

IN THE SUPREME COURT OF OHIO

ORIGINAL

IN RE:	:	
	:	
Complaint Against:	:	
	:	Case No. 09-2302
PAUL J. KELLOGG (#0062303),	:	
	:	
RESPONDENT	:	RELATOR'S OBJECTIONS
	:	
CINCINNATI BAR ASSOCIATION,	:	
	:	
RELATOR	:	

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RELATOR'S OBJECTIONS TO THE FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE  
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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RELATOR'S OBJECTION TO THE FINDINGS OF FACT,  
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BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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Relator objects to the Board's recommended sanction against Respondent.

Relator submits the following brief in support of this objection.

## STATEMENT OF FACTS

Respondent Paul Kellogg graduated from the University of Dayton School of Law and was admitted to the practice of law in Ohio in November 1993. (Findings of Fact, at 1). In 2003, Respondent met his friend Steve Warshak for lunch, where the two discussed the possibility of Respondent becoming general counsel of Warshak's company. (Findings at 2). Shortly thereafter, Warshak offered Respondent the position with Berkeley Premium Nutraceuticals. (Findings at 2.) Respondent accepted the position in an industry he knew virtually nothing about and failed to educate himself about the Food and Drug Administration or how to handle FDA investigations. Respondent was admittedly in over his head. (Hearing Transcript, May 22, 2009, at 102-104).

In late 2003, the Federal Trade Commission (FTC) began investigating the company after receiving a number of consumer complaints. (Findings at 2.) In March 2004, the first of six class action lawsuits was filed against Berkeley. (Findings at 2.) In May 2004, the Food and Drug Administration (FDA) notified Respondent that they planned to conduct an immediate investigation at Berkeley. (Findings at 2.) After these investigations, Respondent faced federal felony charges. Respondent did not enter into a plea agreement, rather, he went to trial and was convicted of six felony offenses including two counts of conspiracy to commit money laundering, two counts of money laundering,

one count of conspiracy to obstruct proceedings before the U.S. FTC and one count of conspiracy to obstruct proceedings before the U.S. FDA. (Findings at 4).<sup>1</sup>

The two counts of conspiracy to commit money and the two counts of money laundering are a result of Respondent's involvement in the Berkley's fraudulent "auto-ship" system and funding of two trusts with the proceeds. (Findings at 4). Customers were offered a free sample of the company's product, but were required to provide their credit card number in order to pay the shipping fees. (Relator's Exhibit 6 at 6-10)<sup>2</sup>. After the free sample was sent, Berkley would automatically ship additional product to the customer and bill their credit card at regular intervals. (Relator's Exhibit 6 at 10). Customers found it nearly impossible to obtain a refund or stop the shipments. (Relator's Exhibit 6 at 7.) Berkley engaged in a pattern of complex and unnecessary money transfers to render the proceeds impossible to trace. (Relator's Exhibit 6 at 6-7).

Although Respondent did not begin working with Berkley until 2004, the Government argued that Respondent's awareness of the company's practices pre-dated his employment; as early as October 2002, when he served as outside counsel for Berkley, he wrote a letter to the Better Business Bureau stating that he represented the company regarding its "auto-ship" system. This was the heart of the defendants' scheme to defraud customers. (Relator's Exhibit 4, Government's Response to Kellogg's Motion for Acquittal at 2-3; *see also* Relator's Exhibit 6 at 21).

The two counts of money laundering resulted from Respondent's role in the review, execution and funding of two trusts for Warshak. (Findings at 3). These trusts were used to hide the proceeds of the "auto-ship" conspiracy during a time when the FTC

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<sup>1</sup> See Relator's Exhibit 1, Indictment, also excerpted in the appendix hereto, and Relator's Exhibit 7, Judgment in a Criminal Case, also excerpted in the appendix hereto.

<sup>2</sup> U.S. v. Warshak et. al, No. 06-CR-0111 (S.D. Ohio May 13, 2008) (Opinion and Order)

was in the process of determining Berkley's ability to pay a proposed consent settlement. (Findings at 3). Respondent served as a trustee for both trusts and facilitated the transfer of nearly \$14 million to the trust. (Findings at 3). Respondent was found guilty of obstructing proceedings before the FTC due to his involvement in the review, execution, and funding of the trust agreements. (Findings at 3).

The final felony conviction, obstructing proceedings before the FDA, is a result of Respondent's involvement in removing misbranded supplements from a warehouse in advance of an FDA inspection. (Findings at 2-3). The FDA had scheduled a routine two-day inspection. Respondent was responsible for giving the investigators access to the company's facilities. (Findings at 2-3). Respondent learned that the warehouse would be searched the next day. (Findings at 2-3). Respondent knew that misbranded supplements were located in the warehouse, and instructed the warehouse workers to get rid of the misbranded supplements. (Findings at 2-3). The misbranded supplements were removed for the inspection, then returned to the property after the inspection was complete. (Findings at 2-3).

Respondent was sentenced to one year and one day in federal prison, to be followed by three years of supervised release, and was to forfeit to the United States \$44,876,781.68 in money laundering judgment forfeiture jointly and severally with two co-defendants. (Relator's Exhibit 7, Judgment in a Criminal Case).

Respondent filed a Motion for Judgment of Acquittal, which the court denied, noting that there was "adequate evidence for the jury to conclude that [Respondent] agreed with others to hide the [misbranded supplement] and ordered it to be moved." (Relator's Exhibit 6 at 26). The court further held that:

the jury rationally concluded that [Respondent] knew about the nature of Berkley's business, and that the proceeds going into the trust came from unlawful activity. [One witness'] testimony concerning [Respondent informing him that there was a] 'window of opportunity' leaves no doubt about evidence regarding [Respondent's] intent to put the assets out of reach of the Federal Trade Commission. The jury rationally concluded that [Respondent] intended to make the assets more difficult to trace to the original source.

(Exhibit 6 at 22-23)

Respondent chose not to appeal his conviction or sentence. (Findings at 4).

As a result of these convictions, Respondent's law license was placed on interim suspension on December 14, 2009, shortly after the Board received a certified copy of the felony conviction. (Findings at 7).

At the hearing, Respondent admitted all five violations of the Ohio Rules of Professional Conduct alleged by Relator in the Complaint, and later stipulated to the First Amended Complaint setting forth the specific rules violations in the alternative under both the Ohio Rules of Professional Conduct and its predecessor, the Ohio Code of Professional Responsibility. (Hearing transcript, May 22, 2009, at 170; *see also* Joint Motion for Agreed Order and First Amended Complaint.)<sup>3</sup> At the conclusion of the hearing, Relator recommended a sanction of permanent disbarment. Respondent requested a two-year suspension, with the second year stayed, to be retroactively effective as of September 2, 2008.

The Board found aggravating factors of acting with a dishonest or selfish motive and multiple offenses. (Findings at 7). The Board found as mitigating factors the fact that

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<sup>3</sup> The five Code/Rules violations to which Respondent admitted are: (1) DR 7-102(A)(7) and/or Rule 1.2(d) (representing a client within the bounds of the law/scope of representation and allocation of authority); (2) DR 7-102(A)(8), 7-109(A) and/or Rule 3.4 (representing a client within the bounds of the law/fairness to opposing party and counsel); (3) DR 1-102(A)(3) and/or Rule 8.4(b) (committing illegal acts that reflect adversely on the lawyer's honesty or trustworthiness); (4) DR 1-102(A)(4) and/or Rule 8.4(c) (engaging in conduct involving dishonesty and deceit); and (5) DR 1-102(A)(5) and/or Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

Respondent had no prior disciplinary record, cooperated in disciplinary proceedings, accepted responsibility for his actions, and expressed remorse. (Findings at 7). The Board also mentioned Respondent's diagnosis of hairy cell leukemia. (Findings at 6).

The Board recommended a suspension of two years, with 6 months stayed, to be applied retroactively to January 15, 2009. (Findings at 7-8).

## ARGUMENT

### PROPOSITION OF LAW

RESPONDENT WAS CONVICTED AT TRIAL OF SIX FEDERAL FELONIES: TWO COUNTS OF MONEY LAUNDERING, TWO COUNTS OF CONSPIRACY TO COMMIT MONEY LAUNDERING, ONE COUNT OF CONSPIRACY TO OBSTRUCT PROCEEDINGS BEFORE THE FEDERAL TRADE COMMISSION AND ONE COUNT OF CONSPIRACY TO OBSTRUCT PROCEEDINGS BEFORE THE FOOD AND DRUG ADMINISTRATION. THIS COURT HAS REPEATEDLY HELD THAT FELONY CONVICTIONS, ESPECIALLY THOSE INVOLVING MONEY LAUNDERING, WARRANT DISBARMENT. RELATOR ASKS THIS COURT TO IMPOSE PERMANENT DISBARMENT ON THE RESPONDENT RATHER THAN THE LESSER PENALTY RECOMMENDED BY THE BOARD OF COMMISSIONERS.

#### Disbarment is Appropriate

“When imposing sanctions for attorney misconduct, we consider the duties violated, the actual or potential injury caused, the attorney’s mental state and sanctions imposed in similar cases.” *Toledo Bar Ass’n v. Cook*, 114 Ohio St. 3d 108, 2007-Ohio-3253, at ¶ 39.

The ABA Standards for Imposing Lawyer Sanctions §5.1 state that “Disbarment is generally appropriate when: (a) a lawyer engages in serious criminal conduct, a necessary element of which includes ...fraud, extortion, misappropriation, or theft...” Ohio disciplinary opinions reference these standards. See *Toledo Bar Ass’n. v. Cook*, at ¶ 41.

Respondent herein was found guilty of six federal felonies and admitted to having violated all five disciplinary rules charged by Relator. Relator respectfully submits that Respondent’s misconduct warrants a more severe penalty than that recommended by the

Board. The Board's recommendation would allow Respondent's immediate reinstatement to the practice of law in Ohio following the resolution of this proceeding.

This Court has held that a felony conviction for money laundering warrants permanent disbarment. *Office of Disciplinary Counsel v. Jones*, 66 Ohio St. 3d 74, 1993-Ohio-101. The respondent in *Jones* was convicted of money laundering for failing to report monetary transactions and structuring transactions to evade reporting requirements and received a 15 month jail sentence, probation and a fine. *Id.* at 74. The respondent, like Respondent in the instant matter, presented a number of witnesses to attest to his character. The Board found the respondent guilty of violating both DR 1-102(A)(3) and (4) and recommended an indefinite suspension with no credit for time served. *Id.* at 74-75. The Court refused to adopt the recommendation of the Board, stating that a conviction of this kind warrants a more severe penalty, disbarment. *Id.* at 75.

In a similar case, the Court held that "such conduct speaks for itself. Disbarment is the only appropriate sanction". *Office of Disciplinary Counsel v. Williams*, 66 Ohio St. 3d 71, 1993-Ohio-100. (1993). That respondent was convicted on two criminal counts based on his actions in conspiring to launder money from the proceedings of illegal drug sales. *Id.* at 72. He was convicted of failure to report monetary transactions; structuring transactions to evade reporting requirements and aiding-and-abetting. *Id.* at 73. The respondent was given a 10 month sentence, along with probation and a fine. *Id.* The Board found the respondent guilty of violating both DR 1-102(A)(3) and (4) and recommended indefinite suspension. *Id.* The panel focused on the government's stipulation in the plea agreement that the respondent was the least culpable party in the

money laundering scheme. *Id.* The Court found that disbarment was the “only appropriate sanction” for this type of conduct and conviction. *Id.*

A lawyer who commits this type of illegal conduct violates the duty to maintain personal honesty and integrity. *Office of Disciplinary Counsel v. Bein*, 105 Ohio St. 3d 62, 2004-Ohio-7012 at ¶ 13. The respondent in *Bein* pled guilty to two felonies: conspiracy to engage in interstate commerce of stolen property and money laundering by selling stolen items. *Id.* at ¶ 3. The respondent was sentenced to 6 months of house arrest and 5 years of probation. *Id.* The panel unanimously found that the respondent had violated DR 1-1-2(A)(3), (4), and (6), and recommended permanent disbarment. The Court found that the respondent tried to downplay his role, acted with a selfish motive, and caused significant harm. *Id.* at ¶ 8. In upholding the Board’s recommendation of permanent disbarment, the Court noted that attorneys have a “duty to maintain personal honesty and integrity which is one of the most basic professional obligations owed by lawyers to the public” and that the legal profession “is and ought to be a high calling dedicated to the service of clients and the public good.” *Id.* at ¶ 13.

In *Cincinnati Bar Ass’n v. Banks*, 94 Ohio St.3d 428, 2002-Ohio-1236, the Court again found an indefinite suspension to be too lenient of a sentence for a felony conviction. The respondent was found guilty of interstate transportation of stolen lap-top computers. *Id.* at 428. The relator recommended an indefinite suspension, but the Board, finding violations of DR 1-102(A)(3), (4), and (5), recommended permanent disbarment. The Court agreed, saying “[We] are compelled to impose our most severe punishment -- disbarment.” *Id.* at 429.

Lastly, the obvious impropriety of illegal conduct necessitates the strict sanction. *Cincinnati Bar Ass'n. v. Schott*, 10 Ohio St. 2d 117 (1967). The respondent was selling securities without a license, a charge relating to his participation in a Ponzi scheme. *Id.* at 117-119. The Court again found permanent disbarment to be the proper sanction. *Id.* at 131.

Respondent's conduct herein was very similar to the cases outlined above. The Court in *Jones* and *Williams* stated that disbarment was the only appropriate sanction for this type of conviction. Like the respondent in *Williams*, Respondent conspired to launder and participated in the laundering of money through his review, execution and funding of two trusts. Also like the *Williams* respondent, Respondent was charged with, among other things, violating DR 1-102(A)(3) and (4). Respondent received a greater jail sentence than the respondent in *Williams*. Despite the fact that, in *Williams*, the government had stipulated the respondent was the least culpable person, the Court disbarred the respondent. While Respondent may have not been the most culpable person in the money laundering scheme, the government did not stipulate to this fact in the instant matter, as it did in *Williams*. Respondent was found guilty at trial of six felonies and ultimately admitted to having violated all five of the Professional Rules with which he was charged, thus warranting disbarment.

Respondent's crimes deceived the public and harmed the public through the loss of their money -- Respondent facilitated the transfer of nearly \$14 million to the trusts with the "intent to put the assets out of reach of the Federal Trade Commission" and "to make the assets more difficult to trace to the original source" (Relator's Exhibit 6 at 22) and "participated in two money laundering conspiracies to hide the source of a portion of

proceeds from a conspiracy that defrauded customers, [where] the gain to defendants was in excess of \$400 Million Dollars . . . . (Relator's Exhibit 8, Statement of Reasons at VIII).

All of the cases discussed above involve offenses dealing with causing monetary harm to individuals through deception. All of the respondents were disbarred for their conduct. There is no reason why Respondent should not be disbarred for his professional misconduct. The Court has rejected a suggested sanction of indefinite suspension on numerous occasions for this type of activity and where the loss to victims has been far less.<sup>4</sup> There is no precedent for the Court accepting an even lighter sanction, specifically, a two year suspension with six months stayed. This lenient punishment should not be upheld by a Court that routinely disbars lawyers for equivalent conduct.

#### Aggravation and Mitigation

While this Court decides disciplinary matters on a case by case basis, the Court has recognized that "other similar disciplinary proceedings are helpful in determining sanctions" and, therefore, attempts to demonstrate that its decisions "comport with sanctions . . . imposed in previous cases involving comparable ethical violations." *Brown*, 87 Ohio St.3d at 318. When considering an appropriate sanctions, the Court may also take into account the aggravating and mitigating factors set forth in Section 10 of The Rules and Regulations Governing Procedure on Complaints and Hearings Before the

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<sup>4</sup> For example, the loss to victims in *Banks* was calculated to be in excess of \$500,000 (*Williams*, 94 Ohio St. at 429) and in *Shott*, the loss to victims was over \$657,000. (*Shott*, 10 Ohio St.2d at 134).

Board of Commissioners on Grievances and Discipline of the Supreme Court (hereinafter Rules and Regulations).

In aggravation, the Board found that Respondent acted with a dishonest or selfish motive. They also found that there were multiple offenses of misconduct.

In mitigation, the Board found Respondent had no prior disciplinary record, was cooperative in the proceedings, took responsibility for his actions and expressed remorse. However, Respondent has not fully admitted the extent of his involvement in the crime he was convicted of. At hearing, Respondent testified that “ Greg said ‘I told Paul about the misbranded Rovacid and he said get rid of it,’ which could be possible, but I don’t specifically remember ever making that comment, but I definitely would have never told someone to hide it.” (Hearing Transcript, May 22, 2009, at 41; *See also* Findings at 3).

At Respondent’s criminal sentencing, he was not given the two-level deduction in his final score for acceptance of responsibility. Respondent did not receive this deduction because he did not provide a statement to the parole officer accepting responsibility. (Hearing Transcript, May 22, 2009 at 97-98.)

Respondent, in his Brief in Support of Recommendations of the Board, argues that Respondent’s convictions come from two “distinct and discreet” events, the FDA inspection and the funding of the trusts. (Respondent’s Brief at 2). Respondent asserts that he was never charged in connection with the fraudulent “auto-ship” program. (Respondent’s Brief at 2). However, Respondent cannot separate his criminal conduct from the fraudulent scheme perpetuated by Berkley. As noted by the Court in its Statement of Reasons justifying the sentence,

[Respondent] acted as in house counsel at Berkeley Premium Nutraceuticals. In that capacity, he participated in two money

laundering conspiracies to hide the source of a portion of proceeds from a conspiracy that defrauded customers, and the gain to defendants was in excess of \$400 Million Dollars, since the loss to customers cannot be reasonably determined. He also tried to obstruct the investigations of two federal agencies. [Respondent] comes from an intact, stable family. By all accounts, he is [an] excellent family man. It is disconcerting that he chose to help his fraternity brother and employer launder the proceeds of fraud because the defendant had so much to lose. **It should have been clear to him the consequences of criminal activity.**

(Exhibit 8, Statement of Reasons at VIII (emphasis added)).

By continuing to attempt to minimize his culpability, Respondent is clearly not accepting responsibility for his misconduct.

The Board references a number of witnesses who testified as to Respondent's character despite his criminal convictions. In *Jones*, the respondent also presented a number of character witnesses on his behalf. Despite the respondent's apparent good character, the Court imposed this strictest sanction on that respondent.

The Board seems to focus on Respondent's unfortunate battle with cancer as a mitigating factor in the recommendation. However, the only medical factors listed in Section 10 of the Rules and Regulations are mental illness and chemical dependency. The Board should not consider this illness as a mitigating factor, particularly insofar as Respondent posits no connection between his criminal conduct and his subsequent physical illness.

While Respondent does have a serious disease, it should not affect the sanction imposed here. Respondent's medical condition apparently mitigated his jail sentence, as his complex medical needs may not have been readily addressed in prison while serving his sentence. There is no similar reason to allow Respondent's attorney discipline to be

dictated by his illness. Respondent's pattern of criminal conduct has shown him unfit to practice law, and the presence of a physical illness does not change that fact.

## CONCLUSION

Relator strongly objects to the sanction recommended by the Board as too lenient. Respondent knowingly participated in two money laundering conspiracies to hide the source of a portion of the proceeds from a conspiracy that defrauded customers of over \$400,000,000.00, and tried to obstruct the investigations of two federal agencies. Respondent,

...by taking the oath as an attorney and accepting his certificate to practice, has assumed a position of public trust, holding himself out to the public as fit and capable of handling its funds and problems. He has assumed a position of responsibility to the law itself, and any disregard thereof by him is much more heinous than that by the layman who may breach the law in all innocence.

...

'To preserve its prestige and standing, the legal profession should not and must not tolerate conduct on the part of its members which brings the profession as a whole into disrepute and invites public condemnation.' [citation omitted].

(*Shott*, 10 Ohio St.2d at 131).

This Court has repeatedly held that even an indefinite suspension is too lenient a punishment for felony convictions of this magnitude. Accordingly, Respondent should be disbarred.

Respectfully submitted,

CINCINNATI BAR ASSOCIATION



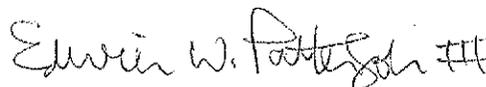
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relator's Objections and Brief in Support was mailed by First Class United States mail, postage prepaid, to David W. Greer, Counsel for Respondent, 400 National City Center, 6 North Main St., Dayton, OH 45402; James P. Fleisher, Co-Counsel for Respondent, 400 National City Center, 6 North Main St., Dayton, OH 45402; and Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, 65 S. Front St., 5<sup>th</sup> Floor, Columbus, OH 43215 on this 27th day of January, 2010.



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# APPENDIX

ORIGINAL

BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO

In Re:	:	09-2302
Complaint against	:	Case No. 08-092
Paul Joseph Kellogg Attorney Reg. No. 0062303	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	<div data-bbox="478 631 885 901" data-label="Text"> <p><b>FILED</b> DEC 22 2009 CLERK OF COURT SUPREME COURT OF OHIO</p> </div>
Cincinnati Bar Association	:	
Relator	:	

This matter was heard May 21, 2009, in Cincinnati, Ohio and on May 22, 2009, at the Ashland Federal Correctional Institute in Ashland, Kentucky. The panel consisted of Judge Beth Whitmore of Akron, Alvin R. Bell of Findlay, and Nancy D. Moore, Chair, of Columbus, Ohio. None of the panel members is a resident of the district from which the complaint originated or a member of the probable cause panel that certified this matter to the Board.

Susan R. Bell and Peter Rosenwald represented Relator, Cincinnati Bar Association. Respondent, Paul Joseph Kellogg, was present only on May 22, 2009, but was represented by James Fleisher both days.

**FINDINGS OF FACT**

Respondent graduated from the University of Dayton Law School and was admitted to the practice of law by the Supreme Court of Ohio in November 1993. In 2003, Respondent was working at a Cincinnati firm handling primarily estate planning and small business matters.

One day in 2003 Respondent received a call from a childhood friend and fraternity brother, Steve Warshak, and met him for lunch to catch up on each other's lives. Warshak was the owner of a quickly growing supplement company, and complained that while he enjoyed the marketing aspect of managing his company, he disliked dealing with legal issues and attorneys. Respondent suggested that Warshak hire General Counsel for his company.

About two weeks later Respondent got an e-mail from Warshak offering him the position of General Counsel for his company. The offer included a generous salary and full benefits. After a few weeks of evaluating his options, Respondent accepted the position and began working for Berkeley Premium Nutraceuticals [Berkeley].<sup>1</sup> At that time Berkeley employed about 1500 people.

Respondent's workload was light until late in 2003, when Berkeley was notified that they were being investigated by the Federal Trade Commission. Respondent was responsible for providing all documents and information requested by the FTC. Shortly thereafter, seventeen state attorney generals also began an investigation of Berkeley based upon numerous consumer complaints. In March 2004 the first of six class action lawsuits was filed against Berkeley.<sup>2</sup>

On May 13, 2004, representatives from the Food and Drug Administration came to conduct an immediate inspection at Berkeley. Respondent was given the responsibility for giving the investigators access to the company's facilities. One facility (the call center) was to be inspected that day and their warehouse facility was to be inspected the following day.

Shortly after being informed of the impending inspection, Respondent saw the operations manager of the company and told him that the warehouse would be inspected the following day.

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<sup>1</sup>When Respondent began his employment there, Berkeley was still operating under the names of the three companies which later combined to form Berkeley.

<sup>2</sup> The primary focus of the investigations and complaints was the Berkeley continuity program. After receiving a "free sample" of the supplements, monthly shipments were automatically sent to customers and billed to the customer's credit card. Consumers found it difficult or impossible to cancel the shipments and get refunds.

Respondent admits that he told the manager to “make sure the warehouse is in order” for the inspection.<sup>3</sup> Respondent admitted that testimony at the criminal trial indicated that he was informed about some misbranded supplement in the warehouse, and as a result Respondent instructed others to “get rid of” the misbranded supplement.<sup>4</sup> Respondent indicated that it was possible that he told someone to “get rid of it,” but that he would never have instructed workers to simply hide the misbranded supplement.

As an result of Respondent’s warning regarding the impending warehouse inspection, a night warehouse manager had workers load all of the misbranded supplement into a truck and remove it from the warehouse. The supplement was then returned to the warehouse after the FDA inspection was completed.

In September 2004, as the investigations into Berkeley’s activities increased, Warshak’s financial planner encouraged Warshak do some estate planning to protect assets. Outside counsel prepared documents and counseled Warshak on the trusts that needed to be established for Warshak’s wife and children. Outside counsel also recommended how much money should be transferred to the trusts. At one point Respondent was asked to review the trust paperwork to be sure it was compliant with Ohio law, which he did.

Warshak eventually transferred \$13 million to a trust for his wife and \$1 million to a trust for his children. Respondent served as trustee for both trusts. The establishment and funding of the trusts by Warshak effectively hid the proceeds of the conspiracy to deprive and defraud consumers.

On February 22, 2008, as a result of Respondent’s involvement in the removal of the supplement from the warehouse, Respondent was convicted by a jury of Conspiracy to Obstruct

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<sup>3</sup> May 22, 2009 hearing transcript, page 38.

<sup>4</sup> May 22, 2009 hearing transcript, page 41

Proceedings before the U.S. Food and Drug Administration. Respondent was acquitted of two counts involving the actual misbranding of the supplement.

As a result of his involvement in the review, execution and funding of the trust agreements, Respondent was convicted of two counts of Money Laundering and one count of Conspiracy to Obstruct Proceedings before the Federal Trade Commission in U.S. District Court for the Southern District of Ohio. He was acquitted of one count of making a false statement to a bank. Additionally, Respondent was convicted of two counts of Conspiracy to Commit Money Laundering for his role in the continuity program where supplements were automatically shipped to customers.

Despite guidelines recommending a sentence of nearly twenty years, on August 29, 2008, Respondent was sentenced to one year and one day in federal prison. He began serving his sentence on January 15, 2009. Respondent qualified for a fifteen percent reduction in his sentence and had been informed that he would be released to a halfway house on August 31, 2009, and that his remaining sentence would then actually expire on November 29, 2009. Respondent is subject to a three year period of supervision once released from incarceration. Respondent chose not to appeal his conviction or sentence. The Board received a certified copy of Respondent's felony conviction from the Relator in mid-November 2009. The Supreme Court suspended Respondent on an interim basis on December 14, 2009.

#### **CONCLUSIONS OF LAW**

At hearing the issue of whether the Disciplinary Rules or the Rules of Professional Conduct applied in this case was raised. Respondent's misconduct occurred prior to the change in the rules on February 1, 2007, but the convictions actually occurred after the change in the rules. As a precaution, the parties subsequently agreed to an amendment of the complaint, which

was approved by the panel, to include alleged violations of both the Code of Professional Responsibility and the Rules of Professional Conduct.

Respondent was charged in the First Amended Complaint with the following rule violations:

DR 7-102(A)(7) A lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Prof. Cond. R. 1.2(d) A lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

DR 7-102(A)(8) A lawyer shall not knowingly engage in other illegal conduct.

DR 7-109(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

Prof. Cond. R. 3.4(a) A lawyer shall not unlawfully obstruct another party's access to evidence.

DR 1-102(A)(3) Illegal conduct involving moral turpitude.

Prof. Cond. R. 8.4(b) Illegal act that reflects adversely on the lawyer's honesty or trustworthiness.

DR 1-102(A)(4) Conduct involving dishonesty, fraud, deceit or misrepresentation.

Prof. Cond. R. 8.4(c) Conduct involving dishonesty, fraud, deceit or misrepresentation.

DR 1-102(A)(5) Conduct prejudicial to the administration of justice.

Prof. Cond. R. 8.4(d) Conduct prejudicial to the administration of justice.

Based upon the evidence, the Panel finds that Respondent's conduct, by clear and convincing evidence, violated the following rules: DR 7-102(A)(7); DR 7-107(A)(8); DR 7-109(A); DR 1-102(A)(3); DR 1-102(A)(4); and DR 1-102(A)(5).

Additionally, the Panel finds that the following rules were not violated since all misconduct occurred prior to February 1, 2007, when the Rules of Professional Conduct became effective: Prof. Cond. R. 1.2(d); Prof. Cond. R. 3.4(a); Prof. Cond. R. 8.4(b); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d).

### MITIGATION AND AGGRAVATION

Respondent is married and the father of three young children. Beginning in September of 2004, Respondent began to notice a lack of energy. After his vision became affected, Respondent sought medical attention, and in October of 2004 was diagnosed with hairy cell leukemia. At that point Respondent took a leave of absence from Berkeley until after Thanksgiving when he had completed chemotherapy. By January 2005 Respondent's leukemia was in remission.

Unfortunately Respondent's leukemia returned in the summer of 2008, and he required an additional course of chemotherapy shortly before his sentencing hearing in Federal Court. However, at the time of the panel hearing, Respondent believed that his leukemia was in remission.

Respondent immediately ceased practicing law upon being sentenced in September of 2008, and has been cooperative with authorities since his conviction. Respondent was allowed to continue to work at Berkeley for a period of time following his indictment and conviction, assisting the bankruptcy trustee in his efforts. Respondent believes that he has learned from his mistakes, and would be an asset to the legal profession if allowed to practice law in the future.

The Panel finds that Respondent has no prior disciplinary record, has been cooperative in the disciplinary proceedings, and has made some efforts to rectify the consequences of his misconduct. Additionally, Respondent has accepted responsibility for his actions, has expressed remorse, and has otherwise been penalized for his misconduct. Witnesses testified that Respondent is a man of good character and reputation, despite his criminal convictions.

The Panel further finds that Respondent did act with a dishonest or selfish motive, although Respondent apparently did not benefit financially from his actions. The Panel also finds Respondent committed multiple offenses of misconduct.

#### **PANEL RECOMMENDATION**

Relator recommended a sanction of permanent disbarment from the practice of law. Respondent requested a two-year suspension, with the second year stayed upon the condition that he comply with all requirements of his supervised release. Respondent further requests that his suspension be retroactively effective as of September 2, 2008.

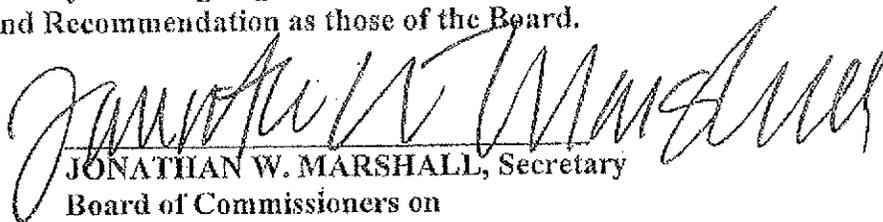
It is the recommendation of the Panel that Respondent be suspended from the practice of law for a period of two years, with the final six months of the suspension stayed upon the condition that he comply with the requirements of his supervised release. The Panel further recommends that the suspension begin retroactive to January 15, 2009, when Respondent began serving his prison sentence.

#### **BOARD RECOMMENDATION**

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 4, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Paul Joseph Kellogg, be suspended on the panel's conditions

for a period of two years with six months stayed, with the suspension to begin to run January 15, 2009. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.**

A handwritten signature in cursive script, appearing to read "Jonathan W. Marshall", is written over a horizontal line.

**JONATHAN W. MARSHALL, Secretary  
Board of Commissioners on  
Grievances and Discipline of  
the Supreme Court of Ohio**

BEFORE THE BOARD OF COMMISSIONERS ON  
GRIEVANCES AND DISCIPLINE OF  
THE SUPREME COURT OF OHIO

FILED

In Re: :  
Complaint Against : No. 08-092  
PAUL JOSEPH KELLOGG, :  
Respondent, : STIPULATIONS  
CINCINNATI BAR ASSOCIATION, :  
Relator. :  
:  
:

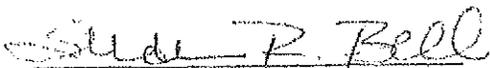
MAY 8 - 2009  
BOARD OF COMMISSIONERS  
ON GRIEVANCES & DISCIPLINE

- 
1. Respondent Paul J. Kellogg (Attorney Registration No. 0062303), has been duly admitted to the practice of law in the State of Ohio in November, 1993.
  2. Relator, through its counsel, has presented to Respondent and his counsel eight (8) Exhibits for use at the Hearing before the Panel in this cause.
  3. Each Exhibit is an accurate copy of various documents from United States of America vs. Paul J. Kellogg, Case No. 1:06-CR-0111(3) in the United States District Court for the Southern District of Ohio.
  4. Paul Joseph Kellogg, Respondent herein, is the Paul J. Kellogg as set forth in the Exhibits.

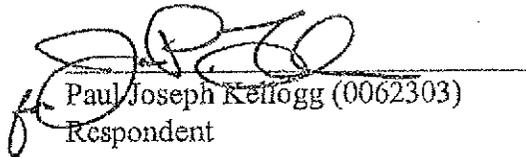
5. Relator's Exhibits shall be admissible at the Hearing before the Panel (and for such later proceedings as may be appropriate) without the need for testimony as to authenticity or accuracy.

Neither the Respondent nor the Government has filed an appeal, or any other post-conviction proceeding, from the Jury Verdicts, Judgment Entry or Sentencing in the criminal case and no appeal or post-conviction proceeding is presently pending.

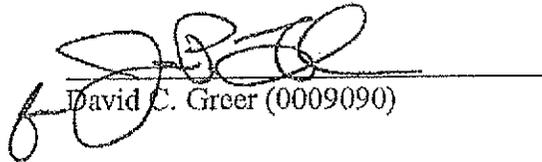
Respectfully submitted,



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Phone: (513) 852-2585  
Fax: (513) 852-8222



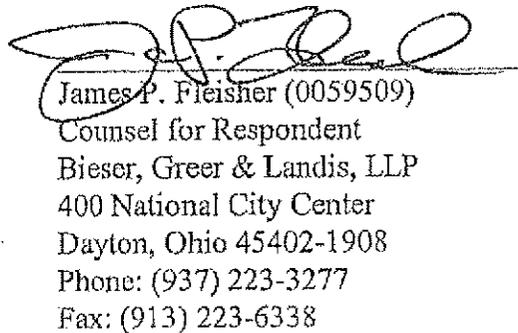
Paul Joseph Kellogg (0062303)  
Respondent



David C. Greer (0009090)



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**Excerpt from Relator's  
Exhibit 1**

AV

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

7006 SEP 20 PM 5:00

UNITED STATES OF AMERICA,

Plaintiff

Criminal No.

~~1106CR 0111~~

INDICTMENT

v.

STEVEN E. WARSHAK (COUNTS 1-98, 102-106, 108-110, 112),  
HARRIET WARSHAK (COUNTS 1, 27, 28, 30, 31, 99-101, 107),  
PAUL J. KELLOGG (COUNTS 14, 30, 31, 96, 97, 109-112),  
CHARLES W. CLARKE, JR. (COUNT 1),  
STEVEN P. PUGH (COUNTS 109 - 111),  
AMAR D. CHAVAN (COUNTS 1, 29),  
TCI MEDIA, INC. ( COUNTS 57-58, 60-73, 79, 83, 91-93)  
and  
BERKELEY PREMIUM NUTRACEUTICALS, INC.  
(COUNTS 1 - 13, 29, 110),

18 U.S.C. § 2  
18 U.S.C. § 371  
18 U.S.C. § 982  
18 U.S.C. § 1029  
18 U.S.C. § 1014  
18 U.S.C. § 1341  
18 U.S.C. § 1344  
18 U.S.C. § 1349  
18 U.S.C. § 1956  
21 U.S.C. § 331  
21 U.S.C. § 333

DLOTT

Defendants.

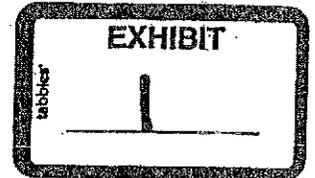
The Grand Jury Charges:

COUNT 1  
CONSPIRACY TO COMMIT  
MAIL, WIRE, AND BANK FRAUD  
18 U.S.C. § 1349

I. GENERAL ALLEGATIONS

A. The Defendants and Coconspirators

1. Defendant BERKELEY PREMIUM NUTRACEUTICALS, INC. (hereinafter referred to as "BERKELEY") is an Ohio Subchapter S corporation, wholly-owned by defendant



2. Between November 28, 2003, and December 2, 2003, pursuant to the direction of defendant STEVEN E. WARSHAK, a conspirator and a Berkeley programmer created false and unauthorized transactions by charging various consumers' credit cards \$1, and then crediting those cards back \$1, without any sale of any product relating to the \$1 charge to such consumers, in order to falsely inflate sales transactions so that Berkeley's transaction numbers would increase, thereby lowering the chargeback ratio for November 2003 in order to maintain the merchant account with SVB.

In violation of 18 U.S.C. §§ 1029(a)(5) and (b)(2).

**COUNT 30**  
**CONSPIRACY TO COMMIT MONEY LAUNDERING**  
**18 U.S.C. § 1956(h)**

**A. THE MONEY LAUNDERING CONSPIRACY AND ITS OBJECTS**

Beginning in or before December 2003 and continuing through at least July 22, 2005, within the Southern District of Ohio and elsewhere, defendants STEVEN E. WARSHAK, PAUL J. KELLOGG, and HARRIET WARSHAK, and other persons known and unknown to the Grand Jury, did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree among themselves and with each other, to conduct or attempt to conduct financial transactions which in fact involved the proceeds of specified unlawful activity. The defendants and conspirators did these acts with the knowledge that such property was derived from a specified unlawful activity, that is, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and bank fraud in violation of 18 U.S.C. § 1344, and :

- a. with the intent to promote the carrying on of said specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i); and
- b. knowing that the transactions were designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(B)(i).

**B. MANNER AND MEANS OF THE CONSPIRACY**

The manner and means by which the defendants sought to accomplish the goals of their conspiracy included, among others, the following:

1. As set forth more fully in Part III of Count 1, above, defendant **STEVEN E. WARSHAK**, defendant **HARRIET WARSHAK**, and others conspired to defraud thousands of consumers and to defraud financial institutions, using the U.S. Mail and wire communications, among other means, to execute the scheme. This fraud scheme generated millions of dollars in proceeds of specified unlawful activity, that is, proceeds of mail fraud in violation of 18 U.S.C. § 1341, proceeds of wire fraud in violation of 18 U.S.C. § 1343, and proceeds of bank fraud in violation of 18 U.S.C. § 1344..
2. Defendants **STEVEN E. WARSHAK**, **HARRIET WARSHAK**, and **PAUL J. KELLOGG** established merchant agreements with various financial institutions to be used for processing credit card purchases. Defendants used merchant accounts of financial institutions to obtain proceeds from victims of their fraud scheme.
3. Defendant **STEVEN E. WARSHAK** received proceeds of consumer fraud, deposited these proceeds into bank accounts at financial institutions, transferred millions of dollars

in fraud proceeds out of the operating accounts into many other accounts for the following purposes, among others: 1) to promote the carrying on of specified unlawful activity by reinvesting fraud proceeds into the illegal enterprise by paying advertising, rent, salaries, and bonuses to managers and other **BERKELEY** employees, such as defendants **PAUL J. KELLOGG** and **HARRIET WARSHAK**; and 2) to conceal or disguise the nature and source of the proceeds of specified unlawful activity through frequent and complex movement of the proceeds and by transferring proceeds into the names of third parties.

4. Defendant **PAUL J. KELLOGG** assisted the defendants and conspirators by, among other things, causing fraud proceeds to be transferred out of the accounts of defendant **STEVEN E. WARSHAK** and into other accounts.
5. Defendant **HARRIET WARSHAK** assisted the defendants and conspirators by, among other things, causing fraud proceeds to be transferred out of the accounts of defendant **STEVEN E. WARSHAK** and into other accounts.

#### C. OVERT ACTS

In furtherance of such conspiracy and to effect the objects of the conspiracy, these defendants committed overt acts in the Southern District of Ohio and elsewhere including, among others, the acts alleged in Counts 32-107, set forth below, which Counts 32-107 are specifically incorporated herein.

In violation of 18 U.S.C. §§1956(h).

COUNT 31  
**CONSPIRACY TO COMMIT 18 U.S.C. § 1957 MONEY LAUNDERING**  
**18 U.S.C. § 1956(h)**

The Grand Jury realleges and incorporates by reference the allegations in Count 30 as though fully set forth herein.

**A. THE MONEY LAUNDERING CONSPIRACY AND ITS OBJECTS**

Beginning in or before December 2003 and continuing through at least July 22, 2005, within the Southern District of Ohio and elsewhere, defendants **STEVEN E. WARSHAK, PAUL J. KELLOGG, and HARRIET WARSHAK**, and other persons known and unknown to the Grand Jury did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree among themselves and with each other, to engage or attempt to engage in a monetary transaction by, through, or to a financial institution, in the United States, in criminally derived property of a value greater than \$10,000.

**B. MANNER AND MEANS OF THE CONSPIRACY**

As described more fully in Part B of Count 30, above, the defendants transferred funds by wire and monetary instrument as set forth and in the amounts listed in Counts 32-107, such property having been derived from a specified unlawful activity, that is, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and bank fraud in violation of 18 U.S.C. § 1344.

**C. OVERT ACTS**

In furtherance of such conspiracy and to effect the objects of the conspiracy, these defendants committed overt acts in the Southern District of Ohio and elsewhere including,

among others, the acts alleged in Counts 32 - 107, set forth below, which Counts 32-107 are specifically incorporated herein.

In violation of 18 U.S.C. § 1956(b).

COUNTS 32-107  
MONEY LAUNDERING  
18 U.S.C. § 1956  
18 U.S.C. § 2

A. GENERAL ALLEGATIONS

With respect to Counts 32-107:

1. On or about the dates set forth in Counts 32-107, in the Southern District of Ohio and elsewhere, defendants STEVEN E. WARSHAK, PAUL J. KELLOGG, HARRIET WARSHAK, and TCI MEDIA, INC., and other persons known and unknown to the Grand Jury, aiding and abetting each other, did knowingly conduct and attempt to conduct the financial transactions by wire and monetary instrument set forth herein, affecting interstate and foreign commerce, which involved the proceeds of specified unlawful activity, that is, mail fraud in violation of 18 U.S.C. §1341, wire fraud in violation of 18 U.S.C. §1343, and bank fraud in violation of 18 U.S.C. § 1344, and:
  - a. with the intent to promote the carrying on of such specified unlawful activity, in violation of 18 U.S.C. §1956(a)(1)(A)(i); and
  - b. knowing that the transactions were designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity, in violation of 18 U.S.C. §1956(a)(1)(B)(i).

2. As set forth more fully in Part III of Count I, above, defendants **STEVEN E. WARSHAK, HARRIET WARSHAK**, and others conspired to defraud thousands of consumers and to defraud financial institutions, using the U.S. Mail and wire communications, among other means, to execute the scheme. This fraud scheme generated millions of dollars in proceeds of specified unlawful activity, that is, proceeds of mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and bank fraud in violation of 18 U.S.C. § 1344.
3. Defendants **STEVEN E. WARSHAK, HARRIET WARSHAK, and PAUL J. KELLOGG** established merchant agreements with various financial institutions to be used for processing credit card purchases. Defendants used merchant accounts of financial institutions to obtain proceeds from victims of their fraud scheme.
4. Defendant **STEVEN E. WARSHAK** received proceeds of consumer fraud, deposited these proceeds into bank accounts at financial institutions, transferred millions of dollars in fraud proceeds out of the operating accounts into many other accounts for the following purposes, among others: 1) to promote the carrying on of specified unlawful activity by reinvesting fraud proceeds into the illegal enterprise by paying advertising, rent, salaries, and bonuses to managers and other **BERKELEY** employees, such as defendants **PAUL J. KELLOGG** and **HARRIET WARSHAK**; and 2) to conceal or disguise the nature and source of the proceeds of specified unlawful activity through frequent and complex movement of the proceeds or by transferring proceeds into the names of third parties.

5. Defendant **PAUL J. KELLOGG, HARRIET WARSHAK, and TCI MEDIA, INC.**, assisted the defendants and conspirators by, among other things, causing fraud proceeds to be transferred out of the accounts of defendant **STEVEN E. WARSHAK** and into other accounts.
6. Defendant **STEVEN E. WARSHAK** is charged in Counts 77-80, 82, and 98 with a violation of 18 U.S.C. § 1956(a)(1)(A)(i).
7. Defendant **STEVEN E. WARSHAK** is charged in Counts 32-76, 81, 83-97, and 102-106 with a violation of 18 U.S.C. § 1956(a)(1)(B)(i).
8. Defendant **HARRIET WARSHAK** is charged in Counts 99-101, 107 with a violation of 18 U.S.C. § 1956(a)(1)(B)(i).
9. Defendant **PAUL J. KELLOGG** is charged in Counts 96-97 with a violation of 18 U.S.C. § 1956(a)(1)(B)(i).
10. Defendant **TCI MEDIA, INC.** is charged in Counts 57-58, 60-73, 79, 83, 91-93 with a violation of 18 U.S.C. § 1956(a)(1)(B)(i).

**B. RELEVANT FINANCIAL ACCOUNTS AND TRANSACTIONS**

With respect to Counts 32-107:

1. Financial institutions with which **STEVEN E. WARSHAK'S** companies held credit card merchant accounts wired revenue into bank accounts owned by **STEVEN E. WARSHAK** and located at Fifth Third Bank, Cincinnati, Ohio. During the conspiracy, merchant banks wired sale proceeds into **STEVEN E. WARSHAK'S** and **BERKELEY'S** bank accounts, including but not limited to, Fifth Third Bank accounts, such as Lifekey, Inc. account number [REDACTED] 3146; Boland Naturals account number

“TTEE” means trustee; and “U/A” means under agreement). This QTIP account was funded with transfers of stocks and/or bonds valued at approximately \$13,194,878.16.

21. In addition, Warshak transferred approximately \$1,000,000.00 out of [REDACTED]4133 and into a gift trust (account no. [REDACTED]7680 in the name of Paul J. Kellogg TTEE, The Warshak 2004 Gift Trust U/A 10/1/04).
22. As set forth in the chart below, in Counts 96 through 97, inclusive, defendants STEVEN E. WARSHAK and PAUL J. KELLOGG transferred or caused to be transferred \$1,000,000.00 from account [REDACTED]4133 into account [REDACTED]7680 and approximately \$13,194,878.16 in stocks/bonds from account [REDACTED]4133 to account [REDACTED]7671.
23. On or about November 23, 2004, WARSHAK’S financial advisor and coconspirator told defendant STEVEN E. WARSHAK that the trust was, in fact, established for litigation purposes, i.e., to hide and otherwise conceal the funds from the FTC. WARSHAK’S financial advisor assured STEVEN E. WARSHAK that the funds were put beyond the reach of the FTC under the guise of an estate planning strategy. WARSHAK’S financial advisor also told defendant STEVEN E. WARSHAK that defendant KELLOGG, as the trustee, could transfer the funds back into defendant WARSHAK’S name after the conclusion of the FTC litigation.

Count	Date of Trust	Deposit to Account No.	Amount of Deposit	Transfer from Account No.	Account Name
96	10/01/04	[REDACTED]7680	\$1,000,000.00	[REDACTED]4133	Warshak investment
97	10/01/04	[REDACTED]7671	\$13,194,878.16	[REDACTED]4133	Warshak investment
		<b>TOTAL</b>	\$14,194,878.16		

2. From about February 2004 until sometime in March 2005, in the Southern District of Ohio and elsewhere, defendants STEVEN E. WARSHAK, PAUL J. KELLOGG, STEVEN P. PUGH and BERKELEY, did, with the intent to defraud and mislead, cause foods and dietary supplements to become misbranded within the meaning of 21 U.S.C. §343(a)(1), and aided and abetted each other in doing so, in that these defendants caused Rovicid, a food and dietary supplement, to contain false or misleading labeling that did not accurately reflect the product's ingredients, and these defendants did so while the food and dietary supplement was held for sale.

In violation of 21 U.S.C. §§ 331 and 333, and 18 U.S.C. § 2.

**COUNT 111**  
**CONSPIRACY TO OBSTRUCT PROCEEDINGS BEFORE THE**  
**U.S. FOOD AND DRUG ADMINISTRATION**  
**18 U.S.C. § 371**

**A. CONSPIRACY TO OBSTRUCT AND ITS OBJECTS**

1. The Grand Jury realleges and incorporates by reference the allegations in Count 109 as though fully set forth herein.
2. Beginning on or before May 13, 2004, and continuing until the date of this Indictment, in the Southern District of Ohio and elsewhere, defendants PAUL J. KELLOGG, and STEVEN P. PUGH, knowingly and willfully conspired and agreed together and with each other, and with other persons both known and unknown to the Grand Jury, to commit an offense against the United States, that is, to corruptly influence, obstruct, impede, and endeavor to influence, obstruct, and impede the due and proper administration of law under which a proceeding was being had before the United States

Food and Drug Administration ("FDA"), an agency of the United States, that is, the inspection of the premises of BERKELEY, including a warehouse facility operated by BERKELEY at 5462 Duff Drive, Cincinnati, Ohio, and aided and abetted each other in doing so, by removing from the warehouse, hiding, and otherwise concealing and attempting to conceal and directing others to remove, hide and otherwise conceal from the FDA inspectors, a substantial quantity of the product Rovacid, a product sold by BERKELEY, in violation of 18 U.S.C. §1505.

**B. OVERT ACTS**

In furtherance of such conspiracy and to effect the objects of the conspiracy, one or more of these defendants committed one or more overt acts, including, but not limited to, the following:

1. On or about May 14, 2004, after learning that the U.S. Food and Drug Administration intended to conduct an inspection of BERKELEY products housed in BERKELEY'S warehouse facilities, including the warehouse on 5462 Duff Drive in Cincinnati, Ohio, defendant PAUL J. KELLOGG instructed a conspirator to tell defendant STEVEN P. PUGH to remove from the warehouse the misbranded Rovacid, that is, the "old" Rovacid previously marketed and labeled for prostate health which had been placed into packages with labeling for use of the product for heart health, in order to hide and conceal the misbranded Rovacid from the FDA inspectors.
2. Later on or about May 14, 2004, pursuant to defendant KELLOGG'S direction, defendant PUGH ordered the second-shift warehouse manager to have the misbranded Rovacid and excess packaging moved out of the warehouse and loaded onto a rental truck

which was being used at that time by **BERKELEY** to transfer products between warehouse locations.

3. Later on or about May 14, 2004, pursuant to defendant **PUGH'S** instruction, the second-shift warehouse employees removed the misbranded Rovicid from the warehouse and loaded onto the rental truck, completing the loading the next morning, before the FDA inspectors arrived at the Duff warehouse.
4. On or about May 15, 2004, defendant **PUGH** instructed a Duff warehouse employee to move the rental truck loaded with the misbranded Rovicid from the Duff warehouse to the parking lot of another **BERKELEY** office location.
5. On or about May 18, 2004, after the FDA inspectors had concluded the Duff warehouse inspection, a conspirator directed the same Duff warehouse employee to go to the offsite location to pick up the rental truck, drive it back to the Duff warehouse, and restock the misbranded Rovicid into the warehouse for continued sale.

In violation of 18 U.S.C. § 371.

**COUNT 112**  
**CONSPIRACY TO OBSTRUCT PROCEEDINGS BEFORE THE**  
**U.S. FEDERAL TRADE COMMISSION**  
**18 U.S.C. § 371**

**A. CONSPIRACY TO OBSTRUCT AND ITS OBJECTS**

From about September 2004 and continuing until the date of this Indictment, the exact dates being unknown to the United States, defendants **STEVEN E. WARSHAK** and **PAUL J. KELLOGG** knowingly and willfully conspired and agreed together and with each other and with other persons both known and unknown to the Grand Jury, to commit an offense against the

United States, that is, to corruptly influence, obstruct, impede, and endeavor to influence, obstruct, and impede the due and proper administration of law under which a proceeding was being had before the United States Federal Trade Commission ("FTC"), an agency of the United States, that is, an investigation into false claims and advertising, unauthorized billing and shipping, and other unfair trade practices in connection with the marketing and sale of certain products by BERKELEY, located in the Southern District of Ohio in Cincinnati, Ohio, in that defendants PAUL J. KELLOGG, STEVEN E. WARSHAK, and other persons both known and unknown to the Grand Jury, transferred funds out of an account held by and under the ownership and control of defendant STEVEN E. WARSHAK, and transferred such funds into a trust fund account in the name of defendant WARSHAK'S spouse, purportedly established for estate planning, but in actuality for the purpose of hiding and otherwise concealing and attempting to conceal such funds from the FTC, in violation of 18 U.S.C. § 1505.

**B. OVERT ACTS**

In furtherance of such conspiracy and to effect the objects of the conspiracy, one or more of these defendants committed one or more overt acts, including, but not limited to, the following:

1. In June 2004, defendant STEVEN E. WARSHAK was aware that he and his companies were being investigated by the Federal Trade Commission (FTC) for fraudulent business practices. Thereafter, defendant STEVEN E. WARSHAK, defendant PAUL J. KELLOGG, and others began considering investment strategies to remove assets out of the name of Defendant STEVEN E. WARSHAK to protect assets from the anticipated FTC litigation and fines. Defendant WARSHAK, and others known and unknown to the

Grand Jury, decided that the use of trusts under the guise of estate planning would successfully hide WARSHAK'S money from the FTC.

2. Defendant KELLOGG told a conspirator that STEVEN E. WARSHAK was not personally named by the FTC as a liable party and that there was a "window of opportunity" in which they could get the money out of WARSHAK'S name and into the name of defendant WARSHAK'S wife.
3. On or about October 1, 2004, STEVEN E. WARSHAK, with the assistance of defendant PAUL J. KELLOGG and WARSHAK'S financial advisor, created a QTIP trust, account no. BJS-017671 in the name of Paul J. Kellogg TTEE, The Carri E. Warshak 2004 QTIP Trust U/A 10/1/04 ("QTIP" means qualified terminable interest property; "TTEE" means trustee; and "U/A" means under agreement). This QTIP account was funded with transfers of stocks and/or bonds valued at approximately \$13,194,878.16.
4. In addition, WARSHAK transferred approximately \$1,000,000.00 out of BJS-014133 and into a gift trust (account no. BJS-017680 in the name of Paul J. Kellogg TTEE, The Warshak 2004 Gift Trust U/A 10/1/04).

In violation of 18 U.S.C. § 371.

**FORFEITURE ALLEGATION  
SPECIFIED UNLAWFUL ACTIVITY PROCEEDS**

The Grand Jury further finds probable cause to believe that upon conviction of one or more of the offenses alleged in Count 1 (Conspiracy to Commit Mail, Wire and Bank Fraud); Counts 2 - 13 (Mail Fraud); Counts 15, 23, and 27 (Bank Fraud); and Count 29 (Access Device Fraud) of this Indictment, defendants STEVEN E. WARSHAK, BERKELEY PREMIUM

**Excerpt from Relator's  
Exhibit 7**

United States District Court  
Southern District of Ohio at Cincinnati

UNITED STATES OF AMERICA  
v.  
PAUL J. KELLOGG

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:06-cr-00111(3)

USM Number: 04430-061

David Greer, Esq., James Fleisher, Esq.  
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s): \_\_\_
- pleaded nolo contendere to count(s) \_\_\_ which was accepted by the court.
- was found guilty on count(s) 30, 31, 96, 97, 111 and 112 of the indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

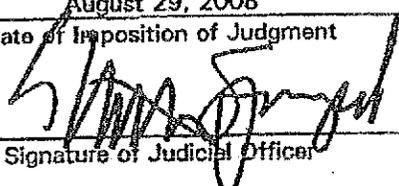
<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
See next page.			

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on counts(s) 14, 109, 110 of the indictment.

- Count(s) \_\_\_ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States Attorney of material changes in the defendant's economic circumstances.

August 29, 2008  
 \_\_\_\_\_  
 Date of Imposition of Judgment  
  
 \_\_\_\_\_  
 Signature of Judicial Officer

S. ARTHUR SPIEGEL, United States Senior District Judge  
 \_\_\_\_\_  
 Name & Title of Judicial Officer

8/29/08  
 \_\_\_\_\_  
 Date



CASE NUMBER: 1:06-cr-00111(3)

Judgment - Page 2 of 8

DEFENDANT: PAUL J. KELLOGG.

**ADDITIONAL COUNTS OF CONVICTION**

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	7/22/2005	30
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	7/22/2005	31
18 U.S.C. §§ 1956 and 2	Money Laundering	10/1/2004	96
18 U.S.C. §§ 1956 and 2	Money Laundering	10/1/2004	97
18 U.S.C. § 371	Conspiracy to Obstruct Proceedings Before the U.S. Food and Drug Administration	9/20/2006	111
18 U.S.C. § 371	Conspiracy to Obstruct Proceedings Before the U.S. Federal Trade Commission	9/20/2006	112

STANDARDS FOR IMPOSING LAWYER SANCTIONS

AS APPROVED, FEBRUARY 1986

AND AS AMENDED, FEBRUARY 1992

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#### **4.6 LACK OF CANDOR**

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

- 4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.
- 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
- 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.
- 4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

#### **5.0 VIOLATIONS OF DUTIES OWED TO THE PUBLIC**

##### **5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY**

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

- 5.11 Disbarment is generally appropriate when:
  - (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
  - (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously

adversely reflects on the lawyer's fitness to practice.

- 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.
- 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.
- 5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

## 5.2 FAILURE TO MAINTAIN THE PUBLIC TRUST

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official:

- 5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.
- 5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.
- 5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.
- 5.24 Admonition is generally appropriate when a lawyer in an official or governmental position engages in an isolated instance of negligence in not following proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.

## 6.0 VIOLATIONS OF DUTIES OWED TO THE LEGAL SYSTEM

### 6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

Rules and Regulations Governing  
Procedure on Complaints and Hearings  
Before the Board of Commissioners on  
Grievance and Discipline of the Supreme  
Court Section 10

## Section 10. Guidelines for Imposing Lawyer Sanctions

(A) Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors.

(B) In determining the appropriate sanction, the Board shall consider all relevant factors; precedent established by the Supreme Court of Ohio; and the following:

(1) Aggravation. The following shall not control the Board's discretion, but may be considered in favor of recommending a more severe sanction:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) lack of cooperation in the disciplinary process;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of conduct;

(h) vulnerability of and resulting harm to victims of the misconduct;

(i) failure to make restitution.

(2) Mitigation. The following shall not control the Board's discretion, but may be considered in favor of recommending a less severe sanction:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) timely good faith effort to make restitution or to rectify consequences of misconduct;

(d) full and free disclosure to disciplinary Board or cooperative attitude toward proceedings;

(e) character or reputation;

(f) imposition of other penalties or sanctions;

(g) chemical dependency or mental disability when there has been all of the following:

(i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor;

(ii) A determination that the chemical dependency or mental disability contributed to cause the misconduct;

(iii) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment;

(iv) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.

(h) other interim rehabilitation.

[Section 10 Adopted by the Supreme Court of Ohio, effective June 1, 2000;  
amended effective February 1, 2003].

#### **Section 11. Consent to Discipline.**

(A) As used in this section:

(1) "Misconduct" has the same meaning as used in Gov. Bar R. V, Section 6(A)(1);

(2) "Sanction" means any of the sanctions listed in Gov. Bar R. V, Section 6(B)(3), (4), or (5).

(B) Pursuant to Gov. Bar R. V, Section 11(A)(3)(c), the relator and respondent may enter into a written agreement wherein the respondent admits to alleged misconduct and the relator and respondent agree upon a sanction to be imposed for that misconduct. The written agreement may be entered into after a complaint is certified by the Board, but no later than sixty days after appointment of a hearing panel. For good cause shown, the chair of the hearing panel or the Board chair may extend the time for the parties to file a written agreement by an additional thirty days. The written agreement shall be signed by the respondent, respondent's counsel, if the respondent is represented by counsel, and relator, and shall include all of the following:

(1) An admission by the respondent, conditioned upon acceptance of the agreement by the Board, that the respondent committed the misconduct listed in the agreement;

(2) The sanction agreed upon by the relator and respondent for the misconduct admitted by the respondent;