IN THE CIRCUIT COURT FOR PALM BEACH COUNTY, FLORIDA

IN RE: ESTATE OF

PROBATE DIVISION

WILSON CHARLES LUCOM

Deceased.

File No. 502006CP003580XXXXSB

HILDA PIZA LUCOM'S MEMORANDUM IN OPPOSITION TO AMENDED MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 1.540(b), FLA. R. CIV. P.

HILDA PIZA LUCOM ("HILDA"), by and through her undersigned attorney, files this Memorandum in Opposition to the Motion for Relief from Judgment ("Motion for Relief") filed by Richard S. Lehman ("LEHMAN") and Richard S. Lehman, P.A. ("RSL, PA.").

INTRODUCTION

LEHMAN as "a covetous opportunist... seeking personal advantage and control of assets" who, *interalia*: "improperly took, converted, and intermeddled in decedent's property," "breach[ed] his fiduciary duty," engaged in "conflict of interest" transactions, commingled funds, acted in "bad faith, with reckless indifference to the rights or interests of the interested parties," converted "hundreds of thousands of dollars in cash assets from the Florida ancillary estate," and tried to explain his behavior in "a most unconvincing and non-credible manner at trial." The Final Judgment Denying Discharge, Denying Personal Representative's Fee, Granting Surcharge, Voiding Transactions and Granting Objections to the Final Accounting (the "Judgment") is attached hereto as Exhibit "A." 1

¹ Based on LEHMAN's actions, Judge Phillips (i) sustained all objections to LEHMAN's Accounting; (ii) awarded \$623,547.05 of damages against LEHMAN for improperly spending Estate money; (iii) awarded \$390,000 in damages against LEHMAN for the fees incurred by the Curator in investigating LEHMAN's activities; (iv) declared all conflict of interest transactions between LEHMAN and RSL, PA. void under Fla. Stat. 733.610 and entered a Judgment against RSL, PA. and LEHMAN, jointly and severally, for \$423,261.15; (v) denied LEHMAN's Petition for Discharge; (vi) denied LEHMAN's and RSL, PA.'s claim for fees and reimbursement; and (vii) awarded the interested parties' attorney's fees and costs to be paid by LEHMAN and RSL, PA.

The Judgment contains alternative rulings, each of which support the relief granted therein and only one (1) of which is addressed in LEHMAN's Motion for Relief.

Judge Phillips entered an Order on April 24, 2009 denying LEHMAN's Motion for Rehearing and New Trial and Motion to Alter and Amend Judgment, a copy of which is attached hereto as Exhibit "B." LEHMAN now seeks a new trial through his Motion for Relief based on procedural orders entered in Panama relating to his Post-Judgment appeal of the Panama Court's Order 952 ("Order 952") a copy of which is attached hereto as Exhibit "C." LEHMAN's Motion for Relief greatly exaggerates Order 952's importance and relevance to the Judgment. Further, LEHMAN's Motion for Relief misrepresents that Order 952 has been "overturned" and mischaracterizes procedural orders relating to LEHMAN's Post-Judgment appeal of Order 952 as new evidence that warrant relief from the Judgment. In fact, all of LEHMAN's challenges to Order 952 that have been ruled on to date have been denied. Even assuming arguendo that the status of Order 952 has changed since the entry of the Judgment, any such change has absolutely no bearing on Judge Phillips' findings of fact or conclusions of law and does not mollify LEHMAN's unethical and egregious misconduct described in the Judgment. The Motion for Relief fails to address the Judgment against RSL, PA. As a result, the Motion for Relief must be denied.

LEGAL GROUNDS FOR RELIEF FROM FINAL JUDGMENT

LEHMAN alleges he is entitled to relief from the Judgment under Rule 1.540(b)(2) and (5) Rule 1.540(b)(2) provides that the court may relieve a party from a final judgment where new evidence is discovered which by due diligence could not have been discovered in time to move for a new trial or rehearing. The requirements for granting relief from a Judgment based on newly discovered evidence are: (1) the evidence would probably change the result if the new trial is granted; (2) the evidence must have been discovered since the trial; (3) the evidence could not have

been discovered before the trial by the exercise of due diligence; (4) the evidence is material to the issues; and (5) the evidence is not merely cumulative or impeaching. Gary vs. Geico General Insurance Co., 938 So.2d 613 (Fla. 4th DCA 2006).

Rule 1.540(b)(5) provides that the court may relieve a party from a final judgment where a prior judgment upon which the Judgment is based has been reversed or otherwise vacated.

I. <u>Post-Judgment Panama Court Orders Do not Affect This Court's Determination that LEHMAN Was Improperly Appointed as Florida Ancillary Personal Representative.</u>

Wilson C. Lucom died as a Panama resident on June 2, 2006. LEHMAN filed a Will with the Panama Probate Court which named HILDA, Christopher Ruddy, and LEHMAN as Albaceas (Panama Personal Representatives). Despite the fact that HILDA was named as one (1) of three (3) "Albaceas" in the Decedent's Will, LEHMAN filed a writ, without notice to any other party, to open the Decedent's domiciliary estate proceedings in Panama on July 5, 2006 and was installed as the sole "Albacea" pursuant to an order dated July 5, 2006 (the "July 5th Order"). No explanation was provided for his failure to provide notice.

HILDA first received notice of the July 5th Order on July 12, 2006 and filed her appeal on July 14, 2006. "Unequivocal evidence received at trial" established that HILDA's July 14, 2006 appeal immediately suspended the effect of the July 5th Order installing LEHMAN as the sole Albacea and, as a result, LEHMAN was not properly serving as the Albacea of the Panama Estate. See Page 2 of the Judgment. LEHMAN had actual knowledge of HILDA's appeal on July 18, 2006.

Despite having actual knowledge of HILDA's appeal, LEHMAN filed a Petition for Ancillary Administration on July 19, 2006 in Palm Beach County, Florida which contained false information (See Paragraph 2 of Judgment) and represented that LEHMAN was properly serving as the sole Albacea in Panama and entitled to preference of appointment as the sole Florida Ancillary Personal Representative ("APR"). The very same day at an exparte hearing, LEHMAN persuaded this Court

to appoint him as the sole APR without providing HILDA or any other interested party with the required formal notice of the Petition for Ancillary Administration or notice of the hearing.

Because LEHMAN was not properly serving as the sole Albacea on July 19, 2006 (the date of filing of the Petition for Ancillary Administration and the date of the exparte hearing), HILDA was entitled to equal or greater preference of appointment as the APR on July 19, 2006 under Fla. Stat. 734.201 and was entitled to formal notice of the Petition for Administration under Florida Probate Rule 5.201. The Judgment states in Paragraph 2 as follows:

"[b]ecause Lehman was not Albacea in Panama as of July 19, 2006, [HILDA] had preference of appointment equal to or greater than Lehman. [HILDA] was entitled to receive formal notice of the Florida Petition for Administration before Letters of Administration could be issued, see Florida Probate Rule 5.201. The appointment as APR and Letters of Administration were issued by the Florida Court based on false information in Lehman's Petition."

As a result of the false information in LEHMAN's Petition and LEHMAN's failure to provide HILDA with proper notice prior to being appointed as APR on July 19, 2006, the Judgment declared LEHMAN's appointment as APR void ab initio. In re Bush's Estate, 80 So.2d 673 (Fla.1955) (administrator's failure to provide proper notice before the granting of letter of administration was a fatal omission, and appointment was void ab initio).

Order 952 (which decrees LEHMAN's installation as Albacea a nullity due to LEHMAN's failure to provide proper Notice to interested persons and renders without effect any action taken by LEHMAN as Albacea) was entered more than two (2) years after HILDA's appeal of the July 5th Order. Thus, Order 952 has no bearing on the "unequivocal evidence received at trial" that HILDA's appeal suspended the effect of the July 5th Order installing LEHMAN as the sole Albacea. The effect HILDA's Appeal had on the July 5th Order installing LEHMAN as Albacea is not changed by the existence or nonexistence of Order 952.

Order 952 was also entered more than two (2) years after LEHMAN filed his Petition for Ancillary Administration with this Court on July 19, 2006. Order 952 has no bearing on this Court's determination that LEHMAN's "appointment as APR and Letters of Administration were issued by this Court based on false information in Lehman's Petition." (Paragraph 2 of Judgment).

Thus, Order 952 and any Post-Judgment rulings relating to the appeal of Order 952 do not affect this Court's determination that LEHMAN was not properly serving as Albacea when he Petitioned for appointment as APR of the Florida Estate on July 19, 2006 or that LEHMAN's appointment as APR was based on false information in Lehman's Petition and will not change the result of the Trial. See Gary, 938 So.2d 613.

II. Although this Court Correctly Determined that LEHMAN Was not Properly Appointed as APR, this Court also Ruled in the Alternative Making It Clear that the Result Will Not Change If New Evidence Establishes LEHMAN Was Properly Appointed as APR.

LEHMAN's Motion for Relief argues that this Court based its Judgment on a determination that his appointment as Albacea was "automatically and immediately null and void when Hilda P. Lucom filed her appeal of that Order," and "Lehman was not properly installed or properly serving as Albacea of the Panama Estate." Page 5 of Motion. While the Judgment contains the quoted statements, the relief contained therein was supported on independent grounds having nothing to do with whether his appointment in Panama was void or suspended upon the filing of HILDA's appeal. Lehman's status as Albacea was factually relevant to his appointment as APR only insofar as it related to his priority to be appointed in Florida. His appointment in Panama had no other factual relevance with respect to LEHMAN's payments from the Florida Estate. While the trial court concluded LEHMAN's appointment as APR was improper, it also ruled that even if his appointment was proper, the relief granted in the Judgment was justified. The Judgment states as follows:

13. Should another Court hold that Lehman was properly appointed APR, his actions were still improper, objectionable, and not excused by the terms of the Exculpatory clause in Decedent's will. Lehman exhausted the liquid assets of the

ancillary estate for illegitimate purposes, to the detriment of the ancillary and entire estate. He sought to avoid or circumvent legitimate Orders of the Panama Court in the domiciliary estate with actions financed by converting hundreds of thousands of dollars in cash assets from the Florida ancillary Estate. He was unable to pay Class 1 administration expenses related to the Florida Estate and Class 3 United States Estate Taxes when they became due. By the time Lehman resigned, his Final Accounting reflected that the outstanding, overdue U.S. Estate Taxes were \$255,255 and that the Estate was insolvent. The Estate also has over \$50,000 in potential claims (Class 8 obligations) made against the Estate which were the subject of ongoing independent actions. Lehman's failure to preserve sufficient assets in the Florida Ancillary Estate to pay (I) costs and expenses of ancillary administration, (ii) U.S. Estate Taxes, and (iii) local creditors was a breach of Lehman's fiduciary duty. In re Wilson's Estate 197 So. 557, 562 (Fla. 1940). The failure to maintain sufficient local assets to pay the foregoing obligations represents a reckless disregard of the interests of interested persons in the Ancillary Estate.

- 14. Commingling \$423,261.15 of estate money with the assets of RLPA without any formal loan documentation or any interest paid to the Estate is the equivalent of an interest free loan and is a conflict of interest transaction within the meaning of Fla. Stat. 733.610. The Decedent's Last Will and Testament does not allow for such self dealing transactions and this Court does not approve the transactions. As such, even assuming the validity of Lehman's appointment as APR, all estate transfers to RLPA were in bad faith and are void under Fla. Stat. 733.610. Further this Court finds that RLPA is an improper payee under Section Fla. Stat. 733.812.
- 15. Assuming Lehman was properly appointed as Florida APR, Lehman's actions described above constitute breaches of fiduciary duty made in bad faith, with reckless indifference to the rights or interests of interested parties. As such, Lehman is liable for damages to the Estate under Fla. Stat. 733.609 and under the terms of the Exculpatory Clause as modified by this Court's January 15, 2009 Order. (Emphasis added).

The foregoing determinations in the Judgment independently support all of the relief set forth in the Judgment and are unaffected by LEHMAN's status as an Albacea in Panama.

A. LEHMAN Is Not Entitled to Relief from the Judgment under Rule 1.540(b)(2) and (5) for LEHMAN's Breach of Fiduciary Duty Relating to His Failure to Preserve Sufficient Florida Ancillary Estate Assets to Pay Costs and Expenses of Ancillary Administration, U.S. Estate Taxes, and Real Estate Taxes.

In Paragraph 13 of the Judgment, this Court states that LEHMAN's improper payments left the Florida Ancillary Estate insolvent when LEHMAN resigned. The Florida Supreme Court has

held that Florida ancillary estate assets are required to be preserved for the payment of costs and expenses of ancillary administration; and next for the satisfaction of local creditors and taxes associated with the Ancillary Estate; and thereafter to be applied to other just claims against the estate. In re Wilson's Estate, 197 So.557, 562 (Fla. 1940); Fla. Stat. 733.707. The foregoing law ensures that Florida ancillary estates will be administered and local interests will be protected.

Rather than preserving the Florida Estate Assets to pay the costs and expenses of ancillary administration (Class 1 Obligation), outstanding U.S. Estate Taxes (Class 3 Obligation) and outstanding Creditors of the Estate (Class 8 Obligations) as required by the Wilson case and Fla. Stat. 733.707(1), LEHMAN improperly spent "\$608,665.58 on, among other things, attorneys fees to [RSL, PA.] and attorneys in Panama, Nevis, and British Virgin Islands, plus litigation costs and expenses which," according to Paragraph 9 of the Judgment, "did not benefit the ancillary or overall estate." LEHMAN breached his fiduciary duty by paying non-Florida Estate expenses from assets of the Florida Estate while substantial outstanding obligations of the Florida Estate remained unpaid. LEHMAN's failure to preserve sufficient assets to pay the foregoing obligations was found to represent "a reckless disregard of the interests of interested parties." Paragraph 13 of Judgment.

The status of Order 952 and any alleged new evidence cited in LEHMAN's Motion for New Trial (I) have absolutely no relevance to the Court's determination that LEHMAN's "failure to maintain sufficient local assets to pay the [obligations of the Florida Estate] represents a reckless disregard of the interests of interested persons in the Ancillary Estate" and (ii) will not change the results of the Trial. See Gary, 938 So.2d 613.

B. LEHMAN and RSL, PA. Are Not Entitled to Relief from the Judgment under Rule 1.540(b) for LEHMAN's Commingling of Estate Assets with the Assets of RSL, PA.

RSL, PA. was named as a defendant to HILDA's Counter-Petition titled "Petition to Void

Transaction." The Petition to Void Transaction sought to void LEHMAN's transfer of Estate funds to RSL, PA.'s general account pursuant to Fla. Stat. 733.610.

The facts of the instant case were almost identical to <u>Langford v. Shamburger</u>, 392 F.2d 939 (5th Cir. 1968). In <u>Langford</u>, the Trustee made a practice of commingling Trust funds with his own account without paying interest. The Court found that commingling is a form of self dealing. <u>Id</u>. Just as in <u>Langford</u>, LEHMAN commingled Estate funds with RSL, PA.'s account and no interest was paid or credited to the Estate for the funds paid to RSL, PA. Bogert states as follows:

The trustee may violate the duty of loyalty by lending trust funds to himself. He thus brings into play a conflict of private and representative interests. As lender it is his duty to get the best terms possible as to interest, security, and maturity. As debtor his impulse is naturally in the direction of getting the money at the lowest rate and often on other terms not advantageous to the lender. If he lends to himself, he cannot give an impartial judgment as to the adequacy of the security offered. * * *

If there is no formal loan but a trustee mingles the trust funds with his own and uses them in his private business, the transaction can be treated as a breach of trust on either of two theories, namely, that of conversion of the trust property, or disloyalty. Bogert Trusts and Trustees, 2d Ed. § 543 (J), p. 548.

In the instant case, the Court determined that LEHMAN commingled \$423,261.15 of Estate money with the monies in RSL, PA.'s general account and the foregoing represented a conflict of interest transaction which the Court declared void under Fla. Stat. 733.610. The Court determined that neither LEHMAN nor RSL P.A. kept any specific estate accounting records with respect to the commingled funds and LEHMAN "explained his behavior in a most unconvincing and non-credible manner at trial." (Paragraph 6 of Judgment). This Court held LEHMAN and RSL, PA. jointly and severally liable for \$423,261.15 plus interest as a result of the conflict of interest transaction.

The status of Order 952 and any Post-Judgment Orders by the Panama Courts have no relevance to the relief granted by this Court relating to LEHMAN's commingling of Estate assets with RSL, PA. assets and will not change the results of the Trial. See Gary, 938 So.2d 613.

C. LEHMAN is Not Entitled to Relief from Judgment under Rule 1.540(b) for LEHMAN's Payment of Panama Expenses from the Florida Estate Assets which Avoided and Circumvented Panama Court Orders No. 1188/173-06 and No. 1227-2006.

As a result of HILDA's Appeal of the July 5th Order, LEHMAN was unable to gain access to any assets in Panama or Administer the Panama Estate. Thus, he filed Petitions with the Panama Probate Court in an attempt to gain access to monies in Panama Bank Accounts and administer the Panama Estate. On August 18, 2006, the Panama Court entered Order No. 1188/173-06 (Exhibit "D") which denied LEHMAN access to the monies in the Panama Bank Account. On August 31, 2006, the Panama Probate Court entered General Protective Order No. 1227-2006 (Exhibit "E") which unequivocally stated that LEHMAN is not entitled to execute any acts of administration with respect to the Panama assets. Once these Orders were entered and LEHMAN was unequivocally denied access to Domiciliary Estate Assets, LEHMAN began raiding the monies in the Florida Estate.

This Court refers to the foregoing Orders in Paragraph 5 of the Judgment as the Orders which "denied Lehman access to money in the Panama Estate and directed that Lehman was not entitled to execute any acts of administration in connection with Domiciliary Estate Assets" and again in Paragraph 13 of the Judgment by stating LEHMAN "sought to avoid or circumvent legitimate Orders of the Panama Court in the domiciliary estate with actions financed by converting hundreds of thousands of dollars in cash assets from the Florida ancillary Estate." The foregoing Panama Court Orders are still valid and in effect today.

The status of Order 952 and the Post-Judgment Orders of the Panama Court have no effect on the foregoing Orders and this Court's determination that LEHMAN converted cash assets from the Florida Ancillary Estate in violation of the Orders and will not change the results of the Trial.

See Gary, 938 So.2d 613.

III. The Post-Judgment Orders Are Not New Evidence under 1.540(b)(2).

None of the Post-Judgment Orders cited in LEHMAN's Motion for Relief overturn Order 952. The Post-Judgment Orders are red herrings which do not represent new evidence that justifies relief under Rule 1.540(b)(2). Because Order 952 has not been overturned, the real evidence at issue in LEHMAN's Motion for Relief is the evidence which LEHMAN cites in his underlying appeals of Order 952 and all such evidence (i) existed prior to Trial, (ii) was known to LEHMAN prior to Trial, and (iii) could have been presented at Trial if LEHMAN so chose. Thus, LEHMAN has failed to produce new evidence which justifies relief from the Judgment within the meaning of Rule 1.540(b)(2). Gary, 938 So.2d 613.

IV. <u>Contrary to LEHMAN's Representations, Order 952 Has Not Been "Overturned" and the Post-Judgment Order Which Suspends Jurisdiction of the Lower Court Pending Appeal of Order 952 Does Not Constitute Grounds for Relief from Judgment under Rule 1.540(b)(5).</u>

LEHMAN's Motion for Relief significantly overstates Order 952's importance and relevance to the Judgment. Rule 1.540(b)(5) provides that a party may be relieved from a final judgment where a prior judgment upon which the Judgment is based has been reversed or otherwise vacated. In the instant case, the Judgment makes no specific reference to Order 952 and no finding in the Judgment is "based" on Order 952 within the meaning of Rule 1.540(b)(5).

Further, Order 952 has been not been "vacated" or "overturned" within the meaning of Rule 1.540(b)(5). After this Court entered its Judgment, LEHMAN filed multiple appeals of Order 952 in a transparent attempt to collaterally attack this Court's Judgment². To date, every Panama Court that has ruled on LEHMAN's appeals has denied LEHMAN's request to overturn Order 952. LEHMAN's latest ploy is an action against the Fifth Civil Court for the First Judicial Circuit of

² Despite the fact that Order 952 was entered on August 28, 2008, approximately six (6) months prior to the date of the Trial, LEHMAN failed to file his constitutional challenge to the Order until September 10, 2009, more than one (1) year after Order 952 was entered and six (6) months after the Judgment was entered.

Panama alleging that the Court violated the Panamanian Constitutional Rights of LEHMAN, a U.S. Citizen, by entering Order 952. Order 952 was initially stayed while this action was pending before the First Superior Court of Panama. On November 17, 2009, the First Superior Court of Panama denied LEHMAN's action and vacated the stay of Order 952. LEHMAN has appealed this decision to the Panama Supreme Court. The First Superior Court's Edict, attached as Exhibit "F," granted LEHMAN's appeal to the Supreme Court with "suspensive effect" meaning the jurisdiction of the First Superior Court is suspended from the date the Appeal is granted through the date the Supreme Court of Panama decides the Appeal. The foregoing Edict is procedural in nature and is not a decision on the merits. According to LEHMAN's expert, a Supreme Court decision on the merits could take ten (10) years. Miguel Bernal's Deposition, Page 147, Lines 9 -13, attached as Exhibit "G." Contrary to LEHMAN's representations on Page 8 of his Motion for Relief, the Order does not "vacate" or "overturn" Order 952. Thus, LEHMAN is not entitled to relief under Rule 1.540(b)(5).

CONCLUSION

In summary, the Post-Judgment Orders of the Panama Courts do not represent new facts which justify relief from the Judgment. This Court relied on "unequivocal evidence received at trial" to determine that LEHMAN was not properly serving as the Albacea on July 19, 2006. LEHMAN's pending Post-Judgment appeal of Order 952 (which is never specifically mentioned in the Judgment) and corresponding procedural Orders related thereto are not changes in fact that overcome the scathing Judgment entered by Judge Phillips which condemns virtually all of LEHMAN's actions over the previous two and one-half (2 ½) years since the Decedent's death. Even if the Post-Judgment Orders in Panama render this Court uncertain as to whether LEHMAN's appointment was proper, this Court's alternative rulings (see Paragraphs 7, 13-15 of Judgment) justify the relief granted in the Judgment. Thus, LEHMAN's Motion for Relief should be denied.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the attached service list in the manner provided therein on the day of June, 2010.

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