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May 22, 2006

Satisha Gibbs  
Case Manager  
Clerk' Office  
U.S. Court of Appeals, Second Circuit  
40 Foley Sq., 18<sup>th</sup> Floor  
New York, N.Y. 10007

**Roy Den Hollander v. Flash Dancers Topless Club, et al.**  
**Second Circuit Court of Appeals, 04-6700-CV**

Dear Ms Gibbs:

Apparently, there is some continuing confusion over the "Petition for Rehearing En Banc" that I filed on March 24, 2006. I had assumed this Court's granting of my April 4, 2006 motion had resolved the confusion, but it has not.

The April motion requested the Second Circuit to direct you to docket my "Petition for Rehearing En Banc," which you had refused to do under the mistaken belief that petitions for rehearing en banc only applied to appeal decisions rather than "other proceedings" in the Second Circuit. Fed. R. App. P. § 35(a). The April motion was not, as the docket incorrectly indicates at 4/4/06, a motion for leave to file a late petition for rehearing of my appeal.

The March 24, 2006 Petition for Rehearing En Banc states in paragraph one that it concerns the panel's order granting defendant Flash Dancers leave to file its bill of costs late. It does not request a rehearing en banc of the panel's February 3, 2006 Summary Order denying my appeal from the District Court. Since the March 24, 2006 Petition for Rehearing En Banc concerns the panel's orders granting Flash Dancers leave to file a bill of costs late (April 11, 2006) and denying my opposition (March 15, 2006), the only orders required under Local Rule 35(a) are those two. Both are attached in Exhibit A of my second set of papers for Petition for Rehearing En Banc that includes the required change in caption that we discussed on Friday, May 19th. The April 11, 2006 order granting Flash Dancers' motion was not included in the March 24, 2006 Petition for Rehearing En Banc because the order was not docketed until after the filing of the petition.

The second set, which includes the full caption, is, as the original set, less than 15 pages, excluding material not counted under Rule 32, and is, as the original set, properly numbered with the exhibits following the argument and noted by letters in ascending order.

Finally, the applicable Rule is § 35 En Banc Determination, not Rule § 40: Petition for Panel Rehearing. I was not and am not requesting a rehearing by the panel.

Sincerely,

Roy Den Hollander

CC Chief Deputy Clerk, Thomas W. Asreen

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
Roy Den Hollander,

Appellant-Plaintiff,

Docket No. 04-6700-cv  
**AFFIRMATION OF FACT**

v.

Flash Dancers Topless Club, et al.,

Appellees-Defendants.

-----X

**Affirmation in Support of a Motion Requesting this Court to Direct its  
Case Manager Satisha Gibbs to Docket a Petition for Rehearing En  
Banc of a Panel’s Decision Permitting the Late Filing of a Bill of Costs  
Without a Showing of Good Cause.**

I, Roy Den Hollander, am the attorney plaintiff-appellant, am familiar with the matters within and submit this affirmation in support of this motion requiring the Second Circuit’s case manager, Satisha Gibbs, to docket a petition for rehearing en banc of a panel’s decision to allow the late filing of a bill of cost without a showing of good cause.

1. On March 15, 2006, a panel<sup>1</sup> of this Court granted defendant Flash Dancers’ motion to file a bill of costs after the time period for submitting such had expired. Exhibit A, Panel Order.

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<sup>1</sup> Hon. Sonia Sotomayor, Pierre N. Leval, *Circuit Judges*, Hon. Mark R. Kravitz, *District Judge*.

2. On March 24, 2006, appellant Hollander submitted a petition for rehearing en banc requesting this Court to review the panel's granting of Flash Dancers' motion on the grounds that it conflicts with the decision of another panel of this Court set out in Apex Oil Co. v. Belcher Co. of N.Y., Inc., 865 F.2d 504, 505 (2d Cir. 1989), which requires a showing of good cause for enlarging the time limits prescribed in the Rules of Appellate Procedure. Exhibit B, Cover page of petition for rehearing en banc.

3. On March 29, 2006, Satisha Gibbs, the case manager for the above captioned case, mailed appellant Hollander a notice stating:

“This will advise you that we received and filed the petition (sic) for rehearing .... Upon review we have determined that it does not comply with the Federal Rules of Appellate Procedure or Second Circuit Rules in the following manner:

Missing information: Motion to file late petition for rehearing.

You are hereby notified to submit 1 original and 4 copies of the motion to file petition late to this office not later than 4/12/2006.” Exhibit C, Gibbs' Notice.

4. Ms. Gibbs clearly confused the petition as one referring to the panel's Summary Order disposing of this case's appeal from the District Court, which was entered on February 3, 2006. Any petition for rehearing of the Summary Order would have been out of time on March 24<sup>th</sup> and required an accompanying motion to file late.

5. The petition that was filed on March 24<sup>th</sup>, however, did not request review of the Summary Order but rehearing of the panel's decision to grant

Flash Dancers' motion to file a bill of costs after the deadline had expired.

This reason for the petition is stated in the first sentence of its first paragraph. Exhibit B, Cover page of petition for rehearing en banc.

6. On March 31, 2006, at approximately 4:40 PM, appellant Hollander telephoned Ms. Gibbs who emphatically said that a petition for rehearing en banc was not permitted for requesting a review of the panel's decision on Flash Dancers' motion.

7. Ms. Gibbs then instructed appellant Hollander to file a motion, not a petition, requesting that the panel review its decision of Flash Dancers' motion.

**WHEREFORE**, Ms. Gibbs' interpretation of the Rules of Appellate Procedure is inaccurate as set out in the attached Memorandum of Law and appellant Hollander, by this motion, requests:

(1) This court instruct Ms. Gibbs to docket the petition for rehearing en banc as originally filed with the date of filing as March 24<sup>th</sup>;

(2) This Court rescind Ms. Gibbs' order to file an additional motion, whether to request a late filing of the petition or to request the panel's review of its decision; and

(3) Appellant Hollander be awarded costs in time of four hours at \$150 an hour and money for copying and mailing of \$13.20 for a total of

\$613.20 in making this motion that should never have been necessary in the first place.

Executed under the penalty of perjury.

Dated: New York, New York  
April 3, 2006

Attorney plaintiff-appellant

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
Roy Den Hollander,

Appellant-Plaintiff,

Docket No. 04-6700-cv

v.

Flash Dancers Topless Club, et al.,

Appellees-Defendants.

-----X

**MEMORANDUM OF LAW**

The Federal Rules of Appellate Procedure § 35(a) states, “A majority of the circuit judges who are in regular active service may order that an

appeal or **other proceeding** be heard or reheard by the court of appeals en banc.” (Emphasis added). Case Manager Gibbs failed to docket appellant Hollander’s “Petition for Rehearing En Banc” (“Petition”) because it did not request a rehearing of this case’s appeal but rather a rehearing of the panel’s decision granting a motion. A panel’s decision on a motion is clearly within the statutory words of “other proceeding.”

Fed. R. App. P. § 46(c) states, “Cases and controversies shall be heard and determined by a ... panel ... unless a hearing or rehearing before the court en banc is ordered by a majority of judges ....” The motion order that is the subject of appellant Hollander’s Petition grows out of a case before this Court, Hollander v. Flash Dancer, et al., and involves a controversy over whether a panel of this Court can enlarge time limits prescribed by the Rules of Appellate Procedure without good cause and in contradiction of another panel’s decision in Apex Oil Co. v. Belcher Co. of N.Y., Inc., 865 F.2d 504, 505 (2d Cir. 1989).

An intra-circuit conflict can only be resolved by a Court of Appeals sitting en banc, *see* Tornay v. U.S., 840 F.2d 1424, 1427 n.3 (9<sup>th</sup> Cir. 1988); therefore, appellant Hollander’s Petition provides the only way of conforming this Court’s decisions on whether the deadlines of the Appellate Rules require a showing of good cause for any time extensions. Case

Manager Gibbs' refusal to docket appellant Hollander's petition prevents this Court from securing and maintaining uniformity of its decisions.

Dated: April 3, 2006

Roy Den Hollander, Esq.  
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