I suggest that you retain counsel to investigate what has happened to your property." For that useless response, Dr. Cordero was made to wait a month. If after working on the case for six months that was all the Trustee had to say, how much had he worked?

85. That letter, dated April 16, 2002, was more incriminating of Trustee Gordon's tardiness than responsive to Dr. Cordero's request, for it simply stated that he would "not be renting or controlling the storage units or any of the assets at the Jefferson Road location [of the warehouse used by the Debtor]. Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank [the lienholder]." It took four months since his appointment as trustee for Trustee Gordon to inform a key party in interest, the landlord in possession of the Debtor's assets, that he, the trustee, was washing his hands of those assets! What was Trustee Gordon expecting the landlord to do in the meantime with the Debtor's assets in his warehouse, since the Debtor had disappeared long ago? Did the Trustee take prompt action to secure those assets?

86. When other parties affected by the bankruptcy kept referring Dr. Cordero back to Trustee Gordon, Dr. Cordero faxed him a letter on August 26, 2002. There was no feedback. So Dr. Cordero had to call Trustee Gordon's office. But the Trustee would neither take nor return his calls, even though Dr. Cordero left messages on his answering machine and with his secretary. When the Trustee finally responded, it was almost a month later in a letter dated September 23, 2002, where he not only made defamatory statements that he published to other parties, but also issued an injunction to wash his hands of Dr. Cordero by stating this:

> "Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank

> which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again."

87. Trustee Gordon has neither justification at law nor merits in equity to demand a degree of promptitude that he never showed others although he has an official duty to communicate with them in order to attain his trustee's "primary goals of ensuring the prompt, competent, and complete administration of chapter 7 cases," as provided under United States Trustee Manual, Chapter 7 Case Administration §2.1.1, adopted by the Department of Justice and its United States Trustee Program.
88. Wash he may, but to no avail, for tardiness and unresponsiveness are the dirt still stuck to Appellee Gordon's hands. He only affronts both Dr. Cordero and the district court when he comes into it with such dirty hands to ask that the appeal from the dismissal of the cross-claims against him be dismissed because notice of the appeal, instead of being filed by the clerk of the bankruptcy court on Thursday, January 9, was filed two business days later, on Monday, January 13, 2003. He is outrageous!

E. Weighing the equities of excusable neglect for achieving substantial justice

89. If Dr. Cordero, despite his good faith best efforts to comply with the Rules, made a mistake in the interpretation of those for filing a timely notice of appeal, it was only through excusable neglect. The Supreme Court has concluded that "determining what sorts of neglect will be considered 'excusable,'…is at bottom an equitable [determination], taking account of all relevant circumstances surrounding the party's omission;" *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498.
90. The Court identified some factors to guide this determination:
    1. "the danger of prejudice to the debtor": here the Debtor, whose assets Trustee Gordon already abandoned, would not be affected at all if the Trustee's motion to dismiss is denied and he is required to answer in court for his defamatory statements about Dr. Cordero and untruthful submissions to the court as well as his negligent and reckless performance as trustee, particularly since the Trustee will in any event have to defend against other parties in Adversary Proceeding 02-2230;
    2. "the length of the delay and its potential impact on judicial proceedings": if the notice of appeal is found subject to the application of the general rules of complete-on-mailing and three additional days under Rule 9006(e) and (f), Dr. Cordero's timely mailing was

timely filed and there was no delay; otherwise, there was a 4-day filing delay; which neither had nor will have any impact on the bankruptcy case or the Adversary Proceeding;

3. "the reason for the delay, including whether it was within the reasonable control of the movant": Dr. Cordero reasonably relied on the plain language of the Rules and their coherent and consistent construction; and just as he had received other instructions and forms, he reasonably expected to receive those for filing appeals that Judge Ninfo had said at the hearing would be sent to him with the order of dismissal; but there were no instructions and the forms were sent by mail, all of which was beyond his control;
4. "whether the movant acted in good faith": Dr. Cordero, a pro se appellant, exercised due diligence in following the Rules and as a matter of fact did mail the notice of appeal timely; if he somehow failed to meet the timely filing requirement, it was in spite of his best efforts.

91. *In re Pioneer* the Court stated that "erecting a rigid barrier against late filings attributable in any degree to the movant's negligence…is irreconcilable with our cases assigning a more flexible meaning to "excusable neglect"…[which] is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant."
92. In light of a) a consistent and coherent construction of the rules on notice of appeal, b) the court's obligation under the Rules to safeguard substantial rights by curing harmless error, and c) the equities of the situation where a pro se Appellant timely mailed the notice and an Appellee is seeking with dirty hands to fetch a technicality to escape facing the consequences of having wronged others, Dr. Cordero respectfully submits that the court should deny the motion to dismiss and allow Dr. Cordero to have his day in court, for "refusal to take such action appears to the court inconsistent with substantial justice," FRCivP Rule 61.

IV. Order sought

93. Appellant respectfully requests that the district court:
    a) find that the notice of appeal was timely given by Appellant Dr. Cordero and filed by the bankruptcy court clerk;
    b) deny Appellee Gordon's motion to dismiss the appeal;
    c) in the event of denying the motion and requiring an appellate brief, extend the period

under Rule 8009(a)(1) for Dr. Cordero to serve and file it because by the time he receives the notice of the order and considering how early thereafter he would have to mail it, he would have fewer than 10 days to research and write the brief, which he, a pro se appellant, has never written before, so that it would take him a considerable amount of time and effort to accomplish that task adequately;

d) in the event of requiring oral argument, allow Dr. Cordero to present his arguments by phone given the hardship in terms of cost and time that requiring his appearance in person would cause;

e) in the event of granting the motion to dismiss, order the clerk of the Bankruptcy Court for the Western District of New York, Paul R. Warren, to refund to Dr. Cordero the $105 fee for filing the appeal, for if the clerk knew that the notice was untimely, he could not take the money, and if he did not know, although he is a lawyer specialized in applying day in and day out the filing rules of the FRBkrP, why should Dr. Cordero, a pro se appellant, be held to a higher standard?; and order that the fee be applied toward the fee for filing an appeal to the Court of Appeals for the 2nd Circuit; and

f) award Dr. Cordero reasonable attorney's fees and the reimbursement of all expenses that he may incur concomitant with handling this motion hundreds of miles from his home, together with such other relief as may seem just and proper.

V. Table of Exhibits

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

10) Dr. **Cordero**'s letter of **September 27**, 2002, **to** Trustee **Gordon** .....[A:2]

11) Trustee **Gordon**'s letter of **October 1**, 2002, **to** Judge **Ninfo** and others .....[A:19]

12) Judge **Ninfo**'s order, entered on **December 30**, 2002, to **dismiss cross-claim** against Trustee Gordon.....[A:151]

Certification of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that at the same time I mailed to the District Court my brief in opposition to Appellee Kenneth Gordon's motion to dismiss my appeal from the Bankruptcy Court for the Western District of New York, I also mailed copies thereof on the following parties:

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Dated: February 12, 2003

Appellant Dr. Richard Cordero

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Attorneys at Law

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Facsimile (585) 244-1085

February 25, 2003

Honorable David G. Larimer
United States District Court
1360 U.S. Courthouse
100 State Street
Rochester, New York 14614

RE: Motion to Dismiss Appeal
Cordero v. Gordon
03-CV-6021L

Dear Judge Larimer:

Enclosed please find my prior brief to Bankruptcy Court regarding the untimeliness of the Notice of Appeal and the Order Denying Dr. Cordero's Motion to Extend Time. I submit the enclosed regarding my pending motion to dismiss Dr. Cordero's appeal.

Respectfully submitted,

Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem
Enclosures

p.c. Dr. Richard Cordero

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD CORDERO,

Appellant,

v.

KENNETH W. GORDON, ESQ.,

Appellee.

DECISION AND ORDER

03-CV-6021L

Richard Cordero ("Cordero") appeals from an order of United States Bankruptcy Judge John C. Ninfo, II, entered December 30, 2002. Cordero filed a notice of appeal on January 13, 2003.

The Trustee-Appellee moved to dismiss the appeal by Cordero on the grounds that it is untimely, having been filed more than ten days after entry of the order appealed from (Dkt. #2). Appellant, Cordero, submitted a brief in opposition to the motion to dismiss (Dkt. #6).

The motion to dismiss is granted. Rule 8002(a) of the Federal Rules of Bankruptcy Procedure provides that a "notice of appeal shall be filed with the clerk within 10 days of the date of entry of the judgment, order, or decree appealed from." Cordero's notice of appeal was therefore filed three days too late.

There are no other provisions in the Bankruptcy Rules that will excuse this untimeliness. Rule 8002(c) provides that "[t]he *bankruptcy* judge may extend the time for filing the notice of appeal" in certain circumstances (emphasis added), but it gives the district court no power to extend the ten-day period of subsection (a). *See In re Bond*, 254 F.3d 669, 675 n. 3 (7th Cir. 2001) (even if appellant had requested extension of time from district court, she would have been in

#7

error, since Rule 8002(c) only allows the bankruptcy court to grant extensions of time for filing notice of appeal). In addition, Cordero did not move for an extension in the bankruptcy court within the time for doing so under subsection (c), so that provision could not apply in any event.

Rule 9006, dealing with computation of prescribed time periods, also does not help Cordero. First, although there were four weekend days and one federal holiday (New Year's Day) in the period between the entry of Judge Ninfo's order and the time that Cordero filed his notice of appeal, those days were not excluded from the ten-day period of Rule 8002(a). Rule 9006(a) states that Saturdays, Sundays, and legal holidays are excluded from computation only "[w]hen the period of time prescribed or allowed is less than 8 days." Since Rule 8002(a) sets forth a ten-day period, this provision of Rule 9006(a) is inapplicable.[1] *Williams v. EMC Mortgage Corp.*, 216 F.3d 1295, 1297 (11th Cir. 2000).

Rule 9006(b) also provides for enlargement of prescribed time periods in certain circumstances, but it expressly states that "[t]he court may enlarge the time for taking action under Rule[] ... 8002 ... only to the extent and under the conditions stated in [that] rule[]." As stated, Cordero failed to meet the conditions for obtaining an extension of time under Rule 8002.

Subsection (f) of Rule 9006 provides for an automatic three-day extension in certain cases, but that provision applies only when a time period begins running from the date of service of an order or judgment. The ten-day period in Rule 8002(a) for appealing an order of the bankruptcy court is not such a period, however, since it begins to run from the time of *entry* of the judgment, *not* service. *See In re Arbuckle*, 988 F.2d 29, 31 (5th Cir. 1993).

Finally, the fact that Cordero may have mailed the notice of appeal before the ten days had

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[1]I also note that Rule 9006(a) states that if the last day of a prescribed time period falls on a Saturday, a Sunday, or a legal holiday, 'the period runs until the end of the next day which is not one of the aforementioned days." Here, the ten-day period of Rule 8002(a) expired on Tuesday, January 10, which was not a holiday.

expired is inconsequential. "[A] notice of appeal is filed as of the date it is actually received [by the court], not as of the date it is mailed." *Id.* (quoting *Matter of Robinson*, 640 F.2d 737, 738 (5th Cir. 1981)). Cordero's notice of appeal was received and filed by the court thirteen days after the entry of the bankruptcy court's order, and it is therefore untimely.

CONCLUSION

The Trustee's motion to dismiss the appeal (Docket #2) is granted, and the appeal is dismissed.

IT IS SO ORDERED.

David G. Larimer

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 12, 2003.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC., Debtor — Chapter 7 bankruptcy case no. 01-20692

JAMES PFUNTNER, Plaintiff — Adversary proceeding no. 02-2230

-vs-

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

Defendants

RICHARD CORDERO, Third party plaintiff

-vs-

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

Third party defendants

RICHARD CORDERO, Appellant — case no. 03cv6021L

-vs-

KENNETH W. GORDON, Appellee

NOTICE OF MOTION FOR REHEARING OF GRANT OF TRUSTEE'S MOTION TO DISMISS NOTICE OF APPEAL

Madam or Sir,

PLEASE TAKE NOTICE, that Dr. Richard Cordero, pro se appellant, will move this Court at 1550 United States Courthouse on 100 State Street, Rochester, New York, 14614, at _____on _____, 2003, pursuant to Rules 8015 and 9026 of the Federal Rules of Bankruptcy Procedure for a rehearing concerning its grant of Trustee Kenneth Gordon's motion to dismiss Dr. Cordero's appeal from the bankruptcy court's dismissal of the cross-claims against the Trustee.

Dated: March 20, 2003

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

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

Affirmation of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that I have mailed to the following parties a copy of my notice of motion for a rehearing by the District Court concerning its grant of Trustee Kenneth Gordon's motion to dismiss my appeal from the bankruptcy court's dismissal of my cross-claims against him:

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Dated: March 20, 2003

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Dr. Richard Cordero
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re PREMIER VAN LINES, INC.,
Debtor

Chapter 7 bankruptcy
case no. 01-20692

JAMES PFUNTNER,
Plaintiff

-vs-

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

Adversary proceeding
no. 02-2230

RICHARD CORDERO,
Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO, and JEFFERSON HENRIETTA ASSOCIATES,
Third party defendants

RICHARD CORDERO,
Appellant

-vs-

KENNETH W. GORDON,
Appellee

case no. 03cv6021L

CORDERO'S BRIEF IN SUPPORT OF MOTION FOR REHEARING OF GRANT OF TRUSTEE'S MOTION TO DISMISS APPEAL

Dr. Richard Cordero affirms under penalty of perjury the following:

1. Dr. Cordero, pro se appellant, moves under Rules 8015 of the Federal Rules of Bankruptcy Procedure (FRBkrP) for a rehearing of the District Court's grant of Appellee Kenneth Gordon' motion to dismiss his appeal from the bankruptcy court's dismissal of the cross-claims against the Trustee on grounds that the District Court failed to take into account material factual, legal, and equitable issues raised in Dr. Cordero's brief in opposition dated February 12, 2003.

2. Dr. Cordero also invokes FRBkrP Rule 9026 Objections Unnecessary, which makes applicable Rule 46 of the Federal Rules of Civil Procedure –FRCivP- so as to "make[ ] known to the court the action which [Dr. Cordero] desires the court to take or [his] objection to the action of the court and the grounds therefor."

3. The District Court failed to consider, let alone exercise, its equitable and discretionary powers to achieve its first and ultimate objective of dispensing justice by upholding the superiority of Appellant Dr. Cordero's substantial right to have his day in court to seek redress, as oppose to allowing Appellee Gordon take advantage of the technicality of a timely mailed-untimely filed gap to avoid having to face responsibility in court for having defamed Dr. Cordero and performed negligently and recklessly as trustee.

4. In so doing, the District Court also failed to give any weight to the fact that Dr. Cordero is a pro se litigant and that toward such class of litigants it has a duty to interpret procedural rules so as to make effective in practice the right to appear in court.

5. The District Court did not give any consideration to the statement of the Supreme Court in its landmark case in the area of timely filing under the Bankruptcy Code, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 13 S.Ct. 1489, 509 U.S. 380, 123 L.Ed.2d 74 (1993), that "Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules."

6. Nor did it consider the Supreme Court in another bankruptcy case, namely, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), where the Court stated the rule of statutory construction that "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."

7. Had the District Court considered these statements, it could have found that the Bankruptcy Code does have a scheme for computation of time which is based on the general applicability of Rule 9006(e) and (f) to all other time provisions, including Rule 8002. Such a comprehensive scheme, as laid out in pages 7 et seq. of Dr. Cordero's brief in opposition, cannot reasonably be defeated by plucking out of Rule 9006(f) the phrase "a prescribed period after service of a notice" to have it mean that it applies only to provisions concerning time with

reference to service rather than to filing. Had the Code and the Rules wanted to make that distinction, it would have done so explicitly, as it did in the particular case of Rule 8008(a).

8. Moreover, the meaningful phrase of Rule 9006(f) is not just "a prescribed period after service of a notice," but rather it must be completed with its phrase "the notice or paper…**is served by mail.**" When both phrases are read as part of a whole, the meaning of the Rule becomes evident: It is intended to compensate for time wasted while the notice or paper is in transit in the mail. Thus, if the notice or paper is delivered by hand, there is no need for the three additional days and the Rule does not apply. By the same token, those that cannot file papers by hand because, as Dr. Cordero, live hundreds of miles away from the filing office, should not be penalized and forced to rush the preparation of their papers and scramble to mail them by costly express mail.

9. The District Court also preferred a mechanical application of rules rather than a just one that is not only intended to secure the ultimate objective of the courts, which is to dispense justice, but that is also mandated by FRBkrP Rule 1001 itself, which provides: "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."

10. It can hardly be just to deny his day in court to

    1) a pro se litigant,

    2) who made such a good faith effort to comply with the rules that he did mail the notice of appeal timely,

    3) after making an enormous effort to learn and reasonably construe the applicable Rules,

    4) in order to appeal from the baffling dismissal by the bankruptcy court of his cross-claims even before any disclosure or discovery whatsoever had taken place,

    5) just as the court ignored the false statements that the Trustee submitted to it in an effort to avoid a review of his performance and fitness to serve as trustee for the Debtor in this Adversary Proceeding,

    6) while the court allows other parties to assert the same or similar claims and defenses

7) in the context of this baffling case where the court has required only Dr. Cordero to take steps toward discovery, to wit, the inspection of his property, but not even from the Plaintiff, who would reasonably be expected to establish his claims by taking steps toward the same discovery.

11. Indeed, the pertinence to this motion of this issue of the inspection of Dr. Cordero's property and the circumstance surrounding it becomes apparent in Dr. Cordero's accompanying motion for a rehearing of the District Court's adoption of the bankruptcy court's recommendation to deny his application for default judgment against Mr. David Palmer. These two motions read together provide a picture marred with blotches of troubling questions. They warrant that the claims and applications put forward by Dr. Cordero be allowed to come to court so that some answers, and perhaps some justice, may emerge from this case.

Relief sought

12. Therefore, Dr. Cordero respectfully requests that the District Court:

1) take notice of his objection to the narrow grounds on which it granted Trustee Gordon's motion to dismiss his appeal from the bankruptcy court's order dismissing his cross-claims against the Trustee;

2) take into consideration the broader equitable, factual, and legal aspects of his brief in opposition to such motion;

3) vacate its order granting that motion and allow the appeal to go forward;

4) in the event of denying this motion, certify for appeal to the Court of Appeals for the Second Circuit the issue of the applicability of Rule 9006(e) and (f) to Rule 8002 and the equitable and factual grounds raised in support of allowing Dr. Cordero to bring his cross-claims to court on appeal.

Dated: March 20, 2003

Dr. Richard Cordero

59 Crescent Street
Brooklyn, NY 11208-1515

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

Affirmation of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that I have mailed to the following parties a copy of my notice of motion for a rehearing by the District Court concerning its grant of Trustee Kenneth Gordon's motion to dismiss my appeal from the bankruptcy court's dismissal of my cross-claims against him:

Mr. David Palmer
1829 Middle Road
Rush, New York 14543

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
300 Linden Oaks, Suite 220
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Chapter 7 Trustee
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David D. MacKnight, Esq.
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Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
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fax (585) 263-5862

Dated: March 20, 2003

Dr. Richard Cordero

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Gordon & Schaal, LLP
Attorneys at Law

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

March 24, 2003

Honorable David G. Larimer
United States District Court
1360 U.S. Courthouse
100 State Street
Rochester, New York 14614

RE: Notice of Motion for Rehearing of Grant
of Trustee's Motion to Dismiss Appeal
Cordero v. Gordon
03-CV-6021L
Premier Van Lines, Inc.
Case No: 01-20692

Dear Judge Larimer:

Please be advised that I received Dr. Cordero's Motion for Rehearing with respect to the above-referenced matter and will rely on my previous submission.

Respectfully submitted,

Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem

p.c. Dr. Richard Cordero ✓

A:210 Tr Gordon's letter of 3/24/3 to J Larimer stating his reliance on his previous submission re rehearing motion

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD CORDERO,

Appellant,

v.

KENNETH W. GORDON, ESQ.,

Appellee.

DECISION AND ORDER

03-CV-6021L

Richard Cordero moves for a rehearing or reconsideration of this Court's Decision and Order entered March 12, 2003 (Dkt. #7). The motion is in all respects denied.

IT IS SO ORDERED.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 27, 2003.

Dr. Richard Cordero

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

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

COPY

January 23, 2003

Ms. Mary Dianetti [tel. (585) 586-6392]
612 South Lincoln Road
East Rochester, NY 14445

Dear Ms. Dianetti,

As discussed earlier over the phone, I am interested in obtaining from you for the purpose of gathering the record on appeal, a transcript of the hearing held by the Hon. Judge John C. Ninfo, II, on December 18, 2002, of the motion brought by Kenneth Gordon, Esq., Chapter 7 Trustee, in Adversary Proceeding no. 02-2230, to dismiss my cross-claims.

After having checked your notes, you indicated that the transcript would run to some 25 pages, that each page costs $3, and that the total cost would be between $75 and $80. I accept that estimate and would pay that amount upon your transferring the transcript to the clerk of court and your sending me a copy of it.

I thank you in advance for your efforts on my behalf and remain,

yours sincerely,
Dr. Richard Cordero

cc: Clerk of Court

NOTE: I received this transcript on Friday, March 28, 2003.
Page 19 was folded top over bottom and stuck in the left edge between the transparent plastic front cover and page 1. Page 19 is not dated. It is titled “Statement; ”on its back and showing through the transparent plastic, the word “Statement” had been handwritten.

At the back of the transcript is page 18, which is titled “Reporter Certificate.” It is dated March 12, 2003.

Both pages are signed Mary Dianetti.

Dated: March 30, 2003 Dr. Richard Cordero

Dr. Richard Cordero

A:262 Dr. Cordero’s note of 3/30/3 indicating the date of his receipt of the transcript prepared by Reporter Dianetti

S T A T E M E N T

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

FROM: Mary Dianetti
Bankruptcy Court Reporter
612 South Lincoln Road
East Rochester, New York 14445

Amount: $51.00

For transcript of proceedings held on the 18th day of December before The Honorable John C. Ninfo, II, Bankruptcy Court Judge of the Western District of New York, in the matter of PREMIER VAN LINES, Debtor, BK. No. 02-2230.

Thank you.

Mary Dianetti

Mary Dianetti
Bankruptcy Reporter

Statement

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF NEW YORK

----------x

In Re:

Premier Van Lines

Debtor.

----------x

A.P. No. 02-2230

Transcript of Proceedings

Before The Honorable John C. Ninfo, II

United States Bankruptcy Court Judge

Wednesday

December 18, 2002

Rochester, New York

Reported by:

Mary Dianetti

Bankruptcy Court Reporter

612 South Lincoln Road

East Rochester, New York 14445 (585)586-6392

APPEARANCES:

GORDON & SCHAAL
By: Kenneth W. Gordon, Esq.
100 Meridan Centre Boulevard
Rochester, New York 14618

MR. RICHARD CORDERO
59 Crescent Street
Brooklyn, New York 11208-1515
(Appearing telephonically)

KARIN TACY, CLERK
Bankruptcy Court Clerk's Office
Rochester, New York

THE CLERK: This is the matter of Premier Van Lines and Dr. Cordero is on the phone.

THE COURT: Dr. Cordero --

MR. CORDERO: Hello, your Honor.

THE COURT: -- can you hear me?

MR. CORDERO: I can.

THE COURT: Okay. Good. Mr. Gordon just walked in the courtroom.

Do you know anything about the whole status of this adversary proceeding, Mr. Gordon, aside from the fact that you're not necessarily involved in all of it?

MR. GORDON: Well, your Honor --

THE COURT: What happened here? It was filed in September, but it's never gotten to me for some reason in terms of a pretrial.

MR. GORDON: Here's what I know Judge --

THE COURT: Why wasn't this pretried?

MS. TACY: Your Honor, for two reasons. One, there is a third party complaint that was filed.

The answer has been submitted in that, but Ms. Schmitt the Trustee would like to have a pretrial before all the answers come in, so we're scheduled on January 10th, but not with all the parties though.

THE COURT: I understand.

Today this is just the Trustee's motion, Dr. Cordero, to dismiss your cross claim.

MR. CORDERO: Yes.

THE COURT: And your claim appears to be two alleged causes of action; one for defamation and one because you're alleging that the Trustee really didn't do his job properly with respect to the stuff that you have in storage formerly with Premier Van Lines.

I guess your stuff now we know is in Avon; Is that correct?

Or we don't know where it is?

MR. CORDERO: Where my -- it all was -- initially they were at the Jefferson warehouse in Henrietta. They were in there.

The lawyer said that they were there, but the Trustee Gordon abandoned them and the bank, Manufacturer bank bought them from the Trustee and he auctioned the containers and all the equipment to a third party that - Champion Moving, any of those product - containers eventually with my name.

So I asked them -- the owner of Champion Moving, Christopher Carter, to look for them.

He went into the business files that were among those assets in the different warehouse that

he found that the debtor also have all those assets in another warehouse, and they -- now they say they have at least one storage container, but hopefully two storage containers with my name.

And the owner of that warehouse has filed an adversary proceeding and said that he cannot release the goods because the Trustee could sue him.

So right now all my goods are at the Avon warehouse and where -- and at a different type warehouse.

(Unintelligible) the Trustee Gordon had performed his duty there would be -- at least the warehouse in the Jefferson warehouse, there would be -- that were abandoned to the owner of the Jefferson warehouse, there would be what goods were given to the bank and were given to the warehouse, but nothing of that was done.

And before it was (unintelligible) interest and neglect of negating it and debtor cannot possibly liquidate without talking -- the warehouse and they -- that while entrusted to the debtor and to give, against the debtor or debtor --

MR. GORDON: Your Honor, if I may? This was originally filed as a Chapter 11 and was converted to Chapter 7.

THE COURT: Look --

MR. GORDON: Let me, if I could just address what is before the Court, though, which is my motion to dismiss two cross claims, your Honor.

The first of those cross claims is a claim for defamation based upon two letters that I wrote, one to the Court and one to Mr. Cordero.

In those letters I was addressing issues raised by Mr. Cordero in the context of the bankruptcy proceeding. I addressed those issues.

I had tried throughout this proceeding to direct Mr. Cordero to the parties who I believe could help him, those who are actually in possession of what he says are his assets.

He has taken offense at some of the things I have said in my letter.

I believe that the case law I cited to the Court is very clear, that those letters, given that they were in the context of the bankruptcy proceeding, responding to Mr. Cordero's request for information, are absolutely privileged and cannot legally in this state form the basis of a defamation claim.

And so I believe that that particular claim, the defamation claim, even if you take everything in Mr. Cordero's complaint as true would not sustain a

cause of action and should be dismissed.

And secondly is the claim that there has been negligence in the performance of the Trustee's duties and that Mr. Cordero has suffered as a result of it.

I understand Mr. Cordero's frustration that he has not been able to recover his property, but his property is not property of the estate.

At no time was his property either administered by me or abandoned by me. It never became property of the estate.

I think I cited case law to the Court indicating that property stored and held as property is not, in fact, property of the Debtor.

It would certainly have been inappropriate of me to have sold Mr. Cordero's property or administered it in any way.

So that his complaint which is essentially that I have not diligently found his assets and directed him to find his assets, even if you take those allegations as true, they do not form the basis for a cause of action for negligent performance of the Trustee's duties since they're outside the scope of the Trustee's duties.

It is not the duty of the Chapter 7 Trustee

to administer property of a third party. That is essentially the issue before the Court today.

I think I could help shed some light on the other issues, finding Mr. Cordero's property and what we can do to get either Mr. Pfunter or Mr. Dworkin, who are the two landlords involved here, to search their warehouses and find everything that might be Mr. Cordero's, and I also believe it would be beneficial to Mr. Cordero to present to the Court and the parties a list of his assets which he believes were in storage so that those parties can actually look for those assets.

That is the practical answer, Judge, and if you will, my legal position on the motion to dismiss.

MR. CORDERO: I would like to respond.

THE COURT: Fine. Go ahead.

MR. CORDERO: On defamation and the negligence case, first of all, I made a recent -- Trustee Gordon -- it may not be applicable at all for the reason that currently - here are further - Gordon is a appointed scheduled appointee.

He later goes to court, a Federal judge and U.S. Trustee so that it may be that Federal law and particularly, the interpretation of defamation of the person in the case is the controlling thing in this

case.

Rather than New York law, the Federal constitution has been interpreted to provide --

THE COURT: Dr. Cordero, before we even get there, would you tell me what you think was defamatory in these two letters?

Quite frankly, I don't find anything about the letters defamatory at all.

MR. CORDERO: Your Honor, in here is that -- first of all I have asked them, but remains to (unintelligible) but I -- while demands remains that I made more than twenty phone calls to -- just to dispose of the same thing, that you've taken the property of the customers, and that I either -- or that application or that I'm unable to receive that and all that is (unintelligible) taken -- taken as a whole is in danger by -- at my personal and professional competence as to -- explain to you and prove from taking into account of my application for a review of the performance and for his removal as Trustee in this

Those were allegations. There's no way that even if it were applicable the first allegation would privileged.

Trustee Gordon is an officer of the Court who is to make a truthful statement to the Court at all

times, and me.

The Court will -- who will -- nothing to application that I made.

In fact, at this - in the last paragraph of his letter not to take any action on my application, Trustee Gordon, they do to use the Court to my application.

Same thing. Same letter is the letter of December 23rd and the letter of October 1st to other parties, even parties who have nothing to do in either of the cases now in existence. Somebody who at the time wasn't even a party to anything.

THE COURT: Okay. Dr. Cordero, I'm going to cut you off now because you explained all of this stuff in your papers so it's already part of the record.

You're just repeating what basically you have in your papers which is fine.

I'm going to rule on the motion and then I'm going to explain my ruling to you.

First of all, I'm going to grant the Trustee's motion and I'm going to dismiss your cross claims.

First of all, with respect to the defamation,

quite frankly, these are the kind of things that happen all the time, Dr. Cordero, in Bankruptcy court.

They may not happen in your world, but they do happen in Bankruptcy court and no one in the bankruptcy system who would read those two letters - either myself, my clerk, any lawyer in the bankruptcy bankruptcy system - and for one second look at those and say there is anything defamatory about them. defamatory about them.

I mean, it's just not the case, and it's all part really of the Trustee just trying to resolve these issues.

With regard to the negligence issue, let me really try to refocus and reframe you as to what the problem is.

We in the system really do the best job that we can, whether they be clerks in the bankruptcy system, whether they be Judges, whether they be people from the chamber's staff, Trustee, U.S. Trustee and everybody, but we just deal with what we're given.

The real problem here isn't Mr. Gordon. The real problem is the people who ran Premier Van Lines who couldn't run it properly and ended up going bankrupt and who don't have the best records in the world and didn't prepare for their business demise the

way you would have liked them to, and who didn't think as much of their customers as perhaps some others would.

Over the thirty years, Doctor, that I have been doing this I've seen all kinds of business failures and I've seen all kinds of principals in business who performed various services for their demised businesses, depending on what kind of people they are.

I have seen people who have worked for three years after their company went bankrupt to try to sort out records, and these people like yourself, not necessarily in this business, at their own time and expense, working a regular job and doing this at night for three or four nights every month.

Those are the kind of people you run into sometime and other people just walk away from these businesses and just don't care, and there is a third group that walk away because they're just so distraught over it all and they have some emotional problems and they're upset of the loss of their business and failure of their family and that they can't just bring themselves to do anything.

There are all kinds of people in business that go bankrupt and the trustees try to do the best

that they can, given what are horrible records and people that are walking away and don't care anymore, for one reason or another, and the trustees do try to help people like yourself in these kind of situations, but that really is not necessarily their jobs.

Mr. Gordon is right. They have limited duties to try to protect the creditors, to some extent to try to get this resolved, but when there are other parties - parties like secured creditors involved and landlords and Debtors, they really defer to those people also in the hopes that people like you will be taken care of.

It doesn't always happen this way. That appears to be a little bit of a mess, but it does appear that everybody now is focused on it. They brought it to my attention.

This motion for the first time has really brought this meaningfully to my attention. We are going to try to resolve some of these things for people like yourself on January 10th when this pretrial -- we'll try to get the landlords in to do these kind of things. Maybe it should have been done before, but it doesn't always happen that way.

But Mr. Gordon really did from the

correspondence that I read try to tell you early on that your property was not property that he had to administer and that you really need to get yourself an attorney and get somebody involved in Rochester in a proactive way to try to resolve those issues on your behalf.

And the paper work that I read indicated to me he gave you a heads up on that very early on. You may not like that. It may be difficult for you.

It's a little bit like the medical profession today in the medical world. If you go into the hospital, you better have someone proactive on your side to work yourself through the hospital and medical staff and so forth.

If you're going to go and put yourself in the hands of the medical staff, you're going to come up short every time.

Here I think you had warning that you need to get real proactive about this, but not necessarily from a distance.

It would have been nice if you had someone on board here in Rochester for a couple of days really kind of seeing this thing through, but the point I'm making to you is that I don't see anything in the paper work that indicates to me that Mr. Gordon has done

done anything wrong given his duties a a Chapter 7 Trustee.

You may not like it. You may have preferred that something different was done.

It would have been nice if everything just just fell into place with the landlord and M&T Bank and maybe if the Debtor had hung in a little bit longer to try to help out, but it didn't happen, Doctor.

But as I look at those two things, I don't don't see defamation and I don't see the Trustee being negligent so I'm going to dismiss.

MR. CORDERO: Your Honor, may I say something?

THE COURT: Sure.

MR. CORDERO: Your Honor, it seems to me that the Creditors -- this case before -- even they, (unintelligible) the case indicates they have money and the calculation there is no -- that would cover his statement and any - there is no way possible that they -- it -- I cannot understand how the Court would accept that Mr. Gordon refuse in that the state action because -- (unintelligible) therefore, it is premature.

Let discovery find out was -- on part of the Trustee was trying to prevent instead of conveying an

an investigation as Trustee and from being removed as Trustee.

As to the issue of the negligence and we are conducting, nobody said -- I haven't even stated that my belongings were part of the estate of the Debtor. That is not the issue.

The issue is that Trustee Gordon is not performing his duties under the Code and I -- collaboration for where he stated that the Trustee has to be - investigate the financial affairs of the Debtor, he has to take a proactive act, and if he had done that he would he have found that somebody had acted --

THE COURT: Doctor, if the Debtor had done its job and looked out for his customers as it went to demise, you would have had all of that information.

The real problem I'm trying to tell you is not with Mr. Gordon. It's with these companies that fail and don't do everything that they could for their customers and their creditors.

At any rate, I've heard your arguments. Your arguments are fine. They're in your papers. You made your record.

If you wish to appeal this, you're more than welcome to do that, but I made my ruling. I'm

sticking to it.

I'm going to grant the Trustee's motion. So good luck to you, Doctor.

MR. GORDON: Judge, would you like me to submit an order or will you be preparing --

THE COURT: You can submit an order.

Thank you, Doctor.

MR. CORDERO: Judge, may I ask you a question?

THE COURT: Real quick because I have other people -- this is not the only matter we have today. We have four calendars today.

MR. CORDERO: Where do I get the information for the appeal?

THE COURT: You can contact the Clerk's office, the Bankruptcy Clerk's Office.

DR. CORDERO: That's fine. Thank you very much.

THE COURT: Okay. Thank you, Doctor.

MR. CORDERO: Bye now.

MR. GORDON: Thank you Judge.

* * *

REPORTER CERTIFICATE

I, Mary Dianetti, do hereby certify that I did report in stenotype machine shorthand the proceedings held in the above-entitled matter;

Further, that the foregoing transcript is a true and accurate transcription of my said stenographic notes taken at the time and place hereinbefore set forth.

Dated: March 12, 2002

At Rochester, New York

Mary Dianetti

Mary Dianetti

Dr. Richard Cordero

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

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

March 30, 2003

Ms. Mary Dianetti [tel. (585)586-6392]
Court Reporter
612 South Lincoln Road
East Rochester, NY 14445

CONFIDENTIAL

Dear Ms. Dianetti,

Last January 8 we first talked about the terms for making a transcript for appeal purposes of the hearing last December 18, before the Hon. John C. Ninfo, II, in which I was the respondent and Kenneth Gordon, Trustee, the movant. You stated that the transcript would run to some 25 pages, that each page costs $3, and that the total cost would be between $75 and $80. You also stated that you could have it ready in about ten days or less, and that you could even prepare it on an expedited basis if I needed it sooner. I accepted the cost and normal delivery terms and confirmed my acceptance by letter to you of January 23.

However, weeks went by without your sending me a copy of the transcript or letting me know what was going on, or rather, what was not going according to our agreement. I called you and even recorded a message on your answering machine, but you did not return my call. Then on March 10, I called you again. Since I did not find you there, I began to record another message. As I was finishing by saying that I found the situation of your not sending me the transcript or returning my call very strange, you picked up the phone.

You assured me that I would receive the transcript by the end of the week, and made that most extraordinary comment that 'you want the transcript from the moment you came in on the phone.' I told you that I wanted everything and that I got the impression that other exchanges had taken place between the Judge and other parties before and after I was on the phone. You said that was not the case. However, when I asked you how long the transcript would run, you said that it would be only 17 pages. I brought to your attention what you had stated before.

Despite your assurance that I would receive the transcript by the end of that week, you failed to perform accordingly: I just received the transcript on Friday, March 28. It is very strange that your Reporter Certificate is dated March 12. Why did you not mail it on that day so that I could have it by the end of the week as you had assured me I would? Where did it linger so that I was deprived of it for more than two additional weeks? Also strange is the fact that there was another paper signed with your name but not dated.

I trust you are aware of the importance of a transcript for an appellant and that the circumstances under which this transcript has finally arrived are quite strange, to put it mildly.

Therefore, I request that you provide me, and copy the Court, with a dated and signed statement containing assurances and explanations concerning the following specific points:

1. a) that you submitted a transcript to the Bankruptcy Court, of which the one you sent me is an identical copy, and
   b) that such transcript contains a complete and accurate written statement of all the statements made in court on December 18, 2002, at the hearing In re Premier Van Lines, case no. 02-2230, including those that were made while I was on the phone as well as those made before or after I was on the phone;

2. why, in spite of your experience, you estimated the length of the transcript to be between 25 and 27 pages but it actually came out at only 17 pages, which represents a mistake of almost 60%;

3. a) why although in the phone conversation that we held on March 10 you assured me that I would have the transcript by the end of that week, and your signed Reporter Certificate is dated March 12, the transcript was only mailed on March 26;
   b) who had access to it in the meantime or thereafter; and
   c) for what purpose.

Kindly add any other statement reasonably intended or necessary to provide full disclosure about, and to put to rest, the concerns that I have expressed about the untimeliness, content, and addressees of the transcript to which I am entitled under the Rules of Procedure and under our agreement.

So that this request may not be left without any action just as that for the transcript was for over two and half months, I ask that you reply within 10 days. That is a period of time that the Rules of Procedure applicable to you too consider reasonable for action to be taken timely in the context of court business. Consistent with the position that I have taken before, I consider that FRBkrP Rules 9006(e) and (f) are applicable to this request.

If I do not receive a timely answer, I will take it to mean that you acknowledge that you did not abide by our agreement and are giving up your claim to compensation.

Sincerely,

Dr. Richard Cordero

Certificate of Service

I, Dr. Richard Cordero, certify that on March 31, 2003, I sent the original of the accompanying letter to:

Ms. Mary Dianetti
Court Reporter
612 South Lincoln Road
East Rochester, NY 14445

Dr. Richard Cordero

Dated: March 31, 2003

59 Crescent Street
Brooklyn, NY 11208-1515

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

April 11, 2003
612 South Lincoln Road
East Rochester, NY 14445

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11206-1515

Dear Mr. Cordero:

In reply to your letter dated March 30, 2003, the answers to your questions are as follows:

1.a) The transcript filed with the Bankruptcy Court is identical to yours and I am enclosing a copy that I had Ms. Tacy copy of said transcript.

b) The transcript contains a complete and accurate written statement of all statements made in court on December 18, 2002, at the hearing In Re: Premier Van Lines, Case No. 02-2230, including those that were made while you were on the phone.
I should note here that in one of our conversations where you inquired if anything said before your matter began and after your matter ended that I got my notes and read to you the beginning and the end of the proceeding, and I assured you nothing was said before or after your proceeding regarding your matter.

2.a) In answer to your questions regarding my estimate of 25 pages, I informed you on the telephone that I always estimate high and that the attorneys when receiving their transcripts are happy about that. I previously made that remark to you. However, what I base my estimate on is the number of folds of the paper that I write on. I had 53 folds and I divided by 3, which means one page for three folds, and then I allow for the title page and appearance and certification pages, and I allow a little more for colloquy versus the question and answer format.
In my estimate it should have been four folds for one page because I had my spacing set a little farther apart than I realized.

3.a) In our phone conversation of March 10th I informed you the transcript was being typed and you would have it probably the end of that week. The certificate was dated the 12th and that is when I signed it and that is when I should have mailed it to you and filed it with the Bankruptcy Court. The other paper that was attached to your copy of the transcript which

was not signed was a certificate that I must have picked up inadvertently when I put the transcript in a folder.

The certificates on my transcripts all read the same, and I do have other transcripts that I produce, and I must have picked that up inadvertently, and obviously, didn't check your copy before I mailed it to you. The two copies filed with the Bankruptcy Court are dated March 12th.

b) The answer to your question as to who had access to the transcript in the meantime or thereafter is as follows:

After proofreading the transcript I was concerned about the record that you made as not being complete as it was obvious that I had not picked up everything that you might have said. I went to the file in the Bankruptcy Court Clerk's Office and read some papers in the file to try and discern whether what you said would be understandable to anyone who read the transcript. I could not fix the record that I took because I can only transcribe the words that I have and not put in other words that I do not have in my notes.

I honestly do not know if it was the reception or your accent or if you were reading from a paper and not speaking right into the phone, but I was trying very hard to get down everything that you said.

You can see from the transcript that I put in the word unintelligible. I was concerned about doing that as the only time I ever do that is while transcribing tapes.

So in that time period from the 12th to when you received the transcript and the filing of them with the Bankruptcy Court Clerk's Office, I consulted with another reporter who had extensive experience. I was concerned about putting the word unintelligible in the transcript because I had never done that before. However, in other courts that I have worked there were never any telephonic proceedings.

Unfortunately, the reporter was on vacation and didn't get back to me for some time. The transcript was in my possession and I was inquiring about the telephonic proceeding and inability to hear every word and the correct procedure.

That is the explanation for the time lapse of the date on the certification and when you received it. And also the explanation of not reading it again and catching the unsigned certificate as I was trying to get it to you as fast as I could.

I would just add that I did not provide this transcript as timely as I could have as the circumstances were such - due to the telephonic appearance - that I really

was trying to resolve the problem of not being able to catch every word you said and inserting the word unintelligible.

When you asked me on the phone whether there was a problem, I should have said I had difficulty understanding you, but I waited to proofread the transcript and then went from there.

I apologize for any inconvenience this has caused you and I trust I have answered all of your questions to your satisfaction.

Very truly yours,

Mary Dianetti

Mary Dianetti
Bankruptcy Court Reporter

cc: Judge John C. Ninfo, II

Dr. Cordero,

Just a note to tell you that we were out of Power for 8 days and therefore this letter may be a little late.

Mary Dianetti.

Docket no. 03-5023

UNITED STATES COURT OF APPEALS
FOR
THE SECOND CIRCUIT

Richard Cordero,
Cross and Third party plaintiff-Appellant

v.

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

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

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

Opening brief and addendum
for and by

Dr. Richard Cordero
Appellant pro se
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