

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PETER G. HERMAN,

Respondent.

Supreme Court Case
No. SC17-2050

The Florida Bar File
No. 2014-50,165 (17E)

CROSS-PETITIONER/RESPONDENT'S ANSWER
AND CROSS-INITIAL BRIEF

On Petition for Review from Report of Referee

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RECEIVED, 04/10/2019 08:22:33 PM, Clerk, Supreme Court

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PREFACE

The following record designations will be used:

(R___) – Record of Proceedings;

(TR___) – Transcript of Final Hearing;

(R. Exh. __) – Respondent's Exhibits from Final Hearing;

(TFB Exh. __) – Complainant's Exhibits from Final Hearing;

(ROR __) – Report of Referee.

JURISDICTIONAL STATEMENT

Respondent is petitioning for review of the Report of Referee. This Court has jurisdiction pursuant to Article V, §15, Florida Constitution and Rule 3-7.7(a)(1), Rules Regulating The Florida Bar (RRTFB).

REQUEST FOR ORAL ARGUMENT

Respondent, pursuant to Rule 7.7(c)(4), RRTFB, respectfully requests the opportunity to present oral argument before the Court.

STATEMENT OF THE CASE AND FACTS

1. Proceedings Before the Referee

The Florida Bar Complaint, filed in November 16, 2017, relates to Peter Herman's conduct, not in his capacity of representing any client, but in connection with the financial Schedules filed in his personal Chapter 7 bankruptcy case. The backdrop for the Bar's Complaint, its case before the Referee and the Bar's appeal to this Court is an Order entered by the Bankruptcy Court on August 5, 2013, following an adversary proceeding initiated by Mr. Herman's main creditor, CIB Marine Capital (CIB), to prevent Mr. Herman from being able to discharge a substantial deficiency judgment it had obtained against him in state court and on which it had been aggressively trying to collect from Mr. Herman. In denying the discharge, the bankruptcy judge accepted CIB's claims that Mr. Herman had intentionally concealed prepetition assets, by failing to disclose on his Schedules: (1) an "interest" in \$10 million in fees his employer received post-petition from two cases in which Mr. Herman served as co-lead trial counsel for the prevailing parties (\$10 million fee); and (2) prepetition transfers of funds out of a joint account to accounts held by a relative (PH Transfers). Unfortunately, the bankruptcy judge did not have the ability to assess all pertinent facts and evidence before entering the harshly worded order that was drafted by Respondent's adversaries and submitted

as a “proposed order.”¹ The standard of proof in the bankruptcy case was preponderance of the evidence (TR 6/26/18, p. 132), not clear and convincing, as in Bar proceedings.

At the Bar trial before the appointed referee, the Honorable August Bonavita, additional evidence relating to both the \$10 million fee issue and the PH transfers,² which was not available to nor considered by the bankruptcy judge in entering his Order, was presented for the Referee’s consideration in determining whether Mr. Herman engaged in dishonest conduct as charged in the Bar’s complaint. Based upon additional evidence presented, and contrary to the bankruptcy court’s Order finding that Respondent intentionally concealed the prepetition PH transfers, the Referee found that the Bar failed to prove Mr. Herman engaged in any wrongdoing concerning the failure to disclose the PH transfers on his Schedules. (ROR ¶115)³ However, the Referee found Mr. Herman in violation of Rules 3-4.3, 4-3.3(a)(1), 4-8.4(a) and 4-8.4(c), concluding that “Respondent’s failure to disclose his interest in the \$10 million Fee was materially misleading.” (ROR ¶91, 116)

The Referee recommended a suspension of eighteen (18) months (ROR ¶120), noting that he gave “substantial weight to the mitigating factors” he found,

¹ The Order is a near verbatim adoption of the Proposed Order drafted by counsel for CIB. (TR 6/25/18, p. 192; 6/26/18, p. 86, 123-124) (Resp. Exh. 37)

² Including, but not limited to, the testimony of Mrs. Herman, Ms. Galloway, Trustee Welt, Mr. Houston, Mr. Markowitz, Mr. Pugatch and Mr. Mrachek.

³ The Bar has not sought review of the Referee’s finding relating to the PH Transfers.

including: absence of a prior disciplinary record; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; character or reputation; and imposition of other penalties or sanctions. (ROR ¶119) The Bar is seeking disbarment.

2. Factual Summary

Introduction

After more than thirty years practicing law with an unblemished record, and at the height of achieving his largest trial victories for his firm's clients, Peter Herman was on the verge of financial hardship due to an investment in a real estate project that failed as a result of the collapse of the national real estate market. As did many in similar situations, he was forced to avail himself of the protections afforded by the bankruptcy laws. Mr. Herman, having never before been involved in bankruptcy proceedings, turned to a respected local bankruptcy attorney, Bart Houston, whose father was a respected retired bankruptcy judge.

At the time, Mr. Herman was no more familiar with the bankruptcy laws or system than an average lay person wading through the complicated and hypertechnical bankruptcy process. As confirmed by Mr. Herman's bankruptcy attorney, although Mr. Herman was an accomplished commercial trial attorney, he was "a bab[e] in the woods" when it came to bankruptcy law, and "not

knowledgeable about even the most basic of bankruptcy matters.” (TR 6/22/18, p. 89, 90) Indeed, even the Referee concluded that Respondent “does not practice bankruptcy law **and to a great degree** he relied upon the advice of his bankruptcy counsel” throughout the bankruptcy proceedings. (ROR ¶119) (emphasis added).

As a result, Mr. Herman, as is true for most debtors, necessarily relied upon his bankruptcy counsel to prepare his financial Schedules to be filed in support of his bankruptcy Petition. In addition, as bankruptcy is a nuanced area of law, Mr. Herman also relied upon his experienced bankruptcy attorney to make the determination, after performing the necessary factual and legal research, regarding what was required to be listed as an asset or otherwise disclosed (including where and in what manner) on his financial Schedules.

Unfortunately, and to Mr. Herman’s detriment alone, Mr. Herman’s bankruptcy attorney gave Mr. Herman’s adversaries the means by which to deny him his bankruptcy discharge. Mr. Herman’s bankruptcy attorney compounded his error by failing to withdraw as counsel and testify on Mr. Herman’s behalf at the adversary trial. Instead, he remained on the case and failed to timely plead an advice of counsel defense which could have prevented the entry of the harshly worded Order on which the Bar’s complaint is based.

Now, in these Bar proceedings, substantial evidence has been presented regarding Mr. Herman’s reliance on his bankruptcy counsel in preparing his

Schedules, which was not available to, nor considered by, the bankruptcy court. Moreover, additional evidence was presented at the Bar trial establishing that, prior to Mr. Herman signing his Schedules, he knew that his involvement in obtaining the multi-million dollar judgments for the clients had been highly publicized, thereby making the contingency fees the firm would receive and his potential to be awarded a substantial bonus publicly known. In fact, the lawyer representing CIB in the state court litigation against Mr. Herman sent a congratulatory email to Mr. Herman's co-counsel after the Home Depot verdict and long before the Petition date (Resp. Exh 2) And, as was established in the Bar trial, and confirmed by the Trustee, who did not testify in the bankruptcy trial, Mr. Herman did not fail to disclose anything that was not already known by the Trustee and counsel for CIB. Such evidence, which was not considered by the Bankruptcy court, is critical to the core factual issue in these Bar proceedings—Mr. Herman's knowledge, intent and state of mind at the time he signed and attested to the truth of his Schedules.

Peter Herman's Position with Tripp Scott at Time of Filing Bankruptcy

Mr. Herman began his employment at Tripp Scott in 1981. Although Mr. Herman was given the title of "director," in his more than 30 years with the firm, he never was an equity partner or a shareholder of the firm. (TR 6/21/18, p.129-130; 6/25/18, p.107-108, 112-113) Mr. Herman was a W-2 employee and did not have a contract with the firm. (TR 6/25/18, p. 112) His compensation consisted of a monthly

salary and an annual discretionary performance bonus. (TR 6/25/18, p. 113)

Tripp Scott Historic Practices in Awarding Bonuses to Non-Shareholders

Three witnesses (Peter Herman, Alexander Brown and Edward Pozzuoli), all from Tripp Scott, were the only witnesses who testified at trial in the bankruptcy case regarding the historical practices of Tripp Scott in the awarding of bonuses to non-shareholder attorneys. Their testimony concerning this issue was admitted into evidence in the Bar proceedings. (TFB Exh. 20 & 21; Resp. Exh. 38) Based upon the witnesses' testimony, performance bonuses were considered and awarded by the Tripp Scott Compensation Committee, which had the sole and absolute discretion as to: (1) whether to award bonuses; (2) determine the timing of any bonus award; (3) whether to award a bonus to any particular director/employee; and (4) determine the amount of any bonus award. (TFB Exh. 20 & 21; Resp. Exh. 38) (Bankruptcy Trial Transcript, p. 84-85; 153-154; 218-219). If awarded, bonuses were historically awarded at year-end. (TR 6/25/18, p. 42-47)

Two of the witnesses, Mr. Herman and Alex Brown, testified before the Referee and testified consistent with their prior testimony that the bonuses at Tripp Scott were discretionary. (TR 6/25/18, p. 85-88, 126-127) Mr. Herman specifically testified that for the 30 years preceding 2012 he had received a discretionary bonus determined in the same fashion. (TR 6/25/18, p. 126-127) An additional witness, Amy Galloway, who had also worked at Tripp Scott as a director for years, testified

in the Bar proceedings. Her testimony was consistent with the testimony of the other three witnesses on the issue. In addition, she gave very specific examples of reasons why bonuses may not be awarded in any given year. (TR 6/25/18, p. 41-44)

Ms. Galloway also testified that at year end it is common practice for lawyers at Tripp Scott to send emails to members of the compensation committee to lobby for their performance bonuses. According to Ms. Galloway, these emails are nothing more than the attorneys expressing their thoughts on their expectations. (TR 6/25/18, p. 51, 58, 60-61)

The Bar did not present any testimony or other evidence to rebut the testimony of the four witnesses who testified that Tripp Scott performance bonuses were discretionary and non-equity “directors” of the firm had no entitlement to a bonus.

Contingency Case Judgments/Fees

Prior to filing for bankruptcy in 2012, Mr. Herman was co-lead trial counsel on two separate contingency fee cases in which substantial judgments were obtained in favor of the clients. The verdicts in those cases were reported in both the mainstream and legal press, with articles specifically mentioning Mr. Herman as one of the lawyers representing the plaintiffs. (Resp. Exh. 2)

After Mr. Herman filed his bankruptcy petition on February 18, 2012, but before the filing of his financial Schedules on March 20, 2012, Mr. Herman’s employer, Tripp Scott, received \$10 million in fees from the two contingency cases.

Home Depot Case: Michael Powell entered into a contingency fee agreement with Tripp Scott to pursue a patent infringement action against Home Depot. Mr. Herman, along with Alexander Brown, filed a Complaint in federal court in May 2007. *Powell v. The Home Depot, U.S.A, Inc.*, Case No. 07-80435-CIV-Hurley/Hopkins (S.D. Fla.) (TFB Exh. 37) (TR 6/21/18, p. 131, 133) Mayback & Hoffman, PA, was brought in as co-counsel. (TR 6/21/18, p. 136; 6/25/18, p.114) In May 2010, a jury found in favor of Mr. Powell, awarding approximately \$23 million. (TFB Exh. 37, 38 & 39) The judgment was affirmed on November 14, 2011, and the mandate was filed on February 22, 2012. (TFB Exh. 40)

When Mr. Herman filed his bankruptcy Petition on February 18, 2012, Tripp Scott had not yet received the fees from the Home Depot judgment, and there was an ongoing dispute with Mayback & Hoffman regarding the fees. Any fees to be received by Tripp Scott were encumbered as a result of a notice of charging lien which had been filed by Mayback & Hoffman, more than one year earlier. (TFB Exh. 20, Bankruptcy trial transcript, p. 98) (Resp. Exh. 10) Approximately two weeks prior to Mr. Herman filing his Petition, Mayback & Hoffman filed a motion to disqualify Tripp Scott in the Home Depot case, seeking fees as well as exemplary damages, on which a hearing was held on March 7, 2012, prior to the filing of Mr. Herman's Schedules. (Resp. Exh. 10) In addition, only three days prior to the filing of Mr. Herman's bankruptcy Petition, Mr. Herman was noticed for deposition by

counsel for Mayback & Hoffman (Resp. Exh. 3) (TR 6/25/18, p. 116-117) As a result of the dispute with Mayback & Hoffman, Tripp Scott made it clear that it had no intention of awarding any bonuses from the Home Depot funds as long as the funds were encumbered. (TFB Exh. 21, Bankruptcy trial transcript, p.199) On April 6, 2012, Mayback & Hoffman filed a claim in Mr. Herman's bankruptcy case. (Resp. Exh. 17) (TR 6/25/18, p. 139-141) Thus, the dispute with Mayback & Hoffman did not resolve until several months **after** Mr. Herman filed his bankruptcy Petition and Schedules. (TFB Exh. 21)

Security Mutual Case: After the Home Depot verdict was reported in the press, Roger Banks contacted Mr. Herman and asked him to take over as lead trial counsel for the plaintiffs in a copyright infringement case which had already been filed against Security Mutual Life Insurance Company. (TR 6/21/18, p. 137-138; 6/25/18, p. 83-84) *Member Services, Inc., Roger D. Banks, and R. Aaron Banks v. Security Mutual Life Insurance Company of New York*, Case No. 06-cv-1164 (TJM/DEP) (U.S. Dist. Ct. N.D.N.Y.) (TFB Exh. 36) Roger Banks entered into a contingency retainer agreement with Tripp Scott.

In October 2011, after a lengthy jury trial, a judgment in the amount of approximately \$26 million was entered on behalf of the plaintiffs. Thereafter, Alex Brown entered into settlement discussions with counsel for Security Mutual, which remained ongoing at the time Mr. Herman filed his bankruptcy Petition on February

18, 2012. (TR 6/21/18, p. 140; 6/25/18, p. 93, 103-104) (TFB Exh. 41) A Satisfaction of Judgment was filed on March 13, 2013 (TFB Exh. 35), after Mr. Herman filed his bankruptcy Petition, but prior to the filing of his financial Schedules.

Emails Sent by Mr. Herman Prior to Receipt of Fees by Tripp Scott
(“Pozzuoli emails”)

Starting in December 2011 and continuing into early January 2012, Mr. Herman sent approximately six emails to Edward Pozzuoli (President of Tripp Scott), and other members of the firm on the Compensation Committee, in which he expressed his expectation regarding the bonuses which should be awarded to those who worked on the two contingency cases, including himself and Alexander Brown. (TFB Exh. 26; Resp. Exh. 1)

At the final hearing in the Bar proceedings, Mr. Herman testified that, at the time he sent the emails, there was a belief that Tripp Scott might receive fees from the contingency cases before the end of 2011, and the money would be available before the year-end performance bonuses were determined. (TR 6/21/18, p. 154; 6/26/18 p. 53, 55, 62) According to Mr. Herman, he was speaking up, not just for himself, but for all those who worked on the cases. (TR 6/21/18, p.152, 159) The purpose of the emails was to discuss what would be fair to award as bonuses if the fees came in. (TR 6/25/18, p. 231-232; 6/26/18, p. 50, 62-63) However, they were wrong and the money was never received in 2011. (TR 6/21/18, p. 154)

Advice Received from Bankruptcy Counsel and Legal Research Reviewed

Attorney Bart Houston represented Peter Herman as co-counsel in the CIB deficiency case. (TR 6/22/18, p. 87) After the deficiency judgment was entered, Mr. Houston represented Mr. Herman in negotiations to resolve the deficiency. (TR 6/22/18, p. 88-91) After the negotiations failed and CIB initiated a garnishment action and served Mr. Herman's employer, Mr. Houston advised Mr. Herman to file a voluntary Chapter 7 bankruptcy petition. (TR 6/22/18, p. 90-92) At that time, Mr. Houston had almost 26 years of bankruptcy practice experience. (TR 6/22/18, p. 84)

On February 18, 2012, Mr. Houston filed Mr. Herman's Voluntary Petition, which he described as a "skeletal filing," after which there is a statutory period of time to file the financial Schedules. (TR 6/22/18, p. 92-93) He filed for and was granted an extension of time until March 16, 2012. (TFB Exhibit 8)

Prior to preparing the Schedules for Mr. Herman, Mr. Houston reviewed the financial information provided to him by Mr. Herman and met with Mr. Herman several times. (TR 6/22/18, p. 96, 101-102) He also conducted an investigation and analysis of the facts and circumstances related to the Home Depot and Security Mutual contingency cases, the potential fees Tripp Scott would receive from them, and Tripp Scott's compensation structure. (TR 6/22/18, p. 103-109) In conducting his factual investigation, Mr. Houston had discussions with Alex Brown, who worked on the contingency cases with Mr. Herman, and Edward Pozzuoli, the

manager of the firm, as well as Mr. Herman. (TR 6/22/18, p. 104, 106) He reviewed trust documents and firm memos dealing with how performance bonuses were decided by the Tripp Scott Compensation Committee. (TR 6/22/18, p. 105-108) Based upon the information he obtained regarding Tripp Scott's compensation structure, Mr. Houston concluded that non-equity "directors" of the firm did not have a legally enforceable entitlement to a bonus because the bonuses were discretionary. (TR 6/22/18, p. 108-110) After conducting his factual investigation, Mr. Houston reviewed case law and concluded that Mr. Herman did not have a vested right to a bonus and, therefore, any potential discretionary bonus would not be considered his property, but rather the property of Tripp Scott, until such time as the bonus was actually awarded. (TR 6/22/18, p. 108-110)

Mr. Houston discussed with Mr. Herman the issue regarding the expectation of being awarded a bonus from the fees the firm would later be receiving from the two contingency cases. He told Mr. Herman that he did not have a legal property right or interest in the contingency fees or bonus at that point in time because the fees had not been received and he had not yet been awarded a bonus, and advised him that the bonus should not be reported as an asset on the Schedules. (TR 6/22/18, p. 111) Mr. Houston discussed the cases upon which he relied with Mr. Herman. (TR 6/22/18, p. 111, 113) Mr. Houston testified that, when he gave the advice to Mr. Herman, he was "unequivocal." (TR 6/22/18, p. 111)

According to Mr. Herman, not being skilled in bankruptcy law, he deferred to Mr. Houston's advice. (TR 6/25/18, p. 121, 127-128) In addition, based upon Mr. Herman's review of the case law, he believed the advice he was given was correct when he filed his Schedules and signed the oath, swearing to their accuracy and completeness. (TR 6/25/18, p.128, 234)

Mr. Houston testified that he still thinks the case law was on his side and noted that "the law has gotten stronger" regarding this issue. (TR 6/22/18, p. 112) He did concede that, looking back now, after what happened, he might have considered doing something different in regard to the Schedules. (TR 6/22/18, p. 112)

Attorney Chad Pugatch, a practicing bankruptcy lawyer of 42 years, who substituted as counsel for Mr. Herman in the bankruptcy case after the bankruptcy Order was entered, testified that "there was a plausible basis for Bart Houston having given that advice." (TR 6/26/18 p. 13, 32) Mr. Pugatch confirmed that, based on case law, a discretionary bonus which has not occurred prior to filing the bankruptcy petition is not required to be disclosed as an asset. (TR 6/26/18, p. 31) But he testified that, because it is a "gray area," Mr. Houston "could have handled it in a more conservative way" by making "some kind of a disclosure on the bankruptcy schedules saying, it's not an asset as [of] the date of the bankruptcy, ... and even if it was, it was exempt, but in the interest of disclosure, we're disclosing it." (TR

6/26/18, p. 32-33) However, Mr. Pugatch testified that Mr. Herman, who is not a bankruptcy lawyer, “was justified in relying on [Mr. Houston].” (TR 6/26/18, p. 33)

Financial Schedules

Mr. Houston prepared Mr. Herman’s Schedules. (TR 6/22/18, p. 101-102) (TFB Exh. 13) The only thing Mr. Herman filled out on the Schedules were his signatures. (TR 6/22/18, p. 114) Based upon the testimony, not just of Mr. Houston, but Mr. Pugatch and both expert witnesses, including the Bar’s, it is undisputed that the Schedules were required to be prepared with information as it existed on the Petition date of February 18, 2012, not the subsequent date of March 20, 2012, on which the Schedules were filed. (TR 6/22/18, p. 32, 93-94; 6/26/18 p. 31-32, 93) It was also undisputed that the fees had not come in by February 18, 2012, and, when they did come in, they belonged to Tripp Scott. (TR 6/21/18, p. 111-112)

Schedule B (Property) does not contain any reference to Mr. Herman having an interest in the approximately \$10 million in fees to be received by his employer, Tripp Scott, from the Home Depot and Security Mutual judgments. (TFB Exh. 13) (TR 6/21/18, p. 77-78)

On Schedule I (Current Income of Debtor), for question 17, which requires the debtor to “[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document,” Mr. Houston included the following language: “Annual performance bonus (historically 65,000 –

70,000).” (TFB Exh. 13) Mr. Houston chose the wording used. (TR 6/22/18, p. 116) He asked Mr. Herman to average out the last three to four years of his annual performance bonuses. (TR 6/22/18, p. 116) Mr. Houston chose to do it this way and included it on Schedule I to put the Trustee on notice that an intangible bonus could be expected within the next year. (TR 6/22/18, p. 116-118) According to Mr. Houston, the historical language was never intended to mislead anybody about the Home Depot and Security Mutual cases. (TR 6/22/18, p. 119) Mr. Houston did not recall having any discussions with Mr. Herman about it other than asking Mr. Herman to provide the amounts of his last several bonuses. (TR 6/22/18, p. 119)

Trustee Kenneth Welt

Kenneth Welt was assigned to serve as the Court-appointed Trustee on Mr. Herman’s bankruptcy case upon the filing of his Petition, on February 18, 2012. (TFB Exh. 9) (TR 6/21/18, p. 43-46, 89) He was not specifically chosen, but assigned from a “wheel.” (TR 6/21/18, p. 43, 45) Within a couple of weeks of his appointment, prior to the filing of the Schedules, Mr. Welt was in contact with counsel for CIB, the major creditor, who informed Mr. Welt about the verdicts in the Home Depot and Security Mutual cases. (TR 6/21/18, p. 97-98) Mr. Welt testified that he knew before the Schedules had been filed that he “for sure” was

going to look into “those two huge verdicts.” (TR 6/21/18, p. 99)⁴

Mr. Welt, who is not an attorney, hires an attorney to represent him in a bankruptcy case when it appears there will be extensive legal work in the case. (TR 6/21/18, p. 59) In Mr. Herman’s case, upon having the initial conversations with counsel for CIB, prior to the filing of the Schedules on March 20, 2012, Mr. Welt thought the case was sufficiently complicated that he would need a lawyer. (TR 6/21/18, p. 90) Mr. Welt hired attorney Robert Schatzman, a partner with Gray Robinson, to represent him in Mr. Herman’s case. (TR 6/21/18, p. 59)

Mr. Welt testified that, when he reviewed the Schedules filed on March 20, 2012, he would have noticed that the Home Dept and Security Mutual cases were not listed. (TR 6/21/18, p. 101) Schedule I (Income) would not have been a place he would have looked. (TR 6/21/18, p. 102-103) He did not recall seeing what was written on Schedule I regarding the annual bonuses. He may have missed it. (TR 6/21/18, p. 104) He testified that, had he seen it, it would have put him on notice regarding Mr. Herman’s anticipated receipt of a bonus. (TR 6/21/18, p. 103-104) He claimed that the bonus should have been listed under accounts receivable. However, he conceded that “bonus” or “bonuses” are not specifically mentioned on the Schedule forms. (TR 6/21/18, p. 107) He also conceded that he would not expect attorneys to list all cases in which they are involved as of the petition filing date.

⁴ The bankruptcy judge heard none of this as Mr. Welt did not testify in that case.

(TR 6/21/18, p. 106)

Mr. Welt testified that he was aware that the fees from the two cases were Tripp Scott's money. However, Mr. Welt thought that, if Mr. Herman had an arrangement with Tripp Scott, whereby he would have received a portion of those awards, it could be a possible source from which to collect. (TR 6/21/18, p. 111) Mr. Welt had an hour and a half meeting with the managing partner and Executive Committee of Tripp Scott shortly after Mr. Herman's Schedules were filed. Mr. Herman was not at the meeting. (TR 6/21/18, p. 113) At the time of the meeting, Mr. Welt knew he was going to make a claim for all or a portion of the bonus to be awarded to Mr. Herman. (TR 6/21/18, p. 63) During his testimony in this case, Mr. Welt declined to answer questions regarding the specific discussions he had with Tripp Scott, claiming he was under "more than one" confidentiality agreement with Tripp Scott. (TR 6/21/18, p. 102-103) However, he explained that Tripp Scott was "very specific" as to how an attorney in Mr. Herman's position at their firm would be compensated. (TR 6/21/18, p. 114-117) He felt comfortable after the meeting with the information they provided. (TR 6/21/18, p. 116) When asked if he was told by Tripp Scott that the bonuses were discretionary, he said he could not answer due to the confidentiality agreement. (TR 6/21/18, p. 117)

Initially, Mr. Welt sought to obtain \$5.2 million from Tripp Scott of the \$10 million in fees the firm received based upon the figure Mr. Herman had proposed

for his bonus in the Pozzuoli emails. (Resp. Exh. 21) Mr. Welt did not file suit against Tripp Scott to collect any of the funds they received from the two contingency cases, not even after the firm eventually awarded Mr. Herman a bonus that was almost half of the amount proposed. (TR 6/21/18, p. 112)

Bonus Awarded to Mr. Herman

In August 2012, after the meeting and subsequent discussions with the Trustee, the Tripp Scott Compensation Committee distributed mid-year bonuses to its employees. (TR 6/22/18, p. 176-177) \$2.7 million dollars was awarded to Mr. Herman. He did not receive it and agreed to have the funds held in trust. *Id.*

On November 6, 2012, seven months prior to the discharge hearing, Mr. Herman amended his Schedules to disclose the awarded bonus. (Resp. Exh. 24)

Bankruptcy Adversary Proceedings and Trial

On July 19, 2012, CIB initiated adversary proceedings objecting to Mr. Herman's discharge (TFB Exh. 11), which was later joined by the Trustee. During the two day trial held on June 5-6, 2013, the primary focus was whether Mr. Herman's bonus was discretionary or vested at the time he filed his bankruptcy Petition. (TR 6/22/18, p.78) Mr. Houston, as counsel for Mr. Herman, argued the bonus was discretionary. Counsel for CIB argued the bonus was vested. The only witnesses who testified on this issue at the bankruptcy trial (Mr. Herman, Alex Brown and Edward Pozzuoli), all testified that Tripp Scott performance bonuses are

discretionary. Despite the unrefuted testimony presented by Mr. Herman's counsel, citing to the Pozzuoli emails, the bankruptcy judge found the bonus was vested and, therefore, property of the estate required to be listed as an asset on Schedule B.

Evidence regarding Mr. Herman's reliance on the advice of counsel was not presented to the bankruptcy court because Mr. Houston did not timely plead the defense. (TR 6/22/18, p. 55; 143-144) Although Mr. Herman testified at the bankruptcy trial regarding his review of case law, he was precluded from testifying regarding the advice he received from his counsel and his reliance thereon. (TFB Exh. 20, Bankruptcy trial transcript, p. 102-105) (TR 6/26/18, p. 133) Without the benefit of this evidence, the bankruptcy court denied Mr. Herman's discharge, finding he knowingly concealed a prepetition asset and signed a false oath.

Attorney's Fees Disclosure Sanctions Hearing

After issuing its Order denying Mr. Herman's discharge, the bankruptcy judge also took issue with how the attorney's fees paid by Mr. Herman to Mr. Houston were disclosed on Mr. Herman's Schedules and issued an Order to Show Cause why sanctions should not be imposed on both Mr. Herman and Mr. Houston. It was at this point that Chad Pugatch substituted for Mr. Houston as bankruptcy counsel for Mr. Herman. At the sanctions hearing, after hearing Mr. Herman's testimony regarding the advice he received from Mr. Houston on how the fees should be disclosed, the bankruptcy court dismissed the Order to Show Cause as to Mr.

Herman, finding that he was the “unwitting” client following his counsel’s advice. (Resp. Exh. 40, p. 197)⁵

Subsequent State Court Arguments by Counsel for CIB

After Mr. Herman was denied a discharge by the Bankruptcy Court, the related civil state court proceedings to collect on CIB’s deficiency judgment, which, in part, was stayed upon the filing of Mr. Herman’s bankruptcy Petition, resumed. (TR 6/22/18, p. 128-129) The Stearns Weaver law firm represented CIB in both the bankruptcy and the state court proceedings. (TR 6/22/18, p.133)

In the bankruptcy court, on behalf of CIB, lawyers from Stearns Weaver argued in support of their objection to Mr. Herman’s discharge that Tripp Scott bonuses were not discretionary and, therefore, were vested at the time Mr. Herman filed for bankruptcy. In the draft of the Joint Pretrial Stipulation prepared by Mr. Herman’s counsel, Bart Houston, in the bankruptcy case, any and all references to the word “discretionary” were removed by Stearns Weaver. (TR 6/22/18, p.135-138) (Resp. Exh. 29) According to Mr. Houston, CIB would have lost the entire bankruptcy case if that language was left in. (TR 6/22/18, p.138)

⁵ The bankruptcy court sanctioned Mr. Houston. Thereafter, the Bar entered into a Consent Judgment with Mr. Houston, agreeing to a 30 day suspension, which was approved by this Court, for his misconduct in “filing false statements with the [bankruptcy] court and failing to disclose the use of the funds” he received as fees from Mr. Herman. *The Florida Bar v. Houston*, Case No. SC15-2120 (Conditional Guilty Plea for Consent Judgment, March 22, 2016) (Order, April 28, 2016).

In contrast, in the subsequent state court proceedings involving the same issue, different attorneys from Stearns Weaver, on behalf of CIB, stipulated (and represented on the record to a state court judge) that Tripp Scott bonuses were entirely discretionary to support their position that one hundred percent of any bonus paid or payable to Mr. Herman was subject to garnishment and not subject to any exemption. (TR 6/22/18, 130-135) (Resp. Exh. 41 & 42) A Stearns Weaver attorney prepared stipulations and evidentiary submissions that specifically stipulated, in pertinent part, that:

There is no formula that determines the bonus amount to be paid. It is entirely at the discretion of the compensation committee ... A bonus is not guaranteed every year ... A bonus does not happen automatically... At the beginning of each year, the amounts of director bonuses are uncertain.

(TR 6/22/18, p.132-133) (Resp. Exh. 41) In support of CIB's own evidentiary submission to the state court, Stearns Weaver relied solely upon the testimony of Mr. Herman, Alex Brown and Edward Pozzuoli from the bankruptcy trial and argued, in pertinent part, as follows:

In addition to his annual salary, debtor may also receive a **discretionary** bonus ... The compensation committee ... has **broad discretion** to determine the amount of the bonus ... There have been years during the course of his employment where the debtor received no bonus ... There is no set policy for the distribution of money through bonuses at the end of the year ... Tripp Scott's compensation committee has the ability to give a director a zero bonus for reasons other than finances ... It is the comp committee meeting that determines the when and how much and to whom gets the money; until that time, **no one is entitled to anything.**

(TR 6/22/18, p.133-135) (Resp. Exh. 42) (emphasis added) According to Mr. Houston, arguing that the bonus was “discretionary,” was the “only way [CIB] could win in the civil case.” (TR 6/22/18, p.139) The Bar presented no evidence or witnesses, even from Stearns Weaver, to rebut the foregoing.

When the inconsistent position was taken in the state court, the United States District Court had already affirmed the Bankruptcy Court’s Order denying Mr. Herman’s discharge. (TR 6/22/18, p.141) Once Mr. Herman lost his discharge, that did not directly resolve the issue of whether the Trustee and CIB would have any right to Mr. Herman’s \$2.7 million bonus, which was still being held in trust until a bankruptcy exemption issue was resolved. (TR 6/26/18, p. 23)

Starting in November 2013, attorney Chad Pugatch represented Mr. Herman regarding the exemption issue in bankruptcy court, which due to discovery, went on for several months. (TR 6/26/18, p. 23, 25) Based upon the discovery received, it became clear to Mr. Pugatch that counsel for CIB knew about the two contingency judgments prior to Mr. Herman filing for bankruptcy, and they must have informed the Trustee about it very early on. Mr. Pugatch’s attempts to question Mr. Welt about it during his deposition, were met with objections based upon attorney client privilege. (TR 6/26/18, p. 28)

Mr. Pugatch filed a Motion for Summary Judgment in the bankruptcy case and in it raised the issue of the inconsistent positions being taken by Stearns Weaver

in the civil state case. Before the Motion could be heard by the bankruptcy court, CIB settled with Mr. Herman. (TR 6/26/18, p. 26-27) According to Mr. Pugatch, the fact that the Motion for Summary Judgment would alert the bankruptcy judge to the inconsistent positions being taken was “absolutely” one of the reasons the case settled. (TR 6/26/18, p. 27) That and the fact they were getting close to establishing that both counsel for the creditor, as well as the Trustee, knew about the judgments and Mr. Herman’s anticipated bonus prior to the filing of the Schedules. According to Mr. Pugatch, their prior knowledge was “significant” because, even if Mr. Herman was required to disclose it on his Schedules, it was “not a material omission.” (TR 6/26/18, p. 29-31)

The Florida Bar’s Expert Witness Testimony

Jerry Markowitz, an attorney who has practiced in the area of bankruptcy law since 1974, testified as the Bar’s expert witness. Mr. Markowitz testified that, in his expert opinion, Mr. Herman’s interest in the \$10 million in fees to be received by Tripp Scott was “property of the estate.” (TR 6/22/18, p. 15-18) However, when questioned regarding the basis for this conclusion, Mr. Markowitz merely referenced that the bankruptcy court had ruled that way based upon the evidence, and the matter was appealed to the District Court. (TR 6/22/18, p. 19) Mr. Markowitz testified that the bankruptcy court found that, even though Mr. Herman’s bonus from the \$10 million in fees was to be paid after the filing of the petition, the bonus was property

of the estate because there was a pre-petition right to the bonus. (TR 6/22/18, p. 25) Mr. Markowitz did not describe in any detail this pre-petition ownership right.

Mr. Markowitz confirmed that the main issue in the bankruptcy case was whether the bonus was discretionary. (TR 6/22/18, p. 77-78) On cross-examination, Mr. Markowitz conceded that all three of the witnesses at the bankruptcy case trial testifying about the awarding of bonuses at Tripp Scott testified that the bonuses were discretionary. (TR 6/22/18, p. 40) He was not aware of any testimony that the bonuses were not discretionary. *Id.* He agreed that state law controls whether someone has a legal interest in an asset to determine whether it would be property of the estate at the time the petition is filed, and conceded that he did not have any state court case supporting his position that the bonus was property of the estate. Instead, he relied upon a single federal case from Connecticut, *In re Soboslai*, 263 B.R. 700 (Bankr. D. Conn. 2001), which another court has described as an “outlier,” *In re Bronikowski*, 569 B.R. 48 (Bankr. W. D. N.C. 2017), as well as “what the bankruptcy Court ruled.” (TR 6/22/18, p. 43-46)

Mr. Markowitz conceded that, based upon the reported decisions on this issue, **“there is some uncertainty as to what the outcome is, not just on the law, but on the facts, and that you have to look into the practicalities from a practice standpoint of how to respond to the questions [on the Schedules].”** (TR 6/22/18, p. 31) (Emphasis added) He agreed that it essentially comes down to “practice

experience,” and it is up to the lawyer to advise the client in bankruptcy situations like this, and clients follow the advice because of the lawyer’s practice knowledge. (TR 6/22/18, p. 36, 74-75) Mr. Markowitz did not have any opinion as to whether Mr. Herman should have followed the advice of his counsel. (TR 6/22/18, p. 73-74)

Based upon the bankruptcy court’s finding that Mr. Herman’s expected bonus was a prepetition asset, it was Mr. Markowitz’ expert opinion that Mr. Herman’s interest in the \$10 million in fees yet to be received by Tripp Scott was required to be disclosed on his Schedules. (TR 6/22/18, p. 25-26) Mr. Markowitz testified there were several places on Schedule B where the “interest” could have been disclosed, such as question 19 (equitable or future interest), question 21 (other contingent and unliquidated claims) or question 35 (other personal property of any kind not already listed). (TR 6/22/18, p. 11-13) According to Mr. Markowitz, Schedule I, question 17, where a debtor is supposed to disclose any anticipated increase in income, does not have anything to do with “property of the estate.” (TR 6/22/18, p. 10, 24)

On cross-examination, Mr. Markowitz clarified his opinion by testifying that the “interest” Mr. Herman was required to disclose on his Schedules was not an interest in the \$10 million in fees, which was the property of Tripp Scott, but “an interest in the bonus arising out of the recovery of that fee.” (TR 6/22/18, p. 66-67) He agreed that Mr. Herman listed on Schedule I that he anticipated receiving “an annual performance bonus,” but testified that the historical language would lead one

to believe that Mr. Herman would continue to get the same bonus. (TR 6/22/18, p. 67-68) According to Mr. Markowitz, “a better answer” would have been to exclude the historical language. (TR 6/22/18, p. 69)

Mr. Markowitz agreed that there would not have been any “downside” to Mr. Herman listing the two contingency case judgments on his Schedules. It would not have disadvantaged Mr. Herman in any way, because the issue would have gone on to an exemption hearing where he may have prevailed. (TR 6/22/18, p. 56)

When questioned about the related state court civil action, Mr. Markowitz testified that, although he was somewhat familiar with the foreclosure and deficiency judgment case, he had no independent knowledge regarding the lawyers for CIB claiming in state court, contrary to their position in bankruptcy court and relying upon Mr. Herman’s testimony from the bankruptcy case, that the bonus was discretionary. (TR 6/22/18, p. 39) He was aware that the Stearns Weaver law firm represented CIB in both the bankruptcy and state court cases.

Respondent’s Expert Witness Testimony

L. Louis Mrachek, who has practiced in the area of bankruptcy law for 40 years, testified as Respondent’s expert witness. The question Mr. Mrachek was asked to consider was whether Mr. Herman’s bonus, at the time of filing his petition, was a “mere expectancy,” which would not, as a matter of law, be required to be disclosed, or a “vested interest” that would have to be disclosed. (TR 6/26/18, p. 88)

According to Mr. Mrachek, “that issue is the subject of a considerable body of law.” *Id.* He reviewed every case that was cited in the bankruptcy case for and against the proposition, as well as additional cases, and “came to a clear and very firm opinion about what the law is as to that specific issue.” Mr. Mrachek’s expert opinion was that “the bonus at issue in this case was a mere expectancy, and by the overwhelming authority of the case law and any fair and objective analysis, it would not have to have been disclosed.” *Id.* In addition, because the bonus would not have been required to be disclosed, it was his opinion that, therefore, there was no false oath and Mr. Herman’s answer was truthful. (TR 6/26/18, p. 88-89)

Mr. Mrachek went through a detailed analysis of the cases on which he relied (TR 6/26/18, p. 92-121), and concluded that, based upon the federal and state case law, “whoever prepared the Schedules need not have disclosed [Mr. Herman’s] expectancy of a bonus.” (TR 6/26/18, p. 121)

According to Mr. Mrachek, the filing date of the bankruptcy, is the critical day to determine whether a bonus is property of the estate. (TR 6/26/18, p. 91) The cases focus on the debtor’s rights and powers at the time the petition was filed, not at some future date. The question is whether the debtor would have the right on the petition filing date to sue his employer for a bonus that had not yet been determined and would typically be paid, for example, at year end. If the answer is no, there is no entitlement to the bonus requiring it to be disclosed. (TR 6/26/18, p. 91-93) For

instance, Mr. Mrachek testified that in *Vogel v. Palmer (In re Palmer)*, 57 B.R. 332 (Bankr. W.D. Va. 1986), like Mr. Herman's case, for the employee to be eligible for a bonus, the employee had to be working for the employer at the time the bonus was awarded and had to perform his work satisfactorily from the date of the filing of the petition until the award of the bonus. And, the most important factor was there had to be a determination by somebody that the employee was entitled to receive a bonus. (TR 6/26/18, p. 93-95)

Mr. Mrachek noted that the bankruptcy court in Mr. Herman's case heard the testimony of Edward Pozzuoli, Alex Brown and Peter Herman that the bonus was purely discretionary, and there was a possibility, given that fact, that the bonus could be zero, yet found that the exchange of email, petitioning for an amount, trumped all the direct testimony on the issue. (TR 6/26/18, p. 94-95, 105-106) He explained that, if the bankruptcy court had not done that, but rather adopted the testimony of the only three witnesses who testified at the bankruptcy trial, it would have been trapped by the applicable case law. The only way for the bankruptcy court to get around those cases was to find as a matter of fact that there was no discretion. Mr. Mrachek pointed out that the district court judge put in his opinion that, even if he disagrees with that finding, he cannot overrule it unless it is clearly erroneous. (TR 6/26/18, p. 94-95)

According to Mr. Mrachek, "[t]he critical issue here is whether, under

applicable state law on the date of the bankruptcy filing, the debtor possessed a right to demand payment.” (TR 6/26/18, p. 107) Mr. Mrachek testified that, as stressed in *In re Gonzalez*, 559 B.R. 326, (Bankr. E.D.N.Y. 2016)), “there is a fundamental difference between a debtor having an expectation of receiving a bonus payment and a debtor having a legally enforceable right to receive such payment.” (TR 6/26/18, p. 107) Mr. Mrachek discussed *Seaver v. Klein-Swanson (In re Klein-Swanson)*, 488 B.R. 628 (8th Cir. 2013), in which the Court found that, as of the petition date, the debtor had nothing more than a hope that she would receive the award payment from IBM, and noted that, to consider the payment to be property of her estate, simply because it related to her prepetition employment, would be to give the bankruptcy estate more than the debtor had on the petition date. Mr. Mrachek explained that, if the debtor does not have a right to demand payment and receive it on the petition date, neither does the trustee, because “the trustee’s rights flow through the debtor.” (TR 6/26/18, p. 103)

Mr. Mrachek also discussed the *In re Lapi*, 18 Fla. L. Weekly Fed. B449 (U.S. Bankr. S.D. Fla. June 24, 2005), decision by Judge Hyman, a bankruptcy judge who sits in Palm Beach County, who also found that a discretionary bonus would not be part of a debtor’s bankruptcy estate. Mr. Mracheck pointed out that, in the bankruptcy court’s Order in Mr. Herman’s case, the only distinguishing factors the bankruptcy court provided was in a footnote where it was noted that in *Lapi* the

debtor was an insurance salesman and not a lawyer and that the bonus amount was \$20,000 rather than \$2.7 million. Mr. Mrachek opined that those distinctions should not have changed the outcome in Mr. Herman's case. (TR 6/26/18, p.100, 112)

Mr. Mrachek discussed *In re Bronikowski*, 569 B.R. 48 (Bankr. W. D. N.C. 2017), which was the most recent case that references prior cases concerning this issue and, according to Mr. Mrachek, establishes that the prior cases remain good law today. (TR 6/26/18, p. 107-111) He also discussed the *Soboslia* case, the only decision relied upon by the Bar's expert witness, and noted that the *Soboslia* decision did not cite to any supporting cases, and for that reason and others the *Bronikowski* court described *Soboslia* as an "outlier." (TR 6/26/18, p. 108-111) According to Mr. Mrachek, the line of cases he is relying upon "was consistent before and it was consistent after *Soboslia*, and *Soboslia* stands by itself as an isolated outlier." (TR 6/26/18, p. 111)

In conducting his state court case analysis, Mr. Mrachek pointed out the decision in *Parrish v. General Motors Corporation*, 137 So.2d 255 (Fla. 2d DCA 1962), in which the Second District Court of Appeal affirmed entry of summary judgment for the employer, finding that the mere possibility or prospect of a bonus without more cannot be regarded as a condition of employment confirming a right enforceable at law. (TR 6/26/18, p. 114) According to Mr. Mrachek, that would be applicable to Mr. Herman in this case. *Id.* Mr. Mrachek noted that *Cnty. Design*

Corp. v. Antonell, 459 So. 2d 343 (Fla. 3d DCA 1984), cited by the bankruptcy court concerning Mr. Herman's right to sue for the bonus, is an express contract case which, in Mr. Mrachek's opinion, is totally inapplicable, because unlike the employer in that case who promised bonuses, Tripp Scott made no such promise. (TR 6/26/18, p. 114-115)

Mr. Mrachek discussed *Rionda v HSBC Bank*, 2010 U.S. Dist. LEXIS 137355, 2010 WL 546725 (S.D. Fla. Dec. 30, 2010), a United States District Court for the Southern District of Florida decision, in which Judge Huck applied Florida law. In that case, there were two claims, one for salary and one for a bonus. Finding that the bonuses were completely discretionary, and, therefore, the employee had no right to compel one, Judge Huck reasoned that there was no meeting of the minds about the amount of the bonus, the amount of the bonus was an essential element of the contract, and, therefore, there could not be a contract claim. (TR 6/26/18, p. 116) In Mr. Herman's case, he had no agreement as to the amount of the bonus, and, therefore, according to the *Rionda* decision, he would have no contract claim. *Id.* According to Mr. Mrachek, what is also important about *Rionda* is the discussion regarding the employee's alternative claim for unjust enrichment because the bankruptcy court in Mr. Herman's case noted that Mr. Herman would have had a claim for unjust enrichment if Tripp Scott attempted to deny him a portion of the \$10 million fee. In *Rionda*, Judge Huck rejected the unjust enrichment claim, noting

that, if the court were to grant equitable relief, it would rewrite the terms of the employer/employee relationship because the employer received the work that the employee was hired to do and for which he was paid a salary. According to Mr. Mrachek: “That’s exactly Mr. Herman's situation. He was paid a salary, he was paid for all his work performed. A bonus was discretionary, over and above the salary. He would have no claim for unjust enrichment . . . because he was paid a salary. He got paid for his work, period, end of story.” (TR 6/26/18, p. 116-117) Mr. Mrachek noted that “[t]here’s no mention in the bankruptcy judge’s opinion about why it is that Mr. Herman would have a claim for unjust enrichment when he already pocketed his salary.” (TR 6/26/18, p. 118)

In Mr. Mrachek’s opinion, given the methodology of awarding bonuses by Tripp Scott, the advice given to Mr. Herman by Mr. Houston, that Mr. Herman was not required to disclose anything regarding the judgments in the contingency case judgments on his Schedules, was accurate. (TR 6/26/18, p. 121-122)

Regarding Mr. Herman’s appeal to the District Court, Mr. Mrachek explained that, although the District Court ruled that the bonus was property of the estate, the District Court did so by adopting the bankruptcy court’s findings of fact that the compensation committee had no discretion regarding the award of the bonus. According to Mr. Mrachek, the District Court never found that Mr. Herman would have a right to bring an action on the day he filed a petition for unjust enrichment.

He explained that the appellate court did not make any factual findings, but merely reviewed and affirmed. (TR 6/26/18, p. 128-130)

Mr. Mrachek confirmed that the bankruptcy court did not permit an advice of counsel defense and because of that such evidence was not available for review by the District Court. Neither would the District Court have had the benefit of the Trustee's testimony in the Bar proceedings nor evidence that CIB's attorneys had taken the contrary position in state court that the bonus was, in fact, discretionary. (TR 6/26/18, p. 132-137)

3. *Mitigation Evidence*

Cooperation in Bankruptcy Proceedings

After his Schedules were filed, Mr. Herman provided documents and information requested by the Trustee and CIB regarding the contingency cases and judgments, the \$10 million in fees to be received by Tripp Scott and Mr. Herman's bonus. (ROR ¶119, p. 58) After the bonus was awarded, Mr. Herman amended his Schedules (Resp. Exh. 24) and voluntarily agreed to have the entire amount of the bonus held in trust until the matter resolved. (ROR ¶119, p. 58)

Other Penalties

As a direct result of the failure to list the anticipated bonus from the \$10 million in fees to be received by his employer as property on Mr. Herman's Schedules, Mr. Herman lost his discharge. CIB eventually settled during the

exemption proceedings, stipulating that the bonus was exempt property and not property of the estate. (TR 6/26/18, p. 26-27) Although, pursuant to the settlement, Mr. Herman was to receive approximately \$500,000 from the \$2.7 million bonus and other funds being held, he was left with “zero” after paying attorneys’ fees and legal expenses. (TR 10/22/18, p. 59)

Mr. Herman testified that his practice has been substantially impacted. Prior to his bankruptcy case, a significant portion of Mr. Herman’s practice was in representing clients in federal courts around the country which require *pro hac vice* admission. Since the entry of the bankruptcy court’s Order, he has been unable to appear *pro hac vice* in various federal district courts or to renew his admission to the Eleventh Circuit Court of Appeals. (TR 10/22/18, p. 59)

Character and Reputation Testimony

“Substantial testimony” was presented regarding Mr. Herman’s good character and reputation from some “highly reputable” witnesses. (ROR ¶119, p. 58) Miles McGrane, a past President of The Florida Bar, met Mr. Herman approximately 10-15 years ago when Mr. Herman asked him to help resolve some issues involving attorneys in a commercial case. What “impressed” Mr. McGrane about Mr. Herman was his “absolute concern for the ethical issues” in the matter. (TR 6/25/18, p. 15-16) Mr. McGrane also worked with Mr. Herman on one or two subsequent matters. It is Mr. McGrane’s opinion that Mr. Herman’s honesty and

integrity is “absolutely the highest.” (TR 6/25/18, p. 18)

The Honorable Thomas Lynch (Ret.) testified that Mr. Herman, who he has known for 25-30 years, practiced in front of him on a regular basis. (TR 6/26/18, p. 8) In his opinion, Mr. Herman is “an extremely honest person,” and “very up front.” He described Mr. Herman’s reputation as “very good” and his overall integrity as “fantastic.” (TR 6/26/18, p. 8-9)

Additional character witnesses included attorneys Amy Galloway (TR 6/25/18, p. 49) and Alex Brown (TR 6/25/18, p. 90), and clients Roger Banks (SM case) (TR 6/25/18, p. 32) and Michael Powell (Home Depot case) (TR 6/26/18, p. 80-81), all of whom testified positively regarding Mr. Herman and his honesty, integrity and reputation.

SUMMARY OF THE ARGUMENT

The Referee erred in finding Mr. Herman committed dishonest conduct. A false or misleading statement must be made “knowingly.” Thus, the key issue to be determined by the Referee was Mr. Herman’s knowledge, intent and state of mind at the time he signed his Schedules under oath. It was clear error for the Referee to disregard the substantial relevant evidence presented regarding Mr. Herman’s reliance on the advice of counsel in determining his knowledge, intent and state of mind. The Referee erred in holding that reliance on advice of counsel was not available as a defense in Mr. Herman’s Bar case. Given the nature of the charges,

the Referee's reliance on *The Florida Bar v. St. Louis*, 967 So.2d 108, 118 (Fla. 2007), was misplaced as the advice relied upon did not involve application of Bar Rules, but was specifically relevant in determining if Mr. Herman had the requisite knowledge regarding the alleged falsity of the statements made on his Schedules.

The Referee also erred in rejecting the relevance of evidence presented regarding subsequent state court proceedings, in which counsel for CIB took the same position Mr. Houston took in the bankruptcy case—that Mr. Herman's bonus was discretionary—and did so relying upon the very same testimony from the bankruptcy trial, where CIB had successfully claimed the bonus was vested. The Referee also disregarded the fact the state court found, contrary to the bankruptcy court, that Mr. Herman's bonus was discretionary. This evidence was critical on the issue of Mr. Herman's knowledge and intent because it proves that the advice given by Mr. Houston to Mr. Herman was a reasonably arguable position and not clearly erroneous. Whether a lawyer violates the Bar Rules cannot depend upon which of two contradictory, valid judicial opinions a Court chooses to rely.

Given the higher standard of proof in the Bar case, as well as the presentation of additional evidence not considered by the bankruptcy court, it was error for the Referee to merely rely upon the bankruptcy court's order and fail to independently consider the applicable bankruptcy and state case law to determine whether it was reasonable for Mr. Herman to rely on the advice of his bankruptcy counsel that his

bonus was discretionary and, therefore, not vested property required to be reported on his Schedules. Bankruptcy jurisprudence is clear that post-petition discretionary bonuses are not considered part of a debtor's bankruptcy estate. Controlling Florida law confirms that Mr. Herman did not have a legally cognizable interest in the bonus as of the Petition date. An at-will employee, like Mr. Herman, has no enforceable contractual right to a discretionary bonus, as no consideration is provided for such a discretionary and undetermined future bonus.

The Referee erred in finding that the historical language included in Mr. Herman's reference to his "annual performance bonus" was misleading and not true. The Referee, contrary to applicable bankruptcy law, incorrectly equated future anticipated income (i.e., a bonus not yet received) reportable on Schedule I, with property assets owned on the petition date reportable on Schedule B. Based on bankruptcy and Florida law and the record evidence, the Referee erred in finding Mr. Herman sought to mislead the Trustee and had a motive not to disclose specific information regarding the contingency fees and his anticipated bonus. The Referee improperly focused on the circumstances that existed at the time Mr. Herman completed his Schedules, rather than as of the Petition date, as is required under bankruptcy law. The Referee erred by disregarding the un rebutted testimony that the bonus was discretionary and placing undue reliance on the "Pozzuoli Emails," which did not create an enforceable legal right or entitlement to any compensation.

Given the context in which Mr. Herman's conduct occurred (personal bankruptcy proceedings and not related to the practice of law) and all the circumstances in this matter, particularly Mr. Herman's lack of experience with bankruptcy practice and applicable law and his reliance on his experienced bankruptcy counsel, as well as the substantial mitigating factors, particularly Mr. Herman's good character and reputation and all the harm he has already suffered in the bankruptcy case and beyond, the Referee's recommendation of an 18 month suspension is excessive and not supported by existing case law. Mr. Herman's acceptance of the arguably misleading language formulated by his experienced bankruptcy lawyer does not justify an 18 month suspension, and definitely not disbarment. The Bar's request for Disbarment has no basis in existing case law.

ARGUMENT

I. THE REFEREE ERRED IN FINDING RESPONDENT COMMITTED DISHONEST CONDUCT IN VIOLATION OF RULES 3-4.3, 4-3.3(a)(1) AND 4-8.4(a) & (c)

A. The Referee erred in disregarding relevant and applicable evidence relating to Respondent's knowledge and intent

1. Reliance on Advice of Counsel

This case involves very complicated issues of bankruptcy law, but the real focus in the Bar proceedings boils down to determining Mr. Herman's knowledge, intent and state of mind at the time he signed his Schedules under oath. This Court has recognized that "finding that an attorney has engaged in dishonesty, fraud,

deceit, or misrepresentation requires proof of intent as a necessary element.” See *The Florida Bar v. Dupee*, 160 So. 3d 838, 844 (Fla. 2015) (citing *The Florida Bar v. Barley*, 831 So. 2d 163, 169 (Fla. 2002); *The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1252 (Fla. 1999)). “Proof of the element of intent is satisfied by showing that the attorney engaged in the conduct *deliberately or knowingly*.” *Id.* (citing *The Florida Bar v. Johnson*, 132 So. 3d 32, 36 (Fla. 2013); *The Florida Bar v. Brown*, 905 So. 2d 76, 81 (Fla. 2005) (emphasis added)).

Even assuming the Schedules were false or misleading on the date filed, concluding they were false or misleading is not enough to constitute sufficient proof Mr. Herman violated the Rules Regulating The Florida Bar. In order to violate the Rules, a false or misleading statement must be made “knowingly.” That means Mr. Herman must have known, at the time he signed and swore to the truth of his Schedules, that the Schedules were indeed false or misleading.

In this regard, what is of critical importance in this Bar matter is the substantial and un rebutted evidence Mr. Herman presented proving his reasonable reliance on his counsel’s advice. Although Mr. Herman is an accomplished lawyer, he never practiced bankruptcy law, had no experience in bankruptcy and necessarily relied on the advice of his counsel in completing his Schedules. Even if it is determined that Mr. Herman’s counsel erred, following his counsel’s erroneous advice does not equate to “knowingly” making a false statement.

Although the Referee allowed testimonial evidence regarding Mr. Herman's reliance on the advice of his bankruptcy counsel to be presented at the final hearing, as noted in the Report of Referee, the Referee ultimately disregarded the testimony presented and rejected Mr. Herman's claim that he did not possess the requisite knowledge and intent, holding that "reliance on the advice of counsel is not available as a defense in a Bar discipline proceeding," citing to *The Florida Bar v. St. Louis*, 967 So.2d 108, 118 (Fla. 2007). (ROR ¶106) Given the nature of the charges in this case, the Referee's reliance on *St. Louis* is misplaced. It is clear the circumstance in this matter is distinguishable as the advice being provided by Mr. Houston did not relate to application of Bar Rules and Mr. Herman's obligations as an attorney thereunder. Moreover, when this Court rejected the advice of counsel defense asserted in *St. Louis*, as well as in *The Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011), the Court specifically relied upon Rule 4-5.2(a), which provides that a "lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." The Comment to that Rule explains that, "[a]lthough a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, **that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules.**" (Emphasis added). In this case, the advice relied upon is relevant in determining whether Mr. Herman had the requisite knowledge regarding

the alleged falsity of the statements he made on his bankruptcy Schedules, which was the key issue to be determined by the Referee. To preclude consideration of such evidence in these proceedings would be a violation of due process and contrary to fairness and the administration of justice.

Certainly, Mr. Herman was very hopeful and expected the Tripp Scott Compensation Committee would decide to award him a substantial annual bonus as a result of the fees the firm would receive from the Home Depot and Security Mutual judgments. The emails Mr. Herman sent lobbying to be awarded a substantial bonus from the fees are insufficient proof that Mr. Herman believed, at the time he signed his Schedules, that he had the required vested ownership right to a bonus. Moreover, such emails were not sufficient to overcome the unrebutted testimony of the four witnesses from Tripp Scott who all testified that bonuses were entirely discretionary, especially when considered in conjunction with Mr. Houston's advice, based upon his investigation of Tripp Scott's compensation structure, that non-equity "directors" of the firm did not have a legally enforceable entitlement to a bonus. (TR 6/22/18, p. 108-110)

Based on all the underlying facts and circumstances, and, most significant, his counsel's advice, it was Mr. Herman's understanding that his expectant interest did not equate to the legal property or possessory interest requiring it to be included on his Schedules. Relying on his counsel, Mr. Herman listed on his Schedules the

disclosure that he would be receiving an “annual performance bonus.” Based upon the case law provided by his bankruptcy counsel, and confirmed by other highly experienced bankruptcy attorneys, Chad Pugatch and Mr. Mrachek, Respondent’s expert witness, Mr. Herman had a good faith basis for relying upon his lawyer’s advice to not specifically include the \$10 million contingency fees to be received by his employer on his bankruptcy Schedules.

Even the Bar’s expert, Mr. Markowitz, conceded that, based upon the reported decisions on this issue, “there is some uncertainty as to what the outcome is, not just on the law, but on the facts, and that you have to look into the practicalities from a practice standpoint of how to respond to the questions [on the Schedules].” (TR 6/22/18, p. 31) He agreed that it essentially comes down to “practice experience,” and it is up to the lawyer to advise the client in bankruptcy situations like this, and clients follow the advice because of the lawyer’s practice knowledge. (TR 6/22/18, p. 36, 74-75) It is uncontested that, although Mr. Herman is an attorney and conducted an independent review of the applicable case law, he lacked any bankruptcy practice knowledge and experience. Thus, the record evidence establishes that Mr. Herman necessarily and reasonably deferred to the advice of his very experienced bankruptcy counsel.

Therefore, it was clear error for the Referee to disregard the substantial relevant evidence presented regarding Mr. Herman’s reliance on the advice of

counsel in determining Mr. Herman's knowledge, intent and state of mind when he signed his Schedules.

2. Conflicting Position Taken by CIB's Counsel in Subsequent State Court Proceedings

Evidence was presented regarding counsel for CIB taking the conflicting position in subsequent state court proceedings that Tripp Scott bonuses were entirely discretionary, relying upon the very same testimony from the bankruptcy trial. Based upon stipulated facts, the state court found that Mr. Herman's bonus was discretionary. **As this strategically occurred after affirmance of the Order denying Mr. Herman's discharge, neither the bankruptcy judge nor the appellate district court judge had the benefit of knowing this critical information.**⁶ This additional evidence is significant and, on the issue of whether the bonus was discretionary or vested, it proves either CIB's attorneys in the civil case were right and telling the truth or there are valid arguable positions on both sides of the issue. When Mr. Houston advised Mr. Herman, he took a position which was supported by case law, and which he believed was valid and correct. The bankruptcy judge disagreed. Later, in the subsequent state court proceedings, Counsel for CIB took the same position Mr. Houston took in the bankruptcy case.

⁶ In the Bankruptcy draft pretrial stipulation, the word discretionary was stricken by opposing counsel five times (Resp. Exh. 29). They refused to stipulate to what they later stipulated to in the State Court (Resp. Exh. 42), where an order was entered finding that the bonuses were discretionary. (Resp. Exh. 46)

The state court agreed. The relevant point to be made here, in this matter, is that, as noted by Mr. Markowitz, there is “uncertainty” regarding this particular issue.

Therefore, based on the evidence presented, it has been proven that the advice given by Mr. Houston to Mr. Herman was a reasonably arguable position and not clearly erroneous. Whether a lawyer violates the Bar Rules cannot depend upon which of two contradictory, valid judicial opinions a Court chooses to rely. Thus, the Referee clearly erred in rejecting the relevance of this critical evidence, which he disregarded as mere “legal strategy” (ROR ¶¶99).⁷

B. Given the Higher Standard of Proof in the Bar case, as Well as the Presentation of Additional Evidence Not Considered by the Bankruptcy Court, it was Error for the Referee to Fail to Independently Consider Whether it was Reasonable for Mr. Herman (and his Bankruptcy Lawyer) to Take the Position the Bonus was Discretionary

The Referee refused to consider the inquiry of whether Mr. Herman’s bonus was discretionary or vested, and likely did so because the bankruptcy court determined it to be vested, and the district court affirmed the ruling. Although Mr. Herman rejects such a conclusion, the Referee was not required to second guess this finding, nor is this Court being asked to do so. Instead, Mr. Herman is merely

⁷ “The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.” 18 MOORE’S FEDERAL PRACTICE, § 134.30, p. 134-62 (3d ed. 2000); *Edwards v. Aetna life Ins. Co.*, 690 F. 2d 595, 599 (6th Cir. 1982) (“Judicial acceptance of an inconsistent position in a later proceeding would create ‘a perception that either the first or the second court was misled.’”).

suggesting that it was error for the Referee to not consider whether it was reasonable for Mr. Herman to rely on the advice of his bankruptcy counsel concerning his counsel's determination that his bonus was discretionary. Indeed, this determination would have critically aided the Referee in two primary respects: (1) To evaluate whether Mr. Herman was justified in relying on the advice of his counsel concerning the disclosure requirements; and (2) To evaluate Mr. Herman's state of mind on the petition date. Even the Bar's expert agreed that this determination was the "critical" issue concerning the outcome of the underlying bankruptcy case. (Resp. Exh. 68) (Markowitz Depo. Tr. at 60:04-24) He also opined that the newly discovered evidence never heard by the bankruptcy court concerning the opposite arguments made in State Court concerning the discretionary nature of the bonus, based on the same evidence, involving the same parties and their lawyers from the bankruptcy proceedings that resulted in the State Court finding that the bonuses *were* discretionary "*would be helpful to Mr. Herman*" in these proceedings. *Id.*

1. Herman's Bankruptcy Schedules were to be Completed as of the Date of His Petition being filed, i.e., as of February 18, 2012

As a threshold matter, in order to accurately evaluate Mr. Herman's state of mind in completing his Schedules, it must be understood that a debtor's bankruptcy Schedules are required to be completed reflecting the debtor's financial status *as of the bankruptcy petition date*, regardless of when the Schedules are actually completed and filed. Indeed, the "plain language of [the bankruptcy code] is clear,

and it makes the commencement of the bankruptcy case the key date for property definition purposes.” *In re Bracewell*, 454 F.3d 1234, 1237 (11th Cir. 2006). “That means the property of the debtor’s estate is property the debtor had **when the bankruptcy case commences, not property he acquires thereafter.**” *Id.* (emphasis added).

This fundamental point of law is critical in these proceedings, and all witnesses who testified on this point, *including the Trustee and the Bar’s expert*, confirmed this well-established principle. (TR 06/21/18, p. 100; 06/22/18, p. 65) The Referee clearly erred when he overlooked this tenet and assessed the facts and circumstances that existed on the date Herman completed his Schedules, *rather than* on the date Herman filed his bankruptcy petition (which was more than one month prior). See ROR ¶95. Reviewing the facts of this case through the incorrect lens no doubt contributed to the Referee’s ultimate conclusions.

2. Vested vs. Discretionary Analysis

a. *Federal Bankruptcy Law*

The legal inquiry that Mr. Herman and his lawyer were tasked to determine, from the correct “focal point” (*as of his Petition date*), was whether Mr. Herman held a vested (ownership) property right to a bonus from the fees that were *yet to even be received by Tripp Scott*. Although the Bar continues to conflate Mr. Herman’s eventual bonus with the contingency fees owned by Tripp Scott, this Court

must focus on Mr. Herman's right to receive a "bonus" from the fees owned by his employer. While this may, at first glance, seem like a distinction without a difference, the distinction is material. Even the Bar's own expert was forced to correct the Bar's counsel and clarify himself on this issue. (TR 06/22/18, pp. 64 & 67) In this regard, all experts (and the Trustee) agreed that Mr. Herman was *not* required to list the contingency fees and/or contingency cases on his Schedules, as the "contingency" was not Mr. Herman's—it was Tripp Scott's. Unfortunately, it is apparent from the Report and the Referee's reference to an "interest in contingency fees" that the issue remained confusing to the Referee.⁸

The core issue here is whether Mr. Herman's potential ownership right to any bonus on the petition date was discretionary or vested. Simply put, if it was a vested property right of Mr. Herman's, it should have been disclosed on Schedule B. If it was discretionary, however, then it was not required to be disclosed. Hence the reason, as *conceded by the Bar's expert*, that this was a "critical" issue to determine whether Herman properly completed his Schedules, and as to his state of mind in relation thereto. The Referee, however, did not consider the legal nature of the bonus but only concluded that Mr. Herman was "well positioned to actually receive a multimillion-dollar bonus," relying almost entirely on the Pozzuoli Emails; such is

⁸ A suggestion was made that on Schedule B a contingent interest could have been listed, but a contingent interest also requires a legal entitlement to it, which did not exist on the petition date, thus disclosure on Schedule B was not required.

not the standard required for disclosure, as it is undisputed that an ownership interest in the asset on the petition date is required. The Referee erroneously overlooked the import of this issue when considering Mr. Herman's state of mind.

Bankruptcy jurisprudence is clear that post-petition discretionary bonuses are not considered part of a debtor's bankruptcy estate and, as such, need not be disclosed on a debtor's Schedule; more particularly, such discretionary bonuses need not be disclosed on Schedule B or any other section that requires the debtor to possess an ownership interest. Although several bankruptcy cases reinforce this point (most of which were discussed by Expert Mracheck), the most persuasive and analogous one stems from the Eighth Circuit's Bankruptcy Appellate Panel in its ruling in *In re Klein-Swanson*, 488 B.R. 628 (8th Cir. B.A.P. 2013).⁹ There, the BAP held that discretionary bonus payments received by a Chapter 7 debtor (like Mr. Herman) after the filing of the debtor's petition, were not properly included as property of the estate, and were not required to be disclosed on the debtor's Schedules. The persuasive precedent within *Klein-Swanson* helped guide Mr. Herman's counsel (and, in turn, Mr. Herman) to conclude that Mr. Herman's potential bonus (which was to be derived from funds *not received* by Tripp Scott as

⁹ "A Bankruptcy Appellate Panel (abbreviated BAP) hears appeals from the decisions of the United States bankruptcy courts in their district. BAPs typically sit as three-judge panels composed of bankruptcy judges appointed from the circuit's districts." https://en.wikipedia.org/wiki/Bankruptcy_Appellate_Panel.

of his Petition date) could not properly be considered property owned by Mr. Herman *as of his Petition date*.

The BAP acknowledged the broad disclosure requirements of the bankruptcy code but specifically noted the Code is not boundless and is not intended to expand a debtor's right against others more than they existed *on the petition date*. *Klein-Swanson*, 488 B.R. 628 (citing S. Rep. No. 95-989, at 82); see also *In re Vote*, 276 F.3d 1024, 1026 (8th Cir. 2002). The BAP also emphasized that, prior to the debtor employer's decision to exercise its discretion by awarding bonuses *after* the petition date, the debtor—an at-will employee—held nothing more than a mere “hope” or “expectation” that she would receive the bonus payments.¹⁰ The BAP analyzed relevant case law to determine what rights the debtor may have had to receive the bonus awards *as of the petition date*. Similar to Florida law—discussed next—the BAP *determined* that, so long as an employer retains *discretion* in deciding whether to make a bonus payment, an employee has no rights to the bonus until the payment is made.

Similar to the Referee's erroneous conclusions here, wherein he concluded that the bonus had been “earned” and thus should have been disclosed, (ROR at ¶¶93 & 96), the BAP in *Klein-Swanson* considered the same argument that the bonus

¹⁰ This “hope” and “expectation” is akin to the hope, expectation, desire and want that Mr. Herman was suggesting in the Pozzuoli emails.

should have been disclosed because all matters had occurred that were necessary for the award by the time that the debtor filed her petition. However, the BAP **rejected** this suggestion by noting that the mere “facts that: (a) the payments from IBM to the Debtor were based on her pre-petition employment; (b) the bonus programs existed on the petition date; and (c) the Debtor was eligible for the bonuses on the petition date, **do not render the bonus payments property of the Debtors bankruptcy estate,**” and thus are not subject to disclosure. *Klein-Swanson*, 488 B.R. at 634 (emphasis added).¹¹ This settled principle is precisely why the Bar’s expert had no choice but to concede that the determination of whether Mr. Herman’s bonus was discretionary is “critical” to the outcome of these proceedings; and, it is also why Mr. Herman’s adversaries’ late concession and evidentiary stipulation in the subsequent state court proceedings that Mr. Herman’s bonus was discretionary is critical to assessing Mr. Herman’s state of mind in completing his Schedules. Yet, the Referee erroneously disregarded this concession (not presented to the bankruptcy court) and, instead, implicitly adopted the determination by the bankruptcy court that Herman’s bonus was vested, and thus required disclosure. Mr. Herman simply had no right to the eventual bonus, and, thus, such was not property of his estate *on the petition date*, and therefore it was not required to be disclosed on Schedule B or any

¹¹ Mr. Mrachek also cited the case of *In Re Lapi*, a case from the Southern District of Florida decided before *Klein-Swanson*, along with several other cases that stand for the same proposition.

other location that required a property ownership right.¹²

b. Florida State Law Further Confirms the Reasonableness of Mr. Herman's Belief that he did not have a Legal Property Interest in the Bonus as of his Petition Date

Controlling Florida law confirms that Mr. Herman did not have a legally cognizable interest in the bonus *as of the Petition date*. Expert Mracheck testified (without rebuttal) that well settled Florida law holds that an at-will employee, like Mr. Herman, has absolutely no property right in or to a discretionary bonus that may, at some point, become payable. See, e.g., Rionda v. HSBC Bank U.S.A., NA, 2010 WL 5476725 (S.D. Fla. Dec. 30, 2010). As Mr. Mrachek explained, *Rionda* holds that there is no enforceable contractual right to a discretionary bonus, as an at-will employee provides no consideration for such a discretionary and undetermined future bonus. Thus, any suggested bonus “right” or “contract” by an at-will employee is entirely illusory, and unenforceable. *Rionda* further holds that an at-will employee—like *Mr. Herman*—does not have an equitable claim against an employer for a discretionary bonus, as the employee is generally paid a salary for his work and, thus, is not entitled to “additional consideration.” As a matter of law, the court found that there cannot be consideration for the award of a *discretionary* bonus since an at-will employee’s salary constitutes the consideration for his work

¹² As Mr. Mrachek opined, case law predating and postdating *Klein-Swanson* reinforces the advice which guided Herman’s completion of his disclosure requirements.

effort, and the same work obligations cannot be construed as consideration for the extra potential of a discretionary bonus. *Rionda*, 2010 WL 5476725, at *8.

It is notable that all witnesses, as well as the Referee, conceded that the amount of any prospective performance bonus awarded to Herman was entirely indeterminable by him on the Petition Date. (TR 06/21/18, p. 111-12; 06/22/18, p. 67) (ROR ¶99). *Rionda* makes clear that, an at-will employee (like Herman) is without any contractual ability to force their employer to award a bonus under such circumstance. Accordingly, in Mr. Herman's mind, he did not possess any ownership right, *on the Petition Date*, under any theory, to claim an entitlement to a performance bonus.¹³

The Bar's expert not only agreed that Tripp Scott *owned* the legal rights to the contingency fees, but also importantly conceded that Herman did not. (TR 06/22/18, p. 65-67) Regardless of what the Pozzuoli Emails are construed to convey, they do not create a legally cognizable right or entitlement where one otherwise does not exist. In other words, Mr. Herman simply could not have used said emails to sue Tripp Scott for an unpaid or even an underpaid bonus.¹⁴ The foregoing facts and law are critical to assessing Mr. Herman's knowledge and state of mind in following

¹³ If Mr. Herman claimed that he had a legal entitlement to the bonus his employer would have considered that a false statement.

¹⁴ Notably, the Bar's expert did not present one State court case to challenge the foregoing. (TR 06/22/18, p. 46)

his bankruptcy attorney's advice in completing his Schedules. If properly considered, the Referee could not have reached the conclusions regarding disclosure of the bonus on Schedule B, as Schedule B requires disclosure of assets owned by the debtor on the petition date.

Indeed, three seasoned bankruptcy attorneys testified on this disclosure issue and all agreed that bankruptcy law was settled in Mr. Herman's favor. The Referee also tellingly noted that even the Bar's expert on the issue "acknowledged case law on the subject **may be interpreted differently** when it comes to determining whether these items were required to be disclosed". (ROR ¶81) (emphasis added). This admission alone, by the Bar's expert, proves that Mr. Herman lacked the required knowledge and intent to be found in violation, especially since the Referee also concluded that "the bankruptcy law dealing with this issue is **subject to differing opinions...**" (ROR ¶119, part 9.22(i)) (emphasis added). Unfortunately, these observations by the Referee were inconsistent with his ultimate conclusions. If the law can "be interpreted differently" and was "subject to differing opinions," as it relates to state of mind, Mr. Herman should be found to have acted reasonably, particularly where, as the Referee further concluded in this case, Mr. Herman "to a great degree...relied upon the advice of his bankruptcy counsel" in completing his Schedules. (ROR ¶119, part 9.22(i))

C. *Based Upon Applicable Bankruptcy Law, the Referee Erred in Equating Future Anticipated Income (ie., a bonus not yet received) Reportable on Schedule I, with Property Assets Owned by the Debtor on the Petition Date Reportable on Schedule B*

While it seems the focus of the Referee's Report concerns disclosures on Schedule B or Schedule I, a closer reading of the Report coupled with comments made by the Referee on the record indicate that the real issue concerning the findings pertain to the disclosures on Schedule I, as it is undisputed that Schedule B requires an ownership interest in an asset as of the petition date for it to be disclosed, which was non-existent based on the record evidence, concessions made and the law. See TR 10/22/18, pp. 75-76, 82-83. Schedule I is very different than Schedule B, as noted by the Bar's expert. See TR 06/22/18, p. 24. Schedule I does not require an ownership interest in an asset. It is simply a disclosure of a debtor's income and expenses *as of the petition date*, and a disclosure of anticipated increases in the debtor's income.

The subject question on Schedule I asks: "*Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document.*" Since the petition date was early in the fiscal year (February 2012) and Mr. Herman had just received a year-end bonus for 2011, Mr. Herman's bankruptcy counsel asked Mr. Herman to provide him with the amounts he had *historically* received (\$65,000 to \$75,000) as a year-end performance bonus. Critically, *on the petition date*, it is undisputed the bonus was indeterminable. Thus, in response to the

Schedule I question, Mr. Herman followed his lawyer's advice and acknowledged he would be receiving an Annual Performance Bonus and that his bonus was *historically* 65,000-70,000, noted in *parenthesis*. The parenthetical, providing additional information, was not designed to mislead anyone. (TR 06/22/18, p. 119)

Nevertheless, the Referee suggests, without record support, that Mr. Herman *testified* that the parenthetical in his answer “(historically 65,000 to 70,000)” was meant to convey “what he expected to receive in 2012.” (ROR ¶69) The Referee is mistaken, as Mr. Herman never said that when he testified. In addition, the Referee expressly stated that Mr. Herman answered this Schedule I inquiry to indicate that his anticipated increase in income “**would be** ‘historically 65,000 – 70,000’”. (ROR at ¶1000) (emphasis added) This finding, not only is unsupported by competent, substantial evidence in the record, it is unfair to remove the parentheses and to, instead, add the words “would be” to this reference. There is no citation to Mr. Herman allegedly explaining the parenthetical reference in this manner, as no such record citation exists.

In this same vein, despite the fact it is indisputable Mr. Herman's bonus was uncertain and indeterminable, the Referee suggests Mr. Herman knew what he was to receive and intentionally did not disclose it:

Thus, while it may be true both the Trustee and the attorneys representing [Herman's adversary in the bankruptcy proceedings] were aware of the judgments in the Contingency Fee Cases prior to the time [Herman] filed the Schedules and SOFA, neither had any idea as to

what amount, if any, [Herman] would be receiving from the Contingency Fee Cases as his bonus. **[Herman] on the other hand did and yet, he intentionally chose not to disclose it.**

(ROR at ¶104) (emphasis added). This finding is simply unsupported by any evidence. Unfortunately, it no doubt led the Referee to conclude in the very next paragraph of the Report that “by not disclosing his interest in the \$10 Million Fee, [Herman] intentionally misled the Trustee and creditors.” (ROR. at ¶ 105) Once again, the Referee makes this conclusion without a single record citation, as *all witnesses* testified that the amount of the hoped for bonus, if any, was in fact indeterminable as of the petition date. Third, and arguably most important (as it is entirely contrary to the above conclusions made by the Referee), the Referee himself found the following facts to constitute mitigating factors:

9.32(d) Timely good faith effort to rectify consequences of misconduct. Based upon the evidence presented, after his Schedules were filed and ***throughout the bankruptcy proceeding, [Herman] provided information and documents requested from the Trustee and [Herman’s adversary in bankruptcy] regarding his interest in the \$10 Million Fee. After [Herman] was awarded his bonus, he moved to amend his Schedules.*** He also ***agreed to have the entire amount of the bonus held in trust*** until the matter was resolved.

(ROR at p. 58) (emphasis added). Mr. Herman respectfully submits that one simply cannot reconcile these facts—*all of which are supported by evidence in the record*—with the harsh conclusions that Herman “knew” what he was going to receive in his bonus, but “intentionally” did not disclose it to the Trustee. If a debtor is intent on misleading and concealing a bonus from his trustee and creditor in bankruptcy, he

simply would not provide “*information and documents*” concerning said bonus to the trustee and creditor “*throughout the bankruptcy proceeding,*” nor would he indicate in his Schedules that he anticipated an *annual performance bonus*, nor would such a debtor “*amend his Schedules*” once the bonus was actually awarded and before any adversary hearing, nor would such a debtor voluntarily “*agree to have the entire amount of the bonus held in trust.*” These realities are simply incongruent with the findings of the Referee and illuminate the clearly erroneous nature of such conclusions. In this regard, notably, when the Bar’s expert was asked what would be a better answer to the inquiry on Schedule I, he opined that Mr. Herman should have simply written “*annual performance bonus,*” and nothing more and he would have been “okay”. (TR 06/22/18, pp. 68-69) The reality is that there is very little distinction in the two answers as the answer to Schedule I *did not matter* to the Trustee and, if he saw the answer, he would have been alerted to the fact Mr. Herman was getting a bonus and would have carried out his business in the very same way that he did. The system worked as designed.¹⁵

In fact, the Trustee knew the anticipated bonus was indeterminable on the

¹⁵ Further, Mr. Herman received an additional performance bonus in the same year which was also larger than the historical amount listed on Schedule I. Tellingly, neither the Trustee nor the creditor sought to claim that bonus as property of the estate. They also did not claim the answer to Schedule I was misleading for the second bonus. It is simply inconceivable that the answer on Schedule I was misleading for one bonus and not the other when they were awarded a few months apart.

petition date (and remained so even at the time Schedule I was completed) and confirmed he was aware of Mr. Herman's potential to receive a substantial bonus. (TR 06/21/18, pp. 99, 106, 111) Tellingly, the Trustee testified he did not think Mr. Herman intended to be misleading or untruthful in his response. (TR 06/21/18, p. 103) And, probably most telling, the Trustee testified he does not recall seeing Mr. Herman's answer to Schedule I, nor, based on his three decade long career as a trustee, did Schedule I *matter* to him; but, he testified that, had he seen it, Mr. Herman's answer *would have* properly placed him on notice Mr. Herman anticipated receiving an annual performance bonus.¹⁶ (TR 06/21/18, pp. 102-04) Based upon the Trustee's own admissions, the Trustee was never misled by the Schedule I answer.

D. Based on Bankruptcy and Florida Law and the Record Evidence, the Referee Erred in Finding that Mr. Herman Sought to Mislead the Trustee and had a Motive Not to Disclose his Anticipated Bonus

The Referee concluded, by inappropriately stacking inferences upon inferences, that Mr. Herman intentionally misled the Trustee in completing his Schedules. To reach his inferred conclusion on Mr. Herman's motive and state of mind, the Referee noted Mr. Herman's answer made on Schedule I, and then

¹⁶ The Trustee testified he thought the bonus should have been listed on Schedule B, but such belief is no doubt a result of the creditor arguing before the bankruptcy court that Mr. Herman's bonus was a "vested" right. However, as discussed herein, the law is unequivocal that Mr. Herman did not have a disclosure obligation under Schedule B.

concluded:

95. This disclosure was made despite the fact that at the time he did so [Herman] knew that he was well positioned to actually receive a multimillion-dollar bonus from the \$10 Million Fee. This is especially true since just a few weeks prior to [Herman] filing the Schedules and SOFA, Tripp Scott had actually received that fee. This conflicts with his claim that at the time he filed the Schedules and SOFA, any bonus from the \$10 Million Fee was purely discretionary. Further, as was pointed out in the BK Orders by not disclosing his bonus, [Herman] was in a position to retain for himself his \$2.7 Million bonus free from any claim by his prepetition creditors, including CIB. From this it can be inferred that [Herman] had a clear motive not to disclose this bonus in the Schedules...

(ROR ¶ 95) This conclusion is clearly erroneous, and also unsupported by competent substantial evidence. First, by focusing on the facts that existed “just a few weeks prior to [Herman] filing the Schedules and SOFA,” the Referee improperly focused on the circumstances that existed at the time Herman completed his Schedules, rather than *as of the Petition date*. Such approach is fundamentally improper. See Section I(B)(1), supra.

Second, the Referee minimizes Mr. Herman’s contention his bonus was discretionary simply by referring to the fact the contingency fees had been received by the date his Schedules were completed, and, thus he was “well positioned to actually receive a multimillion-dollar bonus.” (ROR ¶95) Even assuming, *arguendo*, that such a temporal consideration was proper, the Referee does not explain how the mere receipt of fees *by Tripp Scott* created a vested and legally

cognizable ownership right for Herman to receive a bonus. Once the fees were received, all witnesses (including the Trustee) concur that said fees were owned by Tripp Scott, not Mr. Herman. (TR 06/22/18, pp. 65-67) Moreover, all witnesses who testified on the topic agree the bonuses paid by Tripp Scott have always been entirely discretionary until the bonus award is made. This illustrates why it was erroneous for the Referee to make this conclusion without analyzing the facts (or law) concerning whether the bonus was discretionary.

Finally, the only other stated basis for the Referee's conclusion was that the "Pozzuoli Emails...unquestionably reveal there was never any serious doubt in [Herman's] mind that he would be receiving a substantial bonus..." (ROR ¶ 96) Here, the Referee clearly errs by placing undue reliance on the Pozzuoli emails, where no one has even attempted to suggest *how* the emails created an enforceable legal right or entitlement to any compensation. In fact, as expert Mrachek noted, the Trustee steps into the shoes of the debtor. However, even armed with the same emails, the Trustee never sued Tripp Scott for the amounts contained in the Pozzuoli emails because, like Mr. Herman, the Trustee knew he had no legal right to do so. Rather, he waited for Tripp Scott to exercise its discretion months later when it awarded bonuses, just as Mr. Herman would have had to have done.

Once the surrounding circumstances that existed at the time Mr. Herman filed his Petition are considered, Mr. Herman respectfully submits it is clear the Referee

erred in determining Mr. Herman's state of mind in completing his Schedules was to mislead the Trustee. For example, just some of the more undisputed notable factors that existed *as of the Petition date*, and which formed Mr. Herman's state of mind to complete his Schedule *as of that date*, include: (i) Mr. Herman understood he was required to complete his Schedules *as of his Petition Date*; (ii) Mr. Herman was aware the Trustee and his only creditor knew of the two Contingency Fee Cases prior to filing his Petition; (iii) February was the beginning of the fiscal year at Tripp Scott, and there is no dispute Tripp Scott only made bonuses at year-end; (iv) the Contingency Fees had not yet been received by Tripp Scott *as of his Petition Date*; (v) the Contingency Fees, once received, would be owned by Tripp Scott, not by Mr. Herman; (vi) over the prior thirty-years, Mr. Herman's bonuses had always been discretionary; (vii) Mr. Herman's bonus was indeterminable at the time; (viii) Mr. Herman's wages were actively being garnished by his only creditor; (ix) Mr. Herman's counsel investigated the nature of the bonus by meeting with executives at Tripp Scott, and then researched the issue before reaching a conclusion and advising Herman the discretionary bonus did not require disclosure; and (x) Mr. Herman understood the Trustee would be stepping into his shoes, and would inquire of Tripp Scott concerning his entire compensation.

Indeed, the Referee also notes Mr. Herman is a "highly experienced and skilled attorney" (ROR ¶ 107), and such has been repeatedly touted by the Bar; yet,

considering all of the above circumstances, he inferred Mr. Herman had a motive to mislead the Trustee, that is, “to retain for himself his \$2.7 Million bonus free from any claim by his prepetition creditors.” (ROR ¶ 95) The Referee, again, stacking inferences, concluded, “[f]rom this it can be inferred that [Herman] had a clear motive not to disclose this bonus in the Schedules...” (ROR ¶ 95) The clear error in this conclusion not only lies in the fact the record does not contain competent substantial evidence to support this inference, but it was a legal and factual impossibility for Mr. Herman to “retain for himself” the bonus. Indeed, this impermissible inference by the Referee critically overlooks the Referee’s own finding that Mr. Herman’s creditor commenced wage garnishment proceedings *prior* to the petition date and filing of the Schedules. As a result of the garnishment proceedings, Mr. Herman’s wages—which would include any awarded bonus—were actively being pursued. (TR 06/22/18, p. 87) In other words, if any bonus was awarded, such would be subject to the garnishment proceedings instituted by Mr. Herman’s *same creditor* in the parallel State Court proceedings. Thus, Mr. Herman certainly knew it was a legal and practical impossibility for him to have “retained for himself” the bonus. This further underscores the clearly erroneous nature in the Referee’s inference that Mr. Herman had any ill motive in completing his Schedules, especially when viewed against the clear and convincing standard governing these proceedings where any inferences would have to be clearly and convincingly to the

exclusion of all other reasonable inferences. Here, clearly indisputable facts (not inferences) support the reasons for Mr. Herman's disclosure as they existed on the Petition date. There simply is no reasonable basis or record evidence to establish the *only* motive cited by the Referee that would support the charges brought by the Bar.

It is respectfully requested the Court reject the recommendation by the Referee as to guilt as the recommendation is contrary to the facts and the law.

I. SANCTIONS

A. Given the Context in Which the Conduct Occurred, the Totality of the Circumstances and Substantial Mitigating Factors, the Referee's Recommendation for an 18 Month Suspension is Excessive and is Not Supported by Existing Case Law

1. Context, Totality of Circumstances & Substantial Mitigating Factors

Should this Court accept the recommendation of the Referee as to guilt on one or more of the charges, it is respectfully requested this Court reject the Referee's recommendation as to the appropriate sanction.

We agree with the Referee and the Bar that members of The Florida Bar are required to conform to the highest standard of integrity in all dealings within the legal system, even when they are proceeding as a litigant in a personal capacity. *The Florida Bar v. Cibula*, 725 So.2d 360 (Fla. 1999). Although it is well settled that lawyers may be disciplined for conduct that is not related to the practice of law, "this Court has recognized that misconduct not connected with the practice of law is to be evaluated differently and may warrant less severe sanctions than misconduct

committed in the course of the practice of law.” *The Florida Bar v. Baker*, 810 So. 2d 876 (Fla. 2002) (rejected referee’s disbarment recommendation and imposed a 91 day suspension for attorney who committed three criminally punishable forgeries on legal documents by signing his estranged wife's signature, without her consent, and using the forged documents in a real estate closing during the pendency of divorce proceedings); *Cibula*, supra (cited in ROR) (91 day suspension imposed on attorney found to have intentionally lied under oath regarding his monthly income at two court hearings in personal divorce proceeding); *The Florida Bar v. Cramer*, 643 So. 2d 1069, 1069 (Fla. 1994) (cited in ROR) (approving 90 day suspension for various charges of dishonesty and commingling of client trust funds for attorney who knowingly and deliberately misused trust account in an attempt to mislead the IRS).

In deciding the appropriate sanction for Mr. Herman, we ask the Court to look at the context in which Mr. Herman’s conduct occurred and all the circumstances in this matter, particularly Mr. Herman’s lack of experience with Bankruptcy practice and applicable law and his reliance on his experienced bankruptcy counsel, as well as the substantial mitigating factors.

Reliance on Advice of Bankruptcy Counsel

Based upon the expert testimony and case law presented at the final hearing, there is substantial legal support for the conclusion that a hope or expectation of receiving a bonus does not equate to a legally enforceable right, making the bonus

property of the bankruptcy estate on the petition date and requiring its disclosure on Schedule B (Personal Property of Debtor). Given the applicable facts and the case law, Mr. Herman's reliance on Mr. Houston's advice as it related to not reporting the bonus as property on Schedule B was reasonable. Although the Report of Referee did not set forth an analysis regarding the discretionary versus vested bonus issue (which was the main issue in the bankruptcy case), the Referee did not appear to find to the contrary. Based upon the Referee's comments at the sanction hearing (TR 10/22/18, p. 74-76, 82-84) and in the Report of Referee, it is evident that Mr. Herman was found in violation of the Rules related to his answer to question 17 on Schedule I (Income), which the Referee found to be misleading. Schedule I was prepared by Mr. Houston. The language the Referee found to be misleading was crafted by Mr. Houston, not Mr. Herman.

We are in agreement that Mr. Houston should have erred on the side of caution and taken a more conservative approach, as was testified to by Chad Pugatch, who eventually substituted as Mr. Herman's bankruptcy counsel after the entry of the bankruptcy court's Order. Maybe Mr. Herman, as a lawyer, could have and should have realized this when consulting with Mr. Houston and insisted on including more specific language regarding the anticipated bonus or even removing the historical language. But should Mr. Herman be punished with a lengthy suspension or

disbarment for his failure to insist that his lawyer take a different approach when even the Bar's bankruptcy law expert opined that it was a "practice" issue?

Therefore, even if this Court finds that Mr. Herman's reliance on his bankruptcy lawyer as to the language included on Schedule I was not reasonable and did not excuse him from the obligation to give a more complete answer, his reliance on his bankruptcy lawyer should be considered in determining his level of culpability, as well as in mitigation of any sanction to be imposed. See Adorno, 60 So.3d at 1028 (recognizing that reliance on advice of counsel can be "considered as a matter in mitigation"). Mr. Herman's acceptance of the arguably misleading language formulated by his experienced bankruptcy lawyer does not justify an 18 month suspension, and definitely not disbarment, as the Bar argues.

Personal or emotional problems

At the time Mr. Herman signed his Schedules, he was experiencing particularly emotional personal circumstances. A significant deficiency judgment had been entered against him as a result of him personally guaranteeing a loan for a real estate project which failed due to the recession. CIB commenced aggressive efforts to collect on its judgment. After efforts to settle with CIB failed, Mr. Herman took his lawyer's advice and filed for personal bankruptcy. As Mr. Herman testified, having to file for bankruptcy was upsetting, personally, and also professionally embarrassing. He was trying to assist his bankruptcy counsel in providing all the

necessary information and documentation to prepare his Schedules and reviewing the Schedules before filing, while also attending to all of his pending client matters.

Lack of Harm or Potential Harm to the Trustee and CIB

As now has been confirmed by the Trustee, who did not testify at the bankruptcy trial, the Trustee and counsel for CIB knew, prior to Mr. Herman filing his Schedules, about the Home Depot and Security Mutual judgments, the fees to be received by Tripp Scott and Mr. Herman's potential to receive a substantial bonus. Moreover, the judgments and Mr. Herman's involvement in obtaining them for the clients were highly publicized. In fact, the lawyer representing CIB in the state court litigation sent a congratulatory email to Alexander Brown, Mr. Herman's co-counsel in the two relevant cases long before the petition date. (Resp. Exhibit 2) Thus, it would defy common sense and logic to conclude that Mr. Herman was trying to prevent his creditors and the Trustee from finding out about those cases and his potential to receive a substantial bonus after the fees were received by his employer. It was no secret. As confirmed by Chad Pugatch, an experienced bankruptcy practitioner, who the Trustee testified he holds in high esteem and has represented the Trustee, personally and professionally, the prior knowledge of the trustee and counsel for the creditor was "significant" because, even if Mr. Herman was required to disclose it on his Schedules, it was "not a material omission." (TR 6/26/18, p. 29-31) It caused no harm to anyone other than Mr. Herman himself.

Timely good faith effort to rectify consequences of misconduct

Based upon the evidence presented, after Mr. Herman's Schedules were filed and throughout the bankruptcy proceeding, Mr. Herman responded to all requests for information and documents from the Trustee and CIB regarding the contingency fees to be received by his employer and Mr. Herman's expected performance bonus. Mr. Herman provided over 1700 pages of documents to the Trustee and the creditor. Of particular importance relating to these proceedings, after Mr. Herman was awarded his bonus, and long before the adversary bankruptcy proceeding actually went to trial, he moved to amend his Schedules. He also agreed to have the entire amount of the bonus held in trust until the matter was resolved.

Imposition of other penalties or sanctions

There is substantial evidence in the record establishing that Mr. Herman has been subjected to other penalties and significant personal and professional repercussions in the aftermath of his conduct. As a direct result of his conduct, Mr. Herman lost his bankruptcy discharge. Pursuant to his eventual settlement with CIB, Mr. Herman was only able to retain a small portion of his bonus, all of which went to pay only some of his outstanding legal fees.

In addition to suffering financially, Mr. Herman has been impacted professionally. The Bar Complaint and the underlying Order of the Bankruptcy Court has been referenced in pleadings or in open court by opposing counsel in at

least four cases in federal and state court. Not only has his professional reputation been significantly damaged, his practice has been substantially impaired. Prior to his bankruptcy case, a significant portion of Mr. Herman's practice was representing clients in federal courts, in and outside Florida. For several years, Mr. Herman has had to disclose the Bankruptcy Court's Order and his pending Bar Complaint for reapplication to the Eleventh Circuit Court of Appeal and some applications for admission to courts on a *pro hac vice* basis.

Mr. Herman has also suffered for more than seven years personally, having to endure the stress upon him and his family concerning the accusations against him.

Good character and reputation

Mr. Herman has presented substantial evidence of his good character and reputation. His former law partner, a retired judge, a past president of The Florida Bar and, most importantly, clients testified compellingly as to his character and reputation. He has served the Bar and his clients in a dignified way for over 35 years. He served on a Florida Bar grievance committee, as the chair of the same committee and as an officer of the Federal Bar Association for the Southern District of Florida.

Due to the unique circumstances and substantial mitigation present in this case, particularly Mr. Herman's good character and reputation, all the harm he has already suffered in the bankruptcy case and beyond and the length of time (7 years) since the conduct at issue, it is respectfully submitted that Mr. Herman is not in need

of rehabilitation and, therefore, a lengthy suspension is not warranted.

2. The Referee's Recommendation is Not Supported by Existing Case Law

The Referee's recommended sanction in this matter is not supported by the existing reported cases involving comparable dishonest conduct by attorneys, not just in personal matters, but also in connection with the representation of clients.

For instance, in *Cibula*, 725 So.2d 360 (Fla. 1999), the first case cited to in the Report of Referee to support the imposition of sanctions for dishonest/misleading conduct not connected with representing a client, this Court imposed a 91 day suspension. The respondent attorney was found to have intentionally lied under oath regarding his monthly income at two court hearings held in connection with his alimony obligation in personal divorce proceedings. After the hearings, the Family Court judge entered an order finding that he misrepresented his income in order to induce his former wife to agree to modify alimony. The referee in the Bar case found that the respondent attorney's income "was greatly in excess" of the amount he testified to at both hearings and that he "knew his testimony was false at the time he gave it." In aggravation, unlike Mr. Herman, the attorney in *Cibula* had prior discipline. In determining the appropriate penalty to impose, this Court noted that it "considers a lawyer who intentionally lies under oath to have committed an extremely serious offense," but stressed that it took into account the transgressions occurred in the course of dissolution of marriage proceedings, which the Court

recognized as presenting an emotional time for both parties. Similarly, the conduct at issue in Mr. Herman's case occurred in the course of personal bankruptcy proceedings, which the Referee recognized as being a "traumatic" experience for him (ROR ¶119, p. 58). In *Cibula*, the Court also noted that it took into account that the misrepresentations occurred back in 1991, which was more than five years prior to the filing of the Bar complaint against him. Similarly, in Mr. Herman's case, the conduct the Referee found to be misleading occurred in March 2012, more than seven years ago and more than five years prior to the filing of the Bar's Complaint.

In the second case cited in the Report of Referee to support the imposition of sanctions for misleading conduct in the context of a personal matter, *The Florida Bar v. Cramer*, 643 So. 2d 1069, 1069 (Fla. 1994), this Court imposed a 90 day suspension. The respondent attorney had become significantly delinquent in employee taxes and received a levy notice from the Internal Revenue Service (IRS). Fearing the IRS would garnish his operating account, he left earned fees in his trust account and deposited personal funds to the trust account to prevent the IRS from being able to obtain the funds. In addition to being found to have engaged in commingling and other trust account violations, the attorney was found in violation of the various dishonesty provisions of the Bar Rules because the attorney's knowing and deliberate misuse of the client trust account was done in an attempt to mislead the IRS. In determining the appropriate sanction, this Court took into consideration

mitigating factors, including the attorney's medical conditions which led to many of the problems in his law practice, that he cooperated fully with the Bar in its investigation and that no client suffered any injury.

In other analogous cases provided to the Referee by Respondent's counsel, but not cited in the Report of Referee, this Court has imposed 91 day suspensions:

In *The Florida Bar v. Berthiaume*, 78 So. 3d 503 (Fla. 2011), this Court rejected the referee's recommendation for a 10 day suspension and imposed a 91 day suspension on an attorney who abused the subpoena power for her personal investigation into her client's private finances when she had no authority to seek this confidential information, thereby engaging in dishonest and misleading conduct. The respondent attorney had signed and served a "Subpoena Duces Tecum" on a bank, directing the bank to produce the records of her client, specifically seeking information regarding checks that the client had written to Respondent from the client's account at the bank. Previously, the bank had not honored the checks. There was no pending case and the subpoena was not authorized by law. The fraudulent subpoena stated: "If you fail to produce these records and the above requested information as described, you may be held in contempt of court, punishable by a fine or incarceration or both." The bank refused to honor the false subpoena. This Court found a violation of Rule 4-8.4(c) & (d) (disapproving Referee's finding no violation of Rule 4-8.4(c)) "[b]ecause the record and the referee's findings show that

Respondent ‘knowingly and deliberately sent the purported subpoena with the offending language,’ which was ‘clearly designed to cause the bank to produce the records without legal authority,’ and thus ‘clearly misleading.’” In increasing the sanction from 10 days to 91 days, the Court noted: “Respondent has engaged in serious misconduct—she abused the subpoena power, which is a power of the court, for her personal investigation. Such dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole.”

In *The Florida Bar v. Baker*, 810 So. 2d 876 (Fla. 2002), this Court rejected the referee’s disbarment recommendation even though the respondent attorney signed his estranged wife’s signature, without her consent, on several documents related to the sale of a home they owned, committing three criminally punishable forgeries on legal documents, caused his secretary to unlawfully notarize two of the forgeries, caused two other employees to witness the forgeries, and submitted the forged documents for use in a real estate closing. At the time of his misconduct, the Respondent and his wife were involved in a bitter divorce and the property was subject to foreclosure. This Court agreed with the referee’s findings that the violations were serious and the conduct was dishonest, but found that the appropriate sanction, given all the circumstances of the case, was a 91 day suspension.

Other cases involving dishonest conduct by attorneys, but in the context of representing clients, are also instructive and should be considered in determining an

appropriate sanction in Mr. Herman's case:

In *The Florida Bar v. Russell-Love*, 135 So.3d 1034 (Fla. 2014),¹⁷ this Court imposed a 91 day suspension in a case where Respondent was found to have knowingly and deliberately made false statements on immigration visa forms submitted to the United States government on behalf of the client who hired her to assist her in obtaining a visa to travel to the United States to participate in professional tennis tournaments. Respondent misrepresented that she was the attorney for U.S. Tennis Association (USTA), misrepresented that USTA was petitioning for a visa on behalf of the client and printed the name of a USTA employee on the signature line on the forms. In increasing the suspension to 91 days, the Court noted that, "Significantly, Russell-Love filled out or signed the portions of the revised forms declaring under penalty of perjury that the information therein was true and correct." (Emphasis added). And, the referee found that she acted deliberately and knowingly in order to expedite the immigration filing. The Court considered mitigating factors (absence of prior discipline, inexperience in the practice of law, good character), which were substantially less in number and nature than those present in Mr. Herman's case. Significantly, in aggravation, the Court stressed a factor which was not present in Mr. Herman's case, that the attorney's

¹⁷ This case was decided after *The Florida Bar v. Adler*, 126 So.3d 244, 247 (Fla. 2013), in which the Court stated that the it "has moved toward stronger sanctions for attorney conduct."

actions caused significant harm to her client, a Bahamian citizen, who was charged with immigration violations and is now subject to “permanent inadmissibility” to the United States.

In *The Florida Bar v. Gwynn*, 94 So. 3d 425 (Fla. 2012), the misconduct was in connection with the attorney’s representation of a client in the United States Bankruptcy Court and the Referee relied upon findings in three Orders of the Bankruptcy Judge sanctioning the attorney and finding she acted in bad faith. The Bar had also called a Bankruptcy law expert in support of the Bar’s allegations in the Bar case. In the first Bankruptcy Court Order, the bankruptcy judge set forth specific findings regarding *numerous* instances in which respondent had acted dishonestly, incompetently, and in bad faith in the pending litigation, supporting finding respondent in violation of Rules Regulating the Florida Bar 4-3.1 (lawyer shall not bring or defend a proceeding or assert or controvert an issue therein unless there is a basis for doing so that is not frivolous); 4-3.3(a)(1) (false statement of material fact or law to a tribunal); 4-4.1(a) (false statement of material fact or law to a third person); 4-4.4(a) (use means that have no substantial purpose other than to embarrass, delay or burden a third person); 4-8.4(a) (lawyer shall not violate or attempt to violate the Rules); 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and 4-8.4(d) (conduct prejudicial to the administration of justice). In the first Bankruptcy Court Order, specifically, the bankruptcy judge

found that respondent had (1) filed frivolous claims to harass her opponent and opposing counsel; (2) failed to research and verify claims she advanced in motions she filed with the court; (3) engaged in willful abuse of the judicial system; and (4) continually made allegations, both in pleadings filed with the court and in her testimony before the court, that were simply incorrect or false. The bankruptcy judge found that respondent's conduct was "objectively unreasonable and vexatious" and "sufficiently reckless to warrant a finding of conduct tantamount to bad faith ... for the purpose of harassing her opponent." Subsequently, after respondent no longer represented any party in the Bankruptcy case, she continued to file pleadings and papers with the federal bankruptcy court. In the second Bankruptcy Court Order, the court found that respondent had filed hundreds of pages of documents and directed her to stop filing such items unless specifically ordered to do so by the court or unless mandated by either the bankruptcy rules or the local rules. Subsequently, the court entered its third order finding that even after the second order was entered, respondent continued to file notices of filing, in defiance of the bankruptcy court's order. The order also found that respondent "improperly attempted to influence [the] court by filing numerous Notices of Filing containing inappropriate hearsay documents that are unrelated to any pending contested or adversary proceedings," and in doing so, she "engaged in unprofessional conduct before [the] court." Based upon these subsequent facts and findings of Bankruptcy Court, the Referee

recommended that respondent be found guilty of violating Rules 4-3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists); 4-3.5(a) (lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court); 4-8.4(a) (lawyer shall not violate or attempt to violate the Rules of Professional Conduct); and 4-8.4(d) (conduct prejudicial to the administration of justice). The Referee also found respondent failed to competently represent her client by filing numerous motions for sanctions against opposing counsel and other frivolous claims and needlessly delaying the bankruptcy proceedings. Mitigating factors found by Referee included (1) absence of prior disciplinary record, (2) personal or emotional problems, and (3) imposition of other sanctions. In increasing sanction from 90 days to a 91 day rehabilitative suspension, the Court noted: “The referee found respondent's misconduct in the bankruptcy case to be “intentional, serious and repeated, despite and in defiance of warnings issued to her, and sanctions imposed against her, by a sitting federal judge.” Further, the referee recommended that she be found guilty of fifteen separate rule violations, including making false statements, conduct involving dishonesty, deceit, and misrepresentation, making frivolous claims, using means with no other purpose but to delay or harass, failing to provide competent representation, failing to reasonably expedite litigation, and conduct prejudicial to the administration of

justice. Additionally, the bankruptcy judge found that respondent made “*numerous* allegations of wrongdoing and dishonesty against opposing counsel in the bankruptcy case with no basis in fact for doing so.” (Emphasis added by Florida Supreme Court). Further, respondent intentionally violated the court order directing her to stop filing “notices of filing” in the bankruptcy proceeding and was again sanctioned by the bankruptcy court for doing so.

Based upon the foregoing reported cases imposing no more than a 91 day suspension for dishonest conduct, which we submit was demonstrably more egregious than the conduct of Mr. Herman that was found to be misleading, the Referee’s recommendation of an eighteen month suspension is not supported by the existing reported cases and is, therefore, excessive.

B. The Bar’s Request for Disbarment has No Basis in Existing Case Law

Given the context in which Mr. Herman’s conduct occurred and the totality of circumstances in this matter, as set out in detail above, particularly Mr. Herman’s lack of experience with Bankruptcy law and his reliance on his experienced bankruptcy counsel, as well as the multiple other substantial mitigating factors present in this case, disbarment is unjustified and disproportionate. As the Referee recognized at the sanctions hearing (TR 10/22/18, p. 82-84), the facts and the misconduct found in the disbarment cases upon which the Bar relies are clearly distinguishable from the facts and misconduct found in this matter.

In discussing *The Florida Bar v. Hall*, 49 So.3d 1254 (Fla. 2010), involving conduct related to the personal affairs of the attorney regarding the lease of a portion of land and not her representation of a client, the Bar failed to mention significant facts regarding the nature and extent of the respondent attorney's misconduct, which this Court described as "brazen," "ongoing," and "continuous" and included forgery, multiple misrepresentations, abuse of the legal system and harassment of a vulnerable elderly couple. When an elderly couple refused to sell the attorney pasture land that Respondent was leasing from them, she forged their signatures on an agreement of sale, which she recorded with the county clerk. The respondent also harassed and pressured the couple by sending letters, calling, and visiting them, even after they hired counsel. Respondent was criminally charged with forgery and uttering a forged instrument and entered into a Deferred Prosecution Agreement (DPA). The elderly couple's attorney requested that Respondent execute a quitclaim deed to remove the cloud from the property's title, but Respondent did not comply with this request for over three years and only did so when she was required to sign a quitclaim deed as part of her DPA. The Court noted that, "[d]uring that entire period of time, the public was misled by the fraudulent recording in the clerk's office, and the official recording lent credence to Respondent's misrepresentations, [and] her deliberate actions, . . . put a cloud on the title of the Godwins' property and prevented them from selling it." Thus, as this Court concluded, "Respondent's

brazen misrepresentations and continual harassment distinguish this case from other forgery cases.” In imposing disbarment this Court noted that Respondent “purposefully used her knowledge of the law to harm others, for her own personal benefit,” engaged in a “lengthy process of harassment and abuse of the legal system,” and “was preying upon this vulnerable couple.” The Court found that Respondent “deliberately and intentionally engaged in felonious conduct” and that her misconduct “was not one isolated incident” as she had “engaged in ongoing, continuous misrepresentations for several years.”

Although the respondent attorney in *Hall* had no prior discipline and the referee in her case found in mitigation that she had good character and a positive reputation in the community, that is where the similarities to Mr. Herman’s case end. Mr. Herman’s conduct, unlike Hall, was one isolated incident. He did not engage in ongoing, continuous misrepresentations for several years. Unlike Hall, who not only refused to rectify the consequences of her misconduct, but caused additional harm, over a three year period of time, Mr. Herman has been found by the Referee to have made timely good faith efforts to rectify the consequences of his conduct. And, most significantly, unlike Hall, who caused significant harm, Mr. Herman as a result of his conduct did not cause any harm to anyone, but himself.

In discussing *The Florida Bar v. Kaufman*, 684 So. 2d 806 (Fla. 1996), in which disbarment was imposed, the Bar failed, again, to give a complete picture of

the nature and extent of the respondent attorney's underlying misconduct, which stemmed from the attorney's actions as a landlord (not as an attorney), as well as his additional misconduct before the referee in the Bar proceedings. The Bar also neglected to mention that, unlike Mr. Herman, Kaufman had a prior disciplinary history, including a private reprimand in 1967, a two-year probation in 1977, and a public reprimand in 1992. The Bar's complaint was filed after a civil court judgment had been entered against the lawyer in his capacity as a landlord and the judge in an underlying proceeding entered an order detailing the attorney's actions and efforts to avoid paying the judgment, including filing numerous baseless accusations in court documents and in letters to two judges regarding the underlying civil suit. The attorney was found to have hidden his assets, lied about his assets, and obstructed efforts to collect the judgment against him. Default judgment was entered in the Bar case after Respondent's repeated non-compliance with Bar proceedings. The referee also noted that she had been "subjected to the numerous confusing, almost unintelligible pleadings" submitted by the attorney and had even ordered a psychiatric evaluation of him before continuing with the Bar proceeding. The referee concluded that the attorney's "blatant and bizarre behavior in this case" warranted disbarment and that he should be required to prove both ethical and psychiatric rehabilitation before being readmitted to the Bar.

Unlike Kaufman, Mr. Herman's conduct was one isolated incident. Mr.

Herman, unlike Kaufman, cooperated in the underlying litigation and made timely good faith efforts to rectify the consequences of his conduct. And, significantly, unlike Kaufman, Mr. Herman was found to have been fully cooperative in the Bar proceedings before the Referee.

In relying upon *The Florida Bar v. Rood*, 620 So. 2d 1252 (Fla. 1993), the Bar failed to mention that the attorney had two substantially related Bar cases. In the first one, *The Florida Bar v. Rood*, 569 So. 2d 750 (Fla. 1990) (*Rood I*), the attorney was disciplined with a one year suspension for the underlying fraudulent conduct resulting in the judgment, which he, later, fraudulently tried to avoid paying, leading to the second Bar case (*Rood II*) in which the Court imposed disbarment. In *Rood I*, the referee found the attorney engaged in dishonest and fraudulent conduct in connection with a Michigan medical malpractice case in which the attorney was counsel for the plaintiffs and had his clients sign false answers to interrogatories under oath. The defendants sued the attorney and his clients, and a jury found the attorney engaged in a fraud conspiracy and awarded damages. In *Rood I*, approving a one year suspension, this Court found that, although the misconduct “is serious and reprehensible, ... it does not merit the extreme sanction of disbarment,” in large part “due to the isolated nature of this transaction, especially Rood's lack of disciplinary problems in the lengthy period since the incident came to light.” 569 So. 2d at 754 (emphasis added).

In *Rood II*, Rood was found to have engaged in additional fraudulent conduct by transferring property to his father to hinder efforts to collect on the fraud judgment. In imposing disbarment, this Court found that “the aggravating factors identified by the referee justify the most serious measure of discipline,” noting that “Rood’s prior disciplinary record, coupled with his actions in the fraudulent conveyance case now before us, reflect a pattern of misconduct that demonstrates his unfitness as a lawyer.” 620 So. 2d at 1255. Mr. Herman, unlike Rood, has no prior discipline and he has not been found to have engaged in “a pattern of misconduct.” Thus, the Bar’s reliance on *Rood II* is clearly misplaced.

The Bar’s reliance on both *The Florida Bar v. Kickliter*, 559 So.2d 1123, 1124 (Fla. 1990) and *The Florida Bar v. Kinsella*, 44 Fla. L. Weekly S14 (Fla. Dec. 20, 2018) is misplaced, as those cases deal with attorneys who were charged with, entered pleas and were sentenced on criminal charges. Kickliter, who was disbarred, pled guilty to three felonies, in connection with his forgery of his client's signature on a will submitted for probate. Kinsella, who received a three year suspension, had only been admitted to the Bar for three months when she was arrested for stealing money from her employer.

The Bar also cites to an unreported decision of this Court, *The Florida Bar v. Tuerk*, Case No. SC17-62 (Fla. July 20, 2017), which is clearly not applicable. In 2015 (Case No. SC15-2253), Tuerk was suspended for one year as reciprocal

discipline. In 2016 (Case No. SC16-983), Tuerk was suspended for three years after contempt proceedings were initiated and he failed to respond to the Court's Order to Show Cause. In 2017 (Case No. SC17-62), in a subsequent contempt case for failure to comply with the conditions of suspension, this Court disbarred Tuerk after finding that he made false statements to the Court.

The Bar has failed to cite to even one disbarment case which is similar to Mr. Herman's case because the facts and circumstances of his conduct, coupled with the substantial mitigating factors, simply do not warrant disbarment.

WHEREFORE, Cross-Petitioner/Respondent Peter Herman requests that this Court reject the Referee's recommended findings in the Report of Referee that Mr. Herman violated Rules 3-4.3, 4-3.3(a)(1), 4-8.4(a)&(c). Mr. Herman requests that this Court reject the Referee's recommended sanction of an 18 month suspension and The Florida Bar's request for disbarment. Should the Court find Mr. Herman violated one or more Rules, it is requested that, in imposing its sanction, the Court consider the unique combination of multiple mitigating factors proving Mr. Herman is not in need of rehabilitation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-filing Portal; with copies provided via e-mail to Staff Counsel, The Florida Bar, at aquintel@floridabar.org; Bar Counsel Joi L. Pearsall, at jpearsall@floridabar.org on this 10th day of April, 2019.

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that the type size and style of this Brief is Times New Roman 14pt.

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