

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, III  
Beaufort County  
Trial Court Case No. 2011-CP-07-128 and 2011-CP-07-129

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Case No. 2015-002156

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First Citizens Bank and Trust Company, Inc.,

Respondent/Appellant,

v.

Blue Ox, LLC and J. Chris Lindgren,

Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

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**RECORD ON APPEAL**

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APR 01 2016

**SC Court of Appeals**

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )

First Citizens Bank and Trust )  
Company, Inc., )

Petitioner, )

v. )

Blue Ox, LLC and J. Chris Lindgren, )

Respondents. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

**ORDER OF REFERENCE**

(Case No.: 2011-CP-07-128)

2014 JUL 11 PM 1:12  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

Judgment having been rendered, an Execution issued, a *Nulla Bona* Return made to said Execution, the Petitioner having moved for an examination of the Respondents pursuant to the provisions of §15-39-310, *et seq.*, as amended; it is therefore,

ORDERED that this action be and the same hereby is referred to The Honorable Martin H. Dukes III, Master-in-Equity, to take the testimony arising under the pleadings and to rule upon all motions necessary to dispose of this matter, to include but not limited to, motions to dismiss, motions to appoint Receiver, motions to continue the matter, and motions to sell all or certain property of judgment debtor in satisfaction of the Petitioner's debt and has authority to enter a Final Order. Any appeal from the Master-In-Equity is directly to the Supreme Court.

**AND IT IS SO ORDERED.**

Beaufort, South Carolina

7-11, 2014

s/ [Signature]  
~~Presiding Circuit Court Judge, Beaufort County~~

STATE OF SOUTH CAROLINA )  
)  
COUNTY OF BEAUFORT )  
  
First Citizens Bank and Trust )  
Company, Inc., )  
)  
Petitioner, )  
)  
v. )  
)  
Blue Ox, LLC and J. Chris Lindgren, )  
)  
Respondents. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

**ORDER OF REFERENCE**

(Case No.: 2011-CP-07-129)

2014 JUL 11 PM 4:12  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

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**AND IT IS SO ORDERED.**

Beaufort, South Carolina

7-11, 2014

S. H. K. [Signature]  
Presiding Circuit Court Judge, Beaufort County

|                                     |   |                                  |
|-------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA             | ) | IN THE COURT OF COMMON PLEAS     |
|                                     | ) |                                  |
| COUNTY OF BEAUFORT                  | ) |                                  |
|                                     | ) |                                  |
| First Citizens Bank and Trust       | ) |                                  |
| Company, Inc.,                      | ) | <b><u>RULE TO SHOW CAUSE</u></b> |
|                                     | ) | (Case No.: 2011-CP-07-128)       |
| Petitioner,                         | ) |                                  |
|                                     | ) |                                  |
| v.                                  | ) |                                  |
|                                     | ) |                                  |
| Blue Ox, LLC and J. Chris Lindgren, | ) |                                  |
|                                     | ) |                                  |
| Respondents.                        | ) |                                  |
|                                     | ) |                                  |

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Judgment having been rendered, an Execution issued, a *Nulla Bona* return made to said Execution, the Circuit Court having Ordered this matter to be referred to the Master-In-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure; it is therefore,

ORDERED that **an Authorized Representative for Blue Ox, LLC and J. Chris Lindgren**, DO APPEAR before **Beaufort County Master-in-Equity, The Honorable Marvin H. Dukes III, Beaufort County Courthouse, 102 Ribaut Road, Room 212, Beaufort, South Carolina**, on the 2<sup>nd</sup> day of September, 2014, at 9 :30 a.m., to be examined under oath concerning assets of Respondents; TO SHOW CAUSE why the above-named Respondents' property should not be applied towards satisfaction of the Judgment set out in the Petition; and TO SHOW CAUSE why a Receiver of the Respondents' property should not be appointed, pursuant to the provisions of § 15-39-430, et seq. South Carolina Code Ann. (Law. Co-op. 1976);

IT IS FURTHER ORDERED that the Respondents are hereby restrained and enjoined from making any transaction or transfer or other disposition of property belonging to him/it which is not exempt from execution pending further Order of this Court.

**YOU ARE FURTHER ORDERED TO BRING WITH YOU TO THE HEARING**

copies of the following:

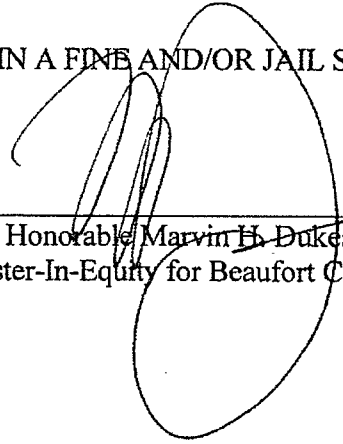
1. Bank statements for all bank accounts owned in whole or in part by Defendants for the past year.
2. Pay stubs for the past five (5) years.
3. Federal and State Tax returns for the past five (5) years.
4. Insurance Policies [home, automobile, real estate, etc...].
5. Records of any real estate owned, either in whole or in part.
6. Records of vehicles and boats.
7. Any inventories of personal property.
8. Copies of any contracts entitling you to payment of money.
9. Any personal financial statements prepared for any reasons either by your self or by any independent sources, with any applicable notes attached thereto from the past five (5) years and, if not reflected in such statements, a complete description of any and all contingent liabilities, including guarantees, by you.
10. Any and all year-end financial statements of any corporation, partnership, trust, or other business entity in which you hold directly or indirectly a 10% interest (balance sheet statements and statement of income and expenses) audited and unaudited for the last three years of the respective entities with any applicable notes attached thereto and any subsequently prepared financial reports or statements prepared by the entity or on its behalf for any reason.
11. Any and all documents and financial records that relate to, refer to, or describe, recount, or are in any way related to any transfer of or pledge, hypothecation, gift, assignment, or granting of a security interest in assets owned or controlled by him, made by him, or on his behalf in excess of One Hundred Dollars (\$100) in any single transaction from the past five (5) years to the present, and any and all documents and financial records that relate to, refer to, to describe the disposition of proceeds, promissory notes, or other evidence of indebtedness or consideration

received from such transfers, pledges, etc.

12. Any and all documents and financial records that relate to, refer to, or describe any and all transactions between him and members of his family.
13. Any and all documents and financial records, including appraisals which relate to, refer to, or describe or substantiate any valuation of assets disclosed in your financial statements/records produced under paragraph 11 above, and the manner of valuation or fixing of value of such assets, prepared either by you or by any third party or entity relating to these assets.
14. Any and all documents which relate to, or recount or describe any pending or potential claim against you or against any entity referenced in paragraph 10 above, whether or not currently in litigation, together with any and all documents which relate to, recount, or describe any judgments held against you or any entity referenced in paragraph 10.
15. Any and all documents which relate to, refer to, or describe any trust in which you are a beneficiary, including any financial statements of the aforesaid trust and the dispositive provisions of the trust as relates to you and members of your family.

IF YOU DO NOT APPEAR IT MAY RESULT IN THE APPOINTMENT OF A RECEIVER AND AWARDING THE PLAINTIFF/PETITIONER SUCH OTHER AND FURTHER RELIEF AS MAY BE REQUESTED. YOU MAY ALSO BE HELD IN CONTEMPT OF COURT, WHICH COULD RESULT IN A FINE AND/OR JAIL SENTENCE.

**AND IT IS SO ORDERED.**

  
\_\_\_\_\_  
The Honorable Marvin H. Dukes III  
Master-In-Equity for Beaufort County

Beaufort, South Carolina

7/17, 2014

|                                     |   |                                  |
|-------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA             | ) | IN THE COURT OF COMMON PLEAS     |
|                                     | ) |                                  |
| COUNTY OF BEAUFORT                  | ) |                                  |
|                                     | ) |                                  |
| First Citizens Bank and Trust       | ) |                                  |
| Company, Inc.,                      | ) | <b><u>RULE TO SHOW CAUSE</u></b> |
|                                     | ) | (Case No.: 2011-CP-07-129)       |
| Petitioner,                         | ) |                                  |
|                                     | ) |                                  |
| v.                                  | ) |                                  |
|                                     | ) |                                  |
| Blue Ox, LLC and J. Chris Lindgren, | ) |                                  |
|                                     | ) |                                  |
| Respondents.                        | ) |                                  |
| _____                               | ) |                                  |

Judgment having been rendered, an Execution issued, a *Nulla Bona* return made to said Execution, the Circuit Court having Ordered this matter to be referred to the Master-In-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure; it is therefore,

ORDERED that **an Authorized Representative for Blue Ox, LLC and J. Chris Lindgren**, DO APPEAR before **Beaufort County Master-in-Equity, The Honorable Marvin H. Dukes III, Beaufort County Courthouse, 102 Ribaut Road, Room 212, Beaufort, South Carolina**, on the 2<sup>nd</sup> day of September, 2014, at 9 :30am., to be examined under oath concerning assets of Respondents; TO SHOW CAUSE why the above-named Respondents' property should not be applied towards satisfaction of the Judgment set out in the Petition; and TO SHOW CAUSE why a Receiver of the Respondents' property should not be appointed, pursuant to the provisions of § 15-39-430, et seq. South Carolina Code Ann. (Law. Co-op. 1976);

IT IS FURTHER ORDERED that the Respondents are hereby restrained and enjoined from making any transaction or transfer or other disposition of property belonging to him/it which is not exempt from execution pending further Order of this Court.

**YOU ARE FURTHER ORDERED TO BRING WITH YOU TO THE HEARING**

copies of the following:

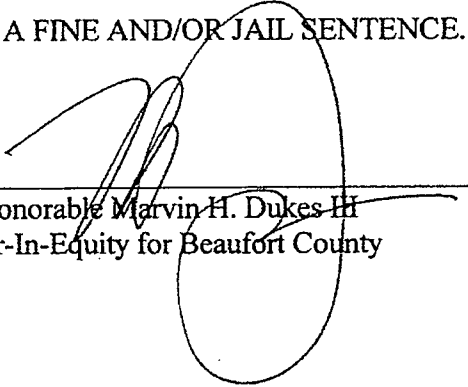
1. Bank statements for all bank accounts owned in whole or in part by Defendants for the past year.
2. Pay stubs for the past five (5) years.
3. Federal and State Tax returns for the past five (5) years.
4. Insurance Policies [home, automobile, real estate, etc...].
5. Records of any real estate owned, either in whole or in part.
6. Records of vehicles and boats.
7. Any inventories of personal property.
8. Copies of any contracts entitling you to payment of money.
9. Any personal financial statements prepared for any reasons either by your self or by any independent sources, with any applicable notes attached thereto from the past five (5) years and, if not reflected in such statements, a complete description of any and all contingent liabilities, including guarantees, by you.
10. Any and all year-end financial statements of any corporation, partnership, trust, or other business entity in which you hold directly or indirectly a 10% interest (balance sheet statements and statement of income and expenses) audited and unaudited for the last three years of the respective entities with any applicable notes attached thereto and any subsequently prepared financial reports or statements prepared by the entity or on its behalf for any reason.
11. Any and all documents and financial records that relate to, refer to, or describe, recount, or are in any way related to any transfer of or pledge, hypothecation, gift, assignment, or granting of a security interest in assets owned or controlled by him, made by him, or on his behalf in excess of One Hundred Dollars (\$100) in any single transaction from the past five (5) years to the present, and any and all documents and financial records that relate to, refer to, to describe the disposition of proceeds, promissory notes, or other evidence of indebtedness or consideration

received from such transfers, pledges, etc.

12. Any and all documents and financial records that relate to, refer to, or describe any and all transactions between him and members of his family.
13. Any and all documents and financial records, including appraisals which relate to, refer to, or describe or substantiate any valuation of assets disclosed in your financial statements/records produced under paragraph 11 above, and the manner of valuation or fixing of value of such assets, prepared either by you or by any third party or entity relating to these assets.
14. Any and all documents which relate to, or recount or describe any pending or potential claim against you or against any entity referenced in paragraph 10 above, whether or not currently in litigation, together with any and all documents which relate to, recount, or describe any judgments held against you or any entity referenced in paragraph 10.
15. Any and all documents which relate to, refer to, or describe any trust in which you are a beneficiary, including any financial statements of the aforesaid trust and the dispositive provisions of the trust as relates to you and members of your family.

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**AND IT IS SO ORDERED.**

  
The Honorable Marvin H. Dukes III  
Master-In-Equity for Beaufort County

Beaufort, South Carolina

7 / 14 , 2014

|                                     |   |                                              |
|-------------------------------------|---|----------------------------------------------|
| STATE OF SOUTH CAROLINA             | ) | BEFORE THE MASTER IN EQUITY                  |
|                                     | ) |                                              |
| COUNTY OF BEAUFORT                  | ) | Case Nos.: 2011-CP-07-128 and 2011-CP-07-129 |
|                                     | ) |                                              |
| First Citizens Bank and Trust       | ) |                                              |
| Company, Inc.,                      | ) |                                              |
|                                     | ) |                                              |
| Plaintiff/Petitioner,               | ) | <u>ORDER</u>                                 |
|                                     | ) |                                              |
| v.                                  | ) |                                              |
|                                     | ) |                                              |
| Blue Ox, LLC and J. Chris Lindgren, | ) |                                              |
|                                     | ) |                                              |
| Defendants/Respondents,             | ) |                                              |
|                                     | ) |                                              |
|                                     | ) |                                              |

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# INTRODUCTION

This matter came before me, the Beaufort County Master-In-Equity, on September 2, 2014, for a Supplemental Proceedings hearing. The Defendant, J. Chris Lindgren ("Lindgren") appeared, with Counsel, and was examined by Counsel for the Plaintiff/Petitioner to see if the Defendants had assets that were subject to execution and levy to be applied towards the judgments that First Citizens holds against the Defendants/Respondents. During the Supplemental Proceedings hearing, Counsel for the Plaintiff/Petitioner discovered certain assets (in particular, Lindgren's voluntary post-judgment contributions to his 401k, IRAs and an education account) and moved to execute on the voluntary post-judgment contributions to the 401k and the IRA(s) during the hearing on September 2, 2014 hearing. Further discovery was conducted by Counsel for the Plaintiff/Petitioner after the September 2, 2014 hearing and this matter was set for a Continuation of the Supplemental Proceedings on November 3, 2014.<sup>1</sup> But, prior to the hearing scheduled for November 3, 2014, the parties agreed to submit briefs to the

<sup>1</sup> The Defendants/Respondents obtained a new attorney after the September 2, 2014 hearing and before the scheduled November 3, 2014 hearing.

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Beaufort County Master In Equity on the Plaintiff's Motion to Execute on the debtor's post-judgment voluntary contributions to his 401(k), IRA accounts and Education account.

### FACTS

The debtors Blue Ox, LLC and J. Chris Lindgren executed Confessions of Judgment on May 13, 2010, both of which were filed with the Beaufort County Clerk of Court on January 6, 2011.<sup>2</sup> During the September 2, 2014 Supplemental Proceedings hearing, Lindgren testified that he is the 100% owner of a company known as Rockmoor, Inc. (p.7-8, lines 24-1). Rockmoor, Inc. ("Rockmoor") has a 401(k) that is a profit sharing plan that is funded through "employee deferrals." (p.14, lines 5-24). Lindgren testified that he is no longer an employee of Rockmoor (p.27, lines 22-23). Lindgren testified that he has formed 38 LLCs and serve as "investment vehicles." (p.22, lines 2-6). Lindgren owns a membership interest in various LLCs (some of which are single member LLCs and some of which are multiple member LLCs) and the various LLCs own a number of real properties. Rockmoor is Lindgren's company that he uses as a management company to manage payroll and operations for the various LLCs.

Lindgren testified during the hearing that he had an IRA at Fidelity, which he estimated to have approximately \$25,000.00 in the IRA at the time of the hearing. (p.18, lines 1-11). After the hearing on September 2, 2014, the parties engaged in the exchange of documents and some post-judgment discovery. The parties stipulated to the following facts regarding Lindgren's contributions to his 401(k), the IRA accounts and the Education account:

Mass Mutual f/k/a The Hartford 401(k) (Account No.: 2812622) → \$45,366.67 in contributions since 2011

Fidelity IRA (Acct. No.: 197-778290) → \$18,500.00 in contributions since 2011

Fidelity Roth IRA (Acct. No.: 218-395517) → \$6,500.00 in contributions in 2014

<sup>2</sup> C/A No.: 11-CP-07-128 (\$100,000.00) and C/A No.: 11-CP-07-129 (\$13,702.24).

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Fidelity Education Account (Acct. No.: 618-670855) → \$22,000.00 contributed in 2012

In summary, Lindgren has voluntarily contributed a total of \$92,366.67 to his 401(k), IRA accounts and an Education Account.<sup>3</sup> For the reasons set forth herein, I find that the Plaintiff/Petitioner is entitled to execute on the debtor J. Chris Lindgren's voluntary contributions to the IRA accounts.

### HOLDING

A Judgment Creditor is entitled to execute on the assets of a debtor, with limited exceptions as provided in S.C. Code Ann. § 15-41-30. The exemption found at S.C. Code § 15-41-30(A)(13), provides, in relevant part:

The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. (emphasis mine).

South Carolina's prohibition on fraudulent transfers/fraudulent conveyances, *i.e.*, the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, provides:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and

<sup>3</sup> As of the time of the hearing, the education account no longer contained funds sufficient for the Plaintiff to pursue.

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practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. (emphasis mine).

In *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995), the South Carolina

Court of Appeals held that:

For existing creditors, conveyances can be set aside in two instances:

First, where the challenged transfer was made for a valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full-not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. *Mathis* at 264-65 (citations omitted)

As an aside, even if the IRAs or 401(k) plan is one to which ERISA applies, "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." See *In re Goldschein*, 241 B.R. 370 (Bkry. D.Md. 1999), which provides as follows: "The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *Id.* at 379 (emphasis mine).

Notwithstanding this fact, this Court notes that Lindgren has submitted an Affidavit in an effort to show/establish a "pattern" of contributing to his retirement account for a number of years. Having carefully reviewed and considered Lindgren's Affidavit, this Court finds that the

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voluntary post-judgment transfers to the 401k are not subject to execution by First Citizens Bank.

However, for the reasons set forth in this Order, the voluntary post-judgment contributions to the IRAs are subject to execution. In this instance, there was no consideration for the transfer of the money into the IRA accounts. The attempted movement of a non-exempt asset (i.e. cash) into the IRA accounts, a purportedly exempt account cannot be a transfer supported by consideration because the transfer was nothing more than Lindgren moving money from one pocket to another pocket in an effort to protect cash from his judgment creditors. Lindgren was indebted to First Citizens at the time of all of the voluntary contributions to his IRA accounts and education account and Lindgren has failed to retain sufficient property/assets to pay First Citizens. Therefore, these transfers should be set aside.

Even if this Court were to assume that there was consideration, as a matter of equity these transfers should be set aside. It is undisputed that Lindgren voluntarily elected to contribute \$25,000.00 to his IRA accounts, all the while knowing that he owed First Citizens in excess of \$110,000.00. All contributions by Lindgren were voluntary and made with full knowledge of the Judgments that First Citizens held against him. Between 2011 and 2014, Lindgren made no effort to pay First Citizens' Judgments. In spite of Lindgren's voluntary contributions to his IRA accounts and Education account, along with his 38 investment vehicles, Lindgren maintains that he has no assets that can be used to apply towards the Judgments that First Citizens holds against him. Lindgren has used the IRA accounts in a number of instances, the maximum amount of money possible on an annual basis (as allowed by the IRS) to put the money beyond the reach of his judgment creditors. To the extent that this Court might be required to find this as a fraudulent intent, this Court finds that that the post-judgment voluntary contributions by

5/1/17

Lindgren to his IRAs and the education account were all contributions made with an intent to delay, hinder and defraud his creditors.

Marjorie A. Shields has provided some helpful insight on this issue in an article. In particular, the article provides that when a judgment debtor moves money into retirement accounts, the fact that the money is moved into an apparent "exempt" account, the Courts can, and should, set aside those transfers as fraudulent transfers.

In *Gilchinsky v. National Westminster Bank N.J.*, 159 N.J. 463, 732 A.2d 482, 23 Employee Benefits Cas. (BNA) 1382 (1999), the Supreme Court of New Jersey recognized that a judgment debtor's individual retirement account (IRA) enjoys qualified immunity from attachment by creditors under N.J. Stat. Ann. § 25:2-1, however, under the Fraudulent Transfer Act, N.J. Stat. Ann. §§ 25:2-20 to 25:2-34, such funds may be attached if deposited as a fraudulent conveyance by a debtor. The court stated that the purpose behind the expansive protection afforded to IRAs is to prevent creditors from attaching money earmarked for retirement. That immunity, however, the court said, is not absolute; creditors can attach funds transferred into an IRA in "preference" of other creditors, as a "fraudulent conveyance," or if the money is subject to a support order. In exempting fraudulent conveyances from the otherwise broad-based immunity, the court said, the legislature clearly intended to prevent debtors from using New Jersey law to shield their assets from creditors. The court recognized a similar exception to the exemption of IRAs for fraudulent conveyances under New York law, N.Y. C.P.L.R. 5205(c)5. The court stated that, although New York law generally exempts individual retirement account (IRA) funds from attachment by creditors seeking to enforce money judgments, that exemption is unavailable where the debtor secretes funds into an IRA in an attempt to avoid paying a money judgment.

Marjorie A. Shields, *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487 (Originally published in 2003).

While South Carolina's Homestead Exemption Act does offer debtors protection in limited situations and circumstances, the Homestead Exemption Act, along with the Statute of Elizabeth protects judgment creditors when a judgment debtor takes assets that are subject to

629 n

execution (i.e. cash) and attempts to place those assets beyond the reach of his creditors by moving the cash into IRA accounts and education accounts in an effort to cloak the cash with an exemption.

While First Citizens is not obligated to prove fraud, intent or attempted fraud, it is apparent to this Court that Lindgren had full knowledge of the fact that he owed First Citizens a substantial amount of money by way of the Confessions of Judgment. In spite of that fact, Lindgren was aggressively moving money into his IRAs and an education account—all of which might have some limited protections under the Homestead Exemption statutes. Notwithstanding that fact, our case law holds as follows:

No rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous. "The law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors. The motive which prompts the donor to make the gift is wholly immaterial. If the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was free from any trace of moral fraud." *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139, 146 (1932) (quotations and citations omitted).

Based on the case law of South Carolina, there is no requirement that a judgment creditor prove "actual fraud" or a "fraudulent intent." While it is not necessary for the Judgment creditor to prove "fraud" or fraudulent intent, I find that Lindgren did move cash into his IRAs and the education account with intent to avoid paying the Plaintiff. Even if he did not have fraudulent intent, I find that the case law of this state clearly prohibits the transfers of non-exempt assets

TJG m

into "exempt assets" to the detriment of Judgment creditors. I find that Lindgren's transfers to his IRA accounts should be treated as fraudulent transfers.

Based on the facts of this case, this Court holds that all of Lindgren's past judgment conveyances into his IRA accounts are subject to execution. Lindgren's contributions to these various accounts are fraudulent transfers/fraudulent conveyances and First Citizens is entitled to this money such that said proceeds can be applied towards the First Citizens' judgments. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

With regards to the 401(k), I find that the statute, SC Code 15-41-30(14) precludes execution on the 401(k) plan. SC Code 15-41-30(A)(14) provides that the debtor has an exemption in: "The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974." Since the 401(k) is an ERISA plan, I find the proceeds in the 401(k) exempt from execution.

### ORDER

For the reasons set forth herein, this court hereby sets aside Lindgren's voluntary post-judgment contributions to his IRA accounts as fraudulent transfers/fraudulent conveyances. First Citizens shall be entitled to serve this Order on Fidelity and upon service of this Order upon Fidelity, said entities are hereby ORDERED to issue payments (bank wires or checks), made payable to First Citizens Bank, to Counsel for First Citizens Bank, within fifteen (15) days of being served with a copy of this Order, in the following amounts:

8 249 n

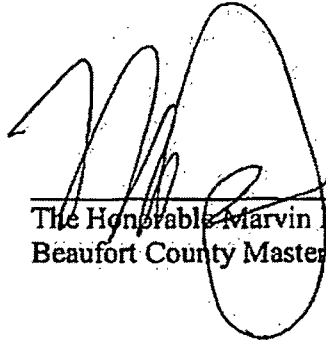
Fidelity IRA (Acct. No.: 197-778290) → \$18,500.00

Fidelity Roth IRA (Acct. No.: 218-395517) → \$6,500.00

To the extent that there are any tax ramifications and/or penalties relating to these payments by Fidelity, Lindgren shall be responsible for the payment of said taxes and/or penalties.

IT IS SO ORDERED.

March 6/10, 2015  
Beaufort, South Carolina

  
The Honorable Marvin H. Dukes, III  
Beaufort County Master In Equity

992

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-00128

FIRST CITIZENS BANK AND TRUST COMPANY INC.

BLUE OX LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant  
or  
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS CAME BEFORE ME ON DEFENDANT J. CHRIS LINDGREN'S MOTION TO RECONSIDER AND FOR STAY OF EXECUTION OF JUDGMENT, FILED 6/26/2015. AFTER HEARING FROM PARTIES AND FURTHER REVIEW OF THE FILE I HEREBY DENY THE MOTION.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069

Judge Code

Date

10/6/15

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

THOMAS WARING

JOEY R. FLOYD

ATTORNEY(S) FOR THE PLAINTIFF(S)

KEATING L. SIMONS III

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter: N/A**

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT  
IN THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-00129

FIRST CITIZENS BANK AND TRUST COMPANY INC.

BLUE OX LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS CAME BEFORE ME ON DEFENDANT J. CHRIS LINDGREN'S MOTION TO RECONSIDER AND FOR STAY OF EXECUTION OF JUDGMENT, FILED 6/26/2015. AFTER HEARING FROM PARTIES AND FURTHER REVIEW OF THE FILE I HEREBY DENY THE MOTION.

## ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

## INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

THOMAS WARING

JOEY R. FLOYD

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

KEATING L. SIMONS III

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**CLERK OF COURT**

**Court Reporter: N/A**

11/6/15 9

|                                     |   |                                             |
|-------------------------------------|---|---------------------------------------------|
| STATE OF SOUTH CAROLINA             | ) | BEFORE THE MASTER IN EQUITY                 |
|                                     | ) |                                             |
| COUNTY OF BEAUFORT                  | ) | Case Nos. 2011-CP-07-128 and 2011-CP-07-129 |
|                                     | ) |                                             |
| First Citizens Bank and Trust       | ) |                                             |
| Company, Inc.,                      | ) |                                             |
|                                     | ) |                                             |
| Plaintiff/Petitioner,               | ) |                                             |
|                                     | ) |                                             |
| v.                                  | ) |                                             |
|                                     | ) |                                             |
| Blue Ox, LLC and J. Chris Lindgren, | ) |                                             |
|                                     | ) |                                             |
| Defendants/Respondents.             | ) |                                             |
|                                     | ) |                                             |

**CONSENT ORDER**  
**FOR STAY OF EXECUTION**

2015 NOV -6 PM 12:16  
CLERK OF COURT, S.C.

THIS MATTER comes before the court by way of consent of the parties hereto. The Defendant/Respondent J. Chris Lindgren has filed a Notice of Appeal to appeal this Court's Orders filed on June 11, 2015 and October 7, 2015 (referred to herein as "the Orders") in the above-referenced matters. In summary, the subject matter of the Orders relates to this Court's granting of Plaintiff's Motion to Execute on certain accounts held by Fidelity Investments ("Fidelity"), which are owned by J. Chris Lindgren.

Upon receipt of the October 7, 2015 Orders denying the Defendant's J. Chris Lindgren's Motion to Reconsider and For Stay of Execution of Judgment, Counsel for the Plaintiff served the October 7, 2015 Orders denying J. Chris Lindgren's Motion to Reconsider upon Fidelity.

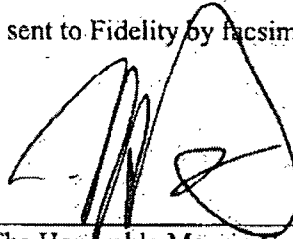
Upon receipt of the Orders, Fidelity has represented to Counsel for Plaintiff and Counsel for Defendant, J. Chris Lindgren, that Fidelity liquidated certain investments in preparation for payment to the Plaintiff. Prior to payment to Plaintiff, Counsel for Plaintiff and Counsel for the Defendant, J. Chris Lindgren, reached an agreement to preserve the status quo and prevent the parties hereto from posting bonds in accordance with Rule 241, SCACR.

WHEREAS Counsel for Plaintiff and Counsel for the Defendant, J. Chris Lindgren, have agreed that Fidelity shall hold the amounts it liquidated in cash in the Fidelity account(s) and said amount(s) shall not be withdrawn, reinvested or otherwise manipulated during the pendency of this appeal. The parties agree that Fidelity shall hold the proceeds in trust until the appeal of the Orders has concluded.

IT IS HEREBY ORDERED, by the Consent of the Parties hereto, Fidelity shall hold

the amounts liquidated in cash in the Fidelity accounts until the appeal of the Orders has concluded. Fidelity shall not make any disbursements or do anything with the liquidated amounts until the appeal of the Orders has concluded.

IT IS FURTHER ORDERED that this order be sent to Fidelity by facsimile.  
AND IT IS SO ORDERED.

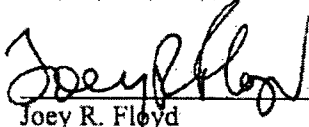


The Honorable Marvin H. Dukes, III  
Beaufort County Master In Equity

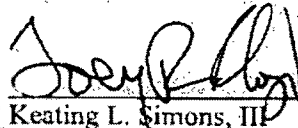
November 7, 2015  
Beaufort, South Carolina

\*\*\*\*\*

We So Move and Consent:

 Date: 11/2/15

Joey R. Floyd  
Bruner Powell Wall & Mullins, LLC  
1735 St. Julian Place, Ste 200 (29204)  
P.O. Box 61110  
Columbia, South Carolina 29260-1110  
(803)252-7693  
*Attorneys for Plaintiff*  
*First Citizens Bank and Trust Company, Inc.*

 Date: 11/2/15

Keating L. Simons, III  
Simons & Dean  
147 Wappoo Creek Drive, Suite 604  
Charleston, SC 29412  
(843) 762-9132  
*Attorneys for the Defendants*  
*Blue Ox, LLC and J. Chris Lindgren*

With the  
expression  
of

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

First Citizens Bank and Trust Company,  
Inc.,

Plaintiff,

v.

Blue Ox, LLC and J. Chris Lindgren,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2011-CP-07-129

**CERTIFICATE OF SERVICE**

I, Annie Rich, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Plaintiff, do hereby certify that on the 15<sup>th</sup> day of December, 2015, I served the pleadings/documents set forth below on the person(s) identified below, by depositing copies thereof in the U.S. Mail, postage-paid, in an envelope securely sealed, and addressed to the following.

Pleadings/Documents Served:

**Consent Order For Stay of Execution**

Person(s) Served:

Keating L. Simons, III, Esquire  
Simons & Dean  
147 Wappoo Creek Drive, Suite 604  
Charleston, SC 29412

Annie Rich

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )

IN THE COURT OF COMMON PLEAS  
COURT FILE NO 2011-CP-07-128

FIRST CITIZENS BANK AND TRUST,  
COMPANY, INC. )

Plaintiff, )

vs. )

BLUE OX, LLC and J. CHRIS LINDGREN, )

Defendants. )

11 JAN -6 PM 3:50  
JEREA ANN ROSEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

CONFESSION OF JUDGMENT

We, the undersigned, BLUE OX, LLC ("Blue Ox") and J. CHRIS LINDGREN ("Lindgren") (Blue Ox and Lindgren referred to collectively as the "Debtors") do hereby confess judgment in this action in favor of FIRST CITIZENS BANK AND TRUST COMPANY, INC. (the "Creditor") as follows: for judgment against us for the sum of One Hundred Thousand and 00/100 (\$100,000.00) Dollars plus interest and costs as hereafter provided.

THIS CONFESSION OF JUDGMENT (this "Confession") is for money justly due the Creditor arising upon the following facts:

1. Creditor is a corporation organized and existing under the laws of the State of South Carolina and doing business in Beaufort County, South Carolina.
2. Blue Ox, LLC is a South Carolina limited liability company doing business in Beaufort County, South Carolina, and J. Chris Lindgren is a resident of Beaufort County, South Carolina.
3. Blue Ox is in debt to Creditor by virtue of that certain Promissory Note dated September 2, 2005, in the original principal amount of One Million One Hundred Thousand and 00/100 (\$1,100,000.00) Dollars with interest thereon as provided therein, (as amended, the "Note") dated September 2, 2005.

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COPY

4. Lindgren is in debt to Creditor by virtue of that certain Unlimited Guaranty Agreement (the "Guaranty") pursuant to which Lindgren guaranteed the payment of the Note.

5. Debtors are now in default under the terms of the Note and the Guaranty with a principal balance due and owing thereon in the amount of One Million Two Thousand One Hundred Eighty Five and 16/100 (\$1,002,185.16) Dollars, together with interest thereon at the rate provided in the Note from December 4, 2009.

6. Blue Ox has this date deeded the property (the "Property") described in the Mortgage securing the Note, and Creditor has received proceeds and credited the sum of \$836,297.96 against the balance due on the Note.

7. Blue Ox executed and delivered a Promissory Note (the "Deficiency Note") dated the date hereof in favor of Creditor in the original principal amount of One Hundred Thousand and 00/100 (\$100,000.00) Dollars together with interest thereon as set forth in the Deficiency Note. The Deficiency Note is in the amount of a portion of the agreed upon reduced balance due on the Note after the conveyance of the Property and the application of the proceeds received by Creditor from the sale.

8. Lindgren, on the same date, executed and delivered an Unlimited Guaranty (the "Deficiency Guaranty") whereby he guaranteed the payment of the Deficiency Note.

9. In the event of an Event of Default (as defined in the Deficiency Note) under the terms of the Deficiency Note, and only after all applicable notice and cure periods under the terms of the Deficiency Note have expired, Debtors hereby authorize the entry of judgment against them in favor of Creditor in an amount equal to the entire outstanding amount on in the Deficiency Note through the filing and recording of this Confession.

10. Any payments made by Debtors and/or other moneys collected by Creditor as payment under the Deficiency Note shall be subject to offset and credit against the Deficiency Note and this Confession.

11. This Confession may be filed in the office of the Clerk of Court for the Beaufort County

CHARLESTON408988v1

Court of Common Pleas, in Beaufort, South Carolina, and any other county or state in which the Debtors may be found, provided, however that any such multiple filings shall constitute only one debt in the aggregated amount of One Hundred Thousand (\$100,000.00) Dollars, plus applicable interest and additional attorneys' fees and costs, less any payments that have been tendered by Debtors to Creditor.

That the facts stated herein are true of Debtors' knowledge.

WHEREFORE, Debtors confess judgment in favor of Creditor as follows:

1. For judgment under the Deficiency Note and Deficiency Guaranty against the Debtors, Blue Ox, LLC and J. Chris Lindgren, in the sum of One Hundred Thousand and 00/100 (\$100,000.00) Dollars, together with interest thereon at the contract rate of 3.0% from the date hereof and attorneys fees and costs, until the filing of this document in the Office of the Clerk of Court for Beaufort County and thereafter, at the legal rate on the judgment from the date of such filing, until paid.

The facts stated herein are true of Debtors own knowledge.

AND FURTHER, the undersigned Affiants sayeth naught.

Blue Ox, LLC

By: J. Chris Lindgren  
Its: Member

J. Chris Lindgren

(L.S.)

(L.S.)

CERTIFIED TRUE COPY  
J. Chris Lindgren  
5/29/13  
SIGNED  
DATED

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )

The Debtors, Blue Ox, LLC, by J. Chris Lindgren, its Member and J. Chris Lindgren, individually, being duly sworn say that the above statement and Confession of Judgment, and the facts therein mentioned are true to their own knowledge, and further sayeth naught.

Blue Ox, LLC

By: J. Chris Lindgren

Its: Member

J. Chris Lindgren

(L.S.)

JENNIFER ROSE HEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

11 JAN - 6 PM 3:50

SWORN to before me this

13 day of May, 2010.

Notary Public for South Carolina

My Commission Expires: \_\_\_\_\_

Bret Pruehs  
My Commission Expires  
March 16, 2016

CHARLESTON403922v1

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

COURT FILE NO. 2011-CP-07-129

FIRST CITIZENS BANK AND TRUST,  
COMPANY, INC.

Plaintiff,

vs.

BLUE OX, LLC and J. CHRIS LINDGREN,

Defendants.

11 JAN -6 PM 3:50  
CLERK OF COURT  
BEAUFORT COUNTY

CONFESSION OF JUDGMENT

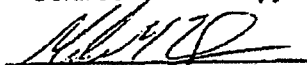
We, the undersigned, BLUE OX, LLC ("Blue Ox") and J. CHRIS LINDGREN ("Lindgren") (Blue Ox and Lindgren referred to collectively as the "Debtors") do hereby confess judgment in this action in favor of FIRST CITIZENS BANK AND TRUST COMPANY, INC. (the "Creditor") as follows: for judgment against us for the sum of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars plus interest and costs as hereafter provided.

THIS CONFESSION OF JUDGMENT (this "Confession") is for money justly due the Creditor arising upon the following facts:

1. Creditor is a corporation organized and existing under the laws of the State of South Carolina and doing business in Beaufort County, South Carolina.
2. Blue Ox, LLC is a South Carolina limited liability company doing business in Beaufort County, South Carolina, and J. Chris Lindgren is a resident of Beaufort County, South Carolina.
3. Blue Ox is in debt to Creditor by virtue of that certain Promissory Note dated September 2, 2005, in the original principal amount of One Million One Hundred Thousand and 00/100 (\$1,100,000.00) Dollars with interest thereon as provided therein, (as amended, the "Note") dated September 2, 2005.

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Certified - A True Copy

  
Jemi Ann Rosenberg, Clerk of Court  
Beaufort County, SC - Melissa Kirby

4. Lindgren is in debt to Creditor by virtue of that certain Unlimited Guaranty Agreement (the "Guaranty") pursuant to which Lindgren guaranteed the payment of the Note.

5. Debtors are now in default under the terms of the Note and the Guaranty with a principal balance due and owing thereon in the amount of One Million Two Thousand One Hundred Eighty Five and 16/100 (\$1,002,185.16) Dollars, together with interest thereon at the rate provided in the Note from December 4, 2009.

6. Blue Ox has this date deeded the property (the "Property") described in the Mortgage securing the Note, and Creditor has received proceeds and credited the sum of \$836,297.96 against the balance due on the Note.

7. Blue Ox executed and delivered a Promissory Note (the "Deficiency Note") dated the date hereof in favor of Creditor in the original principal amount of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars together with interest thereon as set forth in the Deficiency Note. The Deficiency Note is in the amount of a portion of the agreed upon reduced balance due on the Note after the conveyance of the Property and the application of the proceeds received by Creditor from the sale.

8. Lindgren, on the same date, executed and delivered an Unlimited Guaranty (the "Deficiency Guaranty") whereby he guaranteed the payment of the Deficiency Note.

9. Pursuant to the terms of the Deficiency Note, Debtors shall be in default ("Default") under the Deficiency Note upon their failure to pay the Deficiency Note in full on or before November 13, 2010.

10. In the event of a Default under the terms of the Deficiency Note, and only after all applicable notice and cure periods under the terms of the Deficiency Note have expired, Debtors hereby authorize the entry of judgment against them in favor of Creditor in an amount equal to the entire outstanding amount on in the Deficiency Note through the filing and recording of this Confession.

11. Any payments made by Debtors and/or other moneys collected by Creditor as payment under the Deficiency Note shall be subject to offset and credit against the Deficiency Note and this Confession.

12. This Confession may be filed in the office of the Clerk of Court for the Beaufort County Court of Common Pleas, in Beaufort, South Carolina, and any other county or state in which the Debtors may be found, provided, however that any such multiple filings shall constitute only one debt in the aggregated amount of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars, plus applicable interest and additional attorneys' fees and costs, less any payments that have been tendered by Debtors to Creditor.

That the facts stated herein are true of Debtors' knowledge.

WHEREFORE, Debtors confess judgment in favor of Creditor as follows:

1. For judgment under the Deficiency Note and Deficiency Guaranty against the Debtors, Blue Ox, LLC and J. Chris Lindgren, in the sum of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars, together with interest thereon at the contract rate as provided in the Deficiency Note from the date hereof and attorneys fees and costs, until the filing of this document in the Office of the Clerk of Court for Beaufort County and thereafter, at the legal rate on the judgment from the date of such filing, until paid.

The facts stated herein are true of Debtors own knowledge.

AND FURTHER, the undersigned Affiants sayeth naught.

Blue Ox, LLC

By: J. Chris Lindgren

Its: Member

J. Chris Lindgren

(L.S.)

(L.S.)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )

The Debtors, Blue Ox, LLC, by J. Chris Lindgren, its Member and J. Chris Lindgren, individually, being duly sworn say that the above statement and Confession of Judgment, and the facts therein mentioned are true to their own knowledge, and further sayeth naught.

Blue Ox, LLC

By: J. Chris Lindgren  
Its: Member

J. Chris Lindgren

11 JAN -6 PM 3:50  
BEAUFORT COUNTY S.C.  
CLERK OF COURT

SWORN to before me this  
13 day of May, 2010.

Bret Pruehs  
Notary Public for South Carolina  
My Commission Expires: \_\_\_\_\_

Bret Pruehs  
My Commission Expires  
March 16, 2016

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )  
  
First Citizens Bank and Trust )  
Company, Inc., )  
 )  
Petitioner, )  
 )  
v. )  
 )  
Blue Ox, LLC and J. Chris Lindgren, )  
 )  
Respondents. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

**VERIFIED PETITION FOR  
SUPPLEMENTAL PROCEEDINGS**  
(Case No.: 2011-CP-07-128)

2014 JUL 11 PM 4:12  
RECEIVED CLERK OF COURT  
BEAUFORT COUNTY S.C.

PETITIONER WOULD RESPECTFULLY SHOW:

1. That heretofore Petitioner recovered and recorded judgment against Respondents Blue Ox, LLC and J. Chris Lindgren ("Respondents") as hereinafter set forth; and that there is still due and owing on said judgment the sum indicated, Respondents having failed and refused to satisfy same:

JUDGMENT ENTERED: January 6, 2011  
JUDGMENT ROLL # : 2011-CP-07-128  
AMOUNT DUE : \$100,000.00, plus interest

2. That execution thereafter was duly issued to the Sheriff of Beaufort County against Respondents and said Sheriff has returned same NULLA BONA.

3. That upon information and belief, the Respondents have assets in the County not exempt from levy which Respondents unjustly refuse to apply toward satisfaction of said judgment.

4. That Petitioner is informed and believes that it is entitled under the law and statutes to have an examination of Respondents in supplementary proceedings and to ascertain and discover any and all property and assets, real, personal, or mixed, and wheresoever situated,

belonging to Respondents; or in which Respondents could claim any interest, solely or in conjunction with any person, firm, or corporation or entity, and any or all of which is or should be made applicable by the Court to the payment of said debt.

5. In addition, Petitioner is entitled to the appointment of a receiver of Respondents for any and all of the aforesaid property, assets, or effects which are so discovered or revealed in order to carry said judgment into effect.

WHEREFORE Petitioner prays that this court do inquire into the matters hereinabove alleged and that it issue such order or orders granting relief to which Petitioner believes it is entitled, for all expended and statutory costs allowable for this proceeding, and for such other and further relief and remedies as may be allowable and which the Court may deem proper.

And further Petitioner requests this matter be referred to the Master-in-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure with authority to enter a final order with any appeal being directly to the South Carolina Supreme Court.

**BRUNER, POWELL, WALL & MULLINS, LLC**



Joey R. Floyd

P.O. Box 61110

Columbia, South Carolina 29260-1110

(803) 252-7693

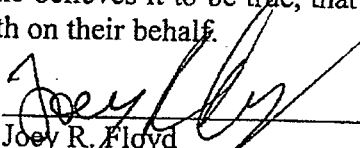
*Attorneys for Petitioner*

*First Citizens Bank and Trust Company, Inc.*

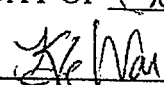
June 17, 2014

VERIFICATION

PERSONALLY appears Joey R. Floyd, who first being duly sworn, deposes and says that he is the attorney for the Petitioning judgment creditor and that he has read the foregoing Petition and knows the contents thereof and the same are true of his own knowledge except to matters alleged therein on information and belief, and as to these, he believes it to be true, that he is the attorney for the Petitioner and is authorized to make this oath on their behalf.

  
\_\_\_\_\_  
Joey R. Floyd  
Attorney for the Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS 20 DAY OF June, 2014

  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: 01-11-2018

2014 JUL 11 PM 4:12  
RECEIVED  
CLERK OF COURT  
SOUTH CAROLINA

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT )

First Citizens Bank and Trust  
Company, Inc., )

Petitioner, )

v. )

Blue Ox, LLC and J. Chris Lindgren, )

Respondents. )

**VERIFIED PETITION FOR  
SUPPLEMENTAL PROCEEDINGS**  
(Case No.: 2011-CP-07-129)

2014 JUL 11 PM 4:11  
CLERK OF COURT  
COUNTY OF BEAUFORT  
S.C.

PETITIONER WOULD RESPECTFULLY SHOW:

1. That heretofore Petitioner recovered and recorded judgment against Respondents Blue Ox, LLC and J. Chris Lindgren ("Respondents") as hereinafter set forth; and that there is still due and owing on said judgment the sum indicated, Respondents having failed and refused to satisfy same:

JUDGMENT ENTERED: January 6, 2011  
JUDGMENT ROLL # : 2011-CP-07-129  
AMOUNT DUE : \$13,702.04, plus interest

2. That execution thereafter was duly issued to the Sheriff of Beaufort County against Respondents and said Sheriff has returned same NULLA BONA.

3. That upon information and belief, the Respondents have assets in the County not exempt from levy which Respondents unjustly refuse to apply toward satisfaction of said judgment.

4. That Petitioner is informed and believes that it is entitled under the law and statutes to have an examination of Respondents in supplementary proceedings and to ascertain and discover any and all property and assets, real, personal, or mixed, and wheresoever situated,

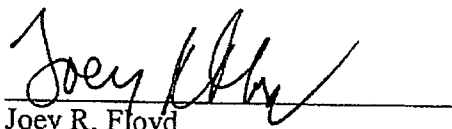
belonging to Respondents; or in which Respondents could claim any interest, solely or in conjunction with any person, firm, or corporation or entity, and any or all of which is or should be made applicable by the Court to the payment of said debt.

5. In addition, Petitioner is entitled to the appointment of a receiver of Respondents for any and all of the aforesaid property, assets, or effects which are so discovered or revealed in order to carry said judgment into effect.

WHEREFORE Petitioner prays that this court do inquire into the matters hereinabove alleged and that it issue such order or orders granting relief to which Petitioner believes it is entitled, for all expended and statutory costs allowable for this proceeding, and for such other and further relief and remedies as may be allowable and which the Court may deem proper.

And further Petitioner requests this matter be referred to the Master-in-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure with authority to enter a final order with any appeal being directly to the South Carolina Supreme Court.

**BRUNER, POWELL, WALL & MULLINS, LLC**



Joey R. Floyd

P.O. Box 61110

Columbia, South Carolina 29260-1110

(803) 252-7693

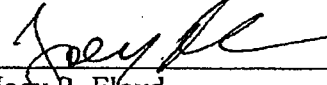
*Attorneys for Petitioner*

*First Citizens Bank and Trust Company, Inc.*

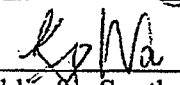
June 17, 2014

VERIFICATION

PERSONALLY appears Joey R. Floyd, who first being duly sworn, deposes and says that he is the attorney for the Petitioning judgment creditor and that he has read the foregoing Petition and knows the contents thereof and the same are true of his own knowledge except to matters alleged therein on information and belief, and as to these, he believes it to be true, that he is the attorney for the Petitioner and is authorized to make this oath on their behalf.

  
Joey R. Floyd  
Attorney for the Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS 10 DAY OF June, 2014

  
Notary Public for South Carolina

My Commission Expires: 01/11/2018

2014 JUL 11 PM 4:12  
CLERK OF COURT  
SOUTH CAROLINA  
JUDICIAL DISTRICT NO. 1

STATE OF SOUTH CAROLINA  
2015 JUN 26 PM 3:47

COUNTY OF BEAUFORT  
BEAUFORT COUNTY, S.C.

First Citizens Bank and Trust Company,  
Inc.,

Plaintiff,

vs.

Blue Ox, LLC and J. Chris Lindgren,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2011-CP-07- 128 and 129

**J. CHRIS LINDGREN'S  
MOTION TO RECONSIDER AND FOR  
STAY OF EXECUTION OF JUDGMENT**

PLEASE TAKE NOTICE that Defendant J. Chris Lindgren ("Lindgren") will and does hereby move before The Honorable Marvin J. Dukes, Master-In-Equity for Beaufort County, to be heard at such place and time as the court may appoint, for an order reconsidering, altering and/or amending the Order entered on June 11, 2015 pursuant to Rules 59 and 60, SCRCP, for an order amending findings of fact, making additional findings of fact and specially finding and separately stating findings of fact pursuant to Rule 52, SCRCP, and staying enforcement of the order pending resolution of the within motion and of any appeal thereafter taken, in respect of the following matters and on the following grounds:

1. The Order erroneously states that the parties stipulated to certain facts. The record contains no stipulation meeting the requirements of Rule 43(k). The parties agreed that the record consists of the hearing transcript, Lindgren's affidavit and a summary of Lindgren's plan contributions submitted by Plaintiff.

2. The Order references the Affidavit of J. Christopher Lindgren but fails to make any findings of fact in light of that evidence. Lindgren requests that the Court expressly find as

fact that Lindgren made contributions as described in paragraphs 8 and 9 of the affidavit, and that in making said contributions Lindgren was not motivated by any intent to evade claims of Plaintiff or any other creditor. The undisputed evidence showing Lindgren's history of past IRA contributions is a relevant fact tending to establish an absence of fraudulent intent on his part. *In re Channon*, 424 B.R. 895 (Bkrcty. D.N.M. 2010). That his behavior did not deviate from his historical conduct is likewise supportive of a finding that the contributions in question were not fraudulent. *In re Beaudin*, No. 0935557-EEB (Bkrcty. D.CO. 2010).<sup>1</sup>

3. The undisputed evidence shows that Lindgren has contributed funds to his Fidelity IRAs to be held and invested by Fidelity. The court erroneously finds as a matter of fact that there was no consideration for the payments by Lindgren to Fidelity. Lindgren received valuable consideration. With respect to the traditional IRA he received: an income tax deduction for the amounts contributed; tax-free treatment of all future earnings within the account; and, the right to have the funds repaid to him after retirement, with earnings, and be taxed thereon at a potentially lower marginal rate. With respect to the Roth IRA he received: tax-free treatment of all future earnings; and, the right to have the funds repaid to him, with earnings, at a later date, tax-free.

4. The Order recites that "Lindgren has failed to retain sufficient property/assets to pay First Citizens" and that "Lindgren maintains that he has no assets that can be used to apply towards the Judgments that First Citizens holds against him." There is no evidentiary support for these "findings" in the record and they should be stricken.

5. The court has erroneously concluded that even in the absence of proof of fraudulent intent South Carolina law "prohibits the transfer of non-exempt assets into exempt

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<sup>1</sup> Copies of these cases are attached as exhibits hereto.

assets' to the detriment of Judgment creditors." There are no South Carolina cases to this effect and settled law elsewhere is to the contrary: *See, e.g., Forsberg v. Security State Bank*, 15 F.2d 499 (8th Cir.1926); *In re Addison*, 540 F.3d 805 (8<sup>th</sup> Cir. 2008); *In re Koehler*, 2012 WL 719744 (Bkrcty. E.D.N.C. 2012); *In re Duncan*, No. S-06-00025-5-AP (Bkrcty. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrcty. E.D.N.C. Jun. 18, 2007); *In re Channon*, 424 B.R. 895 (Bkrcty. D.N.M. 2010); *In re Beaudin*, No. 0935557-EEB (Bkrcty. D.CO. 2010). The court has failed to consider cases requiring extrinsic proof of fraud and holding that it is not fraudulent for an insolvent individual to convert non-exempt property into exempt property for the purpose of claiming exemptions and thereby placing his property out of the reach of his creditors.

6. The court has also failed to consider the reference to federal bankruptcy law in South Carolina's Homestead statute, §15-41-30(A)(13). The Homestead exemption statute explicitly provides that the "interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law." S.C. Code § 15-41-30(A)(13). Federal bankruptcy law at 11 U.S. Code § 522(d) provides that the "following property may be exempted under subsection (b)(2) of this section: ... (12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." <sup>2</sup> The exemption provided is subject to limitations, as where the debtor makes a transfer "with actual intent to hinder, delay, or defraud" a creditor. 11 U.S. Code § 548(a)(1)(A). The exemption for retirement funds is also subject to a monetary limit provided for in 11 U.S. Code §

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<sup>2</sup> Sections 408 and 408A provide for traditional IRAs and Roth IRAs, respectively.

522(n).<sup>3</sup>

In 2012, §15-41-30(A)(13) was amended to delete “, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” at the end of the first sentence, and added the last two sentences, including the specific reference to federal bankruptcy law as a limitation on the exemption provided for retirement plans.<sup>4</sup> Adding the reference to federal bankruptcy law to the exemption statute not only substituted a specific monetary limit instead of a need-based test for exempting IRA accounts on a case-by-case basis, it also effectively incorporated by reference the federal substantive standard for evaluating fraudulent transfer claims in the context of retirement plan contributions.<sup>5</sup> Under the amended statute individual retirement accounts are exempt except to the extent they are inflated as a result of contributions made “with actual intent to hinder, delay, or defraud.” And as discussed above, courts applying this standard require extrinsic evidence of fraud beyond the mere fact of the transfer itself before finding a debtor intended to defraud a creditor.

7. The court’s findings concerning fraudulent intent on the part of Lindgren are erroneous because they are unsupported by the evidence and/or are influenced or controlled by

---

<sup>3</sup> As of April 1, 2013, debtors could protect IRA account balances up to \$1,245,475.00. This number is indicative of the strong public policy in favor of protecting debtors’ retirement assets.

<sup>4</sup> 2012 Act No. 153, § 1, eff May 14, 2012, was enacted “so as to delete the provision that the exemption only applies to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and to provide that the interest of an individual is exempt from creditor process in certain circumstances.”

<sup>5</sup> The Statute of Elizabeth by its terms applies only to interests in lands and came into being centuries before such things as individual retirement accounts were ever conceived. Modernizing the law with respect to allegedly fraudulent transfers into IRAs would be a legitimate objective of the General Assembly.

errors of law. The court: ignored evidence that Lindgren has historically contributed to his IRAs on a regular, recurring basis; ignored evidence that the contributions were not made in response to or in anticipation of Plaintiff's judgments; failed to require proof of any facts or circumstances extrinsic to the mere facts of conversion of assets from nonexempt to exempt indicative of fraudulent purpose on the part of Lindgren; failed to require a clear and convincing standard of proof on the issue of fraudulent intent; and, failed to consider the strong public policy, both state and federal, of protecting and encouraging retirement savings.

8. The Order includes a finding that "Lindgren has used the IRA accounts in a number of instances, the maximum amount of money possible on an annual basis (as allowed by the IRS) [sic] to put the money beyond the reach of his judgment creditors," and another "finding" that "Lindgren was aggressively moving money into his IRAs ..." These "findings" are erroneous and should be stricken because they are unsupported by the evidence and/or influenced or controlled by errors of law. What the court refers to as the maximum amount possible relates to the maximum contribution for which a tax deduction may be taken. The law taxes, but does not prohibit, contributions in excess of those amounts. The court's misapprehension of the law, coupled with its ignoring evidence establishing Lindgren's historical contributions, lead it to erroneously describe Lindgren's post-judgment contributions as "aggressive." As a matter of tax law, Lindgren could have contributed sums substantially in excess of the annual contributions he did in fact make. Had he done so those excess contributions perhaps could be characterized as "aggressive" and "fraudulent" within the meaning of South Carolina's Homestead statute, S.C. Code §15-41-30(A)(13).

9. The court's order requires that funds from Lindgren's IRA and Roth IRA accounts

be paid to Plaintiff by the financial institution at which those accounts are established. That event would render moot any further consideration of this matter by this court or by the court of appeals. Lindgren requests that the court enter an order staying enforcement of its directives in this matter pending entry of a final, non-appealable order.

### CONCLUSION

A motion to reconsider is often made merely for issue preservation purposes as a precursor to an appeal. Lindgren respectfully submits, however, that this is a case that cries out for the court to truly reconsider its decision. Plaintiff has proceeded from a faulty premise - that it is unlawful for a judgment debtor to convert non-exempt assets to exempt assets to take advantage of exemptions otherwise available to him - and thereby led the court to a faulty conclusion - that the retirement plan contributions in this case are fraudulent transfers regardless of whether Lindgren harbored fraudulent intent or not. There can be no question but that public policy, both state and federal, strongly encourages individuals to save for their retirement. Not only does this enhance the general welfare of the public, it also reduces the extent to which retirees become charges of the state. This public policy is made plain by the favorable tax treatment accorded to retirement plan contributions and by the statutory exemptions from creditor claims accorded to retirement plan assets. The existence of this public policy explains why courts require extrinsic evidence of fraud in cases of this nature. There must be something about a questioned transaction beyond the mere conversion of assets to exempt status for a court to find a fraudulent transfer. The order submitted by Plaintiff ignores the cases cited by Lindgren to this effect. If upheld, the position staked out in Plaintiff's order means that no debtor with unsatisfied judgments against him could put aside even a nickel toward retirement. Plaintiff has not cited any

decision of any court anywhere in the country reaching such a conclusion. And again, Lindgren, for his part, has cited case after case upholding the right of debtors to take advantage of exemptions by converting assets from non-exempt to exempt. Provided this is done reasonably, without fraudulent intent, creditors have no legal basis for complaint.

The Order purports to hold that the subject transactions should be set aside "as a matter of equity." However, equity follows the law and in this case the law is squarely on Lindgren's side. This Court should reverse itself and enter an order upholding the application of the homestead exemption to Lindgren's IRA accounts.

Respectfully submitted



Keating L. Simons, III, Esq.  
Simons & Dean  
147 Wappoo Creek Drive, Suite 604  
Charleston, SC 29412  
Telephone: (843) 762-9132  
Fax: (843) 406-9913  
E-mail: [ksimons@simonsanddean.com](mailto:ksimons@simonsanddean.com)

Attorneys for J. Christopher Lindgren

June 22, 2015  
Charleston, SC

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )  
First Citizens Bank and Trust )  
Company, Inc., )  
Plaintiff/Petitioner, )  
v. )  
Blue Ox, LLC and J. Chris Lindgren, )  
Defendants/Respondents. )

BEFORE THE MASTER IN EQUITY

Case Nos.: 2011-CP-07-128 and 2011-CP-07-129

**PLAINTIFF'S REPLY MEMORANDUM**  
**TO DEFENDANT'S MOTION**  
**FOR RECONSIDERATION**

Plaintiff, First Citizens Bank and Trust Company, Inc. ("First Citizens"), hereby submits this Reply to Defendant's Motion to Reconsider the Order setting aside as fraudulent transfers/fraudulent conveyances voluntary post-judgment contributions to individual retirement accounts made by J. Chris Lindgren ("Lindgren").

Under South Carolina's Homestead Exemption Act, funds in an individual retirement account (IRA) are exempt from attachment and levy unless they result from a fraudulent conveyance. S.C. Code Ann. § 15-41-30(A)(13). In his motion to reconsider, Lindgren reads the Homestead statute's reference to federal bankruptcy law, § 522(d), to apply the federal bankruptcy standard found in 11 U.S.C. § 548(a)(1)(A) to the Homestead statute's fraudulent conveyance exception. To qualify as a fraudulent conveyance, Section 548(a)(1)(A) requires a debtor under federal bankruptcy law to make the transfer "with actual intent to hinder, delay, or defraud" a creditor. 11 U.S.C. § 548(a)(1)(A). Assuming Lindgren is correct in his application of the federal bankruptcy law standard to the Homestead statute's fraudulent conveyance exception,

Lindgren nevertheless acted “with actual intent to hinder, delay, or defraud” First Citizens when he made voluntary post-judgment contributions to his individual retirement accounts.

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, courts often evaluate the particular circumstances of the transfer for “badges of fraud.” *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) (“Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as ‘badges of fraud.’ The badges tend to excite suspicions as to the Bona fides of a challenged conveyance.”); *see also In re Addison*, 540 F.3d 805, 811-12 (8th Cir. 2008). South Carolina courts have generally recognized the following as badges of fraud:

[I]nsolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor’s entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property. *Id.*; *see also In re Jones*, 397 B.R. 765, 770 (Bankr. D.S.C. 2008); *In re Ducate*, 369 B.R. 251, 264 (Bankr. D.S.C. 2007).

The circumstances of Lindgren’s voluntary post-judgments contributions into his IRAs meet at least five of these nine badges of fraud. “Although the presence of a single factor, *i.e.* badge of fraud, may cast suspicion on the transferor’s intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud.” *Gilchinsky v. Nat’l Westminster Bank*, 732 A.2d 482, 490 (N.J. 1999). Lindgren (1) was indebted to First Citizens at the time of the post-judgment transfers, (2) did not receive any consideration for the transfer, as he simply transferred his money from one account to another, (3) transferred the funds to himself, the person with whom he clearly has the closest relationship, (4) reserved the benefit of the funds to himself, and (5) retained possession of the funds. The presence of these

five badges of fraud surrounding these post-judgment contributions reveals Lindgren's "actual intent to hinder, delay, or defraud" First Citizens from obtaining the debt Lindgren owed to them.

Lindgren argues that his history of IRA contributions precludes a finding of fraudulent intent. However, even though his behavior did not change, his intent in making those contributions necessarily shifted at the time the debt was incurred. "A defendant rarely will acknowledge that she transferred funds to place them beyond the reach of creditors. Actual intent often must be established through inferential reasoning, deduced from the circumstances surrounding the allegedly fraudulent act." *Gilchensky* at 490. The circumstances surrounding the IRA contributions changed significantly after the Confessions of Judgment were filed on January 6, 2011, acknowledging a debt to First Citizens. The post-judgment contributions were made with the knowledge of the First Citizens Judgment, and changing the nature of nonexempt funds to exempt IRA funds while subject to the First Citizens Judgment reveals an "actual intent to hinder, delay, or defraud" First Citizens. That Lindgren's contribution behavior did not change is irrelevant; that he made those contributions after the fundamental change in circumstances reveals an actual intent to deprive First Citizens of its chance to execute on the judgment.

Lindgren asserts that the transfer itself is not enough to prove a fraudulent conveyance in the context of transferring nonexempt assets into exempt assets. He claims that there must also be extrinsic evidence of fraudulent intent to justify employing the fraudulent conveyance exception to South Carolina's Homestead statute. The precedent that Lindgren relies on, however, is inapplicable to the instant situation. Every case that Lindgren cites in his Motion to Reconsider to support this assertion involved pre-bankruptcy planning, and in all but one case a section of state or federal bankruptcy law other than Section 548(a)(1)(A) governed the

fraudulent conveyance.<sup>1</sup> Lindgren has made no indication that he intends to file a bankruptcy petition, so these post-judgment contributions cannot be considered pre-bankruptcy planning. These post-judgment contributions were not made in anticipation of bankruptcy and are not subject to eve-of-bankruptcy protections.

Of the cases cited in Lindgren's Motion to Reconsider, only the court in *Koehler* evaluated the standard that Lindgren suggests applies to the South Carolina Homestead exemption for IRAs: 11 U.S.C. § 548(a)(1)(A).<sup>2</sup> *In re Koehler*, No. 11-00999-8-JRL, 2012 WL 719744 (Bkrtcy. E.D.N.C. March 5, 2012). This section reads:

[t]he trustee may avoid any transfer . . . of an interest of the debtor in property, . . . that was made or incurred within 2 years before the date of filing of the petition if the debtor . . . made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . . (emphasis added). 11 U.S.C. § 548(a)(1)(A).

Section 548(a)(1)(A) of federal bankruptcy law, which Lindgren claims should apply in the instant case, applies specifically in the context of bankruptcy petitions. Even if "judgment" could be substituted for "petition," this section is still inapplicable to Lindgren's post-judgment contributions because this section applies only *before* the filing. Thus, the standard of Section 548(a)(1)(A), that the debtor must have acted "with actual intent to hinder, delay, or defraud" a creditor, is inapplicable in this situation where the transfers were made after the judgment was filed and where there has been no bankruptcy petition.

---

<sup>1</sup> Some of the cases discussed 11 U.S.C. § 522(o), which does not apply to Section 522(d). Others discussed prepetition exemptions in state law outside of South Carolina. 11 U.S.C. § 727(a)(2), which governs discharge of debt after a prepetition transfer, is not applicable in the instant case.

<sup>2</sup> The court in *In re Addison* discussed Section 548(a)(1)(A) but only in reference to Section 522(o). *In re Addison*, 540 F.3d 805 (8th Cir. 2008).

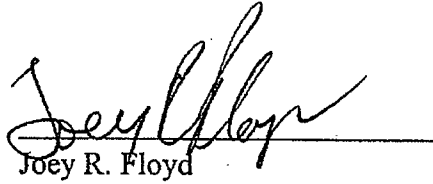
Because the exception to the South Carolina Homestead statute provided by federal bankruptcy law does not apply in the instant case, the term “fraudulent conveyance” as found in Section 15-41-30(A)(13) of the South Carolina Code must be governed by the Statute of Elizabeth, S.C. Code Ann. § 27-23-10. In *Mathis v. Burton*, the South Carolina Court of Appeals held that:

[A]s a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full—not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. *Mathis v. Burton*, 319 S.C. 261, 264-65, 460 S.E.2d 406, 408 (Ct. App. 1995).

When no consideration accompanies a transfer, as in the instance case, extrinsic evidence of fraudulent intent is not required to prove a fraudulent conveyance under the Statute of Elizabeth. Because all three elements of the above standard are met, Lindgren’s voluntary post-judgment contributions to his IRA accounts are fraudulent conveyances and should be set aside.

South Carolina courts have not yet addressed post-judgment transfers of nonexempt assets into exempt assets outside of the realm of bankruptcy. When a judgment has been filed against an individual, and the individual has not filed a petition for bankruptcy, that individual should not be permitted to use the South Carolina Homestead Exception Act to evade payment of the judgment. Such an allowance would undermine the authority of judgments and provide a method of sanctioned nonpayment.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Joey R. Floyd", is written over a horizontal line.

Joey R. Floyd

Bruner Powell Wall & Mullins, LLC

1735 St. Julian Place, Ste 200

P.O. Box 61110

Columbia, South Carolina 29260-1110

(803)252-7693

*Attorneys for Plaintiff*

*First Citizens Bank and Trust Company, Inc.*

Columbia, South Carolina

July 15, 2015

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )  
First Citizens Bank and Trust )  
Company, Inc., )  
Plaintiff/Petitioner, )  
v. )  
Blue Ox, LLC and J. Chris Lindgren, )  
Defendants/Respondents. )

BEFORE THE MASTER IN EQUITY

Case Nos.: 2011-CP-07-128 and 2011-CP-07-129

**CERTIFICATE OF SERVICE**

2015 JUL 20 PM 3:50  
JEROME ROSEBAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

I, Kim Warnock, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Plaintiff, do hereby certify that on the 15<sup>th</sup> day of July, 2015, I served the pleadings/documents set forth below on the person(s) identified below, by depositing copies thereof in the U.S. Mail, postage-paid, in an envelope securely sealed, and addressed to the following.

**Pleadings/Documents Served:**

Plaintiff's Reply Memorandum to Defendant's Motion for Reconsideration

**Person(s) Served:**

Keating L. Simons III, Esquire  
Simons & Dean  
147 Wappoo Creek Drive, Suite 604  
Charleston, SC 29412

Kim Warnock

|                                     |   |                                                  |
|-------------------------------------|---|--------------------------------------------------|
| STATE OF SOUTH CAROLINA             | ) | BEFORE THE MASTER IN EQUITY                      |
|                                     | ) |                                                  |
| COUNTY OF BEAUFORT                  | ) | Case Nos.: 2011-CP-07-128 and 2011-CP-07-129     |
|                                     | ) |                                                  |
| First Citizens Bank and Trust       | ) |                                                  |
| Company, Inc.,                      | ) |                                                  |
|                                     | ) | <b><u>MEMORANDUM IN SUPPORT OF MOTION</u></b>    |
| Plaintiff/Petitioner,               | ) | <b><u>TO SET ASIDE AND EXECUTE ON</u></b>        |
|                                     | ) | <b><u>VOLUNTARY POST-JUDGMENT</u></b>            |
| v.                                  | ) | <b><u>CONTRIBUTIONS BY J. CHRIS LINDGREN</u></b> |
|                                     | ) | <b><u>TO 401(k), IRA ACCOUNTS AND AN</u></b>     |
| Blue Ox, LLC and J. Chris Lindgren, | ) | <b><u>EDUCATION ACCOUNT</u></b>                  |
|                                     | ) |                                                  |
| Defendants/Respondents.             | ) |                                                  |

2014 NOV -3 PM 2:25  
CLERK OF COURT  
BEAUFORT CO. S.C.

Plaintiff, First Citizens Bank and Trust Company, Inc. ("First Citizens"), hereby submits this memorandum in support of its Motion to Set Aside and Execute on the voluntary post-Judgment contributions by J. Chris Lindgren ("Lindgren") to his 401(k), IRA accounts and Education Account.

**PROCEDURAL POSTURE OF THE CASE**

The debtors Blue Ox, LLC and J. Chris Lindgren executed Confessions of Judgment on May 13, 2010, both of which were ultimately filed with the Beaufort County Clerk of Court on January 6, 2011.<sup>1</sup> A Supplemental Proceedings hearing for these matters was held on September 2, 2014, before the Beaufort County Master-in-Equity. This matter was ultimately set for a Continuation of the Supplemental Proceedings before the Beaufort County Master-In-Equity on November 3, 2014, 1:30 p.m. Prior to the hearing scheduled for November 3, 2014, the parties agreed to submit briefs to the Beaufort County Master In Equity on the Plaintiff's Motion to Execute on the debtor's post-judgment voluntary contributions to his 401(k), IRA accounts and Education account.

<sup>1</sup> C/A No.: 11-CP-07-128 (\$100,000.00) and C/A No.: 11-CP-07-129 (\$13,702.24).

## FACTS

During the September 3, 2014 Supplemental Proceedings hearing, Lindgren testified that he is the 100% owner of a company known as Rockmoor, Inc. (p.7-8, lines 24-1). Rockmoor, Inc. has a 401(k) that is a profit sharing plan that is funded through employee deferrals. (p.14, lines 5-24). Lindgren testified that he is no longer an employee of Rockmoor, Inc. (p.27, lines 22-23). Lindgren also testified that he has formed 38 LLCs as "investment vehicles." (p.22, lines 2-6). Rockmoor, Inc. is a management company that manages payroll and operations; primarily Lindgren's LLCs. (p.26, lines 18-20 and p.30, lines 9-21).

During the hearing, Lindgren testified that he had an IRA at Fidelity, which he estimated to have approximately \$25,000.00 in the IRA at the time of the hearing. (p.18, lines 1-11). After the hearing on September 2, 2014, the parties engaged in the exchange of documents and some post-judgment discovery. The parties have agreed to stipulate to the following facts regarding Lindgren's contributions to his 401(k), the IRA accounts and the Education account:

Mass Mutual f/k/a The Hartford 401(k) (Account No.: 2812622) → \$45,366.67 in  
contributions since 2011

Fidelity IRA (Acct. No.: 197-778290) → \$18,500.00 in contributions since 2011

Fidelity Roth IRA (Acct. No.: 218-395517) → \$6,500.00 in contributions in 2014

Fidelity Education Account (Acct. No.: 618-670855) → \$22,000.00 contributed in 2012

Lindgren has voluntarily contributed a total of \$92,366.67 to his 401(k), IRA accounts and an Education Account.<sup>2</sup> During the hearing on September 2, 2014, Counsel for First Citizens moved to execute on the contributions to the 401(k) and the IRA(s). (p.58-62).

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<sup>2</sup> A summary of contributions to the 401(k), IRA accounts and Education account is attached hereto as Exhibit 1. The parties have agreed and stipulated that Exhibit 1 is an accurate summary of Lindgren's contributions to these various accounts.

## ARGUMENT

A Judgment Creditor is entitled to execute on the assets of a debtor, with limited exceptions as provided in S.C. Code Ann. § 15-41-30. The exemption found at S.C. Code § 15-41-30(A)(13), provides, in relevant part:

The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. **A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan.** (emphasis mine).

South Carolina's prohibition on fraudulent transfers/fraudulent conveyances, *i.e.*, the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, provides:

**Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken** (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) **to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.** (emphasis mine).

In *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995), the South Carolina Court of Appeals held that:

For existing creditors, conveyances can be set aside in two instances:

First, where the challenged transfer was made for a valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full-not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. *Mathis* at 264-65 (citations omitted)

As an aside, even if the IRAs or 401(k) plan is one to which ERISA applies, "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." See *In re Goldschein*, 241 B.R. 370 (Bkry. D.Md. 1999), which provides as follows: "The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *Id.* at 379.

In this instance, there was no consideration for the transfer of the money from Lindgren to himself. The attempted movement of a non-exempt asset (i.e. cash) into IRA accounts and a 401(k) account, an exempt account cannot be a transfer supported by consideration because the transfer was nothing more than Lindgren moving money from one pocket to another pocket in an effort to protect cash from his judgment creditors. Lindgren was indebted to First Citizens at the time of his voluntary contributions to his 401(k), IRA accounts and education account and Lindgren has failed to retain sufficient property/assets to pay First Citizens. Therefore, these transfers should be set aside.

Even if we assumed that there was consideration, which First Citizens denies, as a matter of equity these transfers should be set aside. It is undisputed that Lindgren voluntarily elected to

contribute in excess of \$70,000.00 towards his 401(k) and IRA accounts. All contributions by Lindgren were made with full knowledge that First Citizens held Judgments against Lindgren in excess of \$113,000.00 – Lindgren executed Confessions of Judgment in favor of First Citizens. In addition to the 401(k) and IRA contributions, Lindgren contributed \$22,000.00 towards an education account(s) with Fidelity. Between 2011 and 2014, Lindgren made no efforts to payoff First Citizens' Judgments. In spite of Lindgren's voluntary contributions to his 401(k), IRA accounts and Education account, along with his 38 investment vehicles, Lindgren maintains that he has no assets that can be used to apply towards the Judgments that First Citizens holds against him. Lindgren is using his 401(k) and IRA accounts as his personal "offshore bank accounts," funneling, in a number of instances, the maximum amount of money possible on an annual basis (as allowed by the IRS) to put the money beyond the reach of his judgment creditors. During the Supplemental Proceedings hearing, Lindgren's counsel objected to First Citizens' motion to execute on these funds, effectively confirming that Lindgren takes the position that the funds in the 401(k) and the IRA accounts are "exempt" and beyond the reach of a Judgment creditor.

Marjorie A. Shields has provided some helpful insight on this issue in an article, with supporting case law, that demonstrates when a judgment debtor moves money into retirement accounts, the fact that the money is moved into an apparent "exempt" account, the Courts can, and should, set aside those transfers as fraudulent transfers.

In *Gilchinsky v. National Westminster Bank N.J.*, 159 N.J. 463, 732 A.2d 482, 23 Employee Benefits Cas. (BNA) 1382 (1999), the Supreme Court of New Jersey recognized that a judgment debtor's individual retirement account (IRA) enjoys qualified immunity from attachment by creditors under N.J. Stat. Ann. § 25:2-1, however, under the Fraudulent Transfer Act, N.J. Stat. Ann. §§ 25:2-20 to 25:2-34, such funds may be attached if deposited as a fraudulent conveyance by a debtor. The court stated that the purpose behind the expansive protection afforded to IRAs is to prevent creditors from attaching money earmarked for retirement.

That immunity, however, the court said, is not absolute; creditors can attach funds transferred into an IRA in "preference" of other creditors, as a "fraudulent conveyance," or if the money is subject to a support order. In exempting fraudulent conveyances from the otherwise broad-based immunity, the court said, the legislature clearly intended to prevent debtors from using New Jersey law to shield their assets from creditors. The court recognized a similar exception to the exemption of IRAs for fraudulent conveyances under New York law, N.Y. C.P.L.R. 5205(c)5. The court stated that, although New York law generally exempts individual retirement account (IRA) funds from attachment by creditors seeking to enforce money judgments, that exemption is unavailable where the debtor secretes funds into an IRA in an attempt to avoid paying a money judgment.

Marjorie A. Shields, *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487 (Originally published in 2003); *Accord, Baker v. Dorfman*, 2000 WL 1010285 (S.D. N.Y. 2000), *aff'd on other grounds*, 232 F.3d 121 (2d Cir. 2000) (holding plaintiff entitled to have the balance of defendant's IRA turned over to satisfy the judgment where all deposits to the IRA were made after complaint was filed against defendant).

While South Carolina's Homestead Exemption Act does offer debtors protection in limited situations and circumstances, the Homestead Exemption Act also protects judgment creditors when a judgment debtor takes assets that are subject to execution (i.e. cash) and attempts to place those assets beyond the reach of a creditor by depositing the cash into a 401(k) IRA accounts and education accounts to disguise the cash as being exempt. Based on facts of this case, this Court should set aside all of Lindgren's conveyances into his 401(k), IRA accounts and Education account, in the amount of \$92,366.67, which represents the contributions that Lindgren has made to these various accounts because such transfers are fraudulent transfers/fraudulent conveyances that should be set aside and paid to the Petitioner, to be applied towards the satisfaction of First Citizens' judgments. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible."

*Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

First Citizens is not obligated to prove fraud, intent or attempted fraud. In fact, our case law holds to the contrary.

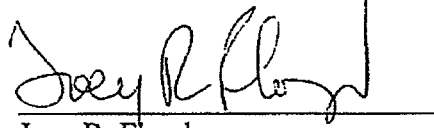
No rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous. "The law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors. The motive which prompts the donor to make the gift is wholly immaterial. If the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was free from any trace of moral fraud." *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139, 146 (1932) (quotations and citations omitted).

Based on the case law of South Carolina, there is no requirement that a judgment creditor prove actual fraud or a fraudulent intent.

### CONCLUSION

For the reasons set forth herein, this court should set aside Lindgren's voluntary post-judgment contributions to his 401(k), IRA accounts and the education account as fraudulent fraudulent transfers/fraudulent conveyances, thereby allowing First Citizens to execute on the funds in the 401(k) account, IRA accounts and the Education account to apply said proceeds towards the Judgment debts that are owed to First Citizens. First Citizens seeks an Order directing Fidelity and Mass Mutual to pay, to First Citizens, the amounts Lindgren voluntarily contributed to Mass Mutual f/k/a The Hartford (401(k) account) and Fidelity (IRA accounts and education account), to be applied towards First Citizens' Judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joey R. Floyd", written over a horizontal line.

Joey R. Floyd  
Bruner Powell Wall & Mullins, LLC  
1735 St. Julian Place, Ste 200  
P.O. Box 61110  
Columbia, South Carolina 29260-1110  
(803)252-7693  
*Attorneys for Plaintiff*  
*First Citizens Bank and Trust Company, Inc.*

Columbia, South Carolina  
October 31, 2014

# EXHIBIT 1

**J. Chris Lindgren Contributions**  
**401k, IRA's, and Education Accounts, 2011-2014**

**John Chris Lindgren Contributions to 401k**  
**Account # - 2812622**

|              |                    |
|--------------|--------------------|
| 2011 Sum*    | \$0.00             |
| 2012 Sum*    | \$20,450.00        |
| 2013 Sum     | \$23,000.00        |
| 2014 YTD Sum | \$1,916.67         |
| <b>Sum</b>   | <b>\$45,366.67</b> |

**Contributions to Fidelity IRA**  
**Plan # - 197-778290**

|              |                    |
|--------------|--------------------|
| 2011 Sum     | \$6,000.00         |
| 2012 Sum     | \$6,000.00         |
| 2013 Sum     | \$6,500.00         |
| 2014 YTD Sum |                    |
| <b>Sum</b>   | <b>\$18,500.00</b> |

**Contributions to Fidelity Education Account**  
**Plan # - 618-670855**

|              |                    |
|--------------|--------------------|
| 2011 Sum     |                    |
| 2012 Sum     | \$22,000.00        |
| 2013 Sum     |                    |
| 2014 YTD Sum |                    |
| <b>Sum</b>   | <b>\$22,000.00</b> |

**Contributions to Fidelity Roth IRA**  
**Plan # - 218-395517**

|              |                   |
|--------------|-------------------|
|              |                   |
| 2014 YTD Sum | \$6,500.00        |
| <b>Sum</b>   | <b>\$6,500.00</b> |

**Grand Sum**

|                          |                    |
|--------------------------|--------------------|
| 401K                     | \$45,366.37        |
| Fidelity Traditional IRA | \$18,500.00        |
| Fidelity Education Acct  | \$22,000.00        |
| Fidelity Roth IRA        | \$6,500.00         |
| <b>Grand Sum</b>         | <b>\$92,366.37</b> |

STATE OF SOUTH CAROLINA

) BEFORE THE MASTER IN EQUITY

COUNTY OF BEAUFORT

) Case Nos.: 2011-CP-07-128 and 2011-CP-07-129

First Citizens Bank and Trust  
Company, Inc.,

**CERTIFICATE OF SERVICE**

Plaintiff/Petitioner,

v.

Blue Ox, LLC and J. Chris Lindgren,

Defendants/Respondents.

I, Annie Rich, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for the Plaintiff/Petitioner, First Citizens Bank and Trust Company, Inc., do hereby certify that on October 31, 2014, I served a copy of the documents listed below on counsel of record by depositing a copy of same in the U.S. Mail, first-class, postage prepaid and addressed as follows:

Pleading(s) served:

*Memorandum in Support of Motion to Set Aside and Execute on Voluntary Post-Judgment Contributions by J. Chris Lindgren to 401(k), IRA Accounts and an Education Account*

Counsel served:

Keating L. Simons, III  
Simons & Dean  
147 Wappoo Creek Drive, Suite 604  
Charleston, SC 29412

*Attorneys for the Defendants/Respondents*

Annie Rich

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT  
First Citizens Bank and Trust Company;  
Inc.,

Plaintiff,

vs.

Blue Ox, LLC and J. Chris Lindgren,  
Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2011-CP-07- 128 and 129

**MEMORANDUM OF  
J. CHRISTOPHER LINDGREN  
IN OPPOSITION TO PLAINTIFF'S  
MOTION TO SET ASIDE AND EXECUTE**

2014 NOV 14 PM 3:30

Defendant J. Chris Lindgren ("Mr. Lindgren") respectfully submits the within memorandum in opposition to Plaintiff's motion to set aside and execute.

Plaintiff alleges that deposits made into various accounts established by or for Mr. Lindgren are voidable as fraudulent transfers under South Carolina's Statute of Elizabeth, S.C. Code §27-23-10(A). The accounts in question include an Individual Retirement Account ("IRA"), a Roth IRA, a 401(k) Plan and a 529 Plan. These accounts have differing characteristics and will be addressed separately.

**CONTRIBUTIONS TO IRA AND ROTH IRA ACCOUNTS**

It is undisputed that Mr. Lindgren has made regular, annual contributions to individual retirement accounts since 1986. [Lindgren Aff. ¶ 8] With one exception, in each year Mr. Lindgren has contributed the exact amount permitted by federal law.<sup>1</sup> Plaintiff asks the court to hold that Mr. Lindgren's contributions made in 2011, 2012, 2013 and 2014 were fraudulent transfers and that Plaintiff can recover these amounts directly from Fidelity, where the accounts

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<sup>1</sup> In 2010, Mr. Lindgren made no contribution to his IRA and a substantially reduced contribution to the 401(k) Plan. [Lindgren Aff. ¶¶ 6, 8]

transfers and that Plaintiff can recover these amounts directly from Fidelity, where the accounts are held.<sup>2</sup>

Individual retirement accounts are exempt from execution under South Carolina's Homestead statute, S.C. Code §15-41-30(A)(13), quoted in its entirety:

The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:

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The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. For purposes of this item, "Internal Revenue Code" has the meaning provided in Section 12-6-40(A). The interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law and is an exception to Section 15-41-35. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise.

The exemption established by the statute "may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." *Id.* Plaintiff argues that all contributions made after entry of its judgment against Mr. Lindgren must be set aside as fraudulent transfers. This is because, according to Plaintiff, Mr. Lindgren attempted to convert a "non-exempt asset (i.e. cash)" into exempt IRA accounts. Plaintiff claims that Mr. Lindgren may not lawfully move "money from one pocket to another pocket in an effort to protect cash from

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<sup>2</sup> No orders should be directed to the financial institutions inasmuch as they are not parties to this proceeding. The court need not reach this point because Plaintiff's claims fail on the merits.

his judgment creditor." Plaintiff is simply wrong on the law. No court has adopted a *per se* rule that any IRA contributions made by a judgment creditor are *ipso facto* fraudulent transfers.

"It is well settled that it is not a fraudulent act by an individual who knows he is insolvent to convert a part of his property which is not exempt into property which is exempt, for the purpose of claiming his exemptions therein, and of thereby placing it out of the reach of his creditors." *Forsberg v. Security State Bank*, 15 F.2d 499, 501 (8th Cir. 1926) quoting *Crawford v. Sternberg*, 220 F. 73 (8th Cir. 1915). In so doing the debtor "merely avails himself of a plain provision of [the exemption] enacted for the benefit of himself and his family." *Id.* "Nor can the use of property that is not exempt from execution to procure a homestead be held to be a fraud upon the creditors of an insolvent debtor, because that which the law expressly sanctions and permits cannot be a legal fraud." *Id.* "We do not think one should be penalized for merely doing what the law allows him to do." *Id.* To make out a case of fraudulent conveyance, "there must appear in evidence some facts or circumstances which are extrinsic to the mere facts of conversion of nonexempt assets into exempt and which are indicative of such fraudulent purpose." 15 F.2d at 502.

The facts of *Forsberg* are worth noting since they illustrate the point so nicely. In 1923, a South Dakota farmer on the eve of bankruptcy exchanged some of his cattle and hogs plus some cash for 21 sheep. He did this because the South Dakota homestead exemption statute permitted him to protect from creditors 2 horses, 2 cows, 5 hogs, and his farm machinery. Cows and hogs over these limits would be lost to creditors. However, the exemption statute also permitted him to protect up to 25 sheep. The farmer had no sheep. By exchanging his excess cattle and hogs for 21 sheep the farmer was able thereby to maximize the benefits and protections accorded to him

by the homestead exemption statute. A creditor objected and sought to have the transaction set aside as a fraudulent conveyance. As noted, the farmer prevailed.

The holding of *Forsberg* - requiring creditors to make a showing of extrinsic evidence of fraud - has been followed by many other courts in myriad circumstances. See E.g., *In re Addison*, 540 F.3d 805 (8<sup>th</sup> Cir. 2008); *Ford v. Poston*, 773 F.2d 52 (4<sup>th</sup> Cir. 1985); *First Texas Savings Association v. Reed*, 700 F.2d 986 (5<sup>th</sup> Cir. 1983); *Marine Midland Bus. Loans, Inc. v. Carey*, 938 F.2d 1073 (10<sup>th</sup> Cir. 1991); and, *In re Jones*, 397 B.R. 765 (Bkrcty. D.S.C. 2008).

A debtor's withdrawing funds from a non-exempt brokerage account and paying down his home mortgage and opening a Roth IRA is not fraudulent. *In re Addison*, 540 F.3d 805 (8<sup>th</sup> Cir. 2008). The court held that in the absence of extrinsic evidence of fraudulent intent the bankruptcy judge erred in denying discharge to the debtor.<sup>3</sup>

The debtors sold their non-exempt household furnishings at auction, using \$12,000 of the proceeds to open two IRA accounts. This was not a fraudulent transfer. *In re Koehler*, 2012 WL 719744 (Bkrcty. E.D.N.C. 2012).

In another North Carolina bankruptcy case involving retirement plans the debtor sold his non-exempt truck and used the proceeds to pay off loans secured by his and his wife's retirement accounts. The court refused to find these transactions to be fraudulent, noting: "The effect of the transfers may have been to convert nonexempt assets to assets that would be exempt in bankruptcy, but the amounts are not excessive and the transfers are consistent with the debtors'

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<sup>3</sup> Bankruptcy cases are relevant here. Not only does the issue at hand most often arise in that context, under bankruptcy law a debtor may lose his exemption or be denied discharge if found to have transferred property with intent to hinder, delay, or defraud a creditor. 11 U.S. Code § 548(a)(1)(A) and § 727(a)(2)(A). This is substantively identical to the language of South Carolina's Statute of Elizabeth. S.C. Code § 27-23-10(A) ("intent or purpose to delay, hinder, or defraud creditors").

legitimate attempts to provide for their retirement.” *In re Duncan*, No. S-06-00025-5-AP (Bkrtcy. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrtcy. E.D.N.C. Jun. 18, 2007) at page 6 of 8.

In contrast, cases disallowing debtors’ efforts to benefit from exemption statutes involve extraordinary or unusual transactions. For example, in *Gilchinsky v. National Westminster Bank*, 732 A.2d 482 (N.J. 1999), the debtor withdrew funds from a New York profit-sharing account and transferred them to an IRS account she opened in New Jersey. Not only did the transfer involve all of the debtor’s assets, the transfer also violated a temporary restraining order that had been entered by the New York Supreme Court prohibiting any transfer of the debtor’s real or personal property in the State of New York. On these facts the New Jersey Supreme Court had no trouble finding the transfer fraudulent and depriving the debtor of the exemption the IRA account would otherwise have enjoyed under New Jersey law.

*In re Zouhar*, 10 B.R. 154 (Bankr. N.M.1981) involved a similarly aggressive scheme. There the debtor borrowed money and secured the loan with non-exempt stock he owned. He used the proceeds to purchase an annuity contract, an exempt asset under New Mexico law. The debtor arranged for the annuity contract to require that its payments be made to the holder of the note secured by the debtor’s stock. Had this been approved, the creditors would have been unable to reach the encumbered stock or the exempt annuity contract. And at the end of the day the stock would have come back to the debtor after the annuity contract paid off the note. In finding this transaction fraudulent the court aptly observed: “There is a principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered.” 10 B.R. at 157, *quoting Dolese v. United States of America*, 605 F.2d 1146, 1154 (10th Cir. 1979).

In *Ford v. Poston*, 773 F.2d 52 (4<sup>th</sup> Cir. 1985) a judgment debtor deeded to himself and his wife, as tenants by the entirety with rights of survivorship, certain real property that had been deeded to the debtor by his parents some six months prior. The debtor claimed that this was merely to correct a mistake made by his parents in their deed to him. Applying the extrinsic evidence of fraud rule discussed above, the Fourth Circuit held that the extrinsic fact that the supposedly corrective deed was recorded the day after entry of judgment was sufficient to warrant a finding of intent to defraud on the part of the debtor.

*Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871 (8<sup>th</sup> Cir. 1988) is another case worthy of the expression, "pigs get fat and hogs get slaughtered." As summarized by the court:

Indeed, this case presents a situation in which the debtor liquidated almost his entire net worth of \$700,000 and converted it to non-exempt property in seventeen transfers on the eve of bankruptcy while his creditors, to whom he owed close to \$19,000,000, would be left to divide the little that remained in his estate. Borrowing the phrase used by another court, Tveten "did not want a mere fresh start, he wanted a head start." *In re Zouhar*, *supra*, 10 B.R. at 156 (*emphasis in original*). His attempt to shield property worth approximately \$700,000 goes well beyond the purpose for which exemptions are permitted.

848 F.2d at 876.

The case before this court presents none of the aggressive or excessive features of the fraudulent transfers described above. None of the subject transactions - in this case Mr. Lindgren's retirement contributions - was made in response to or in anticipation of Plaintiff's judgment. To the contrary, as the undisputed evidence makes plain, Mr. Lindgren's regular, annual contributions to retirement accounts remained unchanged. Also, the challenged transactions did not involve all or substantially all of the debtor's net worth; Mr. Lindgren's retirement contributions were no less and no more than permitted by applicable law. The

retirement contributions were "not excessive," rather they were "consistent with the debtor's legitimate attempts to provide for [his] retirement." *In re Duncan, supra*.

Plaintiff cites *Baker v. Dorfman*, 2000 WL 1010285 (S.D. N.Y. 2000), *aff'd on other grounds*, 232 F.3d 121 (2d Cir. 2000), as a case Plaintiff describes as "holding plaintiff entitled to have the balance of defendant's IRA turned over to satisfy the judgment where all deposits to the IRA were made after complaint was filed against defendant." [Pl. Mem. at 6] Plaintiff's description is incomplete and misleading. As pointed out in the ALR article cited by Plaintiff, the result in *Baker v. Dorfman* was required under a New York statute that "exempts individual retirement accounts (IRAs) from application to the satisfaction of a judgment except where additions to such accounts are made after the date that is 90 days before the interposition of the claim on which such judgment was entered." *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487, at page 13. There is no such statute in South Carolina. And *Baker v. Dorman* provides no support for the extreme position Plaintiff takes in this case: that any retirement contribution made post-judgment is necessarily fraudulent.

Plaintiff's suggestion that it need not prove fraudulent intent in this case is unsupported and without merit. Statute of Elizabeth jurisprudence is not applicable to Mr. Lindgren's IRA contributions. The Homestead exemption statute explicitly provides that the "interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law." S.C. Code § 15-41-30(A)(13). Federal bankruptcy law at 11 U.S. Code § 522(d) provides that the "following property may be exempted under subsection (b)(2) of this section: ... (12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A,

414, 457, or 501(a) of the Internal Revenue Code of 1986.”<sup>4</sup> The exemption provided is subject to limitations, as where the debtor makes a transfer “with actual intent to hinder, delay, or defraud” a creditor. 11 U.S. Code § 548(a)(1)(A). The exemption for retirement funds is also subject to a monetary limit provided for in 11 U.S. Code § 522(n).<sup>5</sup>

In 2012, §15-41-30(A)(13) was amended to delete “, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” at the end of the first sentence, and added the last two sentences, including the specific reference to federal bankruptcy law as a limitation on the exemption provided for retirement plans.<sup>6</sup> Adding the reference to federal bankruptcy law to the exemption statute not only substituted a specific monetary limit instead of a need-based test for exempting IRA accounts on a case-by-case basis, it also effectively incorporated by reference the federal substantive standard for evaluating fraudulent transfer claims in the context of retirement plan contributions.<sup>7</sup> Under the amended statute individual retirement accounts are exempt except to the extent they are inflated as a result of contributions made “with actual intent to hinder, delay, or defraud.” And as discussed above, courts applying

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<sup>4</sup> Sections 408 and 408A provide for traditional IRAs and Roth IRAs, respectively.

<sup>5</sup> As of April 1, 2013, debtors could protect IRA account balances up to \$1,245,475.00. This number is indicative of the strong public policy in favor of protecting debtors’ retirement assets.

<sup>6</sup> 2012 Act No. 153, § 1, eff May 14, 2012, was enacted “so as to delete the provision that the exemption only applies to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and to provide that the interest of an individual is exempt from creditor process in certain circumstances.”

<sup>7</sup> The Statute of Elizabeth by its terms applies only to interests in lands and came into being centuries before such things as individual retirement accounts were ever conceived. Modernizing the law with respect to allegedly fraudulent transfers into IRAs would be a legitimate objective of the General Assembly.

this standard require extrinsic evidence of fraud beyond the mere fact of the transfer itself before finding a debtor intended to defraud a creditor.

In any case, Statute of Elizabeth jurisprudence, properly understood, is not inconsistent with the substantive standard applied in bankruptcy cases and also requires proof of fraudulent intent in the circumstances of this case. Plaintiff argues proof of fraud is not necessary and cites for this proposition, *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139 (1932). That case, however, involved what the court treated as a gift, a conveyance of lands from a husband to wife without consideration, and the holding was unremarkable. As explained in more recent cases, a transfer may be found fraudulent under two conditions: first, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud, and, second, where a transfer is made without actual intent to defraud but without valuable consideration. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). In this case Mr. Lindgren did not, in the words quoted by Plaintiff, "give his property away." To the contrary, he received valuable consideration: an income tax deduction for the amounts contributed; tax-free treatment of all future earnings within the account; and, the right to have the funds repaid to him, with earnings, at a later date, and be taxed at a potentially lower marginal rate. *See In re Dunbar*, 313 B.R. 430, 436 (Bankr.C.D.Ill.2004) (increased value of retirement account following loan repayment constituted debtor's receipt of reasonably equivalent value). Plaintiff must prove fraudulent intent on Mr. Lindgren's part and in doing so must meet a clear and convincing evidentiary standard. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012) ("A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth.")

Plaintiff emphasizes the voluntary nature of Mr. Lindgren's contributions to his retirement accounts. This is not disputed. Of course, Mr. Lindgren voluntarily engaged in the challenged transactions. When he contributed to his retirement plans Mr. Lindgren did exactly what the law expressly permits, indeed encourages, him to do. The favorable treatment accorded to contributions to qualifying retirement plans under state and federal tax laws<sup>8</sup> make plain the public policy of our State and Nation to encourage retirement savings. Further, it is the public policy of this State, as expressed through its Homestead exemptions, to protect from creditors a portion of the debtor's property so as to prevent citizens from becoming dependent upon the State for support. *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct.App. 2002) citing *Scholtec v. Estate of Reeves*, 327 S.C. 551, 560, 490 S.E.2d 603, 607 (Ct.App.1997). South Carolina's Homestead statute explicitly exempts from creditors' claims the very retirement plans to which federal and state tax laws encourage all citizens to contribute.<sup>9</sup> There are situations in which a debtor could seek to abuse or take advantage of the system - some examples have been provided above - and in such cases a creditor should obtain relief. But here Mr. Lindgren has done no more and no less than the law permits and encourages him to do. Equally pertinent here is the observation made by the court in dealing with the South Dakota farmer in 1923: "We do not think one should be penalized for merely doing what the law allows him to do." *Forsberg v. Security State Bank*, 15 F.2d 499, 501 (8th Cir.1926). That the challenged contributions were

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<sup>8</sup> It is common knowledge and the court may take judicial notice that contributions to IRA and 401(k) accounts are made with pre-tax dollars, that plan earnings are not taxed as such and no income taxes are paid until funds are withdrawn. Contributions to a Roth IRA are made with after-tax dollars but withdrawals are tax-free.

<sup>9</sup> A reading of the exemption statute that says, in effect: South Carolina residents can protect over a million dollars in an IRA once they get there, but if they have creditors they cannot put any money into the account to try to build such a nest egg, obviously makes no sense.

made by Mr. Lindgren after the entry of judgments against him is, without more, of no consequence. As one court aptly observed:

If conversion of nonexempt into exempt assets should not itself result in denial of discharge, should it do so when it occurs shortly after the debtor has been sued or incurred a large debt, or is insolvent, or is about to file bankruptcy? If that were the rule, it would mean that prospective debtors could engage in exemption planning only up until the point where it appeared they might need to do so.

*In re Crater*, 286 B.R. 756, 765 (Bankr. D. Ariz. 2002).

If Plaintiff's argument in this case were to be accepted it would mean that judgment debtors, even individuals who had merely been sued or threatened with suit, could no longer engage in reasonable, prudent retirement planning. Plaintiff has offered no authority in support of such an extreme position.

Plaintiff has failed to meet its burden of coming forth with extrinsic evidence to make a clear and convincing case of fraudulent intent on the part of Mr. Lindgren and its motion should be denied with respect to the IRA and Roth IRA accounts.

#### THE 401(K) PLAN

The 401(k) Plan established by Mr. Lindgren's employer is a qualified ERISA retirement plan. [Lindgren Aff. ¶ 3]<sup>10</sup> As such, it is exempt from creditors' claims under federal law. 11 U.S. Code §§ 522(b)(3)(A) and 522(d)(12); *See Patterson v. Shumate*, 504 U.S. 753, 119 L.Ed.2d 519, 112 S.Ct. 2242 (1992). It is also exempt under South Carolina's Homestead exemption statute:

The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:

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<sup>10</sup> Once the IRS issues the determination letter attached as an exhibit to Lindgren's affidavit the funds in the account are presumed to be exempt. 11 U.S. Code §§ 522(b)(4)(A).

... The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.

S.C. Code § 15-41-30(A)(14).

Importantly, unlike §15-41-30(A)(13) (dealing with individual retirement accounts), the above-quoted code section exempting ERISA plans has no fraudulent transfer qualification or limitation. A 401(k) Plan is different from an IRA. Contributions to a 401(k) Plan are made by the taxpayer's employer rather than by the taxpayer himself. The employer withholds wages and pays these funds directly to the Plan. The employee never has possession of the funds until they are withdrawn from the Plan. Wages are not subject to garnishment in South Carolina. The 401(k) Plan contributions - consisting of the employee's withheld wages - are exempt from levy or execution while in the hands of the employer and remain so after payment to the Plan. When an employer pays to the 401(k) Plan wages withheld from its employee, there is no conversion of exempt cash to non-exempt retirement plan assets.

The undersigned has been unable to find any cases involving a creditor's challenge to 401(k) Plan employer contributions. There are cases, however, dealing with debtors' repayment of loans taken from 401(k) Plans. See *In re Hoetmer*, 2012 WL 4482387 (Bkrtcy.S.D.Ind., Slip Copy, Sept. 26, 2012) and *In re Dunbar*, 313 B.R. 430, 436 (Bankr.C.D.Ill.2004). The loan repayment was set aside in *Hoetmer* but not in *Dunbar*. The former case involved actual fraud; the latter constructive fraud. But in any event these cases are distinguishable and not relevant here because the money at issue in those cases was transferred from the debtors' own bank accounts to the 401(k) Plan. *Hoetmer* and *Dunbar* did not involve what we have here: payroll withholdings paid directly by Mr. Lindgren's employer to the 401(k) Plan.

In the circumstances of this case there has been no conversion of non-exempt cash to

exempt retirement plan assets and therefore no basis for finding any cognizable legal injury to Plaintiff or for finding any fraudulent transfer. In the absence of a transfer by Mr. Lindgren there can be no basis for application of the Statute of Elizabeth or the substantive fraudulent transfer jurisprudence of federal bankruptcy law, discussed above in respect to IRAs.

Even if the 401(k) Plan contributions are subjected to fraudulent transfer scrutiny, they pass muster. Plaintiff must prove intent to defraud as a matter of state law (because valuable consideration was received in the form of similar tax deferral and other benefits as with IRAs) or federal law (based on the authorities discussed extensively above). As was the case with the IRAs, Plaintiff has failed to show any extrinsic evidence of fraud. The mere fact that Mr. Lindgren's employer continued to make 401(k) Plan contributions - as it had done virtually without interruption since 1992 - is not evidence of fraudulent intent. To the contrary, based on the record herein Mr. Lindgren did not change his behavior in any way post-judgment; he simply continued a pattern of reasonable, prudent retirement planning. There is simply no evidentiary basis, much less one sufficient to meet a clear and convincing standard, to support a finding that the 401(k) Plan contributions were made "with intent to hinder, delay, or defraud a creditor."

#### 529 PLAN CONTRIBUTIONS

A 529 Plan is a tax-advantaged investment account vehicle designed to encourage savings for college education. Mr. Lindgren has such a plan. At this time there is \$13.18 in the account.<sup>11</sup>

In 2012, Mr. Lindgren paid \$22,000.00 into the account. Plaintiff seeks an order directing the financial institution holding the account, Fidelity Investments, to pay this sum to Plaintiff. However, the \$22,000.00 is no longer in the account. In 2012, Fidelity paid \$17,236.33 to the

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<sup>11</sup> The figure provided is the balance as of June 30, 2014. No additional funds have been paid into the account. The figure provided may be off by a few pennies in accrued interest.

University of Colorado. Also in that year, \$5,020.00 was withdrawn and used to pay qualified housing expenses for Mr. Lindgren's daughter. [Lindgren Aff. ¶ 11] Again, the money is no longer there and Fidelity, who is not named as a party herein, could reasonably be expected to resist being ordered to send \$22,000.00 to Plaintiff.

On the merits, it is unclear whether 529 Plan assets are exempt from creditor claims. No specific provision of South Carolina's Homestead exemption statute seems applicable. However, a statute dealing with the South Carolina College Investment Program provides:

The SCCIP trust fund, contributions to the SCCIP trust fund, and the right of a person to a refund of contributions or any other right accrued or accruing to any person under the provisions of this chapter are exempt from attachment, garnishment, levy, and sale under any means or final process issued by any court or bankruptcy proceeding and are unassignable except as specifically otherwise provided in this chapter.

S.C. Code § 59-2-140.

Whether strictly speaking this statute applies to the 529 Account at issue here is not clear. However, it is clear that the public policy of this State favors protecting educational savings accounts from creditors' claims. In any case, the payments made into and out of the 529 Plan were all in the ordinary course of Mr. Lindgren's educating his youngest daughter. There is no evidence that these transactions were fraudulent in any way. Had the \$22,000.00 been paid directly to University of Colorado would Plaintiff be seeking to avoid the transfer for want of consideration and to recover the money from the university?

## CONCLUSION

The point bears emphasis that the only evidence before the court is to the effect that Mr. Lindgren repeatedly made regular, annual contributions to various retirement plans over a period of decades, and that this practice continued after Plaintiff obtained its judgments against Mr. Lindgren. Plaintiff offers no evidence of fraudulent intent beyond the mere fact of the contributions themselves. Case after case has rejected Plaintiff's approach. Courts universally recognize that debtors may plan and manage their financial affairs to maximize their ability to benefit from homestead and other exemptions. When a debtor goes too far courts grant relief to creditors. That is simply not the case here. If Plaintiff prevails on the facts of this case, it means that no judgment debtor could reasonably plan and prepare for retirement or the future security of his family. Such an outcome flies in the face of the public policy underlying the Homestead exemptions and incentives established to promote retirement savings, all of which are intended to prevent debtors from becoming dependent upon the state for support. Plaintiff's argument for a *per se* rule that post-judgment retirement plan contributions are *ipso facto* fraudulent must be rejected.



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Attorneys for J. Christopher Lindgren

November 10, 2014  
Charleston, SC

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )  
 )  
First Citizens Bank and Trust Company, )  
Inc., )

Plaintiff, )  
 )

vs. )

Blue Ox, LLC and J. Chris Lindgren, )  
 )  
Defendants. )  
 )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2011-CP-07- 128 and 129

**AMENDED MEMORANDUM OF  
J. CHRISTOPHER LINDGREN  
IN OPPOSITION TO PLAINTIFF'S  
MOTION TO SET ASIDE AND EXECUTE**

Defendant J. Chris Lindgren ("Mr. Lindgren") respectfully submits the within memorandum in opposition to Plaintiff's motion to set aside and execute.

Plaintiff alleges that deposits made into various accounts established by or for Mr. Lindgren are voidable as fraudulent transfers under South Carolina's Statute of Elizabeth, S.C. Code §27-23-10(A). The accounts in question include an Individual Retirement Account ("IRA"); a Roth IRA, a 401(k) Plan and a 529 Plan. These accounts have differing characteristics and will be addressed separately.

**CONTRIBUTIONS TO IRA AND ROTH IRA ACCOUNTS**

It is undisputed that Mr. Lindgren has made regular, annual contributions to individual retirement accounts since 1986. [Lindgren Aff. ¶ 8] With one exception, in each year Mr. Lindgren has contributed the exact amount permitted by federal law.<sup>1</sup> Plaintiff asks the court to hold that Mr. Lindgren's contributions made in 2011, 2012, 2013 and 2014 were fraudulent

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<sup>1</sup> In 2010, Mr. Lindgren made no contribution to his IRA and a substantially reduced contribution to the 401(k) Plan. [Lindgren Aff. ¶¶ 6, 8]

transfers and that Plaintiff can recover these amounts directly from Fidelity, where the accounts are held.<sup>2</sup>

Individual retirement accounts are exempt from execution under South Carolina's Homestead statute, S.C. Code §15-41-30(A)(13), quoted in its entirety:

The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:

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The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. For purposes of this item, "Internal Revenue Code" has the meaning provided in Section 12-6-40(A). The interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law and is an exception to Section 15-41-35. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise.

The exemption established by the statute "may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." *Id.* Plaintiff argues that all contributions made after entry of its judgment against Mr. Lindgren must be set aside as fraudulent transfers. This is because, according to Plaintiff, Mr. Lindgren attempted to convert a "non-exempt asset (i.e. cash)" into exempt IRA accounts. Plaintiff claims that Mr. Lindgren may

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<sup>2</sup> No orders should be directed to the financial institutions inasmuch as they are not parties to this proceeding. The court need not reach this point because Plaintiff's claims fail on the merits.

not lawfully move "money from one pocket to another pocket in an effort to protect cash from his judgment creditor." Plaintiff is simply wrong on the law. No court has adopted a *per se* rule that any IRA contributions made by a judgment debtor are *ipso facto* fraudulent transfers.

"It is well settled that it is not a fraudulent act by an individual who knows he is insolvent to convert a part of his property which is not exempt into property which is exempt, for the purpose of claiming his exemptions therein, and of thereby placing it out of the reach of his creditors." *Forsberg v. Security State Bank*, 15 F.2d 499, 501 (8th Cir. 1926) quoting *Crawford v. Sternberg*, 220 F. 73 (8th Cir. 1915). In so doing the debtor "merely avails himself of a plain provision of [the exemption] enacted for the benefit of himself and his family." *Id.* "Nor can the use of property that is not exempt from execution to procure a homestead be held to be a fraud upon the creditors of an insolvent debtor, because that which the law expressly sanctions and permits cannot be a legal fraud." *Id.* "We do not think one should be penalized for merely doing what the law allows him to do." *Id.* To make out a case of fraudulent conveyance, "there must appear in evidence some facts or circumstances which are extrinsic to the mere facts of conversion of nonexempt assets into exempt and which are indicative of such fraudulent purpose." 15 F.2d at 502.

The facts of *Forsberg* are worth noting since they illustrate the point so nicely. In 1923, a South Dakota farmer on the eve of bankruptcy exchanged some of his cattle and hogs plus some cash for 21 sheep. He did this because the South Dakota homestead exemption statute permitted him to protect from creditors 2 horses, 2 cows, 5 hogs, and his farm machinery. Cows and hogs over these limits would be lost to creditors. However, the exemption statute also permitted him to protect up to 25 sheep. The farmer had no sheep. By exchanging his excess cattle and hogs for

21 sheep the farmer was able thereby to maximize the benefits and protections accorded to him by the homestead exemption statute. A creditor objected and sought to have the transaction set aside as a fraudulent conveyance. As noted, the farmer prevailed.

The holding of *Forsberg* - requiring creditors to make a showing of extrinsic evidence of fraud - has been followed by many other courts in myriad circumstances. See E.g., *In re Addison*, 540 F.3d 805 (8<sup>th</sup> Cir. 2008); *Ford v. Poston*, 773 F.2d 52 (4<sup>th</sup> Cir. 1985); *First Texas Savings Association v. Reed*, 700 F.2d 986 (5<sup>th</sup> Cir. 1983); *Marine Midland Bus. Loans, Inc. v. Carey*, 938 F.2d 1073 (10<sup>th</sup> Cir. 1991); and, *In re Jones*, 397 B.R. 765 (Bkrtcy. D.S.C. 2008).

A debtor's withdrawing funds from a non-exempt brokerage account and paying down his home mortgage and opening a Roth IRA is not fraudulent. *In re Addison*, 540 F.3d 805 (8<sup>th</sup> Cir. 2008). The court held that in the absence of extrinsic evidence of fraudulent intent the bankruptcy judge erred in denying discharge to the debtor.<sup>3</sup>

The debtors sold their non-exempt household furnishings at auction, using \$12,000 of the proceeds to open two IRA accounts. This was not a fraudulent transfer. *In re Koehler*, 2012 WL 719744 (Bkrtcy. E.D.N.C. 2012).

In another North Carolina bankruptcy case involving retirement plans the debtor sold his non-exempt truck and used the proceeds to pay off loans secured by his and his wife's retirement accounts. The court refused to find these transactions to be fraudulent, noting: "The effect of the transfers may have been to convert nonexempt assets to assets that would be exempt in

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<sup>3</sup> Bankruptcy cases are relevant here. Not only does the issue at hand most often arise in that context, under bankruptcy law a debtor may lose his exemption or be denied discharge if found to have transferred property with intent to hinder, delay, or defraud a creditor. 11 U.S. Code § 548(a)(1)(A) and § 727(a)(2)(A). This is substantively identical to the language of South Carolina's Statute of Elizabeth. S.C. Code § 27-23-10(A) ("intent or purpose to delay, hinder, or defraud creditors").

bankruptcy, but the amounts are not excessive and the transfers are consistent with the debtors' legitimate attempts to provide for their retirement." *In re Duncan*, No. S-06-00025-5-AP (Bkrcty. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrcty. E.D.N.C. Jun. 18, 2007) at page 6 of 8.

In contrast, cases disallowing debtors' efforts to benefit from exemption statutes involve extraordinary or unusual transactions. For example, in *Gilchinsky v. National Westminster Bank*, 732 A.2d 482 (N.J. 1999), the debtor withdrew funds from a New York profit-sharing account and transferred them to an IRA account she opened in New Jersey. Not only did the transfer involve all of the debtor's assets, the transfer also violated a temporary restraining order that had been entered by the New York Supreme Court prohibiting any transfer of the debtor's real or personal property in the State of New York. On these facts the New Jersey Supreme Court had no trouble finding the transfer fraudulent and depriving the debtor of the exemption the IRA account would otherwise have enjoyed under New Jersey law.

*In re Zouhar*, 10 B.R. 154 (Bankr. N.M. 1981) involved a similarly aggressive scheme. There the debtor borrowed money and secured the loan with non-exempt stock he owned. He used the proceeds to purchase an annuity contract, an exempt asset under New Mexico law. The debtor arranged for the annuity contract to require that its payments be made to the holder of the note secured by the debtor's stock. Had this been approved, the creditors would have been unable to reach the encumbered stock or the exempt annuity contract. And at the end of the day the stock would have come back to the debtor after the annuity contract paid off the note. In finding this transaction fraudulent the court aptly observed: "There is a principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered." 10. B.R. at 157, *quoting Dolese v.*

*United States of America*, 605 F.2d 1146, 1154 (10th Cir. 1979).

In *Ford v. Poston*, 773 F.2d 52 (4<sup>th</sup> Cir. 1985) a judgment debtor deeded to himself and his wife, as tenants by the entirety with rights of survivorship, certain real property that had been deeded to the debtor by his parents some six months prior. The debtor claimed that this was merely to correct a mistake made by his parents in their deed to him. Applying the extrinsic evidence of fraud rule discussed above, the Fourth Circuit held that the extrinsic fact that the supposedly corrective deed was recorded the day after entry of judgment was sufficient to warrant a finding of intent to defraud on the part of the debtor.

*Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871 (8<sup>th</sup> Cir. 1988) is another case worthy of the expression, "pigs get fat and hogs get slaughtered." As summarized by the court:

Indeed, this case presents a situation in which the debtor liquidated almost his entire net worth of \$700,000 and converted it to non-exempt property in seventeen transfers on the eve of bankruptcy while his creditors, to whom he owed close to \$19,000,000, would be left to divide the little that remained in his estate. Borrowing the phrase used by another court, Tveten "did not want a mere fresh start, he wanted a head start." *In re Zouhar*, *supra*, 10 B.R. at 156 (*emphasis in original*). His attempt to shield property worth approximately \$700,000 goes well beyond the purpose for which exemptions are permitted.

848 F.2d at 876.

The case before this court presents none of the aggressive or excessive features of the fraudulent transfers described above. None of the subject transactions - in this case Mr. Lindgren's retirement contributions - was made in response to or in anticipation of Plaintiff's judgment. To the contrary, as the undisputed evidence makes plain, Mr. Lindgren's regular, annual contributions to retirement accounts remained unchanged. Also, the challenged transactions did not involve all or substantially all of the debtor's net worth; Mr. Lindgren's

retirement contributions were no less and no more than permitted by applicable law. The retirement contributions were "not excessive," rather they were "consistent with the debtor's legitimate attempts to provide for [his] retirement." *In re Duncan, supra*.

Plaintiff cites *Baker v. Dorfman*, 2000 WL 1010285 (S.D. N.Y. 2000), *aff'd on other grounds*, 232 F.3d 121 (2d Cir. 2000), as a case Plaintiff describes as "holding plaintiff entitled to have the balance of defendant's IRA turned over to satisfy the judgment where all deposits to the IRA were made after complaint was filed against defendant." [Pl. Mem. at 6] Plaintiff's description is incomplete and misleading. As pointed out in the ALR article cited by Plaintiff, the result in *Baker v. Dorfman* was required under a New York statute that "exempts individual retirement accounts (IRAs) from application to the satisfaction of a judgment except where additions to such accounts are made after the date that is 90 days before the interposition of the claim on which such judgment was entered." *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487, at page 13. There is no such statute in South Carolina. And *Baker v. Dorman* provides no support for the extreme position Plaintiff takes in this case: that any retirement contribution made post-judgment is necessarily fraudulent.

Plaintiff's suggestion that it need not prove fraudulent intent in this case is unsupported and without merit. Statute of Elizabeth jurisprudence is not applicable to Mr. Lindgren's IRA contributions. The Homestead exemption statute explicitly provides that the "interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law." S.C. Code § 15-41-30(A)(13). Federal bankruptcy law at 11 U.S. Code § 522(d) provides that the "following property may be exempted under subsection (b)(2) of this section: ... (12) Retirement funds to the extent that those

funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.”<sup>4</sup> The exemption provided is subject to limitations, as where the debtor makes a transfer “with actual intent to hinder, delay, or defraud” a creditor. 11 U.S. Code § 548(a)(1)(A). The exemption for retirement funds is also subject to a monetary limit provided for in 11 U.S. Code § 522(n).<sup>5</sup>

In 2012, §15-41-30(A)(13) was amended to delete “, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” at the end of the first sentence, and added the last two sentences, including the specific reference to federal bankruptcy law as a limitation on the exemption provided for retirement plans.<sup>6</sup> Adding the reference to federal bankruptcy law to the exemption statute not only substituted a specific monetary limit instead of a need-based test for exempting IRA accounts on a case-by-case basis, it also effectively incorporated by reference the federal substantive standard for evaluating fraudulent transfer claims in the context of retirement plan contributions.<sup>7</sup> Under the amended statute individual retirement accounts are exempt except to the extent they are inflated as a result of contributions

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<sup>4</sup> Sections 408 and 408A provide for traditional IRAs and Roth IRAs, respectively.

<sup>5</sup> As of April 1, 2013, debtors could protect IRA account balances up to \$1,245,475.00. This number is indicative of the strong public policy in favor of protecting debtors’ retirement assets.

<sup>6</sup> 2012 Act No. 153, § 1, eff May 14, 2012, was enacted “so as to delete the provision that the exemption only applies to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and to provide that the interest of an individual is exempt from creditor process in certain circumstances.”

<sup>7</sup> The Statute of Elizabeth by its terms applies only to interests in lands and came into being centuries before such things as individual retirement accounts were ever conceived. Modernizing the law with respect to allegedly fraudulent transfers into IRAs would be a legitimate objective of the General Assembly.

made "with actual intent to hinder, delay, or defraud." And as discussed above, courts applying this standard require extrinsic evidence of fraud beyond the mere fact of the transfer itself before finding a debtor intended to defraud a creditor.

In any case, Statute of Elizabeth jurisprudence, properly understood, is not inconsistent with the substantive standard applied in bankruptcy cases and also requires proof of fraudulent intent in the circumstances of this case. Plaintiff argues proof of fraud is not necessary and cites for this proposition, *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139 (1932). That case, however, involved what the court treated as a gift, a conveyance of lands from a husband to wife without consideration, and the holding was unremarkable. As explained in more recent cases, a transfer may be found fraudulent under two conditions: first, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud, and, second, where a transfer is made without actual intent to defraud but without valuable consideration. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). In this case Mr. Lindgren did not, in the words quoted by Plaintiff, "give his property away." To the contrary, he received valuable consideration: an income tax deduction for the amounts contributed; tax-free treatment of all future earnings within the account; and, the right to have the funds repaid to him, with earnings, at a later date, and be taxed at a potentially lower marginal rate. See *In re Dunbar*, 313 B.R. 430, 436 (Bankr.C.D.Ill.2004) (increased value of retirement account following loan repayment constituted debtor's receipt of reasonably equivalent value). Plaintiff must prove fraudulent intent on Mr. Lindgren's part and in doing so must meet a clear and convincing evidentiary standard. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012) ("A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute

of Elizabeth.”)

Plaintiff emphasizes the voluntary nature of Mr. Lindgren’s contributions to his retirement accounts. This is not disputed. Of course, Mr. Lindgren voluntarily engaged in the challenged transactions. When he contributed to his retirement plans Mr. Lindgren did exactly what the law expressly permits, indeed encourages, him to do. The favorable treatment accorded to contributions to qualifying retirement plans under state and federal tax laws<sup>8</sup> make plain the public policy of our State and Nation to encourage retirement savings. Further, it is the public policy of this State, as expressed through its Homestead exemptions, to protect from creditors a portion of the debtor’s property so as to prevent citizens from becoming dependent upon the State for support. *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct.App. 2002) citing *Scholtec v. Estate of Reeves*, 327 S.C. 551, 560, 490 S.E.2d 603, 607 (Ct.App.1997). South Carolina’s Homestead statute explicitly exempts from creditors’ claims the very retirement plans to which federal and state tax laws encourage all citizens to contribute.<sup>9</sup> There are situations in which a debtor could seek to abuse or take advantage of the system - some examples have been provided above - and in such cases a creditor should obtain relief. But here Mr. Lindgren has done no more and no less than the law permits and encourages him to do. Equally pertinent here is the observation made by the court in dealing with the South Dakota farmer in 1923: “We do not think one should be penalized for merely doing what the law allows him to do.” *Forsberg v.*

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<sup>8</sup> It is common knowledge and the court may take judicial notice that contributions to IRA and 401(k) accounts are made with pre-tax dollars, that plan earnings are not taxed as such and no income taxes are paid until funds are withdrawn. Contributions to a Roth IRA are made with after-tax dollars but withdrawals are tax-free.

<sup>9</sup> A reading of the exemption statute that says, in effect: South Carolina residents can protect over a million dollars in an IRA once they get there, but if they have creditors they cannot put any money into the account to try to build such a nest egg, obviously makes no sense.

*Security State Bank*, 15 F.2d 499, 501 (8th Cir.1926). That the challenged contributions were made by Mr. Lindgren after the entry of judgments against him is, without more, of no consequence. As one court aptly observed:

If conversion of nonexempt into exempt assets should not itself result in denial of discharge, should it do so when it occurs shortly after the debtor has been sued or incurred a large debt, or is insolvent, or is about to file bankruptcy? If that were the rule, it would mean that prospective debtors could engage in exemption planning only up until the point where it appeared they might need to do so.

*In re Crater*, 286 B.R. 756, 765 (Bankr. D. Ariz. 2002).

If Plaintiff's argument in this case were to be accepted it would mean that judgment debtors, even individuals who had merely been sued or threatened with suit, could no longer engage in reasonable, prudent retirement planning. Plaintiff has offered no authority in support of such an extreme position.

Plaintiff has failed to meet its burden of coming forth with extrinsic evidence to make a clear and convincing case of fraudulent intent on the part of Mr. Lindgren and its motion should be denied with respect to the IRA and Roth IRA accounts.

#### THE 401(K) PLAN

The 401(k) Plan established by Mr. Lindgren's employer is a qualified ERISA retirement plan. [Lindgren Aff. ¶ 3]<sup>10</sup> As such, it is exempt from creditors' claims under federal law. 11 U.S. Code §§ 522(b)(3)(A) and 522(d)(12); *See Patterson v. Shumate*, 504 U.S. 753, 119 L.Ed.2d 519, 112 S.Ct. 2242 (1992). It is also exempt under South Carolina's Homestead exemption statute:

The following real and personal property of a debtor domiciled in

---

<sup>10</sup> Once the IRS issues the determination letter attached as an exhibit to Lindgren's affidavit the funds in the account are presumed to be exempt. 11 U.S. Code §§ 522(b)(4)(A).

this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:  
... The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.

S.C. Code § 15-41-30(A)(14).

Importantly, unlike §15-41-30(A)(13) (dealing with individual retirement accounts), the above-quoted code section exempting ERISA plans has no fraudulent transfer qualification or limitation. A 401(k) Plan is different from an IRA. Contributions to a 401(k) Plan are made by the taxpayer's employer rather than by the taxpayer himself. The employer withholds wages and pays these funds directly to the Plan. The employee never has possession of the funds until they are withdrawn from the Plan. Wages are not subject to garnishment in South Carolina. The 401(k) Plan contributions - consisting of the employee's withheld wages - are exempt from levy or execution while in the hands of the employer and remain so after payment to the Plan. When an employer pays to the 401(k) Plan wages withheld from its employee, there is no conversion of non-exempt cash to exempt retirement plan assets.

The undersigned has been unable to find any cases involving a creditor's challenge to 401(k) Plan employer contributions. There are cases, however, dealing with debtors' repayment of loans taken from 401(k) Plans. See *In re Hoetmer*, 2012 WL 4482387 (Bkrtcy.S.D.Ind., Slip Copy, Sept. 26, 2012) and *In re Dunbar*, 313 B.R. 430, 436 (Bankr.C.D.Ill.2004). The loan repayment was set aside in *Hoetmer* but not in *Dunbar*. The former case involved actual fraud; the latter constructive fraud. But in any event these cases are distinguishable and not relevant here because the money at issue in those cases was transferred from the debtors' own bank accounts to the 401(k) Plan. *Hoetmer* and *Dunbar* did not involve what we have here: payroll withholdings paid directly by Mr. Lindgren's employer to the 401(k) Plan.

In the circumstances of this case there has been no conversion of non-exempt cash to exempt retirement plan assets and therefore no basis for finding any cognizable legal injury to Plaintiff or for finding any fraudulent transfer. In the absence of a transfer by Mr. Lindgren there can be no basis for application of the Statute of Elizabeth or the substantive fraudulent transfer jurisprudence of federal bankruptcy law, discussed above in respect to IRAs.

Even if the 401(k) Plan contributions are subjected to fraudulent transfer scrutiny, they pass muster. Plaintiff must prove intent to defraud as a matter of state law (because valuable consideration was received in the form of similar tax deferral and other benefits as with IRAs) or federal law (based on the authorities discussed extensively above). As was the case with the IRAs, Plaintiff has failed to show any extrinsic evidence of fraud. The mere fact that Mr. Lindgren's employer continued to make 401(k) Plan contributions - as it had done virtually without interruption since 1992 - is not evidence of fraudulent intent. To the contrary, based on the record herein Mr. Lindgren did not change his behavior in any way post-judgment; he simply continued a pattern of reasonable, prudent retirement planning. There is simply no evidentiary basis, much less one sufficient to meet a clear and convincing standard, to support a finding that the 401(k) Plan contributions were made "with intent to hinder, delay, or defraud a creditor."

#### 529 PLAN CONTRIBUTIONS

A 529 Plan is a tax-advantaged investment account vehicle designed to encourage savings for college education. Mr. Lindgren has such a plan. At this time there is \$13.18 in the account.<sup>11</sup>

In 2012, Mr. Lindgren paid \$22,000.00 into the account. Plaintiff seeks an order directing the financial institution holding the account, Fidelity Investments, to pay this sum to Plaintiff.

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<sup>11</sup> The figure provided is the balance as of June 30, 2014. No additional funds have been paid into the account. The figure provided may be off by a few pennies in accrued interest.

However, the \$22,000.00 is no longer in the account. In 2012, Fidelity paid \$17,236.33 to the University of Colorado. Also in that year, \$5,020.00 was withdrawn and used to pay qualified housing expenses for Mr. Lindgren's daughter. [Lindgren Aff. ¶ 11] Again, the money is no longer there and Fidelity, who is not named as a party herein, could reasonably be expected to resist being ordered to send \$22,000.00 to Plaintiff.

On the merits, it is unclear whether 529 Plan assets are exempt from creditor claims. No specific provision of South Carolina's Homestead exemption statute seems applicable. However, a statute dealing with the South Carolina College Investment Program provides:

The SCCIP trust fund, contributions to the SCCIP trust fund, and the right of a person to a refund of contributions or any other right accrued or accruing to any person under the provisions of this chapter are exempt from attachment, garnishment, levy, and sale under any means or final process issued by any court or bankruptcy proceeding and are unassignable except as specifically otherwise provided in this chapter.

S.C. Code § 59-2-140.

Whether strictly speaking this statute applies to the 529 Account at issue here is not clear. However, it is clear that the public policy of this State favors protecting educational savings accounts from creditors' claims. In any case, the payments made into and out of the 529 Plan were all in the ordinary course of Mr. Lindgren's educating his youngest daughter. There is no evidence that these transactions were fraudulent in any way. Had the \$22,000.00 been paid directly to University of Colorado would Plaintiff be seeking to avoid the transfer for want of consideration and to recover the money from the university?

## CONCLUSION

The point bears emphasis that the only evidence before the court is to the effect that Mr. Lindgren repeatedly made regular, annual contributions to various retirement plans over a period of decades, and that this practice continued after Plaintiff obtained its judgments against Mr. Lindgren. Plaintiff offers no evidence of fraudulent intent beyond the mere fact of the contributions themselves. Case after case has rejected Plaintiff's approach. Courts universally recognize that debtors may plan and manage their financial affairs to maximize their ability to benefit from homestead and other exemptions. When a debtor goes too far courts grant relief to creditors. That is simply not the case here. If Plaintiff prevails on the facts of this case, it means that no judgment debtor could reasonably plan and prepare for retirement or the future security of his family. Such an outcome flies in the face of the public policy underlying the Homestead exemptions and incentives established to promote retirement savings, all of which are intended to prevent debtors from becoming dependent upon the state for support. Plaintiff's argument for a *per se* rule that post-judgment retirement plan contributions are *ipso facto* fraudulent must be rejected.



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January 19, 2015  
Charleston, SC

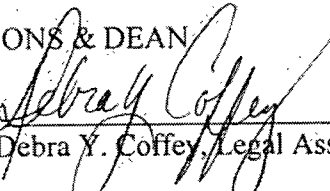
**CERTIFICATE OF SERVICE**

I, Debra Y. Coffey, a legal assistant with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Amended Memorandum of J. Christopher Lindgren in Opposition to Plaintiff's Motion to Set Aside and Execute upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

Joey R. Floyd, Esquire  
BRUNER, POWELL, WALL & MULLINS, LLC  
P.O. Box 61110  
1735 St. Julian Place, Suite 200 (29204)  
Columbia, SC 29260-1110

This 19 day of January, 2015.

SIMONS & DEAN

BY: 

Debra Y. Coffey, Legal Assistant

2015 JAN 22 PM 3:15  
U.S. COURT  
CLERK  
COLUMBIA, S.C.

1 STATE OF SOUTH CAROLINA  
2 COURT OF COMMON PLEAS  
3 BEAUFORT COUNTY  
4 FIRST CITIZENS BANK AND TRUST COMPANY, INC.,  
5 Petitioner(s),  
6 vs. Case No.: 2011-CP-07-128  
7 BLUE OX, LLC AND J. CHRIS LINDGREN,  
8 Respondent(s).  
9 SUPPLEMENTARY PROCEEDINGS  
10 RULE TO SHOW CAUSE  
11  
12 DATE: SEPTEMBER 2, 2014  
13 TIME: 9:30 a.m.  
14 LOCATION: Beaufort County Courthouse  
15 102 Ribaut Road, Room 212  
16 Beaufort, South Carolina  
17 BEFORE: Judge Marvin H. Dukes, III  
18 REPORTED BY: JEFFREY M. THOMAS  
19 Registered Professional Reporter  
20 -----  
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14

15

16 (INDEX AT REAR OF TRANSCRIPT)

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1 (Judge Dukes administered the oath to  
2 J. Chris Lindgren.)

3 JUDGE DUKES: All right. Do you have  
4 any questions before we begin?

5 THE WITNESS: No.

6 JUDGE DUKES: All right. Please  
7 answer any questions Plaintiff's attorney may have.

8 MR. FLOYD: May it please the court,  
9 Your Honor.

10 JUDGE DUKES: Yes, sir.

11 WHEREUPON:

12 CHRIS LINDGREN, being duly sworn and  
13 cautioned to speak the truth, the whole truth and  
14 nothing but the truth, testifies as follows:

15 DIRECT EXAMINATION

16 BY MR. FLOYD:

17 Q. Mr. Lindgren, we met just a few moments  
18 ago. As you know, I represent First Citizens Bank  
19 as we go through this process. Have you ever done  
20 supplemental proceedings before?

21 A. I've done one.

22 Q. Have you?

23 A. Yes.

24 Q. Have you had your deposition taken?

25 A. Ever?

1 Q. Sure.

2 A. Yes.

3 Q. Have you had your deposition taken by a  
4 creditor?

5 A. No.

6 Q. Has Ron Anderson's lawyer tried to take  
7 your deposition?

8 A. Yes.

9 Q. Did he end up taking your deposition?

10 A. Yes.

11 Q. And where did they take your deposition?

12 A. Hilton Head.

13 Q. Who has it? Do you have a copy of that  
14 transcript?

15 A. I believe I do.

16 Q. Is it in your possession or is it in your  
17 lawyer's possession or --

18 A. If I don't have it, my lawyer has it.

19 Q. Okay. Can you get a copy of it for me?

20 A. Sure.

21 Q. And was that deposition taken maybe in  
22 January of this year?

23 A. It was this year. I'm not sure exactly  
24 when.

25 Q. On that same note, have you settled up

1 with Ronald Anderson?

2 A. No.

3 Q. Is Mr. Anderson a former partner of yours?

4 A. No.

5 Q. He is merely a creditor?

6 A. He is now. He was an investor.

7 Q. What was he an investor in?

8 A. Red Rocks, LLC.

9 Q. And I have noticed that it appears that  
10 you have a number of LLCs here in South Carolina.

11 A. Yes.

12 Q. What was his role as an investor in Red  
13 Rocks? What did he do?

14 A. He was an investor.

15 Q. Did he just dump some money in Red Rocks?  
16 Is that what he did?

17 A. He didn't dump it. He loaned it.

18 Q. Loaned money to Red Rocks?

19 A. Uh-huh.

20 Q. Was there a security agreement of some  
21 sort?

22 A. No.

23 Q. Just an unsecured loan?

24 A. Yes.

25 Q. How much did he loan?

1           A.    Over the course of seven years about  
2   14 million.

3           Q.    How did you know Ron Anderson?

4           A.    A neighbor.   Friend.

5           Q.    Does he live in your neighborhood?

6           A.    He did.

7           Q.    Where does he live now?

8           A.    To the best of my knowledge, Florida.

9           Q.    Okay.   That answers a few of my questions  
10   that I had.   As you know, this is supplemental  
11   proceedings.   And this is First Citizens Bank's  
12   opportunity to try and find assets that may be  
13   subject to execution.   On that note, can you tell me  
14   what sort of vehicle you drove here in today?

15          A.    A BMW.

16          Q.    Whose BMW is that?

17          A.    It's owned by my wife, I believe.

18          Q.    And your wife doesn't have any employment,  
19   does she?

20          A.    She's self-employed.

21          Q.    Who is she employed by?

22          A.    Herself.

23          Q.    Okay.   What does she do?

24          A.    She's a consultant for skin care products.

25          Q.    Is that Rodan + Fields?

1 A. Yes.

2 Q. And what is her annual income, do you  
3 know?

4 A. It varies. I think the tax return, you  
5 have it, is 18,000.

6 Q. And what sort of BMW is it that she drives  
7 -- that you are driving?

8 A. It's a 2007, 750.

9 Q. It was purchased new, right?

10 A. Yes.

11 Q. And was cash paid for that?

12 A. No.

13 Q. Was it financed?

14 A. No.

15 Q. All right. How was it -- if it wasn't  
16 paid for with cash and it wasn't financed, how was  
17 it paid for?

18 A. A trade-in.

19 Q. Trade-in. What did you trade? What was  
20 traded to get that?

21 A. A Maserati.

22 Q. Whose Maserati was traded?

23 A. I believe it was owned by Rockmore, Inc.

24 Q. And you are the hundred percent owner of  
25 Rockmore, Inc., right?

1 A. Yes.

2 Q. Where did you buy the BMW from or where  
3 was it obtained?

4 A. It was a dealership in Atlanta.

5 Q. The Atlanta BMW dealership?

6 A. There are several. I'm not sure which  
7 one, what the name of it was.

8 Q. Do you have the documents relating to  
9 purchase of the BMW and the trade-in?

10 A. I'm not sure. I can find out, but that  
11 was, again, eight years ago.

12 Q. All right. What other vehicles do you  
13 own?

14 A. None.

15 Q. Does your wife own any other vehicles?

16 A. Yes.

17 Q. What else does your wife own?

18 A. She owns a 2002 Yukon and a 2007 Range  
19 Rover.

20 Q. Any other vehicles?

21 A. I'm not sure. She might also own our  
22 daughter's car.

23 Q. What does the daughter drive?

24 A. She drives a -- I'm not very good with  
25 cars. I think it's an Acura something. It's an SUV

1 about three or four years old.

2 Q. Are there any vehicles titled in your  
3 name?

4 A. No.

5 Q. Have you moved any vehicles out of your  
6 name in the past four years?

7 A. I would have to check. I'm not sure.

8 Q. Have you or your wife sold any vehicles in  
9 the past four years?

10 A. Not that I recall.

11 Q. You have a son and a daughter, right?

12 A. I have two daughters and a son.

13 Q. Two daughters and a son? Okay. Do your  
14 other children drive vehicles?

15 A. They do.

16 Q. That are owned by you or your wife?

17 A. I don't believe so. I believe they both  
18 own their own.

19 Q. Can you tell me your children's names?

20 A. My oldest daughter is Jennifer.

21 Q. Middle name?

22 A. Michelle.

23 Q. Lindgren?

24 A. Right.

25 Q. All right. Middle child?

- 1 A. John Christopher Lindgren.
- 2 Q. He has the same name as you, right?
- 3 A. Yes.
- 4 Q. Is he a Junior?
- 5 A. We've never put Junior on his name so -- I
- 6 mean no.
- 7 Q. Same name?
- 8 A. Same name, yeah.
- 9 Q. All right. And your youngest daughter?
- 10 A. Jessica Mazo Lindgren.
- 11 Q. Is your wife's maiden name M-a-z-o?
- 12 A. Uh-huh.
- 13 Q. Mazo?
- 14 A. Yes. Sorry.
- 15 Q. Tell me their ages, if you will.
- 16 A. Jennifer is 27. The boy is 24. And
- 17 Jessica is 21.
- 18 Q. All right. So your youngest daughter
- 19 Jessica, is she still in school?
- 20 A. Yes.
- 21 Q. And where does she go to school?
- 22 A. University of Colorado.
- 23 Q. Does she have student loans?
- 24 A. She does.
- 25 Q. Did you pay for any of her college?

- 1 A. Yes.
- 2 Q. How did you pay for her college?
- 3 A. From salaries.
- 4 Q. From salaries?
- 5 A. Yes.
- 6 Q. What bank account would you have used to
- 7 pay that tuition?
- 8 A. I believe it would be Coastal States.
- 9 Q. When was the last time you paid tuition?
- 10 A. It was probably -- I don't recall exactly.
- 11 I think maybe January of 2014.
- 12 Q. How much did you write a check for at
- 13 Coastal States Bank?
- 14 A. I'm not sure.
- 15 Q. Was it in the range of \$40,000?
- 16 A. No.
- 17 Q. Less than that?
- 18 A. Yes.
- 19 Q. More than 20?
- 20 A. I don't recall.
- 21 Q. Okay. Do you have records from Coastal
- 22 States Bank that would tell me how much you paid in
- 23 tuition there?
- 24 A. Yes. And, again, if it came out of that
- 25 account.

1 Q. Would you have had another account that  
2 you --

3 A. Well, there is also money left by my  
4 mother's estate that has paid most of her college  
5 education.

6 Q. And where is that money?

7 A. Well, there is none left, but it was in a  
8 IRA BDA.

9 Q. One more time?

10 A. IRA BDA.

11 Q. IRA, I-R-A?

12 A. BDA.

13 Q. What is that?

14 A. IRA BDA.

15 Q. Does it stand for something?

16 A. It's a beneficiary IRA.

17 Q. Okay.

18 MR. SCHEIDER: Beneficiary designated  
19 account, is it not?

20 THE WITNESS: Yes.

21 BY MR. FLOYD:

22 Q. And has that all been used up?

23 A. Yes.

24 Q. Where was that account held?

25 A. I believe it was TIAACREF.

1 Q. In Charlotte?

2 A. I have no idea. Massachusetts, maybe.

3 Q. Does TIA --

4 A. I'm not sure at all.

5 Q. I'm sorry. I didn't mean to chop you off.

6 Does TIAACREF have -- and I think you spell that

7 T-I-A-A-C-R-E-F; is that right?

8 A. That's right. That is how they spell it.

9 Q. All right. Do you have any other accounts  
10 at TIAACREF?

11 A. No.

12 Q. Whether they be IRAs, pension plans,  
13 profit sharing?

14 A. No.

15 Q. Did you have some earlier this year?

16 A. Yeah.

17 Q. Do you remember completing a financial  
18 statement for First Citizens?

19 A. Yes.

20 Q. And do you remember completing this in  
21 March of 2014?

22 A. Yes.

23 Q. And do you recall putting in \$595,000?

24 A. I don't recall the number, but I do recall  
25 595 or I do recall putting down a pension plan.

1 Q. Right there?

2 A. Yes.

3 Q. Do you have a pension plan there?

4 A. No.

5 Q. Okay. Where is the pension plan?

6 A. At The Hartford. It's a -- to be clear,  
7 it's a profit sharing plan.

8 Q. And where is the profit sharing plan  
9 coming from?

10 A. What do you mean coming from?

11 MR. SCHEIDER: The sponsoring entity.

12 THE WITNESS: Oh. Rockmore, Inc.

13 MR. SCHEIDER: My apologies, Your  
14 Honor.

15 JUDGE DUKES: That's fine with me.

16 MR. FLOYD: That is helpful. I  
17 appreciate it.

18 BY MR. FLOYD:

19 Q. When did Rockmore, Inc., fund the pension,  
20 profit sharing plan?

21 A. It's a 401-K.

22 Q. All right. Does it fund it every year?

23 A. It's a 401-K. It's funded through  
24 employee deferrals.

25 Q. And it funds every year?

1 A. It funds through payroll deferrals.

2 Q. Are you still on Rockmore's salary?

3 A. No.

4 Q. Okay. When was the last time money was  
5 put in there?

6 A. Probably December 2013.

7 Q. Do you know how much you've put in there  
8 every year? Do you have statements?

9 A. I can get on-line statements, yes.

10 Q. You can?

11 A. I don't have paper statements, but I can  
12 get them.

13 Q. What is the maximum amount that you can  
14 put in every year through Rockmore?

15 A. It's a 401-K. 23,000.

16 Q. \$23,000?

17 A. Yeah. That is with the 55-year-old  
18 catch-up provision.

19 Q. I will admit that I am outgunned in taxes  
20 when it comes to you. So I'm sorry that I'm asking  
21 some of these questions that may frustrate you.

22 A. That's all right.

23 Q. I don't mean to frustrate you. And has it  
24 contributed -- has Rockmore, Inc., contributed  
25 \$23,000?

1 A. No.

2 Q. How much has it contributed over the past  
3 couple years?

4 A. Nothing.

5 Q. Okay. But you just said it contributed  
6 some money in December of --

7 A. I contributed.

8 Q. You contribute personally?

9 A. Right.

10 Q. Through the --

11 A. It's a 401-K.

12 Q. Through the --

13 A. Payroll deferral.

14 Q. -- payroll deferral?

15 A. Right.

16 Q. Okay. Have you maxed out every year --

17 A. No.

18 Q. -- through that? All right. Do you have  
19 an idea of how much you put in there in 2013?

20 A. 23,000.

21 Q. All right. How much did you put in in  
22 2012?

23 A. I would have to check.

24 Q. Do you think it was the maximum amount?

25 A. I'm not sure. It would be approximated,

1 but I'm not sure.

2 Q. You would have been over 55 in 2012?

3 A. Yes.

4 Q. So you would have had the ability to put  
5 in?

6 A. The ability, yes.

7 Q. Were you over 55 in 2011?

8 A. I turned 55 in 2011.

9 Q. Would that mean that you would have the  
10 ability to contribute the maximum amount --

11 A. Yes.

12 Q. -- in that year since you turned 55?

13 A. Yes.

14 Q. Do you think you contributed the maximum  
15 amount that year?

16 A. I would have to check.

17 Q. And this is with The Hartford?

18 A. The plan is sponsored by The Hartford or  
19 the plan is at The Hartford, sponsored by Rockmore,  
20 Inc.

21 Q. All right. Have you had any other forms  
22 of savings for retirement besides this 401-K?

23 A. I have an IRA.

24 Q. Where is the IRA?

25 A. It is at Fidelity.

1 Q. Do you know what sort of IRA it is?

2 A. Yes.

3 Q. Can you tell me?

4 A. It's an IRA.

5 Q. It's a 408-K, is it?

6 A. It's just a -- it's just sort of a  
7 straight IRA. It's not a Roth IRA.

8 Q. And how much money is in that IRA account?

9 A. That is a component of the number you just  
10 showed me. And I'm going to guess it's in the  
11 25,000 range.

12 Q. Do you have statements from Fidelity?

13 A. I do not, but I can get them.

14 Q. That is my question. Can you get  
15 statements from Fidelity?

16 A. I can.

17 Q. When was the last time you would have  
18 contributed money to Fidelity?

19 A. It would have been around April 15th of  
20 2014.

21 Q. April 15th of 2014?

22 A. Uh-huh.

23 Q. How much did you contribute then?

24 A. I would have to check. I'm not sure.

25 Q. What is the maximum amount that you can

1 put in in April?

2 A. 6,500.

3 Q. Is that Fidelity IRA -- is it just one IRA  
4 that you have with Fidelity?

5 A. Yes.

6 Q. Does your wife also have a separate IRA?

7 A. She does.

8 Q. And was -- did she fund her IRA as well in  
9 April of this year?

10 A. I would have to check.

11 Q. Okay. All right. So you think roughly  
12 you would have, if I do the math, \$595,000. And if  
13 I subtracted 25, that would put it at about \$570,000  
14 in The Hartford plan. Does that sound right?

15 A. It's less than that.

16 Q. Okay. Was there another component besides  
17 those two components?

18 A. No.

19 Q. Okay. Why is it less than that?

20 A. I took a distribution.

21 Q. When did you take a distribution?

22 A. I would have to check. Sometime since  
23 March. I'm not sure. A few months ago.

24 Q. How much is there?

25 A. I beg your pardon?

1 Q. How much is there now?

2 A. Where?

3 Q. In The Hartford plan.

4 A. I believe -- I'm not sure. I would have

5 to check. I haven't checked for awhile. I would

6 say in the 300,000 range.

7 Q. All right. Do you have any other IRAs?

8 A. No.

9 Q. Do you have any other --

10 A. Pardon me. I do have a Roth IRA.

11 Q. How much do you have in the Roth IRA?

12 A. I think it's like 3,000.

13 Q. Do you know when you deposited that money

14 in the Roth?

15 A. I would have to check.

16 Q. Would it have been in 2013?

17 A. I'm not sure. Well, it might have been --

18 I think it was with respect to 2013. I'm not sure.

19 Q. Would that mean that you were putting

20 money in in 2014?

21 A. I would have to check.

22 Q. Okay. But the most you think is there is

23 \$3,000?

24 A. Right.

25 Q. Where is that Roth IRA?

1           A.    At Fidelity.

2           Q.    And you can get me statements of those as

3   well?

4           A.    Sure.

5           Q.    All right. Have you contributed any money

6   to any college savings plan?

7           A.    Yes.

8           Q.    Have you done it in the past three years?

9           A.    I would have to check.

10          Q.    Where would your college savings plan be?

11          A.    They were with -- I'm not sure. I would

12   have to check.

13          Q.    Was it with a company out of New Jersey?

14          A.    It might be.

15          Q.    Who did you use to handle your college

16   savings plans?

17          A.    Nobody.

18          Q.    You did it yourself?

19          A.    Yes.

20          Q.    How about the Unique College Savings Plan?

21   Have you ever heard of that?

22          A.    That sounds right.

23          Q.    Is that yours that you created?

24          A.    I remember the name Unique College Savings

25   Plan, but I'm not sure who handled it or what

1 vehicle that was invested through.

2 Q. Did you create any vehicles for savings  
3 and investing -- investments?

4 A. Yes.

5 Q. What sort of vehicles did you create?

6 A. Well, I've formed 38 LLCs.

7 Q. What college savings plans is what I'm  
8 talking about. I'm sorry.

9 A. That's all right. No.

10 Q. Was the Unique College Savings Plan  
11 something that you merely invested money in?

12 A. Yes.

13 Q. Was it an entity that you created?

14 A. No.

15 Q. Where are your wife's -- where is your  
16 wife's family from?

17 A. Savannah, Georgia.

18 Q. All right. Do you have any other IRAs,  
19 401-Ks, besides the three that we've talked about?

20 A. No.

21 Q. Do you have any other pension plans or any  
22 or vested retirement accounts?

23 A. No.

24 Q. What other banks do you currently bank  
25 with?

1           A.    The only bank I bank with is Coastal  
2   States.

3           Q.    Do you bank with any foreign financial  
4   institutions?

5           A.    No.

6           Q.    Have you ever banked with any foreign  
7   financial institutions?

8           A.    Personally?

9           Q.    Or through your businesses.

10          A.    Yes.

11          Q.    What banks have you invested with with  
12   foreign financial institutions?

13          A.    I would have to check, but I believe  
14   Chase.

15          Q.    And where did you bank with Chase?

16          A.    In the Virgin Islands. It wasn't me. It  
17   was through an entity.

18          Q.    Which entity was that?

19          A.    John V. Brose, Inc., Foreign Sales  
20   Corporation.

21          Q.    An exporting company, right?

22          A.    That was not an exporting company. It's a  
23   foreign sales corporation.

24          Q.    Foreign sales. Is there still a bank in  
25   the Virgin Islands?

1           A.    There are lots of banks in the Virgin  
2 Islands.

3           Q.    That you banked with. I'm sorry.  
4 Terrible question. I apologize.

5                   MR. SCHEIDER: No.

6                   THE WITNESS: No. And, again, I've  
7 never banked personally, but through the entity I  
8 did.

9 BY MR. FLOYD:

10          Q.    Does the entity still have an account?

11          A.    No.

12          Q.    Any other offshore bank accounts? You  
13 understand when I mean when I say an offshore bank  
14 account?

15          A.    Yes. No.

16          Q.    Do you own any real property outside the  
17 United States?

18          A.    No.

19          Q.    Have you ever owned any property outside  
20 the United States?

21          A.    Property?

22          Q.    Uh-huh.

23          A.    Yes.

24          Q.    What have you owned outside the United  
25 States?

1           A.    Bank accounts through entities.

2           Q.    All right.  And would that have all been

3 through Chase?

4           A.    I would have to check.

5           Q.    Have you ever owned any real property, any

6 land, outside the United States?

7           A.    No.

8           Q.    Do you or any entities in which you own an

9 interest in currently have any bank accounts outside

10 of the United States?

11          A.    No.

12          Q.    Do you have any cash at your house?

13          A.    Yes.

14          Q.    How much cash do you have at your house?

15          A.    Probably about 30 bucks.  A jar of coins.

16          Q.    Okay.  You don't keep any cash on hand in

17 a safe or anything like that?

18          A.    No.

19          Q.    All right.  Do you have any securities,

20 stocks?

21          A.    Personally?

22          Q.    Uh-huh.

23          A.    No.

24          Q.    All right.  Do any entities that you own

25 own any stock?

- 1 A. Yes.
- 2 Q. Which one are those?
- 3 A. Which stocks do they own?
- 4 Q. Which entity owns stocks?
- 5 A. Rockmore, Inc., owns stock.
- 6 Q. What does Rockmore, Inc., own?
- 7 A. Stock in?
- 8 Q. Uh-huh.
- 9 A. Coastal States Bank.
- 10 Q. How much Coastal States Bank do they own?
- 11 A. I think it's 10,000 shares.
- 12 Q. What is the current stock value of Coastal
- 13 States Bank?
- 14 A. I'm not sure.
- 15 Q. You are the single shareholder of
- 16 Rockmore; is that right?
- 17 A. That's correct.
- 18 Q. What does Rockmore, Inc., do? What is its
- 19 purpose?
- 20 A. It's a management company.
- 21 Q. All right. What does it manage?
- 22 A. Payroll, operations.
- 23 Q. How many employees does Rockmore, Inc.,
- 24 have?
- 25 A. One.

1 Q. Who is that?

2 A. Dee Heaton.

3 Q. Dee?

4 A. Heaton.

5 Q. Heaton. Where is he located?

6 A. She is located in Hilton Head.

7 Q. Where is Rockmore, Inc.'s, office?

8 A. When you say "office" you mean operations?

9 Q. All of the above. Does it have a  
10 brick-and-mortar type office?

11 A. Yes.

12 Q. Where is that?

13 A. 5 Dunmore Court.

14 Q. Is that someone's house?

15 A. No.

16 Q. Is that Hilton Head Island?

17 A. Yes.

18 Q. Do you go to work there as well?

19 A. Yes.

20 Q. So do you not consider yourself an  
21 employee?

22 A. As I told you, I don't -- I'm not an  
23 employee of Rockmore anymore.

24 Q. You are not? Have you sold Rockmore?

25 A. No.

1 Q. You just don't have -- you are just an  
2 investor now?

3 A. No. I'm a shareholder.

4 Q. Do you have any input in the day-to-day  
5 operations for Rockmore?

6 A. Yes.

7 Q. Do you also serve any other capacity  
8 besides shareholder?

9 A. Yes.

10 Q. Do you also serve as president?

11 A. Yes.

12 Q. Do you also manage the day-to-day  
13 operations?

14 A. Yes.

15 Q. Do you also write the checks?

16 A. Yes.

17 Q. Does Dee Heaton have the authority to  
18 write checks?

19 A. No.

20 Q. What does Dee Heaton do? What are her job  
21 responsibilities?

22 A. She is controller, manager, bookkeeper.

23 Q. The way you've described it is a person  
24 who would manage the financial books of a company.  
25 Is that an accurate description?

- 1           A.    Right.
- 2           Q.    And at any given time she will tell you or
- 3    give you a report of how much money that particular
- 4    company may have, snapshots and that sort of stuff?
- 5           A.    Correct.  Yes.
- 6           Q.    Does she also manage the bills, the
- 7    accounts payable, accounts receivable?
- 8           A.    Which entity are you talking about?
- 9           Q.    Rockmore.
- 10          A.    No.
- 11          Q.    Does it have any accounts payable?
- 12          A.    Payroll.
- 13          Q.    Just one person on payroll though, right?
- 14          A.    Correct.
- 15          Q.    And that is her?
- 16          A.    Correct.
- 17          Q.    So she manages her own payroll?
- 18          A.    Right.
- 19          Q.    All right.
- 20          A.    No.  No.  She doesn't manage her payroll.
- 21          Q.    She doesn't manage her payroll?
- 22          A.    No.
- 23          Q.    Who manages her payroll?
- 24          A.    I do.
- 25          Q.    How much do you pay her?

1           A.    I think her net bimonthly pay is about  
2   after deferrals for 401-Ks and loan repayments and  
3   that sort of thing is about \$1,600.

4           Q.    A month?

5           A.    Bimonthly.

6           Q.    So her annual salary is in the range of 50  
7   grand?

8           A.    Probably 55.

9           Q.    Tell me what the management company does.

10          A.    I told you.  It manages payroll and it  
11   manages operations.

12          Q.    Other people's payroll?  Other companies'  
13   payroll?

14          A.    Other companies' operations.

15          Q.    What other companies does it manage?

16          A.    You can go through that list if you want  
17   of the LLCs.

18          Q.    Primarily your LLCs?

19          A.    Yes.

20          Q.    Okay.

21          A.    Yes.

22          Q.    Does it handle any other LLCs or any other  
23   corporations?

24          A.    Other than?

25          Q.    The ones that you own an interest in.

1 A. No.

2 Q. Okay. So the single purpose of that  
3 entity is to kind of keep track of all of your LLCs?

4 A. Right.

5 Q. And the tax bills and all of that sort of  
6 stuff because a number of your entities own real  
7 estate, right?

8 A. Yes.

9 Q. Would that be the primary business model  
10 of these LLCs?

11 A. What is that?

12 Q. Real estate ownership.

13 A. Generally, yes.

14 Q. Okay. What other areas would you consider  
15 there to be business line beyond investment in real  
16 property?

17 A. Well, there has been export trade.

18 Q. Are you still involved in that?

19 A. Yes.

20 Q. What does the export trading company do?

21 A. Export trades.

22 Q. Got to be more specific than that. I'm  
23 not a very good businessman.

24 A. It exports products.

25 Q. Exports for other companies?

1           A.    It buys products for its own account and  
2   exports those to overseas customers.

3           Q.    Can you give me an example of something  
4   that you've done recently to help me understand?

5           A.    Say it buys a hundred faucets and then  
6   sells a hundred faucets to a first chair wholesaler  
7   in the Honduras.

8           Q.    All right. And that would be something  
9   that maybe John V. Brose would do?

10          A.    Yes.

11          Q.    Now, how did John V. Brose get that name?  
12   Was there a guy named John V. Brose?

13          A.    It was founded by a gentleman named John  
14   V. Brose.

15          Q.    And did you buy him out or --

16          A.    I bought his stock in the company.

17          Q.    When did you do that?

18          A.    In November 1990.

19          Q.    Is it still known as John V. Brose?

20          A.    Yes.

21          Q.    Is that an LLC or is it --

22          A.    No.

23          Q.    A corporation, right?

24          A.    It's a C Corp.

25          Q.    All right. Why don't we go through these

1     LLCs and corporations and you tell me kind of their  
2     purpose and all of that sort of stuff.

3             A.     Sure.

4             Q.     EM Security Services, Inc. Have you ever  
5     heard of them?

6             A.     I have.

7             Q.     Is it still active?

8             A.     I don't believe so.

9             Q.     Okay.

10            A.     I don't own it. You have a registered  
11     agent list there.

12            Q.     That's right. Do you own EM Security  
13     Services, Inc.?

14            A.     No.

15            Q.     Who owns it?

16            A.     If it's still in existence, it's owned by  
17     Dick Estes and the Estate of Irwin Mazo.

18            Q.     That would be your father-in-law?

19            A.     Yes.

20            Q.     And why were you serving as the registered  
21     agent?

22            A.     Because they needed one in South Carolina.

23            Q.     Okay. How about HCC, LLC?

24            A.     What is the question?

25            Q.     Do you own it?

1 A. I do.

2 Q. What does it do?

3 A. It developed Hospital Center Common on  
4 Hilton Head.

5 Q. How many members?

6 A. One.

7 Q. Is it still an ongoing entity?

8 A. It doesn't own any of the development  
9 anymore. And I'm not sure if the checking account  
10 is still open or not.

11 Q. Who gets the rents for that?

12 A. HCC got the rents when it owned the  
13 properties, but it doesn't own the properties  
14 anymore.

15 Q. Who transferred the properties to another  
16 entity?

17 A. No. It sold them to doctors and hospital  
18 administrators and stockbrokers and that sort of  
19 stuff.

20 Q. So for all intents and purposes you would  
21 say that that HCC, LLC, is --

22 A: It's effectively dormant.

23 Q. How about Oak Ridge Park?

24 A. Oak Ridge Park --

25 Q. LLC.

- 1           A.    -- is an entity that owns half of a
- 2   trailer park in Ridgeland, South Carolina.
- 3           Q.    How many members?
- 4           A.    One.
- 5           Q.    You?
- 6           A.    No.
- 7           Q.    Who is the member in that?
- 8           A.    Red Rocks. Red Rocks, LLC.
- 9           Q.    Who are the members in Red Rocks, LLC?
- 10          A.    Me.
- 11          Q.    Any other members?
- 12          A.    No.
- 13          Q.    And that particular LLC generates quite a
- 14   bit of rent, right?
- 15          A.    How do you define quite a bit?
- 16          Q.    Cash. Does it generate cash every month?
- 17          A.    It's generally money orders.
- 18          Q.    Money orders every month?
- 19          A.    Yes.
- 20          Q.    Okay. And what happens to those money
- 21   orders? Are they made out to Oak Ridge Park, LLC?
- 22          A.    No.
- 23          Q.    Who are those money orders made out to?
- 24          A.    Las Flores, LLC.
- 25          Q.    L-a-s Flores, F-l-o-r-e-s, LLC?

- 1           A.    Correct.
- 2           Q.    Why is that?
- 3           A.    Why is what?
- 4           Q.    Why do they make their checks and monye
- 5 orders out to Las Flores, LLC?
- 6           A.    Because that is now the landlord.
- 7           Q.    The landlord is Las Flores, LLC?
- 8           A.    That's correct.
- 9           Q.    Are you the owner of that limited
- 10 liability company?
- 11           A.    No.
- 12           Q.    Are you the member of that limited
- 13 liability company?
- 14           A.    No.
- 15           Q.    Is Red Rocks, LLC?
- 16           A.    Yes.
- 17           Q.    Is Red Rocks, LLC, the single member of
- 18 that entity?
- 19           A.    I believe so.
- 20           Q.    Okay. What does Las Flores, LLC, do with
- 21 the money that it collects during the month? Does
- 22 it issue a check to Red Rocks, LLC?
- 23           A.    It generally transfers money to Oak Ridge,
- 24 LLC.
- 25           Q.    And then what does Oak Ridge -- Oak Ridge

1 Park, is that what you are talking about? Not Oak  
2 Ridge. There is not a separate one named Oak Ridge.

3 A. Oak Ridge Park, LLC. I think it's Oak  
4 Ridge Park, LLC.

5 Q. And does Oak Ridge Park, LLC, pay a  
6 management fee?

7 A. Generally the bulk of it goes to debt  
8 service.

9 Q. What about the remaining portion?

10 A. Would go to operations.

11 Q. Which would be to the management company?

12 A. No, it would be -- Oak Ridge pays its own  
13 bills; trash management, that sort of something.

14 Q. About those excess? Where does the excess  
15 go?

16 A. That would be either a management fee or  
17 go for other debt service to other investors.

18 Q. Were there other investors in that  
19 particular company?

20 A. Yes.

21 Q. Who were the other investors in Oak Ridge  
22 Park, LLC?

23 A. My father John Lindgren.

24 Q. But he's not a member of any LLCs, right?

25 A. No. He's an investor.

1 Q. What is the difference between being a  
2 member and being an investor?

3 A. A member owns a membership interest. An  
4 investor invests money.

5 Q. Are there documents memorializing their  
6 investments?

7 A. Yes.

8 Q. Would they be in the form of mortgages?

9 A. No. Promissory notes.

10 Q. Generally unsecured loans?

11 A. Yes.

12 Q. So your father-in-law would be an  
13 investor?

14 A. No.

15 Q. No?

16 A. (Shook head.)

17 Q. Who was the investor?

18 A. My father.

19 Q. Your father?

20 A. (Nodded head.)

21 Q. Any other investors in there?

22 A. Yes.

23 Q. Who were the other investors?

24 A. Rob Reichel.

25 Q. Can you spell his last name?

- 1 A. R-e-i-c-h-e-l.
- 2 Q. Any others?
- 3 A. Yes.
- 4 Q. Will you please tell me?
- 5 A. Lisa Lindgren.
- 6 Q. And who is Lisa Lindgren?
- 7 A. She is my sister.
- 8 Q. All right. Who else?
- 9 A. David Greenberg.
- 10 Q. What is his relationship?
- 11 A. Investor.
- 12 Q. Friend?
- 13 A. Yeah. Investor.
- 14 Q. Okay. Who else? Name all the investors
- 15 for me if you would.
- 16 A. I think that is it.
- 17 Q. And those are all investors in Oak Ridge
- 18 Park, LLC?
- 19 A. Yes.
- 20 Q. Will these investors show up as investors
- 21 in other LLCs as well?
- 22 A. No.
- 23 Q. Okay. Will any of those investors show up
- 24 as investors in other LLCs?
- 25 A. Isn't that the same question?

1 MR. SCHEIDER: Asked and answered.

2 You said the same thing.

3 BY MR. FLOYD:

4 Q. Okay. I'm sorry.

5 A. The answer is still no.

6 Q. All right. Would these folks that you  
7 just named as investors, would they appear as  
8 investors in any of these other LLCs, not  
9 necessarily altogether, but just perhaps your father  
10 being an investor?

11 A. No.

12 Q. Okay. All right. Start Me Up, LLC?

13 A. Is --

14 Q. Tell me about that. Who is the member?

15 A. I'm the member.

16 Q. What does it do?

17 A. It doesn't do anything. It was formed to  
18 do prospective business and has never done anything.

19 Q. Dormant LLC?

20 A. Well, it's got a checking account, but  
21 hasn't done anything.

22 Q. Where do these LLCs bank?

23 A. Which ones?

24 Q. Do you bank at different banks with these  
25 LLCs?

1 A. Yes.

2 Q. All right. Where would you have banking  
3 relationships with LLCs besides Coastal States Bank?

4 A. Oh, there are TD Bank, Sun Trust Bank,  
5 South Carolina Bank and Trust.

6 Q. Which is now South Bank, right?

7 A. I believe so.

8 Q. I think that is right.

9 A. What is that?

10 Q. That is it?

11 A. I was asking what you said.

12 Q. I just said I think that is South Bank  
13 now.

14 A. I believe so. Savannah Bank which is, I  
15 think, also part of South Bank now.

16 Q. Okay.

17 A. Bank Meridian was HCC, but they've been  
18 bought by somebody else or F.D.I.C. took them over.  
19 I think that is it.

20 Q. All right. Would any of these entities  
21 also bank at Coastal States Bank?

22 A. Yes.

23 Q. Who decides where these LLCs open up bank  
24 accounts? Do you make that decision?

25 A. Yes.

1 Q. How do you decide where a particular  
2 entity will bank?

3 A. It depends on business variables.

4 Q. Your relationships and your needs, is  
5 that --

6 A. Right.

7 Q. All right. What is 5 Dunmore Court  
8 Property Owners Association?

9 A. It's a horizontal property regime, C Corp.

10 Q. Who owns the 5 Dunmore Court property  
11 where your business is located; Rockmore, Inc.?

12 A. Nobody. It's a horizontal property  
13 regime.

14 Q. Okay. What is the name of the horizontal?  
15 Is that the Property Owners Association that own  
16 that property?

17 A. That is the horizontal property regime.

18 Q. Are there other businesses there at  
19 Dunmore Court?

20 A. That are physically located there?

21 Q. Uh-huh.

22 A. Yes.

23 Q. Tell me.

24 A. Raymond James, Sodemann Architects, Tarbow  
25 Properties, Red Rocks, Rockmore. In effect,

1 anything that is operating or dormant now that  
2 hasn't been dissolved is out of 5 Dunmore Court.

3 Q. Okay. And do those other entities or  
4 other businesses that you aren't involved with, do  
5 they pay rent?

6 A. Yes. Well, yes and no. One does and one  
7 doesn't.

8 Q. Who is it that does?

9 A. Raymond James.

10 Q. And where does that money go?

11 A. Savannah Bank.

12 Q. Who is it made payable to?

13 A. Tarbow Properties.

14 Q. Why is that?

15 A. Because Tarbow owns the building.

16 Q. All right. And you own -- are you the  
17 single member of Tarbow Properties, LLC?

18 A. No.

19 Q. Is Red Rocks, LLC, the --

20 A. No.

21 Q. Who is the single member of Tarbow  
22 Properties?

23 A. There is not a single member.

24 Q. Who are the members of Tarbow Properties?

25 A. Two members; myself and Harold Yellen.

1 Q. What is your relationship to Mr. Yellen?  
 2 A. Friend.  
 3 Q. Is he from Savannah?  
 4 A. Yes.  
 5 Q. Is he related to you by blood or marriage?  
 6 A. I think he's a second or third cousin to  
 7 my wife. I'm not sure.  
 8 Q. All right. What does he do?  
 9 A. Old Savannah family. He's a lawyer.  
 10 Q. What firm does he work with?  
 11 A. Hunter McClain.  
 12 Q. All right. Tell me about Double Play,  
 13 LLC.  
 14 A. It is a company that was formed to pay for  
 15 the Hilton Head High School baseball press box and  
 16 concession stand.  
 17 Q. And is it still operating and ongoing?  
 18 A. Its debt was paid off recently, so it's  
 19 effectively dormant.  
 20 Q. Dissolved?  
 21 A. I don't know if it's dissolved or not.  
 22 Q. Who was the member of Double Play, LLC?  
 23 A. Me.  
 24 Q. Individually?  
 25 A. Yes.

1 Q. Okay. Fishburn Construction, LLC?

2 A. Was a contractor that built during a  
3 period substantially most -- substantially all of my  
4 developments.

5 Q. Were you the single member?

6 A. Yes.

7 Q. Individually?

8 A. Yes.

9 Q. Is it still an active and ongoing concern?

10 A. I'm not sure if it's been dissolved or  
11 not, but it's not active.

12 Q. Would it have operated out of the 5  
13 Dunmore Court?

14 A. No.

15 Q. Where would it have operated?

16 A. 89 Main Street.

17 Q. In Hilton Head?

18 A. Uh-huh. Yes.

19 Q. Was that the office location prior to your  
20 relocation to 5 Dunmore Court?

21 A. Yes.

22 Q. And when did you relocate to 5 or locate  
23 at 5 Dunmore Court?

24 A. I'm not sure. Approximately two years  
25 ago.

- 1 Q. All right. Riva Ridge, LLC?
- 2 A. Reva Ridge.
- 3 Q. Reva Ridge?
- 4 A. Right.
- 5 Q. Who are the members of Reva Ridge, LLC?
- 6 A. Herb King and myself.
- 7 Q. Who is Herb King?
- 8 A. Herb King was an erstwhile partner who
- 9 passed away.
- 10 Q. What does River Ridge, LLC, do?
- 11 A. Reva Ridge?
- 12 Q. Yeah.
- 13 A. It is an entity that owns a commercial
- 14 parcel -- currently owns a commercial parcel in
- 15 Bluffton, South Carolina.
- 16 Q. Is it for sale?
- 17 A. Always.
- 18 Q. Does it have anything on it at this time?
- 19 A. No.
- 20 Q. Is it drawing any rents or anything to
- 21 that effect?
- 22 A. No.
- 23 Q. Does it have any means of revenue?
- 24 A. No.
- 25 Q. Clear Creek Capital, LLC?

1           A.    Is an entity that hasn't done anything yet  
2    like Start Me Up that was formed to do prospective  
3    business.

4           Q.    How about Flat Creek, LLC?

5           A.    Is an entity that owns real estate in  
6    Bluffton.

7           Q.    Who are the members, I'm sorry, of Clear  
8    Creek Capital, LLC?

9           A.    Me.

10          Q.    Individually?

11          A.    Yes.

12          Q.    Any other members?

13          A.    I believe -- yes. I'm not sure. I'll  
14    have to check, but I believe yes.

15          Q.    Who are the other members?

16          A.    I believe it's -- my wife is a member and  
17    each of my children.

18          Q.    And we are talking about Clear Creek now,  
19    right?

20          A.    Right.

21          Q.    All right. How about Flat Creek, LLC, who  
22    are the members?

23          A.    Clear Creek.

24          Q.    Flat Creek, LLC.

25          A.    Clear Creek.

- 1 Q. It's the same thing?
- 2 A. No. Clear Creek is the member of Flat
- 3 Creek.
- 4 Q. Okay. All right. Single member?
- 5 A. Yes.
- 6 Q. What does Flat Creek, LLC, do?
- 7 A. It owns real estate in Bluffton.
- 8 Q. How much real estate in Bluffton?
- 9 A. Thirty-five acres.
- 10 Q. Does it have any revenue sources?
- 11 A. Yes. There is a mobile home park on it.
- 12 Q. So that is the second mobile home park
- 13 that we've talked about?
- 14 A. Yes.
- 15 Q. Do you have other mobile home parks?
- 16 A. No.
- 17 Q. All right. Same sort of set-up? Do they
- 18 pay their rent to Las Flores, LLC?
- 19 A. No.
- 20 Q. Who do they pay their rent to?
- 21 A. Flat Creek.
- 22 Q. And then who does Flat Creek, LLC, pay any
- 23 excess to?
- 24 A. Coastal States Bank.
- 25 Q. That is the debt service, right?

- 1           A.    Yes.
- 2           Q.    After the debt service is done?
- 3           A.    It pays -- well, it pays operation
- 4   expenses.
- 5           Q.    Of Flat Creek, LLC?
- 6           A.    Right.
- 7           Q.    Or would it be paying the management fee?
- 8           A.    It also pays a management fee.
- 9           Q.    To Rockmore?
- 10          A.    To Rockmore and to -- I think just to
- 11   Rockmore, but I would have to check.
- 12          Q.    All right.  Black Diamond, LLC?
- 13          A.    Is --
- 14          Q.    Who are the members and tell me what it
- 15   does?
- 16          A.    The members are currently David Brosnon --
- 17   no.  I'm sorry.  Yeah.  David Brosnon and Red Rocks.
- 18          Q.    What does it do?
- 19          A.    Black Diamond owns real property in
- 20   Bluffton.
- 21          Q.    Revenue generating?
- 22          A.    Yes.
- 23          Q.    Rentals and that sort of stuff?
- 24          A.    Yes.
- 25          Q.    Same sort of set-up?  Pays the bank for

1 debt service? Does it have debt service?

2 A. It does have debt service.

3 Q. And any excesses would be paid to the  
4 management fee?

5 A. No. Well, yes, it pays a management fee  
6 to it used to be called Bosely Asset Management.  
7 Now it's called South State Management, I think.

8 Q. And they all ultimately pay a management  
9 fee to Rockmore?

10 A. No.

11 Q. This particular entity doesn't?

12 A. No.

13 Q. All right. So who does it pay it's  
14 management fee to? You said it used to be Bosely?

15 A. It used to be Bosely Asset Management.  
16 And I believe it is now called I think South State  
17 Management. And that is fairly recent.

18 Q. Is that an entity that you own?

19 A. No.

20 Q. Who owns South State Management?

21 A. I'm not sure.

22 Q. Why would it pay a management fee to South  
23 State Management?

24 A. Because they manage the property.

25 Q. All right. What about any excesses?

1 Where would the excesses go?

2 A. The bulk of the excess goes to the bank.

3 Q. All right. Where would the residual go,  
4 if there is any?

5 A. To operating expenses.

6 Q. Which would be the management fee of  
7 Rockmore?

8 A. No. I just told you there is no  
9 management fee to Rockmore.

10 Q. All right. If any of these entities pay a  
11 fee to Rockmore, Inc., would it be called a  
12 management fee?

13 A. Generally, yes.

14 Q. Okay. Roaring Fork, LLC?

15 A. Roaring Fork owned a property in Sea Pines  
16 Island, I think.

17 Q. Did it sell it?

18 A. No.

19 Q. Did it get foreclosed on?

20 A. Yes.

21 Q. Who foreclosed on that property, which  
22 bank?

23 A. Wells Fargo.

24 Q. Was that the only asset of Roaring Fork,  
25 LLC?

1 A. Yes.

2 Q. Who were the members of Roaring Fork?

3 A. Me, I believe.

4 Q. All right. Core Creek, LLC, who were the  
5 members? What was its purpose?

6 A. Core Creek, LLC, members were Larry Paige,  
7 myself, and Rob Reichel.

8 Q. And what was its purpose?

9 A. It purchased property in Sea Pines on the  
10 ocean and built a spec house.

11 Q. Did it sell?

12 A. Yes.

13 Q. And were the proceeds distributed amongst  
14 the members?

15 A. Yes.

16 Q. When did that sale take place?

17 A. I would say four years ago.

18 Q. Were you a member individually in this  
19 company or were you a member through another LLC?

20 A. Individually.

21 Q. Do you remember how you received the  
22 proceeds from that sale? Would it have been payable  
23 to J. Chris Lindgren, Chris Lindgren, or would it  
24 have been through another LLC?

25 A. I imagine it was payable to me.

1 Q. Does Core Creek own any other real estate?

2 A. No.

3 Q. Has it sold any other real estate?

4 A. No.

5 Q. How about The Plunge, LLC?

6 A. The Plunge was the predecessor name of  
7 Black Diamond, LLC.

8 Q. I don't think we've talked -- I think we  
9 may have briefly mentioned Black Diamond, but I  
10 don't know that we've --

11 A. Black Diamond is the one you just asked me  
12 about.

13 Q. That's right. David Brosnon and Red  
14 Rocks, LLC?

15 A. Right.

16 Q. So The Plunge became Black Diamond, LLC?

17 A. Right. The banks didn't like the name.

18 Q. I can't imagine why. So The Plunge, LLC,  
19 doesn't do business anymore. It does business as  
20 Black Diamond?

21 A. It's the same entity, it's just the name  
22 changed.

23 Q. Okay. Neptune Media, LLC?

24 A. Is an advertising company.

25 Q. Is it still operating?

1 A. No.

2 Q. Who were the members?

3 A. Me.

4 Q. Individually?

5 A. Yes.

6 Q. Rebel Stoke, LLC?

7 A. Owned an apartment complex in Hardeeville,  
8 South Carolina.

9 Q. Who were the members?

10 A. Just me.

11 Q. Individually?

12 A. Yes.

13 Q. When you say -- I think you said owned.

14 Does that mean the apartment -- it doesn't exist  
15 anymore? It doesn't own?

16 A. It doesn't own. It was a deed in lieu to  
17 Atlantic Community Bank was another bank we've used.

18 Q. Atlantic Community Bank?

19 A. Right.

20 Q. All right. Covered Bridge, LLC?

21 A. It is the management company for the  
22 property in Colorado.

23 Q. That is the mountain house condo?

24 A. Right.

25 Q. Does -- who owns the mountain house condo

1 in Vale, Colorado?

2 A. I do.

3 Q. Individually or do you own it with your  
4 wife?

5 A. Individually.

6 Q. Is there still some litigation going on  
7 about that?

8 A. Yes.

9 Q. Have you settled it?

10 A. No. There is still litigation going on.

11 Q. Have they foreclosed on it all the way?

12 A. No.

13 Q. Okay. Ron Anderson is still trying to  
14 foreclose on it; is that right?

15 A. No.

16 Q. What is going on about it? Tell me about  
17 the litigation.

18 A. It's -- he's a plaintiff in a case  
19 asserting that certain deeds of trust were --  
20 constitute fraudulent transactions.

21 Q. And did you almost settle that case?

22 A. Almost? I mean, hard to say.

23 MR. SCHEIDER: Object to the form of  
24 the question.

25 BY MR. FLOYD:

1 Q. All right. So it's still going?

2 MR. FLOYD: Yes.

3 THE WITNESS: Yes.

4 BY MR. FLOYD:

5 Q. All right. Does that property generate  
6 rents?

7 A. Yes.

8 Q. And would Covered Bridge, LLC, get paid  
9 the rents?

10 A. Yes. They did. Not now.

11 Q. Is it not rented now?

12 A. It's a short-term -- it's rented on a  
13 short-term basis.

14 Q. Is it kind of like a hotel?

15 A. It's a condotel is what they call it.

16 Q. One-night rentals? One week, usually?

17 A. I think it's three-day minimum.

18 Q. And who handles those rentals for you?

19 A. The condotel association.

20 Q. And they pay the rental fee after they  
21 take away their management fee to Covered Bridge  
22 LLC?

23 A. Not now.

24 Q. Who do they pay that money to?

25 A. They are keeping it in escrow.

1 Q. What is the company that is holding it in  
2 escrow?

3 A. I believe Mountain House Condominium  
4 Association. I'm not sure.

5 Q. All right. Are they under a court order  
6 to do that?

7 A. No.

8 Q. Have you agreed to have that happen?

9 A. No.

10 Q. When people used to rent it, did they pay  
11 Covered Bridge, LLC, or did they pay you  
12 individually?

13 A. Neither.

14 Q. Who did they pay?

15 A. The condominium association.

16 Q. And then the condominium association would  
17 pay you a check or would they pay Covered Bridge?

18 A. Covered Bridge.

19 Q. What is the typical rental for a week?

20 A. It depends on the season.

21 Q. High season. Wintertime, is that right,  
22 high season?

23 A. I think Christmas is probably 12.

24 Q. Thousand dollars?

25 A. Uh-huh.

1 Q. For the week of Christmas between  
2 Christmas and New Years?

3 A. Right.

4 Q. All right. Ginmo, LLC?

5 A. Owned a commercial office building on  
6 Hilton Head.

7 Q. Who are the members?

8 A. Other members were Red Rocks and Rob  
9 Reichel.

10 Q. Does it own any other property?

11 A. No.

12 Q. Does it still own that property or --

13 A. No.

14 Q. Sold it?

15 A. No.

16 Q. Foreclosed?

17 A. No.

18 Q. Where did it go?

19 A. Deed in lieu.

20 JUDGE DUKES: Let me get you all  
21 to -- go off the record one second.

22 (Recess 10:34 to 10:48.)

23 JUDGE DUKES: Back on the record.

24 MR. FLOYD: Judge, in the interest of  
25 time my thought was to go ahead and move for some

1 relief on the issues that I have found thus far.  
2 And I think we are going to continue the examination  
3 while you head off to your other responsibilities.

4 And if we happen to need you, we'll  
5 certainly find you or we will wait on you. But as  
6 of today Mr. Lindgren has testified that he has  
7 contributed significant amounts to his retirement  
8 plan back in '11, '12, and '13. And that was cash.  
9 And that plan was at The Hartford.

10 And I would also like to see what his  
11 investments were with the Fidelity I.R.A. I think  
12 both of those would be transfers that should be set  
13 aside as fraudulent transfers because these  
14 judgments have been pending since 2011. One  
15 judgment being entered in January, January 6th,  
16 2011. And actually both of them were filed  
17 January 6th, 2011.

18 And for that reason we would move to set  
19 aside any contributions that have been made to his  
20 Hartford plan, Fidelity plan, and any I.R.A. at this  
21 time.

22 JUDGE DUKES: All right.

23 MR. SCHEIDER: Your Honor, the source  
24 of all of those contributions was salary. That is  
25 an exempt income. It is not subject to lien or

1 attachment, not in South Carolina. He is free to  
2 earn income. And that income may be transferred up  
3 to the limitations he's outlined for you.

4 He has not gone beyond that. Had he done  
5 so, had he funded an I.R.A. or his Roth or 401-K for  
6 an amount greater than the statutory allowed amounts  
7 you may have a case, but in the situation he has  
8 not, sir. So I take the position that all of that  
9 income, if you want to call it income, was salary.

10 MR. FLOYD: In response --

11 MR. SCHEIDER: Compensation for his  
12 services. So I'm saying it's not as though somebody  
13 wrote him a check. "Here, Chris Lindgren, \$400,000.  
14 That was not the case.

15 THE WITNESS: It's all salary  
16 deferral.

17 MR. FLOYD: In response, Judge --

18 THE WITNESS: It's on the W-2.

19 MR. FLOYD: In response, Judge, I  
20 would say that for that matter all cash for most  
21 people is at one time or another salary. It is  
22 cash. It was subject to execution. And for that  
23 reason I think it is subject to execution.

24 MR. SCHEIDER: But it was all based  
25 upon salary. No single check.

1 MR. FLOYD: I could garner wages.  
2 I'm not trying to garner the wages.

3 MR. SCHEIDER: I understand.

4 MR. FLOYD: And I think that is what  
5 is exempt in South Carolina. However, once you  
6 deposit that money somewhere it's no different than  
7 this being in a bank account. The difference here  
8 is this money was moved into an account that is  
9 otherwise sheltered by exemptions that prevents me  
10 from executing on cash. Cash is subject to  
11 execution.

12 MR. SCHEIDER: This is not cash I say  
13 again for the record. This is salary deferral,  
14 income paid to him for services rendered. Exempt.

15 JUDGE DUKES: Well, why don't we do  
16 this. I'm sure somewhere there is a great case or  
17 something on this exact same subject. So let me  
18 withhold my judgment on this particular thing  
19 because I know that you all have a lot more  
20 questions and answers to go. And maybe there is  
21 some lower hanging fruit that you will ask for in a  
22 little while that we won't even have to reach this  
23 point or, my preference, you all reach some  
24 settlement.

25 So why don't you all talk and see what you

1 can do. I've got to go do the sale. My  
2 understanding is by consent you are going to  
3 continue on without me.

4 MR. SCHEIDER: Right.

5 JUDGE DUKES: If we have further  
6 motions, then if I need part of the transcript I'll  
7 just get the transcript if you all can't agree on  
8 what the question was, but I imagine you can.

9 And if I am gone by the time you finish,  
10 if you all would just ask Heather to schedule a  
11 conference call, you know, this week, next week, at  
12 some point. And we will just see how we are going  
13 and whether or not we need to --

14 MR. SCHEIDER: Let's do that for the  
15 record. We'll set a conference call for --

16 JUDGE DUKES: Well, I'm not sure what  
17 my schedule is.

18 MR. FLOYD: We'll check with Heather  
19 before we leave.

20 MR. SCHEIDER: Yeah, for next week.  
21 Let's don't do it this week, at which time we will  
22 have provided to the court the bases or the support  
23 documentation for our respective positions. May we  
24 do that?

25 MR. FLOYD: Can you get me statements

1 of his contributions from '11, '12, and '13?

2 MR. SCHEIDER: Yes.

3 MR. FLOYD: I think he has access.

4 That way we will know what he has contributed.

5 THE WITNESS: You are still coming to  
6 review documents, right?

7 MR. FLOYD: Do you have statements  
8 there?

9 THE WITNESS: Yes.

10 JUDGE DUKES: Well, anyway, next week  
11 is fine. All right. We will let you all do that.  
12 And, by the way, your other 9:30 did not appear.

13 MR. FLOYD: One other thing. Just  
14 the restraining order would remain in place, that he  
15 not --

16 JUDGE DUKES: Yeah. We are just  
17 going to leave it open, so all orders not canceled  
18 will remain in place. All right.

19 MR. SCHEIDER: Thank you, Your Honor.

20 JUDGE DUKES: Thank you all.

21 MR. FLOYD: Thank you, Judge.

22 (Recess 10:52 to 10:55.)

23 BY MR. FLOYD:

24 Q. Now, we are back on the record. We were  
25 at Ginmo, LLC. I think we talked about that being

1 Red Rocks, LLC, and you?

2 A. No. And Rob Reichel.

3 Q. Rob. And that was a single purpose entity  
4 that owned some real estate?

5 A. Right.

6 Q. That was foreclosed on or deed in lieu was  
7 given?

8 A. Deed in lieu.

9 Q. Okay. Tell me about Timberline 2, LLC.

10 A. An entity that owned commercial real  
11 property on Hilton Head.

12 Q. Does it still own commercial?

13 A. No.

14 Q. What happened to that property?

15 A. Deed in lieu.

16 Q. Who were the members?

17 A. I believe Red Rocks and I think that was  
18 it.

19 Q. Single member do you think?

20 A. I think so.

21 Q. Have there ever been any other members of  
22 Red Rocks, LLC?

23 A. I don't believe so.

24 Q. It's been primarily you?

25 A. Only me.

1 Q. I guess that would be only you. All  
2 right. We talked about Covered Bridge, LLC. We've  
3 talked about Ginmo, LLC. How about Norvy,  
4 N-o-r-v-y, LLC?

5 A. It was an entity that did export trading.

6 Q. Does it still operate?

7 A. No.

8 Q. Who were the members of Norvy?

9 A. Me.

10 Q. And when you say "me" for purposes of --

11 A. Me personally.

12 Q. It will be you individually?

13 A. Right.

14 Q. If there is an LLC that is member, will  
15 you tell me if there was an LLC member?

16 A. Yes.

17 Q. When did that company stop doing business;  
18 Norvy, LLC?

19 A. I would have to go back and look.

20 Q. More than five years ago?

21 A. Probably.

22 Q. Stellar Trading, LLC?

23 A. Also an export trading company.

24 Q. Who were the members?

25 A. Me personally.

1 Q. Is it still in business?

2 A. No.

3 Q. When did it stop doing business?

4 A. I'm not sure.

5 Q. More than five years?

6 A. Probably.

7 Q. Bailey's Loop, LLC?

8 A. Owned real property in Jasper County.

9 Q. Who were the members?

10 A. Me personally.

11 Q. Does it still own any property?

12 A. No.

13 Q. Blue Ox, LLC. Let me back up. I'm sorry.

14 Bailey's Loop, LLC, what happened to that property?

15 A. Foreclosure.

16 Q. Who did the foreclosure?

17 A. I believe South Carolina Bank and Trust.

18 Q. Fair enough. Blue Ox, LLC?

19 A. Blue Ox is your judgment debtor.

20 Q. Who were the members of Blue Ox, LLC?

21 A. I believe Red Rocks.

22 Q. Any other members?

23 A. I don't believe so.

24 Q. What does Blue Ox, LLC, have by way of

25 assets?

- 1 A. Nothing.
- 2 Q. Does it have a checking account?
- 3 A. No.
- 4 Q. What was Blue Ox, LLC's, purpose?
- 5 A. It owned a commercial property on Hilton
- 6 Head.
- 7 Q. And was that part of a foreclosure?
- 8 A. It was with First Citizens. And I don't
- 9 recall if it was a foreclosure or deed in lieu.
- 10 Q. Okay. All right. Gateway Properties,
- 11 Exit 8, LLC. Who were the members?
- 12 A. Red Rocks, LLC, and Herald Yellen.
- 13 Q. All right. What was its purpose?
- 14 A. It owned real property in the Town of
- 15 Hardeeville.
- 16 Q. Does it own any property anymore?
- 17 A. No.
- 18 Q. What happened to the property?
- 19 A. Foreclosure.
- 20 Q. Do you remember what bank?
- 21 A. That was Bank Meridian.
- 22 Q. No assets now in Gateway Properties?
- 23 A. No.
- 24 Q. RFTB, LLC?
- 25 A. That was an entity that guaranteed a loan

1 on real property in Sun City.

2 Q. Who were the members?

3 A. Myself and Herb King.

4 Q. Was Mr. King a guarantor as well?

5 A. RFTB was the guarantor.

6 Q. Does it own any assets?

7 A. No.

8 Q. Is it still doing business?

9 A. No.

10 Q. Inactive? Dormant?

11 A. I think it's dissolved.

12 Q. Dissolved? Okay. Rockmore, Inc. I think

13 we've talked about this. This is the one where you

14 are the single shareholder, right?

15 A. Right.

16 Q. And it is a management company, right?

17 A. Right.

18 Q. All right. Are there any investors in

19 Rockmore, Inc.?

20 A. No.

21 Q. Dry Creek, LLC?

22 A. Owned a shopping center on Hilton Head.

23 Q. Who were the members?

24 A. Red Rocks, LLC.

25 Q. What happened to that shopping center?

1           A.    Deed in lieu.

2           Q.    Coastal States Insurance, LLC.  Who were  
3 the members?

4           A.    I believe me.  And it was formed to do  
5 captive insurance business.

6           Q.    Did it do business?

7           A.    No, not yet.  Haven't had the time.

8           Q.    Do you plan to do business with that?

9           A.    Yes.

10          Q.    Do you have an insurance background?

11          A.    Yes.

12          Q.    What is your insurance background?

13          A.    General counsel for reinsurance companies  
14 based in Bermuda.

15          Q.    What was the name of that company?

16          A.    Several.  One was` Forum Reinsurance.

17          Q.    I'm sorry.  You've got to say that a  
18 little louder.

19          A.    Forum Reinsurance.

20          Q.    Is that where you started your career?

21          A.    No.

22          Q.    Did you live in Bermuda as well?

23          A.    I went there.  I lived in Boston and went  
24 there every couple days.

25          Q.    Was that the only law job that you did?

1 A. No.

2 Q. What other law jobs did you have?

3 A. I was an attorney at Hunter McClain Ashley  
4 & Dunn.

5 Q. At where?

6 A. Hunter McClain.

7 Q. Where at?

8 A. In Savannah.

9 Q. Any other law jobs besides that?

10 A. Yes.

11 Q. What other law jobs?

12 A. Between law school and my LLM I worked for  
13 Johns Manville.

14 Q. I'm sure you never saw any litigation with  
15 that crowd, did you?

16 A. Saw all the litigation I need to see.

17 Q. And how long did you work there?

18 A. It was a summer job. Three months.

19 Q. Okay. And then you graduated for the LLM,  
20 and you started in the reinsurance business?

21 A. No. I went to Hunter McClain.

22 Q. Hunter McClain. For a couple years? How  
23 many years?

24 A. Three years.

25 Q. And then you did the general counsel?

1           A.     Right.

2           Q.     About how many years were you general  
3     counsel?

4           A.     Three years.

5           Q.     And then what did you do?

6           A.     I bought the export trading company.

7           Q.     So that would put us about 1990. And you  
8     winter into business for yourself?

9           A.     Right.

10          Q.     And that is when the law jobs -- the  
11     formal law jobs stopped?

12          A.     Right.

13          Q.     And you became a business entrepreneur  
14     kind of guy?

15          A.     Right.

16          Q.     All right. Bear Tree, LLC. Who were the  
17     members?

18          A.     Red Rocks, LLC.

19          Q.     What is its purpose?

20          A.     It was formed to purchase -- had an option  
21     on real property in Ridgeland, South Carolina.

22          Q.     Did the Bear Tree, LLC, exercise the  
23     option?

24          A.     It tried to, but was unsuccessful. It  
25     went to litigation.

1 Q. Was that the single purpose that that  
2 entity was created for?

3 A. Selling that property, yes.

4 Q. Did it ever ultimately own the property?

5 A. No. They couldn't exercise the option.

6 Q. Okay. I see what you are saying. Was  
7 Bear Tree, LLC, sued for specific performance?

8 A. No. It was the plaintiff.

9 Q. Bear Tree, LLC, was the plaintiff?

10 A. Right.

11 Q. Was a settlement reached of some sort?

12 A. Yes.

13 Q. Some sort of monetary settlement to pay  
14 Red Rocks?

15 A. I don't recall who got paid, but it was a  
16 nominal amount.

17 Q. Heritage Plaza -- excuse me. Is Bear  
18 Tree, LLC, still operating?

19 A. No.

20 Q. Inactive?

21 A. Yes.

22 Q. All right. Heritage Plaza Horizontal  
23 Property Regime?

24 A. That is a horizontal property regime for  
25 Heritage Plaza.

1 Q. All right. What is Heritage Plaza? Where  
2 is that?

3 A. It's a shopping center on the south end of  
4 Hilton Head.

5 Q. Who owns the dirt?

6 A. I believe Blanchard Calhoun.

7 Q. Are you still active with this particular  
8 H.O.A.?

9 A. No.

10 Q. No?

11 A. No.

12 Q. You are just the registered agent for  
13 them?

14 A. No. I formed it and owned Heritage Plaza,  
15 but I don't now.

16 Q. When did you cease being the owner of it?

17 A. When Dry Creek -- this was the property  
18 Dry Creek owned that went in the deed in lieu.

19 Q. Okay. All right. Island Gateway, LLC.  
20 Who were the members?

21 A. That was Herald Yellen and Red Rocks.

22 Q. And what is its purpose?

23 A. It was to develop 23 acres at Exit 8 in  
24 the Town of Hardeeville.

25 Q. And did that happen?

1 A. No.

2 Q. What caused it not to happen?

3 A. The foreclosure I mentioned earlier.

4 Q. Is that entity still active and ongoing?

5 A. No.

6 Q. 1188 Center -- 1188 Center Owners

7 Association, Inc.?

8 A. Is another H.P.R.

9 Q. What is the nature -- is that a horizontal  
10 property regime? That is what you are telling me?

11 A. H.P.R. is a horizontal property regime.

12 Q. Okay. Is it still active and ongoing?

13 A. Yes.

14 Q. What does it -- what association -- what  
15 property is that the H.O.A. for?

16 A. It is property that currently has a Golden  
17 Coral and Advance Auto, a Tire Kingdom, a Wild Wing  
18 Restaurant, and a shell building and other parcels.

19 Q. On owns the dirt there, the land?

20 A. Black Diamond owned it all and sold off  
21 parcels and retains ownership of a portion of it.

22 Q. What portion does it still own?

23 A. A shell building at 1188 Center -- excuse  
24 me. 1188 Fording Island Road and commercial  
25 parcels.

1 Q. Is there any rent being generated off of  
2 those?

3 A. No.

4 Q. Are they just empty? Vacant?

5 A. Shell.

6 Q. Shell buildings. What does that mean?  
7 It's ready for a tenant?

8 A. It's a shell. It has no upfit so it's not  
9 ready for a tenant.

10 Q. You are hoping a tenant will come along to  
11 upfit it kind of thing?

12 A. Yes.

13 Q. Does it have dirt floors in it and that  
14 sort of stuff?

15 A. Yes.

16 Q. But no rents are being generated through  
17 that property?

18 A. No.

19 Q. All right. In 2011 -- I think this is a  
20 copy of your 2011 tax return, or at least the front  
21 page, the 1040. US individual tax return. Did you  
22 contribute \$21,000 to a pension of some sort?

23 A. It looks like -- it says 27,000.

24 Q. All right.

25 A. Hold on a second. That is the taxable

1 amount of the pension, not deduction.

2 Q. What does that mean?

3 A. What does it mean? It's a taxable  
4 distribution. It's income, not expense.

5 Q. Okay. So, in other words, that tells me  
6 that you took \$27,000 through a distribution?

7 A. I would have to go back and check to see  
8 what it was.

9 Q. Or a pension of some sort?

10 A. That is in the income section so --

11 MR. SCHEIDER: It's not money going  
12 in.

13 THE WITNESS: It connotes a  
14 distribution, not a contribution.

15 MR. SCHEIDER: Right.

16 BY MR. FLOYD:

17 Q. Forgive this question. Why is there a  
18 taxable amount only \$7,747 if you took a pension of  
19 27,000?

20 A. Again, I would have look at what the  
21 details of it are.

22 Q. Okay. Would the details be somewhere  
23 else?

24 A. Well, yeah. I mean, it's not on the face  
25 of the return.

1 Q. All right.

2 A. And I don't have any of the details or any  
3 of the --

4 Q. Would that be a worksheet or a schedule?

5 A. But I'm sure that it's a function of -- I  
6 don't know. I would have to find out. There are  
7 different reasons it could be that.

8 Q. Okay. All right. Here is I think also a  
9 part of your 2011 tax return. And I think this is a  
10 supplemental income and loss, a Schedule E. Do you  
11 see that?

12 A. It's a Schedule E, yes.

13 Q. And I think you had to complete multiple  
14 Schedule Es to fit the number of properties that you  
15 owned. Does that sound right?

16 A. Yes.

17 Q. Because there are only three properties  
18 per page?

19 A. That's correct.

20 Q. In 2011 does this reflect that you  
21 collected about a million dollars -- a little over a  
22 million dollars in rents from the various  
23 properties?

24 A. 23T says 1,300,000.

25 Q. Would that be the total of all rents from

1 your properties?

2 A. 23G is a total of all amounts reported on  
3 Line 20 for all properties.

4 Q. So I am reading that correctly, right,  
5 that you did get over 1.3 million?

6 A. Well --

7 Q. Before expenses?

8 A. This is tax accounting. It's not  
9 financial accounting.

10 Q. Okay. Tell me what you mean by that. I'm  
11 telling you I don't know much about tax.

12 A. Well, it would take a semester to tell you  
13 the difference between tax and financial accounting.

14 Q. All right. Can you do it in two  
15 sentences?

16 A. No.

17 Q. All right. What does that mean;  
18 1.3 million? Does that mean before expenses?

19 A. That means it's the sum of all Line 20s on  
20 all the Schedule Es.

21 Q. Well, Line 20 would be the expenses,  
22 right? Right?

23 A. I would have to look at it.

24 Q. All right.

25 A. Yes.

1 Q. So that would be the expenses that you had  
2 in renting those, right?

3 A. Right.

4 Q. So the amounts reported for the rentals  
5 would be 1,098,000; is that right?

6 A. Yes.

7 Q. All right. Who generally gets commissions  
8 off of these rentals?

9 A. Which rentals?

10 Q. There are some rentals on here that  
11 reflect commissions.

12 A. Well, you would have to specify the  
13 property.

14 Q. Okay. For example, the Oak Ridge,  
15 Ridgeland, South Carolina, shows commissions of  
16 about \$4,200.

17 A. Commissions or management fees?

18 Q. It appears as commissions on that one, I  
19 think.

20 A. All right. That was probably paid to the  
21 property manager.

22 Q. All right. Would the management fees be  
23 the fees that would be payable to Rockmore?

24 A. It depends on the entity. And I would  
25 have to go back and check. There were management

1 fees paid to different entities.

2 Q. Okay. Is it fair to say that Red Rocks,  
3 LLC, is the parent LLC?

4 A. Of?

5 Q. Multiple LLCs?

6 A. It is a member LLC.

7 Q. Red Rocks seem to be a common element in a  
8 number of these LLCs?

9 A. It is for several of the LLCs. As we  
10 discussed, it is a member.

11 MR. SCHEIDER: Let's stop a minute  
12 and go off the record.

13 (Discussion off the record.)

14 MR. FLOYD: Back on.

15 BY MR. FLOYD:

16 Q. Do each of these entities have their own  
17 checking accounts as well?

18 A. Name an entity and I'll tell you if it  
19 does or not.

20 Q. All right. For the ones that I see on the  
21 supplemental income and loss on your tax returns  
22 such as Oak Ridge?

23 A. Oak Ridge has its own.

24 Q. Flat Creek?

25 A. Has its own checking account.

1 Q. Hospital Center Common, Hilton Head  
2 Island?

3 A. Had. I don't think it does anymore.

4 Q. Okay. If an entity that would have  
5 received rent doesn't have a checking account, who  
6 would pay the taxes or what entity would pay the  
7 taxes?

8 A. Well, I don't believe that any entity that  
9 paid taxes doesn't have a checking account.

10 Q. If an entity received rent it would have  
11 had a checking account. Is that a fair statement?

12 A. I think that is a fair statement.

13 Q. All right. And in lieu of me going  
14 through each and every one of these -- I could go  
15 through each one of these if you want me to and ask  
16 you which property owns which LLC. I think we've  
17 probably gone through that, but if I have additional  
18 questions would you be willing to supplement those  
19 answers?

20 A. No properties own any LLCs.

21 Q. LLCs own the property?

22 A. Right. Correct.

23 Q. I think we've gone through a number of  
24 that, but I don't know that I necessarily have them  
25 matched up by address such as 89 Main Street. What

1 I'm asking you is if I have questions, will you be  
2 willing to supplement questions that I ask of you?

3 A. Yes.

4 MR. SCHEIDER: Absolutely.

5 MR. FLOYD: Instead of going through  
6 all of this. There are certain questions that I  
7 have.

8 MR. SCHEIDER: Yes.

9 BY MR. FLOYD:

10 Q. In 2012 I think you said you took a  
11 distribution of some sort recently?

12 A. In 2014.

13 Q. In 2014. Did you also take a distribution  
14 in 2012?

15 A. I would have to go back and check.

16 Q. All right. I'm going to let you look at  
17 this. This may help you. This is your 2012 US  
18 individual tax return.

19 A. Yes. What about it?

20 Q. It has the word "rollover" right here?

21 A. Right.

22 Q. Can you tell me what that is all about?

23 A. What a rollover is?

24 Q. Why it's shown on here as a pension and  
25 annuity as part of your income, but it also has a

1 rollover -- the word "rollover" over there. Did you  
2 roll over some money into that or --

3 A. Apparently. I would have to go back and  
4 look.

5 Q. Okay. Would you have records to show what  
6 money was rolled over and that sort of stuff?

7 A. Sure. And you realize a rollover is from  
8 a qualified plan, right?

9 Q. No, I don't, but explain to me what you  
10 are saying.

11 A. A rollover is from one qualified plan to  
12 another qualified plan.

13 Q. Do you remember this specific rollover,  
14 the details of this transaction?

15 A. No. I would have to go back and look at  
16 it.

17 Q. You have the LLM in the room, not me.  
18 Have you filed your 2013 tax returns?

19 A. I have.

20 Q. When did you file the 2013 tax returns?

21 A. I would have to check, but I think  
22 somewhere around the beginning of August.

23 Q. Do you have those at your office?

24 A. Yes.

25 Q. All right. I may want to get those from

1 you. I see in 2012 it appears that the amount of  
2 rentals that you received went down ever so  
3 slightly. Does that sound accurate?

4 A. I would have to check.

5 Q. You don't keep track of it that closely?

6 A. As you can see, there are a lot of moving  
7 parts.

8 Q. I agree with that. What bank account do  
9 you use to service your home debt?

10 A. None.

11 Q. Who services the home debt?

12 A. Nobody.

13 Q. It's not being paid?

14 A. No.

15 Q. When was the last payment that was made?

16 A. I would have to check.

17 Q. Is your house currently in foreclosure?

18 A. Yes.

19 Q. Do you owe about \$2.2 million on your  
20 home?

21 A. Yes.

22 Q. I probably just asked you this, but I'm  
23 going to ask you again. Did you tell me what bank  
24 it was that was foreclosing?

25 A. I did not.

- 1 Q. Did I ask you that question?
- 2 A. No.
- 3 Q. All right. What bank is it that is
- 4 foreclosing?
- 5 A. Wells Fargo.
- 6 Q. And are you defending that foreclosure
- 7 action?
- 8 A. I'm working on a modification.
- 9 Q. Are you in the midst of doing the
- 10 modification program and that sort of thing?
- 11 A. Working on it.
- 12 Q. Are your children still in school?
- 13 A. One is.
- 14 Q. Is it the youngest daughter that is still
- 15 in school?
- 16 A. Yes.
- 17 Q. And she goes to Boulder, Colorado, right?
- 18 A. Right.
- 19 Q. Is this her last year?
- 20 A. We hope so.
- 21 Q. What do you have at CIAACREF?
- 22 A. Nothing.
- 23 Q. When was the last time you had something
- 24 there, money there?
- 25 A. Remember, this was an issue we discussed

1 earlier?

2 Q. Okay. I don't remember that. I'm sorry.  
3 Did you close out all accounts that you may have  
4 had?

5 A. Yes.

6 Q. All right. Did that happen in 2011, '12?

7 A. I would have to check.

8 Q. Okay. And earlier you testified, as your  
9 tax returns show as well -- I'll let you look at  
10 this also if you want to look at it, but it appears  
11 to me that you contributed \$6,000 to a regular  
12 I.R.A. contribution. Does that sound right?

13 A. It appears so.

14 Q. And your wife also contributed \$6,000?

15 A. It appears so.

16 Q. Were there any other retirement vehicles  
17 that you would have invested or deposited money in?

18 A. No.

19 Q. Besides the 401-K and your Roth I.R. A.  
20 and your Fidelity Simple I.R.A., right?

21 A. Right.

22 Q. Okay. Do you own a Chevrolet Tahoe?

23 A. No.

24 Q. Have you ever owned a Chevrolet Tahoe?

25 A. No.

1 Q. Does your wife own a Chevrolet Tahoe?

2 A. Yes. I think I told you earlier it was a  
3 Yukon, but I guess it's a Tahoe.

4 Q. Okay. How about a Boston Whaler? Who  
5 owns the Boston Whaler?

6 A. My son owns a Boston Whaler.

7 Q. Is it kept at your house?

8 A. Yes.

9 Q. Is it tied up at the end of your dock most  
10 of the time?

11 A. It is usually at our dock, yes.

12 Q. And does he also own the Mercury outboard?

13 A. Yes.

14 Q. Is that part of the Boston Whaler?

15 A. It's attached to the Boston Whaler.

16 Q. When did your son buy the Boston Whaler?

17 A. I would have to check.

18 Q. Did you assist him in buying the Boston  
19 Whaler?

20 A. How do you mean?

21 Q. Did you give him any financial assistance  
22 to buy the Boston Whaler?

23 A. No.

24 Q. Did you or any company you own provide him  
25 with any money to buy that boat?

- 1 A. No.
- 2 Q. Do you own any other boats?
- 3 A. No.
- 4 Q. Have you ever heard of a 2006 Bombardier?
- 5 A. Yes.
- 6 Q. Is that a jet ski?
- 7 A. Yes.
- 8 Q. Or is it a boat, a watercraft?
- 9 A. I think a Bombardier is a jet ski.
- 10 Q. Do you own any jet skis?
- 11 A. No.
- 12 Q. Have you owned any jet skis?
- 13 A. Yes.
- 14 Q. When did you sell them?
- 15 A. I never sold one.
- 16 Q. Where are they? I mean, do you still have
- 17 them?
- 18 A. You know, either abandon or crashed. Jet
- 19 skis are not a good investment.
- 20 Q. How many have you owned?
- 21 A. Four or five.
- 22 Q. Do you own any now, any operable?
- 23 A. No.
- 24 Q. Have you given any away to anybody?
- 25 A. No.

1 Q. We went over a number of LLCs today. Are  
2 there any that I've forgotten?

3 A. I'm not sure if you covered them all or  
4 not.

5 Q. All right. We didn't talk about John V.  
6 Brose I don't think, did we?

7 A. Yes, we did.

8 Q. Very brief. Is it still operating?

9 A. Yes.

10 Q. Do you draw a salary from John V. Brose?

11 A. No.

12 Q. Do you get a consulting fee?

13 A. No.

14 Q. Do you derive any income or does any LLC  
15 that you own derive any income from John V. Brose  
16 Exports?

17 A. No.

18 Q. How many employees does John V. Brose  
19 have?

20 A. None.

21 Q. Who operates it?

22 A. To the extent that there is operations, I  
23 do.

24 Q. Are there any current operations?

25 A. Nominal.

1 Q. Tell me what you mean by "nominal." What  
2 is the current deals on the table on the radar?

3 A. Right now nothing on the table.

4 Q. Do you have anything in the works, any  
5 proposals or anything like that?

6 A. There is always things in the works, but  
7 nothing that is reduced to writing.

8 Q. Tell me about the tire kicking that is  
9 going on right now.

10 A. What do you mean?

11 Q. Who is talking to you wanting you to get  
12 some exports for them?

13 MR. SCHEIDER: Objection. Form of  
14 the question. It's too broad-based.

15 BY MR. FLOYD:

16 Q. All right. What sort of deals are you  
17 trying to get right now with John V. Brose?

18 A. Well, I'm always looking at opportunities.  
19 Right now in Argentina, Chile, Philippines, and  
20 China.

21 Q. What sort of products?

22 A. It's generally building materials.

23 Q. Is the main thrust of Brose Exports  
24 building materials?

25 A. Yeah, primarily plumbing.

1 Q. Who is the shareholder -- is it a  
2 corporation or is it an LLC?

3 A. It's a corporation.

4 Q. Who are the shareholders of John V. Brose?

5 A. Rockmore, Inc.

6 Q. Is it the single shareholder?

7 A. It's the sole shareholder.

8 Q. Only shareholder? Does Rockmore, Inc.,  
9 charge or is it compensated for your services  
10 through management fees? Is Rockmore, Inc.,  
11 compensated for your services through management  
12 fees?

13 A. Can you rephrase that?

14 Q. Sure. When you make money with John V.  
15 Brose Exports, Inc., do you get paid that money  
16 individually?

17 A. No.

18 Q. Does the money go to Rockmore, Inc.?

19 A. It's consolidated.

20 Q. Tell me what that means; it's  
21 consolidated?

22 A. What does "consolidated" mean?

23 Q. Yeah. What are you saying; it's  
24 consolidated? Who gets the money?

25 A. It's a C Corp structure, and the

1 accounting is consolidated.

2 Q. All right.

3 A. So it's all in the accounting.

4 Q. Does John V. Brose have a checkbook?

5 A. Yes.

6 Q. Does it write a check to Rockmore, Inc.,  
7 for money that it makes?

8 A. No.

9 Q. What does it do with profits?

10 A. There would be inner company transfers.

11 Q. Who would get those transfers?

12 A. Rockmore, Inc.

13 Q. Any other companies would get --

14 A. Again, it's consolidated.

15 Q. I'm going to apologize. I don't  
16 understand what you mean by "consolidated."

17 A. Well, It's -- I mean, it's -- even though  
18 they are separate C Corps, they are operated as one  
19 from a tax perspective.

20 Q. John V. Brose, Rockmore --

21 A. Yes. Consolidated.

22 Q. All of your companies are consolidated?

23 A. No, the C Corps.

24 Q. The C Corporations, C Corps, are all  
25 consolidated?

- 1           A.    Yes.
- 2           Q.    All right. Do you ever get a check from  
3 any of these consolidated? Do you ever get a check?  
4 Do you ever deposit a check?
- 5           A.    I'm not sure I understand. I get, you  
6 know, my payroll -- my self-employed employment  
7 income. It's not through checks though. It's  
8 through direct deposits.
- 9           Q.    From Rockmore, right?
- 10          A.    Right.
- 11          Q.    That would be the entity that paid you?
- 12          A.    Yes.
- 13          Q.    But you are not on payroll, right?
- 14          A.    Right.
- 15          Q.    So what do you call those distributions to  
16 you?
- 17          A.    Self-employment income.
- 18          Q.    Self-employment income?
- 19          A.    Uh-huh.
- 20          Q.    Do you have a SEP?
- 21          A.    No.
- 22          Q.    Did you ever have a SEP?
- 23          A.    No.
- 24          Q.    Is there a reason why?
- 25          A.    Couldn't.

1 Q. Can you tell me why?

2 A. The law doesn't allow it.

3 Q. It did if you had one before '95, right?

4 A. It sounds like you know more about SEPs  
5 than I do. I'm not sure.

6 Q. All right.

7 A. If you have an employee, you can't have a  
8 SEP.

9 Q. All right. Tell me about Radari A.V.  
10 Transatlantic. Have you ever heard of that?

11 A. Can you repeat that?

12 Q. A company Called Radari A.V.  
13 Transatlantic? Have you ever heard of B&N,  
14 Nordstrip? Have you ever heard of that?

15 A. Not that I know of.

16 Q. How about B&N Seko Union, have you ever  
17 heard of that? S-e-k-o?

18 A. No.

19 Q. You never heard of those?

20 A. Not that I can recall.

21 Q. All right. Are you a shareholder in any  
22 companies that are formed offshore, foreign  
23 companies?

24 A. Derivatively, yes.

25 Q. Explain that to me.

1 A. Indirectly, yes.

2 Q. I'm sorry?

3 A. Indirectly.

4 Q. Indirectly? Tell me.

5 A. Well, through my 401-K I own shares of  
6 companies that are based in Europe and South America  
7 and the Far East.

8 Q. That would be through stock ownership,  
9 right?

10 A. How else would you own it?

11 Q. Through your 401-K. Do you have any  
12 shares that you hold through Red Rocks or some other  
13 entity; Rockmore?

14 A. No.

15 Q. Are you involved with any foreign  
16 companies in consulting and that sort of stuff?

17 A. Yes.

18 Q. Which ones?

19 A. Just a variety of companies I've done  
20 business with over the years.

21 Q. Can you tell me who those are?

22 A. Well, we're talking hundreds.

23 Q. Would that be through John V. Brose?

24 A. It would be in connection with John V.  
25 Brose.

1 Q. All right. In spite of all of those  
2 business dealings, you don't have any ownership  
3 interest in any other companies, any foreign  
4 companies, other than through your 401-K. Is that  
5 what you are telling me?

6 A. Correct.

7 Q. Have you had any ownership of any  
8 companies outside of your 401-K?

9 A. Yes.

10 Q. Which ones?

11 A. Everything we've gone over.

12 Q. Those were foreign?

13 A. No. You didn't say foreign.

14 Q. All right. I'll reword the question.

15 A. Okay.

16 Q. You are a better listener than I am. A  
17 better question asked. Have you ever owned any  
18 foreign stock or foreign company besides using the  
19 ownership through your 401-K?

20 A. Not directly.

21 Q. All right. Tell me about indirectly.

22 A. I owned a company in the Virgin Islands.  
23 John V. Brose, Inc., owned a company in the Virgin  
24 Islands that was consolidated with Rockmore and John  
25 V. Brose.

1 Q. It was a Virgin Islands company?

2 A. Correct.

3 Q. What was the name of that company?

4 A. John V. Brose, USVI, Inc.

5 Q. Did you set it up in the Virgin Islands to  
6 do business in both places or was it already set up?

7 A. No. I formed it under Subpart F of the  
8 Internal Revenue Code.

9 Q. Okay. What does that mean?

10 A. Subpart F is foreign business. It's a  
11 foreign sales corporation.

12 Q. All right. Do you have any other  
13 investments in foreign companies besides the 401-K?

14 MR. SCHEIDER: Asked and answered.

15 BY MR. FLOYD:

16 Q. I don't think I've asked that specific  
17 question.

18 A. You did, but no.

19 Q. Okay. How about Seahorse Holdings? Have  
20 you ever heard of that company?

21 A. No. At least I don't think so.

22 Q. Okay. Have you ever heard of Fiddler's  
23 Holdings, LLC?

24 A. Yes.

25 Q. What is Fiddler's Holdings, LLC?

1           A.    It was an entity that owned a unit at  
2 Fiddler's Cove.

3           Q.    Who were the members?

4           A.    John Cardimon and myself.

5           Q.    Does it still own any real property?

6           A.    No.

7           Q.    Does John V. Brose have different  
8 variations of its name? Has it been John V. Brose,  
9 Brose Exports?

10          A.    Well, its corporate name is John V. Brose,  
11 Inc.

12          Q.    Okay. Does it do business as something  
13 else?

14          A.    It's -- I mean --

15          Q.    Such as Brose Experts? Does it have  
16 tradenames?

17          A.    Yeah. For example, Brose Exports.

18          Q.    Okay. All right. Do you have a handle on  
19 how many pieces of property or real estate that  
20 you've owned, whether directly or indirectly, and  
21 that would be through all the LLCs?

22          A.    It's all in the tax returns.

23          Q.    All right. Do you own any real estate  
24 individually?

25          A.    Yes.

- 1 Q. What property do you own individually?
- 2 A. The Belfair Golf.
- 3 Q. Is it paid for?
- 4 A. No.
- 5 Q. What is the mortgage on that?
- 6 A. It's around 700.
- 7 Q. What is its value?
- 8 A. Well, that is the one that we tried to do
- 9 a short sale on that you declined to let happen.
- 10 And that was for 321.
- 11 Q. Presumably that buyer is gone?
- 12 A. Long gone.
- 13 Q. Okay. Do you own any other real estate
- 14 individually?
- 15 A. Yes.
- 16 Q. Which one?
- 17 A. Mountain house condominium.
- 18 Q. Any others?
- 19 A. No.
- 20 Q. Any other real estate would be owned
- 21 through LLCs and that sort of stuff? You do own --
- 22 excuse me. Let me ask it this way. You do own real
- 23 estate through LLCs, right?
- 24 A. Yes.
- 25 Q. A variety of them. So any other

1 properties that you would own would be through LLCs,  
2 right?

3 A. Yes.

4 MR. FLOYD: All right. Go off the  
5 record for a moment.

6 (Recess 11:38 to 11:42.)

7 BY MR. FLOYD:

8 Q. For purposes of clarification, Mr.  
9 Lindgren, I think you own three properties in some  
10 interest individually. That would be your mountain  
11 house -- the Mountain House Condominium in Vale,  
12 Colorado; the Belfair cottage, individually, you  
13 yourself; and you also own the home that you live in  
14 at 32 Widewater Road --

15 A. Jointly.

16 Q. -- jointing with your wife?

17 A. Right.

18 Q. Is the name Pluth Mud, LLC --

19 A. Yes.

20 Q. -- familiar to you? What is Pluff Mud?

21 A. It is an entity that purchased a  
22 condominium unit at The Plaza at Belfair.

23 Q. Does it still own the condo?

24 A. I presume.

25 Q. Are you a member of Pluff Mud, LLC?

1 A. No.

2 Q. All right. Okay. Do you know who the  
3 members of Pluff Mud, LLC, are?

4 A. Not really sure.

5 Q. Are you generating any rent from that?

6 A. No.

7 Q. Okay. So all of these properties that  
8 we've talked about, the LLCs that own these various  
9 properties -- and there are properties that generate  
10 rent each month, right?

11 A. Some of them, yeah.

12 Q. Some of them do. In 2011 about a million  
13 bucks; is that accurate?

14 A. Before expenses?

15 Q. Before expenses.

16 A. Yeah. I think altogether it was a net  
17 \$200,000 loss.

18 Q. And would the entity Rockmore, Inc., be  
19 the entity charged with taking in the rents --

20 A. No.

21 Q. -- allocating the expenses? Who does  
22 that?

23 A. The different entities.

24 Q. Okay. Do those entities -- do any of  
25 those entities have employees?

1 A. No.

2 Q. All right. When you say those entities  
3 would do that, would you mean to say that you as the  
4 single member or a member of the LLC would allocate  
5 those rents and expenses? Is that what you are  
6 telling me?

7 A. What do you mean by "allocate those rents  
8 and expenses"?

9 Q. Well, somebody has got to write a check to  
10 the LLC or to whomever --

11 A. The tenant.

12 Q. The tenant has been told to write a check  
13 to, right?

14 A. Right.

15 Q. Presumably. Are any of these on bank  
16 direct deposit type rentals?

17 A. Yes.

18 Q. Okay. And where would that direct deposit  
19 go into?

20 A. Well, when you say direct deposit, it's  
21 not technically direct deposit. It's a lock box.

22 Q. Do they send the money straight to the  
23 bank?

24 A. Yes.

25 Q. And which entity is that?

- 1           A.    Which bank?
- 2           Q.    Or which LLC?
- 3           A.    That would be Flat Creek.
- 4           Q.    Flat Creek, LLC?
- 5           A.    (Nodded head.)
- 6           Q.    So that tenant that rents the Flat Creek,
- 7    LLC, property or properties, they send a check to a
- 8    lock box?
- 9           A.    Right.
- 10          Q.    And when it gets to the lock box, what
- 11   account does it get deposited in?
- 12          A.    The lock box account.
- 13          Q.    Is it for the bank to sweep -- to pay?
- 14          A.    It's from the bank to accumulate to -- for
- 15   debt service.
- 16          Q.    Is there any excess that ever comes out of
- 17   that?
- 18          A.    Yes.
- 19          Q.    Where is the excess transmitted to?
- 20          A.    To an operating account.
- 21          Q.    For Flat Creek?
- 22          A.    Uh-huh.  Yes.
- 23          Q.    And then where does that money go from the
- 24   Flat Creek, LLC, account?  To Rockmore?
- 25          A.    It depends.  You know, vendors.  Operating

1 expenses are paid out.

2 Q. After all the expenses are paid, if there  
3 is any excess, will it be sent to Rockmore?

4 A. Well, there is a management fee that we  
5 pay to Rockmore.

6 Q. Do all of these entities pay Rockmore,  
7 Inc., some sort of management fee?

8 A. No.

9 Q. Okay. Did most of them pay a management  
10 fee to Rockmore, Inc.?

11 A. No.

12 Q. They do not?

13 A. Right.

14 Q. All right. But you could compile a list  
15 for me, just tell me who pays management fees --

16 A. We do have financial statements.

17 Q. -- to Rockmore, Inc.? Would the financial  
18 statements show me who is paying management fees to  
19 Rockmore?

20 A. Yes. They should.

21 Q. What expenses does Rockmore, Inc., have?

22 A. Payroll.

23 Q. Is that the only expense that it has?

24 A. Well, it has 401-K administration fees.

25 Q. Does it pay a power bill?

1 A. No.

2 Q. Utilities and all of that sort of stuff?

3 A. No.

4 Q. What entity pays the power bills,  
5 utilities?

6 A. For which properties?

7 Q. Would it be Dunmore Court?

8 A. No.

9 Q. Who pays it for that?

10 A. Tarbow.

11 Q. Does Rockmore, Inc., pay rent?

12 A. No.

13 Q. Do any of these entities pay rent to  
14 Tarbow Properties?

15 A. No.

16 Q. How big is the office space that you have  
17 at 5 Dunmore Court?

18 A. I think it's 3,450 square feet.

19 MR. FLOYD: Let's go off the record  
20 for a second.

21 (Discussion off the record.)

22 BY MR. FLOYD:

23 Q. Do you use -- you said 33,000 square feet?

24 A. 3,450, I believe.

25 Q. Do you use all of that office space for

1 your operations, the LLC's operations that we've  
2 talked about today?

3 A. Yes.

4 Q. All right. Is there any other office  
5 space that you have that you keep records and that  
6 sort of stuff?

7 A. Personal?

8 Q. Personal and your business.

9 A. No.

10 Q. You may keep some at home, right?

11 A. Right.

12 Q. But generally speaking, 99 percent of your  
13 documents would be at your business?

14 A. Yes.

15 Q. Okay. Do each of these LLCs have  
16 financial statements?

17 A. Yes.

18 Q. Do you have an accountant?

19 A. No.

20 Q. Have you ever paid an accountant?

21 A. Yes.

22 Q. You have? For what purposes have you paid  
23 an accountant?

24 A. When all the entities were running and I  
25 had foreign sales in large volumes it was a lot more

1 efficient to pay an accountant, accounting firm.

2 Q. For you to run the business?

3 A. Right. Because of the complexity of the  
4 returns. They used to be a lot more complex.

5 Q. Okay. Who was your accountant whenever  
6 they were?

7 A. Hancock Askew in Savannah.

8 Q. All right. Do they have a South Carolina  
9 office?

10 A. I don't believe so.

11 Q. Okay. Do you get a check every month or  
12 direct deposit you said from Rockmore?

13 A. Yes.

14 Q. What is that amount?

15 A. It's in the neighborhood of 10,000.

16 Q. Monthly draw kind of thing?

17 A. Yes. Well, it's self-employment income,  
18 right.

19 Q. So about \$120,000 a year?

20 A. Right.

21 Q. And that is before taxes; is that correct?

22 A. You've seen my tax returns.

23 Q. Right.

24 A. How much do you think I pay in taxes?

25 Q. You haven't paid much in taxes, have you?

1 A. Well, I have carry forewards.

2 Q. How many years can you use carry  
3 forewards?

4 A. Indefinitely.

5 Q. At this pace with your losses how long do  
6 you think you can have a carry forward loss?

7 A. It's a function of how much income I have  
8 in the future.

9 Q. Okay.

10 A. Currently I have about eight million in  
11 carry forwards.

12 Q. Which essentially means that you can  
13 offset about \$8 million of income with those losses?

14 A. Not essentially. You can.

15 Q. Never made money through doing that  
16 sort -- having that sort of losses though, have you?

17 A. Beg your pardon?

18 Q. Can't necessarily make money off of losses  
19 though, can you?

20 A. Well, it depends.

21 MR. SCHEIDER: Let's be careful here.

22 MR. FLOYD: All right. Let's go off  
23 the record.

24 (Recess 11:51 to 11:53.)

25 MR. FLOYD: We've talked about

1 looking at some documents. And there is a number of  
2 documents that your lawyer and I have talked about.  
3 And we're going to, as he said, when we have a sane  
4 moment after today we are going to go through and  
5 figure out what documents exactly that I've asked  
6 for and that you said that you could provide.

7 I also believe that you have a number of  
8 financial documents at your office. I would like to  
9 have the opportunity to look at those, but today I  
10 think it's best perhaps if we do it once. And it  
11 may take twice, but I would like perhaps to have  
12 some financial assistants with me when we go through  
13 those.

14 And as I understand it, neither you nor  
15 your lawyer have any objection to us rescheduling a  
16 document review at some point in the future; is that  
17 right?

18 THE WITNESS: I don't.

19 MR. SCHEIDER: Without objection.

20 MR. FLOYD: Okay. Is there anything  
21 else that we need to put on the record today?

22 MR. SCHEIDER: I think not other than  
23 we are going to adjourn this session and --

24 MR. FLOYD: Have a conference call?

25 MR. SCHEIDER: Reconvene with a

1 conference call.

2 MR. FLOYD: Okay. And, you know,  
3 once we go through the record then there may be some  
4 additional forms of remedy that I may ask for, but  
5 I'm sure that you will be prepared for. All right.  
6 That is all I have.

7 MR. SCHEIDER: We may not agree to  
8 them, but --

9 MR. FLOYD: We won't agree to them.  
10 Mr. Lindgren, I hope it's been as pleasant as it can  
11 be.

12 (Whereupon, the Rule to Show Cause  
13 Hearing was concluded at 11:54 a.m.)

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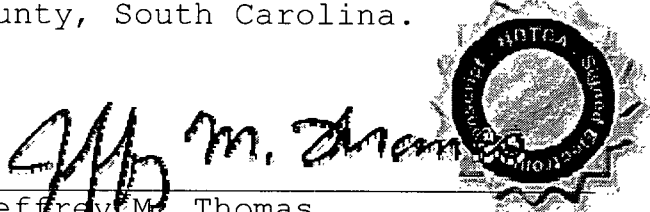
## 1 CERTIFICATE OF REPORTER

2 I, Jeffrey M. Thomas, Registered Professional  
3 Reporter, and Notary Public for the State of South  
4 Carolina at Large, do hereby certify:

5 That the foregoing hearing was taken before me  
6 on the date and at the time and location stated on  
7 Page 1 of this transcript; that the witnesses were  
8 duly sworn to testify to the truth, the whole truth  
9 and nothing but the truth; that the testimony of the  
10 witnesses and all objections made at the time of the  
11 examination were recorded stenographically by me and  
12 were thereafter transcribed; that the foregoing  
13 transcription as typed is a true, accurate and  
14 complete record of the testimony of the witnesses  
15 and of all objections made at the time of the  
16 examination to the best of my ability.

17 I further certify that I am neither related to  
18 nor counsel for any party to the cause pending or  
19 interested in the events thereof.

20 Witness my hand, I have hereunto affixed my  
21 official seal this 8th day of September, 2014, at  
22 Columbia, Richland County, South Carolina.

23  
24  
25  
  
Jeffrey M. Thomas  
RPR, Notary Public  
State of South Carolina at Large  
My Commission expires  
December 14, 2017

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1 State of South Carolina) Court of Common Pleas  
2 ) 14th Judicial Circuit  
3 County of Beaufort ) No.: 2011-CP-07-128 and 129

3

4

5 First Citizens Bank and )  
6 Trust Company, Inc., )  
7 Plaintiff, )  
8 vs. ) HEARING  
9 Blue Ox, LLC, and J. )  
10 Chris Lindgren, )  
11 Defendants. )  
12 )  
13 )  
14 )  
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22 )

12 Hearing reported by Deborah S. Thomas,  
13 Certified Verbatim Reporter and Notary Public in and  
14 for the State of South Carolina; said hearing held  
15 before the Honorable Marvin H. Dukes, III, Beaufort  
16 County Master in Equity and Special Circuit Court  
17 Judge in accordance with the South Carolina Rules of  
18 Civil Procedure, at the Beaufort County Courthouse,  
19 102 Ribaut Road, Room 212, Beaufort, South Carolina,  
20 on July 8, 2015, at the hour of 9:54 a.m.

21

22

THOMAS REPORTING SERVICES  
156 Argent Way  
Bluffton, South Carolina 29909

#19 7-8-15 first citizens hearing  
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23

24

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1

# Appearances

2

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3

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# EXHIBIT INDEX

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Exhibits:

Marked at Page

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(None were proffered.)

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#19 7-8-15 first citizens hearing

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1 This hearing is taken in accordance

2 with the South Carolina Rules of Civil Procedure.

3 JUDGE DUKES: Good morning. We are

4 here in a motion to reconsider subsequent to an

5 order on supplemental proceedings in Case

6 11-CP-07-128. And Mr. Lindgren's attorney,

7 Mr. Simons, has filed that motion. I'm happy to

8 hear from you, sir.

9 MR. SIMONS: Thank you, sir. First I

10 would like to thank the court for giving me an

11 opportunity to discuss the legal issues in this case

12 with you. As I indicated in our motion to

13           #19 7-8-15 first citizens hearing  
14 reconsider, it's a little unusual. A lot of times  
15 you file a motion to reconsider simply to make sure  
16 you've got all of your bases for appeal purposes.

17           In this particular case I believe that the  
18 court should truly reverse itself, correct an error  
19 of law before the case goes up. And I thank the  
20 court for allowing me the opportunity to make that  
21 case to you.

22           What I would like to do is jump straight  
23 to the key point in the case. I've indicated in my  
24 motion and in e-mails to the court that I believe  
25 that the order the Plaintiff submitted and the court  
signed precedes from a faulty premise.

6

1           And the faulty premise, Judge Dukes, is  
2 this. The Plaintiff takes the position that it is  
3 wrong to convert non-exempt assets to exempt assets.  
4 And that the mere fact of doing that, the mere act  
5 of the conversion is fraudulent as against a  
6 judgment creditor.

7           Based on that premise Plaintiff rejects  
8 the notion that they have to prove fraudulent  
9 intent. And so what they do is they say, okay,  
10 number one, the conversion is bad. And therefore we

#19 7-8-15 first citizens hearing

11 don't have to prove that your conversion was  
12 accompanied by fraud or motivated by fraudulent  
13 intent. And they are simply wrong on that.

14 The first case we cited in our motion --  
15 excuse me -- our memorandum on this issue was from  
16 the '20s. And that was the case because I know you  
17 remember the case because you commented about it on  
18 the phone one time. That was the case involving the  
19 cows and the pigs and the sheep and so forth.

20 In the 1920s it was regarded as, quote,  
21 well settled that it is not fraudulent for a debtor  
22 to take advantage of exemptions that are provided to  
23 him by statute in order to shield those assets from  
24 the claims of creditors. That is what the exemption  
25 statutes are for.

7

1 And that case, of course, involved the man  
2 converted -- I've forgotten the numbers now, but  
3 they are in our motion. He converted cows and pigs  
4 I believe it was. He had too many of those under  
5 the exemption statute. He took the excess cows and  
6 pigs and traded them for some sheep. And the sheep  
7 that he got was less than the number that he's

8 #19 7-8-15 first citizens hearing  
permitted by the exemption statute.

9 And so that was a pretty clear case of  
10 where he had simply converted non-exempt assets in  
11 the form of his cows and so forth into exempt assets  
12 in the form of sheep. And I thought that was a  
13 wonderful case to illustrate the point that the  
14 exemption -- excuse me. That the conversion is not  
15 ipso facto bad. It's okay.

16 And the courts have held that that is  
17 expressly okay. And I've cited cases involving  
18 people where they sold their non-exempt furniture  
19 and used their money to put into exempt assets.

20 A fellow sold his pickup truck to the same  
21 effect. Most recently we've cited two more cases  
22 involving but one a traditional IRA, one a Roth IRA,  
23 and both of those cases the people took tax refunds,  
24 cash. In one of the cases it was a tax refund plus  
25 some of his earned income which as Joey argues in

8

1 this case, my guy converted cash in his possession  
2 which was non-exempt. And he converted it into  
3 exempt meaning the IRA accounts.

4 And these cases we've cited to you all  
5 involve the same thing where the debtor has

#19 7-8-15 first citizens hearing

6 converted a non-exempt asset into an exempt asset.  
7 And in every single one of those cases that we've  
8 cited in our brief and in our newest motion, the  
9 more recent two cases that we've cited, the courts  
10 have held that they were not fraudulent.

11 And what they've said is that in order for  
12 it to be a fraudulent transfer the creditor has got  
13 to prove something more than the transfer. That is  
14 what the case from the 1920s going back to the cows  
15 and the pigs and the sheep, what they said is the  
16 creditor has got to prove extrinsic -- some  
17 extrinsic evidence of fraud; in other words,  
18 something beyond the mere transfer.

19 And in this case Joey hasn't done that.  
20 All he has said is that Lindgren made voluntary,  
21 which I take to mean knowing, post-judgment  
22 contributions to his IRA accounts. In other words,  
23 he took the money knowing that he was indebted to  
24 the bank and he didn't give it to the bank. And he  
25 instead put it in an IRA account.

9

1 Well, that is the mere conversion that the  
2 courts have said is not enough to prove fraudulent

3           #19 7-8-15 first citizens hearing.  
4           intent for purposes of the relief they are seeking  
5           here. There has got to be something beyond that.

6                     Now, if you read the cases, the more  
7           modern cases, they speak to what are called badges  
8           of fraud. In the two cases we've cited most  
9           recently, the count may differ, but they were  
10          somewhere in the neighborhood of 17 or 19 different  
11          badges or indicia of fraud that the courts examined.

12                    Well, I've not addressed the badges of  
13          fraud because it's the burden on Joey to come  
14          forward to show something beyond the mere  
15          conversion, to bring some evidence forth to  
16          establish some of those badges of fraud, and he's  
17          not done that. So I've not attempted to argue the  
18          negative.

19                    I say the burden is on him. And the law  
20          in South Carolina is clear, at least on this point,  
21          that for a fraudulent transfer claim he's got to  
22          prove it by clear and convincing evidence.

23                    So the law is that the Plaintiff has got  
24          to come forward with evidence on these badges of  
25          fraud to a clear and convincing standard to show  
26          something beyond the mere conversion of the assets

10

#19 7-8-15 first citizens hearing

1 from non-exempt to exempt. That they haven't done.

2 And that is why I say it is just so  
3 crystal clear because -- and I'll put it to you very  
4 simply. If you believe that the mere conversion is  
5 enough, then there is nothing else to talk about.  
6 But if you agree with me after you've read the cases  
7 that the mere conversion is not enough, and there  
8 has got to be something else, then you will examine  
9 the record in this case and find out there is  
10 nothing else.

11 And that, in essence, is the argument.  
12 There is another piece of this to be considered.  
13 And that is in -- and the matter of the 401-Ks is  
14 not before you today but something that is -- and we  
15 talked about it before we got on the record about  
16 there is something different about the 401-Ks and  
17 the IRAs.

18 One of the differences is in the Homestead  
19 Exemption Statute provides that ERISA plan funds are  
20 exempt. And it doesn't contain a fraudulent  
21 transfer exception. That is one of the reasons why  
22 the 401-K has got a greater degree of protection  
23 from the claims of the Plaintiff in this case than  
24 do the traditional or Roth IRAs.

25

I mention that because the subsection of

11

1 the homestead statute that pertains to individual  
2 retirement accounts does contain a fraudulent  
3 transfer exception. And you wonder, okay, what does  
4 that mean?

5 Now, Joey would have you believe that even  
6 though it talks about fraudulent transfer as an  
7 exception in the homestead exemption statute, he  
8 doesn't have to prove fraudulent intent. I've  
9 already explained why other courts all around the  
10 country have concluded to the contrary, but there is  
11 also an issue of statutory interpretation in South  
12 Carolina. And that is that the subsection of the  
13 Homestead Exemption Statute that pertains to the  
14 individual retirement accounts and that has the  
15 fraudulent transfer exemption also says that the  
16 interest of an individual under a retirement plan  
17 shall be exempt from creditor process to the same  
18 extent permitted in Section 522(d) under Federal  
19 Bankruptcy Law.

20 We've laid it out in our memorandum, and I  
21 believe also in the motion to reconsider, how that

22           #19 7-8-15 first citizens hearing  
reference to 522(d) brings in the applicable Federal  
23           standard on fraudulent transfers which unambiguously  
24           and without any question provides and requires proof  
25           of an actual intent to hinder, delay, defraud, the

12

1           magic language of the statute.

2                       So for two different reasons, one the  
3           complete unanimity of the law elsewhere that the  
4           mere fact of the conversion is not enough. You've  
5           got to extrinsically prove actual intent to commit  
6           fraud onto the creditor. You've got that argument.  
7           Then you've also got the statutory argument that I  
8           submit to you expressly incorporates the Federal  
9           standard into our State standard again requiring  
10          proof of intent and again requiring actual intent  
11          and to a clear and convincing standard.

12                      And, again, there is no evidence in this  
13          record on that. Now, that is the -- I guess the sum  
14          and the substance of the arguments on the merits --  
15          on the key issues of the merits. Some other points  
16          I would make just to briefly go through the motion  
17          to reconsider, the order that Joey submits or  
18          submitted said that the parties stipulated to the  
19          facts. We did not stipulate to the facts. We

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20 expressly did not stipulate to the facts. We did  
21 agree on what the record consisted of.

22 And I would ask the court to clearly  
23 define in whatever order is entered as a result of  
24 today that the content of the record on which the  
25 court has acted be clearly stated in the order so we  
13

1 don't have any questions when we go elsewhere.

2 My recollection, and what is reflected in  
3 my correspondence with Joey is that we agreed that  
4 the -- obviously the hearing transcript when Mr.  
5 Lindgren was here on the supplemental proceedings  
6 testimony, that is part of the record. Lindgren  
7 submitted an affidavit. That is part of the record.  
8 And Joey submitted a one-page summary of the  
9 evidence as it related to the amounts and the timing  
10 of the contributions that he challenges. And that  
11 is in the record.

12 Insofar as I'm concerned nothing else is  
13 in the record other than the memoranda we've  
14 submitted and the motions and so forth. Now turning  
15 to the facts, Mr. Lindgren filed an affidavit. And  
16 the court in the order submitted by Joey did not

17           #19 7-8-15 first citizens hearing  
make any findings of fact based on that affidavit.

18           And we would specifically ask that the  
19           court -- and this is again set forth in Point 2 of  
20           our motion to reconsider.

21           JUDGE DUKES: Can I ask you real  
22           quickly about any factual dispute though because as  
23           I recall there really wasn't too much of a factual  
24           dispute about the following. Number one, the  
25           judgment existed. Mr. Lindgren knew it existed.

14

1           Number 2, he had previously had this IRA. I think  
2           that is not disputed. And that he had been making  
3           contributions to it in the past.

4           MR. SIMONS: That he had.

5           JUDGE DUKES: That he had.

6           MR. SIMONS: Yeah. Yes, sir.

7           MR. FLOYD: I'm not sure there is  
8           evidence on that point.

9           MR. SIMONS: Sure there is. It's in  
10          his affidavit.

11          MR. FLOYD: There was evidence of  
12          contributions to the IRA -- to the 401-K, but not  
13          the IRA. I could be wrong.

14          MR. SIMONS: You are wrong. I'm

15       sorry.

16                       MR. FLOYD: The affidavit speaks for  
17       itself. I'll agree with that.

18                       JUDGE DUKES: All right. But I guess  
19       I'm trying to figure out what was undisputed. There  
20       was no evidence that the IRA was created to dump  
21       this money into as I recall. It was a preexisting  
22       IRA, maybe. Maybe I'm misremembering it.

23                       MR. SIMONS: That is true. He did  
24       open and fund a Roth IRA. And to that extent there  
25       was an IRA opened post-judgment. My answer to that

15

1       is that in both of the cases we've more recently  
2       cited the accounts were opened post-creditor  
3       activity. I don't remember whether it was a  
4       judgment or what the creditor activity was, but they  
5       were both clearly done with a view toward the  
6       creditor activity. They opened new accounts.

7                       And the law on Roth and traditional IRAs  
8       is you can fund one or the other or both, but only  
9       up to the total that you are allowed on an annual  
10       basis. You can put half in each one of the  
11       accounts. So the fact that he put all of his

12           #19 7-8-15 first citizens hearing  
13       permitted annual contribution into a new Roth as  
14       opposed to an old traditional IRA is of no  
15       consequence to me in the analysis.

16                   JUDGE DUKES: Well, I guess I asked  
17       the wrong question. The undisputed facts I think  
18       were he had made consistent contributions --

19                   MR. SIMONS: Over many years.

20                   JUDGE DUKES: -- over many years.  
21       And the contributions had not increased. Is that  
22       accurate or not?

23                   MR. SIMONS: Except to the extent  
24       that Federal law would have enabled him to increase  
25       them, right.

                  JUDGE DUKES: Right. But, I mean,

16

1       they hadn't doubled or tripled or anything like  
2       that. They had gone up concurrent with whatever  
3       the --

4                   MR. SIMONS: Precisely.

5                   JUDGE DUKES: Okay. Because that  
6       seemed like I recall it being an undisputed fact.  
7       So, you know what, let me let you finish your  
8       argument. And I have a couple of questions.

9                   MR. SIMONS: The only fact that is

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10       disputed that I'm aware of is that the order that  
11       Joey put in front of you says, in effect, you don't  
12       have to find fraudulent intent, but if I do have to  
13       find it, I find it without ever telling what is the  
14       basis on which such a finding is made.

15                So I suppose that the order says that  
16       Lindgren's post-judgment transfers were accompanied  
17       by fraudulent intent --

18                JUDGE DUKES: Because they were  
19       post-judgment transfers?

20                MR. SIMONS: Right.

21                JUDGE DUKES: That is your first  
22       argument. You are just --

23                MR. SIMONS: So that is the issue of  
24       fact.

25                JUDGE DUKES: Right.

17

1                MR. SIMONS: Lindgren has sworn that  
2       he made these contributions the same as he has. And  
3       they were not motivated by an intent to defeat his  
4       claims or anybody else's. The Plaintiff's claims or  
5       anybody else's.

6                Now, that is what he says under oath. And



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5 finding of fraud where the evidence -- I think it's  
6 undisputed the evidence was that -- let me say this.  
7 There was nothing beyond his knowledge of the  
8 judgment and his transfer with that knowledge. And  
9 as I understand the argument, that is fine. You can  
10 have that, but you have to accompany that with an  
11 independent finding of fraud from some other  
12 evidence other than the mere transfer under  
13 knowledge of the judgment. That is the sum and  
14 substance I think of the first argument and the  
15 second.

16 MR. SIMONS: Right.

17 JUDGE DUKES: Okay. Anything else?

18 MR. SIMONS: Well, now I want to get  
19 into sort of a nuanced argument, but I want you to  
20 have -- boy, I was going to say I want you to have a  
21 complete understanding. I don't mean to suggest  
22 that your understanding is incomplete.

23 JUDGE DUKES: Oh, I'm never insulted  
24 by that. I often don't have a complete  
25 understanding, so go right ahead.

19

1 MR. SIMONS: The bank argues that

2           #19 7-8-15 first citizens hearing  
under South Carolina law -- and this is just  
3       standard Statute Elizabeth black letter law that a  
4       transfer accompanied by valuable consideration is  
5       not fraudulent absent intent to defraud.

6           On the other hand, a transfer without  
7       valuable consideration can be fraudulent without  
8       proof of intent to defraud. And the bank would  
9       argue that Lindgren's transfer was unaccompanied by  
10      consideration, therefore they don't need to prove  
11      fraudulent intent.

12           And I agree with the sort of black letter  
13      rules that I've summarized and they argue. What I  
14      don't agree with, and this is the nuanced part, I  
15      don't believe that -- and I've read everything I can  
16      read on this subject. I don't believe that the  
17      Statute of Elizabeth construct about looking at a  
18      transfer and whether there was or was not valuable  
19      consideration is applicable to the conversion case  
20      that we have here.

21           Joey wants to argue, and does in his  
22      briefing and maybe in the order, that all Lindgren  
23      did was move money from one pocket to another, and  
24      that is the conversion. But then he wants to argue  
25      that there was no consideration when he transferred

20

1 it.

2 Now, what I would say to the court is that  
3 the Statute of Elizabeth juris prudence that is  
4 looking at a transfer and valuable consideration  
5 isn't applicable here because consideration -- if  
6 you go back to Contracts 101, consideration involves  
7 an exchange of consideration.

8 And so when a court is talking about  
9 whether a transfer was accompanied by consideration  
10 they are talking about whether the party to whom the  
11 transfer of the asset was made parted with valuable  
12 consideration in exchange.

13 Well, that doesn't happen when the money  
14 goes from one pocket to the other pocket, but the  
15 courts have held that the conversion is to be  
16 treated as a transfer for fraudulent conveyance  
17 purposes.

18 And what I suggest to the court is that in  
19 conversion cases, as opposed to third party transfer  
20 cases, the existence or presence or absence of  
21 consideration shouldn't be determinative, but if you  
22 want to apply the old fashioned Statute of  
23 Elizabeth, you know, either/or situation, was there

#19 7-8-15 first citizens hearing

24 or was there not consideration accompanying this  
25 transfer? The answer is there was consideration.

21

1 And that is that Lindgren -- the cases Joey cites  
2 would be a case where the husband gives his house to  
3 the wife.

4 That is obviously no consideration.  
5 That's a gift. Well, Lindgren didn't give his money  
6 away. To the extent there was a transfer, it was a  
7 transfer to Fidelity. And Lindgren received  
8 valuable consideration in return for that transfer.  
9 He got the right to get that money back with a tax  
10 free rate of return and to be potentially taxed at a  
11 lower rate in the future.

12 Now, the niceties of that are a little bit  
13 different between the traditional and the Roth IRAs  
14 for reasons I'm sure you know, but the point is that  
15 he didn't just give away his money for no  
16 consideration, which would trigger a Statute of  
17 Elizabeth analysis in sort of the old fashioned way.

18 In this case he converted non-exempt to  
19 exempt. And if you want to consider that to be a  
20 transfer, and if want to examine whether that was

21           #19 7-8-15 first citizens hearing  
22       accompanied by consideration, the answer is it was  
23       accompanied by consideration. And as I say, that is  
24       a nuance I don't think is necessary to get into, but  
25       it is an interesting academic discussion of how to  
      apply very old what used to be common law and then

22

1       Statute of Elizabeth fraudulent conveyance concepts,  
2       how to apply that to a traditional IRA that didn't  
3       even exist when courts were writing early decisions  
4       on the Statute of Elizabeth.

5           And it didn't exist when the court held in  
6       the Vorzburg case in the '20s that it was well  
7       settled that the conversion was okay. IRAs didn't  
8       exist at that time. So anyway, I question whether  
9       those juris prudential principles are applicable to  
10      a transfer from a debtor from his checking account  
11      to an IRA.

12           The order contains a finding to the effect  
13      that Lindgren failed to retain sufficient property  
14      assets, to pay First Citizens. There is no evidence  
15      in the record to my knowledge of Mr. Lindgren's  
16      financial status other than --

17           JUDGE DUKES: Nulla bona or not?

18           MR. SIMONS: There --

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19 JUDGE DUKES: I thought that was in  
20 nulla bona.

21 MR. SIMONS: There may be.

22 JUDGE DUKES: All right. Any way --

23 MR. SIMONS: But whether -- whether  
24 the Sheriff found something versus what he retained  
25 is different to my understanding, but --

23

1 JUDGE DUKES: All right.

2 MR. SIMONS: And understand the case  
3 doesn't turn on that factual finding.

4 JUDGE DUKES: Right.

5 MR. SIMONS: But if I don't question  
6 it here, I can't argue about it later. And it also  
7 contained a finding that Lindgren maintains that he  
8 has no assets that can be used to apply towards the  
9 judgments.

10 I couldn't find any testimony from  
11 Lindgren to that effect. So I would say both of  
12 those factual findings are without evidentiary  
13 support.

14 And the only other point I would make at  
15 this time is that -- and that is relating to if the

16           #19 7-8-15 first citizens hearing  
17           court is going to adhere to its position that  
18           Fidelity should be required to pay Lindgren's IRA  
19           money to the bank.

20                     In other words, if you don't truly  
21           reconsider your position today, then I would ask the  
22           court to include in that order a provision that that  
23           order be stayed pending appeal, otherwise I've got  
24           to run around like a headless chicken and get my  
25           notice of appeal filed and my supersedeas or  
                petition for stay filed before Joey can talk

24

1           Fidelity into parting with my client's money.

2                     JUDGE DUKES: Well, we've got a  
3           current order basically that says nothing is going  
4           to happen until I rule on this.

5                     MR. SIMONS: Correct.

6                     JUDGE DUKES: That is what the order  
7           said the other day.

8                     MR. SIMONS: And I just want whatever  
9           ruling today to clarify going forward.

10                    JUDGE DUKES: No, I understand.

11                    MR. SIMONS: That's all.

12                    JUDGE DUKES: Okay.

13                    MR. SIMONS: And I would be delighted

#19 7-8-15 first citizens hearing

14 to answer whatever questions you might have, Judge  
15 Dukes. I know I've been kind of long winded and I  
16 apologize.

17 JUDGE DUKES: No, it's always  
18 interesting. So the essence of it essentially as I  
19 understand it is that you had mentioned 15 badges of  
20 fraud. I didn't know there were 15. I don't think  
21 I could recite them, but --

22 MR. SIMONS: Actually 19.

23 JUDGE DUKES: Nineteen. But that the  
24 one that basically talks about transfers without  
25 consideration is not applicable here as fraud

25

1 because in essence the payment into an IRA is not a  
2 transfer -- a classic transfer without any sort of  
3 consideration. I mean, that's --

4 MR. SIMONS: I think you can look at  
5 one of two ways or both ways at the same time.

6 JUDGE DUKES: Uh-huh.

7 MR. SIMONS: I don't know how much  
8 particle physics you remember, but --

9 JUDGE DUKES: None. I don't even  
10 know if I took particle physics, but --

#19 7-8-15 first citizens hearing

11 MR. SIMONS: A particle can be a  
12 particle and it can be a wave at the same time.

13 JUDGE DUKES: I do remember that  
14 somehow.

15 MR. SIMONS: Yeah. Okay. Well, in  
16 this case, and I don't mean to get metaphysical  
17 about it, but you can consider it to be not a  
18 transfer or you can consider it to be a transfer  
19 with consideration. I would submit to you that the  
20 best way to analyze it is the way that other courts  
21 have. And they are the cases that we've cited and  
22 I'm sure you will read.

23 And that is that when you convert assets,  
24 you haven't really transferred them to anybody else,  
25 although in this case we have transferred them

26

1 physically, I guess, to Fidelity, but to the extent  
2 that Lindgren retains control over them, he haven't  
3 really transferred them, but that conversion is  
4 deemed to be a transfer for purposes of considering  
5 whether the conversion was fraudulent.

6 And in order to treat a conversion as  
7 fraudulent, the courts are unanimous that there has  
8 got to be something more than the mere conversion.

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9 JUDGE DUKES: But if the transfer is  
10 a transfer without consideration, and I understand  
11 you take a different position, but if it is that is  
12 one of the 19 -- I didn't realize -- 19 you said?  
13 Nineteen badges of fraud?

14 MR. SIMONS: I don't know that the  
15 transfer without consideration is one of the badges.  
16 They are most recently listed, and comprehensively  
17 listed in the -- I want to say the Bodan case. I  
18 sent you a copy -- copies of the two cases we cited  
19 most recently, the Bodan and the Channon cases were  
20 both attached to the motion. If you've got the  
21 court's copy of the motion here, they list them in  
22 there.

23 And I don't remember a transfer without  
24 consideration as being one of the badges of fraud.  
25 They had to do more with things like concealment and  
27

1 things of that nature, actions taken by the debtor  
2 in connection with the conversion that could be  
3 relevant to the guy's state of mind.

4 JUDGE DUKES: Okay. So -- but the  
5 summary then in essence is you can't just show the

6           #19 7-8-15 first citizens hearing  
transfer. And the transfer itself is not the proof  
7 of the fraud. You must show the transfer and the  
8 fraud, this is your argument as I understand it.

9           MR. SIMONS: Yes, sir.

10          JUDGE DUKES: And that the transfer  
11 to the 401-K is not indicative of fraud because,  
12 first of all, maybe it's not one of the badges of  
13 fraud. And second, because it's not truly a  
14 transfer without consideration based on the  
15 mechanics of the 401-K system and all of that.

16          MR. SIMONS: I want to be sure I  
17 understand what you are asking me. Whether the  
18 transfer to the 401-K can be used as a badge of  
19 fraud with respect to the transfer to the IRA  
20 account? Is that what you are --

21          JUDGE DUKES: I'm sorry. Not 401-K.  
22 The IRA.

23          MR. SIMONS: Okay.

24          JUDGE DUKES: The IRA. I misspoke.  
25 The IRA is what we are talking about, not the 401-K.

28

1           MR. SIMONS: Okay.

2           JUDGE DUKES: The transfer to the  
3 IRA -- and I understand that is your -- I'm not

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4 asking you that. I think that is your argument.  
5 Your argument is, in fact, the transfer to the IRA,  
6 forgive me if I said 401-K. The IRA, even though  
7 traditional consideration was not paid back, is not  
8 a transfer without consideration. That is  
9 Lindgren's argument?

10 MR. SIMONS: It is certainly not a  
11 transfer without consideration here. I don't  
12 believe a transfer to an IRA is ever a transfer  
13 without consideration because, A, you can argue  
14 there is no transfer because he retained control.  
15 B, to the extent there was a transfer to the third  
16 party holding the funds, there was valuable  
17 consideration. He didn't just give away the money.

18 I received in return custodial services  
19 plus various tax benefits. So you can't say that it  
20 was without consideration if you want to treat it as  
21 a true traditional transfer. My argument is that  
22 the modern cases deem it to be a transfer for  
23 purposes of fraudulent conveyance examination, but  
24 don't get hung up about whether there was or wasn't  
25 consideration when somebody makes a deposit into an

29

1           #19 7-8-15 first citizens hearing  
2           IRA. That is the nuance of it I'm suggesting to  
3           you.

4                       JUDGE DUKES: Okay. I think I  
5           understand it.

6                       MR. SIMONS: In other words, I don't  
7           think you can simply apply old black letter Statute  
8           of Elizabeth rules to an IRA --

9                       JUDGE DUKES: That predate the IRA.

10                      MR. SIMONS: To an IRA transfer and  
11           say, okay, there was no consideration; therefore, he  
12           doesn't have to prove intent which is what, I guess  
13           at bottom, his argument is, but there is not a case  
14           in the country that has reached that conclusion.

15                      JUDGE DUKES: This is different, you  
16           are saying, from someone selling the house to their  
17           friend for a dollar kind of thing?

18                      MR. SIMONS: Right. Very much so.

19                      JUDGE DUKES: Okay.

20                      MR. SIMONS: And one final point, and  
21           that is that if the law is as sit forth in the order  
22           that Joey put in front of you that means that no  
23           judgment debtor could ever put any money in their  
24           retirement plan because the mere act of doing so  
25           would expose that money to the claims of the

25                   #19 7-8-15 first citizens hearing  
creditors.

30

1                   And no court anywhere has reached that  
2                   conclusion. And, 2, that conclusion would just fly  
3                   in the face of the public policy of promoting and  
4                   protecting retirement savings. I mean, the mere  
5                   fact that we've got all of these tax advantages for  
6                   making these contributions to retirement plans and  
7                   the fact that these retirement plans are by statute  
8                   exempt from creditor claims as a general matter  
9                   shows that there is a public policy to promote  
10                  retirement savings, keep these people off the dole.

11                  And the result that is achieved in Joey's  
12                  order is just to the contrary. Hey, anybody in this  
13                  country can save for retirement except judgment  
14                  debtors. And it would even go farther than that.  
15                  Once you get sued and there is a prospect that you  
16                  might have a judgment against you, you better not  
17                  contribute to your retirement plan.

18                  And I say again that that is an extreme  
19                  position that no court has ever reached that  
20                  conclusion. And the cases that we've cited again  
21                  and again say that it's okay for the debtor to  
22                  convert his property.

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23 JUDGE DUKES: Okay.

24 MR. SIMONS: To protect it.

25 JUDGE DUKES: Anybody need a break

31

1 before we go onto Joey? Deborah, you good? Okay.

2 All right.

3 MR. FLOYD: My turn?

4 JUDGE DUKES: Your turn.

5 MR. FLOYD: Okay. Judge, what we

6 have here today is that the Defendant is saying to

7 allow us to execute on these funds that are

8 otherwise not exempt are now allegedly exempt. The

9 debtor has moved from one pocket to the other is

10 essentially a shelter.

11 And I would suggest that his last

12 statement, what he said about courts and public

13 policies and all of that sort of stuff, well, I

14 would submit to you that the court has never found

15 to the contrary of what he said either.

16 They haven't said you can contribute to

17 your retirement account. I think debtors -- and I

18 think the court -- these courts -- the South

19 Carolina courts will ultimately find that if you are

20           #19 7-8-15 first citizens hearing  
21           a judgment debtor you need to take care of your  
22           judgment creditors before you start moving money  
23           around and doing things to the chagrin of your  
24           creditors..

25           Also -- as a preliminary matter I also  
want to point out that the record contains the

32

1           record of contributions. And I'm certain that you  
2           will go back and look at that. And I would submit  
3           to you that it is sporadic. It does show a spike.

4           He opened up an education IRA  
5           post-judgment. He opened up a Roth IRA  
6           post-judgment. It's neither here nor there. I know  
7           you will look at that, but I did want to bring that  
8           up.

9           But additionally as a preliminary matter I  
10          think it's important to note that debt in these  
11          judgments arises by way of confession of judgment.  
12          The debtor's counsel suggests that there is no  
13          evidence to support the assertion that he has no  
14          assets to apply towards the judgment.

15          And it's exactly as you pointed out. We  
16          have a nulla bona return. If the debtor -- I guess  
17          what he's saying is, I have chosen not to pay the

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18 judgment because either he has assets or he doesn't.  
19 If he had assets he would have paid the judgments  
20 and we wouldn't be here today.

21 Either way there is a nulla bona return.  
22 I would submit to you that this is just another  
23 index or indicia of fraud because he's not paying  
24 the judgment. Also I want to keep in mind that all  
25 of these contributions are post-judgment, voluntary

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1 contributions.

2 To allow a judgment debtor to aggressively  
3 contribute towards his IRAs effectively provides a  
4 shelter for debtors. A Swiss bank account, I mean  
5 moving money from one pocket to the other, it's wide  
6 open for execution. And then you've moved it over  
7 into another pile where purportedly creditors can't  
8 reach is just fundamentally wrong to me.

9 One of the cases cited by the debtor's  
10 counsel in this case makes reference or quotes a  
11 case from New Mexico which I found pretty  
12 interesting. It's the case of Donanne Savings  
13 versus Dofflemyer. And it's cited in the Channon  
14 case. And I wanted to read just a couple paragraphs

15           #19 7-8-15 first citizens hearing  
because I thought it was pretty instructive.

16           We hold that the object of exemption  
17 statutes quoted above is to allow for exemptions in  
18 certain funds, but that it does not allow a debtor  
19 to find shelter in these statutes by perpetrating a  
20 fraud upon his or her creditors. On their face the  
21 statutes allow for unlimited exemptions in life  
22 insurance annuities and pension and retirement  
23 funds.

24           At least one judge, however, has noted  
25 that the potential for the abuse of the legitimate

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1 exemptions under the statute. It cites a case. The  
2 legislature did not intend that these generous  
3 provisions should be prostituted to the  
4 encouragement of extravagance and the evasion of  
5 just indebtedness.

6           Then it goes on to say, to hold that a  
7 debtor automatically may find refuge in these  
8 statutes on the eve of execution would render the  
9 statute's application absurd, unreasonable, and  
10 unjust.

11           That sums it up better than I can sum it  
12 up, probably. If the court allows the debtor to

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13 take these actions that essentially give approval to  
14 all debtors to immediately convert assets that are  
15 otherwise subject to exemption into exempt assets  
16 would render not only the Statute of Elizabeth  
17 meaningless and provide creditors with no remedy --  
18 I think it sets a horrible precedent for judgment  
19 creditors going forward because if someone were to  
20 get a judgment against somebody, essentially would  
21 take all of their money, move it over into a life  
22 insurance policy or into a 401-K or an IRA and  
23 immediately claim they are all exempt. You can't  
24 touch this money.

25 I think that is fundamentally wrong in

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1 South Carolina. And, in fact, if you read all of  
2 these cases, even the ones that he's cited, it's not  
3 this automatic protection.

4 And even if you buy into this I have to  
5 show fraud argument, I mean the record is replete --  
6 even if you go into these indicia of fraud, badges  
7 of fraud, there is nothing in South Carolina that  
8 says you have to do that, but even under the Statute  
9 of Elizabeth it's there.

10                   #19 7-8-15 first citizens hearing  
                  He had the money. He moved it over here.

11           I hid it from his creditors. Maybe he didn't hide  
12           it, but he made this transfer. In all of these  
13           bankruptcy cases that you cite or that we cite and  
14           we see, all of these things are disclosed on their  
15           schedules. They tell the bankruptcy trustee, this  
16           is what I did.

17                   In this instance but for these  
18           supplemental proceedings I would not have found what  
19           I found, and that is that he took money, cash. He's  
20           moving it over. And it's also important to note a  
21           lot of these cases have the suggestion that it's  
22           prudent retirement planning. It's prudent  
23           retirement planning. It's good for the debtors to  
24           not get on the dole.

25                   Well, I would submit to you in this

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1           instance nothing could be farther from the truth  
2           because there is evidence in the record of where  
3           he's using this money just like a bank account. Not  
4           this IRA, but he's using his 401-K just like a bank  
5           account.

6                   He took a distribution. Page 19, Lines 11  
7           through six. He took a distribution from his 401-K.

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8 That is no different than a bank account. He took  
9 the money -- yes, he's entitled to do it, but that  
10 money that he took some \$200,000, plus or minus,  
11 that he testified, was nothing more than a bank  
12 account that was not subject to exemption that he  
13 had access to. He took the money. And who knows  
14 where that money has gone because he didn't have  
15 enough money in the bank to pay my client during  
16 these supplemental proceedings.

17 So I think all the facts taken into  
18 account, the fact that he's using the 401-K at  
19 least, and he used the education IRA that he opened  
20 up -- the education IRA was opened in 2012 with a  
21 contribution of \$22,000.

22 And immediately withdrawn or immediately  
23 went aware. There were no contributions in 2013 and  
24 2014. So as we sit here at the time of the  
25 supplemental proceedings there was no more money

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1 left. That is another piece of evidence that I  
2 think is important.

3 You take the money that is not exempt.  
4 You throw it in an exempt account until you need it.

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5 Then when you need it, creditors can't get it, but  
6 you have access to it. Mr. Lindgren controlled all  
7 of this money. It was all within his control. It's  
8 all post-judgment. It's all voluntary. It's not  
9 like he's working at some major corporation where  
10 they're putting money into his retirement for him.

11 I think the record is sufficient and ample  
12 to show that these are fraudulent transfers. And to  
13 somehow suggest that moving money, cash, into an IRA  
14 is somehow with consideration is to me just an  
15 unreasonable assertion that I don't think any court  
16 is ever going to find that to be with consideration.

17 That again flies in the face of a judgment  
18 creditor's rights to try and collect money. To not  
19 allow a judgment creditor to get this money in this  
20 situation is fundamentally unfair by giving a debtor  
21 the right to move money that is otherwise not exempt  
22 into an exempt account and to put up a fence around  
23 it and tell creditors you can't get it. And for  
24 that reason I think the ruling is correct on the  
25 IRAs.

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1 JUDGE DUKES: Let me ask you this. I  
2 mean, are there ever circumstances in which a

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3 judgment debtor can pay into an IRA in the face of a  
4 judgment against them? I guess that would -- by  
5 definition make them a judgment debtor.

6 MR. FLOYD: So, in other words, you  
7 are saying with a judgment debtor --

8 JUDGE DUKES: When a judgment debtor  
9 has an IRA, is it the bank's position that they  
10 simply cannot pay into an IRA in any amount?

11 MR. FLOYD: I believe that speaks to  
12 the case that one must be just before one is  
13 generous. Before you give money to yourself I think  
14 you have to make proper arrangements with your  
15 creditors before you do that.

16 JUDGE DUKES: So you are saying there  
17 would be no circumstances under which -- I mean, is  
18 that the -- I guess that is a no.

19 MR. FLOYD: I don't want to make a  
20 blanket statement, but in the facts of this case I  
21 think the answer is no because he clearly has  
22 sufficient cash that he could have dealt with this  
23 judgment within the past four years between the  
24 contribution to his 401-K, the traditional IRA, the  
25 educational IRA, the Roth IRA, over \$92,000 since

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1 the judgment was entered, not saying what he took  
2 out in the other cash activities that he did and the  
3 other expenditures that he had.

4 But in this specific case the two  
5 judgments in this case total \$113,000. Over the  
6 course of four years he could have dealt with this  
7 judgment. He could have paid it. He could have  
8 made arrangements with the creditor or creditors.

9 Does he have to pay them off? No. I'm  
10 not saying he has to pay them off, but I think he  
11 could have made the necessary arrangements to do  
12 both.

13 JUDGE DUKES: Okay. How about back  
14 to the fraud issue for a second. The bank's  
15 position I think is fraud isn't really required in  
16 South Carolina under these circumstances. And so is  
17 it the bank's position that because fraud isn't  
18 required that there -- well, let me ask this. Is it  
19 the bank's position that there is any evidence of  
20 fraud in the record?

21 MR. FLOYD: Absolutely.

22 JUDGE DUKES: And is that the  
23 transfer without consideration or what is that?

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24 MR. FLOYD: That is the transfer that  
25 he made. He converted the exempt asset into a --

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1 the non-exempt asset into an exempt asset to shield  
2 it from his creditors. That is one. Another is --

3 JUDGE DUKES: I guess what I meant is  
4 independent of the transfer itself which I think is  
5 Mr. Simons' argument is -- everyone acknowledges the  
6 transfer. I think Mr. Simons' argument is that  
7 exclusive of that it requires -- if I understand the  
8 argument correctly, exclusive of the transfer itself  
9 it requires some other independent evidence of  
10 fraud. Is that -- did I understand that correctly?

11 MR. SIMONS: That is my -- that is  
12 one of my arguments, yes, sir.

13 JUDGE DUKES: So that is -- my  
14 question is was there anything in the record?

15 MR. FLOYD: I think so. If you -- he  
16 talked about these 19 badges of fraud. And if you  
17 go through them, these are the 19. Whether the  
18 transfer was disclosed or concealed. It was  
19 concealed because it didn't find out until these  
20 supplemental proceedings.

21 Whether the debtor was being sued or

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22 threatened with suit when the transfer was made, a  
23 judgment was there. Whether the transfer was of  
24 substantially all the debtors assets, well, it was  
25 because he had no more cash. There are no more

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1 assets that I have found that have been subject to  
2 execution beyond the cash that was contributed to  
3 the 401-K and the IRA at this time.

4 Whether the debtor absconded. He clearly  
5 absconded with the education IRA money. It's gone.  
6 Whether the debtor removed or concealed assets.  
7 Yes. Whether the debtor was insolvent or became  
8 insolvent shortly after the transfer was made or the  
9 obligation was incurred. Yes.

10 Whether the transfer occurred shortly  
11 before or shortly after a substantial debt was  
12 incurred. Yes. The value of the asset claimed is  
13 exempt. And, yes. The value was asset is a  
14 substantial asset if you take into consideration the  
15 401-K and the IRA. But even the IRAs, the education  
16 IRA being 22,000 and the two other IRAs being of  
17 substantial money as well.

18 The proportion of the debtor's non-exempt

19           #19 7-8-15 first citizens hearing  
assets transmuted into exempt form. I would submit  
20 to the court at this time that those are the only  
21 assets that we found. Those were all converted into  
22 exempt form. Whether the exemption is limited or  
23 unlimited. In this instance he says that those are  
24 all unlimited. So yes, we meet that one, too.

25                       Whether the debtor already owned the

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1       exempt asset and used non-exempt assets to increase  
2       its value. He purports that an IRA was already in  
3       existence. He used those assets to increase the  
4       value.

5                       Whether the debtor borrowed funds to  
6       acquire the exempt asset. There was no borrowing in  
7       that. Whether the debtor intended to use the exempt  
8       asset for the legislative purpose behind the claimed  
9       exemption. Taking money that is otherwise  
10      non-exempt and moving it into exempt I think is the  
11      absurd result because I think what the legislature  
12      says is if you've got money there that you  
13      preplanned for retirement we are going to protect  
14      that. We are not going to protect you from that  
15      money that you move in post-judgment. I think that  
16      is a more realistic reading and not bending it and

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17 stretching it and contorting the statute.

18 Whether allowance of the exemption is  
19 consistent with the legislative purpose for the  
20 exemption. I think I went over that. Whether the  
21 transmutation of the non-exempt asset into exempt  
22 form was made in contemplation of a bankruptcy  
23 filing and the proximity of the transmutation to the  
24 bankruptcy filing, that is a bankruptcy issue not  
25 necessarily applicable, but it is applicable to -- 43

1 if you change that into execution -- judgment  
2 execution.

3 And then it goes into another bankruptcy,  
4 voluntary, involuntary. Whether the debtor  
5 misrepresented any aspect of the transaction by  
6 which exempt assets were acquired or the values of  
7 assets in question. Whether and to what extent  
8 non-exempt assets remain available for distribution  
9 to creditors in the bankruptcy case.

10 By going all of those that he cited in New  
11 Mexico, I think you can put a check by most if not  
12 all of those, even though I don't think you have to  
13 look to those little indicia of fraud or badges of

14           #19 7-8-15 first citizens hearing  
fraud, whatever you want to call them.

15           The acts -- you can't just look at the  
16 facts through a needle -- the eye of the needle as  
17 the debtor's counsel wants us to look at. These are  
18 just contributions. I think if you look at the  
19 whole scheme of things from the time the confession  
20 of judgment was entered, no efforts were made to pay  
21 the judgment. During that whole time period he is  
22 contributing post-judgment voluntary contributions.  
23 He's opening up IRAs. He's moving money that is  
24 otherwise exempt into non-exempt assets.

25           That in and of itself to me I believe --

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1           and the law I believe says is not right. And the  
2 bank is entitled to those assets. To hold otherwise  
3 would suggest and give a license to all future  
4 judgment debtors that if you see a judgment coming  
5 or if you see something bad going on in your life,  
6 gather all of that money up, open up IRAs, as many  
7 as you can, and open them up to protect them from  
8 your creditors.

9           I don't think that is the case. I don't  
10 think that is the intent of the legislature. I  
11 think the intent is to keep the status quo. Take a

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12 snapshot of what is there. And then go from there.

13 So to the extent fraud is required, I  
14 think the record is replete with plenty of evidence  
15 for that. I don't think it's required, but to the  
16 extent it's necessary I think you can look at all of  
17 those and get to where you need to be.

18 JUDGE DUKES: Now, he didn't take it  
19 all and put it in the IRAs. He took the -- what is  
20 the amount that you can put?

21 MR. SIMONS: 5,000 or 6,000 bucks,  
22 depending on the year, I believe.

23 JUDGE DUKES: And that was the amount  
24 he put, right?

25 MR. SIMONS: Yes, sir.

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1 JUDGE DUKES: It wasn't like he  
2 put -- because you can certainly put more, but then  
3 you lose tax advantages, obviously. But it was the  
4 taxable maximum benefit amount. Is that accurate?

5 MR. SIMONS: Correct.

6 MR. FLOYD: In the years that he did  
7 contribute.

8 JUDGE DUKES: Right. But, I mean,

9           #19 7-8-15 first citizens hearing  
10       what I'm saying is, I think, your point was you can  
11       take all of your assets and dump them in an IRA and  
12       shield them. That is not what we've got going on  
13       here. He made the standard contribution pursuant to  
14       Federal law to get the maximum tax advantage.

15                   MR. FLOYD: Or a 401-K. You can open  
16       up multiple IRAs because he did have multiple IRAs  
17       and that sort of stuff, so --

18                   JUDGE DUKES: I mean, but in any  
19       given year it either went to the Roth or to the  
20       regular one. Was that what happened? I'm trying  
21       to --

22                   MR. SIMONS: There was only one year  
23       of a Roth contribution. And you could do one or the  
24       other --

25                   JUDGE DUKES: Right.

                  MR. SIMONS: -- or both, but only up       46

1       to one limit.

2                   JUDGE DUKES: Right. And it was  
3       the -- I guess my question as I recall this, and  
4       it's been awhile, was it was the limit every year,  
5       whether it was one, both, or a combination, it was  
6       the limit --

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7 MR. SIMONS: Yes.

8 JUDGE DUKES: -- not exceeding the  
9 limit.

10 MR. SIMONS: Correct.

11 JUDGE DUKES: All right.

12 MR. FLOYD: Along with the education  
13 IRA that he loaded up.

14 JUDGE DUKES: But that one, of  
15 course, is not the subject I don't think of today  
16 because that one has already gone, right?

17 MR. FLOYD: That's correct.

18 JUDGE DUKES: You are just saying as  
19 a matter of the compilation of the facts associated  
20 with the whole thing, not necessarily the motion?  
21 Okay.

22 MR. SIMONS: May I address a couple  
23 of points I'm trying to make?

24 JUDGE DUKES: Yes. Go ahead, please.

25 MR. SIMONS: Since you were talking

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1 about -- I'm going to start at the end.

2 JUDGE DUKES: I think you were  
3 finished, right? You were finished.

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4 MR. FLOYD: I'll be finished whenever  
5 you want me to. Yeah.

6 JUDGE DUKES: I'm sorry.

7 MR. FLOYD: No. No. That's fine.

8 JUDGE DUKES: I thought you were.

9 Okay.

10 MR. FLOYD: I'll be glad to answer  
11 any questions that you have.

12 JUDGE DUKES: Okay.

13 MR. FLOYD: But that covers it.

14 MR. SIMONS: It sounded like a  
15 crescendo.

16 JUDGE DUKES: It did sound like you  
17 were finished.

18 MR. SIMONS: Yes. Joey finished with  
19 that if you agree with me, then that would be  
20 setting a bad precedent because you would be telling  
21 potential debtors that if you see something coming  
22 up you better hurry up and do something to protect  
23 your assets or something to that effect was his  
24 closing argument.

25 And it put me in mind of one of the most

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1 interesting comments in one of the cases we cited.

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2 And you will find it when I know you will sit down  
3 and read all of these cases, that if that were the  
4 standard, then it would mean that you could only use  
5 your exemptions up until the time you actually  
6 needed to.

7 When you can see something coming and you  
8 want to do some pre-bankruptcy planning, under  
9 Joey's argument, you can't do it then. It's too  
10 late. You can only use your exemptions when you  
11 don't need to. And that was one of the more  
12 fascinating little twists in one of the cases.

13 So that argument is self-defeating. Joey  
14 talks about -- and the debtor would take all of  
15 their money and convert it into an exempt property.  
16 And as you pointed out, that is not what we have  
17 here.

18 The cases that have gone against the  
19 debtors have been when the debtors have done  
20 something extreme. One of my favorites, and again I  
21 cite this case in our briefing on the original  
22 issue, was a guy takes his money and he -- as I  
23 recall he borrowed money to fund to buy an annuity  
24 or no he bought an annuity. He borrowed money,  
25 secured it with the annuity, and then made

1 arrangements so the annuity would repay the loan.

2 So the creditor couldn't get to the cash  
3 because it had been tied up in the life insurance  
4 contract. And they couldn't get to the life  
5 insurance contract because it was an exempt annuity.  
6 What the guy had effectively done was take a whole  
7 bunch of money and protect it in this way. That was  
8 an extreme aggressive -- to use Joey's term,  
9 aggressive attempt by a debtor.

10 Another similarly aggressive attempt was  
11 in the case that was relied upon by Joey involved a  
12 woman -- I believe it was a woman who did an IRA  
13 rollover. As you may know, you can take all of your  
14 money out of one IRA and put it in another IRA.

15 She took all of her money out of a New  
16 York IRA and put it in a New Jersey IRA. And that  
17 was -- the court put the kibosh on that. In that  
18 particular case there was an existing order  
19 requiring that she not make any transfers out of the  
20 New York IRA. And she ignored that and tried to put  
21 all the money in the New Jersey IRA. And the New  
22 Jersey court said, no, we are not going to let you

23           #19 7-8-15 first citizens hearing  
get away with that.

24           Both of those were extreme, aggressive,  
25           over-the-top situations in which the homestead

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1           exemptions and the exemptions provided for the IRAs  
2           did not protect the money.

3           Lindgren has not been aggressive. As you  
4           were obviously well aware the contributions to the  
5           IRA were in the routine amounts on a year in, year  
6           out basis. Lindgren did not change his behavior as  
7           a result of this judgment. And so the use of the  
8           word aggressive is just simply not applicable here.

9           Concerning the education IRA, Joey wants  
10          to argue that Lindgren's transfer to that is somehow  
11          evidence of his fraudulent intent with respect to  
12          the IRA. I have a 529 account for my son who is now  
13          at Clemson. And I only opened that account I guess  
14          it was about two years ago. My son will be a rising  
15          Junior.

16          And my accountant said, well you need to  
17          have a 529 plan. I said, well, it's kind of late to  
18          be saving for paying Clemson. He said, well, all  
19          you've got to do is you put the money in. And the  
20          next day you take it out and give it to Clemson and

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21 you get a tax deduction for doing that. I said,  
22 you've got to be kidding me. He said, oh, no. No.  
23 No. That is what the law is.

24 So the fact that Lindgren -- let me back  
25 up. All that money, the \$22,000, went for qualified  
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1 educational expenses for his daughter at I believe  
2 it's the University of Denver. And had Lindgren  
3 simply stroked a check to the University of Denver  
4 and stroked checks on the landlord for her apartment  
5 wherever the University of Denver is, Boulder I  
6 think, I don't think Joey would be here arguing that  
7 the University of Denver has to give the money back.

8 That was clearly a household expense of  
9 educating his daughter that he took. It was not  
10 fraudulent to the bank in any sense. He only put it  
11 in the 529 account for the same reason I put money  
12 in my 529 account because I get a State tax  
13 deduction for doing it. And it doesn't matter how  
14 long the money stays in the account.

15 So the educational account, not only is  
16 the money gone so it's irrelevant to your decision  
17 from that point of view, because of the nature of

18           #19 7-8-15 first citizens hearing  
the 529 account it's got nothing whatsoever to do on  
19 whether Lindgren's IRA funding was fraudulent. I  
20 would also point out with regard to the educational  
21 529 plan, we haven't claimed that that money is  
22 exempt. And I don't know that it is.

23           We've not briefed it. We've not asserted  
24 it. From the very git-go our position was the money  
25 is not there. And furthermore, all it was was not  
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1 fraudulent because he could have just given the  
2 money to the people in Colorado and we wouldn't even  
3 be having this discussion.

4           I'm tempted to go through the badges of  
5 fraud individually for you, but I'm not going to do  
6 that. What I will encourage you to do, Judge, is  
7 Joey acknowledged, I believe, that his position is  
8 that a judgment debtor cannot make the typical IRA  
9 contributions, period. He wanted to quibble a  
10 little bit, but the answer -- that is clearly what  
11 the bank's position is.

12           And if you review your e-mail  
13 correspondence with us in which we argued back and  
14 forth you will see that that is their position.  
15 That a per se rule that a judgment creditor --

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16 excuse me. Judgment debtor cannot make the routine  
17 annual IRA contributions following judgment. That  
18 is their position.

19 When you read the two cases, the Channon  
20 case and the Bodan case, they talk about -- and  
21 other cases as well make the observation that it is  
22 difficult for a practitioner, legal practitioner to  
23 know how to advise a client, what can you do? What  
24 can you not do in terms of retirement funding,  
25 pre-bankruptcy planning.

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1 And the courts note that there is a fine  
2 line between what is permitted and what is not  
3 permitted. And in the cases we've cited the courts  
4 have all held that the debtor stayed on the clean  
5 side of that fine line.

6 And in this case all Lindgren has done is  
7 continue to do what he had done for years. And that  
8 was to make the routine annual contributions to the  
9 IRA. The contributions made by his employer to the  
10 401-K plan have got nothing to do with whether  
11 Lindgren's personal contributions to his IRAs were  
12 fraudulent.

13                   #19 7-8-15 first citizens hearing  
                  And, again, I'm going to resist the  
14           temptation to go through all 19 or 17, however many  
15           there are, badges, one of them I didn't hear Joey  
16           comment on was whether the debtor varied from his  
17           historical conduct.

18                   And in both of those cases the debtor had  
19           varied from his historical because they both  
20           involved newly opened accounts. And the court said  
21           that that badge weighed against the debtor but  
22           nevertheless it wasn't fraudulent.

23                   In my case that badge strongly weighs in  
24           favor of the non-fraudulent nature of the conduct  
25           because Lindgren has not varied from his historical

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1           behavior. And again I'm not going to go through all  
2           the badges. I'm sure you will when you analyze the  
3           record in the case.

4                   There is no evidence that Lindgren has  
5           used all of his money. There is no evidence -- you  
6           know, Joey wants to say, well, he hasn't paid us.  
7           Well, I would submit that he's under no obligation  
8           to come forward and pay.

9                   Obviously there is a judgment against him.  
10           And he's at risk to having procedures taken out

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11 against him and to have non-exempt property taken  
12 from him, but every time he gets a paycheck there is  
13 nothing in the law that says that he's required to  
14 tithe to the bank.

15 And he says that Lindgren concealed these  
16 transfers. He didn't conceal them. He was asked  
17 about them. He produced all of his account records  
18 and gave an affidavit of them. He was under no  
19 obligation to volunteer the fact of these  
20 contributions simply because there was a judgment  
21 out there.

22 So when you go through those badges of  
23 fraud consider what was Lindgren obligated to do.  
24 And in this case he has done everything he was  
25 obligated to do. He was served with supplemental

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1 proceedings. He came in. He produced records. He  
2 answered all the questions that were put to him  
3 truthfully.

4 Joey says Lindgren doesn't have assets.  
5 Well, Lindgren has never said that. And Joey has  
6 identified a host of LLC interests that Lindgren  
7 owns. And he's not been fooling with that. Why, I

8           #19. 7-8-15 first citizens hearing  
9           don't know. He's apparently going straight for  
10          cash, but in this case it's cash that he's not  
11          entitled to access.

12                 You've probably heard enough from me for  
13          the day and for the week.

14                 JUDGE DUKES: No. No. It's  
15          interesting stuff.

16                 MR. FLOYD: Briefly, three points?

17                 JUDGE DUKES: Yeah.

18                 MR. FLOYD: One of the things he said  
19          was exemptions are not available when you need them.  
20          The exemptions are there. I'm not trying to get  
21          into the corpus that was already there. I'm looking  
22          at post-judgment voluntary contributions.

23                 This business about his employer  
24          contributing to the 401-K. Let's all keep in mind  
25          that he is his employer or he was. Now he says he's  
26          not employed by his own corporation. And the

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1          variance from the historical account. The data  
2          shows itself. There was no money contributed in  
3          2011. And the amount spikes up. I think the record  
4          will speak to that. I mean, there is no reason for  
5          us to go over all of that, but beyond that, that is

#19 7-8-15 first citizens hearing

6 all I have.

7 JUDGE DUKES: All right. Can you all  
8 do me a favor and you have filed your motion with  
9 the cases, I guess, or sent those to Heather or  
10 where --

11 MR. SIMONS: The two more recent  
12 cases that I've kept referring to, the Channon and  
13 the Bodan, I think it's Bodan -- I don't know  
14 whether it's Bodan or Bodan. Those cases were  
15 attached to the motion filed with the clerk. They  
16 were also attached to the copy that I believe --  
17 didn't I e-mail?

18 MR. FLOYD: Yeah, you did. You  
19 attached those to the e-mail.

20 JUDGE DUKES: Okay. So Heather must  
21 have it in her --

22 MR. SIMONS: I would be delighted to  
23 collect all the cases and stick them into one e-mail  
24 and send them to you if that would --

25 JUDGE DUKES: If you've got them PDF

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1 where you can do that --

2 MR. SIMONS: I can do that.

#19 7-8-15 first citizens hearing

3 JUDGE DUKES: -- that would be great.

4 And then your response, if you don't mind, just PDF  
5 it to me again so I can have it all in one. I'll  
6 try it assemble like a file. That way I'll know --

7 MR. FLOYD: Do you want us just to  
8 PDF the cases that we've cited for support?

9 JUDGE DUKES: That would be great.  
10 And I can put it in one spot. It's a lot easier as  
11 you all know than printing things.

12 MR. SIMONS: What I would propose to  
13 do -- I don't want to burden you, but I want to do  
14 whatever I can to make your review of all of this  
15 easy. I don't mind collecting in one e-mail the  
16 memoranda that I filed and Lindgren's affidavit,  
17 your exhibit, your memoranda, my motion, all the  
18 cases that I've cited and that you want to include.  
19 I'll put all of that into one e-mail and send it to  
20 you or send it to Heather and she can print the  
21 whole kit and caboodle.

22 JUDGE DUKES: Well, I would rather --  
23 I try not to print things unless I have to, but,  
24 yeah, that would be great. Thanks. At least I  
25 could have a tab, you know, on my home screen, I can

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#19 7-8-15 first citizens hearing

1 hit it.

2 MR. SIMONS: Joey, can we collaborate  
3 on the content of that?

4 MR. FLOYD: Sure.

5 JUDGE DUKES: All right.

6 MR. SIMONS: We will get you an  
7 e-mail with what we want you to consider.

8 JUDGE DUKES: Outstanding. Okay.  
9 Anything else for this record? No? Okay. Well,  
10 thank you all so much.

11 MR. FLOYD: Thank you, Your Honor.

12 MR. SIMONS: Thank you.

13 (Whereupon, the hearing was concluded  
14 at 11:04 a.m.)

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1 Certificate of Reporter

2

3 I, Deborah S. Thomas, Certified Verbatim  
4 Reporter and Notary Public in and for the State of  
5 South Carolina, do hereby certify that I reported  
6 the hearing of First Citizens Bank v. Blue Ox, et  
7 al, on the 8th day of July, 2015: and that the  
8 foregoing 58 pages constitute a true and correct  
9 transcription of the said hearing.

7

8 I further certify that I am neither  
9 attorney nor counsel for, nor related to or employed  
10 by, any of the parties connected with this action,  
11 nor am I financially interested in said cause.

11 I further certify that the original of  
12 said transcript shall be hereafter delivered to  
13 Keating L. Simons, III, Esquire, Simons & Dean, 47  
14 Wappoo Creek Drive, Suite 604, Charleston, SC 29412.

13

14 In witness whereof I set my hand and seal  
15 this 17th day of December, 2015.

15

16

17

18 My Commission  
19 Expires 1/4/18

19

20

21

Deborah S. Thomas, CVRM  
and Notary Public for the  
State of South Carolina

#19 7-8-15 first citizens hearing

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STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT  
First Citizens Bank and Trust Company,  
Inc.,

Plaintiff,

vs.

Blue Ox, LLC and J. Chris Lindgren,  
Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2011-CP-07-129

**AFFIDAVIT OF  
J. CHRISTOPHER LINDGREN**

2014 NOV -3 PM 3:59  
CLERK OF COURT

Personally appeared before me, J. Christopher Lindgren, who upon being first duly sworn did depose and say as follows:

1. I am the J. Chris Lindgren named as a defendant herein. I have reviewed Plaintiff's submission to the court dated October 2, 2014, and offer this affidavit in response. I am over the age of majority, have personal knowledge of the matters stated herein unless otherwise indicated, and if called to court, could and would so testify under oath.

2. I have been employed by Rockmoor, Inc. ("Rockmoor") continuously since June of 1990. Since 1992 Rockmoor has had in place a 401(k) plan (the "Plan"). Rockmoor is the employer and Plan sponsor. The Plan is administered by a third party in Savannah, known as Qualified Plans. I am the Plan trustee. The Plan documents, consisting of 94 pages, have been provided to Plaintiff for review as requested.

3. The Plan has complied in all material respects with all reporting and filing requirements mandated under ERISA and the IRS has issued a determination letter that the Plan is qualified under ERISA (copy attached).

4. Employee contributions can only be funded through payroll deferrals. That is, a participant cannot make lump sum contributions to the Plan; rather, contributions can only be made sequentially throughout the year with respect to each payroll. There are twenty four (24) payrolls during each Plan year so there have generally been twenty four (24) separate contributions spread out during each Plan year.

5. I have participated in the Plan for twenty-two (22) straight years and have attempted to contribute the maximum allowable each year, all in accordance with IRS rules. The maximum annual allowable contribution amount has changed slightly over the years. Also, there is a catch-up provision allowed for individuals who have reached 50 years of age. The current maximum annual allowable contribution to a 401(k) plan is \$17,500 and the maximum catch-up provision is \$5,500. This means an individual at or over the age of fifty (50) can currently defer \$23,000 in payroll per year. I reached 50 years of age in 2006 and have tried to utilize the catch-up provision since then.

6. Set forth below are my Plan contributions for as far back as online records are available along with explanatory notes as necessary:

|      |          |                                                  |
|------|----------|--------------------------------------------------|
| 2006 | \$26,550 |                                                  |
| 2007 | \$20,850 |                                                  |
| 2008 | \$29,200 |                                                  |
| 2009 | \$19,975 |                                                  |
| 2010 | \$4,463  | Wages drastically reduced, contributions limited |
| 2011 | - 0 -    | No wages paid, no contributions permitted        |
| 2012 | \$20,450 |                                                  |

|      |          |                                                           |
|------|----------|-----------------------------------------------------------|
| 2013 | \$23,000 |                                                           |
| 2014 | \$1,917  | Employment terminated, no further contributions permitted |

7. The 401(k) Plan contributions challenged by Plaintiff as fraudulent transfers were part of a decades-long, regular pattern of retirement savings and were not motivated by any intent to evade claims of Plaintiff or any other creditor. Moreover, all of these contributions consisted of wages, not subject to garnishment in South Carolina, paid directly by the Employer to the Plan, in keeping with the wage deferral feature of 401(k) plans.

8. Beginning in 1986, I have also made regular annual contributions to an Individual Retirement Account ("IRA") as permitted by law. During the years covered by paragraph 6 herein I have made the following contributions to my IRA:

|      |         |                                             |
|------|---------|---------------------------------------------|
| 2006 | \$5000  |                                             |
| 2007 | \$5000  |                                             |
| 2008 | \$6000  |                                             |
| 2009 | \$6000  |                                             |
| 2010 | None    |                                             |
| 2011 | \$6,000 |                                             |
| 2012 | \$6,000 |                                             |
| 2013 | \$6,500 |                                             |
| 2014 | None    | Contribution for this year made to Roth IRA |

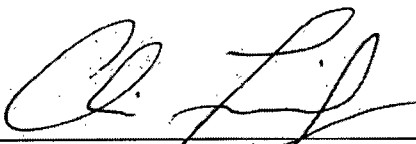
9. In 2014 I opened a Roth IRA. Federal law permits contributions into both a traditional IRA and a Roth IRA in the same year but the total cannot exceed the maximum

contribution applicable to the taxpayer. For 2014 the maximum contribution I am permitted to make is \$6,500, and I placed all of this into the Roth IRA.

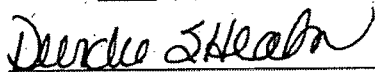
10. The IRA and Roth IRA contributions challenged by Plaintiff as fraudulent transfers were part of a decades-long, regular pattern of retirement savings and were not motivated by any intent to evade claims of Plaintiff or any other creditor.

11. In addition to the retirement accounts described above, I also had what is known as a 529 Plan for expenses associated with my youngest daughter's college education expenses. The 529 Plan contributions were made into the Fidelity Education Account referenced in Plaintiff's October 2, 2014 submission. In 2012, \$22,000 was paid into this account, \$17,236.33 was paid directly out of the account to the University of Colorado, and \$5,020.00 was withdrawn and used for my daughter's housing expense, a qualifying educational expense under Section 529 of the IRC. As of June 30, 2014 the value of the account was \$13.18. All of these transactions were made for the benefit of my daughter; none was motivated by any intent to defeat or avoid creditor claims.

FURTHER THE AFFIANT SAYETH NOT.

  
J. CHRISTOPHER LINDGREN

SWORN and subscribed to before  
me this 28 day of October, 2014

  
Notary Public of South Carolina  
My Commission Expires: 10-31-2021



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

Plan Description: Volume Submitter Profit Sharing Plan With CODA  
PFN: 115B1140701-002 Case: 200608263 EIN: 58-2605083  
BPD: 01 Plan: 002 Letter Serial No: M581682a  
Date of Submission: 01/31/2006

QUALIFIED PLANS LLC  
545 EAST YORK STREET  
SAVANNAH, GA 31401

Contact Person:  
Janell Hayes/Leticia Young  
Telephone Number:  
513-261-3602/513-261-3584  
In Reference To:  
TEGE:EP:7521  
Date: 03/31/2008

Dear Applicant:

In our opinion, the form of the plan identified above is acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of their employees. This opinion relates only to the acceptability of the form of the plan under the Internal Revenue Code. It is not an opinion of the effect of other Federal or local statutes.

You must furnish a copy of this letter, a copy of the approved plan, and copies of any subsequent amendments to adopting employers if the practitioner is authorized to amend the plan on their behalf, to each employer who adopts this plan.

This letter considers the changes in qualification requirements contained in the 2004 Cumulative List of Notice 2004-84, 2004-2 C.B. 1030.

Our opinion on the acceptability of the form of the plan is not a ruling or determination as to whether an employer's plan qualifies under Code section 401(a). However, an employer that adopts this plan may rely on this letter with respect to the qualification of its plan under Code section 401(a), as provided for in Rev. Proc. 2005-16, 2005-1 C.B. 674 and outlined below. Please review Announcement 2008-23 I.R.B. 2008-14 to determine the items necessary for filing an application for a determination letter if one is required for reliance, or is otherwise desired. The terms of the plan must be followed in operation. Generally, the employer may request a determination letter by filing an application with Employee Plans Determinations on Form 5307, Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans.

Except as provided below, our opinion does not apply with respect to the requirements of: (a) Code sections 401(a)(4), 401(l), 410(b) and 414(s). Our opinion does not apply for purposes of Code section 401(a)(10)(B) and section 401(a)(16) if an employer ever maintained another qualified plan for one or more employees who are covered by this plan. For this purpose, the employer will not be considered to have maintained another plan merely because the employer has maintained another defined contribution plan(s), provided such other plan(s) has been terminated prior to the effective date of this plan and no annual additions have been credited to the account of any participant under such other plan(s) as of any date within the limitation year of this plan. See section 19.02(1) of Rev. Proc. 2005-16, 2005-1 C.B. 674 regarding volume submitter defined contribution plans and the repeal of Code section 415(e). Our opinion also does not apply for purposes of Code section 401(a)(16) if, after December 31, 1985, the employer maintains a welfare benefit fund defined in Code section 419(e), which provides postretirement medical benefits allocated to separate accounts for key employees as defined in Code section 419A(d)(3), or an individual medical account as defined in Code section 415(l)(2).

Our opinion applies with respect to the requirement of Code section 410(b) if 100 percent of all nonexcludable employees benefit under the plan. Employers that elect a safe harbor allocation formula and a safe harbor compensation definition can also rely on an advisory letter with respect to the nondiscriminatory amounts requirement under Code section 401(a)(4).

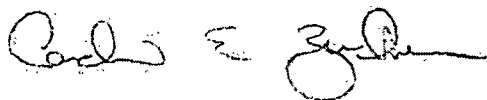
This letter is not a ruling with respect to the tax treatment to be accorded contributions which are picked up by the governmental employing unit within the meaning of section 414(h)(2) of the Internal Revenue Code.

If you, the volume submitter practitioner, have any questions concerning the IRS processing of this case, please call the above telephone number. This number is only for use of the practitioner. Individual participants and/or adopting employers with questions concerning the plan should contact the volume submitter practitioner. The plan's adoption agreement, if applicable, must include the practitioner's address and telephone number for inquiries by adopting employers.

If you write to the IRS regarding this plan, please provide your telephone number and the most convenient time for us to call in case we need more information. Whether you call or write, please refer to the Letter Serial Number and File Folder Number shown in the heading of this letter.

You should keep this letter as a permanent record. Please notify us if you modify or discontinue sponsorship of this plan.

Sincerely yours,



Andrew Zuckerman  
Director,  
Employee Plans Rulings and Agreements

**CERTIFICATE OF SERVICE**

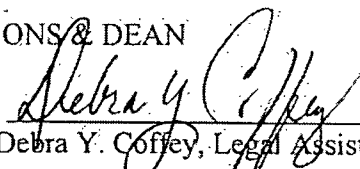
I, Debra Y. Coffey, a legal assistant with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Affidavit of J. Christopher Lindgren upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

Joey R. Floyd, Esquire  
BRUNER, POWELL, WALL & MULLINS, LLC  
P.O. Box 61110  
1735 St. Julian Place, Suite 200 (29204)  
Columbia, SC 29260-1110

2014 NOV -3 PM 3:59  
CLERK OF COURT  
JUDICIAL BRANCH  
SOUTH CAROLINA  
COUNTY, S.C.

This 30 day of October, 2014.

SIMONS & DEAN

BY: 

Debra Y. Coffey, Legal Assistant

**Keating**

**From:** Dukes, Marvin [mdukes@bcgov.net]  
**Sent:** Friday, January 16, 2015 3:53 PM  
**To:** Keating L. Simons, III; Joey Floyd  
**Cc:** McLeod, Heather  
**Subject:** Lingren

Dear Joey and Keating,

I have not forgotten about Lindgren.

The statute reads:

(13) The debtor's right to *receive* (italics mine) individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. For purposes of this item, "Internal Revenue Code" has the meaning provided in Section 12-6-40(A). The interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law and is an exception to Section 15-41-35. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise.

Federal BR Code 522(d)(10) and (12) read

(d)The following property may be exempted under subsection (b)(2) of this section:

(10)The debtor's right to receive—

(A)a social security benefit, unemployment compensation, or a local public assistance benefit;

(B)a veterans' benefit;

(C)a disability, illness, or unemployment benefit;

(D)alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E)a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i)such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii)such payment is on account of age or length of service; and

(iii)such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(12)Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

I'm not completely sure that a strict reading of the statute doesn't show that the protection extends

only the corpus of the retirement account(s) and the payments received therefrom, rather than new payments into such accounts.

I'd be happy to hear both of your thoughts, but not until the middle of next week as I would not like either of you to think about this at all during this sunny weekend.

Best to both of you,

Marvin H. Dukes, III

Master-in-Equity for Beaufort County

Beaufort County Courthouse

102 Ribaut Road, Room 212

Post Office Drawer 1228

Beaufort, SC 29901

Office: 843.255.5710

Fax: 843.255.9505

Neither this office, nor its staff gives legal, financial or other advice. Any information obtained from this office or it's staff, regardless of form, should not be taken as legal or financial advice. Persons seeking to purchase properties from foreclosures or other sales should obtain independent advice as to value, sufficiency of title, tax consequences, other liens, and all other matters related to said purchase. Persons involved in litigation should obtain counsel and may not rely on any information obtained from this office as legal advice. Do not rely on this office for legal advice- always obtain independent legal advice.

**Keating****Subject:** FW: Lingren**Attachments:** Lindgren Memo FILED 11-10-14 rev'd 1-19-15.pdf**From:** Keating L. Simons, III [mailto:ksimons@simonsanddean.com]**Sent:** Monday, January 19, 2015 12:11 PM**To:** Dukes, Marvin; Joey Floyd**Cc:** McLeod, Heather**Subject:** RE: Lingren

Judge Dukes:

In response to your email I offer the following comments:

1) The money upon which Plaintiff seeks to levy is on deposit with the financial institutions holding Lindgren's IRA and 401(k) accounts. The remedy Plaintiff seeks is an order directing the financial institutions to pay money to Plaintiff. Money is fungible and of necessity any order directing payment(s) to Plaintiff by the financial institutions would require those institutions to invade the corpus of Lindgren's retirement accounts. The funds at issue, therefore, are part of the corpus of the retirement plans referenced in the exemption statutes you discuss in your email. Requiring the financial institutions to pay Plaintiff part of Lindgren's retirement accounts is plainly forbidden by 15-41-30(A)(13), 15-41-30(A)(14), 11 U.S. Code 522(b)(3)(A), and 11 U.S. Code 522(d)(12), even if, as you suggest, these statutes only exempt the corpus of funds held in retirement accounts.

2) Since any "new payments into" retirement accounts are now in fact part of the corpus of the respective funds, and because all money in the accounts was at one time "new payments into" the accounts, we don't believe a distinction between "payments into" versus "the corpus of" the retirement funds drives the outcome of this matter. No court has held that retirement contributions made post-judgment are reachable by creditors on that basis alone. And if that were the law, the fraudulent conveyance language contained in S.C.'s exemption statute for IRAs would be wholly unnecessary.

15-41-30(A)(13) provides that the debtor's exemption for funds held in IRA accounts "may be reduced or eliminated by the amount of a fraudulent conveyance." Under the statute a judgment creditor cannot rest upon the mere fact that retirement contributions were made after entry of its judgment. Rather, the creditor must establish the fraudulent nature of the "new payments" into the plan. Under the facts of this case, where the debtor merely continued a long-standing practice of making regular, lawfully permitted retirement contributions, there is no extrinsic evidence of fraud and hence no factual support for finding the retirement contributions to be fraudulent transfers. Proof required to establish the fraudulent nature of retirement contributions is discussed at pages 3 to 11 of our memorandum.

3) The S.C. statute exempting 401(k) accounts from levy, unlike the exemption statute for IRAs, does not include a fraudulent transfer exception. 401(k) plans are a form of deferred compensation and the contributions at issue in this case were all made by Lindgren's employer from withheld wages. As discussed in our memorandum at pages 11 and 12, there is no conversion of non-exempt cash to exempt retirement funds when an employer make's contributions to a debtor's 401(k) plan.

(Our memorandum included a typo. The last sentence of the first full paragraph on page 12 should have read: "When an employer pays to the 401(k) Plan wages withheld from its employee, there is no conversion of non-exempt cash to exempt retirement plan assets." We have corrected this and a couple of other typos and are today mailing an amended memorandum to the clerk for filing. A copy is attached for your convenience.)

4) Even if 401(k) plans are subject to a fraudulent transfer exception, notwithstanding the absence of any such exception in the relevant statutes, Plaintiff has again failed to make out a case of fraudulent intent on the part of Lindgren.

As we see it, the present matter can be disposed of on a single ground: that the facts of this case - the continuation of a regular pattern of retirement contributions, unaccompanied by any change in the debtor's actions post-judgment - negates any finding of fraudulent intent or transfers by the debtor.

I welcome the opportunity to discuss these issues further at the court's convenience.

Best regards, Keating

**Keating L. Simons, III**  
**Simons & Dean**  
147 Wappoo Creek Drive  
Suite 604  
Charleston, SC 29412

**Phone: 843.762.9132**  
**Fax: 843.406.9913**  
**Cell: 843.709.4447**

**Keating**

---

**Subject:** FW: Lingren

---

**From:** Joey Floyd [mailto:JFloyd@brunerpowell.com]  
**Sent:** Monday, January 19, 2015 3:55 PM  
**To:** 'Dukes, Marvin'; Keating L. Simons, III  
**Cc:** McLeod, Heather  
**Subject:** RE: Lingren

Judge Dukes,

Good afternoon. All contributions by Mr. Lindgren to his 401k and IRAs after the entry of the Judgments are/were fraudulent transfers – these contributions were post-judgment voluntary contributions. The voluntary post-judgment contributions consisted of cash that was otherwise subject to execution by First Citizens Bank. By making the post-judgment voluntary contributions to his 401K and IRA accounts, Mr. Lindgren attempted to place the cash beyond the reach of his creditors because the cash was placed into accounts that have some limited protections through the homestead exemption statute. However, the homestead exemption statute and the Statute of Elizabeth expressly prohibit such transfers (i.e. fraudulent transfers) into these types of accounts (IRAs) or other plans (401k). In particular, see SC Code 15-41-30 (13): “A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan.” The statute speaks specifically to IRAs and speaks to transfers to “other plan[s].” A 401k is an “other plan” as contemplated by the homestead exemption statute. There is no requirement that “fraudulent intent” be shown on the part of Lindgren. Under Mr. Lindgren’s theory, as long as a judgment debtor stashes the cash in an IRA or some “other plan,” such as a 401k plan, the judgment debtor’s creditors can never touch the money in the IRA or 401k plan. First Citizens Bank maintains that Mr. Lindgren’s post-judgment voluntary contributions to his 401k and IRAs should be set aside as fraudulent transfers. First Citizens Bank requests that the Court issue an Order to enable First Citizens Bank to execute on Mr. Lindgren’s post-Judgment voluntary contributions to his 401K and IRA accounts.

With my highest regards,

Joey R. Floyd

**BRUNERPOWELL**

BRUNER, POWELL, WALL & MULLINS, LLC  
 P.O. Box 61110  
 1735 St. Julian Place, Suite 200 (29204)  
 Columbia, SC 29260-1110  
 (o) 803.252.7693  
 (f) 1.888.945.9333  
 direct dial: 803.744.0629  
[www.brunerpowell.com](http://www.brunerpowell.com)

## Keating

---

**From:** Joey Floyd [JFloyd@brunerpowell.com]  
**Sent:** Wednesday, July 15, 2015 1:08 PM  
**To:** Dukes, Marvin  
**Cc:** 'Keating L. Simons, III'  
**Subject:** First Citizens Bank v. Lindgren, et.al.  
**Attachments:** Gilchinsky v National Westminster Bank NJ.PDF; Mathis v Burton.pdf; Coleman v Daniel.pdf; Memo in Support of Motion to execute on 401k, IRA, etc. (filed).pdf; Letter to Bfrt. Cty. Clerk of Court filing Reply Memo and Reply Memo 7.15.15.pdf

Judge Dukes,

I am going to be out of the office next week on vacation (giving the mouse in Florida some money). In the interest of keeping things moving along in this case (and so that I do not cause any delays in this case), I have attached the following:

- (1) Plaintiff's Memo in Support of Motion to Execute on 401(k), etc..
- (2) Plaintiff's Reply Memorandum, which is being filed and served today.
- (3) Three cases

- (a) *Gilchinsky v. National Westminster Bank* (NJ case)
- (b) *Mathis v. Burton* (SC case)
- (c) *Coleman v. Daniel* (SC case)

I am certain that Mr. Simons will share/provide his information (the Defendants' filings/cases) in short order.

With my highest regards,

Joey R. Floyd

**BRUNERPOWELL**

BRUNER, POWELL, WALL & MULLINS, LLC  
P.O. Box 61110  
1735 St. Julian Place, Suite 200 (29204)  
Columbia, SC 29260-1110  
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**Keating**

**Subject:** FW: First Citizens Bank v. Lindgren, et.al.

**Attachments:** First Texas Savings v Reed.pdf; Ford v Poston.pdf; Forsberg v. Security State Bank,.pdf; In re Addison.pdf; In re Beaudin.pdf; In re Channon.pdf; In re Crater.pdf; In re Duncan.pdf; In re Jones.pdf; In re Koehler.pdf; In re Zouhar.pdf; Lindgren Affidavit.pdf; Lindgren Amended Memo in Oppo.pdf; Lindgren motion to recon and to stay.pdf; Marine Midland v Carey.pdf; Norwest Bank Nebraska, NA v. Tveten.pdf

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**From:** Keating L. Simons, III [mailto:klsimons@simonsanddean.com]

**Sent:** Thursday, July 16, 2015 4:09 PM

**To:** Joey Floyd; Dukes, Marvin

**Subject:** RE: First Citizens Bank v. Lindgren, et.al.

Judge Dukes:

In accordance with discussions at the conclusion of the hearing on July 8, attached are the following materials:

- 1) Amended Memorandum of J. Christopher Lindgren in Opposition to Plaintiff's Motion to Set Aside and Execute
- 2) Affidavit of J. Christopher Lindgren
- 3) J. Chris Lindgren's Motion to Reconsider and for Stay of Execution of Judgment
- 4) *Forsberg v. Security State Bank*, 15 F.2d 499 (8th Cir.1926)
- 5) *In re Addison*, 540 F.3d 805 (8<sup>th</sup> Cir. 2008)
- 6) *Ford v. Poston*, 773 F.2d 52 (4<sup>th</sup> Cir. 1985)
- 7) *First Texas Savings Association v. Reed*, 700 F.2d 986 (5<sup>th</sup> Cir.1983)
- 8) *Marine Midland Bus. Loans, Inc. v. Carey*, 938 F.2d 1073 (10<sup>th</sup> Cir.1991)
- 9) *In re Jones*, 397 B.R. 765 (Bkrtcy. D.S.C. 2008)
- 10) *In re Koehler*, 2012 WL 719744 (Bkrtcy. E.D.N.C. 2012)
- 11) *In re Duncan*, No. S-06-00025-5-AP (Bkrtcy. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrtcy. E.D.N.C. Jun. 18, 2007) at page 6 of 8.
- 12) *In re Zouhar*, 10 B.R. 154 (Bankr. N.M.1981)
- 13) *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871 (8<sup>th</sup> Cir. 1988)

14) *In re Crater*, 286 B.R. 756, 765 (Bankr. D. Ariz. 2002)

15) *In re Channon*, 424 B.R. 895 (Bkrcty. D.N.M. 2010)

16) *In re Beaudin*, No. 0935557-EEB (Bkrcty. D.CO. 2010)

Judge Dukes, I will resist the temptation to respond to Joey's post-hearing submission of a new memorandum other than to observe that the plaintiff has yet to cite a single case from any jurisdiction setting aside a routine IRA contribution. Every case I have found supports the debtor's right to lawfully make such contributions. After you have had the chance to review the materials before you I would welcome the opportunity to address any questions or concerns you might have.

Joey, enjoy your vacation - you're at one of my alltime favorite places.

Best regards, Keating

**Keating L. Simons, III**  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**SC Court of Appeals**

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, III  
Beaufort County  
Trial Court Case No. 2011-CP-07-128 and 2011-CP-07-129

Case No. 2015-002156

First Citizens Bank and Trust Company, Inc.,

Respondent/Appellant,

v.

Blue Ox, LLC and J. Chris Lindgren,

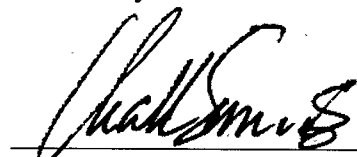
Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

**CERTIFICATE OF COUNSEL**

As required by Rule 210(g), SCACR, the undersigned certifies that the Record on Appeal contains all material proposed to be included by the parties and not any other material.



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Attorneys for Appellant/Respondent

March 30, 2016