

IN THE SUPREME COURT OF THE
STATE OF OREGON

In Re:)	Case No. 12-111
)	
Complaint as to the Conduct of,)	SC S061840
)	
DAVID HERMAN, OSB #902967,)	
)	
Accused-Petitioner on Review.)	
_____)	

REPLY BRIEF OF DAVID HERMAN, ACCUSED

Petition for Review from the decision of the Oregon State Bar Trial Panel dated November 14, 2013.

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April, 2014

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**REPLY TO OSB’S RESPONSE TO:
“QUESTIONS PRESENTED ON REVIEW.”**

The accused disagrees that the attempted expansion of the accusations to now include, “stealing business opportunities from his partners,” was alleged or even an issue at hearing.

The accused had no “partners.” The parties were to be directors and shareholders in Blue Q1, prior to their rescission of the initial arrangement, and Mr. Meadowbrook forming Blue Q2 making Mr. [REDACTED] and Mr. [REDACTED] its sole members. It was to build and market testing cubes. Importantly, this would have been more thoroughly examined if it had been alleged. Carbcert’s later online grade-marking product and certification services, if that is what the OSB refers to, will nevertheless be briefly addressed below, in response to the OSB’s Statement Facts and Argument.

REPLY TO THE OSB’S STATEMENT OF FACTS AND ARGUMENTS

While it is recognized that simply restating facts or arguments already set forth in the opening brief is to be discouraged, the accused’s counsel believes it appropriate to briefly point out some salient facts, which are not contested, or are simply ignored and not addressed by the OSB:

- The panel found:

“The Bar has not proven money was owed to neither Mr. [REDACTED] nor Mr. [REDACTED].”

The bar’s own expert did not identify an amount of money that

should have been paid to either person.” The accused agrees. Tr. 95-96.

Furthermore, ignored and not mentioned by the OSB, is what the amounts were that the accused advanced via Equine Management, Inc., on his own and on VISA and Am Ex cards, to finance Blue Q1. The OSB’s own Ex. 38 it introduced at hearing, in fact shows, “Loans from David Herman - \$509,450.02,” with a net income of only \$6,989.56 as of March 31, 2009.

- The OSB asserts that no meeting occurred at the _____ shop in late February of 2009. The accused describes the meeting in detail. Tr. 90-93, 103, 104, 109. However, the OSB does not contest that immediately after the meeting, on *March 6, 2009*, the accused *responded* to Mr. _____ attorney by letter, providing the receipts for his expenses and explanation as to the business’s transactional history as it related to Mr. _____ (Ex. 18-Ex. 106).

The OSB doesn’t dispute that Mr. _____ specifically recalls the removal of one cube from the _____ shop (later he expanded it to two). (Ex. 95, p.7). The accused recalls removing some electronics and chemistry supplies only, which were taken to Mr. _____ garage in Corvallis, Oregon.

From _____ unsworn OSB letter, claiming Mr. Herman and he apparently just walked into _____ shop and removed materials without having keys but having unfettered access when Mr. _____ wasn’t present: “In late February, HERMAN asked me to assist in the removal of all electronic components from _____ shop in Lebanon.

was not present in his shop at that time. HERMAN deposited some of these components in my residence in Corvallis.” “HERMAN describes a specific meeting on February 22, 2009. I do not recall that meeting.” Not recalling is obviously not the same thing as, “There was no such meeting.” Ex. 95, “ 0007”.

- The OSB does not dispute (nor did Mr. that not one more thing was done by Mr. after the February 2009 meeting (at least for Blue Q1 - what he did thereafter was for the benefit of Blue Q2). Tr. 112-113.
- The OSB does not dispute that Mr. and/or Mr. and Mr. Herman, any two acting as a majority as two of the three directors, could agree Blue Q1 was over and to be dissolved, it “was done” (and replaced by Blue Q2). Mr. claims in his unsworn statement to the OSB to have learned of this in May 2009 and, “ promptly formed a new entity Blue Q Labs LLC on June 10th, 2009.” Without mention, however, that he was the 50% co-member. Ex. 95, “ 0004.” And that as between Mr. and Mr. that Blue Q2 was to be and was in fact formed by Mr. and Mr. Mr. advised the OSB after the February 2009 meeting, he wanted nothing to do with Blue Q1. Tr. 131.
- The OSB does not dispute that no funds were invested by Mr. or Mr. in Blue Q1, (Tr. 81) excepting for the relatively small costs, for which they were reimbursed (if the \$15,000 on check 1001 deposited to Mr. bank account is deemed “small” and if it was a legitimate

reimbursement - Mr. Herman didn't sign the check but Herman's forged signature was somehow supplied to the check). Nor is it disputed that the capital for Blue Q1 came solely from the accused, or credit card debt on the Equine Mgmt. accounts, or from net loss sales.

- The OSB does not contest that Carbcert was a wholly unrelated online grademark testing certification company and tied to PSI. It was developed and formed by Mr. [redacted] and the accused. Mr. [redacted] acknowledges its creation was disclosed and explained to him. Ex. 95, " [redacted] 0004." It wasn't a corporate opportunity of Blue Q1 (or Blue Q2). Mr. [redacted] and Mr. [redacted] had no interest in, and claim no interest in that business. Tr. 102, 103. *See*, Ex. 89 – PSI was billing Carbcert \$63,000+ in 11/09. Mr. [redacted] connection with Carbcert was limited to supplying customer contacts via his employment with Professional Services Industries ("PSI") for which Carbcert paid PSI. Ex. 89, [redacted] E-Mail to Carbcert customer advising he had no interest in the company.
- The OSB does not dispute that Mr. [redacted] and [redacted] promptly formed Blue Q2 after the February 2009 meeting. They were represented by Mr. Meadowbrook, their attorney, who was the contact regarding the filing as set forth on ER 1, the Articles for Blue Q2. Those articles name only Mr. [redacted] and Mr. [redacted] as members.

There is no evidence the accused was given any notice of creation of this competing LLC, by anyone, at any time, until the accused stumbled onto the

information in talking to PSI employees, PSI being Mr. _____ employer at the time. Specifically, (Ex. 89), Mr. _____ and Mr. Herman learned of Blue Q2 because Miranda Wilcox, Mr. _____ assistant at PSI, inadvertently had copied Mr. _____ and Mr. Herman with an e-mail thread regarding Ag-Agro, a mill certification customer of PSI, who had been steered to Blue Q2.

- Vintrack Information Systems, Inc. apparently initially had *authorized* shares of 1,000 (Ex. 8, 9), but there is no testimony that any shares were *issued*, or to who, or that any shares remained outstanding when the name was changed to Blue Q Labs, Inc. Or whether (obviously) any or all issued shares of Vintrack were intended to be or were returned to treasury share status, upon the name change from Vintrack Information Systems, Inc. to Blue Q Labs, Inc., and were planned to be to be subsequently re-issued 1/3, 1/3, 1/3 to the accused, _____ and _____
- There was no evidence Mr. _____ or Mr. _____ were ever shown the amended Vintrack articles. If he wanted to cheat Mr. _____ and Mr. _____ the accused could have not named them as directors at all, and not loaned \$509,000+ to the enterprise.

Rather, it was Mr. Meadowbrook, and Mr. _____ and Mr. _____ that established themselves as the only members in forming Blue Q2, and that didn't name Mr. Herman anywhere in the filings.
- The OSB does not contest that *no* shares of stock in Blue Q1 were *ever* issued,

precisely as was correctly reflected on the Nevada State dissolution filing. Ex. 11; Tr. 111. David Herman would have also remained as President, Secretary, and Treasurer of Vintrack/Blue Q1, as was correctly stated.

There is no dispute that Mr. Herman was the only surviving director after the meeting in late February 2009, the accused being contacted by Mr. Meadowbrook (again, the date of the accused's response to Mr. Meadowbrook was, *ad nauseum* - but ignored by the OSB), on 03/06/2009. Ex. 18.

- As to a possible sanction, if addressed by this court, the court may wish to consider before expending valuable and limited judicial resources, whether this case is even ripe, justiciable, or moot, as well as being a reason dismissal is appropriate.

The OSB does not dispute that a reinstatement application by the accused would require complete investigation of the accused under BR 8.7, as Disciplinary Counsel deems proper, with report and recommendation to the Executive Director or the Board, with final approval for reinstatement being made by this court. In the unlikely event that the accused should ever elect to apply for reinstatement, the record here would remain available.

In *Brown v. Oregon State Bar*, 293 Or 446, 450, 648 P2d 1289 (1982), the court held to be ripe or justiciable, the controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical nature, *i.e.* in this case, the accused's applying for reinstatement to the OSB.

As to the OSB's other arguments, the OSB asserts that \$38,030 was wired into Blue Q1's Bank account and that Ex. 35 shows \$275,000 was deposited into Blue Q1's bank account. But what the OSB does not mention, is that Ex. 36 also shows a, "Net Income of \$19,425," with Ex. 38 showing again, as of March 31, 2009, outstanding loans from David Herman of \$509,450.02 to Blue Q1.

Ex. 18 reflects that nine chambers were fabricated by Mr. [REDACTED] and sold for gross revenue of \$81,804.67 and that Mr. Herman expended an additional \$19,000 correcting functionality of the [REDACTED] cubes and in shipping costs. Tr. 86-87. Mr. Herman also expended \$7,700 for the initial shipping container cube from his own funds. Ex. 18. The Idaho cubes were shipped to and installed by Mr. [REDACTED]. Tr. 114-115.

The OSB does not dispute the expenses and loan debt of Blue Q1 far exceeded the income of Blue Q1.

The OSB states the accused's wife owned Equine Management, Inc. In fact, the accused received 100% ownership of Equine in their dissolution of marriage, along with its very sizeable debts. The accountants kept track of intercompany balances. Tr.76-78.

The conclusion the OSB makes or infers, that Blue Q1 was profitable, whether it was \$100 or \$275,000 received, is nowhere established. Blue Q1 wasn't profitable, consistent with the panel's correct finding, that no amount of money rightfully being that of Mr. [REDACTED] or Mr. [REDACTED] was established to have been taken by the accused, because none was.

The reverse is not true. Blue Q2 LLC took product of Blue Q1, sold it to the customers, and never paid Blue Q1 for it.

The accused could not unilaterally, “take a name off a bank account.” If Mr. [redacted] was a signatory on the account card, a co-signatory would obviously have no ability to unilaterally “remove” him. What this demonstrates is that the accusers and their attorney will say whatever seems helpful to them, in attempting to harm Mr. Herman, and in furtherance of distracting from their own actions.

The arguments of the OSB about improper transfers, in fact reflect that precise records of deposits, expenses, and transfers were kept by the accused and the corporate accountants. And they were freely supplied to the Bar, and in discovery in the U.S. District Court case that Mr. Meadowbrook has filed and which remains pending against Mr. Herman.

The OSB says the reporting of contracting with the Idaho manufacturer was “reported” to Mr. [redacted] but without accurately reporting the reason. The reason was that Mr. [redacted] didn’t come close to keeping up with production of just the basic cube. Tr. 87-90. Nor would he allow anyone else to do so. The evidence was not controverted that the accused hired Mr. [redacted] to try to fulfill orders, however, Mr. [redacted] wouldn’t hear of it. Obviously vacuum systems, computer and chemical testing analysis components, and recording systems also had to be installed.

Mr. [redacted] was able to and did supply the e-mails to the OSB that revealed that, “a customer was paying EMI.” Ex. 84 and several of the other exhibits all bear

the indexing by his name, “ with a Bates type number on the bottom of his exhibits. For example Ex. 85 referencing the one Equine Mgmt. payment, is, “ 0056,” Ex. 95, “ 0006” and “ 0056.” The accused sent a copy of the request as to the Carbert invoice for testing work to Mr.

(Exs. 88-89): “From: David Herman; cc: These transactions weren’t concealed from Mr. or he wouldn’t have possessed the exhibits to be able to supply them to the OSB.

The accused was the only remaining director of Blue Q1 after the February meeting. Mr. was “done” as was Mr. who preferred to maintain his employment at PSI and become a co-member with in Blue Q2 LLC, and they did so.

The Bar complaint, Ex. 19, was created by Mr. Meadowbrook and only signed by Mr. It is submitted it was generated and done for whatever strategic advantage he might believe it could bring in the U.S. District Court case pending in Eugene.

Mr. Herman had one motivating factor in ending Blue Q1. And that is, Mr. committed delivery and set up dates given to customers, weren’t being met. The product wasn’t getting shipped and installing, as was promised. “ [was consistently unable to meet his own production schedule, by weeks and months in some cases. Aside from the verbal abuse I [Herman] received from the people who had been promised delivery dates based on unmet completion commitments for the chambers, many of the people I managed transactions with

either decided to go somewhere else or drop the project as Mr. Wu did.” Ex. 18. Mr. [redacted] wasn’t performing his duties and Mr. Herman was receiving threats from customers with materials that could not be imported, and obviously sat warehoused as a result (Ex. 18).

The accused is charged in the OSB’s brief of engaging in a, “sustained effort to cheat his partners.” Yet, Mr. [redacted] didn’t think he was even suing for anything related to Blue Q1. Mr. [redacted] filed no claim against Mr. Herman and when directly asked what he thought Herman owed he said, “two cubes and some electronics.” This is understandable given the uncontroverted formation and engaging in business under Blue Q2 by Mr. [redacted] and Mr. [redacted] by obfuscation of its creation, and to the complete exclusion of the accused.

Mr. [redacted] was a welder. He was not the “developer” nor assembler of the intricate vacuum systems, power supplies, timers, testing components, sensors, chemical analysis and reagents, and computer controls for the cubes.

How was Mr. Herman to, “steal it all for himself?” That has it backwards. Mr. [redacted] was the party with the PSI, mill, and wood component contacts. Mr. [redacted] was to produce the cubes at cost. And they proceeded without dispute in the evidence, to do so under Blue Q2.

The OSB states the accused didn’t corroborate that he loaned the funds to Blue Q1. First, this isn’t correct. The OSB introduced Ex. 38 which shows, “loans from David Herman of \$509,450.02.” The accused, or the accountants Manzer and Davis, provided this information to the Bar and it was introduced by the OSB and

received at the panel hearing. Second, this isn't his burden of proof. Third, and more importantly, where does the OSB suggest the funds for Blue Q1 came from? Certainly not from Mr. _____ or Mr. _____ by their own admissions.

By trying to give full and complete answers, involving events five years past, with as much detail as he could possibly recall, and by "not looking at" the undersigned, the accused is argued to therefore be deemed, un-credible. The argument and this suggestion is incredible. This case involves the very basic intrinsic competing inferences and subjective and objective factors *Fitzhenry* refers to. "Not looking at his attorney," by any text, study, or authority is not a, "credibility determination factor," until this case, in counsel's experience. *Fitzhenry*, 343 Or 86, 162 P3d 260 (2007).

As to where the accused was born, his attorney – his other attorney – put down the wrong city. It was immaterial in this case, it was signed in a hurry and it was corrected by his subsequent testimony. What could have possibly been gained by the error in the place of birth in what should be a wholly unrelated case and matter? It bears no relationship to determining diversity jurisdiction in U.S. District Court, in any case.

The accused was not actively licensed to practice law in Washington. He was suspended when he declined to pay bar dues. He had historically "lived" in Portland and missed that Mr. Emerson had put "born" in Portland.

And this court is asked to conclude that from this, the court should leap to the conclusion that the OSB proved by clear and convincing evidence that Mr. Herman

stole funds of Mr. and which the very same panel and the OSB's expert testified, was not proven, not quantified, nor even estimated in any amount or degree.

The reference to, “ [OSB #820032] complaint,” is so far removed as to be wholly irrelevant, and it was objected to at hearing. And the OSB appears to have it wrong. Exhibit 47 does not appear to be a complaint against Mr. Herman as may be what the OSB wishes to infer, but rather it is a response to something Mr. or a complainant had sent to the OSB, presumably involving a complaint against Mr. and the probate of the Bailey estate he was handling.

The accused was responding to Ms. on behalf of Mr. regarding Msrs. and and and locating an aircraft in a hanger, occupied/leased by Mr. (who apparently had shared space or sub-leased some unknown square footage on some unknown basis to Mr. Herman). This was done without permission of the owner of the aircraft, or the building's owner (State of Oregon), or the lessee of the hanger (Mr.).

Mr. hired as counsel to deal with the airplane as an estate asset (Estate of Bailey). “ paid for the plane and it was eventually removed from the rental space following Mr. eventually, but belatedly, paying \$2,400 for storage/rent. (Ex.47).

As is clear, Mr. and the accused were in fact never, “partners.” The generic reference from the 2003 letter to “business partners” was to business

transactions, where each had very distinct obligations and duties, not with any agreed upon or established percentage division of losses and profits as general partners, contributing equal capital, and having equal liability, nor having partnership returns and K-1 tax statements. And there is no evidence of such in this record.

REPLY TO RESPONSE TO SANCTION

Without waiver of prior arguments and factual observations, if the sanction issue should be reached by this court, protection of the public, again, is accomplished via BR 8.7. That rule would require a thorough investigation by Bar Counsel and recommendation by the OSB Executive Director or the Board of Governors, before reinstatement of the accused by this court could occur.

CONCLUSION

The accused again respectfully requests judgment of this court as follows:

- 1) For dismissal of the Complaint with prejudice;
- 2) For award of costs and disbursements pursuant to BR 10.7 and ORAP 13.05.

Respectfully submitted this 7th day of April, 2014.

/s/Lawrence W. Erwin, OSB #730850

Lawrence W. Erwin, OSB #730850

Attorney for Accused-Petitioner on Review

CERTIFICATE OF COMPLIANCE WITH
ORAP 11.25(2)(b); ORAP 5.05(2)(d)

Brief Length:

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2)(d)(i) & (ii) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,272.

Type Size:

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(d)(ii) & (4)(g).

Dated this 7th day of April, 2014.

/s/ *Lawrence W. Erwin*, OSB #730850

Lawrence W Erwin, OSB #730850

Law Office of Lawrence W. Erwin

Attorney for David Herman, Accused

CERTIFICATE OF e-FILING and
PROOF OF SERVICE

I certify that I submitted the original of David Herman's ("Accused")
REPLY BRIEF, via eFiling on April 7, 2014, so that it may be filed with the
Appellate Court Administrator at this address:

Oregon Supreme Court
Court Administrator, Appellate Courts Record Section
1163 State Street
Salem, Oregon 97301

I further certify that on April 7, 2014, I served via eService a true and
correct copy of David Herman's, the ("Accused") REPLY, BRIEF, on Mary
Cooper at: mcooper@osbar.org

/s/ *Lawrence W. Erwin*, OSB #730850

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