IN THE SUPREME COURT
OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

F. LEE BAILEY,

Respondent.
________________________/

CASE NO. SC 96,767
TFB Number 1996-51,085(15B)
1997-50,110(15A)

F. LEE BAILEY'S (1) MOTION TO RELINQUISH JURISDICTION TO ALLOW REFEREE TO CONSIDER MOTION FOR RELIEF FROM JUDGMENT BASED UPON NEWLY DISCOVERED EVIDENCE; (2) MOTION TO EXTEND TIME FOR SERVING BAILEY'S INITIAL BRIEF IN THIS COURT FOR 30 DAYS FROM DATE REFEREE RULES, IF JURISDICTION IS RELINQUISHED AND REFEREE DENIES RELIEF; OR (3) MOTION TO EXTEND TIME FOR SERVING BAILEY'S INITIAL BRIEF IN THIS COURT FOR 30 DAYS FROM AN ORDER DENYING THIS MOTION TO RELINQUISH JURISDICTION TO THE REFEREE, OR UNTIL DECEMBER 1, 2000, WHICHEVER DATE IS LATER; AND (4) MOTION TO SUPPLEMENT THIS RECORD WITH THE NEWLY DISCOVERED EVIDENCE IF THIS COURT DENIES THE MOTION TO RELINQUISH JURISDICTION

A. THE PROCEDURAL POSTURE

On July 24, 2000 the Hon. Cynthia A. Ellis, in her capacity as a Referee, recommended the disbarment of F. Lee Bailey. Appendix A, p. 20 ("I recommend that the Respondent be disbarred from the practice of law in Florida").[1]

A Petition for Review of the Referee's Report was timely filed on October 2, 2000. Appendix B. The letter from the Florida Bar advising the Court of the Board

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[1] The disbarment recommendation was the result of the Referee's recommendation that Bailey be found guilty of "having personal funds in his money market account" when he transferred stock proceeds to that account on its way to a government account (Count I); of "misappropriating sale and loan proceeds from the Biochem stock and commingling the sales loan proceeds into his own money market account" (Count II); of misappropriating the sale and loan proceeds from the Biochem stocks and continuing to expend funds from his Barnett Bank money market account after service and knowledge of the orders of Judge Paul" (Count III) (App. A, p. 18); "by stating under oath . . . that he did not see the January 12, 1996 and January 25, 1996 orders [of U.S. District Judge Paul] until February 2, 1996 (Count IV); that he acquired a "pecuniary interest adverse to a client" (Count V); and that he sent "two letters to [Judge Paul] concerning an unsentenced client that contained both information that was detrimental to his client and to protect his financial interest in continuing to represent his client." (Count VII) (App. A pp. 19-20).

The "client" was Claude Duboc, for whom Bailey had negotiated a plea agreement in the Northern District of Florida, which included the forfeiture of millions of dollars of foreign assets and properties. The "Biochem stock" was transferred to Bailey by Duboc, with the government's acquiescence and approval. The primary issue in this matter is whether the stock, which ultimately appreciated in value, was given to Bailey "in trust" or given to him without restriction as to its ownership by him and profits that might accrue.

of Governors' decision not to seek review of the Referee's Report and that Bailey had "until October 2, 2000 to file a petition" is attached as Appendix C. Under Rule 3-7.7(c)(3), Bailey's Brief is due on November 1, 2000.

Attached as Appendix D (composite) are the September 18, 2000 letter from the Bar to John K. Aurell and John R. Beranek informing them that the Bar denied their request that they be permitted to continue their representation of Bailey, and Mr. Aurell's September 19, 2000 transmittal letter informing Mr. Bailey of the Bar's refusal to waive a conflict based on the fact that a partner of their law firm "presently serves on the board of governors." Messrs. Aurell and Beranek successfully represented Mr. Bailey in this Court in the initial proceeding – when the Bar unsuccessfully sought an emergency suspension based on the allegations that ultimately were presented to the Referee. *See* Orders of March 20 and May 16, 1996, Appendix E.

Having been denied by the Bar his first choice of appellate counsel, Bailey formally retained undersigned counsel on October 11, 2000. A Notice of Appearance was filed on October 17, 2000.

B. A SUMMARY OF THE REQUESTS IN THIS MOTION

This Motion seeks four things.

First, based upon the Motion for Relief from Judgment Pursuant to Rule

1.540(b)(2), Fla.R.Civ.P., which is based on newly discovered evidence, and which has been contemporaneously filed with the Referee (Appendix F), F. Lee Bailey asks that this Court relinquish jurisdiction to the Referee so that she may consider the issues raised by the newly discovered evidence.[2] That is the proper procedural requirement. *Glatstein v. City of Miami*, 391 So. 2d 297, 298 (Fla. 3d DCA 1980) (pendency of appeal divests trial court of jurisdiction absent a relinquishment of jurisdiction to consider Rule 1.540(b) motion). *See also Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 n. 1 (Fla. 4th DCA 1994) ("The pendency of the appeal divested the trial court of jurisdiction to hear the rule 1.540 motion"); Rule 9.600(b), Fla.R.App.P.

Second, if the Court does relinquish jurisdiction but the Referee denies relief, then Bailey requests that the time for serving his Brief in this Court be the same 30 days set forth in Rule 3-7.7(c)(3), but that the 30 days run from the time of the Referee's denial of the Rule 1.540 motion. If the motion were granted, and the

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[2] The newly discovered evidence goes to the heart of this matter – whether Bailey held the Biochem Pharma stock given to him by his client with the government's permission – "in trust." The new discoveries were made in a pending United States Court of Federal Claims lawsuit, in depositions that were taken after the Bar hearing because the United States would not produce the Department of Justice officials in the Bar proceeding, and because one Assistant United States Attorney who did appear in the Bar proceeding later changed his testimony on the critical "in trust" issue after he discovered a lost memorandum regarding what was said to Judge Paul in an off-the-record in-chambers meeting. The newly discovered evidence is detailed at p. 10 *et seq.*, *infra*.

Referee granted Bailey a new hearing, there would be no immediate need for Bailey to file a Brief.

Third, if the Court decides not to relinquish jurisdiction to the Referee, then Bailey requests that the time for serving his Initial Brief in this Court be extended for 30 days from the date of any Order denying this Motion to Relinquish Jurisdiction, or to December 1, 2000, whichever date is later. Because the Bar has refused to allow Bailey's original counsel in this Court to continue to represent him in this Court, new counsel, who had no prior knowledge of the 1,257-page hearing transcript or the 57 Bar exhibits and 17 Bailey exhibits, which include voluminous deposition and court proceeding transcripts, need the additional time to absorb the record and prepare the Brief for this Court.

The severity of the recommended sanction – disbarment – and the fact that the actions complained of occurred between 1994 and 1996, compel the conclusion that the requested extension for preparing an Initial Brief is a reasonable and responsible request.

Fourth, if the Court decides not to relinquish jurisdiction to the Referee, Bailey requests that the Court consider the newly discovered evidence, allowing the record to be supplemented with the United States Court of Federal Claims deposition testimony detailed in and attached to this submission. That evidence is relevant to the

recommendation of guilt and punishment, and would probably lead to a different recommendation as to guilt and/or punishment. *See Alston v. Shiver*, 105 So. 2d 785, 789 (Fla. 1958) (general rule for new trial based on newly discovered evidence is whether the newly discovered evidence "would probably change the result of the case upon a new trial"). Given the standard of proof (clear and convincing evidence) and the "broader scope of review" of disciplinary recommendations (*The Florida Bar v. Buckle*, ___ So. 2d ___, 25 Fla. L. Weekly S815a (Fla. Oct. 12, 2000), fairness and due process support consideration of that newly discovered evidence in this case. *See also Ogburn v. Murray*, 86 So. 2d 796, 798 (Fla. 1956): "[T]his court has said that the rules as to newly discovered evidence `are not inflexible and must sometimes bend in order to meet the ends of justice.'" (internal citation omitted). [3]

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[3] In *Robinson v. State*, ___ So. 2d ___, 25 Fla. L. Weekly S742a, 2000 WL 1473147 (Fla. Oct. 5, 2000), the Court made clear that in a criminal case, newly discovered evidence requires a finding that it "`would probably produce an acquittal on retrial,'" *quoting Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), 709 So. 2d 512, 521 (Fla. 1998). A Bar disciplinary proceeding is not criminal, thus that more stringent standard is not applicable here.

C. THE REASONS WHY RELINQUISHMENT OF JURISDICTION IS A REASONABLE AND RESPONSIBLE REQUEST

The Motion for Relief from Judgment Pursuant to Rule 1.540(b)(2), Fla.R.Civ.P., focuses upon the newly discovered evidence that is relevant to the single most important reason for the Referee's findings and recommendation of disbarment: whether Bailey's possession of 602,000 shares of Biochem Pharma stock, which the United States agreed could be transferred to him, was to be held by him "in trust" or in fee simple. It was that issue that prompted the federal court proceedings against Bailey, which in turn led to the Bar complaint, especially Counts II, III and V, the "Biochem trust" counts.[4]

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[4] Most of this case hinges on the Biochem stock, and that is why the newly discovered evidence necessitates reconsideration of whether there was an oral trust, and whether, given the ambiguity of the matter, disbarment would be a fair punishment. It is highly doubtful that disbarment would be upheld based only on Count I, commingling of funds between July 6 and August 15, 1994, the date when the funds ($730,000) were transferred to the United States Marshall's account. App. A, p. 4, ¶ 4. Count IV, a dispute about whether Bailey actually "saw" two January 1996 federal court orders before February 2, 1996 (App. A, pp. 11-13) is also an unlikely basis for disbarment, as is Count VII, writing two ex-parte letters to United States District Judge Paul in January 1996. App. A, pp. 15-17. Count VI was dismissed. *Id.* at 15. Any fair comparison with other cases "involving similar conduct" as the kinds of offenses set forth in Counts I, IV and VII would likely not result in disbarment . *The Florida Bar v. Buckle*, ___ So. 2d ___, ___ Fla. L. Weekly S815a (Fla. Oct. 12, 2000) (This Court has a broad scope of review as to sanctions).

The Referee's Report leaves no doubt that she believed Bailey received the Biochem stock "in trust":

> The identified asset was 602,000 shares of Biochem Pharma stock. This would serve as a fund from which Respondent could serve as *trustee* and guardian of Duboc's French properties.
>
> *   *   *
>
> At no time prior to the entry of Duboc's plea of guilty plea on May 17, 1994 did Respondent, Duboc or any other person, including members of the United States Attorney's Office or Judge Paul, suggest that the stock which Respondent now claims to be his "in fee simple absolute" was anything other than an intangible asset *to be held in trust* by Respondent for the purposes outlined above.

Appendix A, pp. 3-4, ¶s 12, 15 (emphasis supplied).

It is undisputed that no written document established a "trust" or a trust obligation.

> Q. Did anybody put anything in writing and say to Duboc and Bailey, this is the deal, this is the agreement, this is what we have decided to do and we're going to put it in writing so that all of us understand and there can be no confusion in the future regarding our agreement. Did anybody do that?
>
> A. No, there was nothing in writing.

> Q. Did anybody on behalf of the government even consider or discuss memorializing the agreement?
>
> A. No.

TR 337 (testimony of GREGORY R. MILLER, Chief of the Criminal Division of the U.S. Attorney's Office, Northern District of Florida in 1994).

Faced with that fact, the Referee relied on euphemisms: "form of trust" (App. A, p. 5 ¶ 3a); "nature of a trust" (*id.* at p. 6, ¶ 3d); "nature of a trust (*id.* at ¶ 3g). But they cannot obscure the fact that not a single document spelled out the terms by which Bailey received the Biochem stock. The "oral trust" found by the Referee requires the highest quantum of proof. *See Sottile v. Mershon*, 166 So. 2d 481, 483 (Fla. 3d DCA 1964) ("In order to demonstrate error upon this record [in which the chancellor found that an attorney's deposit to his account was not in trust] the appellants would be required to show that the evidence to establish the oral trust was so clear, strong and unequivocal as to remove every reasonable doubt as to its existence").

Against that backdrop, the new newly discovered evidence is critical. We set forth that evidence below, and have attached to this submission excerpts of the testimony adduced in August and September 2000 – testimony that was not available at the time of the Referee's hearing in May and June because the Department of Justice would not cooperate in allowing some of its employees to be subpoenaed

to testify at that Bar proceeding, and because missing memoranda / notes of a key Bar witness were subsequently found, confirming that his testimony in the Bar proceeding was not true.[5]

1. THOMAS KIRWIN

Thomas Kirwin was in 1994, and is today, an Assistant United States Attorney in the Northern District of Florida. He was the "line assistant" on the Duboc case. TR 121-122. His testimony before the Referee on May 30, 2000 included this recitation of what he said to Judge Paul[6] in the unreported May 1994 in-chambers Duboc pre-plea conference regarding the Biochem stock:

> I had mentioned to the court at that specific time that approximately six and a half million dollars in stock had been given to the defense *in trust* by their client to hold and to be used for two purposes.
>
> The stocks are to be held *in trust* to be sold only as needed, and it was explained to

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[5] *See* testimony of Thomas F. Kirwin, *infra* at pages 11-13, and discussion of Bailey's "Emergency Motion for Abatement or Stay" filed in this Court on May 24, 2000 and denied on May 26, 2000 (Appendix L), page 22, *infra*.

[6] Judge Paul's testimony was precluded by a protective order. That fact was brought to this Court's attention in an "Emergency Motion for Abatement or Stay," p. 9, filed by Bailey in this Court on May 24, 2000.

> the court these stocks were expected to be very valuable, appreciate in value, and the defense would be selling only those portions of the stock as needed to manage and keep up these [French] properties [of Duboc], that no fees were going to be taken out of those stocks by the defense for the purpose of attorney fees or costs, and that the defense had agreed to only apply for their fees and costs associated with the representation at the conclusion of the case, and that they were going to be agreeable to letting the court determine on a reasonable basis whether or not they were going to be entitled to those fees that were being claimed.

TR 259-260 (emphasis supplied).

On August 28, 2000, Mr. Kirwin's deposition was taken in the lawsuit Bailey brought in the United States Court of Claims against the United States, to secure the return of the Biochem assets. This colloquy between Mark Horwitz, Bailey's counsel, and Mr. Kirwin is both illuminating and disturbing:

BY MR. HORWITZ:

> Q. Let me hand you what we have marked as number 22 to your deposition.
>
> A. [MR. KIRWIN] Uh-hum.
>
> Q. Do you recognize that as a copy of your notes?
>
> A. Right. It was a missing one.

MR. PETRIE [TERRY M. PETRIE, Department of Justice, representing Kirwin]: Missing notes. Geez.

*   *   *

THE WITNESS [KIRWIN]: I mean, we've – we were looking for this at the Florida Bar hearing. And I just couldn't find this note.

*   *   *

BY MR. HORWITZ

Q. Okay. Would the – that note, one of the notes on that page concerns the hearing in front of Judge Paul.

A. Uh -hum.

Q. Is that correct?

A. Uh - hum. It is.

*   *   *

Q. Okay. So we'll – we'll refer to that as the best record of – of that proceeding.

But – so now in relation to the in-chambers discussion that your notes make reference to –

A. Uh -hum.

Q. — was there a statement by anyone at that meeting that the Biochem Pharma stock was received by Bailey in trust?

> A. *I don't remember that the words "in trust" were ever used.*

Appendix G, Excerpt of August 28, 2000 Deposition of Thomas F. Kirwin in *Bailey v. United States*, United States Court of Federal Claims, Case No. 96-666c (Judge Horn), pp. 266-268 (emphasis supplied).

Obviously, Mr. Kirwin's testimony before the Referee (*supra*, p. 10), told with such attention to detail that it must have seemed highly credible, was, we now know, inaccurate and misleading on the critical "in trust" issue.

The importance of Mr. Kirwin's refreshed memory reversal of the unequivocal testimony he gave to the Referee ("I had mentioned to the court . . . in trust . . . . The stocks are to be held in trust . . . ." (TR 259-260)) is heightened by the fact that Gregory R. Miller, the Chief Assistant United States Attorney for the Northern District of Florida, was equally unequivocal to the Referee in his recollection of the Judge Paul off-the-record meeting:

> Q. [BY BAR COUNSEL]: All right. And to the best of your recollection can you tell the Judge [Referee Ellis] what was said in chambers on May the 17th of '94?
>
> * * *
>
> A. I had mentioned to the court at that specific time that approximately six and a half million

> dollars in stock had been given to the defense *in trust* by their client to hold and to be used for two purposes.
>
> The stocks are to be held *in trust* to be sold only as needed. . . .

TR 258-259 (emphasis supplied). Since Kirwin's Bar testimony now has been shown to be inaccurate, Miller's same "in trust" testimony is also inconsistent with the "best record" notes of the meeting with Judge Paul.

Bailey's Bar proceeding testimony was just the opposite of Kirwin's and Miller's testimony before the Referee: there was no "trust." AUSA Gregory Miller had approved the stock being given to Bailey in lieu of $3.5 million cash for fees and costs. Bailey knew that he was accountable for the use of the stock to manage and liquidate Duboc's properties, but since he took the risk of loss of value, he was not restrained from benefitting as to any gain in the stock's price.

> Q. [BY BAR COUNSEL on cross-examination]: Mr. Bailey, is it your contention that when you discussed this matter with Mr. Miller and you subsequently received that Biochem stock, that money was transferred to you in fee simple?
>
> A. Yes. Effectively it was.
>
> * * *
>
> Q. It was a done deal why?

A. Because they chose to transfer it in fee simple to a non trust account and they knew it was a non trust account and they never said anything about getting it back.

TR 986. Bailey's understanding that the stock was his fee, for better or worse, was not inconsistent with Mr. Miller's acknowledgment that Bailey was accepting the risk that the stock could go down in value and he (Bailey) would be left feeless and out of pocket the expenses of salvaging Duboc's properties for the government's forfeiture benefit:

Q. My question is this, Mr. Miller: How did you explain the risk to Mr. Bailey?

A. I said that that was the only account that we were making available to him, that stock fund; that if it went down, he was risking that he was not going to be able to pull out the monies that he needed to manage those properties; and possibly not have the money in that fund to pay his fees.

* * *

Q. Did you ever tell Mr. Bailey that had the stock gone down, had there been insufficient funds with which to pay his fee, that that was a gamble which he was taking and that if he ran out of money that he simply would have to do without a fee?

* * *

> A. Essentially yes. Essentially, that's basically what I told Mr. Bailey. . . .

TR 351-352.

Was Bailey lying when he said there was no "trust" – that the Biochem stock was his? The Referee called him a liar: "The court also notes at this point that although it was neither charged nor argued by the Bar, the Respondent testified falsely in this disciplinary proceeding, and this serves as further aggravation under Standard 9.22(f)." App. A, p. 21. But the newly discovered evidence supports the conclusion that Kirwin's and Miller's "trust" testimony was false and misleading.

The newly discovered evidence, which shows that Kirwin and Miller never intimated or said to Judge Paul that the stock was to be held in trust, undermines the foundation of the Referee's findings and requires reconsideration by the Referee.

That conclusion is also buttressed by the newly available testimony of a high ranking Justice Department official – Linda Samuel.

2. **<u>LINDA SAMUEL</u>**

Linda Samuel was, in 1994, Special Counsel in the Department of Justice Asset Forfeiture and Money Laundering Section. Appendix H. Deposition Excerpt of Linda Samuel, August 24, 2000, p. 7, taken in *Bailey v. United States*, United States Court

of Federal Claims, No. 96-666c (Judge Horn). She testified that she was contacted in May 1994 by the United States Attorney's Office in Tallahassee and "asked if I would assist them in the foreign forfeitures." *Id.*, p. 8.

BY MR. HORWITZ:

> Q. Did they ever discuss – did any of the assistants [Assistant United States Attorneys] ever discuss Biochem Pharma stock with you at all?
>
> A. Yes.
>
> Q. And in any – with whom did you discuss Biochem Pharma stock, among the Assistant US Attorneys for the Northern District of Florida?
>
> A. With Dave McGee, with Jimmy Hankinson, and with Tom Kirwin.
>
> Q. Was that conversation with all three at once or a series of conversations?
>
> A. Those would be different conversations over a period of years.
>
> Q. In the conversations with Mr. McGee, in which the subject matter of the Biochem Pharma stock was discussed, did Mr. McGee ever say that the stock had been given to Bailey in trust?
>
> A. He never said that.

Q. Did he ever show you any written trust agreements concerning the Biochem Pharma stock and Mr. Bailey's receipt of the stock?

A. No.

Q. In any of your conversations with Mr. Hankinson, concerning the Biochem Pharma stock, did Mr. Hankinson ever relate that the stock was given to Mr. Bailey in trust?

A. No.

Q. Did Mr. Hankinson ever state that there were any documents reflecting the creation of the trust involving Biochem Pharma stock?

A. No.

Q. In relation to your conversations with Mr. Kirwin, concerning the Biochem Pharma stock, did Kirwin ever say the stocks were given to Mr. Bailey in trust?

A. No.

Q. Did Kirwin ever say there were any trust documents in relation to the Biochem Pharma stock and Mr. Bailey?

A. No.

Id., pp. 11-13.

Thus, Ms. Samuel's testimony is particularly telling and supportive of Mr.

Bailey's position, because she confirms that "over a period of years" there was no talk of a "trust" *vis a vis* Bailey and the Biochem stock.

3. <u>GERALD McDOWELL</u>

Gerald McDowell is (and was in October 1994) the Director of the Asset Forfeiture Office of the Department of Justice. He is Linda Samuel's supervisor. App. I, p. 8, August 24, 2000 Deposition Excerpt of Gerald McDowell, in *Bailey v. United States*, United States Court of Federal Claims, No. 96-666c (Judge Horn).

Mr. McDowell confirmed that Ms. Samuel told him "that Miller had indicated to Bailey, in words or substance, that if the price of this stock went down that was being given to Bailey, it would be his risk or there would be no other money there to serve the purposes for which he was being given the stock[.]" App. I, p. 35. He confirmed that he was never told by anyone in the United States Attorney's Office for the Northern District of Florida that Bailey was given the Biochem Pharma stock in trust and that there were no documents indicating that the stock had been provided to Bailey in trust. *Id.*, pp. 14, 36.

Thus, the newly discovered testimony of both high ranking Justice Department officials lends added support to Bailey's position that the Biochem Pharma stock, for which he assumed all risk of loss of value, was not given to him "in trust." As Bailey

said in this colloquy, any added value was to be his:

> Q. Based on what Mr. Miller told you . . . did it ever occur to you that if you accepted that gamble, accepted that downside risk, took that money, put it into your account, made full disclosure to the government regarding the number of the account, relied on their capabilities to transfer the stock into your account, that you would not have the opportunity, if it happened to occur, to benefit from any upside performance of the stock?
>
> A. [F. LEE BAILEY]: It would be my value, that was Miller's statement to me. When you tell someone, you got the downside risk and that was his only concern, he didn't want me to come back to him or give a lackluster performance because I was broke, I guess. His only concern was if it had shrunk in value.
>
> The government didn't have any problem with it if it went up.

TR 912-913.

> [F. LEE BAILEY]: But no one ever asked me, have you sold any stock, how much money is left, what are you doing with it, is it in the trust account. Never. Never mentioned until January 11 [1996] when the news hit the fan that it was now 18 million dollars despite a third of it having been sold. That's the first time I ever heard a hostile word out of anyone.

TR 912.

4. CARL LILLEY

The September 25, 2000 deposition excerpt of DEA Agent Carl Lilley in the United States Court of Federal Claims proceeding (Appendix J) adds to Bailey's claim that there was no "trust." These colloquies with Bailey's Court of Federal Claims counsel are persuasive:

> Q. In this meeting following the [May] hearing and conversation with Judge Paul, was there any mention by Mr. Miller that Bailey had been given the Biochem Pharma stock in trust?
>
> A. No, I don't think so. I don't recall that.
>
> Q. Did anyone else present for this meeting state in your presence that Bailey was given the Biochem Pharma stock in trust.
>
> A. No.

Lilley Deposition, Appendix J, p. 136.

> A. So Bailey had to provide a bank account number and Duboc had to sign a letter to the fiduciary or to the bank to transfer that account. So there were discussions along that line the 25th and 26th [of April].
>
> * * *
>
> Q. In those discussions, did anyone suggest that

> any of the documentation that was being prepared indicated that Bailey was receiving the stock in trust?
>
> A. No, I don't think there was any documentation like that.

Id., Appendix J, p. 149.

Finally, the person at the highest Department of Justice supervisory perch – Mary Lee Warren – left no doubt that no one, at no time, urged the "trust" theory until the Biochem stock went up in value.

5. MARY LEE WARREN

The August 16, 2000 deposition of Mary Lee Warren, Deputy Assistant Attorney General, in the United States Court of Federal Claims (Appendix K) and her production of and identification of a May 19, 1994 memorandum from P. Michael Patterson, United States Attorney for the Southern District of Florida, lends additional credence to Bailey's position. Ms. Warren, the supervisor of both Ms. Samuel and Mr. McDowell, was responsible for oversight of the Department of Justice Asset Forfeiture Money Laundering Section. Appendix K, p. 7. She was a subject of Bailey's May 24, 2000 "Emergency Motion for Abatement or Stay" of the May 30, 2000 Referee hearing. In that Motion to this Court Bailey set forth the facts that Judge

Paul had refused to testify, and that the government refused to produce a memorandum to Ms. Warren on the Duboc case. This Court denied Bailey's emergency motion on May 26, 2000. Appendix L. Subsequently Bailey was able to depose Ms. Warren and obtain the memorandum in the Court of Federal Claims case.

The memorandum to Ms. Warren from the United States Attorney was to "[m]ake you aware of and highlight the Duboc case, which by any measure we believe is the premiere case currently being prosecuted in the United States, when measured by profits, quantity of drugs, and/or sophistication of operation." Appendix K, p. 25. Despite the significance and importance of the Duboc case, not a word in the memorandum mentioned a trust (Appendix J, pp. 25-27), nor was a "trust" mentioned in oral conversations with Ms. Warren:

> Q. Did Mr. Patterson . . . or Mr. Miller who was apparently present according to the memo, did they discuss with you the fact that while Mr. Duboc was in custody that the government prepare a document that caused Duboc to transfer his 602,000 shares of Biochem Pharma stock to Mr. Bailey and at the same time 3.5 million in funds to a DEA account in Panama City?
>
> A. I know nothing of that, no. Just to be absolutely clear, I know that there was this stock involved. I don't know what the agreement was, but I certainly don't recall ever

> seeing any document or having it described to
> me.

Appendix J, pp. 33-34.

Indeed, Ms. Warren never knew until "the last couple of days" that the United States Attorney's Office had, in 1994, prepared the transfer document that caused the Biochem shares to be transferred to Bailey. Appendix K, p. 34. Surely, had a "trust" been created in the "premiere" case in the country, one would think that the top Department of Justice officials in the relevant chain of command would know about it. The newly discovered evidence that there was no such knowledge at any level of the Department of Justice is important evidence which enhances Bailey's explanation and his credibility. The Referee should consider the new evidence.

CONCLUSION

There is now clear and undisputed evidence that the foundation of the Bar's position – that the Biochem Pharma stock was to be held in trust, and that Judge Paul was unequivocally so informed by two Assistant United States Attorneys – is belied by the newly discovered evidence, especially the evidence of Assistant United States Attorney Kirwin's newly discovered notes and his reversal of his critical testimony regarding what he told Judge Paul and the lack of Department of Justice

knowledge of any "trust."

The Motion to Relinquish Jurisdiction to allow the Referee to consider a motion for relief from judgment based on newly discovered evidence should be granted. In the alternative, if jurisdiction is not relinquished, the 30-day extension of time from the date of an Order of this Court or until December 1, 2000, whichever is later, for serving the Initial Brief should be granted, and the request that this Court consider the newly discovered evidence as part of the record on appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by FedEx to the following counsel of record this 23rd day of October, 2000:

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