FINDINGS OF FACT / CONCLUSIONS

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	Case No. 85-00070
INSLAW, INC.,	)	(Chapter 11)
	)	
Debtor.	)	
	)	CL|IN|FI-01
INSLAW, INC.,	)	
	)	
Plaintiff,	)	Adversary Proceeding
	)	No. 86-0069
v.	)	
	)	
UNITED STATES OF AMERICA AND THE UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Counts I, II and III of the Complaint)

[The following paragraphs are numbered as they appear in the United States Bankruptcy Court's Findings of Fact]

VII. BREWER'S USE OF MODIFICATION 12 "TO GET INSLAW'S GOODS"

A. NEGOTIATION OF MODIFICATION 12

229. The DOJ persisted in its attempts to interrelate resolution of the advance payments issue and INSLAW's assertion of proprietary rights in Enhanced PROMIS. (PX 62; PX 66) When it became clear to INSLAW in March 1983 that DOJ would not resolve the advance payment issue without first obtaining the PROMIS

software, INSLAW proposed in a March 11, 1983 letter to DOJ that the parties enter into an escrow agreement pursuant to which DOJ would receive the software if, and only if, INSLAW went into bankruptcy. (PX 68; Hamilton, T. 167-168; Brewer, T. 1693-1694; Merrill, T. 791) Brewer's and Videnieks' professed concern about INSLAW's financial viability was merely a smoke screen; such concerns would have been fully met by placing the PROMIS software in escrow with a third party. The only reason such an arrangement was not acceptable to DOJ was because it wanted to "get" INSLAW's "goods." This is further evident from the exchange of correspondence from Mr. Rugh whereby the Department having gotten the goods, pretended to find fault with INSLAW's methodology for proving private funding while refusing to divulge to INSLAW either any realistic purported defects in that methodology or any alternative methodology which would be acceptable to DOJ. DOJ thus took the tack designed to be the most harmful to INSLAW without any conceivable concomitant benefit to the Government other than the desire to get away with taking something without right.

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231. A March 28 memo further recounts that Videnieks was in full agreement with Brewer about the letter, indicating quite significantly '... why do you need signature if you got the goods?' (PX 73; Videnieks, T. 1837-1838)

* * *

271. After Rooney left the PROMIS Oversight Committee meeting, and based upon the urging of Brewer and his staff and notwithstanding Rooney's favorable conclusions about a constructive resolution to the word processing problem, and the fact that that was an initiative arranged by Deputy Attorney General Schultz, Jensen approved a decision to begin termination of the contract for default. (Richardson, T. 644, 698; PX 339 (Stephens] at pp. 25-26; PX 341 (Tyson] at pp. 175-178)

* * *

312. The Executive Office reported directly to Jensen when he was Associate Attorney General and then began reporting directly to the Deputy Attorney General when Jensen was promoted to that position. (Brewer, T. 1661-1662; Tyson, T. 1534-1535).

313. About the time that Jensen was promoted to Associate Attorney General, ranking DOJ official on the PROMIS Oversight Committee and immediate organizational superior of the Executive Office, Videnieks first suspended the payment of costs to INSLAW under the PROMIS Contract. (PX 98) The July 18, 1983, letter to INSLAW from Contracting Officer Videnieks, that sought to justify the suspension of almost a quarter of a million dollars in payments due INSLAW under the Contract, showed Associate Attorney General Designate Jensen as the number one "cc". (PX 98) Videnieks testified that he never met Jensen and cannot account for why he copied the payment suspension letter to Jensen but

failed to copy the DOJ Director of Procurement, his immediate superior. (Videnieks, T. 1869-1871)

* * *

316. In December 1983, INSLAW counsel Richardson met with Assistant Attorney General Rooney in an attempt to resolve both the payment-suspension problem and a word processing hardware problem. There was every indication that the meeting would lead to constructive resolution of the problems. (Richardson, T. 641-644).

* * *

320. In February 1984, Brewer telephoned Hamilton to tell him that Jensen had just decided to terminate the word processing part of the INSLAW contract for convenience. (Hamilton, T. 207)

* * *

323. Elliot Richardson and Don Santarelli visited Acting Deputy Attorney General Jensen on March 13, 1985, to ask for an immediate investigation into INSLAW's complaints about Brewer; a process for fair and expeditious resolution of the contract disputes that had propelled INSLAW into bankruptcy; and DOJ consideration of the larger public interest involved in preserving INSLAW as a unique asset for both U.S. Attorneys and

the state and local prosecutors and courts. (Richardson, T. 658-660; PX 328 [Jensen] at pp. 22-24).

324. Jensen appointed his aide, Jay Stephens, to follow through on the matters raised by Richardson and Santarelli. (PX 328 (Jensen] at pp. 24-25, 37-38; PX 339 (Stephens] at p. 40; Richardson, T. 661)

325. Although Jensen testified that he believed an investigation of Brewer's conduct against INSLAW had been conducted, in fact neither Stephens nor the designated agency ethics officer ever conducted such an investigation. (PX 328)[Jensen] at PP. 25-26; PX 339 [Stephens] at pp. 47-48; PX 343 (Wallace] at pp. 44-46, 210-211; Sposato, T. 2267-2270).

* * *

339. On May 2, 1983, Hamilton met with William Tyson to complain about the biased administration of the PROMIS Contract on the part of Brewer and Videnieks, and to state that Brewer's conduct may be the result of a lack of impartiality against Hamilton for having previously fired Brewer. (Hamilton, T. 199; PX 341 (Tyson] at pp. 136-138, 140-1421, Tyson, T. 1531-1532, 1550-1551) Hamilton specifically identified ten to twelve incidents which appeared to have been the result of Brewer's bias, including Brewer's conduct at the April 19, 1982 meeting in connection with the BJS contract and the spreading of false information concerning INSLAW's financial condition among personnel in various U.S. Attorney's offices. (Hamilton, T.

199-201) Tyson responded that he took seriously these sort of allegations and that he would conduct an inquiry. (Hamilton, T. 202; Tyson, T. 1554-1555) Again, no referral to OPR occurred, nor did Tyson do anything other than to ask McWhorter whether Brewer had been fired by the Institute. (PX 341 [Tyson) at pp. 140-142; Tyson, T. 1552, 1556; Hamilton, T. 208) INSLAW never even got a report back from Tyson on this matter. The government began to suspend payments on its contract cost expenses later on in May 1983. (Hamilton, T. 208; Tyson, T. 1554-1555).

* * *

351. This Court has found, (i) in an extended bench ruling on June 12, 1987 (which is incorportated herein by reference), as a result of four days of hearing in In re INSLAW, Inc., Case No. 85-00070, at which DOJ appeared and offered evicence, (ii) in an Order dated July 20, 1987, and (iii) in Findings of Fact and Conclusions of Law issued on this date in that case, and this Court incorporates into these findings in this adversary proceeding the following:

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(b) Sometime between February 7 and February 20, 1985, Brewer discussed the INSLAW Chapter 11 bankruptcy case with Thomas J. Stanton, Director of the Executive Office of United States Trustee ("EOUST"). At the time of Brewer's discussion

with Stanton, Brewer and DOJ believed that they had an interest in seeing that INSLAW was liquidated in order to weaken or eliminate INSLAW's ability to press its contract disputes with DOJ. As result of the discussion, Stanton made a commitment to Brewer that he would undertake to cause the conversion of INSLAW's Chapter 11 case to a Chapter 7 liquidation case.

(d) Acting on his commitment to Brewer, Stanton contacted William C. White, the local United States Trustee whose office had jurisdiction over the INSLAW bankruptcy, and pressured him to convert the case to a Chapter 7 liquidation. When White resisted, Stanton sought to have the office of Cornelius Blackshear, then the United States Trustee for the Southern District of New York, detail Blackshear's assistant trustee, Harry Jones, to EOUST, Washington, D.C., where Jones would be assigned to accomplish the conversion. Blackshear refused to permit this.

(g) The fact of Stanton's commitment to Brewer to seek INSLAW's liquidation was relayed by Brewer to Rugh on or before February 20, 1985. Brewer told Rugh that Stanton had said the INSLAW bankruptcy would be converted to a Chapter 7 liquidation within 30 to 60 days. On February 20, 1985, acting on

this information, Rugh telephoned Peter Videnieks, the Contract Officer on the PROMIS contract, and told him that Brewer had talked to Stanton and that there was 'no way' the INSLAW bankruptcy would continue as a Chapter 11 case and that INSLAW probably would be liquidated within 30 to 60 days. Rugh told Videnieks that in view of the impending liquidation, DOJ would need to obtain a new site for the Government computer then on INSLAW's premises in Lanham, Maryland.

(h) On or about February 21, 1985, Rugh telephoned Gregory McKain, a senior INSLAW software programmer who had worked on the PROMIS contract since its inception, and told them that EOUSA had found out from the 'trustees' that INSLAW could not make it in Chapter 11 and that the company would probably go into Chapter 7 in 30 to 60 days. Rugh then discussed with McKain the possibility of working for DOJ on the remainder of the PROMIS project under a six-month sole source contract, assuming INSLAW did go out of business.

* * *

352. Rugh of DOJ's Executive Office attempted to recruit an INSLAW software engineer during the month INSLAW filed for protection, telling the INSLAW employee, Gregory McKain, that the 'trustees' had told the Executive Office that INSLAW would probably be liquidated within 30-60 days.

* * *

362. DOJ converted INSLAW's Enhanced PROMIS by trickery, fraud and deceit, and DOJ has used and continues to use Enhanced PROMIS not only in the 20 U.S. Attorney's offices entitled to use a different non-proprietary version of PROMIS, but also in approximately 25 other U.S. Attorney's offices.

* * *

398. During the trial of this matter, the Court observed the witnesses very closely and reached certain definite and firm convictions based on the demeanor and expressions of those witnesses, as well as on an analysis of the inherent probability or improbability of their testimony in light of the documentary evidence and other known facts. Accordingly, the Court makes the following general findings with respect to such trial witnesses, although the comments expressed herein should not be interpreted as being fully inclusive:

(a) The testimony of William Hamilton was accurate in all or almost all respects, even taking into account the natural human tendency to emphasize those things favorable to one's own cause. Mr. Hamilton was an impressive witness with an exceptionally good memory and an extraordinary ability to remember with precision details of events that occurred years ago.

(b) The testimony of John Gizzarelli was accurate in all major respects. Although his recollection was not as good as

Hamilton's recollection, it is impossible for the Court to conclude that Gizzarelli was inaccurate in his detailed, and substantiated testimony describing Brewer's intense hatred of Hamilton. Gizzarelli is no longer an employee of INSLAW, and there was no reason for him to slant his testimony to one side or the other.

(c) The testimony of Elliot Richardson was very impressive. The Court found Richardson to be of high integrity and his testimony to be absolutely reliable.

(d) The testimony of James Rogers, Dean Merrill, Harvey Sherzer, Bellie Ling and Marian Holton was straightforward and consistent with the known facts.

(e) The Court was impressed with the credentials and expertise of Thomas DeLutis, INSLAW's expert witness. The Court believes DeLutis to have conducted himself with a tenable aura of impartiality and finds the DeLutis testimony to be very believable.

(f) The testimony of Laurence McWhorter was totally unbelievable for a number of reasons. First, McWhorter could not remember anything other than a 30-second telephone call that he had with Hamilton before the contract was entered into. On cross-examination, it was brought out that McWhorter had testified at his deposition that he repeatedly could not recall virtually anything related to the contractual relationship between the parties, notwithstanding that he supposedly had supervisory responsibility over this relationship and over Brewer. Second, McWhorter's testimony was contradicted by

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Hamilton and also by his supervisor, William Tyson. Third, Brewer was a member of McWhorter's wedding party and had advanced money to McWhorter in the form of buying into a real estate partnership with McWhorter.

(g) The testimony of James Kelley was not believable. His hatred of Hamilton oozed from every pore; it was tangible and palpable. The Court finds that Kelley was a very bitter man who was eager to find any loophole that might exist to evade his ethical responsibilities as a lawyer not to reveal the confidences of a former client. Kelley showed that he was eager to say <u>anything</u> to harm Hamilton as long as it would sound plausible. In addition, Kelley is heavily involved with a company at least partially in competition with INSLAW and he is a friend or acquaintance of Brewer.

(h) The testimony of Jack Rugh also was not believable. Rugh was a biased witness whose testimony was tainted by the negative effect Mr. Brewer and his lack of impartiality had upon Mr. Rugh. Mr. Rugh also was biased in view of his ambitions to carry on the PROMIS Project in-house. Moreover, his testimony is at odds with the written PROMIS contract in several important particulars. For example, § 3.2.4.3. of the contract provides that INSLAW was required to provide 'error-free' software which Rugh mistakenly believed required INSLAW to fix any 'bugs' in the software regardless of who reported such bugs. This is contrary to the contract and is totally inconsistent with the logic of competitive bidding. As Hamilton pointed out in his testimony, INSLAW would be at a significant disadvantage to another company

attempting to get the PROMIS contract because the other company would have no other customers making bug fix demands whereas INSLAW would have to be including in DOJ's software all bug fix demands made by its customers or third parties other than DOJ. In addition, Rugh "interpreted' the contract to continue in effect as to all 94 offices even after the 74 office word processing phase of the contract was cancelled. This construction is implausible, as was Rugh's denial of Brewer's bias which was evidenced again and again during the course of the contract. Finally, Rugh suffered from the collective amnesia that many of DOJ's witnesses were suffering from and this is further evidence of his unreliability.

(i) The testimony of William Tyson was not believable. His testimony that Brewer's attitude toward INSLAW was positive, constructive and favorable is so ludicrous in light of the evidence taken as a whole that it was difficult for this Court to believe any of Mr. Tyson's testimony. Tyson displayed an extraordinarily blase attitude toward serious allegations of personal bias by Brewer towards Hamilton and INSLAW, and did little, if anything, to discharge his responsibilities as Brewer's superior to investigate these allegations.

(j) The testimony of C. Madison Brewer was most unreliable, and entirely colored by his intense bias and prejudice against Hamilton and INSLAW.

(k) The testimony of Robert Whiteley and Vito DiPietro was generally truthful, although they tended to slant certain of their testimony in favor of their employer.

(l) The testimony of Peter Videnieks was substantially unreliable. Videnieks was under Brewer's domination and was thoroughly affected by Brewer's bias. In addition, Videnieks displayed an amazing lack of recollection of pertinent facts, especially in regard to the very detailed notes which he maintained in respect to this matter. It is obvious that Videnieks acted at the bidding of Brewer and that his attitude toward INSLAW was directly the consequence of Brewer's influence on him.

(m) The testimony of James Mennino was absolutely incredible. It was totally unsubstantiated and obviously biased. The Court infers from the evidence as a whole that Mennino sought to obtain a copy of PROMIS software from DOJ by offering to provide DOJ with false information that Mennino believed would injure INSLAW. Mennino failed to substantiate his charges against INSLAW at the time these charges were originally made, even though DOJ requested substantiation at that time. Moreover, Mennino failed to bring any substantiating information to trial, notwithstanding his testimony that such information was available.

(n) The testimony of Ugo Gagliardi, DOJ's expert witness, is entitled to little weight and should be thoroughly discounted for several reasons. First, Gagliardi was heavily influenced in his view of the case by a viciously inaccurate characterization of INSLAW's position in this case provided by Rugh. Second, Gagliardi assumed the role of an advocate for the government and there was not even a pretense of impartiality in his testimony.

Finally, Gagliardi reached speculative conclusions on the basis of inadequate factual premises.

(o) The testimony of Alan Gibson was basically believable, except as otherwise noted in these Findings, although he is not an expert qualified to give an opinion concerning the adequacy of INSLAW's methodology for determining the source of funding for individual enhancements to the premised software.

(p) The testimony of Janis Sposato is to be viewed with considerable skepticism. Given Sposato's position as a DOJ ethics officer, her casual treatment of repeated serious allegations of outrageous misconduct by Brewer can only be described, even charitably, as willful blindness to the obvious.

(q) The testimony of Geraldine Schacht and Joyce DeRoy was substantially believable, and the Court has no indication that they were biased or would have any reason to favor either party.

* * *

399. The acts of DOJ as described in the foregoing findings of fact were done in bad faith, vexatiously, in wanton disregard of the law and the facts, and for oppressive reasons -- to drive INSLAW out of business and to convert, by trickery, fraud and deceit, INSLAW's PROMIS software.

George Francis Bason, Jr.
United States Bankruptcy Judge.