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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No.: SC17-2050
Fl. Bar File No.: 2014-50, 165 (17E)

v.

PETER G. HERMAN,

Respondent.

APPENDIX TO

THE FLORIDA BAR'S

INITIAL BRIEF

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297 So.3d 516
Supreme Court of Florida.

The FLORIDA BAR, Complainant,

v.

Peter G. HERMAN, Respondent.

No. SC17-2050
|
June 18, 2020

Synopsis

Background: Referee recommended 18-month suspension from practice of law for failing to disclose expected bonus from $10 million in contingency fees in two cases.

[Holding:] The Supreme Court held that attorney was entitled to present advice of counsel defense to rebut charge that he was intentionally dishonest.

Remanded

West Headnotes (5)

[1] Bankruptcy False Oath or Account

Reliance on counsel generally absolves a debtor of fraudulent intent regarding truthfulness of a debtor's financial disclosures, if debtor acted in good faith by providing the attorney with all the necessary facts and documentation. 11 U.S.C.A. § 727(a)(4)(A).

[2] Bankruptcy False Oath or Account

Advice of counsel defense is unavailable regarding truthfulness of a debtor's financial disclosures if it should have been obvious to the debtor that his attorney was mistaken or if a disclosure is incompatible with the debtor's own knowledge. 11 U.S.C.A. § 727(a)(4)(A).

[3] Bankruptcy Errors on and omissions from schedules

Advice of counsel defense regarding truthfulness of a debtor's financial disclosures does not negate fraudulent intent when it is transparently plain that the property should be scheduled. 11 U.S.C.A. § 727(a)(4)(A).

[4] Attorneys and Legal Services Defenses, Excuses, and Justifications

Attorney in disciplinary proceeding was entitled to present advice of counsel defense to rebut charge that he was intentionally dishonest in schedules to personal bankruptcy petition by failing to disclose expected bonus from $10 million in contingency fees in two cases and by disclosing only an annual performance bonus of $65,000 to $70,000. 11 U.S.C.A. § 727(a)(4)(A); Fla. Bar Rule 3-4.3, 4-3.3(a)(1), 4-3.4(a), 4-8.4(c).

[5] Attorneys and Legal Services Presumptions, inferences, and burden of proof

Attorney bore burden of production to come forward with evidence necessary to support his advice of counsel defense to rebut charge in disciplinary proceeding that he was intentionally dishonest in schedules to personal bankruptcy petition, but the ultimate burden of proof remained on the Bar.

Original Proceeding – The Florida Bar

Attorneys and Law Firms

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Opinion

PER CURIAM.

***517** We have for review a referee's report recommending that Respondent, Peter G. Herman, be found guilty of professional misconduct and suspended from the practice of law for eighteen months. We have jurisdiction. *See* art. V, § 15, Fla. Const. As discussed below, we remand this case to the referee for further proceedings and reconsideration in light of this opinion and for the filing of an amended report.

BACKGROUND

This case arises entirely out of Herman's personal bankruptcy proceeding. More specifically, the case is about certain final disclosures that Herman allegedly failed to make in that proceeding. The disclosures at issue relate to bonus compensation that Herman hoped to receive after filing his Chapter 7 bankruptcy petition. In November 2017, The Florida Bar (Bar) filed a complaint with this Court alleging that Herman "had an obligation to be forthright" in his bankruptcy financial disclosure forms and that he failed to live up to that obligation.[1]

[1] The Bar's complaint also alleged that Herman committed misconduct by failing to disclose $46,000 in prepetition transfers to an account beyond his creditors' reach. The referee recommended that Herman be found not guilty on the transfer-related charges, and the Bar has not sought review of that recommendation.

The complaint alleged that Herman's conduct violated the following Rules Regulating the Florida Bar (Bar Rules): 3-4.2 ("Violation of the Rules of Professional Conduct ... is a cause for discipline."); 3-4.3 ("[Acts] contrary to honesty and justice may constitute a cause for discipline ...."); 4-3.3(a)(1) ("A lawyer shall not knowingly ... make a false statement of fact or law to a tribunal ...."); 4-3.4(a) ("A lawyer must not ... unlawfully obstruct another party's access to evidence or ... conceal a document or other material that a lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding ...."); 4-8.4(a) ("A lawyer shall not ... violate or attempt to violate the Rules of Professional Conduct ...."); and 4-8.4(c) ("A lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation ...."). This Court referred the Bar's complaint to a referee for a hearing and recommendation, and the referee made the following findings of fact.

In December 2011, CIB Marine Capital, LLC (CIB) obtained a deficiency judgment of approximately $4.5 million against Herman, based upon the nonpayment of a loan that he personally guaranteed for Esquire Ventures, LLC, in connection with a real estate investment that failed in 2007. *CIB Marine Capital, LLC v. Esquire Ventures, LLC*, No. 2009CA010465 (Fla. 19th Cir. Ct. Dec. 9, 2011). CIB immediately pursued collection proceedings against Herman on the judgment. Then, on February 18, 2012, Herman filed a petition for Chapter 7 bankruptcy as a debtor because he did not have the funds available to satisfy the judgment that had been levied against him. *In re Herman*, 495 B.R. 555 (Bankr. S.D. Fla. 2013).

When Herman initiated his bankruptcy proceeding, he was employed as a "director" ***518** with Tripp Scott, P.A. As a director, Herman's salary was determined by Tripp Scott's compensation committee. Additionally, he received an annual performance bonus. However, there was no written contract between Herman and Tripp Scott regarding this compensation package.

Prior to filing for bankruptcy, Herman served as co-lead counsel, along with another Tripp Scott attorney, in two high-value contingency cases. The plaintiffs in those cases prevailed. Under the governing fee agreements, Tripp Scott received approximately $10 million in combined legal fees. The law firm received the fees after Herman filed his bankruptcy petition, but before March 20, 2012, the date Herman filed the financial disclosure schedules at issue in this case.

Beginning in December 2011 and continuing into early January 2012 (i.e., before he filed for bankruptcy), Herman had sent approximately six emails to the president of Tripp Scott, Edward Pozzuoli, as well as to members of Tripp Scott's compensation committee. Anticipating that the firm would be receiving its fees from the contingency cases, and having heard rumors that fee allocation discussions were already underway within the firm, Herman wrote the e-mails to advocate his position about how the fees should be distributed. Among other things, Herman expressed that he wanted Tripp Scott to be consistent with its historical practices in awarding bonuses. Ultimately, the compensation committee did not allocate bonuses from the fees until August 2012. Herman's bonus was $2.7 million; however, in light of

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his ongoing bankruptcy proceeding, those funds were placed in trust.

During Herman's bankruptcy proceeding, CIB objected to the petition for discharge, alleging that Herman had: (1) intentionally concealed prepetition assets; (2) failed to disclose prepetition transfers of assets; and (3) made false oaths in connection therewith. Relevant to this case, CIB claimed that Herman intentionally failed to disclose his anticipated bonus from the $10 million fee. In June 2013, the bankruptcy court held a trial on CIB's and the bankruptcy trustee's objection to Herman's bankruptcy discharge.

At the conclusion of that trial, the bankruptcy court entered a seventy-one-page order denying Herman's petition for discharge. The court concluded that Herman had deliberately concealed his expected bonus share of the $10 million fee and that Herman had done so with the intent to hinder, delay, or defraud his creditors. *In re Herman*, 495 B.R. at 595-97. The bankruptcy court did not consider an advice of counsel defense, because Herman did not timely plead one. The United States District Court for the Southern District of Florida affirmed the bankruptcy court's order. *Herman v. CIB Marine Capital, LLC*, No. 13-cv-62251-KMM (S.D. Fla. Sept. 29, 2014). In light of the nature of the bankruptcy court's findings and the district court's affirmance, the district court forwarded the matter to the U.S. Attorney for the Southern District of Florida and to the Bar.

The hearing on the Bar's complaint included testimony from Herman's bankruptcy attorney, Bart Houston. Houston's testimony centered on two particular schedules to Herman's bankruptcy petition: schedule B and schedule I. Schedule B focuses on property of the estate at the time of the bankruptcy petition. Houston testified that his "unequivocal" advice to Herman was that it was unnecessary to report an interest in Tripp Scott's $10 million fee from the contingency cases, including an interest in the form of Herman's expected bonus, because the bonus was discretionary and not vested when ***519** Herman filed his bankruptcy petition. Schedule I includes question 17, which asks: "Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of [the bankruptcy schedules]." Houston testified that he chose the exact wording in Herman's response: "Annual performance bonus (historically 65,000 – 70,000)." The referee's report says: "Houston explained that he chose this methodology in order to put the Trustee on notice that [Herman] could be expected to receive an intangible bonus in the next year." Herman testified that he relied on Houston's advice in filling out both schedule B and schedule I.

In his Report and Recommendation, the referee recommended that Herman be found guilty of violating the Bar rules charged in the complaint. The referee found that, by failing to disclose his expected bonus from Tripp Scott's $10 million fee, Herman intentionally misled the bankruptcy trustee and Herman's creditors. The referee noted that he based this finding not just on the court orders from Herman's bankruptcy proceeding, but also on the evidence and testimony presented at the hearing in this case. The referee rejected Herman's advice of counsel defense, concluding: "First and arguably foremost, reliance on advice of counsel is not available as a defense in a Bar discipline proceeding." As a sanction, the referee recommended that Herman be suspended for 18 months.

ANALYSIS

On review, the Bar argues that the referee's proposed sanction is too lenient and that Herman should instead be disbarred. Herman in turn challenges the referee's recommended findings and recommendation as to guilt and argues that, in any event, the referee's recommended sanction is too harsh.

Our decision to remand this case to the referee for further proceedings turns on Herman's advice of counsel defense, so we will start there. Our most important precedent on this issue is *Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011), which involved alleged violations of the Bar's conflict of interest rules, its rules against dishonesty, and its rule prohibiting excessive attorney's fees. We concluded that Adorno violated those rules when he secretly settled a putative class action solely on behalf of the named plaintiffs and "abandoned" the putative class, thereby creating "a windfall for the named plaintiffs and his firm." *Id.* at 1035. In *Adorno*, we declined even to consider the respondent's advice of counsel defense. We cited our earlier decision in *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007), for the proposition that advice of counsel "is not a defense available to respondents in Florida Bar discipline cases, unless specifically provided for in a rule or considered as a matter in mitigation." *Adorno*, 60 So. 3d at 1028.[2] We observed that Adorno "had the obligation to act to the benefit of the entire class" and that he could not avoid a finding of misconduct "by attempting to shift blame to others." *Adorno,* 60 So. 3d at 1028.

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2 In *Adorno*, we erroneously described this as a holding of *St. Louis*. The relevant passage from *St. Louis* appears in the opinion's description of the referee's findings and recommendation, not in the Court's own analysis, which did not address the advice of counsel defense. *See St. Louis*, 967 So. 2d at 118. This error is of no consequence, however, because we stand by the general principle that an advice of counsel defense is usually unavailable in Bar discipline proceedings.

While we do not fault the referee for interpreting this Court's precedent as he did, the general principle we articulated in *Adorno* is not so unyielding as to preclude ***520** consideration of Herman's advice of counsel defense in this case. The reason an advice of counsel defense is usually unavailable in Bar discipline proceedings is that the Bar rules themselves charge Florida lawyers with knowledge of the rules and of "the standards of ethical and professional conduct prescribed by this court." R. Regulating Fla. Bar 3-4.1. But here, Herman does not claim that he relied on the advice of counsel as to the meaning and requirements of any Bar rule. Nor does this case have anything to do with Herman's work as an attorney serving clients. Instead, Herman himself was the client, and the charges in this case are inextricably intertwined with Herman's obligations under federal bankruptcy law. The Bar rules at issue did not require of Herman anything over and above what federal bankruptcy law already required—honesty and good faith in completing his bankruptcy schedules. To the extent that federal bankruptcy law permits an advice of counsel defense to negate a finding of bad intent, we conclude that such a defense should also be available to Herman in this Bar discipline proceeding.

[1] **[2]** **[3]** Where the truthfulness of a debtor's financial disclosures is in dispute, federal bankruptcy law includes an "element of mens rea that involves an assessment of whether the debtor made the false statement 'knowingly and fraudulently,' as opposed to carelessly." *Robinson v. Worley*, 849 F.3d 577, 583 (4th Cir. 2017) (quoting 11 U.S.C. § 727(a)(4)(A) (2012)). In determining culpability, "reliance on counsel generally absolves a debtor of fraudulent intent." *Id.* at 586. But there are conditions on the availability of this defense. The court must determine whether the debtor acted in good faith. To make that showing, the "debtor must demonstrate that he provided the attorney with all the necessary facts and documentation." *Id.* And even then, the defense is unavailable if "it should have been obvious to the debtor that his attorney was mistaken" or if a disclosure is incompatible with the debtor's own knowledge. *Id.* The advice of counsel defense does not negate fraudulent intent "when it is transparently plain that the property should be scheduled." *In re Zizza*, 875 F.3d 728, 732 (1st Cir. 2017) (citation omitted). In short, "[a] debtor may rely on the advice of counsel only when the advice is reasonable." *In re Creasy*, 138 F. App'x 45, 46 (9th Cir. 2005).

[4] Herman is entitled to assert the same advice of counsel defense in this Bar discipline proceeding, subject to the conditions we have just described. All of the Bar rules at issue in this case prohibit conduct that is knowingly or intentionally dishonest. To establish that Herman is guilty of misconduct, the Bar would have to prove by clear and convincing evidence not only that Herman's bankruptcy disclosures were false or misleading, but also that Herman knew that they were false or misleading. Put differently, the Bar would have to prove that Herman's answers to the questions on his bankruptcy schedules were not made in good faith. The advice Herman received from counsel, along with whether Herman relied on that advice in good faith, is relevant to determining whether the Bar can prove its case.

Without prejudging the merits, we believe that Herman's advice of counsel defense is sufficiently plausible that it cannot be taken off the table without consideration by the referee. Recall that there are two schedules at issue, schedule B and schedule I. Schedule B attempts to identify the property of the bankruptcy estate as of the time the bankruptcy petition is filed (here February 2012). Whether something is property of the estate turns on considerations of both state property law and federal bankruptcy law. A key focus of Herman's ***521** bankruptcy case was the extent to which Herman's bonus was discretionary. Herman argued that the bonus was too discretionary for it to be considered property of his bankruptcy estate. The bankruptcy court disagreed, concluding that Tripp Scott's compensation committee "only had discretion to determine what amount, within a reasonable range, of the $10 million fee would be paid to the debtor based upon his prepetition performance." *Herman*, 495 B.R. at 583.

This dispute continued into Herman's Bar discipline proceeding. The referee heard from experts who reached opposite conclusions on whether bankruptcy law obligated Herman to disclose on schedule B a potential bonus from Tripp Scott's $10 million fee in the contingency cases. Herman's expert testified that the bonus was discretionary and a mere expectancy that did not need to be disclosed on that schedule. Relying heavily on the bankruptcy court's analysis, the Bar's expert witness testified to the contrary. But he

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acknowledged that in the governing case law "there is some uncertainty as to what the outcome is, not just on the law, but on the facts, that you have to look into the practicalities from a practice issue of how to respond to the questions." The Bar's expert agreed that it was a "fair statement" that the disclosure issue for schedule B "comes down to" whether Herman's bonus was vested or discretionary. In light of the conflicting expert testimony and the acknowledged uncertainty in the case law, Herman deserves to have his advice of counsel defense considered.

The potential merit of Herman's advice of counsel defense as to schedule I is a closer call. Recall that question 17 of that schedule asks: "Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of [the bankruptcy schedules]." Herman's answer on this schedule was: "Annual performance bonus (historically 65,000 – 70,000)."

At the hearing, Bar counsel asked Herman: "When you wrote that answer to that question, you weren't referencing any of the fees from [one of the contingency fee cases], were you?" Herman responded:

> That's not true. First of all, this was written by Mr. Houston. I certainly reviewed it and signed it, no question about that. However, in my practice at Tripp, Scott for 30 years, we've always gotten a discretionary bonus at the end of the year for whatever work we had done. Some years, we didn't get bonuses, but if there was going to be an award of a bonus, it was usually toward the end of the year. So, in my mind, based on whatever performance and money that would come in and would be available for a bonus, that would be considered an increase in my salary, an annual performance bonus, and parenthetically, the reason that's parenthetical, is because it says, it gave him a clue, that's what I got in the past, and I would likely get a bonus for 2012.

Later at the hearing, in response to a question from his own attorney, Herman testified that his bankruptcy counsel had told him that there would be follow-up for the trustee to learn more detail about the performance bonus: "For instance, Schedule I, he said, the bonus, likely what will happen is, the trustee will go to your employer and come to you and try to figure out what that might be, and that's exactly what happened in this case."

Bart Houston, Herman's bankruptcy counsel, also testified about schedule I at the hearing. Consistent with Herman, Houston testified that he had authored Herman's response to question 17. Houston answered "no" when he was asked whether the contingency fee cases had ***522** been part of his "thought process" in drafting an answer for the schedule. Houston testified that, because the amount of Herman's bonus was indeterminate, "[y]ou couldn't really pick one out, so I averaged out two or three years and put that number down, and if the trustee wanted to take off from there, he had the information to do it."

The Bar's expert faulted Herman's answer to schedule I, question 17. But the expert's testimony left doubt as to what level of disclosure would have been sufficient. For example, although the testimony is not entirely clear, the expert appeared to indicate that it would have been sufficient for Herman simply to answer "annual bonus," and that the problem with Herman's answer to question 17 is that he added the parenthetical "(historically 65,000 – 70,000)." According to the expert, "the way [Herman] answered the question suggested that was what he would get." This testimony seemingly ignores the wording of question 17, which asks about *increases or decreases* in income. Because it is undisputed that for 30 years Herman's income has typically included a performance bonus, an answer that conveys information about Herman's bonus "historically" merely provides a baseline from which to measure any such increase or decrease.

Admittedly, there is a heavy factual component to schedule I, question 17, whereas in schedule B the legal issues are more prominent. That is what makes the potential viability of Herman's advice of counsel defense as to schedule I a closer call. But there are several reasons why the defense cannot be entirely discounted at the threshold, without additional consideration and findings by the referee. First, because the amount of Herman's bonus remained unknown at the relevant time, and because the range of the law firm's discretion was open to dispute, answering question 17 required the exercise of some judgment. Second, the question asks about "reasonably anticipated" increases or decreases in income. Here we observe that the referee made ample findings as to Herman's subjective expectations, but none as to the law firm's perspective (and what it conveyed to Herman) at the time. The picture is incomplete without that information. And finally, the Bar expert's testimony left some doubt as to whether or how far Herman's answer to question 17 strayed from the acceptable conventions of bankruptcy practice. If Herman could conceivably have complied with the governing requirements simply by answering "annual performance bonus" (and omitting the parenthetical about his

bonus historically), then Herman's advice of counsel defense might make a difference.

For the benefit of the referee and the parties, we conclude by commenting on two aspects of the referee's report that might come up again on remand. First, as a partial explanation of his decision not to consider Herman's advice of counsel defense, the referee indicated that Herman negated the defense by conducting his own legal research about the requirements of schedule B. Herman and Houston testified that this research consisted mainly of Herman reading a handful of cases that Houston provided him. Without more, we do not see how this "legal research" cuts against Herman's advice of counsel defense—especially considering that the defense turns in part on whether the debtor/client's reliance on counsel was reasonable and in good faith.

Second, we note that the relevant inquiry in this Bar discipline proceeding is not the prudence of Herman's answers on the bankruptcy schedules. The referee here concluded that the conflicting testimony of the "two learned experts" in this case "serves only to underscore what the District ***523** Court Judge observed in his order: 'Clearly, the better course of action in the case of a possible difference of opinion about the law is to air [sic] on the side of disclosure.' " To respond to Herman's advice of counsel defense and to justify a conclusion that Herman is guilty of intentional misconduct, it will not be enough for the Bar to prove that Herman did not resolve close calls by erring on the side of disclosure.

[5] To sum up: we hold that, under the circumstances here, Herman is entitled to present an advice of counsel defense to rebut the charge that he was intentionally dishonest in the schedules to his personal bankruptcy petition. Earlier in this opinion we have described the nature of that defense and the preconditions to its assertion. Here the referee declined to consider Herman's advice of counsel defense at all. And the referee relied significantly (though not exclusively) on a bankruptcy court order that also did not consider the defense and that the court decided under a lower standard of proof than the clear and convincing evidence standard that governs in a Bar discipline case. Of course, though Herman bears a burden of production to come forward with the evidence necessary to support his advice of counsel defense, the ultimate burden of proof always remains on the Bar.

We remand this matter to the referee for further proceedings and reconsideration and for the filing of an amended report. The referee shall file an amended report within 90 days from the date of this opinion.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

COURIEL, J., did not participate.

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RECEIVED 11/19/2018 FLORIDA SUPREME COURT

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

PETER G. HERMAN,

Respondent.
_____/

Supreme Court Case No. SC17-2050

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

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein pursuant to R. Regulating Fla. Bar 3.7.6, the following proceedings occurred:

1. On November 16, 2017, the Florida Bar ("Bar"), pursuant to R. Regulating Fla. Bar 3-7.4 filed a formal complaint against Respondent alleging he violated the following: RR. Regulating Fla. Bar 3-4.2; 3-4.3; 4-3.3(a)(1); 4-3.4(a); 4-8.4(a); and 4-8.4(c) ("Complaint")(R1[1]).
2. By order dated November 12, 2017, the Supreme Court referred the matter to the Chief Judge of the Fifteenth Judicial Circuit for the

[1] All references to the Record will be denoted as "R" followed by the corresponding tab number. References to the party's exhibits contained at tabs 51 through 57 will be denoted as follows: "(R x, sub ex. y)" where "x" denotes the tab number and "y" denotes the corresponding exhibit number assigned by each party.

appointment of a referee, (R3) and the Chief Judge appointed the undersigned as referee on December 11, 2017 (R4).

3. On January 5, 2018, Respondent filed his Answer to the Complaint (R8).
4. The matter was bifurcated and proceeded to an evidentiary hearing beginning on June 21, 2018 and continuing through June 26, 2018. The Bar introduced exhibits one (1) through forty-six (46) into evidence without objection (R51-52). Respondent's exhibits one (1) through eighty-nine (89) were likewise admitted into evidence without objection (R53-57).
5. The undersigned granted the Bar's unopposed Motion to Take Judicial Notice of the following two Orders arising from Respondent's personal bankruptcy proceedings: *In Re Peter G. Herman* (Bankruptcy Court Case No. 12-13989-JKO[2]); and *Herman v. CIB Marine Capital, LLC* (USDC Case No.: 13-cv-62251-KMM)(collectively referred to as the "BK Orders")(R32).
6. As the undersigned has taken judicial notice of those cases, it is respectfully submitted that the undersigned may rely upon, and adopt the factual findings set forth in the BK Orders in making the necessary

[2] This case is reported at *In Re Herman*, 495 Bankr. 555 (S.D. Fla.)

findings and conclusions in this matter.[3] *See, The Florida Bar v. Gwynn*, 94 So.3d 425, 430 (Fla. 2012); *The Florida Bar v. Head*, 27 So.3d 1, 7-8 (Fla. 2010); *The Florida Bar v. Rood*, 620 So. 2d 1252, 1255 (Fla. 1993)("Referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they deem relevant in resolving the factual question.").

7. The following persons testified as witnesses at the hearing: For the Bar, Kenneth Welt, Jerry Markowitz, Esquire, and Respondent. For Respondent, Bart Houston, Esquire, Miles McGrance, Esquire, Roger Banks, Amy Galloway, Esquire, Alex Brown, Esquire, Honorable Thomas Lynch, Chad Pugatch, Esquire, Michael Powell, L. Louis Mrachek, Esquire and Respondent.

8. On October 22, 2018, the instant matter proceeded to a Sanctions Hearing at which the Respondent testified. In addition, both parties presented arguments as well as Supplemental Proposed Findings as to Recommended Sanctions.

[3] The undersigned has likewise taken judicial notice of evidence and testimony not presented to, nor considered, by the Bankruptcy Court, in particular, regarding: (1) Respondent's reliance on advice he received from his Bankruptcy counsel, Bart Houston, prior to filing and swearing to the accuracy and truth of his financial schedules and SOFA; (2) the Trustee's and CIB's knowledge of the contingency case judgments prior to the filing of Respondent's schedules; (3) the arguments raised by CIB in both the bankruptcy and state court proceedings; and (4) Respondent's testimony regarding his lack of knowledge of the transfers made by his then-spouse Pamela Herman and documentation for the accounts and expenses paid from the accounts. In addition, the undersigned takes judicial notice that in making factual findings, the Bankruptcy Court applied a lower standard of proof (preponderance of the evidence) as opposed to a clear and convincing standard which must be applied in this Bar matter

9. During the course of these proceedings, Joi L. Pearsall, Esquire, represented The Florida Bar and David B. Rothman, Esquire represented Respondent. The pleadings, hearing transcripts and all other papers filed in this cause, which are forwarded to the Supreme Court of Florida with this report, constitute the entire record.

II. FINDINGS OF FACT

A. Jurisdictional Statement.

10. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary Of the Case.

Introduction and Background

11. This matter arises from the conduct of Respondent in connection with his personal bankruptcy proceedings. Specifically, the Complaint alleges that Respondent failed to accurately and truthfully disclose certain personal financial matters in his bankruptcy schedules ("the Schedules") as well as his Statement of Financial Affairs ("SOFA") (R 51, sub ex. 13) which he is required to file in support of his Chapter 7 personal bankruptcy Petition that he filed in the United States Bankruptcy Court on February 18, 2012. *In Re Herman, 495 Bankr. 555* (S.D. Fla.).

12. At the time, he was employed as a "Director" with Tripp Scott, P.A. ("Tripp Scott"). A Director is not a shareholder. As a Director, Respondent is paid a salary as determined by Tripp Scott's Compensation Committee. Additionally, Respondent receives an annual performance bonus. There is no written contract between Respondent and Tripp Scott regarding this compensation package.

13. *The CIB Judgment.* In December 2011, CIB Marine Capital, LLC ("CIB") obtained a deficiency judgment of approximately $4.5 million dollars against Respondent, based upon the non-payment of a loan that he personally guaranteed for Esquire Ventures, LLC, in connection with a real estate investment that failed in 2007. (R 52, sub. ex 28). CIB immediately began pursuing collection proceedings against Respondent on the CIB Judgment.

14. *The Contingency Fee Cases and $10 Million Fee.* Around this same time, Tripp Scott had been representing plaintiffs in substantially two separate and significantly large lawsuits pursuant to contingency fee agreements. Respondent was the co-lead counsel, along with another Tripp Scott attorney, Alex Brown, in each of these cases. The first was a suit against Home Depot for patent infringement ("HD Case"). The other case was against Security Mutual Life Insurance Company of New York

("SM Case")(collectively, the "Contingency Fee Cases").

15. The plaintiffs in those case prevailed. The jury in the HD Case awarded the plaintiff approximately $23.45 million and the one in the SM Case awarded the plaintiff $26 million. On October 13, 2011, the court entered a final judgment in the SM Case. Ultimately, the parties reached a settlement in the SM Case and a fully executed Satisfaction of Judgment was filed on March 13, 2012 (R 52, sub ex. 35). The Final Judgment in the HD case was affirmed by the Eleventh Circuit on November 14, 2011 (R 52, sub ex 40). Mandate was issued on February 12, 2012. Pursuant to the fee arrangements in the Contingency Fee Cases, Tripp Scott received approximately $10 million in combined legal fees ("$10 Million Fee").[4]

16. *The Pozzuoli Emails.* Beginning in December 2011 and continuing into early January 2012, Respondent sent approximately six (6) emails to the President of Tripp Scott, Edward Pozzuoli, as well as other members of the firm all of whom members of the Firm's Compensation Committee ("Pozzuoli Emails"). In those emails, Respondent discussed how the bonuses from the $10 Million Fee which should be distributed to those who worked on the two contingency cases, including himself and Brown.

[4] The fees were $4.1 million and $5.8 million for the HD and SM Case, respectively.

(R 52, sub exs. 25, 26).

17. He stated that he was "hearing rumors" regarding the distribution methodology of the bonuses. He also mentioned he wanted Tripp Scott to be "consistent" with its historical practices in considering the award of bonuses. In the December 6, 2011 email, Respondent stated that he wanted Tripp Scott to finalize the distribution methodology of the bonuses.

18. Then, in a December 15, 2011 email, Respondent stated that he was frustrated and disappointed that the people who had procured the $10 Million Fee were being "kept out of the loop." After meeting with Pozzuoli, Respondent sent him another email on December 21, 2011 describing the $10 Million Fee as a "heck of a lot of money that is going to result in everybody getting a great payday."

19. Respondent proposed to Pozzuoli that he and Brown should receive approximately $5.2 million due to their successful work on the Contingency Fee Cases. In reaching this amount, Respondent explained to Pozzuoli that it was $500 thousand lower than what he had proposed the day before. Respondent then goes on to further state that based upon his "profit analysis," "the number for both [Brown] and [Respondent] would end up being north of $7,000,000." (R 52, sub ex. 26).

20. In a December 21, 2011 email, Respondent stated, "[W]e have a huge amount of money coming in that will benefit us all" and "I don't want to sound like a broken record, but I was extremely serious that this should be resolved today. It's important to me" (R 52, sub ex. 26).

21. On January 8, 2012, Respondent sent Pozzuoli another email in which he stated, "As you know, I have been trying to get a resolution to the fair and proper distribution of the monies coming from [Contingency Fee Cases] for the last two months.... I believe the Firm should want me and [Brown] to have a feeling that we are being treated fairly and being rewarded fairly for this tremendous and unprecedented result." (R 52, sub ex. 27).

22. In response, Pozzuoli sent Respondent an email raising various questions regarding the Contingency Fee Cases. One such question was regarding the status of the Mayback Fee Dispute.[5] Respondent replied in a January 9, 2012 email that the Mayback Fee Dispute would not affect the receipt of the $10 Million Fee by Tripp Scott. This is because a court order had been entered to hold the Mayback's fee in abeyance and would not prevent entry of the Judgment in the HD Case. In fact, Respondent

[5] There was evidence presented at the Bar trial that another law firm, Mayback and Hoffman ("Mayback") was staking a claim against the legal fees for the HD Case ("Mayback Fee Dispute").

advised Pozzuoli that "the only thing that will probably happen will be that we will be receiving more money."

23. In that very same email, Respondent said that the final details of the settlement in the SM Case were being worked out, that he, Respondent, had complete control over when Tripp Scott would be receiving the settlement funds from that case, and that the money could have been in 2011, but the receipt was pushed out to 2012 for tax reasons. Respondent stated that the HD Case "should be resolved in the next 60 days if not sooner now that the judges are back from the holiday." (R 52, sub ex. 26).

24. In August 2012, after the meeting and subsequent discussions with the Trustee, the Tripp Scott Compensation Committee distributed bonuses to its employees from the $10 Million Fee. Respondent's share was $2.7 Million. However, he did not actually receive it and by agreement his bonus was placed into trust.

25. *The PH Transfers.* On or about November 29, 2011, Respondent liquidated approximately $46,000 in mutual fund investments held in an investment account titled in his name. On December 7, 2011, he deposited the proceeds into a checking account which he and his then-spouse, Pamela Herman, held jointly. The next day, December 8, 2011,

the funds in that joint account were transferred into an account held solely in Pamela's name. They were then transferred into yet another account held in her name. From this account, the funds were disbursed to various third parties. At the Bankruptcy proceedings, Respondent testified that a portion of these funds were used to pay his legal expenses while some went to pay workmen for improvements done to his condominium.

The Adversary Proceedings in the Bankruptcy Court and Appeal to the U.S. District Court

26. As creditor, CIB objected to the petition for discharge alleging that Respondent (1) intentionally concealed prepetition assets, (2) failed to disclosure prepetition transfers of assets, and (3) made false oaths in connection therewith. (R 51, sub ex. 11; R 53, sub ex. 22). Specifically, CIB claimed that Respondent intentionally failed to disclose the following two transactions on the Schedules and SOFA: (1) his bonus from the $10 Million Fee; and (2) the prepetition PH Transfers (R 53, sub ex. 22). As a result, on June 5, and June 6, 2013, the Bankruptcy Court held a trial on Respondent's bankruptcy petition at which the Court-appointed Bankruptcy Trustee, Kenneth Welt, intervened.

27. *Findings of the Bankruptcy Court.* On August 5, 2013, the Bankruptcy

Court entered a seventy-one (71) page Order denying Respondent's Petition for discharge based upon Respondent's failure to disclose both his bonus from the $10 Million Fee as well as the PH Transfers in his Schedules and SOFA. With respect to the omission of Respondent 's bonus from the $10 Million Fee, the Court found:

J. The Debtor's Intent to Hinder, Delay or Defraud his Creditors and Trustee Welt

> The ...Debtor omitted his interest in the $10 Million Fee and the Transfers from his Schedules (including Schedules B and I) and SOFA with the intent to hinder, delay or defraud his creditors. The Debtor purposefully did not disclose his interest in the $10 Million Fee with fraudulent intent in an attempt to prevent his creditors, primarily [CIB] and Trustee Welt, from discovering such interest so that he could keep his multi-million dollar bonus for himself and pay none of it to his bankruptcy estate or his creditors. The Court finds the Debtor's failure to disclose his interest in the $10 Million Fee in his Schedules and SOFA was intentional and based upon a motive to conceal his prepetition interest in the $10 Million Fee, to obtain all of the money in his prospective bonus for himself, and to pay none of it to his creditors, all at a time when [CIB] was executing on its multi-million judgment.
>
> The evidence shows that the Debtor has been the subject of the CIB Judgment in the approximate amount of $4.5 million since December 8, 2011. The Debtor knew the amount of the deficiency since at least mid-November 2011. The hearing on [CIB]'s deficiency judgment occurred on the same day (December 6, 2011) the Debtor commenced a protracted e-mail campaign with the President of Tripp Scott concerning allocation of the $10 Million Fee. The Debtor testified that when he filed bankruptcy, [CIB] was the only creditor that had a judgment against him. The Debtor also testified that [CIB] was the only creditor garnishing his wages at Tripp Scott and his bank accounts. The Debtor knew that he waived, in the Debtor Guaranty, any exemption claim that he could

have attempted to use to protect his interest in a bonus from the $10 Million Fee. Thus, disclosure of the interest in the $10 Million Fee and seeking to claim it as exempt would jeopardize retention of the multi-million bonus he expected to receive from his interest in the $10 Million Fee.

The evidence demonstrates that both the judgments and the fees in the Contingency Fee Cases were the largest the Debtor had ever received in his thirty-plus-year career as an attorney. The Debtor testified that in 2011 and 2012 he knew the gross amount of the fees Tripp Scott was entitled to receive under the contingency fee contracts in the Contingency Fee Cases was approximately $10 Million. The Pozzuoli Prepetition E-mails and the McLaughlin Prepetition E-mails show that the Debtor was contemplating how much of the $10 Million Fee he was going to receive for months, if not longer, prior to the Petition Date. The Brown Prepetition E-mails [6] show that on the Petition Date the Debtor knew Tripp Scott was going to receive the $10 Million Fee within weeks, if not days, after the Petition Date. In fact, Tripp Scott received all of the $10 Million Fee only weeks after the Petition Date and prior to the date on which the Debtor filed his Schedules and SOFA. The Debtor controlled when he filed his bankruptcy petition and the chapter of the Code under which he filed. He did not consider filing a Chapter 11 case in which he could have paid his creditors over time using the bonus generated from the $10 Million Fee.

According to the evidence from the Tripp Scott documents introduced at trial, $2 million was the lowest amount which the firm contemplated paying the Debtor of the $10 Million Fee. Tripp Scott actually paid him $2.7 million. The Debtor testified that prior to the $2.7 million bonus award for the fees generated by the Contingency Fee Cases, he was never awarded a single bonus in excess of one million dollars during his employment at Tripp Scott. Mr. Pozzuoli testified that the $2.7 million bonus award was by far the largest in relation to other Directors and was the largest bonus Tripp Scott had ever given out to any Director in his fifteen years with the firm.

[6] These email exchanges are part of the record in this case (R 52, sub ex. 41).

The Court finds based upon the demeanor of the Debtor at Trial, the documentary evidence presented at Trial, and the testimony of Mr. Brown and Mr. Pozzuoli, the Debtor filed his Chapter 7 bankruptcy case and concealed his inchoate interest in the $10 Million Fee and the Transfers with the actual intent to hinder, delay or defraud his creditors, principally [CIB], and Trustee Welt. The Chapter 7 bankruptcy case was the vehicle through which he sought to discharge the CIB Marine Judgment. The concealment of his interest in the $10 Million Fee from his Schedules and SOFA would (he hoped and anticipated) allow him to keep millions of dollars and be free from the CIB Judgment. The Debtor's testimony that he conducted legal research concerning whether his interest in the $10 Million Fee was property of the estate shows that he was seeking to conceal his interest which he knew was a prepetition contingent asset. The Debtor's statement that he believed he did not provide false information in his Schedules and SOFA is not credible. The Court finds that the Debtor's testimony that he believed he fairly disclosed his assets and liabilities is not believable. The Court finds, based upon the evidence, that the Debtor filed bankruptcy to discharge his prepetition debt, including the CIB Marine Judgment, and keep all of his interest in the $10 Million Fee…

(Bk Order, R 32, pp. 36-39).

28. With respect to Respondent 's failure to disclose the PH Transfers, the

Court found:

I. The [PH] Transfers

[T]he Court finds that the [PH] Transfers were made to place the transferred funds out of the reach of the Debtor's creditors, which was accomplished by transferring the money to an account in which he held no legal interest…

Prior to the Petition Date, the Debtor had an investment account at American Funds… through which he held shares in [the Growth Fund Shares]. The Growth Fund Shares were assets of the Debtor that were purchased with the Debtor's savings…

On or about November 29, 2011, the Debtor caused his Growth Fund Shares, which constituted property of the Debtor, to be liquidated for an aggregate sale price of $46,278.25 (the "Sale Proceeds "). The Debtor received payment on the Sale Proceeds via two separate checks from American Funds in the amounts of $24,545.45 and $21,732.80 (the "American Funds Checks "), both of which were payable to the Order of "Peter G. Herman."...

On or about December 7, 2011, the Debtor caused the American Funds Checks to be deposited in an account at Wells Fargo Bank (Account No. XXXX9849), which was a joint account in the name of the Debtor, Peter G. Herman, and his ex-wife, Pamela M. Herman (the "Joint Account "). ... The Debtor listed his interest in the Joint Account on Schedule B of his Schedules. On the very next day, December 8, 2011, the Sale Proceeds in the Joint Account were transferred to a separate account held solely by Pamela M. Herman at Wells Fargo Bank... (the "First Pam Herman Account"). At the time immediately preceding the foregoing transfer, the First Pam Herman Account held only $30.11. The Debtor does not have any ownership interest in First Pam Herman Account, did not list any ownership interest in such account as an asset in his Schedules, and did not list the transfer of the Sale Proceeds to the First Pam Herman Account in his SOFA... On or about December 9, 2011, the Sale Proceeds were transferred from the First Pam Herman Account to a separate account held solely by Pamela M. Herman at Wells Fargo Bank ... (the "Second Pam Herman Account "). From the time of the foregoing transfer, and through the Petition Date, the Second Pam Herman Account was funded exclusively by the transfer of the Sale Proceeds and interest accruing thereon and did not contain any other funds. The Debtor does not have any ownership interest in the Second Pam Herman Account, did not list any ownership interest in such account as an asset in his Schedules, and did not list the transfer of the Sale Proceeds from the First Pam Herman Account to the Second Pam Herman Account in his SOFA...

As of the Petition Date, the Second Pam Herman Account contained only $90.07. In the 37 days preceding the Debtor's bankruptcy filing, the remainder of the Sale Proceeds were

transferred out of the Second Pam Herman Account as follows (collectively, the "Transfers "):

i. $5,000 (Withdrawal) on January 13, 2012;

ii. $1,500 (Withdrawal) on February 3, 2012;

iii. $30 (Wire Transfer) on February 10, 2012;

iv. $35,000 (Wire Transfer to The Kopelowitz Firm Trust Account[7]) on February 10, 2012;

v. $400 (Online Transfer to First Pam Herman Account) on February 14, 2012; and

vi. $4,300 (Withdrawal) on February 17, 2012.

[T]he Debtor did not list any of the foregoing Transfers on his Schedules or SOFA...

The testimony at Trial and the documentary evidence introduced showed that when the Transfers were made, [CIB] had obtained the final judgment of foreclosure against Esquire Ventures, and the Debtor admitted that [CIB] had filed the motion seeking a deficiency judgment against him. The Transfers were from the Debtor to Pam Herman's account in which the Debtor admitted he did not have an interest. The CIB Marine Judgment was not against Pam Herman. Thus, the Court finds that the Transfers effectuated a movement of funds from an account subject to [CIB]'s reach to an account out of [CIB]'s reach.

The Debtor's testimony about the Transfers was not credible. The Debtor was unable to explain the discrepancy between the $35,000 transfer Pam Herman made to The Kopelowitz Firm PA Trust Account and his disclosure of a $15,000 transfer to Kopelowitz in his SOFA. The Debtor could not identify where the additional $20,000 to the Kopelowitz Firm was disclosed in his Schedules or

[7] Bart Houston at the time was a member of the Kopelowitz Firm. Houston had been representing Respondent in the bankruptcy proceedings. Subsequently in November 2013, Chad Pugatch substituted in as Respondent's bankruptcy counsel.

SOFA, and ultimately admitted that the $20,000 transfer was not disclosed. The Court further finds that the Debtor's testimony that certain transfers were made to pay workmen on his condominium was not credible, as no documents were admitted into evidence to support this contention, the Debtor did not identify who was paid, and these transfers were not disclosed in his Schedules or SOFA. The Debtor admitted at Trial that the Transfers in the amount of approximately $46,000 were not disclosed in his Schedules or SOFA.

(Bk Order, R 32, pp. 34-36).

29. Given this as well as Respondent's "level of sophistication," and applying what it determined to be prevailing bankruptcy law, the Bankruptcy Court concluded that Respondent "acted with intent to hinder, delay or defraud his creditors and Trustee Welt when he concealed his interest in the $10 Million Fee and the Transfers in his Schedules and Statement of Financial Affairs after the Petition Date." For these reasons, the Bankruptcy Court denied Respondent's Petition for discharge (Bk Orders, R 32, pp. 63; 66-67).

30. On September 29, 2014, the United States District Court for the Southern District of Florida, entered an order affirming the Bankruptcy Court's Findings of Facts and Conclusions of Law and Final Judgment in favor of CIB and the Bankruptcy Trustee against Respondent. In addition, based upon the "nature of the bankruptcy court's finding and this Court's affirmance," the District Court forwarded the BK Orders to

the US Attorney for the Southern District and to the Florida Bar (R 32, p. 19, *Herman v. CIB Marine Capital, LLC, supra.*).

31. Respondent appealed the BK Orders to the Eleventh Circuit Court of Appeals however, on December 19, 2014, he voluntarily dismissed this appeal (R 51, sub ex. 6) based apparently on reaching a settlement with CIB.

State Court Collection Proceedings on the CIB Judgment

32. After Respondent was denied his Petition for discharge, the state court proceedings to collect on the CIB Judgment, which had been partially stayed, resumed. CIB was represented in both the bankruptcy and state court proceedings by the law firm of Stearns Weaver ("Stearns Weaver").

33. In the Bankruptcy Court proceeding, Stearns Weaver had argued in support of CIB's objection to Respondent's discharge that at the time Respondent filed for bankruptcy, claims to any bonuses paid out by Tripp Scott were vested. However, in the state court garnishment proceedings, different attorneys from Stearns Weaver, on behalf of CIB, apparently stipulated that bonuses paid by Tripp Scott were discretionary (R 54, sub ex. 41).[8]

[8] Stearns Weaver apparently relied solely upon the testimony of Respondent, Alex Brown and Edward Pozzuoli from the Bankruptcy trial and submitted an evidentiary stipulation which states, in part, as follows:

In addition to his annual salary, debtor may also receive a discretionary bonus from the firm's excess

The Instant Bar Proceedings.

34. In the instant proceedings, Kenneth Welt provided the following testimony. He is a U.S. Bankruptcy Trustee in the Southern District of Florida. He has approximately thirty-two (32) years of experience and over the course of his career has handled over 100,000 bankruptcy cases. Welt is neither an accountant nor is he a lawyer. He was assigned to serve as the Court-appointed Trustee on Respondent's bankruptcy case upon the filing of the Petition. He has never worked for Tripp Scott. He did not know Respondent prior to having been assigned as Trustee.

35. As a Trustee, Welt relies upon a debtor to be complete and truthful when disclosing the debtor's assets in the Schedules and SOFA. This, he explained, is because it is neither possible nor is it the Trustee's responsibility to research the assets and income of every debtor.

36. Shortly after Respondent filed his Petition and prior to filing the

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income ... The compensation committee also determines bonuses at Tripp, Scott and has broad discretion to determine the amount of the bonus ... Bonus payments are not a part of Tripp Scott's lawyer employees annual salary ... There have been years during the course of his employment where the debtor received no bonus ... The allocation of bonuses each year is unique and dependent upon the year ...

There is no set policy for the distribution of money through bonuses at the end of the year ... Sometimes Tripp Scott has money to distribute as a bonus, sometimes it does not ... A bonus is not part of the Debtor's periodic earnings ... If a bonus is paid, it is often, but not always, paid at the end of the calendar year ...

Tripp, Scott's compensation committee has the ability to give a director a zero bonus for reasons other than finances ... There is a chance Debtor would have had a zero bonus because ultimately it is not until the comp committee sits and meets and discusses specifically what is going to be allocated and then how the allocation is going to go. That is solely under the Tripp Scott. It is solely within the province of the comp committee. 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. (R 54, sub ex. 42)

Schedules and SOFA, Welt met with Stearns Weaver. It was during this meeting that Welt became aware of the verdicts in the Contingency Fee Cases. He also met with members of Tripp Scott. Prior to this, Welt had no idea as to what amount, if any, Respondent would be receiving as his bonus from the $10 Million Fee.

37. In reviewing Respondent's Schedules, Welt did not see any disclosure by Respondent of his interest in the $10 Million Fee. Even though he was aware of the two verdicts before the Schedules and SOFA were filed, the Schedules should have included this. This is because they are not just used by the Trustee, but also because the information contained in them is for the benefit of all of Respondent's creditors. Indeed, Welt explained the purpose of the Schedules is to give a blueprint or menu for the Trustee to use in administering the estate for the benefit of those creditors.

38. Even if property may be exempt under state law, the debtor still has a duty to disclose it and then claim the exemption in bankruptcy court. While it is true that he and CIB were aware of the verdicts in the Contingency Fee Cases prior to the filing of the schedules, when CIB objected to Respondent's discharge, Welt was nonetheless forced to intervene in the adversary case. This is because Respondent had omitted

the PH Transfers that Welt believed he had a duty to disclose.

39. Welt was aware that the $10 Million Fee belonged to Tripp Scott. However, he believed that if Respondent had an arrangement with Tripp Scott to receive a portion of that fee, it could be a possible source from which the creditors may collect. Citing to a confidentiality agreement, Welt declined to answer on cross examination whether Tripp Scott advised him any bonus paid from the $10 Million Fee was discretionary.

40. *Respondent's Bankruptcy Attorneys.* Two attorneys represented Respondent during various stages of his bankruptcy proceedings as well as during the state court proceedings. First, Bart Houston gave the following testimony: He has been practicing law since 1986. Eventually he ended up practicing law with his father, who at one point was a bankruptcy judge in the Southern District. Houston's current practice entails representing debtors in various insolvency cases. Prior to this, he spent some twenty-eight (28) years exclusively practicing bankruptcy law, predominately in Chapter 11 reorganization and litigation cases.

41. Houston has known Respondent since 1977. Their relationship has been mainly professional. After the CIB Judgment was entered against Respondent, Houston represented him in negotiations with CIB in an attempt to settle the case. After these negotiations failed, CIB initiated a

wage garnishment action. It was at this point that Houston advised Respondent to file a Petition for Chapter 7 Bankruptcy. He testified that although Respondent is an experienced civil litigation attorney, he was "a bab[e] in the woods" when it came to bankruptcy law. In Houston's view, Respondent was "not knowledgeable about even the most basic of bankruptcy matters."

42. On February 18, 2012, Houston filed the Petition, which he described as a "skeletal filing." He moved for and obtained an extension or until March 16, 2012 in which to file Respondent's Schedules and SOFA. (R 51, sub ex. 8).

43. Prior to preparing the Schedules and SOFA, Houston reviewed the financial information provided to him by Respondent. He also met with Respondent several times. In addition, Houston conducted an investigation and analysis of the facts and circumstances related to the Contingency Fee Cases, the potential fees Tripp Scott would receive from them, and the structure of Tripp Scott's compensation system, including the payment methodology utilized for bonuses.

44. In conducting this factual investigation, Houston had discussions with Brown, Pozzuoli, and Respondent. He reviewed trust documents and Tripp Scott memos dealing with how performance bonuses were decided

by the Tripp Scott Compensation Committee. Based upon the information he obtained regarding Tripp Scott's compensation structure, Houston concluded that non-equity "Directors" of the firm, such as Respondent, did not have a legally enforceable entitlement to a bonus because, in his view, the bonuses were discretionary, and not vested.

45. Houston also reviewed bankruptcy case law and he confirmed his conclusion that Respondent did not have a vested right to a bonus. 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 to Respondent.

46. Houston discussed the bonus issue with Respondent. He advised him that he did not have a legal property right or interest in these fees or any bonus arising therefrom at the point in time the Petition, Schedules and SOFA were filed. This, he explained, is because the $10 Million Fee had not been received by Tripp Scott and Respondent had not yet been awarded a bonus. Thus, Houston determined there was nothing to report on the Schedules. Houston discussed the cases upon which he relied with Respondent and that his opinion on this matter was "unequivocal."

47. Respondent advised Houston that he, Respondent, was not skilled in bankruptcy law so he deferred to Houston. Respondent independently

reviewed bankruptcy case law and advised Houston that he too reached the same conclusion that any disclosure of the interest in the $10 Million Fee was not required.

48. Houston testified that he did not disclose any reference to Respondent having an interest in the $10 Million Fees this under the "contingency cases" section of Schedule B because Respondent was not a plaintiff or an aggrieved party in the Contingency Fee Cases.

49. Question 17, on Schedule I (Current Income of Debtor) requires the debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of [the Schedules.]" In response to this question, Houston advised Respondent to state the following: "Annual performance bonus (historically 65,000 – 70,000)." (R 51, sub ex. 13). Houston chose the exact wording used. He had asked Respondent to average out the last three to four years of his annual performance bonuses.

50. Houston explained that he chose this methodology in order to put the Trustee on notice that Respondent could be expected to receive an intangible bonus within the next year. In his opinion, this disclosure was never intended to mislead anybody about Respondent's income, including his interest in the $10 Million Fee. He does not recall having

any other discussions with Respondent about this other than asking him to provide the average of previous annual bonuses received.

51. *The PH Transfers.* Prior to filing the Schedules and SOFA, Houston was aware of the $46,000.00 investment proceeds Respondent had deposited in the joint account. He opined that Respondent was likewise not required to disclose the transfer of the funds received from the investment account, which he described as an "insurance product," to the joint account. This is because it was not a "transfer" as it was going from Respondent to himself. Houston acknowledged that he listed both the investment/insurance account from which the $46,000 was received and the account to which the funds were deposited, which was the joint account in the Schedules. However, the transfers from the joint account to Pamela Herman's personal accounts were not listed because he was advised by Respondent that the latter was unaware of them prior to the filing of the Schedules and because they were not transfers made by him.

52. Houston discussed with Respondent the disbursement of the funds to pay for remodeling Respondent's condominium, as well as to pay Houston's legal fees. He advised Respondent that the payments to the contractors were made prior to filing his bankruptcy petition and this would not be

required to be disclosed because they were under the dollar threshold required for disclosure, which at that time was approximately $5,600.00.

53. According to Houston, Welt "knew about [the PH Transfers] early in the case," and he never sought to recover the transferred funds from Pamela Herman or the contractors she paid even though, as Trustee, he had the right to do so. Nor did the Trustee seek to recoup the $35,000.00 paid for Houston's legal fees because they were reasonable for this type of case. All accounts were ultimately disclosed, and Welt chose not to pursue the avoidance of these transfers.

54. To this day, Houston still believes the case law he relied upon in advising Respondent was on Respondent's side and noted that "the law has gotten stronger" in support of Respondent's claim that he was not obligated to disclose his interest in the $10 Million Fee. He did however concede that in hindsight after all that has happened, he might have considered handling the disclosures in the Schedules and SOFA differently.

55. Respondent's second bankruptcy attorney, Chad Pugatch, testified to the following: He has been practicing bankruptcy law for approximately forty-two (42) years. He took over representing Respondent in November 2013 following the entry of the BK Orders. Pugatch has

known Respondent professionally for approximately fifteen (15) to twenty (20) years. The two have worked as co-counsel as well as adversaries. In his view, Respondent is "totally honest, has great integrity and... an excellent reputation in the community for same."

56. He opined, "There was a plausible basis for Houston having given the advice [not to disclose Respondent's interest in the $10 Million Fee]." Pugatch opined that, based on his review of bankruptcy case law, a discretionary bonus that has not been received by the debtor prior to filing the bankruptcy petition is not required to be disclosed as an asset. But, because it is a "gray area," he opined that 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." Nonetheless, Pugatch opined that Respondent, who is not a bankruptcy lawyer, was justified in relying on Houston's legal advice. Like Houston, Pugatch disagreed with the findings and legal conclusions set forth in the BK Orders.

57. Pugatch did not introduce evidence regarding Respondent's reliance on the advice of his counsel in the adversary bankruptcy proceedings. This he claims is because Houston did not timely plead this as a defense.

Although Respondent testified at the bankruptcy trial regarding his review of case law, he was precluded from testifying regarding any reliance on the advice he received from his Houston (R 51, sub ex 20, Bk Tr. pp. 102-105).

58. Both Houston and Pugatch agree that the Schedules were required to be prepared with information, as it existed on February 18, 2012, the date the Petition was filed, and not on March 20, 2012, the date on which the Schedules and SOFA were filed. They also agree that the $10 Million Fee had not been received by Tripp Scott on February 18, 2012, and when it was ultimately received, it belonged to Tripp Scott.

59. Regarding the state court proceedings, Pugatch reviewed the discovery he received from Stearns Weaver. It became clear to him that Stearns Weaver was aware of the verdicts in the Contingency Fee Cases prior to Respondent filing for bankruptcy, and that they must have informed Welt about it very early on. Pugatch's attempts to question Welt about this during his deposition, were met with objections based upon attorney-client privilege.

60. Pugatch filed a Motion for Summary Judgment in the Bankruptcy case in which he raised the issue of the inconsistent legal positions being taken by Stearns Weaver regarding Respondent's bonus in the state

proceedings. However, before that motion could be heard by the Bankruptcy Court, CIB reached a settlement with Respondent. Thus, the issue was never fully litigated in the Bankruptcy Court.

61. Pugatch was confident that the fact that the Motion for Summary Judgment would have alerted the Bankruptcy Judge to the inconsistent legal positions being taken by Stearns Weaver was, in his opinion, "absolutely" one of the reasons the case settled. That and the fact he was getting close to establishing that both Stearns Weaver and Welt were aware of the Contingency Fee Cases and Respondent's anticipated bonus prior to the filing of the Schedules. According to Pugatch, this was "significant" because, even if Respondent was required to disclose this on the Schedules it was, in his opinion "not a material omission."

62. *Respondent's Testimony.* Respondent essentially gave the following testimony: He has been a member of the Florida Bar since 1982. He started working at Tripp Scott in 1981 as a law clerk. At the time he filed the Petition he was employed as a Director. Attorneys employed with Tripp Scott are classified at different levels: associates, junior directors, directors, and senior directors.

63. During his career at Tripp Scott, Respondent represented clients in large cases. Beginning in 2000, Respondent began litigating commercial and

personal injury cases for Tripp Scott. Then in 2006, he took on intellectual property litigation and patent infringement cases.[9] The two judgments in the Contingency Fee Cases represent the largest judgments Respondent has ever obtained. As a Director, Respondent received as part of his compensation package an annual salary. In 2011 and 2012, his salary was between $220 and $230 thousand.

64. The SM Case ultimately settled for $26 million and a Satisfaction of Judgment on March 13, 2012 (R 52, sub ex. 35). Until this time, Tripp Scott had been in settlement discussions with the defendants in that case.[10]

65. At the time he wrote the Pozzuoli Emails, Respondent only held an expectation that Tripp Scott would receive the $10 Million Fee before the end of 2011, and that it would be available before the year-end performance bonuses were determined. According to Respondent, in these emails he was merely speaking up, not only for himself, but also for all the Tripp Scott employees who had worked on the Contingency Fee Cases. He claims the sole purpose of the Pozzuoli Emails was to discuss what would be fair to award as bonuses if the $10 Million Fee actually

[9] His biography was admitted at the Bar trial (R 55, sub ex. 71).
[10] Respondent testified that "in theory" he was involved with the SM settlement discussions. Brown handled the discussions directly. The email correspondence between Brown and attorneys for SM were admitted at the hearing ("Brown Emails") (R 52, sub ex. 41)

came into the Firm.

66. Respondent still believed that any receipt by Tripp Scott's of the $10 Million Fees was uncertain. This is true even though at the time he wrote these emails, he was aware that he had the potential to receive a large bonus for his work on the Contingency Fee Cases. He claims that his motivation in writing them were unrelated to the garnishment proceedings by CIB.

67. Respondent claims he made the decision to file for Chapter 7 Bankruptcy in February 2012 because he was unable to satisfy the CIB Judgment and CIB was becoming "very aggressive" in its collection efforts. Towards the end of 2011, the CIB Judgment creditor had begun initiating wage garnishment proceedings. Further, at the time he filed the Petition in February 2012, Tripp Scott had not yet received the $10 Million Fee and there was the ongoing Mayback Fee Dispute. This dispute continued several months past the date Respondent filed the Schedules.

68. When questioned on cross examination as to why he failed make any mention of his interest in the $10 Million Fee in any of the Schedules, Respondent answered that he was relying on the advice of his bankruptcy attorney. He also researched bankruptcy case law on the subject and read

those cases that Houston was relying upon. He concurred with his attorney that because only the members of the Tripp Scott Compensation Committee had the authority to award bonuses, any bonus he may have had in the $10 Million Fee was purely "discretionary." Thus, he believed he was not legally obligated to disclose it anywhere on the Schedules.

69. Respondent was then asked about his response to Question 17 of Schedule I, in which he indicated, "Annual performance bonus (historically 65,000 – 70,000)" (R 51, sub ex 13). He explained this amount represents what he actually received as a bonus in previous years and what he expected to receive in 2012. He emphatically denies any claim that this response to the question was done with the intent to deceive or mislead anyone.

70. *The PH Transfers.* Respondent testified that on or about November 29, 2011, prior to filing for bankruptcy, he received approximately $46,000.00 from the redemption of mutual funds held in his investment account. At that time, he was in the process of remodeling his condominium. Because he was engaged in significant out-of-town litigation, he asked his then ex-spouse, Pamela Herman, to manage the remodeling of his unit.

71. He testified that in early December 2011, in order to keep the remodeling job on track, and for convenience, he opened a joint savings account with Pamela Herman at Wells Fargo Bank and funded it with the investment proceeds, so that she could pay construction workers, as well as any other upcoming necessary expenses for the remodeling project. His bankruptcy attorney's fees were also paid from these proceeds.

72. The Schedules listed the account held jointly with Pamela Herman. However, they did not list any of these transfers. On the advice of his attorney, Respondent believed all of these disbursements would be considered expenses incurred "in the ordinary course" of his financial affairs, which he believed need not be disclosed as transfers in the SOFA and Schedules.

73. *Pamela Herman Affidavit and Deposition Testimony.* Pamela Herman was not called as a witness by either side in the instant proceedings. However, without objection, Respondent admitted her affidavit and deposition testimony that she provided as part of the discovery in this case. In her deposition, Pamela Herman testified that she transferred funds out of the joint account to her own accounts so that she would have the ability to issue checks if needed. (Pamela Herman Depo)(R 56, sub ex. 70, Tr. pp 8-9). She did not inform Respondent that she had

transferred the funds to her accounts prior to making payments on his behalf. (Pamela Herman Depo)R 56, sub ex. 70, Tr. P 12); (Pam Herman Aff.) (R 55, sub ex. Ex.77-I at p. 6).

74. She then disbursed approximately $11,000.00 in funds moved from the joint account to pay for expenses owed by Respondent for the completion of the remodeling project. (Pamela Herman Depo)(R 56, sub ex. 70, Tr. pp. 7, 14); (Pam Herman Aff.) (R 55, sub ex. Ex.77-I at p. 7). This is consistent with Respondent's testimony he gave at the bankruptcy trial that he was unaware Pamela Herman had moved the funds from their joint account to other accounts in her name prior to making the payments on his behalf. (R 51, sub ex. 21, Bankruptcy Tr. p. 230).

75. *The Expert Witnesses.* Each side presented their own expert witness on the subject of federal bankruptcy law.[11] Jerry Markowitz testified as an expert witness for the Bar. Essentially, he gave the following testimony: He is an attorney who has practiced in the area of bankruptcy law since he graduated law school in 1974. He has been a member of various professional committees and organizations in the area of bankruptcy law. In preparing for his testimony in this case, he reviewed the following: Respondent's bankruptcy Petition; the Schedules, statements and the

[11] The curricula vitae of both expert witnesses are part of the record. (R 52, sub ex. 34; R 55, sub ex. 72).

amendments thereto; the BK Orders; the Bankruptcy trial transcripts; and a substantial amount of bankruptcy caselaw.

76. The goal of a Chapter 7 proceeding is to liquidate assets belonging to the debtor and obtain a discharge in bankruptcy, which would forever free the debtor of his or her prepetition debts. The Bankruptcy Code requires a debtor utilizing the Schedules and SOFA to disclose the following: All of the debtor's creditors; a schedule of all assets and liabilities; a schedule of all current income and expenditures; and a statement of the debtor's financial affairs. All of this comprises the property of the debtor's estate.

77. Markowitz opined that the definition of property of the estate is very broad and expansive under bankruptcy law. To this end, all of the Schedules are designed to afford a debtor the means by which to disclose all assets that would constitute the property of the debtor's estate. Because they are submitted under oath, the Schedules and SOFA are official records provided to the Bankruptcy Court.

78. Additionally, a debtor must disclose any reasonably anticipated increase in income or expenditures over the twelve (12) month period following the date the Petition is filed. An asset or cash that a debtor has earned as income but has not yet received in hand, may be disclosed in various

places contained throughout the Schedules (R 51, sub ex. 14, at pp. 7; 35). As stated in the BK Orders, one such place would be in response to Question 17, Schedule I.

79. In addition, Respondent could have disclosed his interest in the $10 Million Fee in response to Questions 19, 21, and 35 of Schedule B as well as in Schedule C, if Respondent was claiming his bonus as exempt property.[12] According to Markowitz, the section of the Schedules dealing with contingent claims is intended for the debtor to disclose claims that have not yet been reduced to a certain amount. This is so the creditors and the Trustee can have an opportunity to find out whether the contingent claim is of any value. Markowitz opined that Respondent was required under the Bankruptcy Code to disclose his interest in the $10 Million Fee either in his Petition or one of the Schedules.

80. Regarding the PH Transfers, Markowitz opined that based upon his review of the BK Orders as well as the facts of Respondent's account, Respondent likewise was required to disclose these transfers in response to question 10 of the SOFA (R 51, sub ex. 14 at p. 22). This is because the transfers all occurred from an account that was titled in Respondent's name and they occurred within two (2) years of the date Respondent filed

[12] The BK Orders likewise reference specific sections in the Schedules where Respondent could have listed his interest in the $10 million fee (R 51, sub ex. 3).

his Petition. One of the joint accounts was disclosed in the Schedules and SOFA but the disclosure did not include any mention of these transfers.

81. In reaching these conclusions, Markowitz acknowledged that case law on the subject may be interpreted differently when it comes to determining whether these items were required to be disclosed. However, when a debtor is confronted with such a situation, the better rule in his opinion would be to disclose. This is true here because there would have been no detriment to Respondent to disclose his interest in the $10 Million Fee as well the PH Transfers, as opposed to not disclosing them at all.[13]

82. L. Louis Mrachek testified for Respondent. He provided essentially the following testimony: He has practiced in the area of bankruptcy law for 40 years. Like Markowitz, Mrachek reviewed numerous documents and pleadings filed both in this case as well as in the bankruptcy proceedings, including but not limited to the BK Orders as well as the case law cited therein.

83. Based upon his review of this case, the bankruptcy proceedings and federal bankruptcy code and case law, he reached the opposite conclusion

[13] The District Court Judge noted in his order, "Clearly, the better course of action in the case of a possible 'difference of opinion about the law' is to air on the side of disclosure." (R 32, at p. 14, fn. 9 (USDC Case No.: 13-cv-62251-KMM)).

that was reached by Markowitz as well as the findings and conclusions contained in the BK Orders. In Mrachek's opinion, Respondent's $2.7 million bonus from the $10 Million Fee was a mere "expectancy," as opposed to a "vested" interest. As such, he opined, Respondent was not required under bankruptcy law to disclose it in any of the Schedules or SOFA. Consequently, Respondent provided "no false oath" and therefore he truthfully answered all of the questions contained in the Schedules and SOFA.

84. In reaching this conclusion, Mrachek disagreed with both the findings and conclusions in the BK Orders as well as the Markowitz' interpretation of the bankruptcy case law. For instance, he noted that the Bankruptcy Court in Respondent's case had heard the testimony of Pozzuoli, Brown and Respondent that the bonus was purely discretionary and there was a possibility, given that fact, that the bonus could be zero. Yet, in his view, that same Court disregarded the testimony of these witnesses and instead relied solely upon the Pozzuoli Emails.

85. Mrachek explained that if the Bankruptcy Court had not done that, but rather relied upon the testimony of the three witnesses who testified at the bankruptcy trial, it would have been trapped by the applicable case law. He opined that 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 in awarding the bonus. He even noted that the District Court Judge sitting as in an appellate capacity, acknowledged in his written opinion that he was constrained by the factual findings of the Bankruptcy Court Judge unless he found those findings were clearly erroneous.

86. In addition, Mrachek provided extensive testimony on his interpretation of various bankruptcy cases cited in the BK Orders. In his opinion, given the methodology utilized by Tripp Scott in awarding bonuses, the advice given by Houston that Respondent was not required to disclose anything regarding the Contingency Fee Cases on the Schedules was accurate. Neither Mrachek nor Markowitz actually attended the Bankruptcy proceedings. Nor, unlike the Bankruptcy Court Judge, did they have the opportunity to observe the demeanor of all of the witnesses who testified or see all of the evidence presented.

III. RECOMMENDATIONS AS TO GUILT

87. Because of the serious consequences attendant to a recommendation of discipline for a member of The Florida Bar, the quantum of proof necessary to support such a recommendation is required to be "clear and convincing." *The Florida Bar v. McCain*, 361 So. 2d 700, 706 (Fla. 1978); *The Florida Bar v. Rayman*, 238 So.2d 594, 598 (1970). This

intermediate level of proof "entails both a qualitative and quantitative standard":

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla. 4th DCA 1983)). Further, "to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." *Florida Bar v. Fredericks,* 731 So.2d 1249, 1252.

88. Further, it is well-settled that all members of the Bar must demonstrate honesty at all times even when, as here, they are proceeding as a litigant in a personal capacity:

> [W]hen lawyers are litigants they do not cast aside the oath they take as an attorney or their professional responsibilities … Not only does the law demand truthfulness under oath, but the obligations of our profession demand it. As former Justice Ehrlich has stated, ['Jour profession can operate properly only if its individual members conform to the highest standard of integrity in all dealings within the legal system.['J…

The Florida Bar v. Cibula, 725 So. 2d 360, 364–65 (Fla. 1998)(c.o.)(*see, R. Regulating Fla. Bar* 3-4.3 (stating in part, "The commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise..."); *see also, The Florida Bar v. Cramer,* 643 So.2d 1069 (Fla. 1994).

89. **Findings Based Upon Independent Review of Evidence.** Applying these well-settled standards, I find there is clear and convincing evidence which was presented in this case to establish that Respondent is in violation of the following Rules Regulating the Florida Bar:

90. **3-4.3** [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise... may constitute a cause for discipline.]; **4-3.3(a)(1)**[A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.]; **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct....]; and **4-8.4(c)**[A lawyer

shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.].

91. **Nondisclosure of Respondent's Bonus from the $10 Million Fee.** Respondent's conduct centers around two separate acts pertaining to his filings in his personal bankruptcy proceeding. The first is the nondisclosure of his interest in the $10 Million Fee in the Schedules and SOFA. The Bankruptcy Court found this omission was done with the intent to "hinder, delay or defraud his creditor." Based on the evidence and testimony presented in this proceeding, the undersigned finds Respondent's failure to disclose his interest in the $10 Million Fee was materially misleading. As such, the undersigned finds Respondent's conduct is a violation of *RR. Regulating Fla. Bar* **4-3.3(a)(1)**[A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.]; and **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct….]; and **4-8.4(c)**[A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.].

92. As the Bar's expert testified, the goal of a Chapter 7 proceeding is to liquidate all assets belonging to the debtor, to the extent possible satisfy the claims of the debtor's prepetition creditors with the liquidated assets and discharge the debtor in bankruptcy which would forever free the debtor of his or her prepetition debts. In achieving this, the Bankruptcy Code requires a debtor to fully and candidly disclose all of his or her assets and liabilities utilizing the Schedules and SOFA, all of which collectively constitute the "property of the debtor's estate." This term is very broad and expansive under bankruptcy law. To this end, all of the Schedules and SOFA are designed to afford a debtor the means to accomplish this. Because the Schedules and SOFA are submitted under oath, the Schedules and SOFA are official records provided by Respondent to the Bankruptcy Court.

93. Additionally, the Schedules require that a debtor disclose any reasonably anticipated increase in income or expenditures that the debtor reasonably anticipates receiving over the (12) twelve-month period following the date Petition is filed. This would include an asset or cash that a debtor has earned but has not yet received in hand. Like assets and liabilities, there are various places contained throughout the Schedules where such income may be disclosed (R 51, sub ex. 14, at pp. 7; 35).

94. In this case, Respondent sought to discharge under Chapter 7 all of his prepetition debt, including the CIB Judgment. Yet, he did not *in any manner whatsoever* disclose his interest in the $10 Million Fee anywhere in either the Schedules or SOFA. Instead, he merely disclosed the following regarding any future income he reasonably anticipated receiving over the next twelve (12) months: "Annual performance bonus (historically 65,000 – 70,000)."

95. This disclosure was made despite the fact that at the time he did so Respondent knew that he was well positioned to actually receive a multi-million-dollar bonus from the $10 Million Fee. This is especially true since just a few weeks prior to the Respondent 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, Respondent 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 Respondent had a clear motive not to disclose this bonus in the Schedules. *See generally, Cramer, supra.* 643 at 1070 (Fla. 1994)(upholding referee's recommendation that attorney be found guilty

of violating Rule 4-8.4(c) where attorney knowingly and deliberately deposited legal fees into trust account in attempt to mislead IRS after receiving notice of intent to levy).

96. The undersigned emphasizes that this finding is not based just on the findings of the BK Orders. Rather, it's also based upon the testimony and evidence, including the Pozzuoli Emails, that were submitted in this case, To be sure, those emails speak volumes as to Respondent's state of mind around the time he filed his Petition, Schedules and SOFA. As stated, they unquestionably reveal there was never any serious doubt in Respondent's mind that he would be receiving a substantial bonus totaling in the millions of dollars as a result of his role as co-lead counsel in the Contingency Fee Cases. The only question left open was the final amount of his share of the $10 Million Fee. Indeed, Respondent testified this bonus was the largest single amount he had ever received over his career as an attorney. Given this, any claim by Respondent's that his decision not to disclose it *anywhere* in the Schedules and SOFA because he believed at the time it was a "discretionary" award, is contrary to the evidence submitted and is not credible.

97. In reaching this conclusion, the undersigned has not overlooked the Respondent's argument that his disclosure regarding his future income

was not done with the intent to mislead anyone, including the Bankruptcy Court, Trustee and/or his creditors. Indeed, as he points out, some of this evidence was unavailable to him during the bankruptcy proceedings. If it were, he argues, the findings of the Bankruptcy Court would have been markedly different. After carefully considering the evidence and testimony presented by Respondent in support of this claim, the undersigned does not find it credible.

98. **Inconsistent Legal Positions Taken by CIB in the Bankruptcy and State Court Proceedings.** As stated, Respondent claims that at the time he filed the Petition, the Schedules and SOFA, any interest that he may have had in receiving any bonus from the $10 Million Fee was solely at the discretion of Tripp Scott. In support of this, he presented numerous exhibits along with testimony demonstrating that in the State court proceedings, CIB argued that Respondent's claim to his bonus was "discretionary." On the other hand, in the bankruptcy proceedings, CIB argued that Respondent's claim was "vested." This contradictory legal position, he argues, proves that at the time he filed the Petition, Schedules and SOFA, he was reasonably justified in believing that any interest he may have had in the $10 Million Fee was uncertain at best. As such, he maintains, his failure to disclose anything regarding his

bonus from the $10 Million Fee was not a deliberate or calculated attempt to mislead his creditors.

99. The undersigned finds this argument unpersuasive. Regardless of the legal strategy used by CIB to advance its interest in the subsequent State Court proceeding, the fact remains that the Bankruptcy Court essentially found that under prevailing bankruptcy law at the time, Respondent was required to disclose his inchoate bonus from the $10 Million Fee. This is because, given all the facts and circumstances known to him at the time, it was an increase in income that Respondent reasonably anticipated that he would be receiving over the twelve-month period following the date of the Petition. As stated, the only thing uncertain at the time he filed his Petition and Schedules was the exact amount that he would be receiving and not whether he would be receiving at all.

100. That CIB made a legal argument in the subsequent state court proceedings that the bonus was discretionary does not change this in any way. It follows that regardless of what legal arguments CIB made in the Bankruptcy and subsequent State court proceedings, Respondent's disclosure that any reasonably anticipated increase in his income over the next twelve (12) months would be "historically 65,000 – 70,000," was simply not true.

101. **Knowledge of the Judgments in the Contingency Fee Cases by the Trustee and CIB.** Respondent also argues that the Trustee and attorneys representing CIB all were aware that Respondent and Tripp Scott had successfully secured the judgments in the Contingency Fee Cases. In fact, he maintains these verdicts were essentially common knowledge during the bankruptcy proceedings throughout the South Florida legal community. Based on this, he argues, Respondent could not have made the disclosure on Schedule I with the intent to mislead anyone since both the Trustee and CIB knew Tripp Scott had successfully obtained the judgments in the Contingency Fee Cases.

102. The undersigned disagrees for several reasons. First, the argument ignores the evidence that as early as December, 2011 Respondent was fully aware that he would be receiving a multi-million dollar bonus. Despite this, he chose not to disclose it in the Schedules that were filed months later. Whatever the Trustee and or the CIB may have known about the Contingency Fee Judgments around the time Respondent filed the Schedules does not alter this.

103. Additionally, as previously stated the goal of a Chapter 7 proceeding is to liquidate all the assets belonging to a debtor and obtain a discharge in bankruptcy. The result would be to forever discharge Respondent

from his prepetition debts, including the CIB Judgment. Any income or assets received by Respondent following this would be unreachable by the creditors. In order to achieve this result, Respondent was obligated under bankruptcy law to fully and candidly disclose in the Schedules and SOFA all of his assets, liabilities and income, including, income that he reasonably anticipated receiving over the twelve-month period following the date the Petition was filed. Because the Schedules and SOFA are submitted under oath, they are official records provided to the Bankruptcy Court.

104. As Welt testified, he relies on the debtor to be truthful when disclosing his or her assets in these filings. This is because it is neither possible for the Trustee to research the assets and income of every debtor nor for that matter is it the Trustee's responsibility to do so. Thus, while it may be true both the Trustee and the attorneys representing CIB were aware of the judgments in the Contingency Fee Cases prior to the time Respondent filed the Schedules and SOFA, neither had any idea as to what amount, if any, Respondent would be receiving from the Contingency Fee Cases as his bonus. Respondent on the other hand did and yet, he intentionally chose not to disclose it.

105. Lastly, based on the evidence presented Respondent had a motive not to disclose his bonus. As the Bankruptcy Judge pointed out, "[t]he concealment of his interest in the $10 Million Fee from his Schedules and SOFA would (he hoped and anticipated) allow him to keep millions of dollars and be free from the CIB Judgment." (Bk Order, R 32, pp. 34-36). It follows that while both the Trustee and CIB may have been aware of the verdicts in the Contingency Fee Cases, by not disclosing his interest in the $10 Million Fee, Respondent intentionally misled the Trustee and creditors.

106. **Reliance on Advice of Bankruptcy Counsel.** Respondent next argues that he never intended to mislead anyone because in disclosing his anticipated income, he was following the legal advice of his bankruptcy attorney. The undersigned rejects this argument for several reasons. First and arguably foremost, reliance on advice of counsel is not available as a defense in a Bar discipline proceeding. *See, The Florida Bar v. Louis,* 967 So.2d 108, 118 (Fla. 2007)("defense based on advice of counsel is not available to respondents in Florida Bar discipline cases unless specifically provided for in a rule or considered as a matter in mitigation."). Second, as the Bar argues, it is Respondent, and not his attorney, that is ultimately responsible for the accuracy of the factual

information contained in the Schedules and SOFA. Respondent and not his attorney is the one who declares under oath that the information contained in those items is true and accurate.

107. Additionally, the evidence in this as well as in the bankruptcy proceeding demonstrates that Respondent did not completely rely on the advice of his attorney. Indeed, Respondent is a highly experienced and skilled attorney. He has been a member of the Bar for over thirty (30) years. Further, his practice entails handling complex litigation, such as intellectual property. To be sure, one need only look to the Contingency Fee Cases as a good example of the degree of sophistication and skill Respondent possesses as a lawyer.

108. Given this, Respondent conducted his own legal research on the issue as to whether he was required to disclose his bonus from the $10 Million Fee in the Schedules and SOFA. This clearly undermines any claim that his decision not to disclose this rested entirely on the advice of his attorney. Thus, the claim by his bankruptcy attorney that Respondent was a "babe in the woods," and "not knowledgeable about even the most basic of bankruptcy matters" is completely without merit and not credible.

109. **The Expert Witnesses.** Both the Bar and Respondent each presented experts who testified on bankruptcy law relating to this issue. The undersigned finds that both witnesses are highly knowledgeable on the subject matter. Their respective presentations were extremely thorough and helpful. The Bar's expert opined that the legal reasoning relied upon by the Bankruptcy Court and District Court Judge was correct. On the other hand, Respondent's expert essentially disagreed with the legal conclusions reached in the BK Orders. The difference of legal opinion by these two learned experts serves only to underscore what the District Court Judge observed in his order: "Clearly, the better course of action in the case of a possible 'difference of opinion about the law' is to air on the side of disclosure." (R 32, at p. 14, fn. 9 (USDC Case No.: 13-cv-62251-KMM)).[14]

110. Further, any issue as to whether the legal findings set forth in the BK Orders are correct is a matter that would arguably be best suited for an appellate court.[15] Suffice it say it would be inappropriate for the undersigned in this proceeding to second-guess or even question those findings and then to conclude that Respondent lacked any intent to

[14] To be sure, Houston testified that looking back he might have done something different with the Schedules. The Bar's expert even acknowledged that the case law on this issue may be interpreted differently. In such a case, Markowitz opined the better rule is to disclose. This is especially true since there would be no harm to Respondent in doing so.

[15] Respondent did appeal the BK Orders to the Eleventh Circuit. However, he later voluntarily dismissed it.

mislead the Trustee and the creditors in submitting the Schedules and SOFA based on federal bankruptcy law.

111. **PH Transfers.** The other reason the Bankruptcy Court denied Respondent's Petition was that he failed to disclose the PH Transfers in the Schedules and SOFA. The question thus presented here is whether this omission amounts to misconduct as charged by the Bar. Having carefully considered the evidence presented and for the reasons stated below, the undersigned finds that the Bar has failed to meet its burden to prove that Respondent's failure to disclose these transfers amounts to misconduct charged in the Complaint.

112. First, the Bar relies on the findings of the Bankruptcy Court. However, as Respondent points out, evidence was presented in this proceeding that was not presented in the bankruptcy case.[16] Specifically, in this case both Respondent and his bankruptcy attorney, Bart Houston, testified that unbeknownst to Respondent, Pamela Herman had herself made the two transfers. The first was from the joint account to her own personal account. The second one was to a different account in her name alone.

[16] In fact, the BK Orders point out that the only evidence that Respondent was unaware of the PH Transfers was Respondent's testimony. The Bankruptcy Judge found Respondent's testimony not credible.

113. Respondent also introduced Pamela Herman's Affidavit (R 55, sub ex. 77-I) as well her deposition testimony given in these proceedings (R 56, sub ex. 70). Her sworn testimony is that Respondent was unaware that she had made these transfers from their joint account to her personal checking accounts. Lastly, Respondent submitted evidence indicating that work had in fact been performed on his condominium. This evidence went essentially unchallenged by the Bar in this proceeding. The Bar presented no evidence in this case that the Respondent himself somehow orchestrated these transfers to Pamela Herman's two personal accounts with the intent to defraud his creditors in the Bankruptcy case.

114. Secondly, as stated the issue presented here is not whether the BK Orders were legally correct in denying Respondent's discharge. Rather, the issue is whether by failing to disclose the PH Transfers, Respondent is guilty of violating the Rules charged in the Complaint. The Bar bears the burden of proving these allegations by clear and convincing evidence. *McCain*; *Rayman; Inquiry Concerning Davey*.

115. Based upon the evidence submitted, the undersigned concludes the Bar has not met this burden as it relates to the PH Transfers. Accordingly, it is respectfully submitted that Respondent be found not

guilty of violating any of the rules charged in this case as they relate to the PH Transfers.

116. **Conclusion.** For the foregoing reasons, the undersigned respectfully recommends that Respondent be found guilty of the following: **3-4.3** [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise… may constitute a cause for discipline.]; **4-3.3(a)(1)**[A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.]; **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct….]; and **4-8.4(c)**[A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.].

117. **Case Law**. The undersigned has considered the following case law: *The Florida Bar v. Gwynn*, 94 So.3d 425, 430 (Fla. 2012); *The Florida Bar v. Head*, 27 So.3d 1, 7-8 (Fla. 2010); *The Florida Bar v. Rood*, 620 So. 2d 1252, 1255 (Fla. 1993)("Referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they deem relevant in resolving the factual question."); *The Florida Bar v. McCain*, 361

So. 2d 700, 706 (Fla. 1978); *The Florida Bar v. Rayman*, 238 So.2d 594, 598 (1970); *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994); *Florida Bar v. Fredericks,* 731 So.2d 1249, 1252 ("To satisfy the element of intent it must only be shown that the conduct was deliberate or knowing."); *The Florida Bar v. Marable,* 645 So.2d 438 (Fla. 1994); *The Florida Bar v. Cibula*, 725 So. 2d 360, 364–65 (Fla. 1998); *The Florida Bar v. Cramer,* 643 So.2d 1069 (Fla. 1994); *The Florida Bar v. Louis,* 967 So.2d 108, 118 (Fla. 2007); *The Florida Bar v. Hall*, 49 So.3d 1254 (Fla. 2010); *The Florida Bar v. Kaufman*, 684 So. 2d 806 (Fla. 1996); *The Florida Bar v. Swann,* 116 So.3d 1225 (Fla. 2013).

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

118. The undersigned considered the following Standards prior to recommending disciplinary measures to be applied:

Standard 3.0 Generally

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

a) the duty violated;
b) the lawyer's mental state;
c) the potential or actual injury caused by the lawyer's misconduct; and
d) the existence of aggravating or mitigating factors;

Standard 5.1 Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate … in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11(f) Disbarment is appropriate when …a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

Standard 6.1 False Statements, Fraud and Misrepresentation

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is appropriate when a lawyer:

a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or

b) improperly withholds material information and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

6.13 Public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

6.14 Admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity and causes little or no actual or potential injury to a party or causes little or no adverse or potentially adverse effect on the legal proceeding.

V. AGGRAVATING AND MITIGATING FACTORS

119. The undersigned considered the following factors prior to recommending discipline:

Standard 9.2 Aggravation

9.22(b) dishonest or selfish motive. Respondent stood to gain $2.7 Million by not disclosing his interest in the $10 Million Fee.

9.22(g) refusal to acknowledge wrongful nature of conduct. Throughout the course of these proceedings, Respondent has failed to acknowledge that his disclosure regarding his future income and nondisclosure of his interest in the $10 Million Fee was wrong.

9.22(i) substantial experience in the practice of law. Respondent has been a member of the Florida Bar since 1982. Undersigned notes however that the bankruptcy law dealing with this issue is subject to differing opinions as was testified to by the expert witnesses. Thus, while the evidence in this matter is that Respondent undertook his own review of the bankruptcy caselaw related to the issues in his case, he does not practice bankruptcy law and to a great degree he relied upon the advice of his bankruptcy counsel, Bart Houston.

Standard 9.3 Mitigation

9.32(a) Absence of a prior disciplinary record.

9.32(c) Personal or emotional problems. Respondent testified that the entire ordeal including the Bankruptcy and instant proceedings has been traumatic for him.

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, Respondent provided information and documents requested from the Trustee and CIB Marine regarding his interest in the $10 Million Fee. After Respondent 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.

9.32(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. There has been no claim that Mr. Herman failed to provide full and free disclosure to The Florida Bar. As Mr. Herman has also been cooperative in the proceedings before this Referee, I find this mitigating factor has been met.

9.32(g) Character or reputation. Substantial testimony was presented by witnesses, including some highly reputable ones, regarding Respondent's good character and reputation in the legal community. Those witnesses include the following: Miles McGrane, Esq., Mr. Roger Banks (Respondent's client in the SM Case); Amy Galloway, Esq.; Alexander Brown, Esq.; Hon. Thomas Lynch (Ret.); and Mr. Michael Powell (Respondent's client in the HD Case). Additionally, Respondent has served on a Florida Bar grievance committee and served as the chair of the same committee. He has served as an officer of the Federal Bar Association for the Southern District of Florida.

9.32(k) Imposition of other penalties or sanctions. Clearly, Respondent was denied his Petition which allowed CIB to pursue Respondent's bonus. Respondent testified at the Sanctions Hearing that he and CIB settled, and Respondent was able to retain $500,000 of the bonus award. Additionally, Respondent testified that because of the instant proceedings, Respondent's practice has been substantially affected in that he is unable to appear *pro hac vice* in various federal district courts as

well as the Eleventh Circuit. Lastly, he testified that these proceedings have had a negative impact on his otherwise stellar reputation in the legal community.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

120. The undersigned respectfully recommends that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. A suspension for a period of eighteen (18) months. In reaching this recommendation, the undersigned is in no way condoning or minimizing the gravity of Respondent's conduct in his personal bankruptcy proceeding. However, undersigned has given substantial weight to the mitigating factors.

B. Additionally, respondent shall pay The Florida Bar's reasonable costs in the disciplinary proceedings.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

121. Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history of respondent, to wit:

A. Personal History of Respondent:

Age: 61

Date admitted to the Bar: November 5, 1982

B. No past disciplinary record.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

122. The undersigned finds the following costs were reasonably incurred by The Florida Bar:

Administrative Costs	$1,250.00
Investigative Costs	$165.00
Court Reporters' Fees	$10,097.10
Bar Counsel Costs	$410.13
Expert Witness Fee	$9,750.00
TOTAL	**$21,672.23**

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 15 day of November, 2018.

AUGUST A. BONAVITA, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to JOHN A. TOMASINO, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, a copy sent in Word format by electronic mail to ***e-file@flcourts.org***, and that copies were furnished by regular U.S. Mail to David Bill Rothman, Esq., Respondent's Counsel, Rothman & Associates, P.A., 200 S. Biscayne Blvd., Ste 2770, Miami, FL 33131-5300; via email at dbr@rothmanlawyers.com, jtm@rothmanlawyers.com; Joi L. Pearsall, Esq., Bar Counsel, The Florida Bar, Ft. Lauderdale Branch Office, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323; via email at jpearsall@florida bar.org, esanchez@floridabar.org; and Adria E. Quintela, Esq., Staff Counsel, The Florida Bar, Ft. Lauderdale Branch Office, Lake Shore Plaza II, 1300 Concord Terrace Suite 130, Sunrise, FL 33323; via email at aquintel@floridabar.org on this 15 day of November, 2018

AUGUST A. BONAVITA, Referee

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

PETER G. HERMAN,

Respondent.
_____/

Supreme Court Case
No. SC17-2050

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

Received, Clerk, Supreme Court
DEC 21 2020

AMENDED REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein pursuant to R. Regulating Fla. Bar 3.7.6, the following proceedings occurred:

1. On November 16, 2017, the Florida Bar ("Bar"), pursuant to R. Regulating Fla. Bar 3-7.4 filed a formal complaint against Respondent alleging he violated the following: RR. Regulating Fla. Bar 3-4.2; 3-4.3; 4-3.3(a)(1); 4-3.4(a); 4-8.4(a); and 4-8.4(c) ("Complaint")(R1[1]).
2. By order dated November 12, 2017, the Supreme Court referred the matter to the Chief Judge of the Fifteenth Judicial Circuit for the

[1] All references to the Record will be denoted as "R" followed by the corresponding tab number. References to the party's exhibits contained at tabs 51 through 57 will be denoted as follows: "(R x, sub ex. y)" where "x" denotes the tab number and "y" denotes the corresponding exhibit number assigned by each party.

appointment of a referee, (R3) and the Chief Judge appointed the undersigned as referee on December 11, 2017 (R4).

3. On January 5, 2018, Respondent filed his Answer to the Complaint (R8).

4. The matter was bifurcated and proceeded to an evidentiary hearing beginning on June 21, 2018 and continuing through June 26, 2018. The Bar introduced exhibits one (1) through forty-six (46) into evidence without objection (R51-52). Respondent's exhibits one (1) through eighty-nine (89) were likewise admitted into evidence without objection (R53-57).

5. The undersigned granted the Bar's unopposed Motion to Take Judicial Notice of the following two Orders arising from Respondent's personal bankruptcy proceedings: *In Re Peter G. Herman* (Bankruptcy Court Case No. 12-13989-JKO[2]); and *Herman v. CIB Marine Capital, LLC* (USDC Case No.: 13-cv-62251-KMM)(collectively referred to as the "Bankruptcy Orders")(R32).

6. As the undersigned has taken judicial notice of those cases, it is respectfully submitted that the undersigned may rely upon, and adopt the factual findings set forth in the Bankruptcy Orders in making the

[2] This case is reported at *In Re Herman*, 495 Bankr. 555 (S.D. Fla.)

necessary findings and conclusions in this matter.[3] *See, The Florida Bar v. Gwynn*, 94 So.3d 425, 430 (Fla. 2012); *The Florida Bar v. Head*, 27 So.3d 1, 7-8 (Fla. 2010); *The Florida Bar v. Rood*, 620 So. 2d 1252, 1255 (Fla. 1993)("Referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they deem relevant in resolving the factual question.").

7. The following persons testified as witnesses at the hearing: For the Bar, Kenneth Welt, Jerry Markowitz, Esquire, and Respondent. For Respondent, Bart Houston, Esquire, Miles McGrance, Esquire, Roger Banks, Amy Galloway, Esquire, Alex Brown, Esquire, Honorable Thomas Lynch, Chad Pugatch, Esquire, Michael Powell, L. Louis Mrachek, Esquire and Respondent.

8. On October 22, 2018, the instant matter proceeded to a Sanctions Hearing at which the Respondent testified. In addition, both parties presented arguments as well as Supplemental Proposed Findings as to Recommended Sanctions.

[3] The undersigned has likewise taken judicial notice of evidence and testimony not presented to, nor considered, by the Bankruptcy Court, in particular, regarding: (1) Respondent's reliance on advice he received from his Bankruptcy counsel, Bart Houston, prior to filing and swearing to the accuracy and truth of his financial schedules and SOFA; (2) the Trustee's and CIB's knowledge of the contingency case judgments prior to the filing of Respondent's schedules; (3) the arguments raised by CIB in both the bankruptcy and state court proceedings; and (4) Respondent's testimony regarding his lack of knowledge of the transfers made by his then-spouse Pamela Herman and documentation for the accounts and expenses paid from the accounts. In addition, the undersigned takes judicial notice that in making factual findings, the Bankruptcy Court applied a lower standard of proof (preponderance of the evidence) as opposed to a clear and convincing standard which must be applied in this Bar matter

9. On November 19, 2018, the undersigned filed his Report and Recommendation with this Court ("R&R").

10. On June 18, 2020, the Court issued its opinion in which it remanded the case and ordering that the undersigned file an Amended Report and Recommendation addressing Respondent's advice of counsel defense. *The Florida Bar v. Herman,* SC17-2050 (June 18, 2020)[4]

11. Case Management Conferences were held on June 23, and July 2, 2020. Both sides have advised the undersigned that they would not be presenting any additional evidence, and that they intended to rely upon the record in its current state.

12. On October 7, 2020, the Respondent submitted his Proposed Report & Recommendation (R 82). The Bar submitted its Proposed Report & Recommendation on October 9, 2020 (R 83). On October 8, 2020, both parties appeared before the undersigned to present additional argument addressing Respondent's advice of counsel defense.

13. By leave of this Court (R 86), the parties have each submitted a Supplement to their respective Proposed Amended Report and Recommendation (RR 84; 87).

[4] Reported at *The Florida Bar v. Herman,* 297 So.3d 576 (Fla. 2020).

14. During the course of these proceedings, Joi L. Pearsall, Esquire, represented The Florida Bar and David B. Rothman, Esquire represented Respondent. The pleadings, hearing transcripts and all other papers filed in this cause, which are forwarded to the Supreme Court of Florida with this report, constitute the entire record.

II. FINDINGS OF FACT

A. Jurisdictional Statement.

15. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary of the Case.

1. Introduction and Background

16. This matter arises from the Respondent's conduct in connection with his personal bankruptcy proceedings. Specifically, The Florida Bar alleges that Respondent violated the foregoing Bar Rules in that during his personal bankruptcy proceedings, Respondent intentionally failed to disclose in his sworn bankruptcy schedules ("the Schedules") as well as his Statement of Financial Affairs ("SOFA") his bonus from approximately the $10 million of legal fees that were generated by his work as an attorney in obtaining successful judgments in two of his cases

("10 Million Fees").[5]

2. Failure to Disclose Respondent's Bonus from the $10 Million Fees

a. Respondent's Compensation Structure

17. To fully understand the basis of the Bar's allegation surrounding Respondent's failure to disclose his bonus from the $10 Million Fees, a brief overview of Respondent's employment and compensation structure is appropriate. At the time he filed his petition for bankruptcy, Respondent was employed as an attorney with the law firm of Tripp Scott ("Tripp Scott"). He was given the title of "director," in his more than 30 years with Tripp Scott. However, he never was an equity partner or a shareholder of the firm. (R 66, 6/21/18, p.129-130; 6/25/18, p.107-108, 112-113) Respondent was a W-2 employee and did not have a contract with the firm. (R 66, 6/25/18, p. 112) His compensation consisted of a monthly salary and an annual discretionary performance bonus. (R 66, 6/25/18, p. 113)

18. Three witnesses (Peter Herman, Alexander Brown and Edward Pozzuoli), all from Tripp Scott, were the only witnesses who testified at the bankruptcy trial regarding the historical practices of Tripp Scott in the

[5] The Complaint also alleges that the Respondent violated the foregoing Bar Rules in that he failed to disclose a series of transfers of his personal assets in an attempt to defraud his creditors in the bankruptcy proceeding ("PH Transfers")(R 1). The undersigned has addressed the PH Transfers in the R&R and respectfully will rely upon the undersigned's findings and recommendation stated therein that the Respondent be found not guilty of violating the Bar Rules charged as they relate to those transfers.

awarding of bonuses to non-shareholder attorneys. Their testimony concerning this issue was admitted into evidence in the instant 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 are historically awarded at year-end.[6] (R 66, 6/25/18, p. 42-47)

19. Two of the bankruptcy trial witnesses, Respondent and Alex Brown, testified at the Bar trial and testified consistent with their prior testimony that the bonuses at Tripp Scott were discretionary. (R 66, 6/25/18, p. 85-88, 126-127) Respondent specifically testified that for the 30 years preceding 2012 he had received a discretionary bonus determined in the same fashion. (R 66, 6/25/18, p. 126-127) An additional witness, Amy

[6] This testimony is fairly consistent with the findings of the Bankruptcy Court. *See, In Re Herman,* 495 B.R. 555, 563-64 (discussing the structure of the Respondent's compensation package, which includes receiving a salary and a bonus "based upon the satisfaction of 'certain performance criteria' (described by Mr. Pozzuoli as the 'one-third' portion of Director's compensation), which are typically made in December of each fiscal year." However, the Court also found based on the testimony and evidence submitted in that case that is unlikely that Respondent would receive a zero bonus. *Id.* at 564.

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. (R 66, 6/25/18, p. 41-44)

20. 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 Galloway, these emails are nothing more than the attorneys expressing their thoughts on their expectations. (R 66, 6/25/18, p. 51, 58, 60-61).

21. The Bar did not present any witness testimony to rebut the testimony of these witnesses.

b. The CIB Judgment, Contingency Fee Cases and the $10 Million Fees

22. In December 2011 and while the Respondent was employed with Tripp Scott, CIB Marine Capital, LLC ("CIB") obtained a deficiency judgment of approximately $4.5 million dollars against Respondent, based upon the non-payment of a loan that he personally guaranteed for Esquire Ventures, LLC. The loan was made in connection with a failed real estate investment by the Respondent. (R 52, sub. ex 28)("CIB Judgment"). CIB immediately began pursuing collection proceedings

against Respondent.

23. Meanwhile at around this same time, Tripp Scott had been representing plaintiffs in two separate lawsuits pursuant to contingency fee agreements. Respondent was the co-lead counsel, along with another Tripp Scott attorney, Alex Brown, in each of these cases. The first was a suit against Home Depot for patent infringement ("HD Case"). The other case was against Security Mutual Life Insurance Company of New York ("SM Case")(collectively, the "Contingency Fee Cases").

24. The plaintiffs in each of those cases prevailed. The jury in the HD Case awarded the plaintiff approximately $23.45 million and the one in the SM Case awarded the plaintiff $26 million. On October 13, 2011, the court entered a final judgment in the SM Case. Ultimately, the parties reached a settlement in the SM Case and a fully executed Satisfaction of Judgment was filed on March 13, 2012 (R 52, sub ex. 35). The Final Judgment in the HD case was affirmed by the Eleventh Circuit on November 14, 2011 (R 52, sub ex 40). Mandate was issued on February 12, 2012. Pursuant to the fee arrangements in the Contingency Fee Cases, Tripp Scott received the $10 Million Fee.[7]

[7] The fees were $4.1 million and $5.8 million for the HD and SM Case, respectively.

c. The Respondent's Expectations Regarding Receiving a Bonus from the $10 Million Fees: The Pozzuoli Emails

25. Beginning in December 2011 and continuing into early January 2012, Respondent sent approximately six (6) emails to Pozzuoli, the President of Tripp Scott, as well as other members of the firm all of whom were members of the Firm's Compensation Committee ("Pozzuoli Emails"). In each of those emails, Respondent discussed how the bonuses from the $10 Million Fee should be distributed to those who worked on the two contingency cases, including himself and Brown. (R 52, sub exs. 25, 26).

26. He stated that he was "hearing rumors" regarding the distribution methodology of the bonuses. He also mentioned he wanted Tripp Scott to be "consistent" with its historical practices in considering the award of bonuses. In his December 6, 2011 email, Respondent stated that he wanted Tripp Scott to finalize the distribution methodology of the bonuses.

27. Then, in his December 15, 2011 email, Respondent stated that he was frustrated and disappointed that the people who had procured the $10 Million Fee were being "kept out of the loop." After meeting with Pozzuoli, Respondent sent him another email on December 21, 2011 describing the $10 Million Fee as a "heck of a lot of money that is going

to result in everybody getting a great payday."

28. Respondent proposed to Pozzuoli that he and Brown should receive approximately $5.2 million due to their successful work on the Contingency Fee Cases. In reaching this amount, Respondent explained to Pozzuoli that it was $500,000 lower than what he had proposed the day before. Respondent then goes on to further state that based upon his "profit analysis," "the number for both [Brown] and [Respondent] would end up being north of $7,000,000." (R 52, sub ex. 26).

29. In his December 21, 2011 email, Respondent stated, "[W]e have a huge amount of money coming in that will benefit us all" and "I don't want to sound like a broken record, but I was extremely serious that this should be resolved today. It's important to me" (R 52, sub ex. 26).

30. On January 8, 2012, Respondent sent Pozzuoli yet another email in which he stated, "As you know, I have been trying to get a resolution to the fair and proper distribution of the monies coming from [Contingency Fee Cases] for the last two months.... I believe the Firm should want me and [Brown] to have a feeling that we are being treated fairly and being rewarded fairly for this tremendous and unprecedented result." (R 52, sub ex. 27).

31. In his January 9, 2012 email, Respondent said that the final details of the settlement in the SM Case were being worked out, that he, Respondent, had complete control over when Tripp Scott would be receiving the settlement funds from that case, and that the money could have been in 2011, but the receipt was pushed out to 2012 for tax reasons. Respondent stated that the HD Case "should be resolved in the next 60 days if not sooner now that the judges are back from the holiday." (R 52, sub ex. 26).

32. Even though the fees from the Contingency Fee Cases had not been received by Tripp Scott before the December 2011 compensation meeting, the anticipation of the arrival of the influx of cash into the firm was palpable and the employees were excited that the two Contingency Fee Cases were going to pay off (R Ex. 27, p. 68, 70, 71).

33. The expectation of the distribution of the $10 Million Fee to the directors and staff at Tripp Scott was so highly anticipated that not only did the Respondent meet with Pozzuoli to discuss the allocation of those fees, he also sent the Pozzuoli Emails to him to convey his expectations that he would get a substantial bonus (R 66, October 22, 2018, p. 26; TFB Ex. 26; TFB Ex. 27). In fact, Pozzuoli told respondent on December 22, 2011 that when Tripp Scott receives the fees from those cases, Tripp

Scott should set aside some money for the approximate $9.7 million for the non-directors and staff at the firm, and subsequently $300,000.00 was distributed to non-directors (TFB Ex. 21, p. 96-197; TFB Ex. 26, R. Ex. 1).

d. Tripp Scott's Expectations Regarding Awarding Bonuses from the $10 Million Fees For the Contingency Fee Cases: The Pozzouli Deposition.

34. The parties each submitted excerpts from Pozzuoli's deposition given in the bankruptcy case relating to Tripp Scott's position on awarding bonuses for the Contingency Cases. Pozzouli provided the following testimony: When Respondent sent the Pozzouli Emails seeking to resolve the amount of his bonus from $10 Million Fee, he informed Respondent that there was "nothing to discuss" and the allocation of the money for bonuses could not be determined at that time because the money had not yet been received and accounted for by the firm. See Resp. Exh. 27 (Deposition of Edward Pozzuoli, May 13, 2013, p. 65, 68, 79, 80, 90, 92).

35. At that time, "no certainty" was provided to Respondent because "[t]he money was not in the door." *Id.* p. 95. In addition, Tripp Scott utilizes multiple factors and concerns which caused uncertainty regarding how much of the $10 million fee would be allocated and disbursed as bonuses,

particularly in relation to having funds to ensure the firm's financial survivability and pay potential cash flow needs. These include funds needed in the event a hurricane closed the firm, the firm experienced an increase in malpractice issues or a partner had died, or to pay for anticipated cash flow needs, such as renovations or market adjustments for associates' salaries. *Id.* p. 92-93.

36. He also testified that there were factors, which delayed the allocation of bonuses even after the fees, were received in March 2012. These include the need to determine how much would be set aside for non-director staff, as well as the need to wait until the July/August 2012 period so that the firm could project the revenues through the balance of the year in order to ensure the law firm, "from a financial standpoint, was on a strong course." *Id.* p. 169-170.

37. He explained that the firm "had a slow beginning of the year" and there was a concern regarding expenditures for a new department in the firm. *Id.* p. 170. Pozzuoli also confirmed that, despite the statement in Respondent's email that a dispute with previous co-counsel in the Contingency Fee Cases litigation should not delay the resolution of Respondent's bonus, the firm waited for settlement of the dispute prior to disbursing any bonuses because, as president of Tripp Scott, he "wasn't

going to hang [the] law firm out while this dispute was pending." *Id.* p. 175-177.

38. When the multi-million dollar verdicts came down in the Contingency Fee Cases, Respondent was considered by Pozzuoli to possess a number of factors that the Compensation Committee looked at favorably when determining how it would distribute additional compensation to the directors in the firm. (R Ex. 27, p. 36). Indeed, Pozzuoli described Respondent as an accomplished litigator who was not only knowledgeable about the history of the firm, but also contributed to the stability of Tripp Scott. (R Ex. 27, p. 39).

39. Additionally, factored into the Compensation Committee's decision on director bonuses was the amount of fees earned by Tripp Scott as a result of an individual director's work (R Ex. 27, p. 36). Respondent, as co-lead counsel in the Contingency Fee Cases, brought in approximately $9.9 million of fees into Tripp Scott (TFB Ex. 21, 196-197).

40. Prior to testifying in the bankruptcy trial, Pozzuoli described in his deposition how Tripp Scott compensated the lawyers who worked on Contingency Fee Cases: "In a law firm like ours, what we were trying to do is clearly when they hit a big case, you want to pay them, but they're certainly not going to make as much as they would have if they were on

their own" (R Ex. 27, p. 54).

41. Of the twenty directors at Tripp Scott, Respondent was one of small number of attorneys whose practice consisted of over 50% contingency fee cases (R Ex. 27, p.14). While two-thirds of a Tripp Scott director's compensation was a predetermined monthly salary, the other one-third came from the revenues of the firm. (R. Ex. p. 34, 46).

42. Respondent met with Pozzuoli a short time before the December 2011 Compensation Committee meeting to talk about how hard he had worked on the two Contingency Fee Cases and how much money he should get (R Ex. 27, p.78). This meeting between the Respondent and Mr. Pozzuoli is memorialized in the December 21, 2011 email that respondent sent to Mr. Pozzuoli (TFB Ex. 26). Respondent stated in that email that Pozzuoli told him that that they had a "huge amount of money coming in that will benefit us all." (R 66, June 21, 2018, p. 153 -154; TFB Ex. 26). Pozzuoli acknowledged that during that meeting he probably asked respondent if he had a thought about "[h]ow to split this money up..." (R Ex. 27, p. 80).

3. The Adversary Proceedings in the Bankruptcy Court and Appeal to the U.S. District Court

43. As creditor, CIB objected to the petition for discharge alleging, *inter alia*, that Respondent intentionally concealed prepetition assets and made false oaths in connection therewith. (R 51, sub ex. 11; R 53, sub ex. 22). Specifically, CIB claimed that Respondent intentionally failed to disclose on the Schedules and SOFA his bonus from the $10 Million Fee (R 53, sub ex. 22). On June 5, and June 6, 2013, the Bankruptcy Court held a trial on Respondent's bankruptcy petition at which the Court-appointed Bankruptcy Trustee, Kenneth Welt, intervened.

44. On August 5, 2013, the Bankruptcy Court entered its Order denying Respondent's Petition for discharge based, *inter alia,* upon Respondent's willful failure to disclose both his bonus from the $10 Million Fee in the Schedules and SOFA. Pointing to the Respondent's "level of sophistication" as a seasoned trial attorney and applying what it determined to be prevailing bankruptcy law, the Bankruptcy Court concluded that Respondent "acted with intent to hinder, delay or defraud his creditors and Trustee Welt when he concealed his interest in the $10 Million Fee ... in [the Schedules and SOFA] after the Petition Date." For these reasons, the Bankruptcy Court denied Respondent's Petition for

discharge. *In Re Herman*, 495 Bankr. 555 (S.D. Fla.) (Bankruptcy Orders, R 32).

45. It is important to note that for purposes of this proceeding the Respondent did not raise his claim that he relied upon the advice of his Bankruptcy attorney, Bart Houston, in completing and submitting the Schedules and SOFA. This is because Houston did not timely plead this as a defense. Although Respondent testified at the bankruptcy trial regarding his review of case law, he was precluded from testifying regarding any reliance on the advice he received from his Houston (R 51, sub ex 20, Bk Tr. pp. 102-105).

46. On September 29, 2014, the United States District Court for the Southern District of Florida entered an order affirming the Bankruptcy Court's Findings of Facts and Conclusions of Law and Final Judgment in favor of CIB and the Bankruptcy Trustee against Respondent. In addition, based upon the "nature of the bankruptcy court's finding and this Court's affirmance," the District Court forwarded the Bankruptcy Orders to the US Attorney for the Southern District and to the Florida Bar (R 32, p. 19, *Herman v. CIB Marine Capital, LLC, supra.*).

47. Respondent appealed the Bankruptcy Orders to the Eleventh Circuit Court of Appeals however, on December 19, 2014, he voluntarily

dismissed this appeal (R 51, sub ex. 6) based apparently on reaching a settlement with CIB.

4. The Instant Bar Proceedings.

a. Testimony of Respondent's Bankruptcy Counsel, Bart Houston.

48. Respondent's bankruptcy counsel, Bart Houston, provided the following testimony: At the time the Petition was filed, Houston had almost 26 years of bankruptcy practice experience. He has been practicing law since 1986. Eventually he ended up practicing law with his father, who at one point was a bankruptcy judge in the Southern District. Houston's current practice entails representing debtors in various insolvency cases. Prior to this, he spent some twenty-eight (28) years exclusively practicing bankruptcy law, predominately in Chapter 11 reorganization and litigation cases.

49. His representation of Respondent began as co-counsel in the CIB deficiency case. After the CIB Judgment was entered against Respondent, Houston continued to represent him in settlement negotiations with CIB. Those negotiations proved unsuccessful. (R 66, 6/22/18, p. 88-91) CIB then initiated a garnishment action against the Respondent's salary at Tripp Scott. It is at that point, Houston advised Respondent to institute a voluntary Chapter 7 bankruptcy proceeding.

50. On February 18, 2012, Houston filed the Petition on Respondent's behalf, which he described as a "skeletal filing." He moved for and obtained an extension or until March 16, 2012 in which to file Respondent's Schedules and SOFA. (R 51, sub ex. 8).

51. Prior to filing the Schedules and SOFA, Houston performed the following investigation: a.) He reviewed the financial information provided to him by Respondent; b.) He met with Respondent several times; and c.) He conducted his own investigation and analysis of the facts and circumstances related to the Contingency cases, the fees Tripp Scott would receive from them, and Tripp Scott's compensation structure. This investigation included meeting with Respondent's co-counsel Alex Brown and Pozzuoli as well as reviewing trust documents and firm memos dealing with the methodology for deciding distribution of performance bonuses by the Tripp Scott Compensation Committee.

52. *Schedule B- Property of the Bankruptcy Estate.* Schedule B requires a debtor to identify "property" of the debtor's bankruptcy estate. Based upon the information he obtained through his investigation as described above regarding Tripp Scott's compensation structure, Houston concluded that non-equity "directors" of the firm, including the Respondent, did not have a legally enforceable entitlement to a bonus

because the bonuses were discretionary. Houston reviewed bankruptcy case law and concluded that Respondent 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.

53. Houston also discussed with Respondent the issue regarding the expectation of being awarded a bonus from the fees the firm would later be receiving from the Contingency Cases. He advised Respondent 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. He further advised him that the bonus should not be reported as an asset on the Schedules.

54. Houston discussed with Respondent the cases upon which he relied and when he gave the advice to Respondent, he was "unequivocal." He testified that although Respondent is an experienced civil litigation attorney, he was "a bab[e] in the woods" when it came to bankruptcy law. In Houston's view, Respondent was "not knowledgeable about even the most basic of bankruptcy matters." Respondent in turn told Houston that he, Respondent, was not skilled in bankruptcy law so he deferred to Houston. Respondent independently reviewed bankruptcy case law and

advised Houston that he too reached the same conclusion that any disclosure of the interest in the $10 Million Fee was not required. As a result, Schedule B does not contain any reference to Respondent having an interest in the $10 Million Dollar Fee (TFB Exh. 13).

55. *Schedule I- Current Income of Debtor.* One of the questions contained in Schedule I requires the debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of [the Schedules.]" In response to this question, Houston advised Respondent to state the following: "Annual performance bonus (historically 65,000 – 70,000)." (R 51, sub ex. 13). Houston chose the exact wording used. He had asked Respondent to average out the last three to four years of his annual performance bonuses.

56. Houston explained that he chose this methodology in order to put the Trustee on notice that Respondent could be expected to receive an intangible bonus within the next year. Houston testified that, because the amount of Respondent's bonus was indeterminate, "[y]ou couldn't really pick one out, so I averaged out two or three years and put that number down, and if the trustee wanted to take off from there, he had the information to do it." (R 66, 6/22/18, p. 116-118) According to Houston, this "historical" language was never intended to mislead anybody about

the Contingency Fee Cases. He does not recall having any other discussions with Respondent about this other than asking him to provide the average of previous annual bonuses received.

b. Respondent's Testimony.

57. Respondent essentially gave the following testimony in the instant proceedings: He has been a member of the Florida Bar since 1982. He started working at Tripp Scott in 1981 as a law clerk. At the time he filed the Petition he was employed as a Director. Attorneys employed with Tripp Scott are classified at different levels: associates, junior directors, directors, and senior directors. During his career at Tripp Scott, Respondent represented clients in large cases. Beginning in 2000, Respondent began litigating commercial and personal injury cases for Tripp Scott.

58. *Schedule B- Property of the Bankruptcy Estate.* In 2006, Respondent took on intellectual property litigation and patent infringement cases.[8] The two judgments in the Contingency Fee Cases represent the largest judgments Respondent has ever obtained. As a Director, Respondent received as part of his compensation package an annual salary. In 2011 and 2012, his salary was between $220 and $230k.

[8] His biography was admitted at the Bar trial (R 55, sub ex. 71).

59. Respondent's compensation package also included the award of any bonus from the Contingency Cases. This would take into account that in addition to being co-lead counsel, Respondent was also given origination credit for the HD case (TFB Ex. 20, p. 41). The term originator means the person who is given credit for bringing that case to the law firm (R 66, June 21, 2018, p. 134). As Respondent explained, the terms "origination" and "allocation" describe how Tripp Scott gives credit for originating the client or working on the case (R 66, June 21, 2018, p. 134).

60. The SM Case ultimately settled for $26 million and a Satisfaction of Judgment was entered on March 13, 2012 (R 52, sub ex. 35). Until this time, Tripp Scott had been in settlement discussions with the defendants in that case.[9]

61. At the time, he wrote the Pozzuoli Emails, Respondent held only an expectation that Tripp Scott would receive the $10 Million Fee before the end of 2011, and that it would be available before the year-end performance bonuses were determined. According to Respondent, in these emails he was merely speaking up, not only for himself, but also for all the Tripp Scott employees who had worked on the Contingency Fee

[9] Respondent was to some extent involved with the SM settlement discussions. Brown handled the discussions directly. The email correspondence between Brown and the attorneys for SM were admitted at the hearing ("Brown Emails") (R 52, sub ex. 41)

Cases. He claims the sole purpose of the Pozzuoli Emails was to discuss what would be fair to award as bonuses if the $10 Million Fee actually came into the Firm.

62. Respondent still believed that any receipt by Tripp Scott's of the $10 Million Fees was uncertain. This is true even though at the time he wrote these emails, he was aware that he had the potential to receive a large bonus for his work on the Contingency Fee Cases. He claims that his motivation in writing them were unrelated to the garnishment proceedings by CIB.

63. Respondent claims he made the decision to file for Chapter 7 Bankruptcy in February 2012 because he was unable to satisfy the CIB Judgment and CIB was becoming "very aggressive" in its collection efforts. Toward the end of 2011, the creditor for CIB Judgment had begun initiating wage garnishment proceedings. Further, at the time, he filed the Petition in February 2012, Tripp Scott had not yet received the $10 Million Fee and there was the ongoing Mayback Fee Dispute. This dispute continued several months past the date Respondent filed the Schedules.

64. When questioned on cross-examination as to why he failed make any mention of his interest in the $10 Million Fee Schedule B as property of

his estate, Respondent answered that he was relying on his attorney's legal advice that such disclosure was not required. Respondent also researched bankruptcy case law on the subject and read those cases that Houston was relying upon. He concurred with Houston's opinion that because only the members of the Tripp Scott Compensation Committee had the authority to award bonuses, any property interest that he would have had stemming from the $10 Million Fee was purely "discretionary." Thus, he believed he was not obligated to disclose it in Schedule B as property of the estate.

65. *Schedule I- Current Income of Debtor.* With respect to his response given to Question 17 of Schedule I (R 51, sub ex 13), Respondent explained this amount represents what he had actually received as a bonus in previous years and what he expected to receive in 2012. He emphatically denies any claim that this response to the question was done with the intent to deceive or mislead anyone. According to Respondent, he was inexperienced in bankruptcy law and deferred to Houston's advice. In addition, based upon Respondent's review of the case law provided to him by Houston and similar to Schedule B, Respondent believed the advice he was given was correct.

66. Also, Houston had advised Respondent that there would be follow-up by the Trustee in order for him to learn more detail about the performance bonus: "For instance, Schedule I, [Houston] said, the bonus, likely what will happen is, the [T]rustee will go to your employer and come to you and try to figure out what that might be, and that's exactly what happened in this case." (R 66, 6/25/18, p.134)

67. When Bar counsel asked Respondent: "When you wrote that answer to [Schedule I], you weren't referencing any of the fees from [the Contingency Fee Cases], were you?", Respondent answered:

> That's not true. First of all, this was written by Mr. Houston. I certainly reviewed it and signed it, no question about that. However, in my practice at Tripp, Scott for 30 years, we've always gotten a discretionary bonus at the end of the year for whatever work we had done. Some years, we didn't get bonuses, but if there was going to be an award of a bonus, it was usually toward the end of the year. So, in my mind, based on whatever performance and money that would come in and would be available for a bonus, that would be considered an increase in my salary, an annual performance bonus, and parenthetically, the reason that's parenthetical, is because it says, it gave him a clue, that's what I got in the past, and I would likely get a bonus for 2012.
>
> (R 66, TR 6/21/18, p. 170)

c. Testimony of the Bankruptcy Trustee.

68. In the instant proceedings, the bankruptcy Trustee, Kenneth Welt, provided the following testimony. He is a U.S. Bankruptcy Trustee in the

Southern District of Florida. He has approximately thirty-two (32) years of experience and over the course of his career has handled over 100,000 bankruptcy cases. Welt is neither an accountant nor a lawyer. He was assigned to serve as the Court-appointed Trustee on Respondent's bankruptcy case upon the filing of the Petition. He has never worked for Tripp Scott. He did not know Respondent prior to having been assigned as Trustee.

69. Welt relies upon a debtor to be complete and truthful when disclosing the debtor's assets in the Schedules and SOFA. This, he explained, is because it is neither possible, nor is it the Trustee's responsibility to research the assets and income of every debtor.

70. Shortly after Respondent filed his Petition and prior to filing the Schedules and SOFA, Welt met with the law firm representing CIB. It was during this meeting that Welt became aware of the verdicts in the Contingency Fee Cases. He also met with members of Tripp Scott. Prior to this, Welt had no idea as to what amount, if any, Respondent would be receiving as his bonus from the $10 Million Fee.

71. Even though he was aware of the verdicts in the Contingency cases, Welt believes the Schedules and SOFA should have included the Respondent's interest in the $10 Million Fee. This is because the

Schedules and SOFA are not just used by the Trustee, but also because the information contained in them is for the benefit of all of Respondent's creditors. Indeed, Welt explained the purpose of the Schedules and SOFA is to give a blueprint or menu for the Trustee to use in administering the estate for the benefit of those creditors.

72. Even if property may be exempt under state law, he opined that the Debtor still has a duty to disclose it and then claim the exemption in Bankruptcy Court. While it is true that he and CIB were aware of the verdicts in the Contingency Fee Cases prior to the filing of the schedules, when CIB objected to Respondent's discharge, Welt was nonetheless forced to intervene.

73. Welt was aware that the $10 Million Fee belonged to Tripp Scott. However, he believed that if Respondent had an arrangement with Tripp Scott to receive a portion of that fee, it could be a possible source from which the creditors may collect. Citing to a confidentiality agreement, Welt declined to answer on cross-examination whether Tripp Scott advised him any bonus paid from the $10 Million Fee was discretionary.

d. Testimony of the Expert Witnesses.

(i) The Bar's Expert Witness: Jerry Markowitz

74. Each side presented their own expert witness on the subject of federal bankruptcy law.[10] Jerry Markowitz testified as an expert witness for the Bar. Essentially, he gave the following testimony:

75. He is an attorney who has practiced in the area of bankruptcy law since he graduated law school in 1974. He has been a member of various professional committees and organizations in the area of bankruptcy law. In preparing for his testimony in this case, he reviewed the following: Respondent's bankruptcy Petition; the Schedules, statements and the amendments thereto; the Bankruptcy Orders; the Bankruptcy trial transcripts; and a substantial amount of bankruptcy case law.

76. The goal of a Chapter 7 proceeding is to liquidate assets belonging to the debtor and obtain a discharge in bankruptcy, which would forever free the debtor of his or her prepetition debts. The Bankruptcy Code requires a debtor utilizing the Schedules and SOFA to disclose the following: All of the debtor's creditors; a schedule of all assets and liabilities; a schedule of all current income and expenditures; and a statement of the debtor's financial affairs. All of this comprises the property of the

[10] The curricula vitae of both expert witnesses are part of the record. (R 52, sub ex. 34; R 55, sub ex. 72).

debtor's estate.

77. Markowitz opined that the definition of property of the estate is very broad and expansive under bankruptcy law. To this end, all of the Schedules are designed to afford a debtor the means by which to disclose all assets that would constitute the property of the debtor's estate. Because they are submitted under oath, the Schedules and SOFA are official records provided to the Bankruptcy Court.

78. Additionally, Schedule I requires that a debtor must disclose any reasonably anticipated increase in income or expenditures over the twelve (12) month period following the date the Petition is filed. An asset or cash that a debtor has earned as income but has not yet received in hand, may be disclosed in various places contained throughout the Schedules, including Question 17, Schedule I (R 51, sub ex. 14, at pp. 7; 35).[11]

79. According to Markowitz, the section of the Schedules dealing with contingent claims is intended for the debtor to disclose claims that have not yet been reduced to a certain amount. This is so the creditors and the Trustee can have an opportunity to find out whether the contingent claim is of any value. Markowitz opined that Respondent was required under

[11] In addition, according to Markowitz Respondent could have disclosed his interest in the $10 Million Fee in response to Questions 19, 21, and 35 of Schedule B as well as in Schedule C, if Respondent was claiming his bonus as exempt property. The bankruptcy Judge likewise references specific sections in the Schedules where Respondent could have listed his interest in the $10 million fee (R 51, sub ex. 3).

the Bankruptcy Code to disclose his interest in the $10 Million Fee in either his Petition or one of the Schedules.

80. In reaching this conclusion, Markowitz acknowledged that case law on the subject might be interpreted differently when it comes to determining whether these items were required to be disclosed. However, when a debtor is confronted with such a situation, the better rule in his opinion would be to disclose.[12] This is true here because there would have been no detriment to Respondent to disclose his interest in the $10 Million Fee as opposed to not disclosing them at all.

81. 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]." (R 66, 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. (R 66, 6/22/18, p. 36, 74-75) Markowitz did not have any opinion as to whether the Respondent should

[12] The District Court Judge noted in his order, "Clearly, the better course of action in the case of a possible 'difference of opinion about the law' is to air on the side of disclosure." (R 32, at p. 14, fn. 9 (USDC Case No.: 13-cv-62251-KMM)).

have followed the advice of his counsel. (R 66, 6/22/18, p. 73-74).

(ii) The Respondent's Expert Witness: L. Louis Mrachek

82. L. Louis Mrachek testified for Respondent. He provided essentially the following testimony: He has practiced in the area of bankruptcy law for 40 years. Like Markowitz, Mrachek reviewed numerous documents and pleadings filed both in this case as well as in the bankruptcy proceedings, including but not limited to the Bankruptcy Orders as well as the case law cited therein.

83. Based upon his review of this case, the bankruptcy proceedings and federal bankruptcy code and various case law, he reached the opposite conclusion that was reached by Markowitz as well as the findings and conclusions of the Bankruptcy Judge. In Mrachek's opinion, Respondent's $2.7 million bonus from the $10 Million Fee was a mere "expectancy," as opposed to a "vested" interest. As such, he opined, Respondent was not required under bankruptcy law to disclose it in any of the Schedules or SOFA. Consequently, Respondent provided "no false oath" and therefore he truthfully answered all of the questions contained in the Schedules and SOFA. In reaching this conclusion, Mrachek disagreed with both the findings and conclusions of the Bankruptcy Judge as well as Markowitz' interpretation of the bankruptcy

case law.

84. In addition, Mrachek provided extensive testimony on his interpretation of the various bankruptcy cases cited in the Bankruptcy Orders. In his opinion, given the methodology utilized by Tripp Scott in awarding bonuses, the advice given by Houston that Respondent was not required to disclose anything regarding the Contingency Fee Cases on the Schedules was accurate.

III. RECOMMENDATIONS AS TO GUILT

1. Standard of Proof.

85. Because of the serious consequences attendant to a recommendation of discipline for a member of The Florida Bar, the quantum of proof necessary to support such a recommendation is required to be "clear and convincing." *The Florida Bar v. McCain*, 361 So. 2d 700, 706 (Fla. 1978); *The Florida Bar v. Rayman*, 238 So.2d 594, 598 (Fla. 1970). This intermediate level of proof "entails both a qualitative and quantitative standard":

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without

> hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla. 4th DCA 1983)).

86. Further, "to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." *Florida Bar v. Fredericks,* 731 So.2d 1249, 1252 (Fla. 1999). In addition, where, as here, intent is at issue, and, as in this case, the Bar's proof depends on circumstantial evidence, to be legally sufficient evidence of guilt, circumstantial evidence must be *inconsistent with any reasonable hypothesis of innocence. Fla. Bar v. Marable*, 645 So. 2d 438 (Fla. 1994) (e.s.).

87. In addition, it is well-settled that all members of the Bar must demonstrate honesty at all times even when, as here, they are proceeding as a litigant in a personal capacity:

> [W]hen lawyers are litigants they do not cast aside the oath they take as an attorney or their professional responsibilities ... Not only does the law demand truthfulness under oath, but the obligations of our profession demand it. As former Justice Ehrlich has stated, [']our profession can operate properly only if its individual members conform to the highest standard of integrity in all dealings within the legal system.[']...

The Florida Bar v. Cibula, 725 So. 2d 360, 364–65 (Fla. 1998)(c.o.)(*see, R. Regulating Fla. Bar* 3-4.3 (stating in part, "The

commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise..."); *see also, The Florida Bar v. Cramer,* 643 So.2d 1069 (Fla. 1994).

2. The Herman I Decision

88. In *Herman I,* the Court held that the Respondent is entitled to raise as a defense to the Complaint his claim that his responses contained in the Schedules and SOFA were based upon the advice of his bankruptcy attorney and therefore he lacked any intent to deceive the Bankruptcy Court or his creditors in his bankruptcy proceeding. If this is the case, then it would follow that, Respondent would not be guilty of violating any of the Rules Regulating the Florida Bar charged by the Bar:

> The Bar rules at issue did not require of Herman anything over and above what federal bankruptcy law already required—honesty and good faith in completing his bankruptcy schedules. To the extent that federal bankruptcy law permits an advice of counsel defense to negate a finding of bad intent, we conclude that such a defense should also be available to Herman in this Bar discipline proceeding.

Herman, 297 So.3d at 520.

89. The Court has instructed the undersigned to apply the principles that are used in bankruptcy cases. Importantly, the Court also stressed that,

"Though [Respondent] bears a burden of production to come forward with the evidence necessary to support his advice of counsel defense, the ultimate burden of proof always remains on the Bar." *Id* at 523 (e.s.). Therefore, it is the Bar's burden to prove by clear and convincing evidence that The Respondent's answers to the questions on his bankruptcy schedules were not made in good faith reliance on the advice of his bankruptcy counsel but rather with the intent to mislead the Trustee and creditors.

3. Findings Based Upon Independent Review of Evidence.

i. Bankruptcy Law Dealing With Advice of Counsel Defense.

90. In this case, the Bankruptcy Court denied Respondent's Petition finding that he intentionally (1) made a false oath in his responses to Schedules B and I; and (2) concealed his interest in the $10 Million Fee. *In Re Herman, supra.* (R32); *see also,* 11 U.S.C. §§ 727(a)(4)(A), (a)(2)(A), and (a)(2)(B). As stated, the Bankruptcy Judge did not address the Respondent's advice of counsel defense because it was not timely pled.

91. In *Robinson v. Worley*, 849 F.3d 577, 585 (4th Cir. 2017)(c.o.), the Court explained that a debtor may avoid being denied a discharge based upon a showing that the debtor relied upon the advice of his or her counsel when completing the Schedules and SOFA:

> While reliance on counsel generally absolves a debtor of fraudulent intent... the bankruptcy court must still consider whether the debtor acted in good faith... A debtor must demonstrate that he provided the attorney with all of the necessary facts and documentation. Likewise, the advice of counsel is no defense when it should have been obvious to the debtor that his attorney was mistaken...

92. Additionally, in *In re McLaren*, 236 B.R. 882, 897 (Bkrtcy.D.N.D.,1999)(c.o.) that Court likewise explained:

> 'Where a debtor's actions were motivated by attorney advice, that reliance, if reasonable, may excuse acts which otherwise bear indicia of fraud. However, the attorney must have been made fully aware of all relevant facts—that is, the debtor must have made a full and fair disclosure to him. Reliance on attorney advice absolves one of intent only where that reliance was reasonable and where the advice given was informed advice.'

ii. Did the Respondent make a "fair and full disclosure" of all "relevant facts" to his Bankruptcy Attorney?

93. In addition to meeting with and receiving information from the Respondent, Houston conducted his own investigation into understanding the overall compensation structure of Tripp Scott. This included interviewing members of Tripp Scott's Executive Committee and reviewing its documents dealing with how performance bonuses were decided. (R 66, 6/22/18, p. 103-109).

94. The Bar presented no evidence disputing this or even suggesting that the Respondent failed to furnish Houston with all of the facts and

documentation that would be necessary to correctly advise the Respondent regarding his disclosure obligation related to his potential to receive a bonus from the $10 Million Fee. Nor for that matter did the Bar present any evidence that it was obvious to the Respondent that his attorney's advice was based upon mistaken information. Based upon the record in this case, the undersigned finds and concludes that the Respondent "provided [Houston] with all of the necessary facts and documents," *Robinson, supra.*, which led Houston to advising the Respondent as to what he was required to disclose in the Schedules and SOFA. *Cf., In re Retz,* 606 F.3d 1189, 1202 (9th Cir. 2010)(upholding Bankruptcy Court's finding that debtor's reliance on attorney's advice is insufficient to vitiate fraudulent intent where debtor failed to make a full disclosure of all relevant facts to his attorney.).

iii. Was Respondent's Reliance on His Attorney's Advice in Completing Schedules B & I Reasonable and in Good Faith?

95. Schedule B. Personal Property. Schedule B requires the disclosure of all assets owned by the Respondent at the time he files his petition for bankruptcy. It is undisputed that the Respondent did not disclose in Schedule B his interest in the $10 Million Fee as property of his estate. He testified that he did so relying upon the advice of his attorney, which

was that the Respondent was not required to it. Houston reached his conclusion based on his determination that Respondent lacked any legal right or interest in the $10 Million Fee and any bonus arising therefrom until such time that the Compensation Committee made the decision to award the Respondent a bonus. In other words, in Houston's opinion, Respondent had a mere contingent interest in receiving a bonus from the $10 Million Fee. This conclusion in turn is based upon the information provided by the Respondent as well as Houston's own investigation into all the facts and circumstances, including his review and analysis of the compensation structure of Tripp Scott as well as relevant bankruptcy case law.

96. The Bankruptcy Court nonetheless found that under its interpretation of the then-prevailing bankruptcy, case law the Respondent had a vested interest in the bonus, and therefore he was legally required to disclose it on Schedule B. The undersigned agrees with the Respondent's argument that it would be unnecessary to address whether the Bankruptcy Court's or Houston's interpretation of the law on this issue is correct. Rather, as stated the issue here is whether the Respondent's failure to disclose the bonus was done with the actual intent to defraud his creditors as opposed to his good faith reliance on his attorney's advice. *See, In re Arnold*, 369

B.R. 266, 271 (Bankr. W.D. Va., 2007). ("Actual intent to hinder, delay or defraud may be negated by a good faith reliance upon the advice of an attorney.")(citing *In re Adeeb,* 787 F.2d 1339, 1343 (9th Cir.1986); *see also United States v. Miller,* 658 F.2d 235, 237 (4th Cir.1981) ("The essential elements of the [reliance] defense are (a) full disclosure of all pertinent facts to an expert, and (b) good faith reliance on the expert's advice."); *In re Ingle,* 70 B.R. 979, 984–85 (Bankr.E.D.N.C.1987) (citing *Adeeb,* 787 F.2d at 1343).

97. Applying these principles, the undersigned finds from the record in this case that the Bar has failed to prove by clear and convincing evidence that the Respondent's omission of his bonus in Schedule B was done with an actual intent to defraud his creditors. Rather, the evidence presented establishes that the Respondent's reliance on his attorney's advice was in good faith after full disclosure of all relevant facts. Therefore, the undersigned finds the Respondent is entitled to rely upon this advice as a defense to the charges in the Complaint. *See, id.*

98. The Bar nonetheless argues that Respondent's reliance on the advice of his bankruptcy attorney is not reasonable. This is because while the Respondent may have disclosed all the pertinent facts to his attorney, his failure to disclose his interest in the $10 Million Fee is incompatible with

what the Respondent knew about those fees at the time he filed his petition. For this proposition, the Bar points to the fact that Respondent possessed extensive institutional knowledge of the Compensation Committee and its methodology for distributing bonuses. The undersigned respectfully disagrees with this argument.

99. The argument ignores the undisputed fact that disclosure or non-disclosure of the Respondent's interest in the $10 Million Fee turned in large part on Houston's interpretation of then-controlling bankruptcy law dealing with the subject. As stated, Houston testified he discussed with Respondent the cases upon which he relied and when he gave the advice to Respondent, he was "unequivocal." Further, the Respondent was entitled to rely on this advice. Indeed, Houston testified that although Respondent is an experienced civil litigation attorney, he was "a bab[e] in the woods" when it came to bankruptcy law. In Houston's view, Respondent was "not knowledgeable about even the most basic of bankruptcy matters." Respondent advised Houston that he, Respondent, was not skilled in bankruptcy law so he deferred to Houston's advice. Respondent independently reviewed bankruptcy case law and advised Houston that he too reached the same conclusion that any disclosure of the interest in the $10 Million Fee was not required. What this

demonstrates is that while it may be true that the Respondent may have been highly knowledgeable of Tripp Scott's compensation structure and the methodology it used to award bonuses, he was not well versed in bankruptcy law as it applies to this process. Therefore, he would be entitled to rely upon the "unequivocal" advice of his bankruptcy attorney.

100. Also, the argument fails to recognize that Houston was likewise in possession of these same "institutional" knowledge and facts. This is because he spent a considerable amount of time conducting his own independent review and investigation of Tripp Scott's compensation structure. The Bar has presented no evidence to refute this or suggest that somehow the Respondent held back on disclosing relevant facts to his attorney. It follows that the Bar failed to prove by clear and convincing evidence that the legal advice given is "incompatible with [the Respondent's] own knowledge of the applicable facts." *Robinson, supra.,*, 849 F.3d at 583.

101. In addition, the Pozzuoli Emails likewise do nothing to alter the conclusion that the Respondent's decision not to disclose his interest in the $10 Million Fee was done in a good faith reliance on his attorney's advice and not with any malevolent intent to defraud his creditors, as the Bar argues. Indeed, what those emails demonstrate is the *Respondent's*

expectation of what he believed he was entitled to receive. However, they do not disclose what expectations, if any, expectations Tripp Scott may have had as to whether any bonus would be awarded to the employees, including the Respondent. Thus, while the Pozzuoli Emails may form the basis for the Bankruptcy Judge's findings and the Respondent's subjective expectations, it does nothing to dispute that the Respondent was in good faith following his attorney's advice by not disclosing this information.

102. Also important is Tripp Scott's expectation of what amount, if any, bonus that would be awarded. This is may be found in the excerpts of Pozzuoli's depositions that were given in the bankruptcy case. A fair reading of those depositions reveal that while the Respondent believed he was entitled to a substantial bonus from the $10 Million Fee, the Tripp Scott Compensation Committee, for multiple reasons, did not share the same belief.

103. For instance, Pozzuoli made it clear that Tripp Scott utilizes multiple factors and concerns, which caused uncertainty regarding how much of the $10 million fee would be allocated and disbursed as bonuses, particularly in relation to having funds to ensure the firm's financial survivability and pay potential cash flow needs throughout the year.

Indeed, he explained that the firm "had a slow beginning of the year" and there was a concern regarding expenditures for a new department in the firm. *Id.* p. 170. Pozzuoli also confirmed that, despite the statement in Respondent's email that the Mayback & Hoffman co-counsel dispute should not delay the resolution of Respondent's bonus, the firm waited for settlement of the dispute prior to disbursing any bonuses because, as president of Tripp Scott, he "wasn't going to hang [the] law firm out while this dispute was pending." *Id.* p. 175-177. Given this, Houston concluded that any expectation the Respondent had to receiving a bonus from the $10 Million Fee was contingent on the decision of the Compensation Committee.

104. Additionally, the testimony of both Galloway and Brown support this. Indeed, each testified at that the bonuses at Tripp Scott were discretionary. In addition, Galloway provided very specific examples of reasons why bonuses may not be awarded in any given year and further 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 Galloway, these emails are nothing more than the attorneys expressing their thoughts on their expectations. The Bar did not present any witness testimony to rebut the testimony of

these witnesses.

105. Lastly, each side presented testimony from two learned experts who, having analyzed these facts and circumstances, reached opposite conclusions as to whether then-prevailing bankruptcy required that the Respondent disclose his interest in the $10 Million Fee on Schedule B. The Respondent's expert testified that the bonus was discretionary and a mere expectancy that did not need to be disclosed on that schedule. Following the Bankruptcy Court's analysis, the Bar's expert witness testified to the contrary. In light of the differing opinions of these two learned experts on the state of the law dealing with this subject, it would have been neither "obvious to [the Respondent] that his attorney was mistaken," nor "transparently plain" that his expected bonus should have been listed on Schedule B. *See, Robinson,* 849 F.3d at 583; *In re Zizza*, 875 F.3d 728, 732 (1st Cir. 2017.[13] For these reasons, the undersigned finds that the Respondent's reliance on his attorney's advice in omitting

[13] In the R&R, the undersigned pointed this out in making the disciplinary recommendation that the Respondent's privilege to practice law be suspended for 18 month:

> **9.22(i)** substantial experience in the practice of law. Respondent has been a member of the Florida Bar since 1982. Undersigned notes however that the bankruptcy law dealing with this issue is subject to differing opinions as was testified to by the expert witnesses. Thus, while the evidence in this matter is that Respondent undertook his own review of the bankruptcy case law related to the issues in his case, he does not practice bankruptcy law and to a great degree, he relied upon the advice of his bankruptcy counsel, Bart Houston. (R&R ¶119, part 9.22(i))(e.s.).

Arguably, while this was a factor that the undersigned considered in making the disciplinary recommendation that the Respondent be suspended for 18 months, it becomes more significant for purposes of addressing the merits of the Respondent's advice of counsel defense.

his interest in $10 Million Fee was in good faith and the Bar presented no clear and convincing evidence to overcome this.

106. Schedule I. Current Income. Question 17 on Schedule I asks the debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document." The answer to Question 17, provided by the Respondent, stated "Annual performance bonus (historically 65,000 – 70,000)." (TFB Exhibit 13). According to the Respondent, he followed Houston's advice that he answer this question using this exact language that was provided to him by Houston.

107. Indeed, Houston testified that he had in fact chosen this wording. He testified that because the amount of the Respondent's bonus was indeterminate, he, Houston, made the judgment call, not the Respondent, to average out two or three years and put that number down so that, when the Trustee followed-up on the bonus, he would have the historical information. He testified that, because the amount of the Respondent's bonus was indeterminate, "[y]ou couldn't really pick one out, so I averaged out two or three years and put that number down, and if the trustee wanted to take off from there, he had the information to do it."

108. The Bar has not presented any evidence to suggest that the Respondent's reliance on Houston's methodology in formulating this response was not in good faith. To be sure, *Herman I* seems to have laid out the necessary groundwork for the Bar to overcome by clear and convincing evidence that the Respondent's reliance on Houston's methodology and advice was not in good faith:

> Admittedly, there is a heavy factual component to schedule I, question 17, whereas in schedule B the legal issues are more prominent. That is what makes the potential viability of Herman's advice of counsel defense as to schedule I a closer call. But there are several reasons why the defense cannot be entirely discounted at the threshold, without additional consideration and findings by the referee. First, because the amount of Herman's bonus remained unknown at the relevant time, and because the range of the law firm's discretion was open to dispute, answering question 17 required the exercise of some judgment. Second, the question asks about "reasonably anticipated" increases or decreases in income. Here we observe that the referee made ample findings as to Herman's subjective expectations, but none as to the law firm's perspective (and what it conveyed to Herman) at the time. The picture is incomplete without that information. And finally, the Bar expert's testimony left some doubt as to whether or how far Herman's answer to question 17 strayed from the acceptable conventions of bankruptcy practice. If Herman could conceivably have complied with the governing requirements simply by answering "annual performance bonus" (and omitting the parenthetical about his bonus historically), then Herman's advice of counsel defense might make a difference.
>
> *Herman*, 297 So.3d 516, 522.

109. As already discussed, Tripp Scott's expectation as to what, if any, bonus would be awarded from the $10 Million Fee was not in line with the Respondent's. It also bears repeating that, as with Schedule B, Houston formulated his response to Schedule I based upon his own investigation into all the facts and circumstances surrounding Tripp Scott's compensation structure as well as his analysis of bankruptcy law. Thus, contrary to the Bar's argument the Respondent was in no better position than Houston was as to his knowledge of all of the applicable facts. It follows that, similar to Schedule B, Houston's advice was not "incompatible with [The Respondent]'s own knowledge of the applicable facts." *Worley*, 849 F.3d at 583.

110. It was incumbent upon the Bar to present clear and convincing evidence beyond what was presented in the Bankruptcy case in order to "complete the picture" as to what the Respondent's state of mind was at the time he signed the Schedules. Yet, the Bar failed to present clear and convincing evidence in this proceeding establishing that it was unreasonable for the Respondent to rely upon what he was told by Houston. Rather, the Bar appears to reiterate much of the same arguments that it has already made in *Herman I* to support its position that the Respondent's reliance on his attorney's advice was

unreasonable.[14] Lastly, inasmuch as the Respondent's advice of counsel defense was not addressed by the Bankruptcy Court and since the burden of proof in this proceeding is one that is greater than the one used in the bankruptcy trial, the undersigned does not find the Bar's arguments persuasive. For these reasons, the undersigned finds that the Respondent's reliance on Houston's advice as it relates to his answer provided in Schedule I was done in good faith reliance on his attorney's advice. *See, id.*

IV. CONCLUSION.

111. For the foregoing reasons, the undersigned finds as follows: The Respondent reasonably relied upon the advice of his bankruptcy counsel in completing the Schedules and SOFA. The Respondent's reliance was in good faith after full disclosure of all facts to his bankruptcy attorney. The Bar failed to prove, by clear and convincing evidence, that the Respondent's reliance on the advice of counsel was not reasonable. Accordingly, the undersigned respectfully recommends that Respondent be found not guilty of any of the Rules set forth in the Complaint.

[14] For instance, the Bar continues to rely on the Bankruptcy Court's findings arguing that the Pozzouli Emails "speak volumes" that the Respondent "was expecting a substantial bonus in the millions of dollars, not a historical bonus of 65-70,000." From this, the Bar argues the Respondent's answer to Question 17 was "materially misleading."(R. 83).

112. **Case Law**. The undersigned has considered the following case law: *The Florida Bar v. Gwynn*, 94 So.3d 425, 430 (Fla. 2012); *The Florida Bar v. Head*, 27 So.3d 1, 7-8 (Fla. 2010); *The Florida Bar v. Rood*, 620 So. 2d 1252, 1255 (Fla. 1993)("Referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they deem relevant in resolving the factual question."); *The Florida Bar v. McCain*, 361 So. 2d 700, 706 (Fla. 1978); *The Florida Bar v. Rayman*, 238 So.2d 594, 598 (1970); *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994); *Florida Bar v. Fredericks,* 731 So.2d 1249, 1252 (Fla. 1999)("To satisfy the element of intent it must only be shown that the conduct was deliberate or knowing."); *The Florida Bar v. Marable,* 645 So.2d 438 (Fla. 1994); *The Florida Bar v. Cibula*, 725 So. 2d 360, 364–65 (Fla. 1998); *The Florida Bar v. Cramer,* 643 So.2d 1069 (Fla. 1994); *Robinson v. Worley,* 849 F.3d 577 (4th Cir. 2017); *In Re McLaren,* 236 B.R. 882 (Bankr. D.N.D. 1999); *In Re Retz,* 606 F.3d 1189 (9th Cir. 2010); *In Re Arnold,* 369 B.R. 266 (Bankr. W.D. Va. 2007); *In Re Adeeb,* 787 F.2d 1339 (9th Cir. 1986); *United States v. Miller,* 658 F.2d 235 (4th

Cir. 1981); *In Re Ingle,* 70 B.R. 979 (Bankr. E.D.N.C. 1987); *In Re Zizza*, 875 F.3d 728 (1st Cir. 2017).

Dated this 17 th day of December, 2020.

AUGUST A. BONAVITA, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to **JOHN A. TOMASINO**, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, a copy sent in Word format by electronic mail to ***e-file@flcourts.org***, and that copies were furnished by regular U.S. Mail to **DAVID BILL ROTHMAN, ESQ.**, Respondent's Counsel, Rothman & Associates, P.A., 200 S. Biscayne Blvd., Ste 2770, Miami, FL 33131-5300; via email at dbr@rothmanlawyers.com, jtm@rothmanlawyers.com; **JOI L. PEARSALL, ESQ.**, Bar Counsel, The Florida Bar, Ft. Lauderdale Branch Office, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323; via email at jpearsall@florida bar.org, esanchez@floridabar.org; and **PATRICIA ANN TORO SAVITZ**, Staff Counsel, The Florida Bar, 651 E Jefferson Street, Tallahassee, FL 32399; via email at psavitz@floridabar.org on this 17th day of December, 2020.

AUGUST A. BONAVITA, Referee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: CASE NO. 12-13989-JKO

PETER G. HERMAN,

Debtor.
_____/

CIB MARINE CAPITAL, LLC,

Plaintiff,

vs. ADV. NO. 12-1785-JKO

PETER G. HERMAN,

Defendant.
_____/

Volume II
TRIAL

June 6 2013

The above-entitled cause came on for hearing before the Honorable John K. Olson, one of the Judges in the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 299 E. Broward Blvd., Fort Lauderdale, Broward County, Florida on June 6, 2013, commencing at or about 9:30 a.m., and the following proceedings were had.

Reported By:
Cheryl L. Jenkins, RPR, RMR

APPEARANCES:

KENNETH A. WELT, Trustee

THE HOUSTON LAW GROUP, by
BART A. HOUSTON, Esquire
On behalf of the Debtor

STEARNS WEAVER, by
KRISTOPHER PEARSON, Esquire
On behalf of CIB Marine Capital, LLC

GRAY ROBINSON, by
NEIL P. LINDEN, Esquire
and
ROBERT A. SCHATZMAN, Esquire
On behalf of Kenneth A. Welt, Trustee

GENOVESE JOBLOVE & BATTISTA, by
JOHN H. GENOVESE, Esquire
On behalf of Tripp Scott, P.A.

ALSO PRESENT

Joyce M. Tommasino, Senior Workout
CIB Marine Bancshares, Inc.

Sylvia Anderson

Jake Houston

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THE COURT: Good morning, and I guess it's your time up, Mr. Pearson, or Mr. Schatzman.

MR. GENOVESE: Your Honor, good morning. John Genovese. I just wanted to note my appearance. Mr. Friedman was here representing Tripp Scott yesterday. I am appearing, and observing today.

THE COURT: Very good. Thank you.

MR. SCHATZMAN: Welcome, Mr. Genovese. Bob Schatzman again, your Honor, on behalf of the trustee, Kenneth Welt. In Court is our client. Also in Court is our colleague, from Stearns Weaver, Kris Pearson and his client, representative of CIB.

Your Honor, we've met until late in the evening, and we determined that we are resting at this point. We believe we've put on a prima facia case. We don't believe we need Mr. Pozzuoli's testimony. We thank Mr. Pozzuoli for being here. He's excused from our subpoena, your Honor. We rest.

THE COURT: Thank you, Mr. Schatzman.

THE COURT: Mr. Houston.

HUSBAND: Yes, sir. Judge, I also identified Mr. Pozzuoli on my list, and intended to present evidence from Mr. Pozzuoli, and so I will proceed now that they have rested.

Prior to doing so, Judge, I would like to

make a motion that I'm sure your Honor would appreciate and expect, and that is a motion for judgment as a matter of law under Rule 9015, a party who has rested, and has not presented a prima facia case, and if that party has the burden of proof on the elements of the claim, then the Court can make a judgment as a matter of law.

The extant issues as it relates to the two subjects, one is the subject of the nature of the performance bonus, or the employment bonus, and I think the case law that we've cited to your Honor amply indicates, that if an award of an employment bonus is discretionary with the employer, then that is enough to take that out of property of the estate. It's not a state law recognized property right and, therefore, is not to be listed, or expected to be listed, or required to be listed in the schedules, and the evidence so far has been two partners from Tripp Scott, and both of them have testified that the bonuses are entirely discretionary, and they rest with the discretion of the compensation committee.

Given that evidence, the being the sole evidence, we ask for a judgment as a matter of law on that issue. I also would say that the two elements that they've asked for, as it relates to the employment bonus, requires evidence of state of mind or intent to conceal, and the evidence that's been presented, not put forth

evidence -- the testimony presented, and the documents, does not put forth evidence of intent or state of mind, and on that basis as well we would move for judgment as a matter of law.

On the transfers to the Wells Fargo account, except for some statements that have gone into evidence, Judge, there has been -- and the pretrial stipulation, of course, there has been no testimony, no evidence put on regarding why the funds were put into the joint account, which is identified in the schedules, and what Mr. Herman's state of mind was, what his intent was, whether he had a mal intent, and so on that count, or those two counts, that's Counts II, III and V, we also move for judgment as a matter of law.

Thank you, Judge.

THE COURT: Thank you.

MR. SCHATZMAN: May I respond, your Honor?

THE COURT: Yes, you may.

MR. SCHATZMAN: Let me work backwards, your Honor. With regard to the transfers, the Court must take into consideration, when considering intent to hinder, delay or defraud a creditor, and to conceal an asset or a transfer, the circumstances that existed at the time the transfer was made.

No one expects a debtor to take the stand

and testify, I transferred it with the intent to hinder, delay or defraud a creditor.

What do we have here? We have, in early December a hearing on a motion to enter a judgment for a deficiency of $4.5 million, and what was Mr. Herman's state of mind at the time? Clearly he said he knew that that judgment was entered, he wasn't objecting to the entry. That motion was filed long before he took money at the end of November out of his account, out of his investment account and transferred it to an account that he and his former wife had, he had just become a sole signatory on that account -- a joint signatory, moved it to her account, and from that account she moved it within hours to another account of hers. All this took place within a space of seven, eight days. It sat there, the stipulated facts, the pretrial stip is undisputed. We've all agreed to how these events unfolded, and on the sixtieth day, approximately 60 days later, when he realized he was going to file a bankruptcy, he then took the money out, or directed her to take the money out and pay his attorneys.

He kept that money so that CIB couldn't garnish it. That was -- it's evident, they were about to get a judgment. He knew the judgment was being entered. He didn't contest the judgment. He didn't object to it.

So working backwards, there -- clearly, and when you look at the statute, and I know the Court is well familiar with the statute, but let me read it to the Court, 727(a)(2) and (a)(4), the Court shall grant the debtor a discharge unless the debtor, with the intent to hinder, delay or defraud a creditor, or an officer of the estate, changed with the custody of property under this this title, has transferred, removed, destroyed, mutilated or concealed, or has permitted to be transferred, moved, destroyed, mutilated or concealed property of the estate after the date of the filing of the petition or, A, property of the debtor within one year before the date of the filing of the petition, and the -- and, 4, the debtor knowing, and fraudulently in -- or in connection with the case, made a false oath or account.

Mr. Herman made a false oath. He didn't declare the transfers, he didn't declare the account, he didn't declare his interest in that transfer, and he didn't even put down that he transferred $20,000 to Kopelowitz Ostrow to pay them to defend him on CIB. So the transfers, in my view, we put on a prima facia case, I hope the Court agrees.

With regard to the account -- to the bonus, intent, the best witness I have for intent is Mr. Herman, he pondered, what's he going to do with this bonus? He

did the research. He asked for the cases.

If the Court will recall, when we started this trial, I said Mr. Herman was a gambler, he was a risk taker. He did, he took the risk, and I also told the Court that he may have made a bad decision. He made that bad decision. He researched the law. He took a gamble. He could have put that on his schedules, bonus or interest in contingency fee from Tripp Scott, disputed as to whether it is an asset of the estate, and fought over it, but it wouldn't have been a failure to disclose it.

He chose to let the water run under the bridge and not disclose it. He didn't disclose it, and he didn't even put down on I that it was coming in. Why? I is the crumbs that led to the treasure, follow the crumbs. He put -- he says, very, very interesting, he said annual performance bonus, and he puts in parenthesis 65 to $75,000, sure, that's what he got, an annual performance bonus, that year, in 2012, he got $115,000 annual bonus. This was not an annual performance bonus. It wasn't given -- it was given out seven months after the beginning of the year.

All the noise about what happened after the judgment. Judge, he knew, he counted every day, he had a dispute with the firm as to how much. He's talking about metrics. This isn't about whether he's getting a bonus.

It's about how much the bonus is.

Let me tell you, Mr. Herman is a fabulous trial lawyer. If he didn't get that bonus, we would have a claim for unjust enrichment on the schedules. We would have a claim for that bonus, an equitable claim for that bonus, and he wasn't about to quit until he got that bonus.

So the issue of, it's contingent until the end of the year because he may quit, he's not quitting, he wants that money, and there is no question in my mind, he had an affirmance from the 11th Circuit, they weren't going to the Supreme Court. They were fighting about how they're dividing it up, and this Mayback issue, that's -- the money was sitting in the Tripp Scott account. They ended up with $242,000 to the better.

So all this is noise. The money was in the bank when he filed the schedules. Before he filed the petition, the satisfaction -- there was a satisfaction of the judgment.

Judge, we have proved every element of 727. If they can put on evidence to show that he did not list that -- that it was not done to hinder, delay or defraud a creditor, or that he did not make a false oath, we are willing to listen, but we have not heard any testimony to this point, based on the facts, the stipulated facts, the

pretrial stipulation, and the testimony and evidence, along with the e-mails, no one creates an e-mail trail if they don't expect a bonus. Never once was there any discussion.

Ed -- I mean, excuse me, Pete, you're not getting a bonus, don't even talk about it, we don't know if you're getting a bonus, and the testimony will show that there has never been a time when the money wasn't there that Pete -- that the directors didn't get a bonus at Tripp Scott, but that's an issue that will come out in their case.

We believe the Court should deny the motion, let's hear the testimony from the defendant.

MR. PEARSON: Brief supplement, your Honor?

THE COURT: Yes, Mr. Pearson.

MR. PEARSON: Good morning, your Honor. Kristopher Pearson of Stearns Weaver Miller here on behalf of CIB, the plaintiff in this case.

Your Honor, with respect to the November transfers, the deficiency hearing on the final judgment of foreclosure in favor of CIB was on December 6th, as is in evidence at Plaintiff's Exhibit 10, but that deficiency judgment, like all deficiency judgments, was rooted in a final judgment of foreclosure against an entity by the name of Esquire Ventures, which Mr. Herman was an interest

holder and guarantor of that loan.

The foreclosure judgment in that case was entered on June 23rd, 2011. So at that point in time really the deficiency judgment was ripe, it was just what was the amount of the deficiency going to be, because in all deficiency judgments, you've got to include the value of the property.

So really from June 23rd, 2011, the hammer had fallen on his guarantee. So we look forward from that date, your Honor.

And with respect to the cases, Chalik v Moorefield, it's an 11th Circuit case, your Honor, it's at 748 Federal 2nd, 616. Mr. Moorefield was the trustee in that case, and the 11th Circuit there said that creditors are entitled to judge for themselves what will benefit and what will prejudice them.

The fundamental concept of bankruptcy is full and fair disclosure of all assets. It's not the debtor, Mr. Herman's job, to determine what he should disclose and what he should not disclose, which is apparently what he did.

What Mr. Herman was supposed to do was disclose all of his assets fully and fairly, and in this case amended schedules were filed where that very disclosure was made, with the caveat that Mr. Herman

didn't believe it was property of the estate. That could have been done, that should have been done. It's undisputed, your Honor, that with respect to the false oath counts, that the debtor signed the schedules under penalty of perjury, you heard the testimony yesterday.

When you read the schedules, both Schedule B and both Schedule I, it doesn't mention anything about a $10 million fee, and in the e-mails from December 2011, to January 2012, which is the unvarnished words of the debtor during the operative period of time, prior to the petition date, nowhere is the word discretionary mentioned, nowhere is performance bonus mentioned. What's mentioned is the $10 million fee, and how we're going to carve that up.

I cite to your Honor's case of Kapila v Dailey, which at 405 BR 386, your Honor stated in that case, I find there is a motive for this debtor, as there is for any dishonest debtor, not to disclose prepetition accounts that generate postpetition cash.

Your Honor, this was the biggest bonus the debtor were ever going to receive in his life. The evidence said that this was so.

This was the biggest fee Tripp Scott, the law firm, had ever received in their life, in the amount of $10 million.

Disclosing that asset would have meant that

he couldn't get the fruits of that bonus postpetition. So, it's a nondisclosure of a prepetition asset in hopes to get that money postpetition.

Your Honor found that the debtor in Kapila v Dailey was a sophisticated debtor. Here we have a very sophisticated 30-year trial lawyer from Tripp Scott, he knew what he was doing when he filled out his schedules under oath, and he signed that under penalty of perjury, there is no dispute.

Your Honor is also familiar that, as Mr. Schatzman touched on, rarely, if ever, probably never you'll have the debtor on the stand saying he confesses. What the ---

THE COURT: We just don't get the Perry Mason moments in this Court.

MR. PEARSON: We don't, your Honor, and what we look at is the circumstances, and the time line is very telling. You have the circumstances of the judgment entered in June, then you have the circumstances of the deficiency hearing, bonus communications heat up, they continue, petition date is filed, schedules are filed later. At the time the schedules were filed, money was in the bank at Tripp Scott, you Honor. So the circumstances in this case show that on the petition date, which, when you look back to the December of 2011 e-mails, and the

January 2011 e-mails, the words of the debtor himself, he wanted to know how much of that $10 million fee he was going to get.

Remember when the schedules are filed, this is the debtor's own mind state. The debtor isn't the arbitrator of what's property of the estate, that's the Court. Full and fair disclosure is the fundamental principal of bankruptcy et al, and that's what a debtor needs to do in order to get a discharge, your Honor.

The plaintiffs have proved through the evidence in the plaintiff's exhibits that were admitted yesterday, and the testimony, that they met their prima facia case.

Thank you.

THE COURT: Thank you.

MR. HOUSTON: Judge, I stand on my motion.

THE COURT: Your motion is denied.

MR. HOUSTON: Yes, sir.

THE COURT: You may proceed.

MR. HOUSTON: Thank you.

I call my Mr. Pozzuoli.

Thereupon,

EDWARD J. POZZUOLI,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOUSTON:

Q. Can you tell me your name, sir?

A. Edward Pozzuoli, P-o-z-z-u-o-l-i.

Q. You're obviously used to spelling that name for court reporters?

A. Yes.

Q. What is your employment, Mr. Pozzuoli?

A. I am employed by the law firm of Tripp Scott.

Q. What is your role at Tripp Scott?

A. I am a director and president of the law firm.

Q. How long have you been a director of the law firm of Tripp Scott?

A. 15 years.

Q. And how long have you been the president of Tripp Scott?

A. 12 years.

Q. Do you serve on any other boards or committees in Tripp Scott?

A. Yes.

Q. And can you tell me what boards or committees those are?

A. I serve on the compensation committee. I'm

an ex oficio member of virtually every committee the firm has.

Q. Can you describe the function of the compensation committee at Tripp Scott?

A. The compensation committee is a -- is comprised of four members, each directors, myself, Dennis Smith, Matt Ziffrony and Jim Scott, is the current formation of the committee.

The committee is there to exercise a review of performance for whatever period of time we're talking about, and then makes disbursements based upon performance, certain performance criteria, essentially filling the one-third, from a performance standpoint, of a compensation package that we have for directors.

The other portion of the function of the compensation committee is more longer term. We also set the two-thirds, or the monthly amount of money each director receives for any given year.

Q. I know you mentioned that you considered these things in connection with the relative -- relevant time period. What is the time period that the committee considers these factors?

A. Generally Tripp Scott is a calendar year accounting -- account from an accountant standpoint -- accounting standpoint, and so we meet just prior to the

end -- generally the end of the close of -- usually in December.

Q. So would that be an annual review?

A. At least.

Q. Yes?

A. Maybe, there are times we meet additional, but generally speaking we meet at the end of each year.

Q. Did, in fact, in 2012 the compensation committee meet prior to the end of the year?

A. Yes.

Q. And what were the circumstances for that?

A. The firm had received fees from two specific cases, which I think is the subject of some of this, what we refer to as the Home Depot case and the Banks' case.

Q. And when was that meeting convened in 2012, approximately?

A. I believe it was right around August -- the first week of August.

Q. And were bonus awards decided at that committee meeting?

A. Yes.

Q. Does the compensation committee also set salaries?

A. Yes.

Q. And the compensation committee sets ---

A. It sets salaries for directors.
Q. For directors?
A. Yes.
Q. Does it also set or determine bonus awards for directors?
A. Yes.
Q. What other forms of compensation is there at Tripp Scott, besides either salary or bonus awards?
A. There is benefits, 401-K, I mean, the whole series of profit sharing, there is a whole series of things that we do for directors.
Q. And you call those benefits?
A. They're benefits.
Q. Okay. So do any of the directors at Tripp Scott receive shareholder distributions?
A. Only to the extent that there is tax liability in the two shareholders, because the operation, or the setup of the law firm is that the equity in the corporation itself is held by two directors, currently Norman Tripp and Dennis Smith. Those are held in a trust for the benefit of everyone else, every other director, and so to the extent there is any, quote, unquote, equity distribution, it's simply to deal with whatever tax impacts there are at the end of the year.
Q. Is Mr. Herman one of those equity

shareholders?

A. No.

Q. That's Mr. Tripp and Mr. Smith?

A. Correct.

Q. And those shares are held in a trust, is that correct?

A. Yes. We've provided that document.

Q. I'm looking for the exhibit number.

MR. LINDEN: Mr. Houston, can I assist you?

MR. HOUSTON: You may.

MR. LINDEN: Exhibit 6 in the plaintiff's book.

MR. HOUSTON: Thank you.

BY MR. HOUSTON:

Q. Would you look at Exhibit 6?

A. Yes. Okay. Exhibit 6 looks like a composite.

Q. It's towards the end of the exhibit, the last several pages.

A. So there is a trust agreement, and then a first amended trust agreement.

Q. And that's the trust agreement you were referring to?

A. Those are the -- yes.

Q. And the individuals you identified,

Norman Tripp and Dennis Smith are the shareholders?

A. They're the trustees.

Q. The trustee shareholders?

A. Correct.

Q. And other than what may be distributions to those two individuals on account of tax liabilities, are there any other shareholder distributions made to directors at the Tripp Scott law firm?

A. No, equity is not a piece of the compensation.

Q. What does that mean, equity is not a piece of the compensation?

A. The fact that technically ownership of the actual shares are with Norman Tripp and Dennis Smith, is not a factor in compensation. It's, frankly, by design, so we ensure a more performance driven compensation.

Q. I see, and that performance driven compensation applies to both long term salary and bonus awards?

A. Yes.

Q. You indicated that you serve on the compensation committee, correct?

A. Yes, sir.

Q. How long have you been on that committee?

THE COURT: Asked and answered, 12 years --

oh, I'm sorry, president for 12 years. I apologize.

MR. HOUSTON: That's right.

THE WITNESS: 14 years.

MR. HOUSTON: Sometimes it's hard to take off the suit when you wear the robe, huh, Judge?

BY MR. HOUSTON:

Q. So approximately four years, you said?

A. 14 years.

Q. 14 years okay.

And so you've participated in deliberations of the compensation committee?

A. Yes.

Q. And is that body vested with the sole discretion to award salaries for directors?

MR. LINDEN: Objection, your Honor, leading.

THE COURT: Sustained. Mr. Houston, this is your witness.

MR. HOUSTON: Yes, sir. He just became my witness 10 minutes ago, but I understand, Judge.

THE COURT: He's your witness.

MR. HOUSTON: Yes, sir, understood, Judge.

THE COURT: Don't lead.

MR. HOUSTON: Understood.

BY MR. HOUSTON:

Q. What is the function of the compensation

committee?

A. We went through that before, but essentially to set directors' compensation in two forms, both in salary, or monthly payment throughout any given year, as well as to provide an analysis around what we figure to be roughly a third of their monthly -- total monthly stipend in performance bonus.

Q. And what considerations does the committee take into account in setting those two forms of compensation?

A. We take into -- there is a document that provided the criteria and factors that we provided.

Q. Have you heard the term Goal 5?

A. Yes, I'm looking at it right now.

Q. You are, and which exhibit is that? Is that in the same exhibit we just looked at?

A. The same exhibit, it is -- it's the first exhibit right after Mr. Genovese's letter.

Q. Is that the document that says Goal 5, Number 5 at the top?

A. That's correct.

Q. And it's Item 5 on Goal 5?

A. Yes.

Q. Are those the exclusive considerations that the committee takes into account in awarding salaries, or

awarding bonuses?

A. No.

Q. And what are some of the other considerations that the committee takes into account?

A. Well, this is a pretty exhaustive list, just do be certain, but we take into consideration varying forms of analyzing some of the numbers that are reflected in here, numbers for generation, kind of finder reminder grinder analysis around a law firm. We also take into consideration the host of other subjective criteria that's outlined here. We also take into consideration, which is an important part of our process, each director has an opportunity to voice their opinion as to how, whatever amount of money we're disbursing, how it should be disbursed among the group.

Q. Is there some formal appeal process if a director doesn't like the compensation they've been awarded, or the bonus they've been awarded?

A. No, none that's practically been used, no. The compensation committee is the final arbiter of these numbers.

MR. HOUSTON: Judge, may I have a minute?

THE COURT: Yes, sir.

Nice to have you back here.

THE WITNESS: Thank you, Judge.

Judge, I'll take a moment and thank counsel and the Court for allowing me to attend today versus yesterday. I appreciate that.

THE COURT: Certainly.

BY MR. HOUSTON:

Q. Mr. Pozzuoli, going back to the 2012 year, where the committee met in August, I think you said, was that for the purpose of bonuses for directors only?

A. Yes.

Q. And did anybody other than directors receive bonuses as a result of that -- those deliberations?

A. No, there was a previous decision made to take a piece of the monies from the fees earned by the firm in the two cases, and to disburse those to both non-directors and to staff.

Q. Mr. Pozzuoli, in the ---

A. But that was made prior to -- that decision was made -- the amount of money that was set aside for those folks was -- that decision was made prior to the compensation committee meeting, and then secondarily the actual disbursement, as to who gets what was made by the entire directorship.

MR. HOUSTON: Very good. I have nothing further, Judge.

THE COURT: Thank you, Mr. Houston.

MR. HOUSTON: Thank you, Judge.

THE COURT: Mr. Linden.

MR. LINDEN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. LINDEN:

Q. Good morning, Mr. Pozzuoli.

A. Good morning, Mr. Linden. How are you?

Q. I'm good. Thank you. We met at your deposition.

A. Yes.

Q. Tripp Scott is a C-corporation, correct?

A. That's correct.

Q. And as a C-corporation, any profit, which I'll use in the generic term, of net operating income over and above all the expenses paid, would have to be distributed out by the end of the calendar year, or you would be paying tax at the corporate level, correct?

MR. HOUSTON: Judge, I'm going to object, outside the scope of my direct.

MR. LINDEN: I believe Mr. Houston asked if it was a C-corporation, your Honor.

MR. HOUSTON: I did not.

THE COURT: I don't think he did.

MR. LINDEN: Well, then maybe I just didn't hear that.

I'll withdraw it.

THE COURT: Okay.

MR. LINDEN: No problem. It's not in my notes.

BY MR. LINDEN:

Q. The Court has heard testimony from Mr. Herman, Mr. Brown, so I'm going to use a little bit of a shortcut in my questioning, since some of the subject matter is already known to the Court.

You mentioned two cases, you mentioned Home Depot and Banks', that's also known as Security Mutual, correct?

A. That's correct.

Q. And the total fees that were generated in those cases were contingency fees based on contingency fee agreements between Tripp Scott and the respective plaintiffs, correct?

A. Yes, and the respective clients, yes.

Q. Clients, yes, okay, and the total amount of fees that those two cases generated were approximately $9.9 million, correct?

A. Approximately.

Q. Yes, and the firm decided to carve out $300,000 for the staff and whoever else from the 9.9, that was what you referred to as the decision that was made

before the comp committee?

A. The non-director portion of this, yes.

Q. So the portion distributable by the comp committee to the directorate -- directorate? -- was $9.6 million, correct?

A. Roughly, yes.

Q. Okay, and from that Mr. Herman received $2.7 million, correct?

A. We allocated and distributed $2.7 million to Mr. Herman.

Q. Right, and the other directors all had different allocations?

A. Yes.

Q. But Mr. Herman's was, by far, the largest?

A. Yes.

Q. In fact, that was the largest bonus that the firm had ever given out to any director, correct, in your time with the firm?

A. Yes, that's likely, yes.

Q. And the $10 million, as an aggregate from the two cases, was also the largest fee recovery that the firm had had since you were at the firm?

A. It depends on how you calculate it.

Q. I guess.

A. Well, I mean, look, Home Depot was a five

year case. So over five years, there were other clients who generated substantially more than $10 million over that period, it simply wasn't a contingency case, but if you're asking me specifically had the firm enjoyed an attorneys' fees recovery on a contingency, or any other matter in the combined amount of $10 million between two cases, no.

Q. In that, the receipt of those funds, do you recall that the firm received those funds in the year -- in the month of March, 2012?

A. I'd have to see something, but it was roughly around March or April.

Q. Okay. Just assume that during the month of March 2012, that the funds came into the firm.

A. Okay.

Q. The firm didn't immediately distribute those funds, correct?

A. That's correct.

Q. You held them for a period of time?

A. We did.

Q. And you held them for a period of time, amongst other reasons, because you, as the president, and I guess that role is like a managing partner, or managing shareholder, wanted to be sure that your cash needs for the balance of the year would be taken care of, that was

one of the reasons, I believe?

A. That was one of the reasons, also when the money came into the Tripp Scott trust account, at that point I was -- there was still open issues with the individual cases. There was a claim by co-counsel, Mayback, on one case, and there were still some open issues on the other case, and so clearly it was prudent for us to ensure, before we distributed any money out of our trust account, to us, or to the client, for that matter, that all those issues were cleared up.

Q. Okay, and they were?

A. Ultimately they were.

Q. To your satisfaction?

A. Yes.

Q. Okay, and so you applied the Goal 5 criteria, as well as circulated spread sheets to the directors for work revenue, client generation, combined work revenue, client generation, and even a sheet that said, to each director, make a decision on this $9.6 million as to how you think the money should be disbursed, or apportioned, correct?

A. How about if I -- the process is as follows: Once the determination was made that -- first that there was no open issues or claims against the money that we held in trust, we analyzed, you know, how much of a fee we

would get, that Tripp Scott would have earned from those two cases, we made a determination as to what was appropriate to share with non-directors. At that point what we did was we then waited for a couple months to see how the rest of the year was flowing out, you talked about that before, because we are a cash run law firm, we don't borrow money, and it's held us in good stead, from a survival standpoint, that's the way we run it, and so we waited until we could calculate -- I could be satisfied that there would be no emerging issues. We had some issues that we had to be concerned with, internal to the business operations as a law firm, and once those, at least, were satisfied that we could release the money, we then called -- convened a meeting of the compensation committee, and prior to the compensation committee meeting, we sent out to each director a package, which included certain numbers which reflected both work revenue for, I think it was either a four or five-year span, as well as the specific work revenue for Home Depot and Banks'.

We also included generation -- what we considered generation numbers for that same period, and for those two cases. We included on a sheet. We also included the amount of bonus, quote, unquote, performance bonus, performance pay that was received by each director

for that period of time, up until that point, and we gave that package to each director, at which time -- we also gave one sheet on the back of that analysis, and this is part of the process I referred to before, where it has a list of initials of each director, and the amount that we were going to disburse at the top of the sheet, and at that point each director got an opportunity to voice their opinion as to how the money we were considering disbursing to each director, and what their opinion was about that money should be disbursed.

Mr. Linden, I don't know how your firm works, but we are an open compensation system, and so we shine a light on compensation, we allow participation, and at the end of the process everybody also gets to see what everybody else makes, which certainly can be messy at times, but allows for everybody to be fully satisfied that they have the full information.

Q. Thank you, Mr. Pozzuoli.

Would you please turn to ---

MR. LINDEN: May I approach the witness, your Honor?

THE COURT: You may.

BY MR. LINDEN:

Q. In the plaintiff's exhibit register, would you turn to Tab 16, which is Exhibit 16 in evidence?

A. Okay.

MR. LINDEN: The cover, of course, is a letter from Mr. Genovese. These are part of the confidential documents we had discussed pre-trial at the case management pre-trial hearing, Judge.

BY MR. LINDEN:

Q. And skip over about four pages, to a document called director bonus allocation?

A. Got it.

Q. Okay. Is this document -- do you have water?

A. I do. Thank you.

Q. This document was distributed to all of the directors in connection with the anticipated comp committee meeting to deal with the Home Depot and Security Mutual/Banks' case fees, correct?

A. That's correct.

Q. It does not address the distribution of an annual performance bonus, in other words, this is not for the annual performance bonus. This is for a special distribution related to those two cases?

A. I wouldn't say it's a special distribution. It's clearly not the end of the year compensation meeting, but it is a performance analysis, and the same criteria are used. So, this is not what I would consider special,

just that there was, frankly, $9 million plus sitting in our account, earning, you know, less than 1 percent interest, and it was -- we were comfortable enough disbursing it.

Q. Okay, and attached to -- or behind this document, there are various spread sheets, and these were what you were talking about a moment ago in your testimony explaining process, is that correct?

A. That's correct.

Q. They got distributed to the directors, so there is one for client generation.

MR. LINDEN: And just so you Honor is aware, I believe Mr. Genovese's office, together with Mr. Pozzuoli, they did the redacting so that the information that we would obtain is information pertinent to the two matters, and the persons who were given origination credit on those matters, as opposed to everyone else in the firm.

THE COURT: Thank you.

BY MR. LINDEN:

Q. And without -- I'm not going to go through the various numbers, we've been through them so many times on deposition and ---

A. I think I described the process pretty well.

Q. Yes, you did?

A. Okay.

Q. I think you did, and obviously it's a process that you've done year over year, correct?

A. Painfully, yes.

Q. I have been a managing partner, I understand.

The last document, that's the blank one that says -- turn it in, I think in accordance with -- it's Paragraph 8 of the director bonus allocation, it says, please complete your allocation, return it to DDS, I assume that's Dennis Smith?

A. Dennis Smith, yes.

Q. By 5:00 p.m. on July 23, 2012. If you would, would you turn over to Exhibit 22 for a moment, in the second -- you'll see a letter from Mr. Genovese of October 1st, transmitting, and you see the director bonus allocation document, it follows his letter?

A. Yep.

Q. Look at Paragraph 7.

A. Got it.

Q. Complete your allocation, return it to DDS by 5:00 p.m. July 30th.

A. Right.

Q. So did this get distributed twice, or was one replacing the other? One says July 23rd, one says

July 30th, and the numbering is a little off.

A. I think the latest one, I think what we provided originally was a draft of the director bonus allocation, there was only one package sent out to the directors.

Q. Okay, and what comes behind that is likewise the information?

A. It's the identical information.

Q. And the directors, or at least some of the directors responded to the request for -- I'm going to use the word "allocation" as a generic word, for their proposed allocation to each other, and themselves, obviously, of the $9.6 million, correct?

A. They did.

Q. Would you go back to Exhibit -- let me find it.

MR. LINDEN: I'm sorry, your Honor. One second.

MR. PEARSON: 41.

MR. LINDEN: 41 is the depo exhibit number. It's Exhibit ---

MR. PEARSON: 22.

MR. LINDEN: 22, thank you.

BY MR. LINDEN:

Q. Would you refer to Exhibit 22?

THE COURT: That's what we're in.

MR. LINDEN: Which is what we were in. I'm sorry, Judge.

THE WITNESS: What specifically?

MR. LINDEN: No, that's not it.

MR. PEARSON: 16?

MR. LINDEN: I'm sorry, 16, your Honor.

BY MR. LINDEN:

Q. I know we went over this at your deposition, and the ---

A. I'm looking at 16.

Q. Please go to the page following Mr. Genovese's letter.

A. Okay.

Q. There should be a spreadsheet.

A. Okay.

MR. LINDEN: May I approach the witness for a moment?

THE COURT: Yes.

MR. LINDEN: Thank you.

MR. HOUSTON: It's out of order.

MR. LINDEN: It's out of order. Do you have it in yours?

MR. HOUSTON: I have it. It's not in the order that you're saying.

MR. LINDEN: Yes, that's why I'm trying to find the document to point to the Judge and the witness.

MR. HOUSTON: It's about the fourth page in in that exhibit, I think.

MR. LINDEN: Yes.

THE COURT: All right. What's it say on the top?

MR. LINDEN: If I may move --

THE COURT: You may.

MR. LINDEN: -- so I can show you.

MR. HOUSTON: A micro spreadsheet, Judge.

THE COURT: Oh, this little tiny thing?

MR. HOUSTON: That's it.

MR. LINDEN: I'm sorry, Judge.

THE COURT: That's okay.

MR. LINDEN: That's the way it was produced.

THE WITNESS: All right. Let me just take a look and see.

MR. LINDEN: I'm going to just help the witness, if I may. There it is.

THE WITNESS: There it is. Okay. I got it.

MR. LINDEN: Okay.

THE WITNESS: Judge, it's right behind the earnings statement. Oh, you have it, okay.

THE COURT: I have it.

MR. LINDEN: And it was produced to us in this size, Judge, so we're all struggling with the same thing.

BY MR. LINDEN:

Q. The forth line down says PGH.

A. Can I -- let me take it out of the book so I can look at it.

Q. Okay.

A. Yes.

Q. Now we've ---

A. On the left-hand column, yes.

Q. Yes, that would be Mr. Herman, correct?

A. Yes.

Q. Okay, and so, as I understand it, this document represents, to the extent that directors responded to the director bonus allocation inquiry, and the materials you provided, the comp committee provided, this is the compilation of those responses, each person determining -- each director determining what he or she would award to each other?

A. Well, yes, along the top there would have been -- along the top there would have been an identifier for the director, which -- who actually opined.

Q. I understand.

A. Okay.

Q. That was removed so ---

A. That was redacted, but I just wanted to -- okay, yes.

Q. And I believe the director bonus allocation suggests that while the directors need to return it to Mr. Smith, he wasn't going to identify who they were --

A. That is the general ---

Q. -- when he did the form?

A. That is our general policy, yes.

Q. Okay, and so in round numbers, and the number in the far right-hand column, is that simply an average of all the numbers that precede it?

A. It appears -- well, I didn't do the math, but it appears, yes, appears to be, yes.

Q. Okay, I'm not being facetious, but ---

A. This is not my document . This is Mr. Smith's document. However, it was produced, and I'm familiar with the document.

Q. Okay, and I don't mean this to be facetious --

A. Sure.

Q. -- but is there any adjustments that's made by the compensation committee, kind of like, you know, the old days with the Russian judge, throw out the high, throw out the low?

THE COURT: I thought it was the east German judge.

THE WITNESS: I think it was ---

MR. LINDEN: I'm dating myself, Judge.

THE WITNESS: It was the east German judge, by the way, and, no, we don't have that same, where you have six judges, and we get rid of -- no.

BY MR. LINDEN:

Q. Okay. So in Mr. Herman's case, if we could read this ---

A. Are we talking about how he came up with the averages?

Q. Well, assuming that's an average, it would just be an average of all the items that preceded it?

A. It appears that way.

Q. Okay, and then the number is almost $2 million, as an average for Mr. Herman, correct?

A. As best I can read it, yes, just shy of $2 million.

Q. And then the compensation committee actually awarded $2.7 million?

A. They allocated $2.7 million.

Q. Okay. So this -- this document, was it used in some way by the compensation committee?

A. It is considered, among the other

information, and obviously it's not binding, and clearly from the -- even taking Mr. Herman out, if you continue to look at any one of these suggestions made, and you run your finger down from, say, take Mr. Herman, from where PGH is, and you run it all the way to the right along his column, clearly opinions varied as to how to distribute the money, and that's subjective nature is part of our process. So that wouldn't be inconsistent with everything we've ever done, but you're right, we didn't follow -- we obviously took this into consideration, but the average is not binding on the comp committee, because the comp committee has the ultimate authority on the issue.

Q. And while someone may be dissatisfied, or someones may have been dissatisfied, it's a fact, isn't it, that no director left the firm as a result of the distributions from the Home Depot and Banks' case?

A. Not that I'm aware. I mean, I know there was frustrations, one director did leave the firm just recently.

Q. But you don't attribute that to Home Depot and Banks, do you?

A. I don't think so, no.

Q. Your firm is fairly stable, I mean, it's not like a revolving door, with directors in and out, correct?

A. No, and that's why -- that is a fact, and

that's why we know the compensation policies that we have in place, and the procedures that we have in place, and the fact that we have an open compensation process, that includes this, as well as everybody seeing what everybody else actually makes, while it produces some pumps along the road, it works for us, and provides us with a stable environment. I'm not suggesting it for every law firm, but it works for us.

Are you -- can I put this away?

Q. Yes.

A. I don't want to lose it, that's why.

Q. When you distributed the funds, did you distribute them in two tranches, 80 percent and 20 percent?

A. We distributed -- once the decision was made, as to what the actual allocations for each director were to be, we distributed 80 percent in one tranche soon after the comp committee met in early August, and then we distributed 20 percent in November. The purpose was, again, to be conservative with the use of the money to ensure that we weren't surprised at the end of the year, either for a lack of collections, or unexpected expense.

We were a little, we were a little burned out at that point, because in April or May we had lost a partner to a heart attack, John Bianco. So we wanted to

ensure that some of his work stayed in the law firm, and some other considerations, but that was all part of being conservative from a money management standpoint.

Q. And as it turned out, at the end of 2012, calendar year 2012, there were -- there was additional bonus money distracted, including to Mr. Herman, in the amount of $115,000 for 2012, unrelated to the fees that had been obtained in the Home Depot and Banks' case, correct?

A. There were performance -- it was basically a performance bonus in a typical fashion in a year-end, a typical review.

Q. A typical annual performance bonus?

A. Yes. It wasn't -- performance is part of what we consider to be part of his compensation for that.

MR. LINDEN: May I have a moment, your Honor?

THE COURT: Yes.

BY MR. LINDEN:

Q. Mr. Pozzuoli, in your -- in the last 10 years, has there ever been a circumstance at Tripp Scott, where the, I'm going to call it the end of the year bonus, directors' bonus was -- for a particular director was reduced to zero dollars when -- based on any factors, other than law firm finances, meaning the firm couldn't

pay?

A. If the director physically was not employed by the law firm, we've had circumstances like that.

Q. Okay.

A. Or if the ---

Q. I'm sorry.

A. Or if the director passed away, we had to vote to ensure that John Bianco would be considered, that had to be a special vote by the directors to include him within this consideration, but, no.

MR. LINDEN: Other than that, no. I have no further questions, your Honor.

THE COURT: Thank you, Mr. Linden.

I'm going to suggest we take a short break --

MR. HOUSTON: Yes, sir.

THE COURT: -- for the benefit of the good of the order. Let me know when you're all back.

MR. HOUSTON: 15 minutes?

MR. LINDEN: Oh, I'm sorry, did you have any redirect?

MR. HOUSTON: Yes, I do, but is 15 minutes, okay for the break?

THE COURT: Sure.

MR. HOUSTON: Okay.

THE COURT: Mr. Pozzuoli, obviously don't talk to anybody about this case.

THE WITNESS: Thank you.

(Thereupon, a recess was had, after which the following proceedings were had:)

MR. HOUSTON: I have brief redirect.

THE COURT: Very good.

REDIRECT EXAMINATION

BY MR. HOUSTON:

Q. Mr. Pozzuoli, I'd like you to look again at Exhibit 16 in that register that's in front of you, and I'm focusing on the document, the first document that's about five pages in, and that's a spreadsheet that at the top says client generations.

A. Yes, I have it.

Q. And you indicated that this document is used as part of the consideration by the compensation committee?

A. Yes.

Q. What does the term client generations mean?

A. It's who brings the work in, the lawyer who brings the work in, and has the relationship with the client.

Q. Okay, and I notice that the first column there is 2012 generations?

A. Right.

Q. And so did the comp committee consider 2012 generations in its decision, on the bonus making decision?

A. We considered all the information, yes.

Q. Including the 2012 generations?

A. Of course.

Q. And flipping to the next to page, it's a similar spreadsheet, but says work revenue at the top.

A. Yes.

Q. Can you tell me what work revenue is?

A. This is collected dollars against work performed.

Q. By an individual lawyer?

A. Yes.

Q. And the first column there is 2012 work, right?

A. Yes, there is one exception to that, if on a contingency case, or a file that -- or what we have flat fees, we have a number of flat fee cases, where the time spent might have been less than the fee earned, that work revenue would also go to -- that work -- that would be called the up piece.

Q. The up work -- work up?

A. Work up. So as an example, if we had a flat fee arrangement for $5,000, and the time actually spent on

the file was $2,000, the up would be 3,000, and that up would be determined by the generating lawyer on where it went.

Q. Okay. So, again, focusing on the document that I'm at, Exhibit 16 on that document that says work revenue, so did the compensation committee consider 2012 work in their decision making process?

A. We considered the -- what is here in the entirety of the document.

Q. And one thing that's not on this document, is what month in 2012 does that go up to?

A. That would have been half a year.

Q. Six months?

A. Yes.

Q. The end of June?

A. It would have been probably the end of May.

Q. Okay.

A. Because we're on a comp year, our actual -- for compensation purposes analysis, we cut off the year November -- the end of November, so we can have a final set of numbers when the comp committee meets at the end of year, generally. So we start calculating whatever you drive in, or work in December, is then rolled over for consideration for the following year.

Q. Understood.

So December from the prior year to November of the bonus year?

A. That's right.

Q. Okay. Now you testified in response to the cross-examination that one instance you recalled of reducing a director's bonus to zero was when the bonus -- or, excuse me, the director wasn't there at the time the bonus was awarded?

A. That's correct.

Q. So is it a requirement that the director has to be employed at the time the bonus is awarded to get it?

A. Yes, they have to be employed by the firm.

Q. Does the compensation committee have the discretion on what to award for bonuses?

A. Yes.

Q. Does it have the sole discretion to award bonuses?

A. Yes.

Q. And in your experience with the system, the compensation system at Tripp Scott, is it your view that any directors have a right to a bonus prior to the compensation committee awarding it?

MR. LINDEN: Objection, your Honor, outside the scope of cross.

MR. HOUSTON: Judge, the entirety of my

testimony originally, and I think the cross was the bonus system and the compensation system in the process.

THE COURT: I'll allow the question.

MR. HOUSTON: Thank you.

THE WITNESS: The fees earned are fees earned by the law firm, and so whatever is distributed through our compensation process is through -- for purpose of performance bonus, is solely discretion of the compensation committee, and there would -- there should be no entitlement to that money, because it's -- of any one particular director, until such time as the comp committee sits and determines how the money is going to be disbursed.

MR. HOUSTON: Thank you, Mr. Pozzuoli.

THE COURT: Is that it with this witness, Mr. Houston?

MR. HOUSTON: That's it, Judge.

THE COURT: Thank you. Mr. Pozzuoli, you may step down.

THE WITNESS: Thank you, your Honor.

THE COURT: Thank you very much. You're free to go.

THE WITNESS: Thank you.

MR. HOUSTON: Judge, my next and final witness would be Mr. Herman.

THE COURT: Mr. Herman, if you'd come back up, please.

THE COURT: Good morning, Mr. Herman.

MR. HERMAN: Good morning.

THE COURT: I'd just remind you you're still under oath.

MR. HERMAN: Yes, sir.

Thereupon,

PETER G. HERMAN,

having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOUSTON:

Q. Mr. Herman, where do you presently reside?

A. 1901 North Ocean Boulevard.

Q. And what kind of a -- is that a residence?

A. Yes, it's a condominium.

Q. And how long have you resided at that address?

A. You know, I bought that condo in mid, like, July of 2011, and I moved in then.

Q. And where did you reside prior to that?

A. I was in 2428 Northeast 7th Place in Fort Lauderdale.

Q. Condo or house?

A. That was a house.
Q. It was a house?
A. Yes.
Q. And how long did you reside there?
A. I resided their until -- well, I bought that home, I believe, in 1997.
Q. So about 14 years?
A. Yes, sir.
Q. Did your children ever reside there with you?
A. Yes, they did, they resided there with me for probably -- well, maybe five or six years.
Q. And are both of your children now living elsewhere?
A. They are. They have graduated from college, and one is up in Gainesville, and one is here in Fort Lauderdale.
Q. Did you sell that -- the home, the prior residence?
A. Yes, I did.
Q. And what did you do with the proceeds from the sale of that residence?
A. I bought the condominium, that was pretty much a simultaneous sale and purchase.
Q. Did you undertake any remodeling of the

condominium?

A. I did, yes, I did, I initially moved in, and thought I was going to remodel the place while living there, but that was not a good idea, and so I moved into a house temporarily, and that's what I did.

Q. And did you hire a general contractor for the remodeling job?

A. You know, it wasn't really a general contractor. Basically what I did was, my ex-wife, who has got a very good eye for design, she's designed -- interiorly designed things for me, as well as for herself, and when we were married, she designed a couple of houses, and I know she's done some stuff up in Alachua, where she lives.

So I called her to ask her to come down and take a look at it, and she helped me in the remodeling process, and so, yes, I hired some people, she hired some people.

Q. Pam Herman is your ex-wife?

A. She is.

Q. When were you divorced from Ms. Herman?

A. The divorce started in 1996, and it ended in 1997.

Q. Amicable divorce?

A. No.

Q. Okay. Where did Pam Herman reside at the time that you were asking her to assist you with the condo remodeling?

A. Alachua County.

Q. And does she live there by herself?

A. No, she lives with her father, who is -- it's essentially out in the country, and she lives with her father at this time.

Q. So you purchased and moved in around July. How soon after that did you ask Pam to assist you with the remodeling project?

A. It had to be within weeks, a month, you know, something like that.

Q. So taking you to the time period of October, November of 2011, which would have been three or four months after you moved into the condo, what was going on with the remodeling job?

A. What timeframe again? I'm sorry.

Q. Yes, the October, November, the end of 2011.

A. Yes, yes, the October timeframe, as we all know, that's when the SML case was being tried. I was spending a lot of time up in New York, pre-trial, as well as post-trial, and during trial, we were up there probably close to a month, and the construction at that point in time, or the remodeling was becoming active, more active.

Q. What does that mean to you, more active?

A. It just -- you know, I guess maybe I thought it was more active, because being gone, and getting calls all the time to make sure that the workers are there, having to call the condo, or having to pay them, or whatever, was getting cumbersome.

Q. And so what role did you ask Pam Herman to play as it related to the remodeling?

A. I asked her to take that over, and -- while I was out of town. I -- like I said, it became cumbersome then in, I think early December. I was -- as a result of SML case, and a result of the Home Depot case, we had gotten other inquiries in other cases, and if you can imagine, there was a lot of phone calls, a lot of cases that we were starting to develop after those cases, and so I was leaving again in early December to do an inspection on a creel up at Sharp Carpeting (phonetic) in Atlanta.

Q. A creel?

A. Yes, a creel is -- I didn't know what it was when I first learned about them, but it was another patent case where a creel is basically what feeds the thread into carpet.

MR. LINDEN: Your Honor, relevance.

THE COURT: Where are we going here, Mr. Houston? What does this have to do with the issues in

this lawsuit?

MR. HOUSTON: Judge, it has quite a bit to do, it's in their complaint regarding these transfers, and I'm getting right to that issue.

THE COURT: Get to the transfers then, please, and let's not talk about other business that Mr. Herman may or may not have been interested in getting into in December and January.

MR. HOUSTON: Yes, sir, but I think that is necessary background to understand why he had to ask Ms. Herman to get involved, as opposed to him to be able to do it himself, and I'm done with that section --

THE COURT: All right.

MR. HOUSTON: -- of testimony.

THE WITNESS: Okay.

BY MR. HOUSTON:

Q. So, we're still focusing on the October, November timeframe. Did you -- how did you handle the payment of contractors when you weren't available to supervise the job?

A. I'd either give the money to Pam, or they'd come by my office and maybe get it from my secretary, or they'd have to wait for it, but the problem with that is, if you don't pay these workers, they don't show, and a lot of times they want cash at the end of the week, or

whatever, and if you don't pay them, they don't show up the next Monday.

Q. And so how did you accomplish the payments in your absence?

A. I just said, through either Pam, or my secretary, or if I was home at some period of time, I would take care of the payment.

Q. So would Pam pay these people out of her pocket and you'd reimburse her?

A. No, I would give her the money.

Q. Did you set up any banking relationship with Pam to accomplish this?

A. I did. As a lot of projects go, it was more than what we budgeted for, and -- but I needed to get out of the house that I was in, because it was up for sale, and I needed to get into the condo. So, I wanted to try to get the work done as quickly as possible.

I had an investment account, which was kind of out there for a while, non-performing. The investment advisor at Tripp Scott had been telling me, you know, you should do something else with the money.

MR. LINDEN: Objection, hearsay.

THE WITNESS: Oh, sorry.

THE COURT: Sustained.

THE WITNESS: Sorry, I apologize,

your Honor.

So, I liquidated an investment account, a non-performing investment account, and opened up a joint account with Pam to pay the workers.

BY MR. HOUSTON:

Q. What bank was this at?

A. Wells Fargo.

Q. And who selected Wells Fargo?

A. She did.

Q. And why, do you know?

A. Well, it's been her bank forever, she had a checking account there, and it's literally down the street from our home.

Q. And is the banking account you just referred to identified in your bankruptcy schedules?

A. Yes, it is.

Q. That's the Wells Fargo account ending in 9849?

A. Yes, it is.

Q. And who were the two signatories on that account?

A. Myself and Pam.

Q. Do you know what happened with the funds in that account, how the funds were used?

A. I ultimately do.

Q. Well, did -- at the time we're talking about, the time you funded the account, what was the purpose of funding that account?

A. Yes, the purpose of account was to set up a fund to pay the workers.

Q. And was that account used for that purpose?

A. It was. Go ahead.

Q. I'm sorry, I was anticipating the next question. If you're not done, then go ahead and finish.

A. No, it ultimately was used also for attorney's fees.

Q. Okay. So describe that, what you mean by, used for attorney's fees.

A. I believe in early February, is the time where I decided that, you know, it's going to be likely I'm going to have to file bankruptcy, because I was -- I actually hired you beforehand, and tried to help assist in working something out with CIB, but it was clear, based on the messages that I was getting, and the e-mail that I referred to the other day, that it wasn't going to happen.

So, I asked you about what was it going to cost here, and you quoted me a retainer agreement -- or retainer, and I ended up -- I was out of town, I believe, at the time, and I asked Pam to wire whatever money is not committed in that, in the joint account that we had to

you, and that ended up being the $35,000, and I think, I think 15,000 of that was for the pre-bankruptcy stuff that we had done, and then the cost of this case was going to be -- or at least at that time was going to be $20,000.

Q. And at that time, did you believe that those funds came from the joint account that's identified in your schedules?

A. Absolutely, yes, sir.

Q. And have you come to learn that perhaps the funds came from another account?

A. Yes.

Q. And when did you learn that?

A. When Neil, or when Mr. Linden pointed that out to me in my deposition.

Q. And did you ultimately find out which account it came from?

A. It apparently came from an account that Pam transferred the money to, because she didn't want to commingle with her ---

MR. LINDEN: Objection

THE COURT: Sustained.

THE WITNESS: Sorry, sorry, sorry.

BY MR. HOUSTON:

Q. So, you said that you learned that there was a different account after Mr. Linden pointed that out to

you?

A. I did.

Q. Did you ever, prior to learning that information, instruct Pam Herman to transfer any of those funds in that manner?

A. No.

Q. Did you ever, prior to learning about it in your deposition, know that she had transferred those funds in that manner?

A. No.

Q. At the time that this account was funded in December -- did you say December, or the fall of 2011?

A. Yes, I believe it was December of 2011, yes.

Q. Okay. Were you contemplating bankruptcy at the time?

A. No, I was still trying to work things out with CIB.

MR. HOUSTON: Nothing further, Judge.

CROSS-EXAMINATION

BY MR. LINDEN:

Q. Good morning, Mr. Herman.

A. Good morning, Neil.

Q. Mr. Herman, did you read the execution version of the joint pretrial stipulation before it was approved and submitted by counsel in this case?

A. I don't think I reviewed the final draft, but I reviewed a draft.

Q. And in reviewing the draft, you saw that there were stipulations regarding these funds, the liquidation of the investment account, the transfer to the joint account, and the transfer by Ms. Herman to another account, that was solely in her name, then the transfer from that account, after 60 days, to another account that was in her name, and then the wires out in February, correct?

A. I -- in the draft there was some language to that effect, yes.

MR. LINDEN: Your Honor, I'm referring to ---

THE COURT: Pages 7, 8 and 9 of the pretrial stipulation?

MR. LINDEN: Yes, sir.

THE COURT: I have it.

MR. LINDEN: Okay. I'm not going to go back through that since it's there.

BY MR. LINDEN:

Q. The account was liquidated November 29, 2011, two checks were issued, two different amounts, that totaled approximately $46,000, correct?

A. I -- are you talking about the Ameritas

account.

Q. Yes.

A. Yes, that had two components, an A and a B component to it. I don't really know what the significance of that was, but that's what it was.

Q. And those were the funds, and I'm just going to refer to it as, round numbers, 46,000, that were deposited to the joint account that was created to receive those funds, correct?

A. It was a joint account, yes.

Q. And would you take a look in plaintiff's exhibit register to Exhibit 13, please?

A. Exhibit 13?

Q. Yes, sir.

A. Yes.

Q. That is the statement, it says American funds, and then it says Ameritas Investment Corp., this is the statement for November 29, 2011, PGH 31 and PGH 32, showing the two tranches, the two funds that were liquidated?

A. Yes.

Q. On November 29, 2011 you were aware that the hearing on the motion for deficiency in the CIB versus Esquire Ventures, Peter Herman and others was scheduled for December 6, 2011, correct?

A. You know, I don't know that I knew the date it was scheduled, because I didn't attend the hearing, but I knew that the motion, like I testified yesterday, I knew that the motion had been filed.

Q. And at the time that you moved these funds, you were aware, were you not, that CIB was aggressively pursuing an action against you?

A. They had filed that motion.

Q. If you look at Exhibit 14 --

A. Yes, sir.

Q. -- PGH 731, I think it's the third page in?

MR. HOUSTON: The second page.

THE WITNESS: 31 or ---

BY MR. LINDEN:

Q. 31?

A. So 731, okay.

Q. You see that on December 9th there is a transfer from an account that ends in the digits 0370, into this account, 9086, for the $46,278.25, that was the exact amount that was liquidated from the Ameritas account?

A. Uh-huh.

Q. If you'll now turn over to PGH 737 in that same exhibit?

A. Yes.

Q. You'll see that there is a wire transfer to the Kopelowitz firm on December -- on February the 10th in the amount of $35,000, that was the transfer that you testified to?

A. Yes, sir.

Q. So the money sat in the account, solely in the name of Pam Herman, from December the 9th to February the 10th, correct?

A. If that's what the document is saying, yes.

Q. Immune from the reach of your creditors?

A. Excuse me?

A. Immune from the reach of your creditors.

A. I don't know that, Neil.

Q. Well, did you have an interest in the account that was solely in the name of Ms. Herman?

A. I didn't know it was in her account.

Q. That's not my question.

Did you have an interest in that account?

A. No.

Q. If you'll turn to your schedules, Exhibit 12.

A. Exhibit 12?

Q. Yes, sir, in connection to the -- we'll do it this way, the statement of financial affairs, if you'll go to Page 22 of 35.

A. 22 of 35?
Q. Paragraph 9.
A. Hold on a second.
Q. Sorry.
A. Yes.
Q. Payments related to debt counseling or bankruptcy, Kopelowitz Ostrow, February 2012, $15,000.
A. Yes, sir.
Q. That was your bankruptcy retainer, correct?
A. No, as I testified, what I recall this to be is the pre-bankruptcy counseling, as it says.
Q. Where is your $20,000 retainer for bankruptcy?
A. That's what I was told that the amount was.
Q. So this was paying for an antecedent debt to a creditor?
A. Neil, I don't know. I had assistance with Bart on this. That's what I did.
MR. LINDEN: I have nothing further, your Honor.
THE COURT: Thank you.
Do you have any further questions?
MR. HOUSTON: No, sir, I don't.
THE COURT: Okay. I have a few.
Mr. Herman, in your brief, your trial brief

that was filed in this case, on June 3rd, on Page 20 of 24, it recites, additionally the debtor directed Pam Herman to pay the requested retainer for Kopelowitz Ostrow for the filing of the bankruptcy case, and for fees owing at the time of the filing.

Do you recall that sentence?

THE WITNESS: Yes, sir.

THE COURT: And so you knew that the funds were coming from Pam Herman?

THE WITNESS: No, I was -- in February I was out of town, and ---

THE COURT: You directed Pam Herman to pay Mr. Houston for antecedent debt, and for retainer for the bankruptcy, is that correct?

THE WITNESS: The way it went was, I talked with Mr. Houston, he initially asked for a $50,000 retainer, not saying one way or the other what it was for, but I know that he had worked for me beforehand, and so when I called, I said to my ex-wife, I said, take the money out of the joint account, whatever is not committed, we only had $35,000 at that time, and then that's what Bart accepted, and she wired that. I presumed that it was wired out of the joint account.

THE COURT: But it wasn't, you know that?

THE WITNESS: Now I do.

THE COURT: Why is it that the disclosure of compensation of attorney for debtor in this case, ECF 17, filed March 20th, 2012, recites that the source of compensation paid to me, signed by Mr. Houston, was the debtor?

THE WITNESS: Is that something I filled out?

THE COURT: No, it's something Mr. Houston filled out. I'm trying to figure out if that's true.

THE WITNESS: Can we ask Mr. Houston?

THE COURT: Well, I'm asking you to explain how it is that Mr. Houston said that the $20,000 retainer came from you.

THE WITNESS: Yes, that's -- you're questioning the amount?

THE COURT: No, I'm questioning the source.

THE WITNESS: Well, I'm sure he was under the impression it came from me, because I was under the impression it came from the joint account.

THE COURT: Where is it, where is this $20,000 disclosed anywhere in your statement of financial affairs, or in your schedules? The bank account that was the joint account says that it had $100 balance, right?

THE WITNESS: Yes.

THE COURT: Okay. Where is this $20,000

that was paid to Mr. Houston for the retainer, where does that appear in your schedules or statement of financial affairs?

THE WITNESS: Unless it was the 15, I don't know, I'm not familiar with it.

THE COURT: Well, you've already stipulated in the joint pretrial stipulation that $35,000 was wired from Ms. Herman's sole account to the Kopelowitz firm on February 10th, 20 -- it says 2013, I assume that means 2012. $35,000 was wired, right?

THE WITNESS: Yes, sir.

THE COURT: Okay. Your schedule -- your statement of financial affairs discloses 15, right?

THE WITNESS: Yes.

THE COURT: Where is there a disclosure of the other 20?

THE WITNESS: I don't know.

THE COURT: It's not there?

THE WITNESS: Apparently it isn't.

THE COURT: I'm a little confused also by your representation to us that the funds were put into this account to pay contractors or workmen, and that you needed ---

THE WITNESS: Material man.

THE COURT: And you needed to do that in

December, right?

THE WITNESS: No, it was not ---

THE COURT: You needed to have the money in her hands in December, right?

THE WITNESS: She needed to have a fund for whatever came up from December to February. I moved in, back in in the first two weeks of February, because I was living in a house that I had to get out of.

THE COURT: Okay. There were no withdrawals from that account in December.

THE WITNESS: Probably not.

THE COURT: The only -- the first withdraw was on January 13th for $5,000. Do you know what that went to?

THE WITNESS: I think what was happening at the end there was that we had punch out items, if you will, that needed to be done, and those -- that could have been, you know, a payment to any number of workers or material men, plumbers, electricians.

THE COURT: The next withdrawal, after January 13th, wasn't until February 3rd, and that was for $1,500.

THE WITNESS: Yes.

THE COURT: And what was that for?

THE WITNESS: If it was a Friday, I'm sure

it went to pay workers who he wanted cash, otherwise they wouldn't show up on Monday, that's why I made that statement, but I can't, I can't guarantee that that's what it was for.

THE COURT: When did you move into the apartment?

THE WITNESS: Probably the first or second week of February.

THE COURT: And everything was done when you moved in?

THE WITNESS: Not a hundred percent. I think we got our CO, or our, whatever that is that you get, that you're permitted to move in, right during that period of time.

THE COURT: The last withdrawal from the account was $4,300 on February 17th. What was that for?

THE WITNESS: I don't know. Again, it could have been either for Pam's work or, again, for material men and that sort of thing that were working on the condo.

THE COURT: And where was any of this disclosed?

THE WITNESS: Well, my understanding is that -- I don't know, maybe I read the schedules wrong, but I thought that it said that if they were amounts less than $5,000, that you weren't required to disclose those, and

I'm not sure whether ---

THE COURT: Where is that, would you show me that page?

THE WITNESS: Yes, I'm not sure where it is in the schedules --

THE COURT: Well, just ---

THE WITNESS: -- but I'll look.

THE COURT: Good, please do, go through the schedules and statements and show me where it says that amounts less than $5,000 don't need to be disclosed.

THE WITNESS: I'm looking at Page 20 of 35.

THE COURT: Uh-huh.

THE WITNESS: And it says, in B there, that's what I read at the time, and if I mistook that, then I, you know ---

THE COURT: Debtor whose debts are not primarily consumer debts --

THE WITNESS: Yes.

THE COURT: -- list each payment or other transfer to any creditor made within 90 days immediately preceding the commencement of the case, unless the aggregate value of all property that constitutes or is affected by such transfer is less than 5,850.

THE WITNESS: Yes.

THE COURT: Well, this was 46,000 that you

transferred to an account.

THE WITNESS: To a joint account.

THE COURT: To a joint account, the only recipient of statements from which was your wife, or your ex-wife, at her address in Alachua County, and she subsequently transferred the funds out of that account into two separate accounts of hers, and I don't, for the life of me, find where the $20,000 that you paid to Mr. Houston is.

MR. HOUSTON: Judge, I'm kind of new at this inquiry from the Bench, so I'm not sure if it's appropriate for me to make objections, or to address disclosures that I personally made. So ---

THE COURT: Well, I'll let Mr. Herman answer the question.

Judges typically do ask questions, Mr. Houston, when they're disturbed by something.

MR. HOUSTON: And I'm always confused on whether I'm entitled to object, because --

THE COURT: Well, you can ---

MR. HOUSTON: -- there is an evidentiary record that has to be protected.

THE COURT: You can object.

MR. HOUSTON: Yes, sir.

THE COURT: If you want to object, go ahead.

MR. HOUSTON: Yes, sir, the objection would be that the disclosure of compensation is a document prepared by counsel, and certainly to the extent that counsel makes that disclosure, it's my disclosure to make and not necessarily the debtor's.

Thank you, Judge.

THE COURT: Okay. Anything else you want to tell me, Mr. Herman?

THE WITNESS: Well, the only thing that I can say is that I was told that there was a retainer that was required of $50,000, I only had 35 at the time in that account available for cash and, you know, that was divided up, part for the bankruptcy, and I know I owed him, Bart, money for pre-bankruptcy issues that he, you know, he had been working on the CIB case also.

THE COURT: All right. Thank you.

I suppose I should let Mr. Herman get off the witness stand, unless somebody else wants to follow-up on anything.

MR. LINDEN: Not for the plaintiffs, your Honor.

THE COURT: Okay.

MR. HOUSTON: None from the defendant, Judge.

THE COURT: Okay. Thank you, Mr. Herman.

THE WITNESS: Thank you.

MR. HOUSTON: Judge, I think it's appropriate for me to say that the defendant rests, and then I think that both counsel would rise and remind your Honor, at the pre-trial conference we considered the issue of closing arguments, and decided in lieu of live closings, we would make submissions to the Court, and I guess the only issue is how long, and we talked about that briefly beforehand, and I think Mr. Pearson indicated 14 days, and that is satisfactory to me.

THE COURT: Okay.

MR. PEARSON: Your Honor, for the purpose, to accommodate the court reporter in preparing the transcript, while we simultaneous prepare.

MR. HOUSTON: Is there a cost factor on terms of how quickly it gets prepared? Because we're going to split it.

MR. PEARSON: Your Honor, we'll order it as an expedited and work it out.

THE COURT: Okay, and you want to have briefs to me by what, June 21st, is that -- or not briefs, but proposed findings and conclusions?

MR. HOUSTON: How about the 30th, Judge?

THE COURT: That's fine with me.

MR. HOUSTON: Yes, sir.

Is that a week day? I didn't even look at a calendar.

THE COURT: The 30th is a Sunday.

MR. HOUSTON: Then I would guess the 1st of July.

THE COURT: That would be fine.

Okay. I'd like findings and conclusions, and how I would like them submitted is in, ideally, Word Perfect form, but if you have to put them in Word, I suppose I'll have to learn one of these days, and e-mail them to Mr. Lachman at his e-mail address, and if you don't have that, get a card, and that's so they don't -- I don't want them uploaded in a PDF format.

MR. PEARSON: Yes, your Honor.

MR. HOUSTON: So I've gotten confused on this issue before, do we also copy each other on our proposed findings or ---

THE COURT: Yes, you should probably ---

MR. HOUSTON: Okay.

THE COURT: You should copy each other.

MR. HOUSTON: Very good.

THE COURT: But simultaneous submission on July 1st --

MR. HOUSTON: Yes, sir.

THE COURT: -- is fine.

MR. HOUSTON: Understood, Judge.

MR. PEARSON: And, your Honor, just for the record, is 5:00 p.m., July 1st acceptable.

THE COURT: That's fine with me. I'm going to be in Maine, I wouldn't be waiting with bated breath for their arrival.

MR. HOUSTON: Okay.

MR. PEARSON: You'll have to say hi to Mr. Moorefield, if you can.

THE COURT: I intend to, in fact.

Okay. I thank you very much, gentlemen.

MR. HOUSTON: Thank you, Judge.

MR. PEARSON: Yes.

MR. LINDEN: Your Honor, on a personal note --

THE COURT: Yes.

MR. LINDEN: -- since I am not a frequent participate in this Court, I'd like to thank you for the courtesies that you and your staff extended us.

THE COURT: You're welcome. Come back.

MR. LINDEN: Only if Mr. Schatzman lets me.

MR. SCHATZMAN: I will, your Honor.

MR. PEARSON: Thank you, your Honor, for also specially setting the trial and taking the last two days to accommodate us for this.

THE COURT: Happy to do it. It's good to see good lawyering, and I thank you for that.

MR. SCHATZMAN: Thank you, your Honor.

MR. PEARSON: Would the Court accommodate me to leave a couple things? I need to make multiple trips to my car.

THE COURT: Sure.

MR. PEARSON: Thank you, your Honor.

THE COURT: Sure.

(Thereupon, the hearing was concluded.)

CERTIFICATION

STATE OF FLORIDA :

COUNTY OF MIAMI-DADE :

I, Cheryl L. Jenkins, RPR, RMR, Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing proceedings were taken before me at the date and place as stated in the caption hereto on page 170; that the foregoing computer-aided transcription is a true record of my stenographic notes taken at said proceedings.

WITNESS my hand this 13th day of June, 2013.

_____

CHERYL L. JENKINS, RPR, RMR

Court Reporter and Notary Public
in and for the State of Florida at Large
Commission #DD 920461
December 27, 2013

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
Case No. 12-13989-BKC-JKO

In re:
PETER G. HERMAN,
Debtor.
_____/

CIB MARINE CAPITAL, LLC,
as assignee of CIB Marine
Bancshares, Inc, successor
by merger to Citrus Bank, N.A.,

Plaintiff,

vs. Adv. No. 12-1785-BKC-JKO

PETER G. HERMAN,

Defendant.
_____/

STEARNS WEAVER MILLER
WEISSLER ALHADEFF & SITTERSON, P.A.
200 East Las Olas Boulevard, Penthouse A
Fort Lauderdale, Florida 33301
Monday, May 13, 2013
2:12 a.m. to 6:18 p.m.

DEPOSITION
OF
ED J. POZZUOLI, ESQUIRE
taken pursuant to notice
on behalf of the Plaintiff.

* * * * *

APPEARANCES:

STEARNS WEAVER MILLER
WEISSLER ALHADEFF & SITTERSON, P.A., by
KRISTOPHER E. PEARSON, ESQUIRE
on behalf of the Plaintiff.

THE HOUSTON LAW GROUP, by
BART A. HOUSTON, ESQUIRE
on behalf of the Debtor/Defendant.

GENOVESE JOBLOVE & BATTISTA, P.A., by
MICHAEL A. FRIEDMAN, ESQUIRE
on behalf of Tripp Scott.

GRAY ROBINSON, P.A., by
NEIL P. LINDEN, ESQUIRE
on behalf of Kenneth A. Welt,
Chapter 7 Trustee.

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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EXHIBITS MARKED FOR IDENTIFICATION

NUMBER	PAGE
41, Letter dated October 1, 2012	146

(Original exhibit retained by Mr. Pearson.)

Thereupon:
ED J. POZZUOLI, ESQUIRE,
after first being duly sworn, was examined and testified under oath as follows:

DIRECT EXAMINATION

BY MR. PEARSON:

Q Good afternoon, Mr. Pozzuoli. My name is Kristopher Pearson with Stearns Weaver Miller. I represent Creditor CIB Marine Capital, LLC, as assignee of CIB Marine Bancshares, successor by merger to Citrus Bank, N.A., which I will refer to as CIB or CIB Marine.

We're here today for your deposition, which is being taken pursuant to discovery Bankruptcy Rule 7030 in the adversary proceeding of CIB Marine Capital versus Peter Herman, Adversary Proceeding No. 12-01785-JKO, which is currently pending in the United States Bankruptcy Court in the Southern District of Florida before the Honorable John K. Olson.

Are you presently under the care of a physician or any issues that would affect your memory or ability to testify --

A No.

Q Are presently taking any medication that could affect your memory or your ability to testify

today?

A No.

Q Have you sustained any injuries in the last three years that affect your memory or your ability to testify today?

A Other than being a management partner -- or managing director of a law firm, no.

Q Is there any reason that you can think of that you can't testify today?

A No.

Q What is your occupation, sir?

A I'm an attorney.

Q Are you employed?

A Yes.

Q Where?

A Tripp Scott, P.A.

Q How long have you been employed by Tripp Scott?

A Approximately 15 years.

Q What's your position at Tripp Scott?

A I'm president.

Q Do you have any other title?

A I'm a director.

Q Are there any committees at Tripp Scott?

A There are.

Q What are the names of the committees?
A I'm a member of the compensation committee. There are other committees which I'm an ex-officio member of, but I think the relevant one is the compensation committee.
Q How many attorneys are there at the Tripp Scott firm?
A Approximately 55.
Q How many directors are there?
A Approximately 20.
Q Please describe what you did to prepare for your deposition today. But don't, obviously, diselose anything you discussed with your lawyer.
A Other than I spoke to my lawyer, not a lot.
Q Did you review any documents in connection with your preparation for this deposition?
A No.
Q Did you have any discussions with Peter Herman, who I'll refer to as the debtor, about this deposition?
A No.
Q Did you have any discussions with Alex Brown about this deposition?
A Other than coordinating dates, when we were going to be deposed, whether it was last week or this

week, no, nothing substantive.
Q Did you review a copy of the debtor's previous deposition transcript in this case?
A I think I saw the first.
Q Did you review the second copy?
A No.
Q Have you reviewed any documents that have been filed in the debtor's bankruptcy case?
A In, like, a schedule?
Q Any documents.
A No. I may have seen his schedule when the firm was served with a writ, but that was back in January or so or February of last year.
Q Have you reviewed any documents that have been filed in this adversary proceeding, CIB versus the debtor, Peter Herman?
A I believe the law firm provided certain documents to the trustee and their counsel. I had reviewed those at the time.
Q How long have you been president of Tripp Scott?
A Approximately ten years, maybe longer. Maybe it just seems longer.
Q How did you become president at Tripp Scott?
A I didn't show up at a meeting one time.

MR. LINDEN: Drafted.
THE WITNESS: No. They elected me.
BY MR. PEARSON:
Q Who is they?
A The directors.
Q What are your duties as president of Tripp Scott?
A Effectively I'm what you would term colloquially as the managing partner.
Q And what duties do you have on a day-to-day basis?
A Well, I still practice law, so I still have a couple thousand hours worth of work every year. I handle my own caseload, and so that takes up quite a bit of time.
On top of that, I am, essentially, the president of the firm, so from an administrative standpoint, I have three non-lawyers who report to me, a comptroller, an office manager, and a technology person. I also regularly meet with, you know, some key directors around finances of the law firm, various caseloads, any other administrative items that need to be taken care of, negotiate leases, the normal business aspect of running a firm the size of ours.
Q You mentioned a comptroller, what is the name

of the comptroller?
A The comptroller is Cheryl Fairweather.
Q What is the name of office manager?
A Ellen Springs.
Q Does the law firm of Tripp Scott have a budget?
A Yes.
Q How is it formulated?
A It's generally worked up by staff and them reviewed by myself and Greg McLaughlin, who is the CFO of the law firm. We make adjustments. We, then, at that point, pass the budget around to the directors. They make their comments, and we put it in final form and approve it.
Q How often is that done?
A Once a year.
Q What month?
A Usually October or November.
Q Is the firm on a ealendar year or fiscal year?
A Calendar year.
Q And you said, November for budget preparation?
A Well, we approve it by November, probably preparation occurs 30 or 60 days prior to the

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Q Where did you practice prior to Tripp Scott?
A I had my own boutique practice. It was Bailey & Pozzuoli and before that Miller Bailey & Pozzuoli and the before that, the county attorney's office in Broward.
Q While you've been an attorney at Tripp Scott, has the firm ever been in a dispute with one of its own attorneys over how a fee was generated in a case?
A There are disputes -- well, there are disputes all the time over that, but are they major? No. So there are disputes all the time, people have differences of opinions about who generated, the percentage of who should split, and whatever else, but we seem to manage through it.
Q What would you consider a major dispute?
A Where people leave because of it.
Q Has that ever occurred?
A Not that I'm aware, no.
Q Is that something that you be would aware of if it occurred during your 15-year tenure at Tripp Scott?
A I don't know during my 15-year tenure, but if there was a major dispute, yes.
Q How does the compensation committee set director income?

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A Director income generally is set in two pieces, two-thirds by monthly salary and one-third in lump sum, year-end compensation, generally.
Q What are the exceptions?
A Well, sometimes at the end of the year, you don't have enough to give out the one-third or sometimes you have more.
Q How is the director salary portion, which is the two-third portion set?
A Discussion inside the compensation committee at the end of each calendar year. The compensation committee sets -- it's not salary, it's just paid month-to-month, but that portion of it is set at the beginning -- at the end of the year for the next year.
Q So the two-third portion is set, but the one-third portion is not at the end-of-year calendar year?
A It could be -- that's the idea, and that provides a floor of compensation for directors, an understanding, and as long as -- if we come anywhere near budget, they'll get a third or more than that. I mean, that's generally the idea, but you've got to look and see. There are other factors to consider how the lump sum is disbursed.
Q What are those factors?

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A I think you have a form, if I can see?
MR. FRIEDMAN: Kris, I think he's talking about --
THE WITNESS: No, it's a goal -- it's a combination of those.
MR. PEARSON: Yeah, I've handed you --
MR. LINDEN: This is seven.
BY MR. PEARSON:
Q I've handed you what's been marked as Exhibit 7 to this series of depositions. Please take a look at it, familiarize yourself with it, and I believe you're referring to the document that's one, two, three pages in.
A Yeah. So, as an example, Kris, the reason why we do it that way is for purposes of cash flow, right, so that -- in order to budget correctly and since we're a cash-based law firm -- meaning we don't borrow money to pay ourselves or borrow money at all where we can avoid it. So as an example, in my time as president, we've never drawn down on any credit facility that's available to the law firm. We have to -- we essentially live month-to-month, and so in managing that piece of it, the portion that is paid to the directors is the two-thirds portion on a regular basis.

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Q And so --
A And so when we get to the end year, say, or when the compensation committee meets, long ago we set down these general guidelines, and some of them have changed, but the considerations and factoring of how we weigh the value of -- okay, we have this much money, and how is it going to be allocated to the directors or whomever, it's a discussion around, you know, how much money they've driven in due to their own work, how much money they've generated by way of clients. There's a factor of, you know, are they managing a client for somebody else, so the whole minder- grinder -- you know, minder-grinder-finder scenario, that's clearly some factor.
We talk about whether or not someone is achieving what we think they should achieve, what they are capable of achieving, are they living up to the expectation. Do they provide internal stability to the law firm? You know, it's the good of the order. Are they a good director internally? Do they -- are they high maintenance, low maintenance? You know, do they require 15 paralegals that cost the law firm a bunch of money, or are they never around when we need to find them, or -- so all that from an internal stability standpoint.

External positioning, like we have here, I'm looking at Paragraph 5, that means does that person -- does that person add to the representation of the law firm from an external standpoint? So does the person sit on boards? Charitable, do they do some level of pro-bono work? Do they have a high profile position in the community, whether it's charitable or community or civic organizations? Do they have a high profile for some reason or another? And how does that contribute to the reputation of the law firm or where we want the law firm positioned from that standpoint.

Do they stay -- you know, just to kind of comment on some of the others, you know, some of this is a little bit duplicative. But so as an example, staying on message, are they consistent with kind of the good of the order externally? Do we -- you know, we don't want to hear bad things from somebody out in the community that your director said to them. So there's some of that. Do they provide leadership within the law firm? And generally how they -- how they, you know, handle themselves both internal and external to the law firm.

Q That was very helpful. With those --

A Fair enough?

Q Yes.

With those factors set in mind, let's discuss Mr. Herman.

A Okay.

Q Let's go through the factors that you just discussed and --

A Oh, there's one other factor that we do consider. It's not binding on us, but we do take into consideration what other directors who are outside the compensation room -- they do provide -- we have an open system, so compensation, what everybody's compensation is both monthly, as well as year-end, or whenever we give out money to the directors, is open, so every director gets to know what every other director makes.

Q When did that process start?

A It's always been, at least as far as I have been there.

Q Okay. Let's get back to the factors. You discussed several. You were very thorough. Let's go through the ones -- let's call them intangible factors, ones where we don't have to look at client generation and work revenue --

A Okay.

Q -- with respect to Mr. Herman.

MR. HOUSTON: Object to the form of the question.

THE WITNESS: Where do you want me to start? And do you have a question specifically as to which letter?

BY MR. PEARSON:

Q You listed off several, and so the ones you listed off, while they are fresh in your mind, let's go through them.

A Well, I mean, obviously Pete has been in the law firm for 30 plus years, so he does add to the overall stability of the law firm. He knows the history of the law firm. He has, in the past particularly, assumed leadership roles in the law firm. So from a positive standpoint, Pete is, frankly, a very accomplished litigator. So those are all positives.

Is he in leadership today in the law firm, other than him being an active director? Not directly, no. Is he out and about in the community in certain senses? Not as much as some other people now, but he was. He takes a role in some of the bar issues, bar organizations. Generally has a good relationship with judges he tries cases in front of, and generally speaking he has a good relationship with opposing counsel, you know, in the Fort Lauderdale,

South Florida area. So those are good things.

You know, as any quality lawyer, you know, Pete has a strong personality. He's not -- at least from my end, he's not tremendously difficult to manage, but sometimes, you know, from a law firm standpoint, we try to manage him, because he's in a larger group, as opposed to solo. But other than that, that's generally a good overview of the good and the bad and the ugly of it.

Q How about any internal issues with respect to other lawyers, staff, personnel, any issues?

A I will speak to me.

Q Okay.

A Pete and I have a good relationship. Sometimes he takes my advice and sometimes he doesn't. We worked on cases together long ago, and we've had some good results. I wish he was more responsive at times in reporting on -- updating the law firm on some of the contingency matters. He has a great relationship with his assistant, but sometimes, because they've known each other so long, they get heated with one another, and that has to be managed to some degree. But none of that is unusual in the context of the work that he does.

Fair enough?

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Q Were there any issues with respect to reporting on the contingency fee case against Home Depot?
A No.
Q Were there any issues with respect to reporting on the contingency fee case that Tripp Scott undertook against Security Mutual?
A No.
Q Does Mr. Herman stay on message?
A Generally, yeah.
Q And when I refer to staying on message, I'm referring specifically to five, goal five.
Does Mr. Herman develop associates?
A Yes. In fact, that's his strength.
Q How is he related to client management?
A Well, it's obvious he had -- I mean, look, you know, he manages his clients. I mean, frankly, Mike Powell, who was the client in the Home Depot matter, really wasn't his client, but he had a great relationship with him. It wasn't his client from a generation standpoint, at least initially. But he had a great relationship with him, and, you know, obviously the client trusted Pete, and he got a great result, and the client trusted him. And I think in the Banks case, the clients trusted -- and the team --

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in that respect, look, in a complex commercial -- Kris, you might know this, in a complex commercial setting like those cases, it's not just one lawyer. It's also, in those cases, Alex Brown, particularly in the Banks case, in the Home Depot with Mike Powell, there are others who had relationship with the client, so it's not just an individual scenario, but to that extent, all those were good things.
Q How about with respect to clients other than Mr. Powell and Mr. Banks?
A Generally speaking?
Q Yes.
A Pete has a pretty good relationship with most of the clients he has. I mean, there have been disputes through the years, but I don't think -- that's not unusual.
Q As far as the factors set forth on Paragraph 5, within goal five, are there any -- is there any single factor, or are there any combination of factors that are more heavily weighted among these factors listed as A through --
MR. HOUSTON: Object to the form of the question.
THE WITNESS: I don't think these are weighted, in that we give, okay, this one is 20%, and

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this one is 30%, so I think that's the wrong approach. I think that the approach we use is we clearly -- look, the law firm, ultimately, is a business that has to stay open and pay expenses and survive as an entity, so there's always an economic review of who is doing the work, is it quality work, is it being paid, who is generating the work, who is maintaining the client, even if they didn't generate it? All of those things are considered, as well as, you know -- you know, if someone is causing disruption because, you know, personal -- you know, they're having issues internally with staff that are so great that it supersedes everything else about them, then it becomes a bigger issue.
If -- if someone is out there, you know, embarrassing the law firm in the newspaper, then it's a bigger issue. Some of that stuff gets overridden, so it -- look, at the end of the day, Tripp Scott is a cash-based law firm that tries its best to manage the cash that we generate for the benefit, not just of the directors, but for everybody who works there. We don't have a lot turnover, and we practice quality law for our clients. That's the goal.
BY MR. PEARSON:
Q You mentioned two circumstances, one

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internal, one external.
A Mm-hmm.
Q Have you ever had any of those issues with Mr. Herman, meaning internal with staff, where it's so great that that becomes a big problem, or external, with the press and the law firm's relationship?
A Internal, no, nothing that couldn't be managed internally. Externally, there was one issue that we had that we worked through with Peter, what I believed to be a spurious allegation from a client that spilled over to the newspapers, that after we found out the details of what had happened, we realized that there wasn't a whole lot of merit to it, and so we dealt with it, and it wasn't that big a deal.
Q How long ago was that?
A Several years ago.
Q More than five?
A I don't exactly know, Kris.
Q It was dealt with --
A Five or six years ago.
Q It was dealt with internally to the satisfaction of Tripp Scott and its directors?
A I believe so, yes.
MR. HOUSTON: Hey, Kris, I've got to make a

phone call, when you get a minute, take a break, as soon as you get to a stopping point.
MR. PEARSON: Let me ask one more question.
BY MR. PEARSON:
Q Mr. Pozzuoli, if we switch back to goal five --
A Mm-hmm.
Q -- there's an important note there that is bolded and italicized --
A Yep.
Q -- what does that mean?
A It says, "Important note, client credit will no longer be tracked." Yeah, we didn't do that. We track it.
MR. LINDEN: May I jump in?
What's the difference between client generation and client credit --
THE WITNESS: I don't think --
MR. LINDEN: -- when you're tracking?
THE WITNESS: I don't think there is. That's why -- I'm not really sure about why that's there, and then "L" is there, because they are the same to me.
MR. LINDEN: Mike, I took advantage of your offer.
THE WITNESS: And I responded.

MR. LINDEN: I couldn't stop myself.
MR. PEARSON: Okay. Bart, you want to take a break?
MR. HOUSTON: Yeah.
(Thereupon, a brief recess was taken from 3:12 p.m. until 3:22 p.m.)
BY MR. PEARSON:
Q The one-third portion of the directors compensation that we discussed, what is the source from which those funds are paid?
A Revenues of the law firm.
Q With respect to the two-thirds allocation and the one-third allocation, are there any different components or factors that are considered?
A Yeah, I mean, the monthly compensation is more long range. It takes into consideration how long they've been with the law firm, more long range, where they are relative to their careers. It's not -- it doesn't really move as greatly as the one-third can move, depending on, you know, how the year went and stuff like that. We try to make sure that's paid. In fact, since I've been there, we've always made those payments on the two-thirds.
Q With respect to the one-third portion, has there ever been a time while you were a director at

Tripp Scott that the one-third portion wasn't paid?
A Well, I don't want to -- one-third is just a guide, but were there times when we went underneath the one-third, yes. Prior to me there were times where they didn't give anything out.
Q Do you know what those circumstances were?
A Obviously the law firm wasn't doing as well as it hoped.
Q Are there any circumstances where a director received zero on that one-third portion or the portion that's paid at the end of the year for factors other than law firm finances?
A Maybe. I have to think about it. Maybe. I have to think through that a little bit. It would be unusual, but maybe. I can't think back 14 years worth, but it's possible.
Q How long have you been on the compensation committee?
A Like 12, 13 years.
Q In the last ten years, has there ever been a circumstance where the end-of-the-year portion of the directors' compensation was reduced to zero based on factors other than law firm finances?
MR. FRIEDMAN: I think he just answered that exact question, didn't he?

MR. PEARSON: No.
THE WITNESS: I'm trying to think, Kris.
MR. PEARSON: Sure.
THE WITNESS: Not that I can recall.
BY MR. PEARSON:
Q Same question, last five years?
A No.
Q Does the compensation have the ability to --
A Compensation committee?
Q Yes.
Does the compensation committee have the ability to give a director a zero on that portion of their income that's paid at the end of the year for reasons other than the finances of the law firm?
A Yes.
Q What are those factors, or what would have to have happened for that to occur?
A Well, the factors don't change. They -- the factors don't change, so the factors that we just went over before would be the same factors, and that would be it. There would be no additional factors.
Q So other than the factors here on Paragraph 5 on goal five of Exhibit 7 -- I'll ask a different question.
Are there any other factors than the factors

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set forth on Paragraph 5 of goal five of Exhibit 7 that would lead to a director receiving zero on his one-third or the year-end portion of his compensation?
A If there weren't -- the only other factor -- because I think those factors cover the whole panoply of considerations, but the only other factors would be if they were not -- they're not a director at that point, so when we give the money out, if you're not a director, then you don't get it.
Q In your experience on the compensation committee, has there ever been a circumstance, other than the passing of a director, that a director didn't receive his year-end portion of the compensation because he wasn't at Tripp Scott?
MR. HOUSTON: Object to the form of the question.
THE WITNESS: Yes. Because he wasn't at Tripp Scott, yes.
BY MR. PEARSON:
Q How many times?
A I think the three or four times that we talked about before, about directors who were terminated, those people did not receive year-end -- they didn't participate in the back-end of the compensation package. That was it. They were out.

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Q Does Tripp Scott have any forms that an exiting director would sign prior to or contemporaneous with their departure from the law firm?
A Not that I recall, no. I mean, they are employees, so when they're terminated, then their employment is terminated. That's it.
Q Does Tripp Scott seek to obtain releases from directors who are terminated?
A I'm sure we've done it -- I'm sure if we can, we try. But I don't recall that being a big issue, either trying to get it or not get it.
Q Do you recall any circumstances where Tripp Scott obtained a release from a director that was terminated?
A Not that I recall, Kris.
Q Have any of the directors who were terminated prior to year-end, which resulted in them not receiving that additional portion of their compensation, made claims against Tripp Scott for that compensation?
A No.
Q Does contingency fee work at Tripp Scott affect the two-third portion of a director's compensation?

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A Not in and of itself, no.
Q Does contingency fee work affect the one-third or year-end portion of a director at Tripp Scott's compensation?
A Sure, because it would be consistent with the factors that we just went through. So as an example, as much as a contingency lawyer might try, there -- cases don't always follow the calendar year, right, and so -- and we only count money in, so when the money hits our account is when it gets factored in, not if, maybe, later on. So if a contingency case hits or doesn't hit before the end of the year, we have to have a snapshot in time, and we look at what the records are at that point and make decisions based upon the information at hand.
Q So for years that a contingency fee lawyer is working on a contingency fee case, solely for directors, would that particular director's one-third portion be impacted in years for which the firm did not receive the contingency fees?
A The committee -- the compensation committee has taken into consideration work that's performed but not yet paid on large contingency matters, and not totally wiping out -- or not paying a contingency lawyer anything for that work, so there's some

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consideration given for the work that was performed, since every -- the law firm was all-in on the cases anyway, we accepted them, and we set upon a course and the lawyers went and worked them, and just because they are not settled, they are ongoing, doesn't mean there shouldn't be some consideration, so their numbers, actual collection dollars, might be impacted, but there's consideration inside the committee for the fact that those lawyers involved might get a little bit more than their numbers might warrant for that year.
Q But they would, on the flip side of that, get less than if they were working the hours, and those hours were paying, like a hourly case would?
A I lost you. I'm sorry.
Q Sure, understood.
So on years for which a contingency fee lawyer is working a contingency case, but the fees aren't paid --
A Right.
Q -- on a monthly or semi-monthly basis, like an hourly case would --
A Right.
Q -- would that lawyer or those lawyers working on that case receive a lower bonus or year-end portion

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of their income than they would have had the fees been paid like an hourly case?
MR. HOUSTON: Object to the form of the question.
THE WITNESS: I don't understand the question.
MR. PEARSON: Sure.
THE WITNESS: Try again. I think I know what you're driving at, but I want to be sure.
MR. PEARSON: Okay.
MR. LINDEN: Try this --
BY MR. PEARSON:
Q So at the end of the year --
A Right.
Q -- in a year in which the contingency fee had not been paid, the fees on that contingency fee case had not been paid --
A Okay.
Q -- would the bonus of that lawyer working on that contingency fee case be lower than a lawyer whose fees were paid consistently throughout the year, if their hours were the same and their hourly rates were the same?
MR. HOUSTON: Object to the form of the question.

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THE WITNESS: Well, I -- let me say it this way, under the extreme circumstance where -- let's just take an extreme circumstance, where a set of lawyers were solely working on a contingency and they didn't drive in a dollar or drove in less money, they would probably get a bigger year-end distribution than they probably deserved, relative to how the numbers reflected, and that would normally come out of the pocket of the people who were doing hourly work in that year and driving in the revenue. It's kind of -- we're trying to flatten -- you don't -- unlike if you were practicing alone or in a small setting, you know, like on your own, where it's feast or famine, right, if you hit a big case, you make a ton of money, and if you don't do anything, you make nothing, in a law firm like ours, what we're trying to do is, clearly when they hit a big case, you want to pay them, but they're certainly not going to make as much as they would have if they were on their own. On the other hand, when the contingency money did not come in any given year, they are not going to make zero. They are going to make something, at least giving credit for the work that they are working on the contingency cases that the firm is committed to. Follow me?
Q Yes.

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A Okay.
Q And they would, using that scenario, these contingency fee lawyers would be making less than they would be if they were working on hourly cases, if the number of hours were the same and the hourly rates?
MR. HOUSTON: Object to the form of the question.
THE WITNESS: I don't -- no, that's a hypothetical. I don't know. But as an example, you know, there are lawyers like Pete, like Alex, who work on a mix of contingency and hourly work, and so it's not as simple as that, but we do take into consideration -- the committee will take into consideration the work performed on what we think are viable contingency cases that haven't hit yet, within the analysis of what they might get, even though the contingency case hadn't hit.
MR. LINDEN: Mr. Pozzuoli, within the firm's governance, if a director is dissatisfied with what the comp committee and the other directors decide that particular person is going to get or not get, is there an appeal to a higher order of any kind?
THE WITNESS: No.
MR. LINDEN: Okay.
BY MR. PEARSON:

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Q Touching on a similar --
MR. LINDEN: Tell me one other thing, but you're a C corp, are you not?
THE WITNESS: Yes.
BY MR. PEARSON:
Q Touching on a similar vein, have there been circumstances in your tenure on the compensation committee where directors have approached you directly concerning their level of compensation?
A Sure.
Q And how, generally, do directors go about doing so?
A Prior to a meeting of the compensation committee, it's an open door, they can come in and talk to me about whatever they want to talk to me about. They might send me an e-mail. They might talk to me personally. Most of it is, "Hey, keep in mind I did X, Y, and Z. I don't know if you knew that." So there's some of that. That's the general conversation.
Q Has there ever been a time when directors submitted to you a memorandum concerning their thoughts on compensation?
A It's rare, but it's happened.
Q How many times do you think?

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A I don't know, but it has happened. It's not even yearly. It may happen every two or three years, someone might -- especially someone who is new to the process or something, you know, if they just became director, there may be some of that.
Q Generally that doesn't happen?
A No.
Q Mr. Pozzuoli, I've now handed you what's been marked as composite Exhibit 3 to these series of depositions.
Please take a look at composite Exhibit 3, familiarize yourself with it, and let me know when you're ready.
A Ready.
Q Ready?
A (Witness nods his head.)
Q Have you seen the documents that make up composite Exhibit 3 before?
A I have.
Q Are these e-mails which you either sent or received?
A Yes.
Q Prior to -- let me ask a different question.
In December of 2011 was there a directors' meeting?

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MR. HOUSTON: Object to the form of the question.
MR. PEARSON: What's wrong with the form?
MR. HOUSTON: Well, over the 15 years prior to that date, I'm sure there was many director meetings.
BY MR. PEARSON:
Q In the month of December in the year of 2011, was there a directors' meeting?
Thank you.
A If there was, there would be a directors' meeting for the sole purpose of approving year-end distributions to staff and associates only.
Q In the year --
A Because that would be normal, Kris.
Q Sure. In the year 2011, the month of November, was there a directors' meeting?
A Probably, I don't have independent recollection, but probably.
Q At that directors' meeting would Mr. Herman have provided the status as to the Home Depot case?
A Probably not.
Q Why not?
A If I recall -- and I wouldn't -- I'm not the one really who would know details around this and the

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dates, but if I recall, the Home Depot case was on appeal up in Washington, and so there wasn't a lot to report on, given the fact that we were not handling the appeal directly and that that was now sitting in some form up there waiting for a decision.
Q Who would be the person with the most knowledge?
A As to the status?
Q Yes.
A Either Mr. Herman or Mr. Brown.
But I do recall that being roughly the case during that time frame, because we had to make a decision, the firm did, to hire the appellate counsel.
Q In the year 2011, month of November, did Mr. Herman or Mr. Brown present a status at the directors' meeting concerning the Banks case, as we're referring to it?
A Well, Mr. Brown would not have, because he would not have been there. I don't believe so, and, again, I don't -- I don't recall one way or the other. I doubt it.
Q Are minutes of the directors' meeting taken?
A Yeah.
Q Who is the custodian of those minutes?
A It was Bill Gross.

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Q Who is the who custodian presently?
A We haven't replaced Bill yet, as far as that.
Q Do you know where the minutes are presently being maintained?
A Yeah. They are probably with the office manager.
Q What is his or her name?
A Ellen Springs, I gave you --
Q Oh, okay.
Do you know when the Home Depot final judgment was entered?
A I do not.
Q Do you know if it was in the year 2010?
A I'm looking at these. The trial -- the final judgment coming out of the trial?
Q (Mr. Pearson nods his head.)
A I think it would have been 2010. Again, I think you have the documents of record, so I would rely on those.
Q Sure. Let me hand to you what's been marked as Exhibit 5 to these series of depositions.
Please take a look at it, familiarize yourself, and let me know when you're ready.
A Okay.
Q For the record Exhibit 5 is a copy of the

first page of the opinion of the federal circuit in the Powell case.
And if you look on the first page, you see that it indicates affirmed?
A That's what it says.
Q And then --
A I've never seen the document before, but that's what it says.
Q And then you see it's dated November 2011?
A Okay.
Q Earlier you testified that in the November 2011 directors' meeting retention of appellate counsel could have been an issue.
A No --
MR. HOUSTON: Object to the form of --
THE WITNESS: -- that's not what I said.
BY MR. PEARSON:
Q Okay. What did you say then? I must be confused.
A I said we knew that it was pending, because previous to that, we had to retain appellate counsel.
Q Ah, okay. Do you recall, now that you're looking at the dates of the judgment -- or of the opinion and judgment of the federal circuit any status report as to the Home Depot case being provided at the

November 2011 directors' meeting?
A No.
Q Do you remember what day the November 2011 directors' meeting occurred?
A No.
Q Do the directors' meetings generally occur at the beginning of the year -- or the beginning of the month or the end of the month?
A Sometime mid-month, generally. But I don't know if -- I don't know what the time frame around this was. I mean, it's -- it is what it is.
Q Would affirmance by an appellate court in a contingency fee case be something that would be reported to you as an ex-officio member of the contingency fee committee?
A No, it would be reported -- my guess is when we received that, that made it's way around the law firm pretty quickly.
Q Is it something that would have been reported to you as a member of the compensation committee?
MR. HOUSTON: Object to the form of the question.
THE WITNESS: No. It would have been reported to me, because everybody would have been pretty happy with the result, and like every other

director, I would have been happy with the result. I don't know when we actually got notice of that, but, yeah.
Kris, back -- on that piece of paper, my recollection, though, that that case wasn't final until the next year. There were maybe rehearings to that.
BY MR. PEARSON:
Q Take a look at the document, please, Exhibit 5?
A Mm-hmm.
Q We see that the mandate was issued on February 16, 2012?
A That would be -- got it. I do remember that. I don't remember the exact date, but that's consistent with what I just said.
Q Okay. Please --
MR. LINDEN: You didn't have to wait for me.
MR. PEARSON: You sure?
MR. LINDEN: Oh, I'm sorry.
MR. PEARSON: No worries.
MR. LINDEN: I can hear through the wall.
BY MR. PEARSON:
Q Please direct your attention to Exhibit 3.
A Mm-hmm.

Q We see at the bottom there's an e-mail from Mr. Herman to yourself?
A Which one are you referring to, Kris?
Q Sure. It's the e-mail that was sent on December 6th --
A Uh-huh.
Q -- at apparently 17:17 on -- in the year 2011.
A Okay. All right.
Q When Mr. Herman stated, "I wanted to discuss and finalize the formula for the allocation of the SML and Home Depot cases," what did that mean to you?
A Pete had something on his mind he wanted to talk about. That's all it meant to me.
Q When he states "discuss and finalize the formula for the allocation of the SML and Home Depot case," what did that mean within Tripp Scott's governance?
A It would have been inconsistent with Tripp Scott's governance.
Q How so?
A I just explained -- we just painfully went through all the factors that we consider, and I've already testified to the fact that we're a cash law firm. If I recall at this point, both the -- as

referred to the SML case, the Banks case, and the Home Depot case, there was no money in our trust accounts that we had, so there was nothing to -- at that point, there was honestly -- to be blunt about it, there was nothing to discuss around any of this at that point.

Q Did you tell Mr. Herman that very statement?

A I did.

Q When?

A We probably talked about it that day. I mean, I don't recall. But I would say to you that I probably -- my guess is when he came in, I listened to what he had to say, and there was nothing I could say to him in return because there was no money in, and that was that. And to be blunt about it, during that time frame, I was focused on something else.

Q Personal or business?

A Business.

Q Unrelated to the Banks case and the Home Depot case?

A That's correct.

Q Please --

A Your firm was involved in the matter that I was concerned with at the time.

Q Please refer to the last --

A Small world.

Q Please refer to the last sentence of the e-mail, the last whole sentence, other than the --

A The last full sentence?

Q Yes. "I know there's been a lot of discussion and for many reasons I would like to have finality by next Friday."

A Okay.

Q What did that mean to you when you read it?

A I didn't really -- it didn't mean anything to me, to be blunt, so it was clear to me he wanted to talk about something. He had something on his mind, and my door is open to him and any other director. That's how I -- I think my response -- is that my response on the next page?

Q Well, the e-mail chain -- these were produced by debtor's counsel as indicated by the Bates number at the bottom, and I believe the e-mail chain moves upward.

A I don't know the answer.

Q Okay.

A I mean, my point is that I didn't have any thought about this at all, Kris, to be blunt, so --

Q When he uses the word "finality" by next Friday, meaning prior to calendar year-end 2011, did you ever indicate to Mr. Herman that -- whether

finality could be achieved or not with regard -- with respect to this issue?

A I think before I went away on vacation, I think I told him there's no way we're going -- that none of this is going to get resolved, because the money is not even here, so let's not even talk about it right now, and I think -- I mean, I'm sure that Pete thought I was pushing him off. I probably was.

Q Did you ever indicate what you said just said to him in writing?

A No.

Q Why not?

A Did you read the e-mails?

Q I have.

A Okay. So that's what I said to him in writing.

Q So you didn't -- so you said things other than your prior testimony to him in writing?

MR. HOUSTON: Object to the form of the question.

THE WITNESS: I said what I said in writing, but you're asking me -- I said what I said, but you're asking me, and I'm giving you my best recollection, if we -- I remember us having a brief discussion over it, and he was concerned about it. I let him say whatever

he wanted to say, and there was not a whole lot of discussion around it. There was nothing to discuss at that point, Kris.

There was no money in. The settlements were not complete. The cases were still pending, as far as I knew, and so if the money came in, then there would be some level of discussion before we convened the comp committee. But given the fact that the money wasn't in, it wasn't going to be taken into consideration, at least as far as the numbers were concerned, for purposes of that end-of-the-year comp meeting.

BY MR. PEARSON:

Q In the year December -- in the year 2011, month of December, did you ever inform the debtor of the very testimony that you just gave?

A I believe I did.

Q In an e-mail?

A No. The e-mails are what they are. They are here.

Q Are there any other e-mails that you have regarding Home Depot and the Banks case that have not been produced by your counsel?

A I don't think so.

Q Did you communicate with Mr. Herman via a

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personal e-mail account, a non-Tripp Scott e-mail --
A No.
Q -- account --
A I wouldn't have.
Q -- in December 2011?
A I wouldn't have done that, no.
Q Did you communicate with him through text message?
A No.
Q Please turn to Exhibit 3, PGH 158.
A Got it. Next page, right?
Q Yes.
A Got it.
Q E-mail dated December 15th, appears to be, I would say, 8:16 in the morning, from Mr. Herman to you.
A Got it --
Q Do you see that e-mail?
A -- mm-hmm.
Q It's a long sentence, but in the middle of the second line, where it says, "And obviously very important to the firm, since I'm hearing secondhand from two to three-year partners that they are being told more than that me," what does that sentence mean to you?

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A I don't know. I mean, I read it, but I -- it doesn't mean anything to me.
Q At that point in time, were you at all discussing allocation of the Home Depot case with anyone else at the firm?
A No.
Q At this point in time, meaning December 2011, were you discussing allocation of the Banks case with any other individual at the firm?
A There was nothing to discuss, no. I don't think Pete says I'm discussing it here. I think he's talking about what other people are talking about, but I have no knowledge of that.
Q Did you -- nice segue. Did you ever hear in December 2011 any other director at Tripp Scott discussing allocation of the Home Depot case?
A I'm president of a law firm. I hear a lot of things, but, honestly, this issue, as far as allocation of monies that were not in the bank at the law firm, they might as well have been talking about, you know, when somebody stepped on Saturn, for crying out loud. It makes no sense at all. I mean, we're a cash law firm. The bottom line is that any of this discussion -- I mean, people were excited about it, Kris, the fact that these cases looked like they were

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going to pay off after -- Home Depot was a five-year deal, so the directors were excited by the result of the trial, and then it looked like we were proceeding through the appeals in a positive way, so people were excited about it, but you can't spend what you don't have.
Q Did you ever hear of any other director mention things like they were going to buy a house, pay off college tuition for their children, or buy a car with the money that could potentially be collected from Home Depot and the Banks case?
A In this time frame?
Q Yes.
A No.
Q In any other time frame?
A Later, when we got ready to distribute the money, the next year, when the money came in.
Q Were you aware of Mr. Herman -- in this very e-mail of December 15th, at 8:16, it indicates that there were rumors and he didn't like what he has hearing, were you aware at this present time the e-mail was written to you that there were any rumors among Tripp Scott attorneys?
MR. HOUSTON: Object to the form of the question.

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THE WITNESS: You're asking me to comment on rumors that are alluded to in someone else's e-mail?
BY MR. PEARSON:
Q I'm asking you, so we're clear on the question, whether you heard any rumors from other attorneys at Tripp Scott concerning the issues that are in this very e-mail?
A I'm not even sure that the e-mail identifies any issues, so the idea of identifying any issues there were rumors about, I'm not sure there's any issues that are really -- that are really identified here. I've read this e-mail, and --
Q Okay. So we're answering and we're moving on in an expedition manner --
A Okay.
Q -- is it fair to say this e-mail discusses allocation of the fees of the Home Depot and the Banks case?
A I'm going to read it closer.
Q Sure.
A You know, honestly, I can't make heads or tails out of the e-mail now, and if I can't make heads or tails now, I'm not so sure I made heads or tails out of it then, so I don't really know what the rumors that he's -- that is referred to in the e-mail. I do

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see at the last line about, you know, some frustration and disappointed. I can read it. But, I mean, other than that, I don't know specifically what this refers to.

And I will tell you, to be blunt about it, first of all, you know, this was a busy time. We were leading up into a comp setting for a comp meeting for the end of the year of 2011, which did not include, at least directly, a consideration of these cases, and it would have been nothing that -- believe it or not, they wouldn't have talked -- people wouldn't have -- if this was going on, shame on the lawyers who were involved with the junk that this e-mail refers to, and, honestly, some of it was a little bit of paranoia from Pete. I mean, but I'm not sure this has any merit at all, other than Pete expressing frustration. That was it. That's how I took the e-mail.

Q Sure. But let's just make sure we're understanding and we're clear as to the subject matter of this e-mail --

A Yeah.

Q -- and I'll direct you to the last line, where it says, "I hope you can understand my frustration and disappointment that the people who procured the $10 million are being kept out of the

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loop."

Is it your understanding that that $10 million relates to the fees that potentially were going to be paid from the Banks and the Home Depot case?

A Kris, the e-mail says what it says, and I'm not going to, you know, parse through the language that Pete sent me. I took this e-mail in a general sense that he was frustrated about something. I don't think it was clearly identified in the e-mail. Pete is a very good communicator. I don't think this was especially clear, but it says what it says.

Q I understand. And the reason why I'm belaboring this point is because you seem to be unclear as to the subject matter of the e-mail?

A There's lot in here. I mean --

Q What is the general topic of this e-mail?

A Pete's frustration about whatever, that's what it seems.

Q Okay. What is the whatever?

A The whatever is about whatever "rumors" there are, and I can't really address those, since I didn't take part in those, so I'm not going to get -- I don't want to fence with you, Kris, I really don't, but I think the e-mail says what it says.

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Q And I'm just trying to understand. I can read the e-mail. Everyone in the room can read the e-mail. I'm trying to -- you're the president of Tripp Scott. You're on the compensation committee. I want to make sure I understand what your understanding of this e-mail is and what the subject matter is.

MR. HOUSTON: Objection --

MR. FRIEDMAN: Objection --

MR. HOUSTON: -- to the form of the question.

MR. FRIEDMAN: Objection. At this point, you've asked him several times, and he's answered.

MR. PEARSON: He answered that he's unclear, and so I'm willing to take the time to read the e-mail to the point where he's clear.

THE WITNESS: Look, the only thing I take out of the e-mail is that a fellow director was frustrated at this time of the year. I don't know why he was frustrated. I can't make heads or tails why he was frustrated here, but that's what I take from this e-mail, and knowing Pete for as long as I've known him, that's what I take away from this.

BY MR. PEARSON:

Q In his e-mail he says his mind is made up.

A Whose mind?

Q "You should know from my standpoint my mind

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is pretty made up concerning this issue, and the firm should not waste so much time in coming up with formulas or continue to solicit opinions from other partners who have no clue about these cases and the circumstances surrounding them."

A Yeah.

Q Do you know the cases that he was referring to?

A I could, yeah, I mean, speculate that -- you know, you want me to speculate? I don't think that's appropriate. But the cases he's talking about -- look, I don't know what that means, his mind is made up. I mean, he didn't sit on the comp committee. The money wasn't in. It is what it is. This is a director, a fellow director, in my view venting frustration, and that's it.

Q Are there any other cases besides the Banks case and the Home Depot case that the debtor could be referring to in this --

A Not that I know of, Kris, no.

Q Had you circulated any formula to Mr. Herman prior to or on the date this e-mail was written, which is, for the record, December 15, 2011, the formula relating to allocation of the fees expected to be received from Banks and Home Depot?

A No. Why would I do that?
Q Do you know if any other individual in the firm had circulated formulas to Mr. Herman regarding this subject in this e-mail?
A Not that I know of, no.
Q Was there a law firm lunch on Friday, December 16th, the year 2011?
A Where do you see that, Kris?
Oh, right here -- oh, no, let's see. Where are you looking at?
Q I'm trying to find it.
"Sorry for the long e-mail, but my expectations were to have this resolved before tomorrow's firm lunch." The e-mail was written on December 15, 2011.
My question is was there a firm lunch on December 16, 2011?
A Yeah, I think we had a Christmas lunch.
Q Would an issue of compensation have been discussed at that lunch?
A It was the Christmas party at the Coral -- it would have been at the Lauderdale Yacht Club, and it would have been -- no, there would have definitely not been discussions there, because there would have -- it was everybody, a hundred-eighty people.

Q Please turn to PGH 159, which is part of composite Exhibit 3. This e-mail is dated December 21, 2011. It appears to be a Wednesday of that calendar year.
It's from Mr. Herman to yourself, with Alex Brown copied, correct?
A That one?
Q Yes, 159.
A Yes, 159. Yes.
Q First line, "Ed, thanks for the meetings and your interest to resolve this issue with us."
Do you know what meetings Mr. Herman is referring to in the first line of this e-mail?
A Yeah, he came in and talked to me and -- with Alex, about their thoughts around when the timing of this money was going to be here, be in here, meaning in our trust account, and their thoughts around how hard they worked and how much they should get.
Q What was your reaction in that meeting?
A I listened to them both. Now, there's a different perspective from both of them, so Peter had been through the process for a number of years. This was Alex's -- Alex was made a director, basically, a week before that, and he had no idea what the process was, so we -- I think we walked him through a little

bit of the process. We probably pulled out what you had previously on the exhibit about the factors and stuff and talked to him about it.
But here -- I do know that the bottom line of this is that when we met there was no way, one, I had the ability or the power to agree to anything. Two, I wouldn't have, because the money wasn't here, and, three, we have a process, which, for purposes of 2011, was now over, December 21st, anyway.
Q Did you, at any point in time, inform either the debtor or Mr. Brown --
A Hang on one second.
Q -- of what you just said in that meeting --
A Hang on just one second. Let me just see something.
Q Sure.
A No. This would have been just -- correction, the date of December 21st would have been just prior to the compensation committee meeting in 2011, so the compensation committee met either on or -- my guess is it was after Wednesday the 21st. We probably met the next day or the day after, like the 22nd or 23rd, to deal with 2011 monies. And here's the problem, it's a basic problem, you can't split up what's not in.
Q And my question, before you provided your

clarification, which I appreciate, was did you tell the debtor or Mr. Brown in that meeting that's referenced in this e-mail, which is PGH 159, that very statement which you told me?
A I think I did.
Q What was their reaction?
What was Mr. Herman's reaction?
A Obviously, you know, he felt the need to put his thoughts down. I probably said to him, "Hey, you got a thought about how to split this money up, like, everybody else, you can give an opinion," but there was nothing really to talk about, Kris, at that point, and they -- that was pretty clear, at least as far as I was concerned, in me communicating to them, that there was -- it would have been -- there was nothing to discuss until such time as that money came in and was accounted for, one. There was some open issues around that money. There was expenses to be recouped by the law firm around that money. There was outside counsel around that money, other things going on, so no one even knew what that was, and clearly the money didn't hit our account until the next year.
Q When the Home Depot case was originated at Tripp Scott, was there any discussion as to the allocation of the potential contingency fee amongst

the directors at Tripp Scott?
A Not as a whole, but there was discussion, clearly a discussion, that is reflected in the split between Peter Herman, Christine Yates, and Greg McLaughlin, that there would be a third, a third, a third generation allocation that they agreed to. That was clear, at least to me, in looking backward on it. We generally allow our directors to work out arrangements among themselves.
So in this case the client, Mike Powell, was, in fact, Greg McLaughlin and/or Christine Yates's, I don't know which one. Pete had -- my understanding is Pete had little or no relationship with Mike prior to this case, but they needed Pete to come in and actually work the case, because neither of those lawyers are litigators, and so that was the arrangement that they worked.
Q Was that the only agreement that you're aware of with regard to allocation of the potential fees in the Home Depot case at origination of the case?
A That would have been -- so understand -- let's understand what this is.
Q Yep.
A This is an internal accounting scenario around -- so when we say who gets the generation of

the client when and if a case hits, so if the case doesn't hit, there's nothing to split up, right, so if he goes and he tries the case and he loses, then he could get a hundred percent of nothing, but there was -- clearly the way the case was opened, there's a designation that had a third, a third, a third for Greg, Christine, and Pete.
Q Is that referenced on any document in relation to Tripp Scott?
A I don't -- I don't think it was ever a question. It might be. It might be referenced in the way it was opened, in the number, in the WIP that's created by the case --
Q Are those --
A -- the work in progress that's created by the case. Sorry, Kris.
Q No worries.
Are those documents that are maintained by Tripp Scott presently?
A I'm sure they are.
Q Who would be the person that would be custodian of those documents?
A I'll keep it simple, it will probably -- I could fish them out for you.
Q Same question, line of questioning, with

respect to the Banks case, and I 'll ask each question if you like.
A I believe so, yeah.
Q And are there documents that are maintained by Tripp Scott that were made at the origination of the Banks case?
A I believe so. In fact, if you look at PGH 162, okay, I think that -- and if you look -- this is my e-mail to Mr. Herman and Mr. Brown, and working through this, Home -- it says, "My initial observations regarding the Home Depot WIP are," and I say that Home Depot looks straightforward, billing advances and expenses are X, and I assume we'll recover the costs before fees, please confirm. The firm has another $330,000 and that has to get paid, right, but see the WIP -- the WIP is -- that's the work in progress, so that I could identify the potential up in the work.
Q What is up?
A Up, meaning there are hours against the file, and that the fee would, based upon the contingency fee arrangement, would exceed the hours -- on an hourly rate that would exceed the -- the fee collected potentially could be higher than the hours that were put in the file.

Q Is there any other business term that could describe "up"?
A No, it's a contingency fee.
Q Okay. Did you have any more?
A No, except if you look at the rest of the e-mail --
Q Okay. Did --
A -- GAM, CTY, and Pete Herman, split equally in the generation. Right?
Q Yes. This e-mail contains attachments, which I've yet to receive.
A What attachments?
Q If you look at the e-mail that says "attachments," attachments?
A It would have been the WIP.
Q Do you have those attachments, because I've yet to see them. They are not in here, because they were not produced to me by Mr. Herman's counsel, and I'm just asking you if you have them?
A I'm sure we have them. We didn't destroy them, so --
Q Okay, great.
A Do you see what I'm saying?
Q Yes.
What was the largest contingency fee that an

attorney at Tripp Scott recovered in the last ten years?
A These two are right up there.
Q Okay. Other than these two?
A I think we've hit for multi-million-dollar cases before, probably not as large as these, cumulatively anyway.
Q Has an attorney at Tripp Scott in a plaintiff's side contingency case ever generated a fee in excess of $5 million for the firm?
A In a plaintiff's contingency?
Q Yes.
A In what period of time? In one case?
Q Yes, in your entire tenure at Tripp Scott.
A Not that I recall, no.
Q In the last five years?
A Not that I can recall, no.
Q How about in any other type of cases, has one lawyer generated a fee in excess of $5 million?
MR. HOUSTON: Object to the form of the question.
THE WITNESS: That's a little bit more difficult. Probably, yes.
BY MR. PEARSON:
Q What type of case?

MR. FRIEDMAN: Without revealing any serious work product or identifying the client.
THE WITNESS: Hourly, constitutional.
BY MR. PEARSON:
Q How many years was that case open?
A Three or four years, at least, and there's a couple others.
Q Without revealing any names, in your tenure on the compensation committee, what was the largest bonus ever allocated to a director in a single year?
A I don't know the numbers. I have an idea who got it.
I mean, other than these cases?
Q Yes.
A I have an idea. I don't know the numbers. I know who would have gotten it.
Q Was the bonus in excess of a million dollars?
A No, not that I know of know. Not since I've been on the comp committee.
Q And you've been on the comp committee for the last ten years, correct?
A Yeah.
Q Was the bonus in excess of a half million dollars?
A Maybe.

Q Please turn back to 159 in composite Exhibit 3.
A Okay.
Q Did you provide Mr. Herman any documents in the meeting that's referenced in the e-mail dated December 21, 2011?
A No.
Q Tomorrow, referenced in the e-mail, would have been Thursday, December 22, 2011, right?
A If the date of the e-mail was Wednesday, December 21st, yeah.
Q And with respect to the allocation of the HD and SML case, to use the terms that are contained in this e-mail, what was your thoughts about the debtor's desire to have the subject matter of the e-mail concluded prior to December 22, 2011?
MR. HOUSTON: Object to the form of the question.
THE WITNESS: The document says what is says.
BY MR. PEARSON:
Q The document is from the debtor.
I'm asking about what your recollection of your reaction to the e-mail was?
A I honestly didn't give it a whole lot of thought, and what someone puts in an e-mail -- I mean,

you know, I could have written an e-mail that I wanted to play center field for the Yankees, it doesn't make it so.
Q You could have written an e-mail saying there's going to be no allocation in 2011 also, correct?
A And there wasn't.
Q But did you write the e-mail?
A I think they knew.
Q But did you write the e-mail, yes or no?
A You have his e-mails. No, obviously, my e-mails say what they say.
Q Let's look to the middle of the e-mail, where it says, "By way of example, as I understand the way you explained your methodology to us," what methodology is the debtor referring to that you explained to him?
A I think we talked about those, because that was the explanation around -- I testified to this before.
Q Sure.
A I explained to Alex around the factors that -- which are considered. And just so we're clear, Kris, those factors are what they are, and that would have been, you know -- those are the

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discussions. That was the discussion. In fact, I think we spent, if I recall, most of the time educating Alex as to what the process was about, and less about -- you know, Pete had his own desires about trying to do whatever, but the bottom line is that that's kind of what we talked about, and we talked about -- Alex asked a bunch of questions, and I tried to respond around those factors. There's no magic to it. There's no formula, because I think -- as a discussion around a formula, there's no formula.

Q Was Mr. Herman's desire to come up with numbers?

A He tried, yeah, clearly. That's what his e-mail seems to reflect.

Q Do you recall how long the meeting that this e-mail references lasted?

A It wouldn't have been all that long, because I do recall being pressed for time around that time frame, so --

Q What was your --

A -- it won't have been long.

Q What was your reaction when you read the e-mail that is PGH 159, 160, 161?

A My reaction?

Q Yes.

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A Okay. Well, my reaction was that this was an unnecessary discussion at this point. It was premature at this point, and Pete could have whatever opinion he wanted to have relative to how to allocate something that may or may not come, but I wasn't going to deal with it directly, and they both knew it, and I think they knew that I was putting them off. But I did think it was important to send back an e-mail, so he didn't think I was totally ignoring him, and what I tried to do is at least set parameters down and reconfirm what I thought our records reflected --

Q Did you agree --

A -- which was a subsequent e-mail.

Q Did you agree with the figures set forth in the e-mail at 159, 160, 161?

A At the time?

Q Yes.

A Honestly, I didn't even give it much thought.

Q Why?

A I just told you why, because there was no money to split up. It wasn't a conversation, and what I thought individually wouldn't have matter anyway, because it's subject to committee discussion and some feedback or input from everybody else.

Q Was there anyone else in attendance at the

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meeting referenced in this e-mail, besides yourself, Mr. Brown, and Mr. Herman?

A I don't think so.

Q Was Mr. Smith in attendance at that meeting?

A No.

Q Did Mr. Smith provide you with any formulas prior to that meeting?

A Absolutely not. It would have been inconsistent with the process.

Q Did he suggest any formulas?

A Who is "he"?

Q Sorry. Mr. Smith, Dennis I believe is his first name.

A Not at that time, no.

Q Please read the first line of the second paragraph, "In recounting yesterday's meeting where you laid out the formula considered by the comp committee and suggested by Dennis" --

A Okay.

Q Was there a formula suggested by Dennis?

A Not that I recall, no. Now, do I know that Dennis has some idea around how to figure compensation out and general ideas about where to start? Yeah, I know that because over the years of sitting on a comp committee with him, I understand generally where he at

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least has a starting place.

Q Did you provide any formula that was suggested by Dennis in the meeting that this e-mail refers?

A No, that's not what this says, so no.

Q The e-mail says, "In recounting yesterday's meeting where you laid out the formula considered by the comp committee and suggested by Dennis," so I just want to make sure --

A Well, let's be clear --

Q Yes.

A -- there's no formula, so the formula was the factors, I think is what he's referring to, but I don't know what he's referring to, because I didn't write the e-mail. So there's no formula, so you can't do a mathematical formula and say, "I'm going to get X," that's not -- that's not the way it works.

And, secondly, there are other factors to consider about how much of whatever money we have is going to get disbursed, and those have to do with survival of the law firm. They have to do with things like -- so as an example, things like -- that I've experienced in the past as president, the fact that a hurricane shuts the law firm down a month and impacts your cash flows, the fact that we get hit with a

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malpractice increase over a time -- or get hit with malpractice issues, you know, where we get a bad spurt of them or whatever, like any law firm, another thing we had to do was a market adjustment for our associates, from a money standpoint, salary standpoint for them, that we have a well-known productive partner die, and deal with those -- the fallout of that, the fact that we renovated our office fully and completely and moved without borrowing a dime. Those are the kinds of cash needs -- and making sure that we had enough money every month to make payroll for a hundred-eighty people, so all of those things come into factor.

So when you ask me about what goes on inside a compensation scenario, about how we figure all of this out, all of those things are considered, because -- so as an example, you know, there were people -- I looked at -- if you look at what else -- I made some observations. There were some other people who actually put serious time in this files that deserved some up, whether they were the status of a director or not, so there's a bunch of those things. We're a cash law firm, and without the money in the door, there was no discussion to be had of any substance.

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Q So you wouldn't have added up any work revenues and divided them by a three-year average at that point in time?

A You're talking about December of '11 --

Q Yes.

A -- so we might have been in the throes of a comp committee discussion, but these cases were not a factor at that point. That was it, because we were dealing with whatever monies we wanted to disburse before year's end, the monies we had in hand. So there's some discussion beginning around -- it might have occurred already or a couple days thereafter, that the comp committee was going to convene.

In fact, I think if you look at what -- some of this, Pete is trying to -- is making these allocations based on -- even his suggested numbers here are based upon a total amount to be distributed of $12,500,000. That's far greater than these two cases even had, so he's including the monies that were already there waiting to be disbursed for end-of-year 2011.

Q In your mind was the debtor looking for certainty as to the amount he was going to receive from the Home Depot and the Banks case?

MR. HOUSTON: Object to the form of the question.

THE WITNESS: There's no certainty provided. The money was not in the door.

BY Mr. PEARSON:

Q I understand the debtor, Mr. Herman, is a very busy practicing lawyer, and he took the time to write you a three-page e-mail, where he actually goes to the painstaking detail of allocating every member, director, of the firm, including yourself, and coming with up an amount of 5.2 million for what appears to be himself and Mr. Brown. I'm just trying to understand why he wrote these e-mails to you and took this amount of detail?

A You'd have to ask him.

MR. HOUSTON: Object to the form of the question.

MR. PEARSON: I did.

THE WITNESS: Okay. So I don't know what his answer was, but you'd have to ask him. I have no idea why he wrote this e-mail.

BY MR. PEARSON:

Q Did you agree at that point in time to using a 41.5% number in multiplying against a bonus?

A No.

Q Do you know where that number was derived from?

A It's Pete's e-mail, so you'd have to ask him.

Q What was your reaction to Mr. Herman's statement that under a profit analysis, the number for Alex and himself would be $7 million out of the $10 million from Home Depot and Banks?

A I remember looking at this e-mail, my initial reaction to the e-mail was that we only have whatever we had to divvy up, the 2011 monies to distribute, and it was about two million bucks, so the rest of this was -- was allowing Peter, who is a highly passionate person, to share his feelings.

Q Do you remember numbers being provided at that meeting which must have taken place on December 20th in 2011?

A There were no numbers taking place. He might have had the sheets -- I don't recall if he had the sheet that was given out for the normal course of our compensation process, with everybody's general totals for that year.

Q Okay. Please turn to 160.

A Mm-hmm.

Q One, two, three, four, five, six lines down, "Of course the number is 500,000 shy of the number I gave you yesterday, and, frankly, I told you a profit

B6I (Official Form 6I) (12/07)
In re Peter G Herman Case No. 12-13989
Debtor(s)

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by every married debtor, whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. Do not state the name of any minor child. The average monthly income calculated on this form may differ from the current monthly income calculated on Form 22A, 22B, or 22C.

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP(S):	AGE(S):
Single	Daughter	23

Employment:	DEBTOR	SPOUSE
Occupation	Lawyer	
Name of Employer	Tripp Scott, P.A.	
How long employed	30 years	
Address of Employer	110 SE 6th Street 15th Floor Fort Lauderdale, FL 33301	

INCOME: (Estimate of average or projected monthly income at time case filed)	DEBTOR	SPOUSE
1. Monthly gross wages, salary, and commissions (Prorate if not paid monthly)	$ 18,333.00	$ N/A
2. Estimate monthly overtime	$ 0.00	$ N/A
3. SUBTOTAL	$ 18,333.00	$ N/A
4. LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$ 5,270.00	$ N/A
b. Insurance	$ 0.00	$ N/A
c. Union dues	$ 0.00	$ N/A
d. Other (Specify): 401K Deferral	$ 1,000.00	$ N/A
	$ 0.00	$ N/A
5. SUBTOTAL OF PAYROLL DEDUCTIONS	$ 6,270.00	$ N/A
6. TOTAL NET MONTHLY TAKE HOME PAY	$ 12,063.00	$ N/A
7. Regular income from operation of business or profession or farm (Attach detailed statement)	$ 0.00	$ N/A
8. Income from real property	$ 750.00	$ N/A
9. Interest and dividends	$ 0.00	$ N/A
10. Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above	$ 0.00	$ N/A
11. Social security or government assistance (Specify):	$ 0.00	$ N/A
	$ 0.00	$ N/A
12. Pension or retirement income	$ 0.00	$ N/A
13. Other monthly income (Specify):	$ 0.00	$ N/A
	$ 0.00	$ N/A
14. SUBTOTAL OF LINES 7 THROUGH 13	$ 750.00	$ N/A
15. AVERAGE MONTHLY INCOME (Add amounts shown on lines 6 and 14)	$ 12,813.00	$ N/A
16. COMBINED AVERAGE MONTHLY INCOME: (Combine column totals from line 15)	$ 12,813.00	

(Report also on Summary of Schedules and, if applicable, on Statistical Summary of Certain Liabilities and Related Data)

17. Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document:
Annual performance bonus (historically 65,000 - 70,000)

495 B.R. 555
United States Bankruptcy Court, S.D. Florida,
Fort Lauderdale Division.

IN RE Peter G. HERMAN, Debtor.
CIB Marine Capital, LLC, as assignee of CIB Marine Bancshares, Inc., successor by merger to Citrus Bank, N.A., and Kenneth A. Welt, solely in his capacity as chapter 7 trustee of the estate of Peter G. Herman, Plaintiffs,
v.
Peter G. Herman, Defendant.

Case No. 12–13989–JKO
|
Adv. Pro. No. 12–1785–JKO
|
August 6, 2013

Synopsis

Background: Creditor and Chapter 7 trustee joined in commencing adversary proceeding for denial of debtor-attorney's discharge in bankruptcy based, inter alia, on his failure to disclose the substantial bonus to which he was entitled based on the $10 million fee earned by his firm on contingency fee matters on which he had been working.

Holdings: The Bankruptcy Court, John K. Olson, J., held that:

[1] bonus of $2.7 million awarded to debtor-attorney postpetition for his years of work on contingency fee cases that together generated fee of $10 million for his firm was sufficiently rooted in debtor-attorney's pre-bankruptcy past that it was included in "property of the estate";

[2] that debtor-attorney had acted with requisite intent to hinder, delay, or defraud creditors, when he filed for Chapter 7 relief without disclosing this bonus, could be inferred, inter alia, from attorney's sophistication;

[3] attorney's nondisclosures were in nature of material "false oaths"; and

[4] debtor's prepetition transfer of funds to account of his nondebtor-wife provided independent basis for denial of bankruptcy discharge on fraudulent prepetition transfer theory.

Judgment for plaintiffs.

West Headnotes (36)

[1] **Bankruptcy** Property of Estate in General

Breadth of the interests captured by the concept "property of the estate" cannot be overstated; nonetheless, while vast, it is not limitless. 11 U.S.C.A. § 541(a).

[2] **Bankruptcy** Effect of state law in general

Courts must consult applicable state law to determine whether particular property interest is swept into bankruptcy estate. 11 U.S.C.A. § 541(a).

[3] **Bankruptcy** Future interests

"Property of the estate" includes debtor's contingent interests in property; indeed, contingency is no bar to a property interest becoming part of bankruptcy estate, even if the contingency requires additional postpetition services, and even if debtor's right to enjoyment of property may be defeated. 11 U.S.C.A. § 541(a).

[4] **Bankruptcy** Future interests

Even speculative interests are included within the Bankruptcy Code's expansive definition of "property of the estate." 11 U.S.C.A. § 541(a).

[5] **Bankruptcy** Effect of state law in general

Whether debtor's interest in property constitutes "property of the estate" is federal question; however, state law generally controls question

of whether debtor has interest in property. 11 U.S.C.A. § 541(a).

[6] **Bankruptcy** After-acquired property; proceeds; wages and earnings

Bonus of $2.7 million awarded to Chapter 7 debtor-attorney postpetition for his years of work on contingency fee cases that together generated fee of $10 million for his firm prior to commencement of his bankruptcy case was sufficiently rooted in debtor-attorney's pre-bankruptcy past that it was included in "property of the estate," though firm's compensation committee had certain amount of discretion with regard to amount of bonus, and though no award was made until after debtor had filed for Chapter 7 relief; firm did not have discretion not to award bonus, but had to calculate bonus amount by applying criteria established by firm, and attorney knew, prior to his bankruptcy filing, the fee that his efforts had generated for firm and that he was entitled to substantial bonus. 11 U.S.C.A. § 541(a)(1).

2 Cases that cite this headnote

[7] **Contracts** Implied agreements

Implied and Constructive Contracts Contracts implied in general

Florida law allows for individuals to recover on contracts implied in fact, as well as contracts implied in law.

[8] **Contracts** Implied agreements

Under Florida law, "contract implied in fact" is one form of enforceable contract, that is based on tacit promise, one that is inferred in whole or in part from parties' conduct and not solely from words of contract.

[9] **Implied and Constructive Contracts** Contracts implied in general

Under Florida law, "contract implied in law" is legal fiction, an obligation created by law without regard to parties' expression of assent by their words or conduct.

[10] **Implied and Constructive Contracts** Unjust enrichment

Fiction of contract implied in law was adopted in order to provide remedy when one party has been unjustly enriched, when that party has received a benefit under circumstances that make it unjust for him to retain it without giving compensation.

[11] **Implied and Constructive Contracts** Unjust enrichment

To prevail on claim for unjust enrichment, plaintiff needs to establish: (1) a benefit conferred on defendant by plaintiff; (2) defendant's appreciation of that benefit; and (3) defendant's acceptance of that benefit; (4) under circumstances such that it would be inequitable for defendant to retain the benefit without paying the value thereof.

[12] **Bankruptcy** Dischargeable Debtors

Discharge in bankruptcy is exclusively for honest but unfortunate debtors. 11 U.S.C.A. § 727(a).

[13] **Bankruptcy** Discharge

Debtor has no fundamental right to a discharge. 11 U.S.C.A. § 727(a).

[14] **Bankruptcy** Dischargeable Debtors

General policy that provisions denying debtor a discharge are construed liberally in favor of debtor and against creditor applies only to honest debtors. 11 U.S.C.A. § 727(a).

[15] **Bankruptcy** Presumptions and Burden of Proof

Bankruptcy Weight and Sufficiency

Burden of proof is on party objecting to debtor's discharge, and party must satisfy that burden

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by preponderance of evidence. 11 U.S.C.A. § 727(a).

[16] **Bankruptcy** 🔑 False Oath or Account

Bankruptcy 🔑 Withholding records; failure to cooperate with trustee

Bankruptcy 🔑 Concealment of Property

To receive the privilege of a discharge, debtor must provide complete financial disclosure. 11 U.S.C.A. § 727(a)(2)(B), (a)(4)(A).

[17] **Bankruptcy** 🔑 Fraudulent or Preferential Transfer

Bankruptcy 🔑 Concealment of Property

To prevail on cause of action to deny debtor a discharge on fraudulent postpetition transfer or concealment theory, plaintiff must show that (1) there was transfer or concealment, (2) after the filing of petition, (3) of property of the estate, (4) by the debtor with the intent to hinder, delay or defraud his creditors. 11 U.S.C.A. § 727(a)(2)(B).

[18] **Bankruptcy** 🔑 Concealment; omission

Bankruptcy 🔑 Fraudulent or preferential transfers

Standard of proof, in proceeding to deny debtor a discharge on fraudulent postpetition transfer or concealment theory, is proof by preponderance of the evidence. 11 U.S.C.A. § 727(a)(2)(B).

[19] **Bankruptcy** 🔑 Fraudulent or Preferential Transfer

Bankruptcy 🔑 Concealment of Property

Plaintiff seeking to deny debtor a discharge on fraudulent postpetition transfer or concealment theory is not required to show that the transfer or concealment caused harm; discharge exception is intended to prevent discharge of debtor who attempts to avoid payment to creditors by concealing or otherwise disposing of assets. 11 U.S.C.A. § 727(a)(2)(B).

[20] **Bankruptcy** 🔑 Concealment of Property

"Concealment" of property occurs, such as may provide basis for denial of debtor's discharge, when debtor's interest in the property is not obvious, but debtor continues to reap the benefits that property has to offer. 11 U.S.C.A. § 727(a)(2)(B).

[21] **Bankruptcy** 🔑 Concealment of Property

Omissions in debtor's bankruptcy schedules and statements of financial affairs (SOFA) constitute "concealment," within meaning of discharge exception, where the omissions are fraudulent and material. 11 U.S.C.A. § 727(a)(2).

2 Cases that cite this headnote

[22] **Bankruptcy** 🔑 Concealment of Property

Omission is "material," as required to rise to level of a "concealment" under discharge exception, if it bears a relationship to debtor's business transactions or estate or concerns discovery of assets, business dealings, or existence and disposition of debtor's property. 11 U.S.C.A. § 727(a)(2).

[23] **Bankruptcy** 🔑 Concealment of Property

Omission of information is "fraudulent," as required to rise to level of a "concealment" under discharge exception, if it is intended to go unnoticed by Chapter 7 trustee. 11 U.S.C.A. § 727(a)(2).

[24] **Bankruptcy** 🔑 Debtor's duties in general

Debtors in bankruptcy must fully disclose all transfers, even if money is not available to creditors at the time of filing.

[25] **Bankruptcy** 🔑 Concealment of Property

Bankruptcy 🔑 Particular grounds for objection to discharge

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That Chapter 7 debtor-attorney had acted with requisite intent to hinder, delay, or defraud creditors, and especially creditor that was pursuing him for his liability on guarantee of multimillion dollar loan, when he filed for Chapter 7 relief without disclosing, as estate asset, the very substantial bonus that he anticipated receiving based on the $10 million fee earned by his firm on contingency fee matters on which he had been working could be inferred from attorney's sophistication, as well as from timing of his bankruptcy filing after creditor had begun to pursue him on guarantee and after firm's receipt of this $10 million fee, and supported denial of debtor's discharge on fraudulent postpetition concealment theory. 11 U.S.C.A. § 727(a)(2)(B).

1 Cases that cite this headnote

[26] **Bankruptcy** Concealment of Property

Because it is extremely unlikely that debtor will confess to acting with intent to hinder, delay or defraud a creditor or trustee, as required to deny him a discharge on fraudulent transfer or concealment theory, courts analyze the totality of the circumstances and rely upon badges of fraud to determine whether actual fraudulent intent exists. 11 U.S.C.A. § 727(a)(2).

[27] **Bankruptcy** False Oath or Account

It is not for debtor to decide what is and is not relevant; debtor who omits important information and fails to make full disclosure places the right to discharge in serious jeopardy. 11 U.S.C.A. § 727(a).

[28] **Bankruptcy** False Oath or Account

Purpose of "false oath" discharge exception is to ensure that debtor provides Chapter 7 trustee and creditors with reliable information in order to assist trustee in administration of bankruptcy estate. 11 U.S.C.A. § 727(a)(4)(A).

[29] **Bankruptcy** Requisites in general

Bankruptcy Property

Bankruptcy Debtor's duties in general

Debtor has obligation to truthfully disclose all of his assets and answer all questions in his bankruptcy schedules.

[30] **Bankruptcy** False Oath or Account

Goal of "false oath" discharge exception is to facilitate administration of Chapter 7 cases without the need for parties in interest to expend resources to confirm veracity of debtor's bankruptcy documents. 11 U.S.C.A. § 727(a)(4)(A).

[31] **Bankruptcy** Errors on and omissions from schedules

Dishonesty in connection with debtor's bankruptcy schedules and statement of financial affairs (SOFA) comes at a price, i.e., the denial of debtor's discharge; prohibitions and consequences set forth in "false oath" discharge exception are the teeth to the Bankruptcy Code's disclosure requirements. 11 U.S.C.A. §§ 521, 727(a)(4)(A).

2 Cases that cite this headnote

[32] **Bankruptcy** False Oath or Account

To prevail on cause of action to deny debtor a discharge on "false oath" theory, plaintiff must establish (1) that debtor made a material false oath, and (2) that false oath was made knowingly and fraudulently. 11 U.S.C.A. § 727(a)(4)(A).

[33] **Bankruptcy** Errors on and omissions from schedules

Deliberate omissions in debtor's schedules and statement of financial affairs (SOFA) constitute "false oaths or accounts" and are sufficient to deny his discharge. 11 U.S.C.A. § 727(a)(4)(A).

2 Cases that cite this headnote

[34] **Bankruptcy** False Oath or Account

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Subject matter of false oath is "material," as required to provide basis for denial of debtor's discharge, if it bears a relationship to debtor's business transaction or estate, or concerns discovery of assets, business dealings, or existence and disposition of debtor's property. 11 U.S.C.A. § 727(a)(4)(A).

[35] **Bankruptcy** Errors on and omissions from schedules

Bankruptcy Particular grounds for objection to discharge

Chapter 7 debtor-attorney's failure to schedule, as estate asset, the very substantial bonus that he anticipated receiving based on the $10 million fee earned by his firm on contingency fee matters on which he had been working for years, and his failure to disclose prepetition transfer of funds into account of his nondebtor-wife, were in nature of material "false oaths," which court could infer were made with intent to hinder, delay, or defraud, of kind required by "false oath" discharge exception; in filing for Chapter 7 relief just after firm received this $10 million fee without disclosing effect that this fee had on bonus payable to him from firm, at time when creditor was pursuing him for his liability on guarantee of multimillion loan, it could be inferred that debtor was attempting to shield funds while obtaining discharge of his debt on guarantee. 11 U.S.C.A. § 727(a)(4)(A).

1 Cases that cite this headnote

[36] **Bankruptcy** Transfer to nondebtor spouse or family members

Chapter 7 debtor's prepetition transfer of funds to account of his nondebtor-wife provided independent basis for denial of bankruptcy discharge on fraudulent prepetition transfer theory. 11 U.S.C.A. § 727(a)(2)(A).

Attorneys and Law Firms

***560** Bart A. Houston, Houston Law Group, P.A., Fort Lauderdale, FL, for Defendant.

Neil P. Linden, Kristopher E. Pearson, Miami, FL, for Kenneth A. Welt, Intervenor–Plaintiff.

Kristopher E. Pearson, Miami, FL, for CIB Marine Capital, LLC, Plaintiff.

Chapter 7

John K. Olson, Judge United States Bankruptcy Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this Adversary Proceeding, Plaintiffs, CIB Marine Capital, LLC, as assignee of CIB Marine Bancshares, Inc., successor by merger to Citrus Bank, N.A. ("*CIB Marine* ") and Kenneth A. Welt, as the duly appointed, authorized, qualified and acting Chapter 7 Trustee ("*Trustee Welt* ") for the bankruptcy estate of Peter G. Herman (the "*Debtor* "), object to and seek denial of the Debtor's discharge based upon intentional concealment of prepetition assets, nondisclosure of prepetition transfers and related false oaths.

For years prior to his bankruptcy filing, the Debtor acted as an originating Director and co-lead trial counsel in two separate contingency fee cases against The Home Depot U.S.A., Inc. (the "Home Depot Case") and Security Mutual Life Insurance Company of New York (the "Security Mutual Case"), respectively (collectively, the "*Contingency Fee Cases* "). The Debtor's trial victories in the Contingency Fee Cases, which occurred prior to the commencement of his Chapter 7 bankruptcy proceeding, resulted in the receipt of approximately $10 million in fees (the "*10 Million Fee* ") by his law firm, Tripp Scott, P.A. ("*Tripp Scott* "), and ultimately in post-petition compensation to the Debtor in the amount of $2.7 million on account of, among other things, his prepetition services and his status as a Director of Tripp Scott. Although the record in this case reflects numerous prepetition communications in which the Debtor stated his expectation and belief that he was entitled to a substantial share in the $10 Million Fee, the Debtor's interest in the $10 Million Fee was not disclosed in any of the Debtor's submissions in his Chapter 7 bankruptcy case, including in his Schedules and Statement of Financial Affairs.

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The Debtor's omissions in this regard must be juxtaposed with his obligations to CIB Marine, which held an approximately $4.5 million prepetition deficiency judgment against the Debtor on account of his guarantee of a failed real estate loan, and was actively attempting to collect such debt at the time of the Debtor's bankruptcy filing, including through the garnishment of the Debtor's wages. Taken together, the Court finds the evidence reflects a scenario where, as of the date of his bankruptcy filing, the Debtor fully expected to receive millions of dollars in earnings in the near term (which he ultimately did), but sought to shield those earnings from his largest creditor through his Chapter 7 bankruptcy filing and related non-disclosure in his bankruptcy Schedules.

For the reasons set forth below, the Court concludes that the Debtor's interest in the $10 Million Fee is property of the ***561** Debtor's bankruptcy estate, and concludes that the Debtor concealed his interest in the $10 Million Fee in his bankruptcy Schedules with the intent to hinder, delay or defraud Trustee Welt and his creditors, most particularly CIB Marine. The Court further concludes that the Debtor committed false oaths or accounts in his bankruptcy Schedules and Statement of Financial Affairs relating to the $10 Million Fee. Based upon the foregoing, the Debtor's discharge is denied. Additionally, because the Court also concludes that the Debtor transferred money to his ex-wife within the year prior to the date on which he filed bankruptcy with the intent to hinder, delay or defraud his creditors, concealed such transfer, and also committed false oaths or accounts in his bankruptcy Schedules and Statement of Financial Affairs relating to such transfer, the Debtor's discharge is denied.

This Adversary Proceeding was tried before the Court on June 5 and 6, 2013 (the "Trial"). The Debtor testified at Trial, along with two of his colleagues, Edward J. Pozzuoli, Esq. ("Pozzuoli") and Alexander D. Brown, Esq. ("Brown"), both of whom are attorneys at Tripp Scott.

I. FINDINGS OF FACT[1]

[1] The findings of fact are derived from the *Joint Pretrial Stipulation* [ECF No. 86] (the "*Pretrial Stipulation* ") and the testimonial and documentary evidence presented at Trial. Pursuant to Local Bankruptcy Rule 9070–1, the Plaintiffs' Trial Exhibits were marked alphabetically and the Debtor's Trial Exhibits were marked numerically, and will be referred to using such markings. Plaintiffs' Exs. 1–28 were admitted into evidence at the beginning of the Trial, without any objection by the Debtor. Thus, Exs. 1–28 were unencumbered by any evidentiary objection, admitted into evidence for all purposes and were given full weight at Trial. The Debtor's Exs. A, C, D, E, and F were admitted into evidence at the beginning of the Trial. The Debtor's Exs. B, G, and H were not admitted into evidence at Trial.

The issues in this Adversary Proceeding, including the Plaintiffs' claims that the Debtor intentionally concealed his interest in the $10 Million Fee, are best understood by assessing the facts and the Debtor's state of mind as of the date he filed his Chapter 7 bankruptcy case, including as to his existing liabilities and anticipated earnings as a Director of the law firm of Tripp Scott. Accordingly, the discussion that follows: (i) begins by addressing the facts surrounding CIB Marine's prepetition judgment against the Debtor in the amount of approximately $4.5 million; (ii) next addresses the Debtor's rights to compensation as a Director of Tripp Scott as they existed and as he understood them as of the date of his bankruptcy filing; (iii) then discusses the Contingency Fee Cases, their resolution and the Debtor's $2.7 million bonus from the $10 Million Fee; and, (iv) sets forth the facts surrounding the Debtor's concealment of assets and improper transfers in connection with his Chapter 7 bankruptcy case, which form the basis for the Plaintiffs' request for denial of the Debtor's discharge pursuant to §§ 727(a)(2) and (a)(4).

A. CIB Marine's Prepetition Judgment Against the Debtor

In January 2007, the Debtor owned certain membership interests in Esquire Ventures, LLC, a Florida limited liability company ("*Esquire* "). In January 2007, Esquire obtained a loan from Citrus Bank in the principal amount of $6,787,500.00 (the "*Esquire Loan* "). The Esquire Loan was secured by, *inter alia,* a first mortgage encumbering real property owned by Esquire in Indian River County, Florida (the "*Esquire Property* "). On January 25, 2007, the Debtor executed an Unconditional Guaranty in favor of Citrus Bank ***562** guaranteeing the Esquire Loan (the "*Debtor Guaranty* ").[2] In the Debtor Guaranty, the Debtor waived the benefits of all exemptions except any homestead exemption.

[2] The Debtor admitted at Trial that his signature appeared on the Debtor Guaranty, which was admitted into evidence at Ex. 11. The Debtor Guaranty reflects a date of June 25, 2007, and no party introduced any evidence

> to the contrary at Trial concerning the date of execution of the Debtor Guaranty.

On January 24, 2009, the Esquire Loan matured, and Esquire failed to pay the loan balance. On February 19, 2009, CIB Marine instituted an action in the Circuit Court for the 19th Judicial Circuit Court for Indian River County, Florida seeking to enforce the Esquire Loan and the Debtor Guaranty (the "*Esquire Action* "). On June 23, 2011, CIB Marine obtained a final judgment against Esquire, *inter alia,* foreclosing the mortgage encumbering the Esquire Property. On December 6, 2011, the court in the Esquire Action conducted a hearing on CIB Marine's request for entry of a deficiency judgment against the Debtor. The Debtor testified at Trial that he did not attend the hearing or oppose the request for a deficiency judgment because the deficiency amount was already established prior to the hearing.

On December 8, 2011, the Court in the Esquire Action entered a final judgment of deficiency in the amount of $4,569,464.48 against the Debtor (the "*CIB Marine Judgment* "). On March 6, 2013, the Fourth District Court of Appeal affirmed the CIB Marine Judgment. On April 16, 2013, the Fourth District Court of Appeal denied the request for rehearing and rehearing *en banc,* and for a written opinion relating to the affirmance of the CIB Marine Judgment.

Prior to the Debtor filing bankruptcy, CIB Marine was the only creditor actively pursuing collection efforts against the Debtor. On December 29, 2011, the court in the Esquire Action, at the request of CIB Marine, issued a Continuing Writ of Garnishment against Salary or Wages to Tripp Scott.

B. The Debtor and Tripp Scott

1. The Debtor

The Debtor is a practicing attorney, was admitted to the Florida Bar in 1982 and is "AV" rated by Martindale–Hubbell. The Debtor is employed by and is a non-shareholder "Director" at Tripp Scott. He has been employed by Tripp Scott since 1982. The Debtor testified that he is a trial lawyer. His areas of practice have included: (i) Intellectual Property Litigation; (ii) General Commercial Litigation (but, specifically excluding any matters relating to bankruptcy practice); (iii) Healthcare; and (iv) Personal Injury. According to the Debtor's biography from Tripp Scott's website, a copy of which was admitted into evidence at Trial as Ex. 1, (i) the Debtor has represented Fortune 500 companies and several prominent Florida businesses; (ii) he has been successful in litigation claims that have resulted in significant changes in the law, specifically in the area of negligence law relating to pharmacists and prescription pharmaceuticals; and (iii) he has served as chair as well as co-chair of the firm's litigation department. The testimony at Trial also reflects that the Debtor is a former member of the Compensation Committee at Tripp Scott.

The Court concludes on the basis of his testimony and the entire record made at Trial that Mr. Herman is a highly skilled, experienced, and sophisticated trial lawyer.

On February 18, 2012 (the "*Petition Date* "), the Debtor filed a voluntary petition ***563** under Chapter 7 of Title 11 of the United States Code, which initiated the bankruptcy case from which this Adversary Proceeding arises.

2. Tripp Scott and Director Compensation

Tripp Scott is a law firm, which is organized as a subchapter C corporation under Florida law. Trial Tr. 127:5–8. Tripp Scott is structured in a manner such that the firm has only two actual shareholders, Norman Tripp and Dennis Smith, each of whom acts as a trustee of a voting trust which has beneficial ownership of all of the firm's shares. The firm has several attorneys who are referred to as "Directors." Because the firm has only two shareholders, it is an individual's status and performance as a Director within the firm, and not the ownership of shares, that provides a basis for sharing in firm profits. Indeed, the Trial testimony of Tripp Scott's President and Director, Edward Pozzuoli, shows that: (i) ownership of actual shares is not a factor in compensation; (ii) all shares in the firm are held in trust for the benefit of all of Tripp Scott's Directors, including the Debtor; and (iii) the compensation package the firm has for Directors is, "by design," "performance driven." *See* Trial Tr. 188:14–24, 189:25–190:16.

Directors at Tripp Scott do not have written employment agreements but instead receive a "compensation package" that consists of the payment of monthly salary throughout a fiscal year (described by Mr. Pozzuoli as the "two-thirds" portion of Director compensation) and "disbursements" based upon the satisfaction of "certain performance criteria" (described by Mr. Pozzuoli as the "one-third" portion of Director compensation), which are typically made in December of each fiscal year.[3] *See id.* at 186:5–18. Director

compensation is established by Tripp Scott's Compensation Committee, whose present members are Mr. Pozzuoli, Dennis Smith, Esq., James Scott, Esq. and Matt Zifrony. Esq., all of whom are Directors at Tripp Scott.

[3] Tripp Scott is on a calendar year for accounting purposes, which means its fiscal year ends on December 31. If Tripp Scott does not distribute all or substantially all of its cash on hand prior to the end of its fiscal year, tax consequences are triggered at the corporate level, which would result in a double taxation on the firm's income.

The Debtor's annual compensation for 2011 consisted of a $220,000.00 salary and a performance bonus in the amount of $65,000.00. The Debtor's annual compensation for 2012 consisted of a $220,000.00 salary and a $115,000 performance bonus.[4] The Debtor's 2012 compensation also included a significantly heightened additional performance bonus (which was paid to the Debtor postpetition) in the amount of $2.7 million on account of his interest in the $10 Million Fee, which, as discussed below, was awarded by the Compensation Committee pursuant to Tripp Scott's established procedures for such awards.

[4] This annual performance bonus was derived from the annual bonus pool at Tripp Scott. The $115,000 bonus was in addition to the $2.7 million special bonus paid from the $10 Million Fee.

Mr. Pozzuoli's testimony at Trial reflects that the Compensation Committee is vested with the authorization to set Director compensation (salary and performance bonuses). The Compensation Committee's ultimate award of the amount of the performance bonus is done through its analysis of a Director's performance in terms of client generation and work revenue, along with consideration of various factors set forth in a document entitled "Goal # 5," ***564** which was admitted into evidence as Ex. 6 and referred to in testimony at Trial.[5] Mr. Pozzuoli's testimony at Trial and in reference to Goal # 5 shows that, while the Compensation Committee may consider certain subjective factors, including the opinions of other Directors, in determining the amount of a Director's performance bonus, the Committee focuses on numerous objective factors including a Director's "personal billing rate," "total dollars billed as client partner," "realization rate," "personal billable hours," and "client generation." *See* Ex. 6; Trial Tr. 192:8–193:15.

[5] From the face of it, the document referred to as Goal # 5 appears to have been prepared some time in 1999.

Although Mr. Pozzuoli testified that the Compensation Committee has discretion in setting the ultimate *amount* of total Director compensation, no testimony or document was admitted into evidence stating (or even suggesting) that the Compensation Committee could suspend or terminate the practice of awarding Director bonuses entirely, which Mr. Pozzuoli testified was part of Directors' "compensation package" and specifically designed to be "performance driven." Likewise, no testimony or document was admitted into evidence establishing that the Compensation Committee could decide to award a Director a bonus in the amount of zero dollars, or depart from the criteria considered by the Compensation Committee in awarding such bonuses, in those instances where there was money to disburse and the Director was alive and employed when the distribution was to occur. To the contrary, Mr. Pozzuoli expressly testified that, in the last ten years, other than for reasons of law firm finances (*i.e.,* instances where the firm lacked the money to make a bonus distribution to Directors), there had not been an occasion where a Director who was alive and employed with the firm at the time a bonus was awarded was denied a bonus. *See* Trial Tr. 213:20–214:10. Moreover, the Debtor testified that the last time he received a zero bonus at Tripp Scott was "probably in, it's either the early 2000s or late '90s." Trial Tr. 64:17–20. Finally, the documentary evidence introduced at Trial revealed that Tripp Scott did not fail to award any Director a bonus between 2008 and 2011.

C. The Contingency Fee Cases

1. The Home Depot Case

The Debtor was co-lead trial counsel, along with Mr. Brown, for the plaintiff in the Home Depot Case, styled *Powell v. The Home Depot U.S.A., Inc.,* Case No. 07–80435–CIV–HURLEY/HOPKINS, which was before the Honorable Daniel T.K. Hurley, United States District Court Judge for the Southern District of Florida and United States Magistrate Judge James M. Hopkins. The Debtor was on the ECF notice list in the Home Depot Case. The Home Depot Case was tried before a jury. On June 3, 2010, the court in the Home Depot Case entered an Amended Final Judgment in favor of the plaintiff against The Home Depot U.S.A., Inc. in the amount of $23,450,889.13 based upon a jury verdict (the "*Home Depot Judgment* "). The Debtor's level of personal involvement in the Home Depot Case decreased substantially after the case was tried.

On June 11, 2010, the defendants in the Home Depot Case appealed the Home Depot Judgment to the United States Court of Appeals for the Federal Circuit (the "*Federal Circuit* "). On November 14, 2011, the Federal Circuit affirmed the Home Depot Judgment. On February 16, 2012, the Federal Circuit's Mandate was ***565** issued. On February 22, 2012, the Federal Circuit's affirmance of the Home Depot Judgment and Mandate were entered on the docket in the Home Depot Case. On March 1, 2012, nine business days after the Debtor's bankruptcy filing, Tripp Scott received $4,126,016 into its bank account as its fee from the Home Depot Case.

The Debtor and two other Directors at Tripp Scott originated the Home Depot Case at Tripp Scott and equally shared origination credit. The plaintiff in the Home Depot Case retained Tripp Scott on a contingency fee basis. The Debtor testified that in 2011 and 2012, he was aware of the terms of the contingency fee contract between Tripp Scott and the plaintiff in the Home Depot Case, Michael Powell.

2. The Security Mutual Case

The Debtor was also co-lead trial counsel, along with Mr. Brown, for the plaintiffs in the Security Mutual Case styled *Member Services, Inc. v. Security Mutual Life Insurance Company of New York,* Civil Action No. 3:06–CV–1164 (TJM)(DEP), which was before the Honorable David E. Peebles, United States Magistrate Judge for the Northern District of New York.

The Security Mutual Case was filed on September 29, 2006, by another law firm. Tripp Scott was substituted as counsel of record for the plaintiffs in the Security Mutual Case on November 4, 2010. The Debtor was on the ECF notice list in the Security Mutual Case. The Security Mutual Case was also tried before a jury. On October 13, 2011, the Clerk of the Court in the Security Mutual Case entered judgment in favor of the plaintiffs against Security Mutual Life Insurance Company of New York and Archway Technology Services, Inc. in the amount of $26,000,000 based upon a jury verdict, which consists of $16,000,000 in compensatory damages and $10,000,000 in punitive damages (the "*Security Mutual Judgment* "). The defendants in the Security Mutual Case did not appeal the Security Mutual Judgment. The Debtor's level of personal involvement in the Security Mutual Case decreased substantially after the case was tried.

The Debtor executed a satisfaction of the Security Mutual Judgment on March 13, 2012, which states that the Security Mutual Judgment had been fully paid to the satisfaction of the plaintiffs. On March 13, 2012, 17 business days following the Debtor's bankruptcy filing, Tripp Scott received $5,796,000.00 into its bank account as its fee in the Security Mutual Case.

The plaintiffs in the Security Mutual Case retained Tripp Scott on a contingency fee basis. The Debtor and Brown equally shared origination credit[6] on the Security Mutual Case. The Debtor testified that in 2011 and 2012 he was aware of the terms of the contingency fee contract between Tripp Scott and the plaintiffs in the Security Mutual Case, Member Services and Roger and Aaron Banks.

6 See Footnote 7 below.

D. The Debtor's Prepetition Communications Regarding His Interest in the $10 Million Fee

In the months prior to the Petition Date, the Debtor engaged in e-mail communications with Mr. Pozzuoli (Tripp Scott President and Compensation Committee member) and Mr. McLaughlin (Tripp Scott CFO and co-originator of the Home Depot Case) concerning dividing the $10 Million Fee. These e-mail communications: (i) establish that on the Petition Date the Debtor believed he was entitled to millions of dollars in compensation from the $10 Million Fee based upon his prepetition interest ***566** in the fee; and (ii) contradict the Debtor's suggestions that prior to and on the Petition Date he believed he had no interest in the $10 Million Fee. Based upon these e-mail communications, which are discussed below, the Court finds the Debtor believed, and reasonably so, he had a substantial interest in the $10 Million Fee on the Petition Date.

1. The Pozzuoli Prepetition E-mails

The Debtor's e-mails from December 2011 through January 2012 are the most probative evidence introduced at Trial of the Debtor's state of mind concerning his prepetition interest in the $10 Million Fee from the Contingency Fee Cases. The Debtor initiated an e-mail dialogue with Mr. Pozzuoli on December 6, 2011, regarding the $10 Million Fee, which continued through January 9, 2012 (the "*Pozzuoli Prepetition E-mails* "). The Pozzuoli Prepetition E-mails, which were admitted into evidence at Ex. 2, demonstrate: (i) the Debtor believed that he possessed a substantial interest in the $10 Million Fee prior to and on the Petition Date; (ii) based upon

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such interest, he reasonably anticipated that he was going to receive a multi-million dollar bonus in 2012 from the $10 Million Fee; (iii) Mr. Pozzuoli did not contradict the Debtor's belief concerning his interest in the $10 Million Fee; and (iv) the members of Tripp Scott were engaged in prepetition discussions regarding dividing the $10 Million Fee among the firm's Directors.

Some of the more significant statements by the Debtor include the following:

- On December 6, 2011, at 5:17 p.m., the Debtor wrote to Mr. Pozzuoli and stated, "I wanted to discuss and finalize the formula for allocation[7] of the Sml and home depote [sic] cases. I know there has been a lot of discussion and for many reasons I would like to have finality by next Friday."[8] Ex. 2, PGH (2)—000157.

- On December 15, 2011, the Debtor wrote to Mr. Pozzuoli at 8:16 a.m., expressing that it was unacceptable that Mr. Pozzuoli was not answering his e-mails and that second and third-year partners were being told more than he was with respect to the anticipated $10 Million Fee. Ex. 2, PGH (2) 00158. Indeed, the Debtor informed Mr. Pozzuoli, "You should know that from my standpoint my mind is pretty much made up concerning this issue and the firm should not waste so much time in coming up with formulas or continue to solicit opinions from partners who have no clue about these cases and the circumstances surrounding them." *Id.* He also stated that he expected that the issue would have been resolved prior to the Firm's lunch on December 16, 2011. *Id.* The Debtor concluded this communication by stating: "I hope you can understand my frustration and disappointment that the people who ***567** procured the 10 million dollars are being kept out of the loop." *Id.*

- On December 15, 2011, the Debtor wrote a further email to Mr. Pozzuoli at 4:11 p.m., in which he referenced a meeting among himself, Mr. Pozzuoli and Mr. Brown, and applied what he claimed was the "formula considered by the comp committee and suggested by Dennis [Smith]," and allocated actual dollar amounts from the aggregate of the $10 Million Fee and the estimated 2011 bonus pool in the amount of $2.5 million to eighteen Tripp Scott Directors, including a proposed allocation of approximately $5.2 million for himself and Mr. Brown. Ex. 2, PGH (2)—000159–61.

- On December 22, 2011, at 4:36 p.m., the Debtor sent a further email to Mr. Pozzuoli, noting the following with regard to his interest in the $10 Million Fee: "Also Eddie, I don't want to sound like a broken record but I was extremely serious that this should be resolved today. I believe this has been vetted enough and it's a simple process based upon what has been done in the past." Ex. 2, PGH (2)—00163.[9]

- On January 8, 2012, the Debtor wrote to Mr. Pozzuoli at 5:47 a.m., and, in referring to his interest in the $10 Million Fee, stressing that he did not "wish to wait until the money comes in and then begin discussions," and further noting the he "was told before the Holidays that we could likely address the resolution of this by the first week of January." Ex. 8.

7 It is clear from the Debtor's testimony that "allocation" meant the allocation of origination credit for the contingent fee cases, not the allocation of dollars from the fees ultimately paid to Tripp Scott.

8 The Debtor testified that when he wrote to Mr. Pozzuoli on December 6, 2011, at 5:17 p.m., he knew what the gross fees were to be awarded to Tripp Scott under the contingency fee contracts in the Contingency Fee Cases based upon the final judgments entered in those two cases and the terms of the respective contingency fee contracts. The Debtor testified that his general understanding was that the gross fees to be awarded to Tripp Scott in the Contingency Fee Cases was approximately $10 million dollars, which is very close to what Tripp Scott was ultimately awarded.

9 The Court finds that this e-mail communication reveals how significant dividing the $10 Million Fee was to the Debtor prior to the Petition Date. The Court infers from this e-mail that the Debtor had been thinking about his distribution from the $10 Million Fee virtually every day since at least December 6, 2011, when he commenced the Pozzuoli Prepetition E-mails.

The foregoing statements contradict the Debtor's testimony at Trial that he believed he had no prepetition interest in the $10 Million Fee because Tripp Scott had not yet collected those proceeds on the Petition Date. Further, the foregoing communications between the Debtor and Mr. Pozzuoli do not contain a single exchange in which Mr. Pozzuoli indicated that the Debtor was not entitled to a performance-based bonus on account of the Contingency Fee Cases or could be denied any such bonus at the sole discretion of the Compensation

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Committee. Indeed, rather than challenging the Debtor's position regarding his right to a performance bonus under the firm's compensation system, Mr. Pozzuoli's responses to the Debtor's communications focused on logistical concerns, noting, for example, that "there needs to be some money set aside for non directors/staff from both cases," Ex. 2, PGH (2)—00162, and seeking additional information regarding the anticipated timing of the firm's receipt of fees from the Contingency Fee Cases. *Id.* at PGH (2)—00166.

With regard to Mr. Pozzuoli's latter inquiry regarding the receipt of fees, on January 9, 2012, the Debtor informed Mr. Pozzuoli that "HD should be resolved in the next 60 days if not sooner now that the judges are back from the holidays." *Id.* at PGH (2)—000167. Consistent with the Debtor's representations, the record reflects that Tripp Scott received the award from the Home Depot Case less than sixty days from January 9, 2012.

With regard to fees in the Security Mutual Case, the Debtor advised Mr. Pozzuoli on January 9, 2012, as follows: "We are working out the final details. *I believe I* ***568** *have complete control over w hen we receive the settlement funds and, in fact, I could have had that money before the end of the year; however, in talking with Greg and the client, it was better to push it into this year for tax reasons."*[10] *Id.* (emphasis added). When this statement is analyzed in the context of the Brown Settlement E-mails, which are discussed below, the Court finds that the Debtor believed on January 9, 2012, he did have complete control over the resolution of the Security Mutual Case. In fact, the Brown Settlement E-mails also support the Court's finding that the Debtor believed that resolution of the Security Mutual Case would occur in December 2011 or January 2012.

10 At Trial, the Debtor testified that this statement was incorrect, but could not identify when he came to discover the erroneous nature of the statement and whether he advised Mr. Pozzuoli that the statement was incorrect.

2. The McLaughlin Prepetition E-mails

Concomitantly with the Pozzuoli Prepetition E-mails, the Debtor engaged in e-mail communications with Mr. McLaughlin, the Chief Financial Officer of Tripp Scott and a co-originator of the Home Depot Case, regarding the proper allocation of the $10 Million Fee among the firm's Directors in December 2011 (the "*McLaughlin Prepetition E-mails* "). The McLaughlin Prepetition E-mails were admitted into evidence at Ex. 7. The McLaughlin Prepetition E-mails buttress the Court's finding and reflect the Debtor's belief, as well as the belief of Tripp Scott's CFO, that the compensation system at Tripp Scott vested the Debtor with a multi-million dollar, prepetition interest in the $10 Million Fee and that the Compensation Committee did not have the discretion to deny the Debtor a performance bonus pursuant to the firm's compensation system. Like the Pozzuoli Prepetition E-mails, the McLaughlin Prepetition E-mails show that the Debtor believed that he possessed an interest in the $10 Million Fee prior to the Petition Date, and that members of the firm (including its President and CFO) were engaged in prepetition discussions regarding the distribution of such proceeds among the Firm's Directors.

Among other discussions contained in the McLaughlin Prepetition E-mails, for example, the following is noted:

- On December 22, 2011, at 11:21 a.m., Mr. McLaughlin advised the Debtor: "Don't fall into the trap about using the same methodology used for the normal bonus pool. The budgeted profit of the firm is around 15%. A $3M total partner would generate 450,000 in profit for the firm in one year. Meaning it would take them 10 years to generate the profit generated by Powell [Home Depot] alone." Ex. 7, PGH (2)—00675.

- Later on that same date at 12:04 p.m., Mr. McLaughlin further discusses the extent of discussions regarding the allocation of the $10 Million Fee among the Directors, noting "I am not far off your 33%. I am a lot closer to you than Ed's $2,000,000 based upon his formulas. Split the different between 25% and 33% and you are there. He has you at 20%." Ex. 7, PGH (2)—00673.

- In response to Mr. McLaughlin's email, at 12:20 p.m., the Debtor stressed as follows: "Not sure who told you I was att [sic] 33 percent. I'm far north of that based upon even the firms [sic] own methodology." *Id.*

Taken together, these communications, coupled with the Pozzuoli Prepetition E-mails, demonstrate not only that the Debtor ***569** believed he was entitled to a significant bonus from the $10 Million Fee prior to the Petition Date, but, perhaps more importantly, that the firm's other Directors, including its CFO and two members of the Compensation Committee (Mr. Pozzuoli and Mr. Smith) were actively engaged in establishing the final amount of such compensation prior to the Petition Date. None of the

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foregoing communications contain any suggestion that the Debtor was not entitled to a performance-based bonus from the $10 Million Fee on account of the Contingency Fee Cases or could be denied any such bonus at the sole discretion of the Compensation Committee.

Based on the foregoing communications, the Court finds that the Debtor's, Mr. Brown's and Mr. Pozzuoli's testimony at the Trial that the Compensation Committee had sole discretion to award bonuses does not mean that the Compensation Committee could have denied the Debtor a bonus from the $10 Million Fee. At most, the testimony and evidence at Trial shows that the Compensation Committee had the authority to determine the exact amount of the Debtor's bonus from the $10 Million Fee within a range of reasonableness based upon the factors ordinarily considered and applied by the Committee in making such determinations.

E. Resolution of the Contingency Fee Cases

As discussed above, Tripp Scott received fees of $4,126,016.00 on March 1, 2012, based upon the Home Depot Judgment and $5,796,000.00 on March 13, 2012, based upon the Security Mutual Judgment. These two fee payments were made based upon months of prepetition settlement negotiations. The settlement communications between Mr. Brown and defendants' respective counsel in the Contingency Fee Cases in the months and days leading up to the Petition Date, which were admitted into evidence at Ex. 27 (the "*Brown Settlement E-mails* "), demonstrate that not only did the Debtor reasonably believe that resolution of those cases was imminent on the Petition Date, but he actually knew substantive resolution had occurred prior to the Petition Date. As discussed below, the evidence at Trial establishes that the Contingency Fee Cases were virtually resolved prior to the Petition Date, and resolved with finality, both substantively and formally, within days after the Petition Date. The Court discusses the Brown Settlement E-mails below.

At Trial, the Debtor and Mr. Brown testified concerning Rule 50 motions[11] in the Security Mutual Case and issues regarding a fee dispute with the law firm of Mayback & Hoffman ("*Mayback* ") in the Home Depot Case. Mr. Brown also testified at Trial that Home Depot intended to challenge the Federal Circuit's affirmance of the Home Depot Final Judgment in the Supreme Court of the United States. These issues raised by the Debtor's in support of the proposition that Tripp Scott's receipt of the $10 Million Fee on the Petition Date was uncertain. The Court addresses these points below.

11 The Court infers that the Debtor and Mr. Brown were referring to motions brought by the defendant in the Security Mutual Case pursuant to Federal Rule of Civil Procedure 50, in which the defendant sought to avoid the effect of the Security Mutual Final Judgment. *See* Fed.R.Civ.P. 50.

1. Resolution of the Security Mutual Case

The Brown Settlement E-mails show that the Security Mutual Case was effectively substantively resolved prior to the Petition Date, and fully resolved, both substantively and formally, by an executed settlement agreement nine days after the ***570** Petition Date. Moreover, the Court finds that the Rule 50 motions referenced by the Debtor and Mr. Brown do not support a finding that a successful resolution of the Security Mutual Case was doubtful on the Petition Date.

a. Brown Settlement E-mails Relating to the Security Mutual Case

On December 1, 2011, counsel for Security Mutual advised Mr. Brown, "We have just circulated amongst our side the latest revisions to the agreement. We anticipate getting it to you and Pete tomorrow. Just wanted you to know where we were with the draft." Ex. 27, Brown–0007. Then on December 2, 2011, the defendant's post-trial counsel at Sullivan & Cromwell, LLP, wrote Mr. Brown, "Alex, here is the draft settlement agreement. We look forward to receiving your comments. For planning purposes, Security Mutual needs to have the final form of the agreement authorized and approved at the next board meeting, which will be held on December 15, 2011." Ex. 7, Brown–0008. A draft settlement agreement was attached to this e-mail. *See id.* Thus, the Debtor and Mr. Brown had a draft settlement agreement from Security Mutual on December 2, 2011, and they knew on December 2, 2011, that Security Mutual sought to have the settlement agreement finalized as early December 15, 2011. Notwithstanding the foregoing, revisions to the draft settlement agreement continued through February 27, 2012, when the agreement was signed by the parties, nine days after the Debtor filed bankruptcy.

While Mr. Brown testified at Trial that there were "deal breaker" terms that in his view made consummation of the settlement in the Security Mutual Case uncertain, there is no documentary evidence, including in any of the Brown

Settlement E-mails, that supports this position. To the contrary, although the settlement agreement and related revisions were not presented into evidence on the grounds of confidentiality, the Brown Settlement E-mails relating to the Security Mutual Case do not show a breakdown in negotiations or hint at a potential for the settlement to collapse at any point from December 2011 through execution of the settlement agreement in February 2012. The Brown Settlement E-mails reveal that defendant's post-trial counsel at Sullivan & Cromwell, LLP consistently attempted to move the settlement negotiations along and expressed a desire on several occasions to finalize the matter in December 2011 and January 2012.

Given: (i) the size of the judgment; (ii) the nature of the settlement communications; (iii) the lack of any corroborative evidence; (iv) the Debtor's prior written representations to Mr. Pozzuoli that "I believe I have complete control over when we receive the settlement funds," *Id.* at PGH (2)—000167; and (v) execution of the settlement agreement within days after the Debtor's bankruptcy filing, the Court finds Mr. Brown's vague and unsupported testimony concerning the alleged "deal breaker" provisions does not support a finding that the Debtor reasonably believed the settlement was in any way uncertain up through the time the settlement agreement was signed on February 27, 2012. The evidence at Trial supports a finding to the contrary: the Debtor knew the settlement was anticipated and secure as of the Petition Date.

b. The Rule 50 motions

The Debtor and Mr. Brown testified at Trial that the defendants in the Security Mutual Case filed Rule 50 motions post-trial. The Rule 50 motions were not introduced ***571** into evidence at Trial.[12] The Debtor's testimony concerning the Rule 50 motions was very general. It provided the Court with no detail as to the substance of the Rule 50 motions. Mr. Brown's testimony concerning the Rule 50 motions had a bit more substance, but was still limited. No corroborative documentary evidence was admitted by the Debtor to support the relative strength or weakness of the Rule 50 motions.

12 The Rule 50 motions filed by the defendants in the Security Mutual Case were tempered by the threat of an additional $12 million dollars in prejudgment interest sought by the plaintiffs in the Security Mutual Case. Mr. Brown filed a motion on behalf of the plaintiffs seeking to add approximately $12 million of prejudgment interest to the $26 million judgment, which would have increased the judgment amount to approximately $38 million. The prejudgment interest motion was admitted into evidence at Ex. 24.

The Debtor attempted to use the testimony concerning the Rule 50 motions to support his position that on the Petition Date resolution of the Security Mutual Case was uncertain. The documentary evidence admitted at Trial contradicts that position. The nature of the communications from Security Mutual's counsel did not demonstrate that from December 2011 through February 2012 either of the post-trial motions filed in the Security Mutual Case were impeding the progress of the settlement negotiations. While each party apparently attempted to posture through post-trial motions, the Court does not find that the Rule 50 motions, when juxtaposed with the documentary evidence, placed doubt in the Debtor's mind on the Petition Date concerning the likelihood of favorable resolution of the Security Mutual Case.

The Brown Settlement E-mails show an eager, not reluctant, settlement dialogue on the part of Security Mutual. This documentary evidence leads to an inference that the defendants themselves were focused on settlement and not pursuing the Rule 50 motions. The plaintiffs did not respond to the Rule 50 motions, which further demonstrates that they were not serious impediments to settlement. The Rule 50 motions were never pending for hearing before the Court. In fact, the docket in the Security Mutual Case, which was admitted into evidence as Ex. 25, contains a Minute Entry on January 26, 2012, stating, "Parties are working diligently to achieve settlement, however, one issue remains regarding the charging lien by Ronald Benjamin, Esq." Ex. 25, at 108. The Security Mutual Docket and the Brown Settlement E-mails show that the defendant in the Security Mutual Case, after prophylactically filing the Rule 50 motions, pivoted toward settlement and never turned back. Thus, the Debtor's and Mr. Brown's testimony concerning the Rule 50 motions provides little, if any, probative value relating to the Debtor's state of mind concerning the $10 Million Fee on the Petition Date.

2. Resolution of the Home Depot Case

The Brown Settlement E-mails show that the Home Depot Case was effectively substantively resolved prior to the Petition Date and fully resolved days later by Tripp Scott's receipt of its fee on March 1, 2012. Moreover, the Court finds that the fee dispute with Mayback and Home Depot's intention to seek certiorari (as referenced by the Debtor and

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Mr. Brown in their Trial testimony) do not support a finding that resolution of the Home Depot Case was doubtful on the Petition Date.

a. Brown Settlement E-mails in the Home Depot Case

On November 14, 2011, the Federal Circuit affirmed the Home Depot Judgment. On February 15, 2012, Tripp Scott's co-counsel for appellate purposes in the ***572** Home Depot Case sent Home Depot's appellate counsel an e-mail containing the amount of the outstanding Home Depot Judgment along with a post-judgment interest *per diem* figure. Ex. 27, Brown–0160. The very next day, on February 16, 2012, the Federal Circuit issued its mandate concerning its affirmance of the Home Depot Judgment. Also on February 16, 2012, Mr. Brown sent Home Depot's appellate counsel a W–9 to facilitate satisfaction of the Home Depot Judgment. *Id.* at Brown–0166. The email communications between Mr. Brown and Home Depot's appellate counsel after February 16, 2012, only address the manner in which the amount of the judgment would be paid, either by check or wire transfer. Thus, the Court finds that as of February 16, 2012, the Debtor was aware that Home Depot had agreed to satisfy the Home Depot Judgment.

The Court finds that the e-mail conveying the amount of the Home Depot Judgment along with a *per diem* figure for post-judgment interest shows that Home Depot had laid down its proverbial arms (to use Mr. Brown's words from his Trial testimony) on that day. In a case which the Debtor and Mr. Brown described as the most heavily litigated case they had ever seen, one of the parties does not send the other party an e-mail with the amount of the judgment and a post-judgment interest *per diem* if their minds have not met concerning resolution. The Brown Settlement E-mails contain no statement or indication after February 16, 2012, that Home Depot was not going to satisfy the Home Depot Judgment, nor do they contain statements by Mr. Brown that his client had not agreed to satisfaction of the Home Depot Judgment as an acceptable resolution of the case. Based upon the documentary evidence admitted and the testimony given at Trial, the Court finds the Home Depot Case was substantively resolved prior to the Petition Date. Thus, the Court finds that on the Petition Date the Debtor knew Home Depot was going to satisfy the Home Depot Judgment.

b. Home Depot's Alleged Intention to Seek Certiorari in the Supreme Court

While Mr. Brown testified that Home Depot planned on seeking certiorari and pursuing the matter to the Supreme Court of the United States, there was no documentary evidence admitted at Trial supporting this notion. Further, his testimony concerning this issue was vague and very general. The Debtor did not testify concerning this subject.

When questioned on cross-examination, Mr. Brown testified that Home Depot did not file a motion to stay the issuance of the Federal Circuit's mandate. He was unfamiliar with the procedure by which Home Depot could have sought certiorari. He also testified that Home Depot did not file a petition for certiorari. Testimony concerning a litigant's posturing about seeking certiorari is much different than testimony relating to the exact rules, deadlines and procedures and how such hurdles would be met. Mr. Brown's testimony merely constituted posturing, and therefore is of little value, if any. Based upon the lack of documentary evidence and the lack of specificity in Mr. Brown's testimony, the Court finds that testimony concerning Home Depot's desire to seek certiorari deserves little weight. Thus, Mr. Brown's testimony is not probative evidence regarding the Debtor's state of mind concerning the likelihood of resolution of the Home Depot Case on the Petition Date.

c. The Mayback Fee Dispute

All three witnesses at Trial testified about Tripp Scott's fee dispute with Mayback in the Home Depot Case. Mr. Pozzuoli ***573** had very little personal knowledge concerning the Mayback issues and obtained most, if not all, of it from the Debtor or Mr. Brown. Both the Debtor's and Mr. Brown's testimony concerning the Mayback fee dispute was general and lacked specific details. Rather, they testified about what Mayback threatened to do without supporting their testimony with any documents filed by Mayback or rulings from either District Judge Hurley or Magistrate Judge Hopkins. No document was introduced into evidence relating to the Mayback fee dispute.

There was no evidence presented at Trial that supported the notion that Mayback had any chance to prevail in denying Tripp Scott the fee it was entitled to under its contingency fee contract with its client. There was no evidence admitted at

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Trial that Tripp Scott's client had any issue with paying Tripp Scott the contractually agreed upon contingency fee upon payment by Home Depot. In fact, Mr. Brown testified that the client in the Home Depot Case terminated Mayback, which supports a finding that Mayback's position was untenable. No documentary evidence or Trial testimony showed that District Judge Hurley or Magistrate Judge Hopkins gave any credence to Mayback's efforts. Further, no Trial testimony or documentary evidence supported the position that anything more than the $1.8 million from the satisfaction of the Home Depot Judgment, placed in escrow with the Court, was reachable by Mayback. The $1.8 million was in excess of the $4,126,016.00 Tripp Scott received on March 1, 2012.

Ultimately, Mayback's attempt to disqualify Tripp Scott was denied. Tripp Scott received an additional approximately $272,000.00 from the $1.8 million put in escrow to resolve the Mayback fee dispute, consistent with the Debtor's e-mail of January 9, 2012, to Mr. Pozzuoli, in which he noted that, "[Mayback's] arrangement does not affect our fee and, in fact, *the only thing that will potentially happen will be that we will be receiving more money.*" Ex. 2, PGH (2)—000167 (emphasis added).

The Court finds that based upon the testimony given and evidence submitted at Trial, any belief by the Debtor on the Petition Date that Tripp Scott was likely to lose the fee to which it was entitled in the Home Depot Case based upon the actions of Mayback was unreasonable and not credible. The docket in the Home Depot Case was introduced into evidence at Ex. 28, and a review concerning the Mayback issues supports the Court's finding.

F. The Debtor's Knowledge and State of Mind on the Petition Date

On the Petition Date, the evidence at Trial demonstrates that the Debtor knew the following facts: (i) the terms of the contingency fee contracts with the plaintiffs in the Contingency Fee Cases; (ii) the amount of the judgments in each of the Contingency Fee Cases; (iii) the gross amount of the fees due to Tripp Scott was approximately $10 million; (iv) Home Depot was a public company; (v) the settlement agreement in the Security Mutual Case was on the verge of being finalized; (vi) Home Depot had agreed to and was about to pay the Home Depot Final Judgment; (vii) CIB Marine held the CIB Marine Judgment against him; (viii) CIB Marine had sought to garnish his wages and bank accounts based upon the CIB Marine Judgment; (ix) he had waived all exemptions other than homestead in the Debtor Guaranty; (x) he was co-lead trial counsel on the Contingency Fee Cases and, thus, generated substantial work revenue credit from those cases; (xi) he was co-originator ***574** of the Contingency Fee Cases, which meant he was to receive substantial client generation credit; (xii) for the last four years while working on the Contingency Fee Cases he had received a bonus far less than the top performing Directors in terms of client generation and work revenue; (xiii) the lowest bonus amount Directors at Tripp Scott were discussing he was going to receive from the $10 Million Fee was $2 million; (xiv) Tripp Scott is a subchapter C corporation and needed to disburse the $10 Million Fee prior to the end of 2012 to avoid tax consequences at the corporate level; (xv) Tripp Scott had consistently paid him a performance bonus pursuant to the firm's compensation system for Directors for at least the preceding twelve years, but possibly longer; (xvi) the judgments in the Home Depot and Security Mutual Cases were the largest judgments the Debtor ever obtained on behalf of a single client during his entire career as an attorney, and the fees they generated represented the largest lump sum fees the firm had ever earned; and (xvii) in the last ten years, or possibly longer, excluding financial reasons, Tripp Scott had not failed to award a Director a bonus if the Director was alive and employed at the time the bonus was awarded.

Based upon the foregoing facts, and the additional facts set forth above, the Court finds that, on the Petition Date, the Debtor reasonably believed he had an interest in and would receive a multi-million bonus from the $10 Million Fee. In addition, on the Petition Date, the Debtor reasonably anticipated that his income would increase by millions of dollars within the year after filing his bankruptcy Schedules. The Pozzuoli Prepetition E-mails and the McLaughlin Prepetition E-mails demonstrate that the Debtor believed he had an interest in the $10 Million Fee worth millions of dollars prior to the Petition Date. The Brown Settlement E-mails show that on the Petition Date, the Debtor knew Tripp Scott would receive the $10 Million Fee shortly after the Petition Date. Finally, as discussed below in section I.H, *infra,* the very fact that the Debtor conducted legal research concerning whether he had a sufficient interest in the $10 Million Fee so as to require disclosure demonstrates by itself that he reasonably expected receiving a portion of the $10 Million Fee on the Petition Date. If he did not expect to receive a bonus from the $10 Million Fee there would have been no need to perform legal research to determine whether the interest could be omitted from his bankruptcy Schedules and SOFA. Therefore, the Debtor's testimony that on the Petition Date he did not reasonably anticipate Tripp Scott

would receive the $10 Million Fee is not credible. Likewise, the Debtor's testimony at Trial that he did not believe he possessed an interest in the $10 Million Fee on the Petition Date is unbelievable.

G. The Debtor's Schedules and SOFA

On March 20, 2012, the Debtor filed his Bankruptcy Schedules ("*Schedules* ") and Statement of Financial Affairs ("*SOFA* ").[13] By March 20, 2012, Tripp Scott had received the entire $10 Million Fee, having received the Home Depot fee on March 1, 2012, and the Security Mutual fee on March 13, 2012. The Debtor testified at Trial that the Schedules and SOFA that appear at Ex. 12 are the Schedules and SOFA that he authorized and approved for filing.

13 The Debtor requested and received two extensions of time to file his Schedules and SOFA.

***575** The Debtor's Schedules required the Debtor to make the following declaration: "I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 17 sheets, and that they are true and correct to the best of my knowledge, information and belief." Ex. 12 at 18. The Debtor testified that he signed the declaration concerning the Schedules and understood what the declaration meant when he signed it. Further, the Debtor's SOFA requested the Debtor to make the following declaration: "I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct." Ex. 12 at 27. The Debtor testified that he signed the declaration concerning the SOFA and understood what it meant when he signed it.

As discussed below, the Court finds that the Debtor's Schedules and SOFA do not contain accurate information because the Debtor failed to disclose his interest in the $10 Million Fee and omitted material information relating to prepetition transfers to his ex-wife.

1. Schedule B Issues

The Debtor did not list a "bonus" as an asset on Schedule B in his Bankruptcy Schedules. Question No. 21, Schedule B, required the Debtor to disclose "[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." As stipulated to in the Pretrial Stipulation, the Debtor disclosed a potential litigation claim against the law firm Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. ("*Stearns Weaver* ") and against CIB Marine for wrongful foreclosure and abuse of process. For No. 21, Schedule B, the Debtor did not list any other contingent assets besides litigation claims against CIB Marine and Stearns Weaver. The Debtor admitted at Trial that No. 21, Schedule B, does not make reference to the $10 Million Fee.

The Debtor testified at Trial that he was aware of the meaning of a contingent claim in the context of representing plaintiffs in contingency fee cases. The Court finds that based on the level and sophistication of the Debtor's legal experience, he thoroughly understands the nature of contingent claims. The Court further finds that the Debtor is a highly sophisticated debtor, especially for a Chapter 7 debtor, based upon, *inter alia*: (i) his annual income, which has been over the last three years in excess of $250,000.00; (ii) his experience as a trial lawyer; (iii) his being a former member of the Tripp Scott Compensation Committee; (iv) his position as head of Tripp Scott's litigation department; and (v) his involvement in a multi-million dollar real estate investment. The Court finds that, given the level of the Debtor's sophistication, the Debtor knows exactly what a contingent claim is within the meaning of No. 21, Schedule B. The Debtor knew that he had an interest in the $10 Million Fee on the Petition Date, and he knew that interest constituted a contingent interest within the meaning of No. 21, Schedule B. Nevertheless, the Debtor failed to disclose his interest in the $10 Million Fee on Schedule B. The Court finds this non-disclosure was knowing, intentional, and not a mistake. In fact, on cross-examination by the Plaintiffs' counsel, the Debtor testified that he made an intentional decision to exclude it from his Schedules and SOFA, and "[i]t wasn't a mistake." Trial Tr. 114:15–24.

This finding is further buttressed by the Debtor's listing of "litigation claims" against CIB and its counsel, Stearns Weaver, for wrongful foreclosure and abuse of process. The Debtor testified that, as of the date of the Trial, he had not ***576** filed a lawsuit against CIB Marine or Stearns Weaver. The Debtor admitted in the Pretrial Stipulation that the litigation claims against CIB Marine and Stearns Weaver were *potential* only. This shows the Debtor was fully aware of the type of claims he was required to disclose in response to No. 21, Schedule B. Unlike the scheduled potential litigation claims against Stearns Weaver and CIB Marine, which had and have to date not been filed, the evidence at Trial shows the Debtor's interest in the $10 Million Fee was fully vested on the Petition Date because of the terms of

the contingency fee contracts, the final judgments, the status of the settlement negotiations, the Pozzuoli Prepetition E-mails, the McLaughlin Prepetition E-mails, and Tripp Scott's compensation system. On the Petition Date, the Debtor was required to take no further actions except receive his multi-million dollar bonus from the $10 Million Fee. Scheduling the claims against Stearns Weaver and CIB Marine in response to No. 21, Schedule B shows the Debtor knew exactly what a contingent claim was on the Petition Date, but chose to intentionally omit his interest in the $10 Million Fee.

The Debtor testified that he did not consider the anticipated bonus, in an unknown amount, from the $10 Million Fee on Schedule C and claiming it as exempt.[14] Of course, had he disclosed his interest in the $10 Million Fee on Schedule B, CIB Marine, other creditors and Trustee Welt would have been alerted to the fact that a multi-million dollar asset was potentially available to the estate if the claimed exemption could be defeated. The Court finds that the waiver of exemptions (other than as to homestead) that is set forth in the Debtor Guaranty provides a material motivation for the Debtor to have not listed his interest in the $10 Million Fee on Schedule B and claim it as exempt on Schedule C, as the record reflects he did with respect to this 2011 bonus. The 2011 bonus was paid in 2011; and thus, already in the Debtor's bank account; so it was readily discoverable and traceable, making disclosure of that money unavoidable. However, the Debtor had not received his multi-million dollar bonus from the $10 Million Fee on the Petition Date so discovery and tracing was not an issue.

14 Relevant to and supportive of the finding that the Debtor intentionally omitted his interest in the $10 Million Fee on Schedule B is the fact that the Debtor listed on Schedule B a bank account at Paradise Bank with funds on deposit in the amount of $39,000.00. Ex. 12 at 4. The Debtor testified that the funds in this account were derived from his 2011 bonus from Tripp Scott. The Debtor claimed the $39,000.00 on deposit in the Paradise Bank account as exempt on Schedule C pursuant to section 222.11 of the Florida Statutes. Ex. 12 at 9. The fact that the Debtor scheduled his 2011 bonus on Schedule B and claimed it as exempt on Schedule C establishes that the Debtor knew that if he had in fact disclosed his interest in the $10 Million Fee on Schedule B or I or both, he could have claimed that interest as exempt on Schedule C.

Finally, the Debtor did not list his interest in the $10 Million Fee in any other place on Schedule B, including in response to No. 19, "Equitable or future interests ...." or No. 35, "Other personal property of any kind not already listed...." Ex. 12 at 6, 8.

2. Schedule I Issues

Question No. 17, Schedule I, required the Debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document." Ex. 12 at 16. The Debtor answered No. 17, Schedule I, as follows: "Annual performance bonus (historically 65,000–70,000)." *Id.* The Debtor admitted at Trial that No. 17, Schedule I does not make reference to the anticipated increase in income from the $10 Million ***577** Fee. Again, the information provided and omitted by the Debtor on Schedule I was intentional and not the result of a mistake.

Indeed, by referring to his "annual performance bonus" in the historical amount of $65,000 to $70,000 as the only prospective income change he anticipated receiving in the next year, the Debtor's disclosure was materially misleading. He had, as of the Petition Date, sought (and ultimately received) a special bonus in the millions of dollars. The evidence is clear that Tripp Scott had never issued a mid-year special bonus to its Directors, and had never received a lump sum fee collection remotely as high as the $10 Million Fee. The Debtor demanded, expected, knew he would receive and did receive a huge bonus in mid-year 2012. His failure to disclose anything with respect to this assured bonus renders his Schedules and SOFA materially misleading and willfully false.

The Tripp Scott compensation system vested the Debtor with a prepetition interest in the $10 Million Fee. The Pozzuoli Prepetition E-mails, the McLaughlin Prepetition E-mails, judgments in the Contingency Fee Cases, and the Brown Settlement E-mails, show the Debtor knew that he was going to receive a multi-million dollar bonus in 2012 in addition to his annual performance bonus. In short, on the Petition Date, the Debtor reasonably anticipated receiving a multi-million dollar bonus from the $10 Million Fee and did not disclose this reasonable belief on Schedule I.

Contrary to the Debtor's testimony, which the Court finds incredible, the Court finds that based upon the evidence presented at Trial, the disclosures made by the Debtor in response to No. 17, Schedule I, did not disclose his interest in the $10 Million Fee. Based upon the testimony

and documentary evidence at Trial, the words "Annual performance bonus (historically 65,000–70,000)" did not disclose the Debtor's interest in a bonus from the $10 Million Fee. Ex. 12 at 16.

Finally, the Court questions how, if both the historical bonus and bonus from the Contingency Fee Cases were dependent on the firm's consideration of the same factors, one could be subject to disclosure on the Debtor's Schedules and the other not.

3. SOFA Issues

The Debtor failed to adequately explain the reason there was an inconsistency with the disclosure of compensation paid to his counsel, Bart A. Houston, Esq., through his prior firm Kopelowitz Ostrow, on his SOFA and the Disclosure of Attorney Compensation filed on March 20, 2012 (as part of the Bankruptcy Rule 2016 Statement) (Bankr.Case ECF No. 17). Moreover, as discussed below, the Debtor failed to disclose transfers of money to his ex-wife within the year prior to the Petition Date in his SOFA. These inconsistencies represent additional issues that challenge the veracity of the Debtor's Schedules and SOFA. They demonstrate the Debtor's blatant disregard for his disclosure obligations, which are a condition precedent to his receipt of a discharge under Title 11 U.S.C. § 727.

H. The Debtor's Legal Research Concerning the $10 Million Fee

The Debtor testified at trial that he did independent legal research and also analyzed cases provided to him by his counsel concerning the issue of whether his interest in the $10 Million Fee constituted property of the estate in connection with preparing his Schedules and SOFA.[15] The ***578** Debtor testified that based upon his legal research he believed that any bonus he received from the $10 Million Fee would not be property of the estate.

15 This research occurred prior to March 20, 2012, the date on which the Schedules and SOFA were filed.

This testimony puts the Debtor's entire trial presentation into context. Many of the terms used in the case law cited by the Debtor in his Trial Brief (ECF No. 92) were used in the testimony by the Debtor himself, Mr. Pozzuoli and Mr. Brown. However, these terms did not appear in the Pozzuoli Prepetition E-mails or the McLaughlin Prepetition E-mails, which were written at a time when the Debtor had not conducted the legal research he relied upon when he decided to not disclose his interest in the $10 Million Fee in his Schedules and SOFA because he determined it was not property of the estate. The Court draws an inference that the Debtor's testimony at Trial was shaped by his view of the law that he believed supported his position that he did not have to disclose his interest in the $10 Million Fee. The stark contrast between the Pozzuoli Prepetition E-mails and the McLaughlin Prepetition E-mails underscores the untenability of the suggestion that the Compensation Committee maintains the sole and unfettered discretion to award bonuses and, therefore, the Debtor did not have a reasonable belief that he had an interest in the $10 Million Fee on the Petition Date. The Court finds that the Debtor's testimony concerning his legal research relating to the Debtor's interest in the $10 Million Fee and property of the estate proves that the Debtor reasonably believed he had an interest in the $10 Million Fee on the Petition Date. If the Debtor had no belief that he had an interest in the $10 Million Fee, there would be no need to conduct legal research. The Debtor was required to disclose this interest in his Schedules.

I. The Pam Herman Transfers

Prior to the Petition Date, the Debtor had an investment account at American Funds (Account No. XXXX4161), through which he held shares in The Growth Fund of America–A and The Growth Fund of America–B (collectively, the "*Growth Fund Shares* "). The Growth Fund Shares were assets of the Debtor that were purchased with the Debtor's savings. *See* Pretrial Stipulation at ¶ 51.

On or about November 29, 2011, the Debtor caused his Growth Fund Shares, which constituted property of the Debtor, to be liquidated for an aggregate sale price of $46,278.25 (the "*Sale Proceeds* "). The Debtor received payment on the Sale Proceeds via two separate checks from American Funds in the amounts of $24,545.45 and $21,732.80 (the "*American Funds Checks* "), both of which were payable to the Order of "Peter G. Herman." *Id.* at ¶¶ 52–53.

On or about December 7, 2011, the Debtor caused the American Funds Checks to be deposited in an account at Wells Fargo Bank (Account No. XXXX9849), which was a joint account in the name of the Debtor, Peter G. Herman, and his ex-wife, Pamela M. Herman (the "*Joint Account* "). *Id.* at ¶ 54. The Debtor listed his interest in the Joint Account on Schedule B of his Schedules. On the very

next day, December 8, 2011, the Sale Proceeds in the Joint Account were transferred to a separate account held solely by Pamela M. Herman at Wells Fargo Bank (Account No. XXXX0370) (the "*First Pam Herman Account* "). At the time immediately preceding the foregoing transfer, the First Pam Herman Account held only $30.11. The Debtor does not have any ownership interest in First Pam Herman ***579** Account, did not list any ownership interest in such account as an asset in his Schedules, and did not list the transfer of the Sale Proceeds to the First Pam Herman Account in his SOFA. *Id.* at ¶ 55. On or about December 9, 2011, the Sale Proceeds were transferred from the First Pam Herman Account to a separate account held solely by Pamela M. Herman at Wells Fargo Bank (Account No. XXXX9086) (the "*Second Pam Herman Account* "). From the time of the foregoing transfer, and through the Petition Date, the Second Pam Herman Account was funded exclusively by the transfer of the Sale Proceeds and interest accruing thereon and did not contain any other funds. The Debtor does not have any ownership interest in the Second Pam Herman Account, did not list any ownership interest in such account as an asset in his Schedules, and did not list the transfer of the Sale Proceeds from the First Pam Herman Account to the Second Pam Herman Account in his SOFA. *Id.* at ¶ 56.

As of the Petition Date, the Second Pam Herman Account contained only $90.07. In the 37 days preceding the Debtor's bankruptcy filing, the remainder of the Sale Proceeds were transferred out of the Second Pam Herman Account as follows (collectively, the "*Transfers* "):

i. $5,000 (Withdrawal) on January 13, 2012;

ii. $1,500 (Withdrawal) on February 3, 2012;

iii. $30 (Wire Transfer) on February 10, 2012;

iv. $35,000 (Wire Transfer to The Kopelowitz Firm PA[16] Trust Account) on February 10, 2012;

v. $400 (Online Transfer to First Pam Herman Account) on February 14, 2012; and

vi. $4,300 (Withdrawal) on February 17, 2012.

16 The Debtor's bankruptcy lawyer was employed at this law firm at the time of the transfer.

As stipulated to in the Pretrial Stipulation, the Debtor did not list any of the foregoing Transfers on his Schedules or SOFA. *Id.* at ¶¶ 58–59.

The testimony at Trial and the documentary evidence introduced showed that when the Transfers were made, CIB Marine had obtained the final judgment of foreclosure against Esquire Ventures, and the Debtor admitted that CIB Marine had filed the motion seeking a deficiency judgment against him. The Transfers were from the Debtor to Pam Herman's account in which the Debtor admitted he did not have an interest. The CIB Marine Judgment was not against Pam Herman. Thus, the Court finds that the Transfers effectuated a movement of funds from an account subject to CIB Marine's reach to an account out of CIB Marine's reach.

The Debtor's testimony about the Transfers was not credible. The Debtor was unable to explain the discrepancy between the $35,000 transfer Pam Herman made to The Kopelowitz Firm PA Trust Account and his disclosure of a $15,000 transfer to Kopelowitz in his SOFA. The Debtor could not identify where the additional $20,000 to the Kopelowitz Firm was disclosed in his Schedules or SOFA, and ultimately admitted that the $20,000 transfer was not disclosed. The Court further finds that the Debtor's testimony that certain transfers were made to pay workmen on his condominium was not credible, as no documents were admitted into evidence to support this contention, the Debtor did not ***580** identify who was paid, and these transfers were not disclosed in his Schedules or SOFA. The Debtor admitted at Trial that the Transfers in the amount of approximately $46,000 were not disclosed in his Schedules or SOFA.

J. The Debtor's Intent to Hinder, Delay or Defraud his Creditors and Trustee Welt

The Court finds that the Debtor omitted his interest in the $10 Million Fee and the Transfers from his Schedules (including Schedules B and I) and SOFA with the intent to hinder, delay or defraud his creditors. The Debtor purposefully did not disclose his interest in the $10 Million Fee with fraudulent intent in an attempt to prevent his creditors, primarily CIB Marine and Trustee Welt, from discovering such interest so that he could keep his multi-million dollar bonus for himself and pay none of it to his bankruptcy estate or his creditors. The Court finds the Debtor's failure to disclose his interest in the $10 Million Fee in his Schedules and SOFA was intentional and based upon a motive to conceal his prepetition interest in the $10 Million Fee, to obtain all of the money in his prospective bonus for himself, and to pay none of it to his creditors, all at a time when CIB Marine was executing on its multi-million judgment.

The evidence shows that the Debtor has been the subject of the CIB Marine Judgment in the approximate amount of $4.5 million since December 8, 2011. The Debtor knew the amount of the deficiency since at least mid-November 2011. The hearing on CIB Marine's deficiency judgment occurred on the same day (December 6, 2011) the Debtor commenced a protracted e-mail campaign with the President of Tripp Scott concerning allocation of the $10 Million Fee. The Debtor testified that when he filed bankruptcy, CIB Marine was the only creditor that had a judgment against him. The Debtor also testified that CIB Marine was the only creditor garnishing his wages at Tripp Scott and his bank accounts. The Debtor knew that he waived, in the Debtor Guaranty, any exemption claim that he could have attempted to use to protect his interest in a bonus from the $10 Million Fee. Thus, disclosure of the interest in the $10 Million Fee and seeking to claim it as exempt would jeopardize retention of the multi-million bonus he expected to receive from his interest in the $10 Million Fee.

The evidence demonstrates that both the judgments and the fees in the Contingency Fee Cases were the largest the Debtor had ever received in his thirty-plus-year career as an attorney. The Debtor testified that in 2011 and 2012 he knew the gross amount of the fees Tripp Scott was entitled to receive under the contingency fee contracts in the Contingency Fee Cases was approximately $10 Million. The Pozzuoli Prepetition E-mails and the McLaughlin Prepetition E-mails show that the Debtor was contemplating how much of the $10 Million Fee he was going to receive for months, if not longer, prior to the Petition Date. The Brown Prepetition E-mails show that on the Petition Date the Debtor knew Tripp Scott was going to receive the $10 Million Fee within weeks, if not days, after the Petition Date. In fact, Tripp Scott received all of the $10 Million Fee only weeks after the Petition Date and prior to the date on which the Debtor filed his Schedules and SOFA. The Debtor controlled when he filed his bankruptcy petition and the chapter of the Code under which he filed. He did not consider filing a Chapter 11 case in which he could have paid his creditors over time using the bonus generated from the $10 Million Fee.

***581** According to the evidence from the Tripp Scott documents introduced at trial, $2 million was the lowest amount which the firm contemplated paying the Debtor of the $10 Million Fee. Tripp Scott actually paid him $2.7 million. The Debtor testified that prior to the $2.7 million bonus award for the fees generated by the Contingency Fee Cases, he was never awarded a single bonus in excess of one million dollars during his employment at Tripp Scott. Mr. Pozzuoli testified that the $2.7 million bonus award was by far the largest in relation to other Directors and was the largest bonus Tripp Scott had ever given out to any Director in his fifteen years with the firm.

The Court finds based upon the demeanor of the Debtor at Trial, the documentary evidence presented at Trial, and the testimony of Mr. Brown and Mr. Pozzuoli, the Debtor filed his Chapter 7 bankruptcy case and concealed his inchoate interest in the $10 Million Fee and the Transfers with the actual intent to hinder, delay or defraud his creditors, principally CIB Marine, and Trustee Welt. The Chapter 7 bankruptcy case was the vehicle through which he sought to discharge the CIB Marine Judgment. The concealment of his interest in the $10 Million Fee from his Schedules and SOFA would (he hoped and anticipated) allow him to keep millions of dollars and be free from the CIB Judgment. The Debtor's testimony that he conducted legal research concerning whether his interest in the $10 Million Fee was property of the estate shows that he was seeking to conceal his interest which he knew was a prepetition contingent asset. The Debtor's statement that he believed he did not provide false information in his Schedules and SOFA is not credible. The Court finds that the Debtor's testimony that he believed he fairly disclosed his assets and liabilities is not believable. The Court finds, based upon the evidence, that the Debtor filed bankruptcy to discharge his prepetition debt, including the CIB Marine Judgment, and keep all of his interest in the $10 Million Fee. Finally, the Court finds that the Transfers were made to place the transferred funds out of the reach of the Debtor's creditors, which was accomplished by transferring the money to an account in which he held no legal interest.

K. The Debtor's $2.7 Million Bonus from the $10 Million Fee

Tripp Scott received the entire $10 Million Fee by March 13, 2012. Mr. Pozzuoli testified that in August 2012 the Compensation Committee met to award bonuses to Directors from the $9.6 million bonus pool derived from the $10 Million Fee.[17] The August 2012 meeting was not the Compensation Committee's annual meeting, but rather was for the specific purpose of allocating bonuses to Directors from the $9.6 million bonus pool generated solely from the fees earned by Tripp Scott from the Contingency Fee Cases.

17 $300,000 of the $10 Million Fee was allocated for non-directors at Tripp Scott.

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Prior to the Compensation Committee's meeting in August 2012, it circulated to Directors a document entitled "Director Bonus Allocation," which was admitted into evidence at Ex. 16, 17, and 22.[18] The Director Bonus Allocation, which Mr. Pozzuoli testified was a performance analysis reflecting the "same criteria" used at year-end ***582** compensation meetings, advises Directors to consider "[t]otal production [meaning a combination of work revenue and client generations]" using the accompanying sheets, which reflected performance information for the prior 4 years, along with client generation and work revenue for all Directors involved in the Contingency Fee Cases. As a result of its consideration of the responses of other Directors to the Director Bonus Allocation—which resulted in an average proposed distribution for the Debtor of approximately $2 million, *see* Ex. 16; Trial Tr. 210:16–19—and its consideration of the firm's performance metrics, the Compensation Committee ultimately awarded the Debtor a performance bonus of $2.7 million based upon his prepetition interest in the $10 Million Fee.

18 The Director Bonus Allocation documents contained in Exs. 16 and 17 are identical, but the document in Ex. 22 differs from the documents in Exs. 16 and 17. Mr. Pozzuoli testified at Trial that he believed the documents in Exs. 16 and 17 were drafts and the document in Ex. 22 was actually circulated to the Directors.

The Compensation Committee's allocation of $2.7 million from the $10 million Fee to the Debtor was not gratuitous. Rather, the Debtor had earned that money over the years he spent working on the Contingency Fee Cases. Tripp Scott's performance based system vested the Debtor with a right to a substantial portion of the $10 Million Fee when it was received by the firm. The way Tripp Scott analyzes performance is by looking at aggregate client generation and work revenue. This is common to the law firm business model where attorneys perform by generating clients and collecting dollars from the work they perform for clients.

The documents attached to the Director Bonus Allocation show that the Debtor's client generations and work revenue, including amounts from the Contingency Fee Cases, over the operative period of time aggregated to $11,810,171.70, which placed him as the number three Director when compared to the other Directors for purposes of aggregate client generations and work revenue. When the Debtor's bonuses are aggregated over the operative period of time, they total $354,000.00, which is less than one third of the amount paid to the other top three performing Directors in terms of total client generations and work revenue. The Court finds, based upon these figures, that the Debtor received substantially lower bonuses during the operative period of time, and thus was compensated less than other Directors because he was working on the Contingency Fee Cases, which generated no current revenue. When the fees from the Contingency Fee Cases were brought into Tripp Scott, he finally received credit for his labor over the years when he was working on the Contingency Fee Cases. The foregoing figures are as follows:[19]

19 The Court derived these figures from Ex. 22. Additionally, on Ex. 22, the identification of Directors that did not work on the Contingency Fee Cases were redacted and numerical identifiers were provided by counsel for Tripp Scott.

I.D.	Total Client Generations/Work Revenue	Total Bonuses 2008-2011
1	$15,507,122.32	$1,260,000
3	$12,924,002.30	$1,127,000
PGH	$11,810,171.70	$354,000
4	$10,933,254.17	$985,000

Ultimately, the Compensation Committee awarded the Debtor a $2.7 million bonus ***583** out of the $9.6 million bonus pool. The $2.7 million bonus was based upon the Debtor's aggregate client generations, work revenue and status as a Director. As the foregoing table reveals, the Debtor had earned the $2.7 million bonus by working on the Contingency Fee Cases for several years and receiving a substantially lower bonus than other Directors. Said differently, the $2.7 million bonus was paid to the Debtor after his vaulting up to the number three performing Director based upon his $11,810,171.70 in client generations and work revenue, status

as a Director and his receipt of only $354,000.00 in bonuses during 2008 through 2011.

The evidence presented at Trial leads to the necessary conclusion that the Compensation Committee only had discretion to determine what amount, within a reasonable range, of the $10 Million Fee would be paid to the Debtor based upon his prepetition performance. There was no testimony given or document introduced at Trial that suggests that the Compensation Committee would or could have exercised discretion and awarded the Debtor zero dollars from the $10 Million Fee. Any other conclusion is so implausible as to be impossible to believe. In fact, the Pozzuoli Prepetition E-mails and the McLaughlin Prepetition E-mails belie the notion that the Compensation Committee could have exercised its discretion and awarded the Debtor a "zero" bonus out of the $10 Million Fee. Nowhere in any of the Pozzuoli Prepetition E-mails or the McLaughlin Prepetition Emails is there even the remotest suggestion that the Debtor would get a bonus in the amount of zero dollars from the $10 Million Fee. The evidence at Trial did not show that the Compensation Committee could have exercised discretion and determined that the Debtor was not entitled to any bonus from the $10 Million Fee only if he were dead or no longer employed by the firm. There was no evidence introduced at Trial that showed the Debtor was in jeopardy of being terminated by Tripp Scott in either 2011 or 2012, nor was there any evidence submitted at Trial that demonstrated that the Debtor intended to leave Tripp Scott in 2011 or 2012.

II. CONCLUSIONS OF LAW

A. Jurisdiction, Core Proceeding and Venue

The Court has jurisdiction over this Adversary Proceeding pursuant to 28 U.S.C. § 1334(b) and 11 U.S.C. § 727. This is a core proceeding for which the Court is authorized to determine all matters regarding this Adversary Proceeding in accordance with 28 U.S.C. § 157(b)(2)(J). Venue is proper in this district pursuant to 28 U.S.C. § 1409.

B. The Debtor's interest in the $10 Million Fee is property of the estate under § 541.

[1] **[2]** The breadth of the interests captured by § 541's concept of property of the estate cannot be overstated. However, the boundaries, while vast, are not limitless. Courts must consult applicable state law to determine whether a particular property interest is swept into a debtor's bankruptcy estate. The Court concludes that the Debtor's inchoate—but very real—interest in the $10 Million Fee became property of the Debtor's bankruptcy estate pursuant to § 541 on the Petition Date. The case law relied upon by the Debtor in his Trial Brief (ECF No. 92) to support his contrary position is distinguishable for a variety of reasons, and therefore does not guide the Court to the Debtor's conclusion.

1. Property of the estate under § 541 is an extremely broad concept and it includes the Debtor's interest in the $10 Million Fee.

The Bankruptcy Code provides that "the commencement of a case under section ***584** 301, 302, or 303 of this title creates an estate." 11 U.S.C. § 541(a). The property of the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (emphasis added). See *In re Hanley,* 305 B.R. 84, 86 (Bankr.M.D.Fla.2003) ("This generous provision sweeps into the bankruptcy estate all interests held by the debtor—even future, non-possessory contingent, speculative, and derivative interests.") (citations omitted). The legislative history of § 541(a) reveals that the section's purpose is to include in the estate all kinds of property whether tangible or intangible, including "anything of value that the debtors have." H.R. Rep. No. 95–595, at 176 (1977).

[3] **[4]** In construing the meaning of the term "property" as included in a debtor's bankruptcy estate, the Supreme Court and courts throughout the country have repeatedly held that property of the estate includes a debtor's *contingent interests* in property. *See Segal v. Rochelle,* 382 U.S. 375, 379, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966);[20] *Thomas v. Bender (In re Thomas),*516 Fed.Appx. 875, 877–79 (11th Cir.2013) (unpublished persuasive decision holding that proceeds of property sale, which stemmed from postpetition sales contract but was contemplated under prepetition option contract, was property of the estate because prior to the petition date the debtor "had more than a mere 'hope, a wish and a prayer" that he might profit" (distinguishing *Bracewell v. Kelley* (*In re Bracewell*), 454 F.3d 1234 (11th Cir.2006)); *Longaker v. Boston Scientific Corp.,* 715 F.3d 658, 661 (8th Cir.2013) (noting that § 541 is broad, "encompasses a debtor's contingent interests under a pre-petition [employment] contract," and, consequently, "[a] post-petition payment on a pre-petition contractual interest belongs to the bankruptcy estate"); *Majestic Star Casino, LLC v. Barden Dev., Inc. (In re Majestic Star Casino, LLC),*

716 F.3d 736, 750 (3d Cir.2013) ("[T]he term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed"); *but see Bracewell,* 454 F.3d at 1241–42 (11th Cir.2006) (refusing to apply *Segal* where no property interest existed at petition date, contingent or otherwise, but rather was created as a result of legislation enacted *after* debtor's bankruptcy filing). "In fact, '[a] contingency is no bar to [a] property interest becoming property of the bankruptcy estate, even if such contingency requires additional postpetition services, and even if the right to enjoyment of the property may be defeated.' " *Prochnow v. Apex Props., Inc. (In re Prochnow),* 467 B.R. 656, 663 (C.D.Ill.2012) (quoting *Allen v. Levey (In re Allen),* 226 B.R. 857, 865 (Bankr.N.D.Ill.1998)); *see alsoLongaker,* 715 F.3d at 661 (holding that interest in contingent postpetition payments under employment contract was property of the estate). Interests that are *speculative* are even included within § 541's expansive definition of property of the estate. *SeeIn re Yonikus*, 996 F.2d 866, 869 (7th Cir.1993) ("[E]very conceivable ***585** interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of 11 U.S.C. § 541."). An interest conditioned on continued employment does not exclude it from becoming property of the estate. *In re Lawton,* 261 B.R. 774, 777 (Bankr.M.D.Fla.2001) (analyzing debtor's interest in stock options and determined they are property of the estate).

20 In *Segal,* "the Supreme Court held that the debtors' claim for a loss carry-back tax refund is property of the estate, even though it is contingent when the petition is filed. There, ... the debtors asserted that because the refund could not be claimed until the end of the year, it was not property of the estate, but the Supreme Court concluded that this circumstance was not sufficient to take the interest out of the estate. In addition, ... the debtors argued that certain postpetition events might eliminate the claim altogether, but again the Supreme Court rejected this argument." *Booth v. Vaughan (In re Booth),* 260 B.R. 281, 285 (6th Cir. BAP 2001) (summarizing *Segal*).

Property of the estate also includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, *except such as are earnings from services performed by an individual debtor after the commencement of the case.*" 11 U.S.C. § 541(a)(6) (emphasis added).

[5] "Whether a debtor's interest constitutes 'property of the estate' is a federal question." *BellTel Fed. Credit Union v. Kalter (In re Kalter),* 292 F.3d 1350, 1353 (11th Cir.2002). State law generally controls the question of whether the debtor has an interest in property. *Id.* (citing *Butner v. United States,* 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979).

Several cases in various jurisdictions have addressed the question of whether a debtor's interest in a postpetition bonus or contingency fee payment constitutes property of the estate. Although numerous factors are applied in making any such determination, the central and repeated question raised in those decisions is whether the postpetition payment is sufficiently grounded in the debtor's prepetition services and rights to qualify as estate property. *See, e.g., In re Riker,* 282 B.R. 724, 725–26 (Bankr.S.D.Fla.2002) (holding that contingency fee received by debtor-attorney after the petition date related to prepetition legal representation and was entirely included in the debtor's bankruptcy estate) (citing *Jess v. Carey (In re Jess),* 169 F.3d 1204 (9th Cir.1999), and *Turner v. Avery,* 947 F.2d 772 (5th Cir.1991)); *Parks v. Dittmar (In re Dittmar),* 618 F.3d 1199, 1209–10 (10th Cir.2010) (finding that the asset at issue was sufficiently rooted in the debtor's pre-bankruptcy past and, thus, property of the estate); *Booth,* 260 B.R. at 289 (characterizing rule as "the nearly unanimous view of the other courts" and collecting cases throughout decision); *In re Soboslai,* 263 B.R. 700, 703 (Bankr.D.Conn.2001) (same).

In this regard, the decision in *Soboslai* is particularly instructive. *Soboslai* involved a debtor-attorney, who—like the Debtor here—was voted a "member" of his law firm, but did not receive any shares. *Soboslai,* 263 B.R. at 701. There, the debtor-attorney filed his bankruptcy petition in October of 1997 and received a $37,000 postpetition bonus for calendar year 1997. The court held that the portion of the debtor-attorney's bonus that related to prepetition services were property of the estate. *Id.* at 703. In reaching that conclusion, the court found that, as a general matter (and consistent with Tripp Scott's known policies in this case) member bonuses at the debtor-attorney's firm were: (i) paid from firm profits remaining at year-end; (ii) larger than non-member bonuses; and (iii) granted in the discretion of the firm's Board of Directors after consideration of the contributions of each member to the firm over the preceding year, and after a survey of the firm's members as to their proposed allocation of the total bonus pool.

[6] Consistent with the foregoing authorities, the $2.7 million bonus awarded to the Debtor here: (i) was based upon the Debtor's years of prepetition work on the Contingency Fee Cases, which led to the prepetition judgments, (ii) was

allocated pursuant to Tripp Scott's methodology, (iii) related almost exclusively (if not entirely) to the Debtor's status as an originating Director and as the co-lead trial counsel; ***586** and (iv) was derived solely from the $10 Million Fee.

[7] [8] [9] [10] Like the decision rendered in *Soboslai* and other cases finding that postpetition bonuses constitute estate assets, Florida law provides that the Debtor had an interest in a bonus from the $10 Million Fee on the Petition Date, and that interest became property of the estate under § 541. Specifically, in addition to recognizing the enforceability of express contractual obligations (whether written or oral), Florida law also allows for individuals to recover on contracts implied in fact, as well as contracts implied in law. "A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from the words of the contract." *Gem Broad., Inc. v. Minker,* 763 So.2d 1149, 1150 (Fla. 4th DCA 2000) (quoting *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co.,* 695 So.2d 383, 385 (Fla. 4th DCA 1997)). In contrast to a contract implied in fact, "[a] contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation." *Id.* at 1151 (quoting *Commerce P'ship,* 695 So.2d at 386).

In elaborating on this rule, the United States Court of Appeals for the Eleventh Circuit has noted that, under Florida law, "the test of an implied contract of employment is whether services were performed under circumstances fairly raising a presumption that the parties understood and intended that compensation was to be paid." *Eskra v. Provident Life & Accident Ins. Co.,* 125 F.3d 1406, 1413 (11th Cir.1998) (citing *Tipper v. Great Lakes Chem. Co.,* 281 So.2d 10, 13 (Fla.1973)). Recognizing that such contracts "are inferred from the facts and circumstances of the case," the Eleventh Circuit stressed that "where a contract of employment is terminable at will by either the employer or employee, continued employment, in itself, is sufficient consideration to support a promise, express or implied, made during the relationship." *Eskra,* 125 F.3d at 1413 (citing *Coastal Unilube, Inc. v. Smith,* 598 So.2d 200, 201 (Fla. 4th DCA 1992)). In determining damages for breach of such an implied contract, that court noted that, "[w]here the existence of a contract is clear, but the terms about how much an employee would receive is unspecified, a jury is empowered to award a reasonable amount of compensation." *Eskra,* 125 F.3d at 1413 (citing *Comty. Design Corp. v. Antonell,* 459 So.2d 343, 345–46 (Fla. 3d DCA 1984), *review denied,*469 So.2d 748 (Fla.1985)). "The impossibility of the calculation 'with absolute exactness' will not defeat recovery where a long track record of a business provides a solid foundation for reasonable projections." *Eskra,* 125 F.3d at 1413.

Consistent with the foregoing, in *Comty. Design Corp. v. Antonell,* 459 So.2d 343, 345–46 (Fla. 3d DCA 1984), the Florida Third District Court of Appeal affirmed a jury verdict finding that a draftsman had an enforceable right to a bonus from his employer under an implied contract. Although the employer argued that the purported employment agreement was too indefinite to be enforceable, as the exact amount of the bonus and the degree of completion of work product required for a bonus to be earned were disputed, the Third District Court of Appeal affirmed the employer's obligation to pay, noting, in part, that "[c]ourts are reluctant to hold contracts unenforceable on grounds of uncertainty, ***587** especially where, as here, one party has received the benefit of the other's performance." *Id.* at 345 (citing *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.,* 302 So.2d 404, 408 (Fla.1974); *Burton v. Keaton,* 60 So.2d 770 (Fla.1952)). Indeed, as is instructive here, the court noted as follows:

> "CDC asserts that there was no agreement as to exactly how much each employee would receive. While this is true, *it is necessarily so because the bonus was to be divided among those still employed at Christmas time and in amounts recommended by Ms. Wooster.* Once the drawings were completed, CDC's *contractual duty to act in good faith in recommending a bonus for those who qualified arose. It was Wooster's failure to recommend a bonus, and CDC's subsequent failure to pay one, which constituted the breach.* It was appropriate for the jury to resolve the compensation question, and the amount awarded is reasonable...."

*Comty. Design,*459 So.2d at 345 (emphasis added) (citations and quotations omitted). In further elaborating on the basis for its decision, the Third District Court of Appeal articulated the weakness in the argument espoused by the Debtor in this case (and discussed in the section that follows):

> "We are in no way suggesting that employers are not free to establish bonus plans like that in *Parrish v. General Motors Corp.,* 137 So.2d 255 (Fla. 2d DCA 1962). *There, the bonus plan gave the employer, in writing, the discretion to award, or choose not to award, a bonus. Such a writing clearly establishes the employer's intention and does not*

> *give rise to a contractual bonus right. Here, the contract is oral* and the evidence is reasonably susceptible to the conclusion that once the drawings were complete the duty to recommend and pay a bonus arose."

*Id.*at 345 n.4 (emphasis added); *see also Wyss v. Inskeep,* 73 Or.App. 661, 699 P.2d 1161 (1985), *review* denied, 300 Or. 64, 707 P.2d 582 (1985) (applying analogous contractual principles under Oregon law and holding that executive was entitled to unpaid bonus, where amount of bonus pool could be determined by arithmetical calculation, and although allocation of pool to individual employees was left to discretion of executive committee, exercise of discretion was not unlimited but was subject to good faith requirement). Here, Tripp Scott has no written employment agreement or policy giving the employer the exclusive right to grant or deny a bonus; rather, the firm's President, Mr. Pozzuoli, unambiguously stated that Director compensation specifically included performance bonus awards grounded on the Compensation Committee's analysis of established metrics.

[11] Based upon the foregoing legal principles, the Court concludes that the Debtor had an undeniable interest under Florida law in the $10 Million Fee as of the Petition Date, as exemplified by the $2.7 million the Debtor was ultimately awarded. Had the Debtor been terminated without receiving any of the $10 Million Fee, which was the product of years of his prepetition efforts, he would have possessed at least one, but most likely more claims against Tripp Scott under Florida law, pursuant to which courts have enforced bonus agreements even in the absence of an express writing.[21]

21 Had Tripp Scott attempted to deny the Debtor a portion of the $10 Million Fee, the Debtor would have at a minimum had a claim for unjust enrichment. In Florida, a plaintiff needs to establish the following to sustain a claim for unjust enrichment: (1) a benefit conferred upon a defendant by the plaintiff; (2) the defendant's appreciation of the benefit; (3) the defendant accepted the benefit; and (4) under the circumstances it would be inequitable for him to retain it without paying the value thereof. *Nova Info. Sys., Inc. v. Greenwich Ins. Co.,* 365 F.3d 996, 1006–07 (11th Cir.2004); *Thompkins v. Lil' Joe Records, Inc.,* 476 F.3d 1294, 1314 (11th Cir.2007). It is not difficult to comprehend the claim here if the Debtor had not received any portion of the $10 Million Fee from the Contingency Fee Cases he worked on for years, secured the judgments and ultimate fees and forwent prior bonus income. See, e.g., 1 Williston on Contracts § 4:25 (4th ed.) (noting that, where a promise to pay compensation in addition to a specified sum is too indefinite to create an enforceable agreement, "the existence of the indefinite promise might rebut any assertion that the specified sum was controlling, and might preserve the right to recover to the extent that the reasonable value exceeded the specified sum." (collecting cases)).

***588** Courts outside of Florida, in an effort to discern the debtor's rights as of the petition date, have "analogize[d] the bankruptcy petition date as a hypothetical termination date." *See In re Scotchel,* 491 B.R. 739, 744 (Bankr.N.D.W.Va.2013). In *Scotchel,* for example, the court assessed a debtor-attorney's rights under the theory of *quantum meruit* if a hypothetical termination had occurred on the petition date, and found the debtor-attorney had an interest in a prepetition contingency fee that was property of the estate. *Id.* The *Scotchel* court disagreed with the debtor-attorney's view that the contingency fee was not property of the estate. *Id.* In support of its holding, the court there stated:

> "Adopting the Debtors [sic] position *would* permit attorneys working on contingent fee basis to file bankruptcy petitions on the eve of settlement and then, postpetition, claim the entire fee for themselves. Such an option would ignore patent economic realities and contravene the intent of the Bankruptcy Code."

Id. at 746 (citing *Banner v. Bagen (In re Bagen),* 201 B.R. 642, 644 (S.D.N.Y.1996)).

In his Trial Brief, the Debtor argued that—*although he was ultimately awarded a distribution of $2.7 million*—because he hadn't received the money as of the Petition Date his bonus cannot be considered property of the estate in this proceeding and its nondisclosure cannot form the basis for denial of his discharge.[22] *See*11 U.S.C. § 727(a)(2)(B) (applying to concealment of property of the estate). As set forth above, the law on property of the estate, however, is expansive and does not support the inequitable windfall the Debtor is seeking here.

22 The Debtor cited to *In re Lapi,* No. 04–35831, 2005 WL 3199022, at *2 (Bankr.S.D.Fla. June 29, 2005) to argue his bonus interest was not property of his bankruptcy estate. *Lapi* is factually distinguishable in a number of ways and, thus, not instructive. First, and most obviously, the debtor in *Lapi* is not an attorney and the interest at issue is not the debtor's interest in millions of dollars in fees generated by the debtor. Next, the court there found that the debtor's bonus was not related to his prepetition labors but rather for his continued

> employment. Here, the $10 Million Fee and the debtor's interest therein all relate to his years of prepetition labor in the Contingency Fee Cases. The evidence shows the Debtor did effectively no work on the Contingency Fee Cases postpetition. Because the bonus at issue here is derived from the $10 Million Fee, which was the fruit of years of the Debtor's prepetition labors, *Lapi* 's logic is entirely distinguishable. Ultimately, even the court in *Lapi* recognized that the debtor there had a contingent interest in the subject bonus on the petition date. *See Lapi,* 2005 WL 3199022 at *2. Thus, even under *Lapi,* the Debtor's *contingent interest* in a bonus from the $10 Million Fee had to be disclosed in his Schedules and SOFA.

Unlike the decisions cited by the Debtor in his Trial Brief, the Debtor possessed an interest in the $10 Million Fee on the ***589** Petition Date based upon *inter alia*: (i) Tripp Scott's compensation metrics and the Debtor's status as a Director, an originating Director, and co-lead trial counsel in the Contingency Fee Cases (as discussed in sections I.B.2 and I.L, supra); (ii) the fact that the $10 Million Fee was generated by the Debtor's prepetition efforts and he was not awarded significant bonus compensation for years while working on the Contingency Fee cases (as discussed in section I.L, supra); and (iii) the fact that denial of a bonus from the $10 Million Fee would have resulted in an actionable claim by the Debtor under Florida law (as discussed above in this section).

2. The Debtor's reliance on corporate bonus and crop disaster payment cases was misplaced.

In his Trial Brief, the Debtor primarily relied on two lines of case law to support his argument that his interest in the $10 Million Fee was not property of his bankruptcy estate under § 541. The first line involved corporate bonus policies and the second line dealt with crop disaster payments.

a. The corporate bonus cases are inapposite.

The Debtor relied heavily on *Rionda v. HSBC Bank USA, N.A.,* No. 10–20654–CIV, 2010 WL 5476725 (S.D Fla. Dec. 30, 2010), which arose from a suit by a former employee of HSBC over, *inter alia,* a year-end bonus. The Debtor focused on the fact that, in that case, HSBC retained discretion to award the bonus, which the court in *Rionda* determined rendered the employee's claim for the bonus unenforceable. The Debtor glosses over the fact that *Rionda* and every other case cited for this proposition fall squarely within the critique identified in *Community Design, i.e.,* they involve written bonus plans in which the employer expressly retained sole discretion to award, or choose not to award, a bonus. *See Rionda,* 2010 WL 5476725 at *1–2 (involving written HSBC policy noting that "[a]ll bonuses are strictly discretionary and may be awarded or not awarded at the sole discretion of the Company," and further providing that "[t]he Company reserves the sole right to ... discontinue any ... bonuses ... for any reason and without prior notice"); *Seaver v. KleinSwanson (In re Klein–Swanson),* 488 B.R. 628, 631 (8th Cir. BAP2013) (involving written policies at IBM, which the court noted gave IBM "the right to decide it would *not make any award* to the Debtor under either program" (emphasis added)); *In re Chappo,* 257 B.R. 852, 855 (E.D.Mich.2001) (involving written policies regarding bonus plan at Ford stating that the "Board of Directors at any time may terminate ... or modify the Plan or suspend any of its provisions," and further providing that the Bonus Plan Committee "may determine in its sole discretion not to make an Award to a particular Participant or group of Participants or to all Participants for any Plan Year."); *Sharp v. Dery,* 253 B.R. 204, 207 (E.D.Mich.2000) (written bonus policy at communications company "gave the employer discretion *as to whether it would pay any bonus at all* " (emphasis in original)); *Vogel v. Palmer (In re Palmer),* 57 B.R. 332, 333 (Bankr.W.D.Va.1986) (written bonus policy at electric company stated that "bonus eligibility does not guarantee anyone a bonus," "and the Company President remains the final authority on the matter of eligibility."). Here, as discussed above in sections I.B.2. and I.L., supra, the Tripp Scott Compensation Committee did not possess the authority to award the Debtor a bonus from the $10 Million Fee in the amount of zero dollars or terminate the firm's compensation policy for Directors, which the firm President acknowledged included an award of performance bonuses as an express component of Directors' compensation package. ***590** The nature of the discretion possessed by HSBC in *Rionda* and the Tripp Scott's Compensation Committee here is decidedly different. This difference mandates a dissimilar outcome.

Rionda is distinguishable for another reason. There, the court found that HSBC employees were paid for their services and, thus, provided no consideration for what would constitute a gratuitous bonus. *Rionda,* 2010 WL 5476725, at *10. Here, the Debtor's interest in the $10 Million Fee was understood to be a component of his compensation as a Director, which had not been paid, and for which he provided years of service on the Contingency Fee Cases while receiving substantially lower bonuses than the top performing Directors. *See* Section

I.L., and Table 1, *supra.* Thus, contrary to the facts of *Rionda,* where the court found the bonus to be extra pay, the Debtor provided Tripp Scott with consideration (work for which he was not fully paid) for the bonus paid out of the $10 Million Fee and that bonus was part of his compensation package.

Finally, *Rionda* does not eliminate the estate's claim for unjust enrichment had Tripp Scott allocated the Debtor a bonus in the amount of zero dollars from the $10 Million Fee or a bonus in an amount far short of the $2.7 million that was awarded. The elements of a claim for unjust enrichment under Florida law would have been easily met, as discussed in section II.B.1, *supra.*

In his Trial Brief, the Debtor suggested that *Seaver v. Klein–Swanson (In re Klein–Swanson),* 488 B.R. 628 (8th Cir. BAP2013) "is most analogous to the case at hand."[23] The Court disagrees. The debtor there was employed by IBM. As noted above, IBM maintained certain types of bonuses that employees could receive if certain conditions were met. The written bonus policies at issue in that case permitted IBM to withhold awards entirely. There was no evidence that IBM decided to make any bonus awards to the Debtor. The bonuses were paid from IBM's coffers, which contained funds not directly generated by the debtor.

23 The Court notes that the Debtor could not have relied upon *Klein–Swanson* when preparing his Schedules and SOFA because the BAP for the Eight Circuit decided the case on March 22, 2013 and the Debtor filed his Schedules on March 20, 2012.

Here, the $10 Million Fee was incontrovertibly tied directly to the Debtor's prepetition labors in working up the cases, taking them to trial and winning at trial. The evidence at Trial showed that the Tripp Scott Compensation Committee could not fail to award the Debtor a bonus from the $10 Million Fee. The Pozzuoli Prepetition E-mails and McLaughlin Prepetition E-mails demonstrate that the process concerning allocating bonuses from the $10 Million Fee was well contemplated on the Petition Date. The amount of the bonus pool was known on the Petition Date. Tripp Scott's past practices demonstrated that bonuses were awarded on a consistent basis. Unlike IBM's income, the $10 Million Fee was going to be distributed to the employees of Tripp Scott given the nature of Tripp Scott's business. Thus, if no money from the $10 Million Fee was allocated to the Debtor, it would have been allocated to other Tripp Scott employees. This was certainly not the case at IBM, as set forth in *Klein–Swanson.*

The nature of the businesses in the cases relied upon by the Debtor render the holdings in those cases inapplicable. In his Trial Brief in the property of the estate section of his arguments, the Debtor did not rely upon one case where the debtor was an attorney or similar professional. ***591** Tripp Scott, while a professional corporation, does not operate like HSBC, IBM, Ford, or a communications, planning or electric company.[24] It is not difficult to understand the difference between Tripp Scott, a law firm organized under Florida law as a subchapter C corporation, and the foregoing companies regarding bonus polices. Moreover, the employees' labors in the cases cited by the Debtor did not directly relate to the source of the funds from which the bonuses were paid. Based upon the foregoing, the corporate bonus cases relied upon by the Debtor in his Trial Brief are not relevant to and do not inform the Court's conclusion that the Debtor's interest in the $10 Million Fee became property of the estate pursuant to § 541 on the Petition Date.

24 *See Rionda v. HSBC Banks US,* 2010 WL 5476725 (S.D Fla. Dec. 30, 2010) (debtor worked at HSBC); *In re Klein–Swanson,* 488 B.R. 628 (8th Cir. BAP2013) (debtor worked at IBM); *In re Chappo,* 257 B.R. 852 (E.D.Mich.2001) (debtor worked at Ford); *Sharp v. Dery,* 253 B.R. 204 (E.D.Mich.2000) (debtor worked at a communications company); *In re Lapi,* 2005 WL 3199022, (Bankr.S.D. Fla. June 24, 2005) (debtor worked at a planning company); *Vogel v. Palmer (In re Palmer),* 57 B.R. 332 (Bankr.W.D.Va.1986) (debtor worked at an electric company). While the Debtor relied upon the foregoing cases to support his position that his interest in the $10 Million Fee was not property of the estate, those cases do not represent the only view of. For example, in *In re Miller,* No. 10–15891, 2011 WL 3741846, at *3–4 (Bankr.N.D.Ohio Aug. 24, 2011), the court found that the debtor's rights under a discretionary bonus policy at Lincoln Electric Company were property of the estate. The court in *Miller* declined to follow *Sharp* and *Palmer,* rather, the court chose to follow the reasoning of the BAP in *Booth. Id.* at *4.

b. The crop disaster payment cases are readily distinguishable.

In his Trial Brief, the Debtor relied on *Bracewell v. Kelley (In re Bracewell),* 454 F.3d 1234 (11th Cir.2006) and *Drewes v. Vote (In re Vote),* 276 F.3d 1024 (8th Cir.2002). These cases related to congressional acts concerning crop disaster payment legislation, which are acts of Congress that provide monetary assistance to farmers who had suffered losses

to their crops for certain years for certain reasons. As with the corporate bonus cases discussed above, the crop disaster payment cases do not lead the Court to the Debtor's conclusion that the Debtor's interest in the $10 Million Fee was not property of the estate.

In *Bracewell,* the United States Court of Appeals for the Eleventh Circuit addressed the question of whether the crop disaster payments to the debtor as a result of congressional legislation were property of the debtor's estate. The Eleventh Circuit determined that the debtor's property interest in claims to payment under the operative law "did not come into existence until the legislation itself became law, which was after his bankruptcy petition had been filed." *Bracewell,* 454 F.3d at 1237–39.

In both *Bracewell* and *Vote,* the legislation upon which the postpetition payments to the debtor were based had not been enacted on the dates on which the debtors filed for bankruptcy. Unlike the crop disaster legislation at issue in those cases, which had not become law on or before the petition dates in *Bracewell* and *Vote,* the Debtor had an undeniable interest in the $10 Million Fee as of the Petition Date. The judgments in each of the Contingency Fee Cases had been entered (and affirmed and mandated in the Home Depot Case) prior to the Petition Date. Moreover, as the Brown Settlement E-mails showed, the resolution of the Contingency Fee Cases was virtually substantively finalized prior to the Petition Date.[25]

25 Indeed, had the settlement negotiations broke down and the $10 Million Fee not been paid, the Debtor's interest in the $10 Million Fee would have turned out to be zero, but that result does not vitiate the estate's interest. Based upon the evidence at Trial, if the $10 Million Fee was paid into Tripp Scott, the Debtor's interest in the $10 Million Fee was definitely worth something more than zero, and ultimately turned out to be worth $2.7 million.

***592** Similarly, while the exact value of the Debtor's interest in the $10 Million Fee was unknown on the Petition Date because the amount of the $10 Million Fee he was to receive was ultimately to be determined by the Compensation Committee, Tripp Scott's compensation system existed prior to and on the Petition Date. Under the Tripp Scott compensation system, the Debtor had an interest in the $10 Million Fee based upon the fact that he was a Director of the firm and co-lead trial counsel on the Contingency Fee Cases. He had worked substantial hours on the two cases, and that he was co-originating counsel, which meant that he was going to receive client generation credit. Moreover, the Pozzuoli Prepetition E-mails and the McLaughlin Prepetition E-mails show that the Debtor had an interest in the $10 Million Fee and the only question on the Petition Date was how much of the $10 Million Fee was going to be awarded to the Debtor.[26] As discussed in the Findings of Fact, Tripp Scott had never failed to award a bonus to a Director who was alive and employed at the time the bonus was awarded if there were bonus funds to distribute. Moreover, there was no evidence adduced at Trial that even hinted to the fact that the Debtor was going to be terminated or that he was going to resign prior to the $10 Million Fee being disbursed.[27]

26 The lowest figure in evidence concerning the Debtor's bonus from the $10 Million Fee was the $2 million figure from Mr. Pozzuoli referred to in the McLaughlin Prepetition E-mails.

27 The evidence at Trial supports the opposite conclusion. Given that the judgments in the Contingency Fee cases were the Debtor's largest trial victories ever and that his bonuses from 2008 to 2011 were substantially less than other top performing Directors in terms of client generations and work revenue, the Debtor was not going to leave Tripp Scott prior to receiving his distribution from the $10 Million Fee.

The holdings in *Bracewell* and *Vote* are factually distinguishable and, as a result, their holdings are not controlling. On the Petition Date, the Debtor here did not have only a hope that he would be paid. Rather, he knew he would be paid a substantial sum from the $10 Million Fee and both hoped and expected it would be in the millions of dollars. *See**In re Thomas*, 516 Fed.Appx. at 877–78 (distinguishing Bracewell and affirming finding that the debtor had an interest in certain sale proceeds stemming from a prepetition option contract).

C. The Debtor's discharge is denied for concealing property of the estate with the intent to hinder delay or defraud creditors, making false oaths or accounts and transferring estate property within one year prior to the Petition Date with the intent to hinder delay or defraud creditors.

In the Amended Complaint (ECF No. 39), the Plaintiffs alleged that the Debtor's discharge should be denied because he: (i) intentionally and fraudulently concealed estate property after the Petition Date;[28] (ii) intentionally transferred property of the Debtor prior to the Petition Date;[29] and

(iii) knowingly and fraudulently made ***593** false oaths or accounts in connection with his Chapter 7 case.[30] The Debtor had no affirmative defenses at Trial.[31]

28 *See* 11 U.S.C. § 727(a)(2)(B) (Counts I and II).

29 *See* 11 U.S.C. § 727(a)(2)(A) (Count III).

30 *See id.* at § 727(a)(4)(A) (Counts IV and V).

31 The affirmative defense asserted by the Debtor in the Answer to the Amended Complaint was stricken by Court order based upon concession by the Debtor (ECF No. 66).

Based upon the foregoing Findings of Fact, as discussed below, the Court concludes that the Debtor's discharge is denied because the Plaintiffs have met their burden at Trial on all of the Counts in the Amended Complaint.

1. The Debtor's conduct in this case runs contrary to the principles underlying the privilege of a discharge in a Chapter 7 case.

[12] **[13]** **[14]** **[15]** Discharges in bankruptcy, which provide a "fresh start," are exclusively for honest but unfortunate debtors. *Gary J. Rotella & Assocs. v. Bellassai (In re Bellassai),* 451 B.R. 594 (Bankr.S.D.Fla.2011) (citing *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007)); *see also Peterson v. Scott (In re Scott),* 172 F.3d 959, 969 (7th Cir.1999). "[T]he debtor has no fundamental right to a discharge." *In re Scott,* 172 F.3d at 966. "The general policy that provisions denying a discharge are construed liberally in favor of the debtor and against the creditor applies only to the honest debtor." *Jennings v. Maxfield (In re Jennings),* 533 F.3d 1333, 1338–39 (11th Cir.2008). "Though the Bankruptcy Code provides most debtors with a fresh start, the Code prevents dishonest debtors from improperly using it as a shield." *E. Diversified Distribs., Inc. (In re Matus),* 303 B.R. 660, 670 (Bankr.N.D.Ga.2004). It is settled that a party objecting to a debtor's discharge bears the burden of proof under the preponderance of the evidence standard at trial. *Grogan v. Garner,* 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (determining preponderance of the evidence standard applied in a § 523 action); *Menotte v. Hahn (In re Hahn),* 362 B.R. 542, 546 (Bankr.S.D.Fla.2007) (stating standard in a § 727 action).

[16] To receive the *privilege* of a discharge, the debtor must provide complete financial disclosure. *In re Scott,* 172 F.3d at 967. After full and fair disclosure, "[c]reditors are entitled to judge for themselves what will benefit, and what will prejudice them." *Chalik v. Moorefield (In re Chalik),* 748 F.2d 616, 618 (11th Cir.1984).

Contrary to the principles underlying the Bankruptcy Code, based upon the Findings of Fact set forth above, the Court concludes the Debtor here is: (i) *dishonest,* rather than honest; (ii) fortunate, as opposed to unfortunate; and (iii) seeking a head start, not a fresh start. The Debtor purposefully concealed a multi-million dollar interest that was property of the estate with the intention of keeping all of the money paid to him as a result of his prepetition interest in the $10 Million Fee. Because the Debtor failed to provide a scintilla of evidence in his Schedules that would lead creditors and Trustee Welt to his interest in the $10 Million Fee, he cannot obtain a discharge that would enable him to shield the concealed asset.

2. The Debtor concealed his interest in the $10 Million Fee and the Transfers in his Schedules and SOFA with the intent to hinder, delay and defraud his creditors and Trustee Welt.

[17] **[18]** **[19]** **[20]** **[21]** **[22]** **[23]** **[24]** To prevail on a claim under § 727(a)(2)(B), a plaintiff must show by preponderance of the evidence that: (1) there was a transfer or concealment; (2) ***594** after the filing of the petition; (3) of property of the estate; and (4) by the debtor with the intent to hinder, delay or defraud his creditors. *SeeMenotte v. Cutaia (In re Cutaia),* 410 B.R. 733, 738 (Bankr.S.D.Fla.2008). A plaintiff is not required to show the transfer or concealment caused harm. *In re Scott,* 172 F.3d at 968; *In re Snyder,* 152 F.3d 596, 601 (7th Cir.1998). "Section 727(a)(2) is intended to prevent the discharge of a debtor who attempts to avoid payment to creditors by concealing or otherwise disposing of assets." *Menotte v. Davis (In re Davis),* 363 B.R. 614, 619 (Bankr.M.D.Fla.2006). " 'Concealment' occurs when a debtor's interest in the property is not obvious, but the debtor continues to reap the benefits the property has to offer." *Kapila v. Dailey (In re Dailey),* 405 B.R. 386, 392 (Bankr.S.D.Fla.2009) (citing *Johnson v. Greene (In re Greene),* 340 B.R. 93, 98 (Bankr.M.D.Fla.2006)). Omissions in bankruptcy schedules and statements of financial affairs constitute concealment where the omission is fraudulent and material. *In re Dailey,* 405 B.R. at 392 (citing *Swicegood v.*

Ginn, 924 F.2d 230, 232 (11th Cir.1991)). An omission is material if it "bears a relationship to the bankrupt's business transactions or estate or concerns the discovery of assets, business dealings or the existence and disposition of his property." *In re Chalik,* 748 F.2d at 618. To be fraudulent, omission of the information is intended to go unnoticed by the Chapter 7 Trustee. *In re Dailey,* 405 B.R. at 392. Debtors in bankruptcy must fully disclose all transfers, even if the money is not available to creditors at the time of filing. *Morrissy v. Dereve (In re Dereve),* 381 B.R. 309, 329 (Bankr.N.D.Fla.2007).

[25] Elements (1) and (2) of a § 727(a)(2)(B) claim require proof of a transfer or concealment after the filing of the petition. Here, the Trial evidence demonstrates these factors are satisfied. The Debtor's Schedules and SOFA provide no information concerning the Debtor's interest in the $10 Million Fee or disclose anything relating to the Transfers. The Debtor's interest in the $10 Million Fee related to his business dealings and concerned discovery of assets. The Debtor omitted reference to his interest in the $10 Million Fee and the Transfers intentionally so that his creditors and Trustee Welt would not discover this asset. The omissions were not the result of a mistake. The Debtor's interest in the $10 Million Fee and the Transfers were not obvious, and he intended to, and most likely would have, reaped the benefits of his interest in the $10 Million Fee and the Transfers but for the actions of CIB Marine and Trustee Welt in bringing this Adversary Proceeding. *See In re Dailey,* 405 B.R. at 392. Moreover, the Debtor's Schedules and SOFA were filed on March 20, 2012, approximately one month after the Petition Date. The Court concludes that there was concealment after the Petition Date when the Debtor did not disclose his interest in the $10 Million Fee or the Transfers in his Schedules and SOFA.

Element (3) of a § 727(a)(2)(B) claim is met here because the Debtor's interest in the $10 Million Fee is property of the estate for the reasons set forth in section II.B.1, *supra,* which are incorporated herein. Equally, the funds that were the subject of the Transfers were also property of the estate because they were transfers of money the Debtor owned in an investment account, as set forth in the Pretrial Stipulation, the Debtor's testimony at Trial and Exs. 13–14.

[26] Element (4) of a § 727(a)(2)(B) claim is established because the Court concludes that, based upon the evidence at Trial, the Debtor acted with the intent to hinder, delay or defraud his creditors and ***595** Trustee Welt when he concealed his interest in the $10 Million Fee and the Transfers on his Schedules and SOFA. It is widely recognized that it is extremely unlikely that a debtor will confess to acting with intent to hinder, delay or defraud a creditor or the trustee. *See In re Jennings,* 533 F.3d at 1338–39; *see also Job v. Calder (In re Calder),* 907 F.2d 953, 955–56 (10th Cir.1990). As a result, courts analyze the totality of the circumstances and rely upon the badges of fraud to determine whether actual fraudulent intent exists. *See In re Jennings,* 533 F.3d at 1338–39. Under this standard, based upon the Court's findings in section I.J., *supra,* the Court concludes that the evidence at Trial shows that the Debtor acted with intent to hinder, delay or defraud his creditors, including CIB Marine and Trustee Welt. *See* Section I.J., *supra.*

The Debtor concealed his interest in the $10 Million Fee hoping this would lead to a discharge of his prepetition debts, including the $4.5 million CIB Marine Judgment, and the retention of the multi-million dollar bonus he expected to receive from the $10 Million Fee. This maneuver demonstrates classic concealment with the intent to hinder, delay or defraud his creditors and Trustee Welt. The Debtor sought to obtain the ultimate windfall through his concealment. This strategy is not original. Concealment cases under § 727 often involve a debtor's attempt to conceal a prepetition asset with the hope of receiving the benefit of a discharge while retaining the concealed asset or the fruits therefrom. In *Dailey,* this Court stated, "I find that there was a motive for this debtor, as there is for any dishonest debtor, not to disclose prepetition accounts and assets that generate postpetition cash ..." *Dailey,* 405 B.R. at 391. The Court concludes the Debtor here shared the motivation of the debtor in *Dailey.* As in *Dailey,* the Court concludes that the elements of § 727(a)(2)(B) are met and the Debtor's discharge is denied for concealment with the intent to hinder, delay or defraud creditors and Trustee Welt. The facts of this case are more egregious than the facts presented in *Dailey,* however, as the Debtor here attempted to conceal a *multi-million dollar interest* that was property of the estate.

The Debtor's level of sophistication, which is discussed in the Findings of Fact, supports the Court's conclusion that his concealment of his interest in the $10 Million Fee and the Transfers was done with the intent to hinder, delay or defraud his creditors and Trustee Welt. *See In re Dailey,* 405 B.R. at 391; *In re Cutaia,* 410 B.R. at 739; *Jensen v. Groff (In re Groff),* 216 B.R. 883, 887 (Banrk.M.D.Fla.1998) ("The fact that the Debtor's omissions were intentional is supported by the fact that the Debtor is a sophisticated businessman.").

The Debtor's testimony at Trial concerning the legal research he conducted that he believed supported omitting his interest in the $10 Million Fee from his Schedules and SOFA also establishes his intent to hinder, delay or defraud his creditors. It shows that the Debtor knew he had the interest in the $10 Million Fee, knew disclosing the interest would be problematic and desired to omit the interest from his Schedules and SOFA. As discussed above in section II.B.1., the Debtor's legal conclusion was wrong. Rather than researching a means to conceal his interest in the $10 Million Fee, the Debtor should have focused on the well-established disclosure requirements under § 521. In the course of the Debtor's legal research concerning whether disclosure of his interest in the $10 Million Fee needed to be made on his Schedules and SOFA, the Debtor presumably did not read, or chose to ignore, the cases that hold the Debtor is not the gatekeeper ***596** concerning disclosure on his Schedules and SOFA.

[27] " 'It is not for the debtor to decide what is and is not relevant. A debtor who omits important information and fail[s] to make full disclosure, place[s] the right to a discharge in serious jeopardy.' " *Matus,* 303 B.R. at 675 (citations omitted); *see also Dereve,* 381 B.R. at 333 (finding that full and accurate disclosure is required when an individual files for bankruptcy); *Rutland v. Petersen (In re Petersen),* 323 B.R. 512, 517 (Bankr.N.D.Fla.2005) ("Debtors must make full and complete disclosures on their bankruptcy schedules, and it is not up to a debtor to decide upon the relevance or value of assets or information before including it on his or her schedules."); *Stone v. Bosse (In re Bosse),* 200 B.R. 419, 421 (Bankr.S.D.Fla.1996) ("A debtor in bankruptcy has an obligation to disclose the existence of all assets, even if they are worthless or unavailable."); *In re Prochnow,* 467 B.R. at 666 ("Debtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or unavailable to the bankruptcy estate."); *Lewis v. Summers (In re Summers),* 320 B.R. 630, 647 (Bankr.E.D.Mich.2005) ("It is not up to the Debtor to decide whether or not to list property based upon his belief as to value.... 'If there is any doubt or uncertainty whatsoever as to a possible interest in any property, the asset should be scheduled with an appropriate explanation ....' " (citations omitted)); *Fokkena v. Tripp (In re Tripp),* 224 B.R. 95, 98 (Bankr.N.D.Iowa 1998) ("It is not for debtors to determine what assets or transactions should be disclosed; debtors must report all property interests, even if they are worthless or unavailable to creditors."). If the Debtor read these cases, he certainly ignored their obvious applicability and intentionally chose not to be guided by their holdings at his own peril. Had he heeded their holdings, the Debtor would have disclosed his interest in the $10 Million Fee and likely would not have been a party to this Adversary Proceeding. The Debtor's violations of the plain disclosure requirements regarding his Schedules and SOFA further support the Court's conclusions that the Debtor concealed his interest in the $10 Million Fee with the intent to hinder, delay or defraud his creditors and Trustee Welt.

Based on the foregoing authorities, the Debtor's interest in a bonus from the $10 Million Fee was a contingent estate asset as of the Petition Date that was concealed from Schedule B of the Debtor's Schedules, which were filed after the Petition Date for the sole and exclusive purpose of hindering, delaying and defrauding his creditors and Trustee Welt. *See*11 U.S.C. § 727(a)(2)(B).

The Debtor's misrepresentations on Schedule I provide an independent basis for denying his discharge. Specifically, the evidence showed that the Debtor filed his Chapter 7 case with the expectation of receiving a multi-million dollar bonus from Tripp Scott in 2012 but only disclosed on Schedule I that he anticipated an "[a]nnual performance bonus (historically 65,000–70,000)." *See* Bankr.ECF No. 14. The evidence at Trial, which is discussed at section I.F., *supra,* demonstrates this statement is flatly untrue. Indeed, the failure to provide disclosure consistent with the Debtor's repeatedly stated expectations—as set forth in numerous prepetition e-mails that are part of the record in this case—is consistent with and wholly supportive of the conclusion that the Debtor's disclosure on Schedule I was not merely incorrect, but specifically intended to conceal his bonus on Schedule B. This misstatement, standing alone, is sufficient to result in the loss of the Debtor's discharge. ***597** *See Thomson v. Glenn (In re Glenn),* 335 B.R. 703, 707–08 (Bankr.W.D.Mo.2005) (stressing that "without engaging in a fair amount of detective work—which neither a court, trustee, nor creditor is required to do—the Debtor's true income simply cannot be ascertained from a review of his schedules," and denying debtor's discharge under 727(a)(4) of the Bankruptcy Code based upon intentional failure to disclose significant bonus income on Schedule I); *see also Wisell v. Wisell (In re Wisell),* No. 05–1044, 2006 WL 1932334, at *4 (Bankr.D.Vt. June 30, 2006) (denying debtor's discharge under 727(a)(4) of the Bankruptcy Code for misrepresentations on Schedule I, including failure to disclose anticipated severance package and other post-termination income).

The Debtor did not present any evidence at Trial from which the Court concludes that he should receive a discharge notwithstanding his intentional and fraudulent concealment of his interest in the $10 Million Fee and the Transfers. *See In re Cutaia,* 410 B.R. at 739 (determining that once the evidence is presented that proves a debtor's discharge should be denied, the burden shifts to the Debtor to present evidence that sufficiently explains why he nevertheless should receive a discharge). The closest evidence the Debtor presented concerning an explanation as to why he nevertheless should receive a discharge was his own testimony concerning the legal research he did in connection with completing his Schedules and SOFA. As discussed above, it was not the Debtor's place to determine what he believed was or was not property of the estate and then make his disclosures based upon his self-serving views. The Court concludes the Debtor's justification for his concealment did not rebut the Plaintiffs' evidence at Trial, which demonstrated he concealed his interest in the $10 Million Fee with intent to hinder, delay, or defraud his creditors.

The facts borne out at Trial show the Debtor acted with intent to hinder, delay or defraud his creditors and Trustee Welt when he concealed his interest in the $10 Million Fee and the Transfers in his Schedules and Statement of Financial Affairs after the Petition Date. Therefore, the Debtor's discharge is denied based upon § 727(a)(2)(B). *See In re Carlson,* 263 F.3d 748 (7th Cir.2001)(affirming denial of discharge where debtor-attorney fraudulently concealed interest in contingent fee case).

3. The Debtor made false oaths or accounts on his Schedules and SOFA.

[28] **[29]** **[30]** **[31]** The purpose of § 727(a)(4) is to ensure that a debtor provide the Chapter 7 trustee and the creditors with reliable information in order to assist the trustee in administration of the estate. *See In re Cutaia,* 410 B.R. at 741; *Day v. Zwirn (In re Zwirn),* No. 05–1036, 2005 WL 1978510, at *5 (Bankr.S.D.Fla. Aug. 15, 2005); *see also Baron v. Klutchko (In re Klutchko),* 338 B.R. 554, 568 (Bankr.S.D.N.Y.2005). The "Debtor had an obligation to truthfully disclose all of his assets and answer all questions in his Bankruptcy Schedules." *Cadle Co. v. Stasch (In re Stasch),* No. 05–2103, 2008 WL 877209, at *10 (Bankr.S.D.Fla. Mar. 31, 2008). The goal of § 727(a)(4)(A) is to facilitate administration of Chapter 7 bankruptcy cases without the need for parties in interest to expend resources to confirm the veracity of the debtor's bankruptcy documents. *See Friedman v. Kaiser* (*In re Kaiser*), 94 B.R. 779, 781 (Bankr.S.D.Fla.1998); *see also Epic Aviation, LLC v. Phillips (In re Phillips),* 418 B.R. 445, 461 (Bankr.M.D.Fla.2009) (recognizing that § 727(a)(4)(A)'s "purpose is to ensure that 'those who seek the shelter of the bankruptcy code do not play fast and ***598** loose with their assets or with the reality of their affairs."). Dishonesty in connection with a debtor's bankruptcy schedules and statement of financial affairs comes with a price, and that price is denial of the debtor's discharge. In short, the prohibitions and consequences set forth in § 727(a)(4)(A) are the teeth to the § 521 disclosure requirements.

[32] **[33]** **[34]** To prevail on a claim under § 727(a)(4), a plaintiff must establish that: (1) the debtor made a material false oath, and (2) the false oath was made knowingly and fraudulently. *See Swicegood,* 924 F.2d at 232; *In re Cutaia,* 410 B.R. at 741. Deliberate omissions in the Debtor's Schedules and SOFA constitute false oaths or accounts and are sufficient to deny his discharge under § 727(a)(4). *See Bakst v. Reis (In re Reis),* 372 B.R. 521, 525 (Bankr.S.D.Fla.2007); *In re Davis,* 363 B.R. at 620. "The subject matter of a false oath is 'material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transaction or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." *In re Chalik,* 748 F.2d at 618.

[35] Based upon the evidence presented at Trial, the Debtor's Schedules and SOFA do not contain accurate information. As discussed above in section II.C.2, *supra,* the Debtor did not disclose his interest in the $10 Million Fee or the Transfers in his Schedules and SOFA. Specifically, the Debtor knew he had at least a contingent interest in the $10 Million Fee, which should have been disclosed in response to No. 21, Schedule B, alongside the potential tort claims against Stearns Weaver and CIB Marine. The Debtor's interest in the $10 Million Fee also could have been disclosed in response to Nos. 19 or 35, Schedule B. Further, the Debtor failed to disclose his interest in the $10 Million Fee in his Schedule I on March 20, 2012, while (completely unbeknownst to his creditors or Trustee Welt) the Debtor vigorously advocated for his right to a multimillion-dollar bonus from the $10 Million Fee. He was fully aware that Tripp Scott had received its full fees from the Security Mutual Case and the Home Depot Case on March 1, 2012 and March 13, 2012, respectively. Accordingly, he reasonably anticipated (consistent with his

prepetition communications) that his income would increase dramatically within the year following March 20, 2012, but opted to keep that information to himself and affirmatively misled all parties and the Court as to what he "reasonably anticipated," as contrary to what is required by Schedule I. These knowing and intentional omissions were made under oath in his Schedules and SOFA.

The Debtor's failure to disclose his interest in a bonus from the $10 Million Fee and the Transfers unquestionably meets the materiality standard articulated by the Eleventh Circuit in *Chalik.* The Debtor's interest in the $10 Million Fee is material in the § 727(a)(4)(A) context. Based upon that interest, Tripp Scott awarded the Debtor a $2.7 million bonus which he had earned for his years of prepetition labor on the Contingent Fee Cases. Standing alone, that bonus is significantly more valuable than the total of all other estate assets in the Debtor's case. Moreover, the $10 Million Fee was derived from the Contingency Fee Cases stemmed directly from the Debtor's business of the practice of law. The Debtor testified at Trial the information contained in his Schedules and SOFA was provided intentionally and not the result of a mistake. The false oaths or accounts relating to the Transfers are also material in regards to § 727(a)(4)(A) because they bear directly on the existence and disposition of the Debtor's property.

The facts that support the Debtor's intent to hinder, delay or defraud his creditors ***599** and Trustee Welt for § 727(a)(2) purposes are discussed at Section I.J., *supra,* are incorporated herein and apply to the Plaintiffs' § 727(a)(4) claim. Accordingly, the Debtor's discharge is denied based upon § 727(a)(4)(A).

4. The Debtor made Transfers with the intent to hinder, delay or defraud his creditors within the year prior to the Petition Date.

[36] In addition to the postpetition concealment and false oath claims relating to the $10 Million Fee and the Transfers set forth in section II.B.2–3, the Court concludes that denial of the Debtor's discharge also results from the Debtor's effectuation of the pre-petition Transfers under § 727(a)(2)(A).

The Pretrial Stipulation filed with the Court in this Adversary Proceeding and the Debtor's testimony at Trial unambiguously provides that the Transfers were made within the ninety days prior to the Petition Date, resulted in pre-petition transfers to accounts wherein the Debtor did not have an ownership interest, and were not disclosed anywhere on the Debtor's Schedule or Statement of Financial Affairs.

The evidence at Trial, as discussed at length herein, revealed that the Transfers were effectuated and concealed by the Debtor with the intent to hinder, delay or defraud creditors and, thus, provides additional grounds for the denial of the Debtor's discharge in this case.

Based upon the foregoing, it is **ORDERED**:

1. Pursuant to 11 U.S.C. § 541 and under applicable Florida law, the Debtor's interest in the $10 Million Fee, which was determined by Tripp Scott to be $2,700,000 gross and approximately $1,700,000 net after the amounts withheld for taxes by Tripp Scott, is property of the Debtor's bankruptcy estate.

2. Pursuant to 11 U.S.C. § 727(a)(2)(B), the Debtor's discharge is **DENIED** based upon his concealment of his interest in the $10 Million Fee and the Transfers with the intent to hinder, delay or defraud his creditors and Trustee Welt after the Petition Date**.**

3. Pursuant to 11 U.S.C. § 727(a)(4)(A), the Debtor's discharge is **DENIED** based upon his false oaths in his Bankruptcy Schedules and Statement of Financial Affairs relating to his interest in the $10 Million Fee and the Transfers.

4. Pursuant to 11 U.S.C. § 727(a)(2)(A), the Debtor's discharge is **DENIED** based upon the Transfers, which were done with the intent to hinder, delay or defraud his creditors and Trustee Welt, within one year before the Petition Date.

5. The Court will enter a separate judgment pursuant to Bankruptcy Rule 9021 and in conformity with Bankruptcy Rule 7054.

All Citations

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of April, 2021, the foregoing was filed and served via the State of Florida's E-Filing Portal to:

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