IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

PETER G. HERMAN,

Respondent.
_____/

Supreme Court Case
No. SC17-2050

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

RESPONDENT'S ANSWER BRIEF

On Petition for Review of Amended Report of Referee

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PREFACE

The following record designations will be used:

(R___) – Record of Proceedings;

(TR__) – Transcript of Final Hearing and Hearing on Remand;

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

(TFB Exh. __) – The Florida Bar's Exhibits from Final Hearing;

(ROR __) – Report of Referee;

(AROR__) – Amended Report of Referee.

STATEMENT OF THE CASE AND FACTS

I. Initial Proceedings Before Referee

The Florida Bar Complaint, filed on November 16, 2017, relates to Peter Herman's conduct, not in his capacity of representing any client, but in connection with the financial schedules filed in his personal Chapter 7 bankruptcy case. The disciplinary proceedings were initiated by the Bar based upon entry of an Order by the bankruptcy court on August 5, 2013, following an adversary proceeding initiated by Mr. Herman's main creditor, CIB Marine Capital (CIB), to prevent Mr. Herman from being able to discharge a substantial deficiency judgment it had obtained against him in state court and on which it had been trying to collect from Mr. Herman. In denying the discharge, the bankruptcy judge accepted CIB's claims that Mr.

Herman had intentionally concealed prepetition assets, by failing to disclose on his Schedules: (1) an "interest" in $10 million in fees his employer received post-petition from two cases in which Mr. Herman served as co-lead trial counsel for the prevailing parties ($10 million fee); and (2) prepetition transfers of funds out of a joint account to accounts held by a relative (PH transfers). The bankruptcy court did not consider an advice of counsel defense because Mr. Herman's bankruptcy counsel failed to timely plead the defense. The standard of proof in the bankruptcy case was preponderance of the evidence (TR 6/26/18, p. 132), not clear and convincing, as in Bar proceedings.

At the Bar trial before the referee, evidence relating to both the $10 million fee issue and the PH transfers, some of which was not available to or considered by the bankruptcy court, including evidence regarding Mr. Herman's reliance on the advice of his bankruptcy counsel, was presented for the referee's consideration in determining whether Mr. Herman engaged in dishonest conduct as charged in the Bar's complaint. Based upon additional evidence presented regarding the PH transfers, and contrary to the bankruptcy court's Order, the referee found that the Bar failed to prove Mr. Herman engaged in any wrongdoing concerning the failure to disclose the PH transfers on his Schedules. (ROR ¶115) However, the referee

recommended that Mr. Herman be found guilty of violating Rules 3-4.3, 4-3.3(a)(1), 4-8.4(a) and 4-8.4(c), finding that Mr. Herman intentionally misled the bankruptcy trustee and his creditors by failing to disclose his expected bonus from his employer's $10 million fee. In so finding, in reliance on *The Florida Bar v. St. Louis*, 967 So.2d 108, 118 (Fla. 2007) and *The Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011), the referee rejected Mr. 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." (ROR ¶ 106)

After holding a bifurcated sanctions hearing and giving "substantial weight to the mitigating factors" (absence of a prior disciplinary record; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; character or reputation; and imposition of other penalties or sanctions) (ROR ¶119), a suspension of eighteen (18) months was recommended. (ROR ¶120)

II. Appeal to the Florida Supreme Court

The Bar sought review of the recommended sanction. Mr. Herman sought review of the referee's recommended findings and recommendation as to guilt relating to the $10 million fee, as well as the recommended

sanction. The Court issued its opinion on June 18, 2020, remanding the case to the referee for further proceedings and reconsideration and for the filing of an amended report. Not faulting the referee for interpreting the Court's precedent as he did, the Court clarified its opinions in *Adorno* and *St. Louis* and explained that the general principle the Court articulated in *Adorno* regarding the unavailability of an advice of counsel defense in Bar cases "is not so unyielding as to preclude consideration of Herman's advice of counsel defense in this case." *The Florida Bar v. Herman*, 297 So.3d 516, 519-20 (Fla. 2020) ("*Herman I"*). The Court held 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 … 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.

Herman I, at 523.

III. Remand Proceedings Before Referee

Case Management Conferences were held on June 23 and July 2, 2020, during which the referee was advised that no additional evidence would be presented by the Bar or Mr. Herman and the parties intended to rely upon the current record in making their respective arguments addressing Mr. Herman's advice of counsel defense.

On October 8, 2020, a hearing before the referee was held at which counsel for Mr. Herman and the Bar presented closing arguments addressing the advice of counsel defense which was raised by Mr. Herman regarding his answers on Schedule B, relating to his assets, and to Question 17 on Schedule I, relating to anticipated decreases or increases in income.

On December 17, 2020, the referee issued his Amended Report of Referee (AROR) and recommended that Mr. Herman be found not guilty of all Rule violations alleged in the Complaint, finding that the Bar "failed to prove, by clear and convincing evidence, that the Respondent's reliance on the advice of counsel was not reasonable" as to his answers on both Schedule B and Schedule I. (AROR ¶111)

IV. Factual Summary

A. Introduction

In its brief, the Bar finally "recognizes that Mr. Herman's performance bonus was legally discretionary" and he had "no guaranty" of being awarded a substantial bonus by his employer following his two wins in the contingency cases against Home Depot and Security Mutual. Bar Brief, p. 4.[1] As a result, the Bar has conceded the referee's findings are correct regarding the application of Mr. Herman's advice of counsel defense as to his answers on Schedule B. In this appeal, the Bar only challenges the referee's findings relating to Mr. Herman's answer to question 17 on Schedule I. Thus, this factual summary focuses on the facts related to the sole remaining issue in

[1] At trial and in the first appeal, in substantial reliance on the findings of the bankruptcy court and despite the vast majority of the caselaw to the contrary, the Bar fought tooth and nail and maintained the bonus was vested. Now in its appeal following remand, the Bar is reversing course, taking the same position Mr. Herman took in the bankruptcy case, on appeal from the bankruptcy court, before the referee in the trial, before this Court on appeal and before the referee on remand, that the bonus was entirely discretionary. Therefore, the Bar now agrees with Mr. Herman's position that the bankruptcy judge was wrong in finding the bonus was vested, which undeniably was the main issue in both the bankruptcy case and in the Bar trial. Whatever the Bar's motive at this point, its concession now as to Schedule B is far too little, far too late. Grasping at straws, the Bar is appealing the not guilty finding on remand and **again** seeking disbarment, this time based solely on the answer to one question on Schedule I. For more than 9 years, ever since he signed his Schedules in reliance upon the advice of his experienced bankruptcy counsel, Mr. Herman has been facing accusations of fraud, followed by the threat of disbarment.

this appeal—whether the referee erred in finding that the Bar "failed to prove, by clear and convincing evidence, that the Respondent's reliance on the advice of counsel was not reasonable" as to his answer to question 17 on Schedule I.[2]

B. Tripp Scott Compensation Structure and Historical Practices in Awarding Bonuses to Non-Shareholders

When Herman initiated his bankruptcy proceeding, he was employed by Tripp Scott, P.A. Although Mr. Herman was given the title of "director," in his more than 30 years with Tripp Scott, he never was an equity partner or a shareholder of the firm. (TR 6/21/18, p.129-130; 6/25/18, p.107-108, 112-113) Mr. Herman was a W-2 employee and did not have a contract with the firm. (TR 6/25/18, p. 112) His compensation consisted of a monthly salary and an annual discretionary performance bonus. (TR 6/25/18, p. 113) As a non-shareholder director, Mr. Herman's annual performance bonus was determined by Tripp Scott's Compensation Committee.

Bonuses were historically awarded at year-end. The typical year-end process began with the Compensation Committee determining the pool of

[2] In its Brief, the Bar repeatedly argues that disbarment should be imposed on Mr. Herman. Bar Brief, pp. 30, 47 and 48. As the referee, on remand, has recommended that Mr. Herman be found not guilty of all the alleged Rule violations, he did not mention, let alone address the issue of sanctions. Consequently, that issue is not presently before the Court.

funds available after paying all the firm's bills and taking into consideration upcoming expenditures and other factors relating to the financial stability of the firm. After the bonus pool was established, performance bonuses to be awarded to individual directors and other staff were considered and determined by the Compensation Committee utilizing various performance criteria which were comprised of both objective and subjective factors. (TR 6/25/18, p. 42-47) (testimony of former Tripp Scott director Amy Galloway).

Three witnesses (Peter Herman, Alexander Brown and Edward Pozzuoli), all from Tripp Scott, were the only witnesses who testified at trial in the bankruptcy case regarding the historical practices of Tripp Scott in the awarding of bonuses to non-shareholder attorneys. Their testimony concerning this issue was admitted into evidence in the Bar proceedings. (TFB Exh. 20 & 21; Resp. Exh. 38) Based upon the witnesses' testimony, although certain formulas were historically used to calculate performance bonuses for its employees, the Compensation Committee 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).

Two of the bankruptcy trial witnesses, Mr. Herman and Alex Brown, testified at the Bar trial and testified consistent with their prior testimony that the bonuses at Tripp Scott were discretionary. (TR 6/25/18, p. 85-88, 126-127) Mr. Herman specifically testified that for the 30 years preceding 2012 he had received a discretionary bonus determined in the same fashion. (TR 6/25/18, p. 126-127) An additional witness, Amy Galloway, who had also worked at Tripp Scott as a director for years, testified in the Bar proceedings. Her testimony was consistent with the testimony of the other three witnesses on the issue. In addition, she gave very specific examples of reasons why bonuses may not be awarded in any given year. (TR 6/25/18, p. 41-44)

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

C. Contingency Case Judgments/Fees

Prior to filing for bankruptcy in February 2012, Mr. Herman was co-lead trial counsel on two separate contingency fee cases in which substantial judgments were obtained in favor of the clients. Mr. Herman's employer, Tripp Scott, expected to obtain approximately $10 million in fees from the

two judgments. The verdicts in those cases were reported in both the mainstream and legal press, with articles specifically mentioning Mr. Herman as one of the lawyers representing the plaintiffs. (R. Exh. 2) In addition, the lawyer representing CIB in the state court litigation sent a congratulatory email to Alexander Brown, Mr. Herman's co-counsel in the two cases, after the Home Depot verdict and long before the bankruptcy petition date. (R. Exh. 2)

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

Starting in December 2011 and continuing into early January 2012, prior to the firm's receipt of the fees from the contingency cases, Mr. Herman sent approximately six emails to Edward Pozzuoli (President of Tripp Scott) and other members of the firm on the Compensation Committee, in which he expressed his expectation regarding the bonuses which should be awarded to those who worked on the two contingency cases, including himself and Alexander Brown. Mr. Herman expressed that he wanted Tripp Scott to be consistent with its historical practices in awarding bonuses. In the emails Mr. Herman received in response, he was not informed that the amount of the bonus to be awarded to him had been resolved. (TFB Exh. 26 & 27).

At the final hearing in the Bar proceedings, Mr. Herman testified that, at the time he sent the emails, there was a belief that Tripp Scott might

receive fees from the contingency cases before the end of the 2011 fiscal year, and the money would be available before the year-end performance bonuses were determined. (TR 6/21/18, p. 154; 6/26/18 p. 53, 55, 62) According to Mr. Herman, he was speaking up, not just for himself, but for all those who worked on the cases. (TR 6/21/18, p.152, 159) The purpose of the emails was to discuss what would be fair to award as bonuses if the fees came in. (TR 6/25/18, p. 231-232; 6/26/18, p. 50, 62-63) However, the money was not received by the firm before the end of the 2011 fiscal year. (TR 6/21/18, p. 154)

E. Tripp Scott's Perspective (and what it conveyed to Mr. Herman) Regarding Bonus to be Awarded from the $10 million Fee

Edward Pozzuoli, the President of Tripp Scott and a member of the firm's Compensation Committee, testified at his deposition in Mr. Herman's bankruptcy case that, when Mr. Herman sent the emails in December 2011 to early January 2012, asking to resolve the amount of his bonus from the fees, he informed Mr. Herman 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 R. Exh. 27 (Deposition of Edward Pozzuoli, May 13, 2013, p. 65, 68, 79, 80, 90, 92). Mr. Pozzuoli testified that, at that time, "no certainty" was provided to Mr. Herman because "[t]he money was not in the door." *Id.* p. 95.

In addition, Mr. Pozzuoli testified about 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, such as would be 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.

He also testified that there were factors which delayed the allocation of bonuses even after the fees were received in March 2012, which included 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 time frame 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. 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.[3] Mr. Pozzuoli also confirmed that, despite the statement in Mr. Herman's email that the Mayback & Hoffman co-counsel dispute should

[3] See also Testimony of Amy Galloway, confirming that the firm had started up a foreclosure defense practice that was "a giant money suck" and a factor which could impact the available bonus pool. (TR 6/25/18, p. 44)

not delay the resolution of Mr. Herman'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.

F. Advice Received from Bankruptcy Counsel

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

On February 18, 2012, Mr. Houston filed Mr. Herman's Voluntary Petition, which he described as a "skeletal filing," after which there is a statutory period of time to file the financial schedules. (TR 6/22/18, p. 92-93) He filed for and was granted an extension of time until March 16, 2012. (TFB Exh. 8). Even though an extension was granted, it is undisputed according to bankruptcy law that the information on the schedules was to reflect the financial information at the time the petition was filed, which was February

18, 2012. (TR 6/22/18, p. 32, 93-94; 6/26/18 p. 31-32, 93) At the time Mr. Herman's bankruptcy petition was filed on February 18, 2012, Tripp Scott had not yet received the $10 million in fees from the two contingency cases.

Prior to preparing the schedules for Mr. Herman, Mr. Houston reviewed the financial information provided to him by Mr. Herman and met with Mr. Herman several times. (TR 6/22/18, p. 96, 101-102) He also conducted an investigation and analysis of the facts and circumstances related to the Home Depot and Security Mutual contingency cases, the potential fees Tripp Scott would receive from them, and Tripp Scott's compensation structure. (TR 6/22/18, p. 103-109) In conducting his factual investigation, Mr. Houston had discussions with Alex Brown, who worked on the contingency cases with Mr. Herman, and Edward Pozzuoli, the manager of the firm, as well as Mr. Herman. (TR 6/22/18, p. 104, 106) He reviewed trust documents and firm memos dealing with how performance bonuses were decided by the Tripp Scott Compensation Committee. (TR 6/22/18, p. 105-108)

Based upon the information he obtained regarding Tripp Scott's compensation structure, Mr. Houston concluded that non-equity directors of the firm did not have a legally enforceable entitlement to a bonus because the bonuses were discretionary. (TR 6/22/18, p. 108-110) After conducting his factual investigation, Mr. Houston reviewed case law and concluded that

Mr. Herman did not have a vested right to a bonus and, therefore, any potential discretionary bonus would not be considered his property, but rather the property of Tripp Scott, until such time as the bonus was actually awarded. (TR 6/22/18, p. 108-110)

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

Before the filing of Mr. Herman's financial Schedules on March 20, 2012, Mr. Herman's employer, Tripp Scott, had received the $10 million in fees from the contingency cases, but no bonuses had been awarded by the Compensation Committee.[4] Mr. Houston prepared Mr. Herman's schedules.

[4] Ultimately, the Compensation Committee did not allocate bonuses from the fees until August 2012. (TR 6/22/18. p. 176-177) $2.7 million dollars was awarded to Mr. Herman. He did not receive it, agreeing to have the funds held in trust. *Id.*

(TR 6/22/18, p. 101-102) (TFB Exh. 13) The only thing Mr. Herman filled out on the schedules were his signatures. (TR 6/22/18, p. 114) On Schedule I (Current Income of Debtor), for question 17, which requires the debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document," Mr. Houston included the following language: "Annual performance bonus (historically 65,000 – 70,000)." (TFB Exh. 13, p. 16) Mr. Houston chose the wording he used, using the information Mr. Herman provided to him. (TR 6/22/18, p. 116) He asked Mr. Herman to average out the last three to four years of his annual performance bonuses. (TR 6/22/18, p. 116) According to Mr. Houston, he chose to do it this way and included it on Schedule I to put the Trustee on notice that an intangible bonus could be expected within the next year. Mr. Houston testified that, because the amount of Mr. 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." (TR 6/22/18, p. 116-118) According to Mr. Houston, the historical language was never intended to mislead anybody about the contingency fee cases. (TR 6/22/18, p. 119)

Mr. Houston did not recall having any discussions with Mr. Herman about the answer on Schedule I other than asking Mr. Herman to provide the

amounts of his last several bonuses. (TR 6/22/18, p. 119) However, Mr. Herman testified that Mr. Houston had told him that there would be follow-up by the trustee 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." (TR 6/25/18, p.134) In addition, when Bar counsel asked Mr. Herman: "When you wrote that answer to that question, you weren't referencing any of the fees from [the contingency fee cases], were you?", Mr. 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.

(TR 6/21/18, p. 170)

According to Mr. Herman, being inexperienced in bankruptcy law, he deferred to Mr. Houston's advice. (TR 6/25/18, p. 121, 127-128) Attorney

Chad Pugatch, a practicing bankruptcy lawyer of 42 years, who substituted as counsel for Mr. Herman in the bankruptcy case after the bankruptcy Order was entered, testified that Mr. Herman, who is not a bankruptcy lawyer, "was justified in relying on [Mr. Houston]." (TR 6/26/18, p. 33)

G. Trustee Kenneth Welt

The Trustee on Mr. Herman's bankruptcy case, Kenneth Welt, testified in the Bar case that, within a couple of weeks of his appointment, prior to the filing of the schedules, he was in contact with counsel for CIB, the major creditor, who informed Mr. Welt about the verdicts in the Home Depot and Security Mutual cases. (TR 6/21/18, p. 97-98) Mr. Welt testified that he knew before the schedules had been filed that he "for sure" was going to look into "those two huge verdicts." (TR 6/21/18, p. 99)[5] Mr. Welt testified that he was aware that the fees from the two cases were Tripp Scott's money. However, Mr. Welt thought that, if Mr. Herman had an agreement with Tripp Scott to receive a portion of those awards, it could be a possible source from which to collect. (TR 6/21/18, p. 111)

Mr. Welt testified that, when he reviewed the schedules filed on March 20, 2012, he did not recall seeing what was written on Schedule I regarding

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

the annual bonuses. He may have missed it. (TR 6/21/18, p. 104) He testified that, had he seen it, it would have put him on notice regarding Mr. Herman's anticipated receipt of a bonus. (TR 6/21/18, p. 103-104)

Chad Pugatch also testified that, even if assuming there was a failure to fully disclose the expected bonus, it was "not a material omission" as the trustee and the main creditor already had knowledge of the fees and Mr. Herman's potential to be awarded a substantial bonus. (TR 6/26/18, p. 29-31)

H. Florida Bar Expert's Testimony Regarding Schedule I

At the final hearing prior to remand, the Bar's expert witness, Jerry Markowitz, testified that, on Schedule I, a debtor is required to disclose reasonably anticipated increases in income over the 12 months following the date the bankruptcy petition is filed. (TR 6/22/18, p. 10) However, he did not provide any testimony about the specific requirements for compliance or acceptable conventions of bankruptcy practice for answering question 17. Specifically, regarding Mr. Herman's answer to question 17, Mr. Markowitz acknowledged that Mr. Herman listed on Schedule I that he anticipated receiving "an annual performance bonus," but testified that his interpretation of the historical language was that "it would lead one to believe that [Mr. Herman] would continue to get the same bonus." (TR 6/22/18, p. 68)

According to Mr. Markowitz, "a better answer" would have been to exclude the historical language. (TR 6/22/18, p. 69) As noted by the Court, Mr. Markowitz'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." *Herman I*, at 522.[6]

Mr. Markowitz also testified about the nature of bankruptcy practice and explained "**you have to look into the practicalities from a practice standpoint of how to respond to the questions [on the Schedules].**" (TR 6/22/18, p. 31) (emphasis added). He agreed it essentially comes down to "practice experience," and it is up to the lawyer to advise the client in bankruptcy situations, and clients follow the advice because of the lawyer's practice knowledge. (TR 6/22/18, p. 36, 74-75) Mr. Markowitz did not have any opinion as to whether Mr. Herman should have followed the advice of his counsel. (TR 6/22/18, p. 73-74)

STATEMENT OF THE STANDARD OF REVIEW

"A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without

[6] After remand, the Bar declined to offer any evidence, in the form of expert testimony or otherwise, regarding whether or how far Mr. Herman's answer to question 17 strayed from the acceptable conventions of bankruptcy practice.

support in the record. Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *The Florida Bar v. Barrett*, 897 So. 2d 1269, 1275 (Fla. 2005), quoting *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996) (citations omitted). "The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *The Florida Bar v. Vining*, 761 So. 2d 1044, 1047 (Fla. 2000) (citations omitted); *The Florida Bar v. Carlon*, 820 So. 2d 891, 898 (Fla. 2002).

SUMMARY OF ARGUMENT

Following the road map set forth by this Court in *Herman I*, the Referee analyzed the substantial and unrefuted record evidence introduced in a week-long trial supporting Mr. Herman's advice of counsel defense and correctly concluded that Mr. Herman acted in good faith reliance on his experienced bankruptcy lawyer's advice. The Referee correctly applied the advice of counsel defense standards under federal bankruptcy law. The substantial and unrefuted evidence in the record supports the Referee's finding that both preconditions for application of the defense of advice of

counsel has been met. Mr. Herman's bankruptcy counsel had all the facts and documentation necessary to correctly advise Mr. Herman regarding his disclosure obligation related to his potential to receive a substantial annual bonus from the $10 million fee. The answer to Schedule I, question 17, formulated by Mr. Houston contained truthful information and was not incompatible with Mr. Herman's own knowledge. It is undisputed that, when Mr. Herman signed his schedules, his annual performance bonus was entirely discretionary and the amount, if awarded, was indeterminate. Mr. Houston chose the wording of the answer and made the judgment call based upon his bankruptcy practice experience. While Mr. Herman's bankruptcy counsel's advice can be criticized, the answer cannot be considered clearly unreasonable under all the circumstances.

Despite being given the opportunity to supplement the record on remand, the Bar failed to present any evidence, let alone clear and convincing evidence to overcome the substantial and unrefuted evidence supporting Mr. Herman's good faith reliance on his bankruptcy counsel's advice. The Bar has failed to prove that the answer to question 17 was, in fact, deficient. No evidence as to whether or how far Mr. Herman's answer to question 17 strayed from the acceptable conventions of bankruptcy practice has been identified in the record by the Bar. Regarding Mr.

Herman's state of mind, as it did prior to remand, the Bar relies extensively upon Mr. Herman's emails. Those emails, when considered together with the other record evidence regarding the perspective of the Tripp Scott law firm and what was conveyed to Mr. Herman, are entirely consistent with a reasonable hypothesis of innocence, namely, a good faith reliance on the advice of his bankruptcy counsel. The Bar also continues its reliance on the findings of the Bankruptcy judge who did not consider the advice of counsel defense and made his decision based on a lower standard of proof. The Referee was correct in finding the Bar failed to prove, by clear and convincing evidence, that Mr. Herman's reliance on the advice of his bankruptcy counsel was not reasonable.

The Bar's claim that Mr. Herman intentionally tried to conceal his bonus is contrary to the record evidence and defies common sense. Mr. Herman knew the trustee would contact his employer and follow up on the bonus. He also correctly believed that CIB, his main creditor, was aware of his victories in the two contingency cases. Due to the garnishment proceedings already underway, Mr. Herman would have known that it was a practical impossibility for him to have prevented CIB from finding out about his potential to receive a substantial bonus after the fees were received by his employer. It was no secret. Under all the circumstances, as known to Mr. Herman, he would not

have had a motive to lie about his expected bonus. And, significantly, based upon the trustee's own admissions, the trustee was, in fact, never misled by the Schedule I answer.

ARGUMENT

I. THE REFEREE'S FINDINGS AND CONCLUSIONS ON REMAND ARE CLEARLY SUPPORTED BY THE RECORD EVIDENCE

A. Introduction

The Referee meticulously followed the clear directives and instructions provided by this Court in *Herman I* in conducting the remand proceedings and to make his findings, conclusions and, ultimately, his not guilty recommendation to this Court. The extensive and detailed Amended Report of Referee shows that the Referee thoroughly analyzed the record evidence and correctly applied the advice of counsel defense standards under federal bankruptcy law as instructed by this Court.

The Referee gave the Bar the opportunity to present additional evidence, but the Bar declined. Instead, as noted by the Referee,[7] the Bar chose to keep asserting the same arguments based upon the exact same record which existed prior to remand. The Bar takes issue with the Referee's new findings and conclusions relating to Mr. Herman's intent and state of

[7] See AROR, ¶110; TR 10/8/20, p. 22.

mind at the time he signed his schedules, claiming they are inconsistent with the Referee's prior credibility findings. The Bar is asking the Court to disregard the findings on remand and, instead, revert back to and adopt the Referee's prior findings in his original ROR regarding Mr. Herman's credibility. However, as astutely observed by the Referee during the Bar's arguments on remand, as a result of the Court's opinion, "we're sort of looking at the same record but through the different lens and a different perspective now." TR, 10/8/21, p. 24 ("The Supreme Court was very clear, I thought, in their order directing me to address the advice of counsel defense based on federal bankruptcy law and they laid out all the cases and the standards that are in those cases, so it's pretty clear."). As required to do on remand, the Referee put aside his prior findings and conclusions and looked at the record evidence anew—through the lens of the advice of counsel defense.

B. Advice of Counsel Defense Under Federal Bankruptcy Law

This Court concluded in its prior Opinion that an advice of counsel defense should be available to Mr. Herman in this Bar discipline proceeding to the extent that federal bankruptcy law permits such a defense to negate a finding of bad intent. *Herman I*, at 520. The Court described the nature of that defense and the preconditions to its assertion:

> 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,**
>
> [1] the **"debtor must demonstrate that he provided the attorney with all the necessary facts and documentation."** *Id*.
>
> [2] 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).

Herman I, at 520 (emphasis added).

C. Substantial and Unrefuted Evidence of Mr. Herman's Good Faith Reliance on Bankruptcy Counsel's Advice

At the final hearing in these Bar proceedings, substantial evidence was presented regarding Mr. Herman's good faith reliance on his bankruptcy counsel in preparing his Schedules. The substantial and unrefuted evidence

supports the Referee's finding that both preconditions for application of the defense of advice of counsel under federal bankruptcy law has been met.

The record evidence undoubtedly supports the Referee's finding that the first precondition (all necessary facts and circumstances have been provided to counsel) has been met. It is undisputed that the information Mr. Herman gave his bankruptcy attorney was accurate. There was no evidence presented by the Bar that Bart Houston did not have all the facts and documentation necessary to correctly advise Mr. Herman regarding his disclosure obligation related to his potential to receive a substantial annual bonus from the $10 million fee or that Mr. Herman withheld any information or documentation from his attorney. Mr. Houston testified at length regarding his investigation of the facts and circumstances related to the $10 million fee and Tripp Scott's compensation structure. According to Mr. Houston, not only did he receive information from and meet with Mr. Herman, but he also interviewed members of the firm's Compensation Committee and reviewed firm documents dealing with how performance bonuses were decided. (TR 6/22/18, p. 103-109)

There is also substantial and unrefuted evidence in the record to support the Referee's finding that the second prong (reasonableness of and good faith reliance on counsel's advice) has been met. Based upon Mr.

Houston's extensive investigation of Tripp Scott's compensation policies and procedures, the pertinent facts known to Mr. Houston were the same as those known to Mr. Herman. There was no evidence presented that Mr. Herman had any insider information which was not known to his attorney. The answer to question 17 formulated by Mr. Houston contained truthful information and was not incompatible with Mr. Herman's own knowledge. The unrebutted testimony of all four witnesses from Tripp Scott who testified regarding the firm's compensation structure was that non-equity employees, like Mr. Herman, are not entitled to any bonus until the Compensation Committee meets and decides the bonus, if any, despite what the employee may lobby for in emails.[8] It is also notable that, not only is it undisputed that bonuses paid by Tripp Scott have always been entirely discretionary until the bonus award is made, all witnesses, including the Bar's expert, were in agreement that the amount of any prospective performance bonus awarded

[8] See R. Exh. 27 (Deposition of Edward Pozzuoli, May 13, 2013, p. 142) ("An individual lawyer can write all the e-mails they want, but at the end of the day, it's the comp committee meeting that determines the when and how much and to whom gets the money, and until that time, no one is entitled to anything."); see also TFB Exh. 20 & 21; R. Exh. 38 (Bankruptcy Trial Transcript, p. 84-85; 153-154; 218-219); TR 6/25/18, p. 41-44, 51, 58, 60-61, 85-88, 126-127).

to Mr. Herman was entirely indeterminable by him when he signed his schedules. (TR 06/21/18, p. 111-12; 06/22/18, p. 67).[9]

No evidence whatsoever was presented that Mr. Herman's employer conveyed to him the amount of the bonus he likely would receive from the $10 million fee. To the contrary, there is evidence in the record that Mr. Herman was specifically informed by Edward Pozzuoli, the President of Tripp Scott and a member of the firm's Compensation Committee, that there was "nothing to discuss" before the fees were received and the pool available for bonuses to directors was established by the firm's Compensation Committee. See R. Exh. 27 (Deposition of Edward Pozzuoli, May 13, 2013, p. 65, 68, 79, 80, 90, 92). Mr. Pozzuoli testified that, at that time, "no certainty" was provided to Mr. Herman because "[t]he money was not in the door." *Id.* p. 95.

As noted by the Court, "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." *Herman I*, at 522. On its face, question 17 does not ask for a specific dollar amount or even an estimate; it asks for a

[9] It was even noted in the bankruptcy court's order that the *amount* of any bonus to be awarded by the compensation committee was discretionary. TFB Exh. 3, Bankruptcy Order, p. 42; Herman, 495 B.R. at 583.

description. It is undisputed Mr. Houston chose the wording of the answer. Because the amount of Mr. Herman's bonus was indeterminate, Mr. Houston, based upon his bankruptcy experience and his own investigation of all the facts and circumstances, made the judgment call, not Mr. Herman, 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.

While Mr. Herman's bankruptcy counsel's advice can be criticized, the answer cannot be considered clearly unreasonable under all the circumstances. As stated, the answer was true. The anticipated increase was an "annual performance bonus," the words contained within the parenthetical provided additional information that was factually true. The Bar is conveniently treating it as if the parenthetical and the word historically were not there. Although the Bar's expert testified that "the way [Mr. Herman] answered the question ***suggested*** that that was what he would get," (TR 6/22/18, p. 70) (emphasis added), indicating that he thought the answer was *potentially* misleading, the Court has already rejected this testimony, concluding that it "seemingly ignores the wording of question 17, which asks about *increases or decreases* in income." *Herman I*, at 522 (emphasis in original). As already found by the Court, "[b]ecause 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**." *Herman I*, at 522 (emphasis added). Thus, consistent with the Court's Opinion, based upon the wording of the question and given that it is undisputed the amount of Mr. Herman's expected bonus remained unknown at the relevant time, the record evidence establishes that it would not have been either "obvious to [Mr. Herman] that his attorney was mistaken," or "transparently plain" that the additional historical information should not have been included in the answer to question 17, particularly where the information given was, in fact, truthful. See *Robinson v. Worley*, 849 F.3d at 583, and *In re Zizza*, 875 F.3d at 732.[10]

Furthermore, the record contains additional evidence relating to Mr. Herman's intent and state of mind at the time he signed his schedules. Significantly, Mr. Herman testified that his lawyer told him there would be follow-up from the trustee to learn more detail about the performance bonus.

[10] Notably, in a later bankruptcy hearing concerning questions about attorney's fees disclosures filed along with Mr. Herman's other schedules, including Schedule I, the bankruptcy judge was presented with and considered an advice of counsel defense and declined to impose sanctions on Mr. Herman, noting that he was the "unwitting" client in connection with advice given to him by his bankruptcy lawyer. (R. Exh. 40, p. 197)

In the trial, the Bar failed to present any evidence, let alone clear and convincing evidence, establishing that it was unreasonable for Mr. Herman to rely upon what he was told by Mr. Houston. And on remand, the Bar failed to present any evidence on this issue. In addition, evidence was presented that, due to the publicity the verdicts received and the congratulatory email sent to Mr. Herman's co-counsel by CIB's counsel, it was Mr. Herman's belief, at the time he signed his schedules, that CIB, his main creditor, was already aware of the judgments and the $10 million fee received by his employer.

Following the detailed road map set forth by this Court in *Herman I*, the Referee analyzed the foregoing substantial and unrefuted record evidence introduced in a week-long trial supporting Mr. Herman's advice of counsel defense and correctly concluded that Mr. Herman acted in good faith reliance on his experienced bankruptcy lawyer's advice. AROR, ¶¶ 106-110. The Bar has utterly failed to demonstrate that "there is no evidence in the record to support [the referee's not guilty] findings or that the record evidence clearly contradicts the conclusions." *Vining*, 761 So. 2d at 1047. Thus, "this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *Barrett*, 897 So. 2d at 1275.

II. ON REMAND, THE BAR FAILED TO SUPPLEMENT THE RECORD WITH ANY EVIDENCE TO OVERCOME THE SUBSTANTIAL AND UNREFUTED EVIDENCE SUPPORTING MR. HERMAN'S GOOD FAITH RELIANCE ON HIS BANKRUPTCY COUNSEL'S ADVICE

Mr. Herman undeniably met his "burden of production to come forward with the evidence necessary to support his advice of counsel defense." *Herman I*, at 523. As stressed by the Court, "the ultimate burden of proof always remains on the Bar." *Id.* The Bar did nothing on remand to meet its heavy burden.

As noted by the Referee, the Court's opinion in *Herman I* "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." AROR, ¶108. It was incumbent on the Bar to prove two things by clear and convincing evidence. One, that the wording of the answer to question 17 was deficient. And, two, that Mr. Herman knew that the wording of the answer was not sufficient to comply with his disclosure obligations under federal bankruptcy law and, therefore, it was unreasonable for him to rely upon his bankruptcy attorney's advice when he signed his Schedules. The Bar failed on both counts. The Referee properly held the Bar to its burden and found Mr. Herman not guilty of all charges.

Other than the very limited testimony of the Bar's expert regarding question 17, no evidence as to whether or how far Mr. Herman's answer to

question 17 strayed from the acceptable conventions of bankruptcy practice has been identified in the record by the Bar or presented as additional evidence on remand. The Bar, seemingly relying on "common sense," continues to argue in this appeal that the wording of the answer to question 17 provided by Mr. Herman's bankruptcy counsel was clearly deficient and, therefore, Mr. Herman could not, in good faith, rely on his attorney. The Bar's main argument is that question 17 is a straightforward, simple question that is understandable to anyone and no bankruptcy expertise was necessary to answer the question. Question 17 is simple in a vacuum. But, when taking into consideration all the underlying facts and circumstances, especially in the context of disclosure requirements in a bankruptcy setting, determining the "correct" answer was not so simple, as evidenced by the many differing opinions, given in hindsight, regarding what would have been a better answer.

Despite this Court's observation that the record evidence (specifically the testimony of the Bar's expert) "left some doubt as to whether or how far Herman's answer to question 17 strayed from the acceptable conventions of bankruptcy practice," on remand, the Bar presented nothing new regarding the requirements under bankruptcy law and practice for answering question 17 to establish that the answer given to question 17 was, in fact, deficient.

Now, before this Court, the Bar injects its opinion as to what, long after the fact, would have been a better answer to question 17. Bar Brief, p. 44. Even the Bar's own expert witness could not provide a clear opinion regarding what would have been a better answer.[11] There is no evidence whatsoever in the record to support the opinion of the Bar suggesting a better answer to the question.

In any event, such an argument does not address the essential issue in this case—Mr. Herman's intent and state of mind. The Bar has ignored this Court's warning that, "[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." *Herman I*, at 523. As noted by this Court, "the relevant inquiry in this Bar discipline proceeding is not the prudence of Herman's answers on the bankruptcy schedules," but whether Mr. Herman made a false or misleading statement "'knowingly and fraudulently,' as opposed to carelessly." *Herman I*, at 520, 522, citing *Robinson v. Worley*, 849 F.3d 577, 583 (4th Cir. 2017) (quoting 11 U.S.C. § 727(a)(4)(A) (2012)).

[11] The Bar's expert faulted the answer provided to question 17, but testified it may have been sufficient if Mr. Herman simply answered: "annual performance bonus." TR 6/22/18, p. 68-69.

Regarding Mr. Herman's state of mind, as it did prior to remand, the Bar relies extensively upon Mr. Herman's emails. The Bar again argues the emails are sufficient circumstantial evidence to prove that, at the time he signed his schedules, Mr. Herman reasonably anticipated a multi-million-dollar bonus and, therefore, must have known his attorney's answer to question 17 was a misrepresentation and intended to conceal his expected bonus. However, when 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.*" *The Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994)) (emphasis added). When considered together with the other record evidence which completed the picture, specifically regarding the perspective of the Tripp Scott law firm and what was conveyed to Mr. Herman, the emails are entirely consistent with a reasonable hypothesis of innocence, namely, a good faith reliance on the advice of his bankruptcy counsel.

While Mr. Herman was hopeful about the amount of the bonus he would be awarded, his employer never communicated any certainty regarding the awarding of the bonus or as to the amount. Based upon the record evidence, which the Bar failed to refute, at the time Mr. Herman signed his schedules, his annual performance bonus was entirely

discretionary and the amount, if awarded, was indeterminate. On remand, with the guidance of this Court, the Referee re-assessed Mr. Herman's state of mind taking into consideration all the record evidence, including Mr. Herman's emails and the testimony regarding the Compensation Committee's multi-factor decision-making process, and correctly concluded that the Bar had failed to prove by clear and convincing evidence that Mr. Herman's reliance on his counsel's advice was not in good faith.

In addition, the Bar continues its substantial reliance on the findings of the Bankruptcy judge. See Bar Brief, pp. 24-27 (quoting and highlighting the bankruptcy judge's opinion at length in Statement of the Case and Facts), pp. 37, 42 and 43 (incorporating bankruptcy judge's findings in Bar's arguments). However, as stressed by this Court in remanding for consideration of Mr. Herman's advice of counsel defense, the bankruptcy judge did not consider the defense and decided the matter under a lower standard of proof than the clear and convincing evidence standard that governs in a Bar discipline case. *Herman I*, at 523. Without specifically identifying sufficient evidence in the record, the Bar cannot meet its clear and convincing burden of proof by, once again, falling back on the findings of the bankruptcy judge.

Simply put, as correctly found by the Referee, the Bar has failed to meet its burden of proof. Despite being given the opportunity to supplement the record on remand, the Bar failed to present any evidence, let alone clear and convincing evidence to overcome the substantial and unrefuted evidence supporting Mr. Herman's good faith reliance on his bankruptcy counsel's advice.

III. THE BAR'S CLAIM THAT MR. HERMAN INTENTIONALLY TRIED TO CONCEAL HIS BONUS IS CONTRARY TO THE RECORD EVIDENCE AND DEFIES COMMON SENSE

On the surface, many of the Bar's arguments would appear to be based on common sense. But, digging deeper, what is revealed is a faulty analysis of the undisputed evidence and a misunderstanding of bankruptcy law, practice and procedures. In actuality, the Bar is asking this Court to ignore common sense, as well as significant and undisputed evidence in the record which was not presented to the bankruptcy court, to find Mr. Herman was intentionally trying to hide his potential to receive a substantial bonus from the $10 million in fees to be paid to his employer.

It is unrefuted Mr. Herman was told by his attorney that the trustee would contact his employer and follow up on the bonus. And that is exactly what happened in Mr. Herman's bankruptcy case. The trustee knew that Mr. Herman was going to get a performance bonus, and he did what he does in

all cases involving compensation from an employer. Mr. Herman knew that because his bankruptcy attorney told him that. The trustee went to Tripp Scott and investigated the potential bonus. Providing the additional information in the answer, which has now been suggested by the Bar in hindsight, would not have changed what the trustee would do.

The Bar's argument that the "historic" language contained in the answer was "a blatant attempt to try to minimize the chances that the large bonus would become an asset of the bankruptcy estate," Bar Brief, p. 42, not only ignores the common sense reading of the answer, but also shows that the Bar does not understand bankruptcy law and the process that occurs after the filing of a debtor's petition and schedules. As explained by the Bar's own bankruptcy expert, Mr. Markowitz, there would not have been any "downside" to Mr. Herman disclosing his expectation to receive a substantial bonus from the two contingency case judgments on his schedules. It would not have disadvantaged Mr. Herman in any way, because the issue would necessarily have gone on to an exemption hearing where he may have prevailed. (TR 6/22/18, p. 56) Critical to this analysis is that Mr. Herman's bankruptcy counsel knew this, as well, and then he chose the language to be used. The issue of whether the bonus was vested and, therefore, a contingent asset, or was discretionary and, therefore, future income and not

property of Mr. Herman's bankruptcy estate, was always going to be litigated. The attorneys for both sides knew it even before the schedules were filed. The way the bonus was disclosed on Schedule I did not change anything that would have happened, except that is, to Mr. Herman's detriment alone. Mr. Herman's bankruptcy attorney gave Mr. Herman's adversaries the only means to deny Mr. Herman his bankruptcy discharge by claiming Mr. Herman knowingly failed to disclose his bonus as a prepetition asset on schedule B.[12] In addition, Mr. Herman's bankruptcy counsel also precluded Mr. Herman from utilizing his arguably best defense in the adversary proceeding by failing to timely plead an advice of counsel defense.

The Bar's claim that the answer given to question 17 was obviously done with the intent to mislead the trustee and Mr. Herman's creditors is also contrary to common sense and is belied by the record evidence. Due to the publicity the verdicts received and the congratulatory email sent to Mr. Herman's co-counsel, it was clear to Mr. Herman, at the time he signed his schedules, that CIB, his main creditor, was already aware of the judgments and the $10 million fee received by his employer. And CIB's pre-petition

[12] The Bar, reversing its position in this appeal after years of maintaining otherwise, has conceded that the bonus was "legally discretionary" and, therefore, did not have to be listed as an asset on schedule B. It bears repeating, Schedule I is not a listing of assets, but has to do with potential sources of income.

knowledge has also now been proven by the trustee's testimony in the Bar proceedings. Moreover, Mr. Herman's creditor commenced wage garnishment proceedings *prior to the petition date* and filing of the schedules, and Mr. Herman's wages–which would include any awarded bonus–were actively being pursued. (TR 06/22/18, p. 87) Because any bonus awarded would be subject to the garnishment proceedings, Mr. Herman certainly would have known that it was a practical impossibility for him to have prevented CIB from finding out about his bonus. It would defy common sense and logic to conclude that Mr. Herman was trying to prevent his creditors and the trustee from finding out about those cases and his potential to receive a substantial bonus after the fees were received by his employer. It was no secret. Under all the circumstances, as known to Mr. Herman, he would not have had a motive to lie about his expected bonus. The notion raised in the Bar's brief of Mr. Herman wanting to keep the money all to himself, under all the circumstances, is an unfair and intentionally inflammatory assertion. It is noteworthy that the bonus money never went to Mr. Herman, and he agreed to have it put in escrow.

Moreover, the trustee confirmed he was aware of Mr. Herman's potential to receive a substantial bonus. (TR 06/21/18, pp. 99, 106, 111) Tellingly, in regard to the answer to question 17 on schedule I, the trustee

testified “[i]t’s possible” that Mr. Herman’s attorney “may have made a mistake,” and that he (the trustee) “never thought it was intentional.” (TR 06/21/18, p. 103) And, probably most telling, the trustee testified he does not recall seeing Mr. Herman’s answer to Schedule I, nor, based on his three-decade long career as a trustee, did Schedule I matter to him; but he testified that, had he seen it, Mr. Herman’s answer would have properly placed him on notice Mr. Herman anticipated receiving an annual performance bonus. (TR 06/21/18, pp. 102-04) Thus, the trustee’s testimony is consistent with the testimony of Mr. Houston and Mr. Herman that the wording of the answer to question 17 on Schedule I, chosen by counsel and adopted by Mr. Herman, was intended to put the trustee on notice regarding the bonus. And, significantly, based upon the trustee’s own admissions, the trustee was, in fact, never misled by the Schedule I answer.

CONCLUSION

It is respectfully submitted the Referee was correct in finding the Bar failed to prove, by clear and convincing evidence, that Mr. Herman's reliance on the advice of his bankruptcy counsel was not reasonable. On appeal, the Bar has failed to demonstrate that there is no evidence in the record to support the Referee’s findings or that the record evidence clearly contradicts the Referee’s conclusions.

WHEREFORE, Respondent requests that the Referee's factual findings, conclusions and recommendation to find Mr. Herman not guilty of all the Rule violations alleged in the Complaint should be adopted and approved by this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-filing Portal; with copies provided via e-mail to Joi Pearsall, Bar Counsel (jpearsall@floridabar.org); Chris W. Altenbernd, Special Counsel (service-caltenbernd@bankerlopez.com; caltenbernd@bankerlopez.com); Patricia Ann Toro Savitz, Staff Counsel, The Florida Bar (psavitz@flabar.org), on this 17th day of May, 2021.

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that the type size and style of this Brief is Arial 14pt and that it complies with the applicable font and word count limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(B). The word count is 9,818 words, and has been calculated by the word-processing system excluding the content authorized to be excluded under the applicable Rule.

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