UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE FIRST CIRCUIT

In re:	*	
	*	**BAP NO. 00-013**
ROBERT A. TARDUGNO and	*	**00-014**
CHARLOTTE K. TARDUGNO	*	
	*	
Debtors	*	
**********		
SALEM FIVE CENTS SAVINGS BANK,	*	
	*	
Appellant	*	
	*	
v.	*	
	*	
ROBERT A. TARDUGNO,	*	
	*	
Appellee	*	
**********		

Before Votolato, Lamoutte, and Haines, Bankruptcy Judges

ORDER

Per Curiam

_____Salem Five Cents Savings Bank has appealed two January 20, 2000, orders of the bankruptcy court. The first order vacated, sua sponte, a November 30, 1999, order dismissing the debtors' Chapter 13 case. The second, entered without notice or hearing, denied Salem Five's motion seeking reconsideration of a December 4, 1998, order sustaining the debtors' objection to its proof of claim. The debtors have not opposed Salem Five's appeal.

In the course of oral argument conducted on May 17, 2000, we announced our decision that the order reopening the bankruptcy case should be vacated as an abuse of discretion and that the subsequent order denying relief on the motion for reconsideration would be vacated, as well.

We announced our decision from the bench and need not elucidate it at length here. Nevertheless, we set forth a brief

explanation below.

This is not the first time this panel has considered the Tardugno bankruptcy case and Salem Five's position in it. Salem Five Cents Savings Bank v. Tardugno, 241 B.R. 777 (B.A.P. 1st Cir. 1999). The dispute between the parties has considerable history. See id. In our decision dated December 6, 1999, we vacated the bankruptcy court's original order denying Salem Five's request that the court reconsider its order sustaining the debtors' objection to its claim. We remanded the matter, directing the lower court to conduct a hearing on the motion in accordance with the standards announced by the Supreme Court in Pioneer Investment Servs. V. Brunswick Assocs. Ltd Partnership, 505 U.S. 380 (1993) and to "place in the record the findings and conclusions that were the basis for his denial of Salem Five's motion to reconsider." Id. at 780. Our mandate issued on January 6, 2000.

Unbeknownst to the panel, on November 30, 1999, the Tardugnos' Chapter 13 case had been dismissed on the trustee's unopposed motion.

The Tardugno/Salem Five dispute concerned only the allowance of Salem Five's claim and had vitality only in the context of an ongoing Chapter 13 bankruptcy case. Nevertheless, following receipt of our mandate, the bankruptcy judge, acting sua sponte, vacated the order of dismissal and, without notice or hearing, again denied the relief on the motion for reconsideration.[1]

---

[1] The bankruptcy court's ruling on the motion, set forth in full, was as follows:

> Consistent with the judgment of the Bankruptcy Appellate Panel for the First Circuit, entered December 6, 1999, the bankruptcy court order of December 18, 1998 denying the motion for reconsideration by Salem Five Cents Savings Bank (Salem) for reconsideration is hereby vacated. Reconsideration is hereby granted. Upon

Doing so was an abuse of discretion. Dismissal of the bankruptcy case itself, an action that was final nearly two months before entry of the January 20, 2000, orders, mooted the claims dispute and, indeed, mooted our mandate. It was improper for the bankruptcy court to take further action.

For the foregoing reasons, the bankruptcy court's orders vacating dismissal and denying relief on Salem Five's motion for reconsideration are hereby VACATED. As there is no longer a pending bankruptcy case, no issues remain for remand. The Tardugnos' bankruptcy case remains dismissed.

> reconsideration, the motion by Salem is denied for failure to demonstrate excusable neglect. Counsel's failure to diary the response deadline does not constitute excusable neglect.

(Order of January 20, 2000; Appellant's App. at Ex. WW.)

We question whether the court's action was consistent with the appellate panel's mandate and whether its holding, that Salem's default (without regard to other circumstances or factors) could not constitute excusable neglect as a matter of law, was consistent with applicable legal standards. See Pioneer Investment Servs., supra; In re Tardugno, 241 B.R. at 780. However, the question is not squarely before us today because we hold that the case itself was improperly reopened.