Dear Jim, Dimondstein's Memorandum of Law 5/20/77

Whether or not the citations are faithful and appropriate, and I have no way of judging, it seems to me that the answer must include an argument of basic legal philosophy, that the law does not sanction plain stealing in interstate commerce, particularly not by the wealthy from from the small and powerless, those without regular counsel or the capability of having regular counsel. Carrying their argument to its logical conclusions would certainly chill interstate commerce. It would make doing the simplest business hazardous. It would make the filling of phone orders unprotected.

It puts a premium on business dishonesty by asking for the judicial sanctioning of a debt the legitimacy of which is not denied. They don't even claim not to have ordered the last 1,000 books.

Now who could possibly do business in interstate commerce is he had to have counsel in each state in which he has a customer, who can possibly engage counsel in a foreign jurisdiction in addition to his local counsel, on either the overall sum or the net, ~~ifxxxxyx~~ in an order for 1,000 books?

This may be a possibility for large corporations but it is an impossibility for small individuals and it is impossible in the book business, where both the valume of purchases and the net per book ~~xxxxxxx~~ guarantee a loss from any litigation.

They are thus arguing that by simply not paying sums owed unless the one to whom the sums are owed assures further loss by suit the dishonesty is with judicial and legal sanction.

There may be more you should have out into the complaint and there may be more you'll want to include in an amended complaint.

The Dimondstein account was a single, continuing account. It is thus on our books and it is thus in all bills rendered and accunts stated. I'd be surprised if their books were of different character.

It began with a written order and a verbal agreement between Herb Dimondstein and me at a trade convention the purposes of which were precisely this and at which Dimondstein had a booth. That was in Washington, early June 1966.

Dimondstein then introduced me to his brother-in-law and business official whose name is Mashman. Thereafter most of the orders were by phone and from Mashman.

The orders were often phoned to the printer, also in Washington, who provided warehousing and did ship.

Dimondstein retumed books fpr which he had not paid and which as a matter of law were his property, even if he had not paid for them. I learned this when there was extensive damage and I then phoned. Mashman asked me to see what I could do with the trucker. I had to go to the last trucker who handled the interstate shipment, not the trucker who picked the books up from Dimondstein in New York. (I am not sure but I think that comtrary to practise and our agreement the books were returned without asking for permission.)

I believe that in this there was a relationship of trust between buyer and seller and an obligation imposed upon Dimondstein by normal and accepted business practise.

I asked Mike Michel to deal with the trucking company for me. It then turned out that although the trucker had given up his Maryland office, although he continued to deliver in Maryland and I had to sue him in Pennsylvania. He never denied the damage or responsibility for the damage, in practise I understand then pro rated among the truckers involved. He did ask for the price of merely reprinting the number of books damaged. I obtained this from the printer. It was greater than the billed price. Knowing that the cost of suing in a foreign jurisdiction was consume 100% of what I claimed the trucker then merely did nothing, said "sue me." Michel said I could not possibly come out on it and besides, as a matter of Maryland law, the obligation to sue and the right to sue were Dimondstein's because as a matter of law the property was their's, even if they had not paid for it.

I presume that I informed Dimondstein through Mashman and I'm sure I ~~xxxxxxxx~~ discussed it with Herb Dimondstein at the next AMerican Booksellers Association convention and show in Washington. I'm sure he said he'd look into this and be in touch with me. This was in the corridor leading to the main lobby of the hotel, not at his booth.

Perhaps they can argue that when Dimondstein did not file the claim against the trucker and when he did not get back in touch with me I should have known he was a crook. Whether or not this would be a valid legal argument the realities did preclude my filing suit, as I could not do in Maryland, and did mean that I had to try to negotiate with them. When there was no response to my efforts by mail I did go there on the first possible occasion. I did consult local counsel in advance of that meeting with Held and after he did not keep his word I did find it impossible to obtain New York counsel. This inability to obtain New York counsel had nothing to do with the legitimacy of the claim, as you know.

I believe that in answer to their quote from 1 NY Jur. 149 on pp 1 and 2 their acceptance of the account stated when it was asked for on a continuing basis by their CPA does constitute such an agreement. I note that they omit their CPA in their arguments. I believe that the fact the request was by the CPA, who had the Dimondstein books and saw Dimondstein owed me money, was not a simple inquiry but was a request for a statement of account. I believe that the fact this was a CPA led me to believe that I received some protection from it because he is licensed by the State of New York and owes public obligations. This also had meaning because I had the same inquiry from Dimondstein's staff bookkeeper. In no sense can they make the representation that follows on p 2, that they did these things out of idle curiosity.

If there were any legitimacy to their argument there would be no purpose in asking for a statement of account. I can't believe the law is as they argue in the next graf, that the have to dispute an accurate bill for there to have been a statement of the account and for the statute argument. Were this true only erroneous bills would be protected by law. That obviously can be law or public policy.

I believe that when we say Held accepted the bill for the 1,000 books after checking his own books in my presence and when as the record shows, I think, that Dimondstein repaid Bookazine for the reshipment of that 1,000 books and when Dimondstein ordered the books there is not the claimed legal insufficiency in their Point II.

Here they are also seeking to exploit something I did at their request and to save them money and give them faster service. The printer sent his own trucks to New York City regularly, at least once a week. He carried the books to Dimondstein and Bookazine without charge, as a favor and business courtesy.

One result is that at Bookzine, when they received the books, the papers they signed were on a Merkle Press form. The bookkeeper, not knowing of the special arrangement with both firms, filed the Bookazine records not under my name but under that of Merkle Press. It thus was impossible for me to know of what happened until the moment I did learn of it. In my presence Ted Epstein had his bookkeeper seach all possible files. In every case he came up with nothing. Only when I wondered about the name of the printer and that file was checked did we find the record. When I gave it to Held the next day, which was the first possible moment and he had his bookkeeper check his records she confirmed their receipt of this 1,000 books and their order of them. Without this, naturally, they would not have paid the shipping costs when they asked Bookazine to reship the books to them. The record I gave them included the notation of their check to Bookazine.

I believe that the placing of an order does constitute a contract and the acceptance of the amended bill by Held and the bookkeeper does constitute furth er acknowledgement.

In answer to Point III can you argue that whether or not their silence argument is valid one does have a right to assume that there is an obligation imposed upon a CPA in the performance of a licensed public function ~~thm~~ and that a CPA's silence does cpnstitute a fraud? By constituting acceptance. Dimondstein's books showed their receipt of this 1,000 books and they payment of shipping costs. ~~xxxxxxxxxx~~ My statement of account did not include the 1,000 books of which the CPA had to know.

What thi s amounts to is that they are trying to hold me responsible for a truck driver's mistake when they are the only people in the world who could correct that mistake and when they knew they had made the purchase and that I had no way of tracing it. That surely should get any honest court's back up. I think their argument over this at the bottom of page 6 is disgusting when their CPA twice did not tell me and when their book-

Keeper also did not tell me. The alone knew. Whether or not I can be held responsible for the mistakes of others they knew they ordered these books, hey knew they accepted them, they knew they paid the shippings costs on them, and they now claim that in keeping it all secret from me after all these requests for statements of accounts they "misrepresented nothing" simple by "silence."

I raise again whether their is a "confidential or fiduciary relationship" in several ways. When one ships without prepayment there is a relationship of trust, of my having confidence they will pay and having their word that they will pay, as I did beginning in 1966. There then is what I regard as the special obligations, I believe of both characters, with their involvement of their CPA.

I can8t believe that the law requires croosk to admit to crookedness in writing for others to be protected from crooks by law, which is what they claim on 7 under IV. They do not dispute my representation of fact. They merely argue that the law licenses them to steal from me by speaking falsely to me and making false promises to pay to me.

On 8 I believe that were all the rest of their arguments valid the latest in a series of entries under a single contract in itself keeps the statue from having run. They do not deny that they entered into the continuing agreement, the only one we ever had. And they do admit that the statute had not run on it. Our books show a single account, persuant to the single agreement, a continuing aggeement. otherwise they had no right to order that single book without prepayment.

In addition, I think all of this argument is predicated uponxx a false assumption, that no account had been stated.

There has been no showing, bottom 8, V, that under outr agreement Dimondstein owed me no obligation, that I did not do business with him on the basis of confidence and trust. Id did honor all verbal orders. He did pay the earlier ones. The Vignari decision stated what is not true in this case and thus is irrelevant:"There is no accpetable justification for the delay. 'Plaintiff wqs not lulled into inactivity'..."

I was by Dimondstein's general reputation, by his having paid the earlier bills, by Mashman's representations for him, xxx by Dimondstein's own promise to look into the matter and be in touch and by the undenied agreement by Held that they did owe me what I stated they owed me. There is no denial of my later writing this to Held. The also undenied fact is that Held asked me for the photographs of the damage to see if they were insured against it. This is an acceptance of responsibilty. At the least I was entitled to so accept it. It is merely another part of Held's representations that did "lull" me. I remained in New York for the rest of that week and made no effort to obtain counsel, as I would have without his representations.

It is simply false to argue, and that contrary to the only evidence, that I "had four years to correct" what is called my mistake in the billing. I was entirely unaware under conditions which precluded awareness. I could not have been more prompt in then acting. I obtained the records the end of one business day and was in New Rochelle before lunch the very next day. It is likewise false to argue that "There is nothing defendant did which deceived plaintiff" when Held did tell me they did owe me and would pay, xxxxx after checking his own books through his own bookkeeper. He did want me to compromise the amount due. I did offer to compromise the interest. This is the kind of arrangement that must have corporate approval. I did take his word that his bookeeper was about to leave on vacation and had more work than was possible that was necessary prior to her leaving. There is no disputing of this in evidence. t is the only evidence. Iwas then the house guest of a couple who resided within New York State. The husband drove me to Dimonstein's place of business. The wife was a legal secretary. It is obvious that if I had not been made these promises and been "lulled" at the least I could have asked that lawyer, whether or not a specialist in this kind of law, to represent me while I was there. That I was in New York, which is undisputed, and that I did not engaged counsel or file them is I think substantiation of the fact that I did take Dimondstein's word, the word not disputed in evidence. Thus also the lawyers argue what is not in evidence and is contrary to the only evidence. I think of this alone they should not prevail and that the argument should be made to the court that it ought not consider what they do not state under ~~oath but~~

oath. An unsubstantiated lawyer's argument is not evidence. They can make all these allegations under oath. That they have failed to is I be lieve we can safely state because there is a penalty for false representations under oath.

Whether or not we had an agreement, whether or not they entered into later agreements, whether or not they "l ulled" me are questions of fact not the ~~mmmm~~ opinions of their lawyers. The same is true of whether or not they ordered and received the last order of a thousand and whether or not they agreed to pay for it. If the statute of limitations had run they could have waived this. I allege that they did, under oath. They do not deny this under oath. There is no evidence before the court on this contrary to my affirmation.

This makes deliberately false the opening sentence of their Memorandum, that "It is assumed for the purposes of this motion that all the allegations of the complaint and the statements in plaintiff's answering affidavit are true."

Whatever else you do and do not do I hope you will seek to reduce this to its simplest formulation, stripped at this point of all legalisms, stating what their motion really argues: that by simply earning trust and paying bills a large corporation can then order merchandise from a small individual, the order in interstate commerce, and by keeping the amount owed below the level that can justify the cost of litigation - and requires the investment of that cost to recapture what is owed - claim the protection ~~mmmmm~~ of the law and allege negligence to the small victim of what turns out to be straightforward business dishonesty.

They then allege that when the give me assurances I am not justified in accepting them a d that unless they admit deliberate dishonesty in writing there is no admission. They claim that because they kept secret from me what I had nc way of knowing I am negligent even though I was at their place of business with the proof less than four hours of the normal working day after I first obtain or could have obtained that proof.

It boils down to the argument that they can be as crooked as they like and claim the protection of the law and of the State courts in that crookedness as long ad the money amount of that crookedness is below the limit for federal court in an interstate ~~purchase~~ purchase.

They are in conservative territory, West Chester county. It is just possible that the proper ridicule of their argument but giving it the actual meaning can augment what legal arguments you might make.

Knowing nothing a out the law or the courts I feel they are weakest in their allegations in oint V. I believe this added approach may well address that.

Hastily,