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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM GREENWOOD COUNTY
Court Of Common Pleas**

The Honorable Curtis G. Clark, Master-in-Equity

Case No.: 2009-CP-24-01272

Appellate Case No.: 2016-001972

RECEIVED

FEB 08 2017

SC Court of Appeals

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

vs.

Dorn Properties, Inc. and Henry A. Dorn.....Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

First Citizens Bank and Trust
Company, Inc.,)

Plaintiff,)

v.)

Dorn Properties, Inc. and
Henry A. Dorn,)

Defendants.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2009-CP-24-1272

ORDER

FILED COMMON PLEAS
8th JUDICIAL CIRCUIT
GREENWOOD, SC
2016 SEP -9 AM 11:35

This matter came before the Court on July 19, 2016, for a hearing on all pending motions filed in connection with Plaintiff's efforts in supplemental proceedings to collect on a judgment it obtained against Defendants in the amount of \$149,665.92 on August 3, 2010. At the time of the hearing, the following motions were pending:

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1. Defendants' Motion for Protective Order; and
 2. Plaintiff's Motion to Set Aside and Execute on Post-Judgment Contributions to IRA Accounts.

At the commencement of the hearing, counsel for Plaintiff and Defendants agreed that both motions present the same legal question: whether post-judgment contributions by Defendant Henry A. Dorn to his Individual Retirement Account are subject to claims of judgment creditors.

FACTUAL BACKGROUND

Defendant Henry A. Dorn is an employee of Dorn, Dempsey & Associates, Inc., an accounting firm in Greenwood, South Carolina. He has been employed by the firm since it was formed on June 1, 2010. Prior to joining Dorn, Dempsey & Associates, Inc., Dorn was employed

by the accounting firm of Green and Company for 29 years.

Dorn, Dempsey & Associates, Inc. provides to its employees an employer-sponsored IRA plan. This plan allows its employees to make contributions to their IRA via salary deferrals. The funds contributed by the employee to the IRA are never actually received by the employee, but are withheld from his paycheck.

ERISA and other federal laws and regulations limit the amount an employee may contribute to his IRA account each year. The amount an employee contributes from his salary cannot exceed \$12,500 in 2015 and 2016. Employees over the age of 50 are allowed an additional "catch-up" contribution of \$3,000.00. Also, amounts contributed to the IRA cannot be withdrawn before the employee turns age 59½ without a penalty of 10%, and all withdrawals are subject to income tax at the rates applicable at the time of the withdrawal.

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During his employment at Dorn, Dempsey & Associates, Inc., Dorn has made the following contributions via salary withholding to his IRA:

Year 2010 \$3,233.00

Year 2011 \$13,083.00

Year 2012 \$14,000.00

Year 2013 \$14,500.00

Year 2014 \$14,500.00

Year 2015 \$2,417.00

Dorn's contributions have never exceeded the amount allowed by law. While he was employed at Green and Company, Dorn made regular contributions to the IRA provided to its employees.

HISTORY OF THE IRA EXEMPTION UNDER SOUTH CAROLINA LAW

Prior to 1999, the South Carolina exemption statute, Section 15-41-30 of the South Carolina Code, did not contain a specific exemption for an IRA. As such, in 1987 the South Carolina Court of Appeals held that Individual Retirement Accounts were not exempt from attachment by judgment creditors. *See Rowland v. Strickland*, 294 S.C. 119, 362 S.E.2d 892 (Ct. App. 1987). However, in 1999, the South Carolina legislature revised the exemption statute to make it clear that IRAs are protected from attachment by adding the following exemption to Section 15-41-10:

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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, 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. For purposes of this item, "Internal Revenue Code" has the meaning provided in Section 12-6-40(A).

1999 S.C. Act No. 60. Then, in 2012, the legislature made the exemption even broader by eliminating the limitation that an IRA is only exempt "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 2012 S.C. Act No. 153. Based on this legislative history, it is clear that the South Carolina legislature intends to extend to IRAs broad protection from attachment by judgment creditors.

LEGAL ANALYSIS

The only limitation on the exemption for an IRA is that the exemption "may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account..." S.C. Code Section 15-41-30(A)(13) (Supp. 2015). Although no South Carolina appellate courts have addressed what constitutes a fraudulent conveyance into an IRA, it seems

that this limitation would typically apply in two circumstances. The first circumstance would arise when a debtor made contributions to his IRA that exceeded the amount allowed under federal law. The second circumstance would arise where a debtor contributes a non-exempt asset into an IRA in order to protect it from attachment. Neither of these two circumstances is present in this case.

First, Dorn's contributions to his IRA have never exceeded the maximum amount allowed by federal law. Second, an individual's earnings for his personal services are not subject to attachment or garnishment in South Carolina. See S.C. Code §15-39-410. Therefore, the funds that are being contributed to the IRA by Dorn are not subject to Plaintiff's judgment and thus the contribution is not a fraudulent conveyance.

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CONCLUSION

I have reviewed and considered all of the arguments set forth by the Plaintiff in its Memorandum in Support of its Motion to Set Aside and Execute on Post-Judgment Contributions by Henry A. Dorn to IRA Accounts, along with the arguments presented by counsel for the Plaintiff at the hearing on this Motion. However, an IRA is subject to the claim of a judgment creditor only to the extent that the account contains funds which represent a fraudulent conveyance. S.C. Code §15-41-30(A)(13) (Supp. 2015). In this case, none of the funds sought to be attached by Plaintiff were fraudulently conveyed by Dorn into the IRA. Dorn, Dempsey & Associates provides an employer-sponsored retirement plan that is available to all of its employees. Like all employees, Dorn had the right to make contributions to the plan via funds withheld from his paycheck. His contributions never exceeded the amount allowed by federal law. Therefore, none of Dorn's post-judgment contributions were fraudulent conveyances, and

his IRA is not subject to attachment by judgment creditors.

Accordingly, based on the foregoing, it is

ORDERED that Defendants' Motion for Protective Order is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Set Aside and Execute on Post-Judgment Contributions to IRA Accounts is DENIED.

AND IT IS SO ORDERED.

It S

September
August 2, 2016
CGL

Curtis G. Clark
Curtis G. Clark
Master in Equity for Greenwood County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
First Citizens Bank and Trust Company,)
Inc.,)
Plaintiff,)
)
v.)
)
Dorn Properties, Inc., Henry A. Dorn,)
Countybank, First South Bank, Greer)
State Bank and Branch Banking and Trust)
Company,)
)
Defendants.)
)

IN THE COURT OF COMMON PLEAS

RULE TO SHOW CAUSE AND
ORDER OF REFERENCE
CIVIL ACTION NO. 2009-CP-24-01272

FILED COMMON PLEAS
8th JUDICIAL CIRCUIT
GREENWOOD, SC
2015 FEB 18 PM 5:06

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 **an Authorized Representative for Dorn Properties, Inc. and Henry A. Dorn**, DO APPEAR before the **Master-in-Equity for Greenwood County, The Honorable Curtis G. Clark, 414 Monument Street, Suite A, Greenwood, South Carolina 29646**, on the **24th day of March, 2015, at 10:00 a.m.** to answer under oath concerning your assets; TO SHOW CAUSE why your property should not be applied towards satisfaction of the Judgment set out in the Petition; to SHOW CAUSE why a Receiver of Respondents' property should not be appointed, pursuant to the provisions of § 15-39-430, *et seq.* South Carolina Code Ann. (Law. Co-op. 1976).

The Master-in-Equity will entertain and 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 judgement 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.

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:

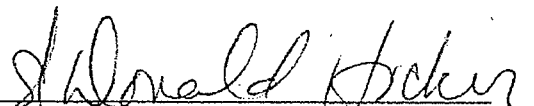
1. Bank statements for all bank accounts owned in whole or in part by Defendants for the past year.
2. Pay stubs for the past five (5) years.
3. Federal and State Tax returns for the past five (5) years.
4. Insurance Policies [home, automobile, real estate, etc...].
5. Records of any real estate owned, 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.


Presiding Circuit Court Judge, Greenwood County

Greenwood, South Carolina

2-10, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

First Citizens Bank and
Trust Company, Inc.,)

Plaintiff,)

vs.)

Dorn Properties, Inc.; Henry A.
Dorn; Countybank; First South
Bank; Greer State Bank; and
Branch Banking and Trust Company,)

Defendants.)

) IN THE COURT OF COMMON PLEAS

SUPPLEMENTAL DECREE

(Deficiency Judgment against
Dorn Properties, Inc. and Henry
Dorn)

C.A. No. 2009-CP-24-01272

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2010 AUG 3 PM 10 20

It appears from the Decree of Foreclosure that the Plaintiff sought a deficiency judgment against Defendants Dorn Properties, Inc. and Henry A. Dorn in this matter. It appears that the Plaintiff was the successful bidder on the property for \$425,000.00.

As a result, a deficiency against Defendants Dorn Properties, Inc. and Henry A. Dorn has been established in the following amount:

INDEBTEDNESS AS OF
SALES DAY (4/5/2010):

\$565,510.07

ATTORNEY'S FEES:

\$4,500.00

COURT COSTS:

Filing fees: \$ 185.00
Publication costs: 785.85
Special Referee's costs: 3,525.00
Service: 160.00

\$4,655.85

\$574,665.92

LESS: Sales Price:

-\$425,000.00

\$149,665.92

Based upon the findings of fact,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff has judgment against Defendants Dorn Properties, Inc. and Henry A. Dorn in the amount of One Hundred Forty-Nine Thousand Six Hundred Sixty-Five and 92/100 Dollars (\$149,665.92), plus interest from April 5, 2010.

IT IS SO ORDERED.

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CURTIS G. CLARK
SPECIAL REFEREE
GREENWOOD COUNTY

Greenwood, South Carolina

Date: July 14, 2010

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP2401272

First Citizens Bank And Trust Company Inc vs. Dorn Properties Inc

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), SCRCP; ☐ Rule 41, SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ 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; ☐ Statement of Judgment by the Court:

Supplemental Decree

Dated at Greenwood, South Carolina, this 14th of July, 2010.

Court Reporter:

SI
PRESIDING JUDGE - / Special Referee- Curtis G Clark

This judgment was entered on the 3rd of August, 2010, and a copy mailed first class this 3rd of August, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

James H. Cassidy Roe Cassidy Coates & Price, PA
P.O. Box 10529 Greenville, SC 29603

Sherman Brook Fowler Carter Smith Merriam
Rogers&Traxler, PA P.O. Box 10828 Greenville, SC

29603

Charles D. LeGrand Attorney at Law 310 Mills
Ave., Ste. 103 Greenville, SC 29605

Thomas E. Lydon McAngus Goudelock & Courie,
LLC P.O. Box 12519 Columbia, SC 29211

Suzanne G. Grigg Nexsen Pruet, LLC P.O. Drawer
2426 Columbia, SC 29202-2426

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Ingram Moon

Ingram B. Moon - Clerk of Court

) IN THE COURT OF COMMON PLEAS

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FILED CLERK OF COURTS
8th JUDICIAL CIRCUIT
GREENWOOD, SC
2015 FEB -9 PM 1:36

1. That heretofore Petitioner recovered and recorded judgment against Respondents Dorn Properties, Inc., and Henry A. Dorn ("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:

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

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

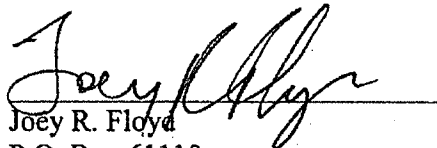
and discover any and all property and assets, real, personal, or mixed, and wheresoever situated, belonging to Respondents; or in which Respondent could claim any interest, solely or in conjunction with any person, firm, or corporation or entity, and any or all of which is or should be made applicable 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

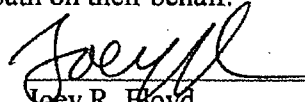
Attorneys for Petitioner

First Citizens Bank and Trust Company, Inc.

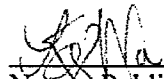
January 26, 2015

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 16 DAY OF January, 2015


Notary Public for South Carolina
My Commission Expires: 01/24/2018

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

First Citizens Bank and Trust Company,
Inc.,

Petitioner,

v.

Dorn Properties, Inc. and Henry A. Dorn,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2009-CP-24-1272

**NOTICE OF MOTION AND MOTION TO
SET ASIDE AND EXECUTE ON POST-
JUDGMENT CONTRIBUTIONS BY
HENRY A. DORN TO IRA ACCOUNTS**

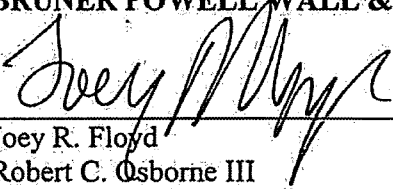
**TO: THOMAS E. LYDON, ESQUIRE, ATTORNEY FOR DEFENDANTS DORN
PROPERTIES, INC. AND HENRY A. DORN**

YOU WILL PLEASE TAKE NOTICE THAT the Plaintiff, First Citizens Bank and Trust Company, Inc. ("First Citizens"), by and through its undersigned attorneys, hereby moves for an Order setting aside fraudulent transfers by Defendant Henry A. Dorn ("Dorn") into an Individual Retirement Account ("IRA") held by Dorn pursuant to S.C. Code Ann. §§ 27-23-10 and 15-41-30(A)(13).

On August 3, 2010, a deficiency judgment was entered against Dorn Properties, Inc., and Henry A. Dorn granting First Citizens a judgment against Dorn in the amount of \$149,665.92, plus accruing interest. Despite the judgment against him, Dorn contributed \$68,110.06 to his IRA account after the judgment was filed while maintaining that he had no assets which could be applied towards First Citizens' judgment. First Citizens contends that Dorn's post-judgment contributions are fraudulent transfers that should be set aside and subject to execution by First Citizens. This motion is further supported by the Memorandum being filed simultaneously herewith.

[Signature Page Follows]

BRUNER POWELL WALL & MULLINS, LLC



Joey R. Floyd

Robert C. Osborne III

P.O. Box 61110

Columbia, SC 29260

(803) 252-7693

*Attorneys First Citizens Bank and
Trust Company, Inc.*

Columbia, SC

May 12, 2016

FILED COMMON PLEAS
8th JUDICIAL CIRCUIT
GREENWOOD, SC

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

First Citizens Bank and Trust Company,
Inc.,

Petitioner,

v.

Dorn Properties, Inc. and Henry A. Dorn,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2009-CP-24-1272

**MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE AND EXECUTE
ON POST-JUDGMENT CONTRIBUTIONS
BY HENRY A. DORN TO IRA ACCOUNTS**

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 Voluntary Post-Judgment Contributions by Henry Dorn to IRA Accounts. For the reasons set forth below, First Citizens is entitled to set aside and execute on \$68,110.06, the amount Henry Dorn voluntarily contributed to his IRA account after First Citizens filed its judgment against him.

FACTS

On August 3, 2010, a deficiency judgment was entered against Dorn Properties, Inc., and Henry A. Dorn (collectively referred to hereinafter as "Dorn"), granting First Citizens a judgment against Dorn in the amount of \$149,665.92, plus accruing interest (the "Judgment"). To date, Dorn has made no payments towards the Judgment. A supplemental proceedings hearing was held on March 24, 2015. Based upon testimony at the hearing and discovery conducted following the hearing, First Citizens discovered that, in spite of owing First Citizens in excess of \$149,665.92, Dorn has, individually and through his employer (i.e., his own business), contributed \$71,626.54 to Individual Retirement Account number 2691-3891 at Stifel, Nicolaus & Co., Inc. (the "IRA") after the Judgment was filed. See Henry Aff. ¶ 8 attached

hereto as **Exhibit A**. That amount includes \$3,516.48 that was rolled over from an IRA at Park Sterling Bank. *Id.* In summary, Dorn has voluntarily contributed \$68,110.06 of non-exempt assets (i.e., cash) to his IRA account after the Judgment held by First Citizen was filed against him. All the while, Dorn has maintained that he has no assets to satisfy the Judgment and has failed to make a single payment towards the Judgment.

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) (hereinafter referred to as the “IRA exemption”), 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 added).

While the IRA exemption provides that a debtor's interest in an IRA is generally exempt from creditors, it also plainly provides that “[a] claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into a retirement account....” S.C. Code Ann. § 15-41-30(A)(13). This caveat shows that although the IRA exemption is designed to protect debtors to a certain extent, the legislature did not intend to create a blanket exemption. The legislature envisioned situations where a debtor's use of the exemption would constitute fraud upon his creditors.

In determining what constitutes a "fraudulent conveyance", South Carolina courts look to S.C. Code Ann. § 27-23-10 (hereinafter referred to as "the Statute of Elizabeth") and related case law. The Statute of Elizabeth 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 added).

S.C. Code Ann. § 27-23-10.

In *Durham v. Blackard*, the Court of Appeals, interpreting the Statute of Elizabeth, held that 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.

313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993) (emphasis added).

Here, First Citizens need not prove "actual intent to hinder or delay creditors" because the transfers at issue were not based upon valuable consideration. *Mathis v. Burton*, 319 S.C. 261, 264-65, 460 S.E.2d 406, 408 (Ct. App. 1995). Rather, First Citizens must only prove that (1) Dorn was indebted to First Citizens at the time of the contributions at issue; (2) Dorn's contributions were voluntary, i.e., based upon no consideration or upon nominal consideration; and (3) Dorn failed to retain sufficient funds to satisfy the judgment against him. *See id*; *see also First State Sav. And Loan Ass'n v. Nodine*, 291 S.C. 445, 450, 354 S.E.2d 51, 54 (1987) ("A conveyance made upon a mere nominal consideration or without consideration is 'voluntary.'").

All of the funds First Citizens seeks to execute upon were contributed to Dorn's IRAs after the Judgment was entered on August 3, 2010. As such, it cannot be disputed that Dorn was indebted to First Citizens at the time of the contributions at issue. At all relevant times, Dorn was fully aware of the Judgment.

As to the second element in *Mathis*, there was no consideration for the transfer of the money from Dorn to his IRA. "Consideration...may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Furman Univ. v. Waller*, 124 S.C. 68, 117 S.E. 356, 358 (1923) (emphasis added). The definition of consideration clearly shows that that consideration involves two separate parties. Furthermore, Dorn neither received a benefit nor suffered a detriment because he did nothing more than move money from one pocket to another in an effort to protect his assets (i.e., cash) from his judgment creditors. Dorn was in the exact same position before and after the transfers to his IRAs. His assets were simply in a different

account. Dorn has maintained full control over the IRA and can freely withdraw or invest the funds.

Additionally, “where a conveyance to a family member or close relative is attacked on account of its voluntary character, the law imposes a duty of the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing evidence.” *Nodine*, 291 S.C. at 450, 354 S.E.2d at 54 (citing *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973)). Here, the transfer involved only one person—Dorn. When a debtor transfers assets from one account into another account controlled by the same debtor, the transfer should be scrutinized in the same manner as a transfer to a “family member or close relative.” See *id.* As such, the burden of proving that the transfer was supported by consideration shifts to Dorn. Dorn has submitted no evidence establishing valuable consideration or the bona fides of the transfers.

The final element set forth in *Mathis* is that the debtor fails to retain sufficient funds to satisfy his debts. See *Mathis*, 319 S.C. at 266, 460 S.E.2d at 408. This element is also not in dispute as Dorn has failed to make a single payment toward the Judgment in the nearly six years since it was filed. Therefore, because (1) Dorn was indebted to First Citizens at the time of the contributions at issue; (2) the contributions were “voluntary”, i.e., not supported by valuable consideration; and (3) Dorn has failed to retain sufficient funds to satisfy the judgment, the Dorn’s post-judgment contributions to his IRA account should be set aside as fraudulent transfers and subject to execution.

If this Court finds that the post-judgment contributions were supported by consideration, something First Citizens denies, the post-judgment contributions are still subject to execution. Under South Carolina law, even if a transfer is supported by consideration, it can still be set aside as a fraudulent conveyance if it is shown that the transfer was (1) 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. *See Durham*, 313 S.C. at 437, 438 S.E.2d at 262. As discussed above, it is undisputed that Dorn was indebted to First Citizens when the contributions were made. All of contributions at issue were made after the Judgment was filed. The issue of whether the grantor's intent is imputable to the grantee is irrelevant because Dorn is both the grantor and the grantee. Therefore, the only real issue for the court is whether Dorn's post-judgment contributions were made with the "intent of defrauding his creditors." *See id.*

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, South Carolina courts often evaluate the particular circumstances of the transfer for "badges of fraud." *See 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."). In *Coleman*, the Supreme Court of South Carolina stated the following regarding the badges of fraud:

The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all. Among the generally recognized badges of fraud are the insolvency 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. (citing 37 Am.Jur.(2d), Fraudulent Conveyances, § 10 (1968)). The circumstances of Dorn's post-judgment contributions to his IRAs meet at least seven of the nine badges of fraud listed

above.¹ “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 (1999). Here, Dorn (1) was indebted to First Citizens at the time of the contributions; (2) transferred the funds to himself, the person with whom he clearly has the closest relationship, (3) made the contributions after the Judgment was filed and while litigation was pending; (4) attempted to conceal the contributions,² (5) reserved the benefit of the funds for himself, and (6) retained possession of the funds. The presence of these badges of fraud surrounding Dorn’s post-judgment contributions reveals Dorn’s actual intent to hinder, delay, or defraud First Citizens from collecting its judgment.³

While IRA exemption offers debtors protection in limited situations and circumstances, it also protects judgment creditors by prohibiting a judgment debtor from taking assets that are subject to execution (i.e. cash) and attempting to place those assets beyond the reach of a creditor by depositing the cash into an IRA account. First Citizens requests that this Court set aside Dorn’s conveyances into his IRA account made after August 3, 2010, with the exception of those funds rolled over from the Park Sterling IRA. “Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.” *Ex*

¹ One of the badges of fraud satisfied is lack of consideration. First Citizens takes the position that the contributions at issue were not supported by valuable consideration. *See supra* pp. 4. However, as this section of the brief assumes, *arguendo*, that there was consideration, First Citizens will only address the other badges of fraud that are present.

² A copy of Dorn’s post-judgment discovery responses are attached hereto as Exhibit B. A copy of Dorn’s Motion for a Protective Order is attached hereto as Exhibit C. Both exhibit Dorn’s continued effort to conceal the transfers from First Citizens.

³ Even if the IRA is ERISA qualified, “[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, 379 (Bkry. D.Md. 1999) (“The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers.”).

parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). Here, Dorn elected to contribute \$68,110.06 to his IRA account after First Citizens filed the Judgment. Despite contributing in excess of \$68,000.00 to his IRA, Dorn has continuously maintained that he has no assets to satisfy the Judgment. In effect, Dorn is using his IRA account as an "offshore bank account," funneling significant amounts of money to the IRA on an annual basis in an effort to put his assets beyond the reach of his creditors. Neither the law nor the principles of equity allow such action.

CONCLUSION

For the reasons set forth herein, this Court should set aside Dorn's voluntary post-judgment contributions to his IRA as fraudulent transfers, thereby allowing First Citizens to execute on the funds in the IRA account and apply the proceeds towards the Judgment debt. First Citizens seeks an Order directing Stifel, Nicolaus & Co., Inc. and/or Dorn to withdraw \$68,110.06, the amount of post-judgment contributions, from IRA account number 2691-3891 and to apply those funds towards First Citizens' Judgment.

Respectfully submitted,

BRUNER POWELL WALL & MULLINS, LLC



Joey R. Floyd
Robert C. Osborne III
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
*Attorneys First Citizens Bank and
Trust Company, Inc.*

Columbia, SC

May 13, 2016

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

v.

Dorn Properties, Inc., Henry A. Dorn,
Countybank, First South Bank, Greer
State Bank and Branch Banking and
Trust Company,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-24-01272

AFFIDAVIT OF

WILLIAM G. HENRY

Personally appeared before me, William G. Henry, being first duly sworn, deposes and states as follows:

- (1) I am over the age of 18 and competent to make this affidavit.
- (2) I am a Financial Advisor for Stifel, Nicolaus & Company, Inc. (referred to herein as "Stifel")
- (3) This affidavit is based on the business records of Stifel.
- (4) The Defendant Henry A. Dorn ("Mr. Dorn"), has two IRA accounts with Stifel, bearing account numbers 3708-7310 and 2691-3891.
- (5) Stifel account number 2691-3891 was opened by Mr. Dorn on November 11, 2007.
- (6) Stifel account number 3708-7310 was opened by Mr. Dorn on January 26, 2012.
- (7) From January, 2009 through March, 2015, \$95,897.00 has been contributed to Mr. Dorn's IRA account number 2691-3891 by Mr. Dorn, or by his

employer for his benefit, which includes \$3,516.48 that was transferred from a Park Sterling Bank IRA to Stifel account number 2691-3891 on February 13, 2012 (rollover).

(8) Since August 3, 2010 (the date of the Judgment in the above-captioned civil action), Mr. Dorn, individually and/or through his employer, have contributed \$71,626.54 to Stifel IRA account number 2691-3891, which includes \$3,516.48 that was transferred from a Park Sterling Bank IRA to Stifel account number 2691-3891 in February, 2012 (rollover).

(9) On February 13, 2012, \$6,319.60 was deposited into Mr. Dorn's IRA account number 3708-7310 from an IRA held at Park Sterling Bank (Transfer).

(10) No other funds have been contributed to Mr. Dorn's IRA account number 3708-7310 as of March 31, 2015, besides the rollover in February 2012.

(11) Mr. Dorn has no other accounts with Stifel besides the two accounts set forth herein.

Stifel, Nicolaus & Company,
Incorporated

By: W. J. Henry

Its: Financial Advisor

SWORN TO and subscribed before me

This 12th day of AUGUST, 2015

Carla B. Register (L.S.)
Notary Public for COLUMBIA CTY
My Commission Expires 4/27/2019

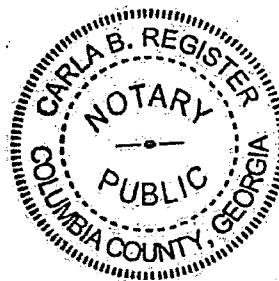


EXHIBIT B

STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

First Citizens Bank and Trust
Company, Inc.,)

Plaintiff,)

v.)

Dorn Properties, Inc., Henry A.
Dorn, Countybank, First South
Bank, Greer State Bank and Branch)
Banking and Trust Company,)

Defendants.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2009-CP-24-1272

**DEFENDANT HENRY DORN'S RESPONSES
TO PLAINTIFF'S SECOND SET OF
POST-JUDGMENT INTERROGATORIES**

Defendant Henry Dorn ("Defendant") hereby responds to Plaintiff's Second Set of Post-Judgment Interrogatories as follows:

In setting forth these answers, Defendant does not waive the attorney-client, work/product, or other privilege or immunity from disclosure which may attach to information called for herein, or responsive to, the Interrogatory. Defendant does not concede the relevance or materiality of the Interrogatory, or the subject matter for which the Interrogatory refers. These answers are submitted by Defendant subject to, and without in any way waiving or intending to waive, but on the contrary intending to reserve and reserving:

A. All objections as to competency, relevancy, materiality, privilege, and admissibility as evidence, for any purpose, of any of the documents referred to or answers given, or the subject thereof, in any subsequent proceeding or in the trial of this action or any other action or proceeding;

B. The right to object to other discovery procedures involving or relating to the

subject matter of the Interrogatories herein and responded to; and

C. The right at any time to revise, correct, add to, or clarify any of the answers set forth herein, or documents referred to herein.

D. Defendant objects to these Interrogatories to the extent that they ask for information protected by the attorney-client or the work product privileges or to the extent the interrogatories go beyond the scope of discovery allowed in the South Carolina Rules of Civil Procedure.

1. Set forth all amounts of money that you have contributed to an IRA, or other financial retirement account from September 2, 2009 to present, together with the account numbers, along with the financial institution into which your contributions were made, including the amount(s) of money that you contributed and the date(s) of your contributions.

Response: Defendant objects to this request on the grounds that the information sought is not relevant to these supplemental proceedings, nor is it reasonably calculated to lead to the discovery of relevant evidence. More specifically, as provided in Section 15-41-30 of the South Carolina Code, IRA accounts are exempt from attachment, levy, or sale. Therefore, Plaintiff is not entitled to information regarding IRA accounts.

2. Set forth all amounts of money that your Employer(s) has contributed to an IRA, or other financial retirement account from September 2, 2009 to present, together with the account numbers, along with the financial institution into which your contributions were made, including the amount(s) of money that you contributed and the date(s) of your contributions.

Response: Defendant objects to this request on the grounds that the information sought is not relevant to these supplemental proceedings, nor is it reasonably calculated to lead to the discovery of relevant evidence. More specifically, as provided in Section 15-41-30 of the South

Carolina Code, IRA accounts are exempt from attachment, levy, or sale. Therefore, Plaintiff is not entitled to information regarding IRA accounts.

3. Does Exhibit A accurately reflect the total amount of contributions to your IRA account(s) for the time period reflected on Exhibit A?

Response: Defendant objects to this request on the grounds that the information sought is not relevant to these supplemental proceedings, nor is it reasonably calculated to lead to the discovery of relevant evidence. More specifically, as provided in Section 15-41-30 of the South Carolina Code, IRA accounts are exempt from attachment, levy, or sale. Therefore, Plaintiff is not entitled to information regarding IRA accounts.

4. If you answered anything other than "Yes" to Interrogatory # 3, provide a breakdown of all contributions by you and your employers to your IRA(s), or other financial retirement accounts, if any.

Response: Defendant objects to this request on the grounds that the information sought is not relevant to these supplemental proceedings, nor is it reasonably calculated to lead to the discovery of relevant evidence. More specifically, as provided in Section 15-41-30 of the South Carolina Code, IRA accounts are exempt from attachment, levy, or sale. Therefore, Plaintiff is not entitled to information regarding IRA accounts.

5. Identify the names and addresses of all owners and/or managing members of each of your employer(s) from September 2, 2009 to present.

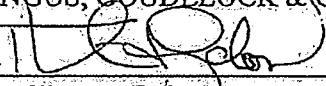
Response: Defendant was employed by Green and Company until June 30, 2010. Since then, Defendant has been employed by Dorn, Dempsey, & Associates, which is managed by Henry Dorn and Kevin Dempsey.

6. Identify the names and addresses of all person(s) from each of your employer(s)

from September 2, 2009 to present that made the decision to make a contribution to your IRA, or other financial retirement account, if any and match the person(s) who made the decision(s) to make a contribution with the amount of each contribution(s).

Response: Defendant objects to this request on the grounds that the information sought is not relevant to these supplemental proceedings, nor is it reasonably calculated to lead to the discovery of relevant evidence. More specifically, as provided in Section 15-41-30 of the South Carolina Code, IRA accounts are exempt from attachment, levy, or sale. Therefore, Plaintiff is not entitled to information regarding IRA accounts.

McANGUS, GOUDELOCK & COURIE, LLC

By: 

Thomas E. Lydon
1320 Main Street, 10th Floor
Post Office Box 12519
Columbia, South Carolina 29211
803-779-2300
Attorneys for Defendant Henry Dorn

June 3, 2015

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

First Citizens Bank

☐ Plaintiff

v.

Dom Properties, Et Al.

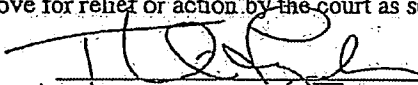
☒ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-24-01272

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Joey R. Floyd, Bar No. Address: Post Office Box 61110, Columbia, SC 29260 phone: fax: e-mail: other:		Defendant's Attorney: Thomas E Lydon, Bar No. Address: PO Box 12519, Columbia, SC 29211 phone: fax: e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Protective Order Estimated Time Needed: 20 min Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant		July 8, 2015 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE: _____	
		CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	
	)	CIVIL ACTION NO. 2009-CP-24-1272
First Citizens Bank and Trust	)	
Company, Inc.,	)	
	)	DEFENDANT HENRY DORN'S
Plaintiff,	)	MOTION FOR PROTECTIVE ORDER
	)	AND TO QUASH DEPOSITION SUBPOENA
v.	)	
	)	
Dorn Properties, Inc., Henry A.	)	
Dorn, Countybank, First South	)	
Bank, Greer State Bank and Branch	)	
Banking and Trust Company,	)	
	)	
Defendants.	)	

TO: JOEY R. FLOYD, ESQUIRE, ATTORNEY FOR PLAINTIFF

You will please take notice that on the tenth (10th) day after service hereof, or as soon thereafter as may be scheduled, the undersigned counsel for Henry A. Dorn will move before the Honorable Curtis G. Clark, Special Referee for Greenwood County, for a Protective Order and an Order quashing the Notice of Deposition and Deposition Subpoena *Duces Tecum* issued to Henry A. Dorn in connection with the referenced matter. The grounds for this Motion are as follows:

1. The Notice of Deposition and Deposition Subpoena *Duces Tecum* do not comply with Rule 30(b), SCRCP, in that ten days' notice was not given; and
2. Plaintiff is seeking to obtain information in this deposition and through the subpoena that is not relevant to these supplemental proceedings, nor is it reasonably calculated to lead to the discovery of relevant evidence. More specifically, as provided in Section 15-41-30 of the South Carolina Code, IRA accounts are exempt from attachment, levy, or sale. Therefore, Plaintiff is not

entitled to information regarding Henry Dorn's IRA accounts.

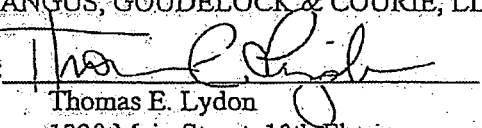
This motion will be based upon Rules 26, 30, 45, and other applicable rules of the South Carolina Rules of Civil Procedure, applicable statutory and case law, and the following exhibits, copies of which are attached to this Motion:

1. Exhibit A – E-mail from Plaintiff's counsel dated June 15, 2015
2. Exhibit B – Notice of Deposition of Henry A. Dorn
3. Exhibit C – Deposition Subpoena *Duces Tecum* to Henry A. Dorn
4. Exhibit D – Certificate of Service

WHEREFORE, Henry Dorn prays for the following relief:

1. For a Protective Order prohibiting Plaintiff from pursuing discovery concerning his IRA accounts;
2. For an Order quashing the Deposition Subpoena *Duces Tecum*;
3. For the costs and attorney's fees incurred in filing this Motion; and
4. For such other and further relief as the Court may deem just and proper.

McANGUS, GOUDELOCK & COURIE, LLC

By: 

Thomas E. Lydon
1320 Main Street, 10th Floor
Post Office Box 12519
Columbia, South Carolina 29211
803-779-2300

July 8, 2015

Attorneys for Henry A. Dorn

Tommy Lydon

From: Joey Floyd <JFloyd@brunerpowell.com>
Sent: Monday, June 15, 2015 10:21 AM
To: Tommy Lydon
Subject: RE: First Citizens v. Henry Dorn/First Citizens v. Kevin Dempsey

So stipulated.

JF

From: Tommy Lydon [mailto:tlydon@mgclaw.com]
Sent: Monday, June 15, 2015 10:20 AM
To: Joey Floyd
Subject: RE: First Citizens v. Henry Dorn/First Citizens v. Kevin Dempsey

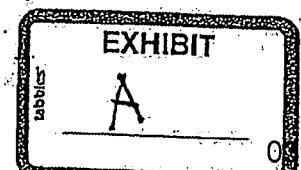
That will only work if you will stipulate that the sole purpose of the deposition is to ask questions about the IRA accounts. I can't file a motion for protective order without some sort of record of what the questions will be.

From: Joey Floyd [mailto:JFloyd@brunerpowell.com]
Sent: Monday, June 15, 2015 10:09 AM
To: Tommy Lydon
Subject: RE: First Citizens v. Henry Dorn/First Citizens v. Kevin Dempsey

For procedural purposes, I want to notice the depositions. Would you like to do a protective order after I notice the depositions? If so, I'll just notice the depositions and you can file your motion for protective order. That should satisfy you and it will check off my procedural purpose.

Thanks.

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) 803.254.5719
direct dial: 803.744.0629
www.brunerpowell.com



STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

First Citizens Bank and Trust Company,
Inc.,)

Plaintiff,)

v.)

Dorn Properties, Inc., Henry A. Dorn,
Countybank, First South Bank, Greer
State Bank and Branch Banking and Trust
Company,)

Defendants.)

IN THE COURT OF COMMON PLEAS

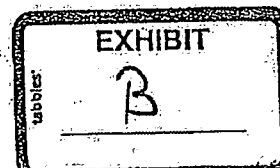
CIVIL ACTION NO. 2009-CP-24-01272

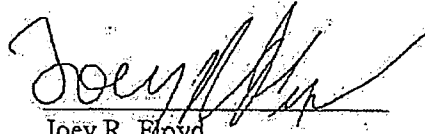
NOTICE OF DEPOSITION OF
HENRY A. DORN

TO: TOMMY LYDON, ESQUIRE ATTORNEY FOR DEFENDANTS DORN PROPERTIES,
INC. AND HENRY A. DORN:

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, the Plaintiff, First Citizens Bank and Trust Company, Inc., through its undersigned counsel, will take the deposition of HENRY A. DORN upon oral examination on FRIDAY, JULY 10, 2015, AT 10:00 A.M. at THE LAW FIRM OF BACOT & PADGETT, LLC, 414 MONUMENT STREET, SUITE C, GREENWOOD, SOUTH CAROLINA 29646. This deposition will be taken upon oral examination before a notary public or before any other officer authorized by law to take depositions, at which time you are notified to appear and take such part as you may be advised and as shall be fit and proper.

YOU WILL PLEASE TAKE FURTHER NOTICE that the oral examination will continue from day to day until completed and that this deposition is being taken for the purpose of discovery, for use at trial and for all other purposes as are permitted under the rules of this Court and all applicable statutes and laws.





Joey R. Floyd

Bruner, Powell, Wall & Mullins, LLC
1735 St. Julian Place, Suite 200 (29204)
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693

Attorneys for the Plaintiff

First Citizens Bank and Trust Company, Inc.

June 29, 2015

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF RICHLAND

First Citizens Bank and Trust Company, Inc.,
Plaintiff

SUBPOENA DUCES TECUM IN A CIVIL CASE

v.

Case Number: 2009-CP-24-01272

Dorn Properties, Inc.; Henry A. Dorn, et.al.

Judgment in Greenwood County

TO:

Henry A. Dorn, c/o Tommy Lydon, Esquire
McAngus Goudelock & Courie, LLC
1320 Main Street, 10th Floor
Columbia, South Carolina 29201

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

AM

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

The Law Firm of Bacot & Padgett, LLC
414 Monument Street, Suite C
Greenwood, South Carolina 29646

DATE AND TIME

July 10, 2015, 10:00 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects): All account statements for any IRA or retirement account from July 14, 2010 to the present date, including but not limited to copies of all documents that reflect the amount of money that you have contributed towards your IRA or other retirement account from the date of the Judgment entered in this case.

PLACE

The Law Firm of Bacot & Padgett, LLC
414 Monument Street, Suite C
Greenwood, South Carolina 29646

DATE AND TIME

July 10, 2015, 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES

Attorney/Issuing Officer's Signature

Date

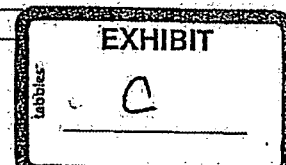
Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

1735 St. Julian Place, Post Office Box 61110, Columbia, SC 29206

(803) 252-7693



Clerk of Court/Issuing Officer's Signature
Pro Se Litigant's Name, Address and
Telephone Number :

Date

Print Name

PROOF OF SERVICE

SERVED:	DATE <u>June 20, 2015</u>	FEEs AND MILEAGE TENDERED TO WITNESS ☒ YES ☐ NO AMOUNT \$ <u>26.15</u>
PLACE:	1320 Main Street, 10 th Floor Columbia, South Carolina 29201	
SERVED ON Henry A. Dorn c/o Tommy Lydon, Esquire		MANNER OF SERVICE: U. S. First Class Mail
SERVED BY Kim Warnock		TITLE: Legal Assistant

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 6/20/2015

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SIGNATURE OF SERVER

Post Office Box 61110, Columbia, SC 29260-1110
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information; or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

v.

Dorn Properties, Inc., Henry A. Dorn,
Countybank, First South Bank, Greer
State Bank and Branch Banking and Trust
Company,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2009-CP-24-01272

CERTIFICATE OF SERVICE

I, Kim Warnock, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for the Plaintiff, First Citizens Bank and Trust Company, Inc., do hereby certify that on June 30, 2015, 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:

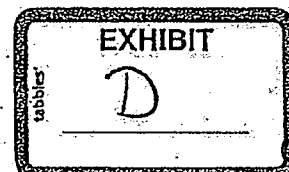
Pleading(s)/Documents served:

- 1) Notice of Deposition of Henry A. Dorn; and
- 2) Subpoena Duces Tecum to Henry A. Dorn

Counsel served:

Thomas E. Lydon, Esquire
McAngus Goudelock & Courie, LLC
1320 Main Street, 10th Floor
Columbia, SC 29201
Attorneys for the Defendants

Kim Warnock



STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

First Citizens Bank and Trust Company, Inc.,

Plaintiff,

vs.

Dorn Properties, Inc., Henry A. Dorn,
Countybank, First South Bank, Greer State
Bank And Branch Banking And Trust
Company

Defendant.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-24-1272

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Joey R. Floyd, Bar No. 68491

Address:

P.O. Box 61110, Columbia, SC 29260

Phone: 803.252.7693 Fax _____

E-mail: jfloyd@brunerpowell.com Other: _____

Defendant's Attorney:

Thomas E. Lydon, Bar No. _____

Address:

P.O. Box 12519, Columbia SC 29211

Phone: 803.779.2300 Fax 803.748.0526

E-mail: _____ Other: _____

☐ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Set Aside Fraudulent Conveyances

Estimated Time Needed: 30 Min

Court Reporter Needed: ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

May , 2016

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)
First Citizens Bank and Trust)
Company, Inc.,)
Plaintiff,)
v.)
Dorn Properties, Inc. and)
Henry A. Dorn,)
Defendants.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2009-CP-24-1272

**DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION
TO SET ASIDE AND EXECUTE ON
POST-JUDGMENT CONTRIBUTIONS
TO IRA ACCOUNTS**

2016 JUL -7 PM 2:11

FILED JAMES E. LEAS
6TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

Defendants submit this Memorandum in opposition to Plaintiffs' Motion to Set Aside and Execute on Post-Judgment Contributions to IRA Accounts.

FACTUAL BACKGROUND

Henry A. Dorn is an employee of Dorn, Dempsey & Associates, Inc., an accounting firm in Greenwood, South Carolina. He has been employed by the firm since it was formed on June 1, 2010. Prior to joining Dorn, Dempsey & Associates, Inc., Dorn was employed by Green and Company for 29 years.

Dorn, Dempsey & Associates, Inc. provides to its employees an employer-sponsored retirement plan, often referred to as a SIMPLE IRA. "SIMPLE" is an acronym for Savings Incentive Match Plans for Employees. These are employer-sponsored retirement plans that allow employees of small businesses to make contributions via salary deferrals. SIMPLE plans are covered by the Employee Retirement Investment Security Act (ERISA), which details requirements for structure and administration of employer retirement plans. ERISA mandates

that employers of SIMPLE IRAs are required by law to match employee contributions. The funds contributed by an employee to a SIMPLE IRA are never actually received by the employee, but are withheld from his paycheck. Employers are required to deposit employee salary deferral contributions for SIMPLE IRAs into the employee's account by the end of the month following the month in which the funds were withheld from the employee's paycheck.

ERISA and the federal government limit the amount an employee may contribute to the SIMPLE IRA each year. The amount an employee contributes from their salary to a SIMPLE IRA cannot exceed \$12,500 in 2015 and 2016. Employees over the age of 50 are allowed an additional "catch-up" contribution of \$3,000.00. Also, amounts contributed to SIMPLE IRAs are not allowed to be withdrawn before the employee turns age 59½ without penalty of 10% and are subject to income tax at prevailing rates both federal and state.

During his employment at Dorn, Dempsey & Associates, Inc., Dorn has made the following contributions to his SIMPLE IRA:

Year 2010 \$3,233.00

Year 2011 \$13,083.00

Year 2012 \$14,000.00

Year 2013 \$14,500.00

Year 2014 \$14,500.00

Year 2015 \$2,417.00

Dorn's contributions have never exceeded the amount allowed by law. While he was employed at Green and Company, Dorn made regular contributions to the SIMPLE IRA provided to its employees.

HISTORY OF THE IRA EXEMPTION FROM ATTACHMENT BY CREDITORS

Prior to 1999, the South Carolina exemption statute, Section 15-41-30 of the South Carolina Code, did not contain a specific exemption for an IRA. As such, in 1987 the South Carolina Court of Appeals had held that Individual Retirement Accounts were not exempt from attachment by judgment creditors. *Rowland v. Strickland*, 294 S.C. 119, 362 S.E.2d 892 (Ct. App. 1987). However, bankruptcy courts in South Carolina had held that the subsection in the statute that provided an exemption for pensions and other retirement plans also protected an IRA from attachment. But, the bankruptcy courts had limited the exemption to individuals over the age of 59½, who had a right to receive payments under their IRA. *See In re Outen*, 220 B.R. 26 (D.S.C. 1998) (attached as Exhibit A). Then, in the *Outen* case, the United States Bankruptcy Court for the District of South Carolina issued an *en banc* opinion that reversed its prior decisions and held that an IRA was exempt from the claims of creditors regardless of the age of the debtor. 220 B.R. at 31.

Apparently in an effort to confirm the *Outen* decision that an IRA is not subject to creditor's claims, the following year the South Carolina legislature revised the exemption statute to make it clear that such accounts are protected from attachment by adding the following exemption to Section 15-41-10:

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. For purposes of this item, 'Internal Revenue Code' has the meaning provided in Section 12-6-40(A).

1999 S.C. Act No. 60 (copy attached as Exhibit B). Then, in 2012, the legislature made the

exemption even broader by eliminating the limitation that an IRA is only exempt “to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” 2012 S.C. Act No. 153 (copy attached as Exhibit C). Based on the foregoing legislative history, it is clear that the South Carolina legislature intends to extend to IRAs broad protection from attachment by judgment creditors.

LEGAL ANALYSIS

The only limitation on the exemption for an IRA is that the exemption “may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account...” S.C. Code Section 15-41-30(A)(13) (Supp. 2015). Although no South Carolina appellate courts have addressed what constitutes a fraudulent conveyance into an IRA, it seems that this limitation would apply in only two circumstances. The first circumstance would arise when the debtor made contributions to his IRA that exceeded the amount allowed under federal law. The second circumstance could arise where a debtor contributes a non-exempt asset into an IRA in order to protect it from attachment. For example, if a debtor maintained an ordinary savings account at a bank and he transferred those funds into an IRA to avoid attachment by a judgment creditor, it could be argued that such transfer was a fraudulent conveyance. However, it should be noted that many courts have held that the mere conversion of non-exempt property to exempt property is not a fraudulent conveyance. See *Wudrick v. Clements*, 451 F.2d 988 (9th Cir. 1971); *In re Thomas*, 2012 WL 2792348 (Idaho Bankr. 2012).

Neither of the two circumstances described above applies in this case. First, Dorn’s contributions to the SIMPLE IRA have never exceeded the maximum amount allowed by federal law. Second, an individual’s earnings for his personal services are not subject to attachment or garnishment in South Carolina. See S.C. Code §15-39-410. Therefore, the funds that are being

contributed to the SIMPLE IRA by Dorn are not subject to Plaintiff's judgment and thus the contribution is not a fraudulent conveyance.

Plaintiff cites a number of cases in support of its position that post-judgment contributions to an IRA are fraudulent conveyances. However, the facts in all of the cases cited by Plaintiff are distinguishable from those in the present case. First, all of those cases involved the conveyance of an asset to a third-party. Here, there has been no transfer to a third-party. The IRA is in the name of and owned by Henry Dorn. Therefore, there has been no conveyance by Dorn.

Second, all of the cases cited by Plaintiff involved the transfer of assets that were subject to attachment by the judgment creditor. Here, the wages used by Dorn to fund the IRA were not subject to attachment by First Citizens. Thus, the cases relied on by Plaintiff in support of its motion are not applicable to the facts in this case.

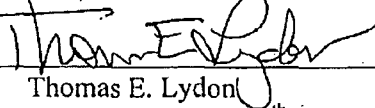
Finally, if Plaintiff's argument is accepted, then all contributions to an IRA by a judgment debtor should be treated as fraudulent conveyances. However, if that is what the South Carolina legislature intended, then it could have simply written that limitation into the statute when it was amended. Instead, the recent amendments by the legislature indicate a desire to offer broad protection to Individual Retirement Accounts from the claims of judgment creditors, regardless of the size of the account.

CONCLUSION

The legislative history of the IRA exemption in South Carolina makes it clear that the legislature intended to extend broad protection to IRAs, as evidenced by the fact that such accounts are exempt from attachment by creditors regardless of how much money is in the account. Moreover, the exemptions provided under the statute are to be construed liberally in

favor of debtors. *In re Holt*, 497 B.R. 817 (Bankr. D.S.C. 2013). The only limitation on the exemption is that the funds in an IRA are not protected to the extent that they were fraudulently conveyed into the account. However, the funds contributed to Dorn's IRA were wages that are exempt from attachment, and his annual contributions never exceeded the amount allowed by law. Accordingly, Plaintiff's Motion to Set Aside and Execute on Post-Judgment Contributions to IRA Accounts must be denied.

McANGUS, GOUDELOCK & COURIE, LLC

By: 
Thomas E. Lydon
1320 Main Street, 10th Floor
Post Office Box 12519
Columbia, South Carolina 29211
803-779-2300
Attorneys for Defendants

June 30, 2016

220 B.R. 26 (1998)

In re Betty R. OUTEN, Debtor.

Bankruptcy No. 97-08675-W.

United States Bankruptcy Court, D.
South Carolina.

March 18, 1998.

Thomas E. Lydon, III, Columbia, SC, for
Debtor.

W. Ryan Hovis, Rock Hill, SC, for
Chapter 7 Trustee.

Before DAVIS, Chief Judge, BISHOP, and
WAITES, Bankruptcy Judges.

ORDER

PER CURIAM.

THIS MATTER comes before the Court sitting en banc upon the objection of W. Ryan Hovis, the Chapter 7 Trustee ("Trustee") to the Debtor's claim of exemption in an Individual Retirement Account ("IRA") with a value of \$24,991.00.¹ The Debtor and the Trustee have stipulated that there were no factual disputes and that the legal issue could be ruled upon by the Court upon the submission of Stipulations of Fact and a proposed order outlining the parties' respective positions. Therefore the Court adopts the parties' Stipulations of Fact and makes the following Conclusions of Law.

STIPULATIONS OF FACT

1. Betty R. Outen filed for relief under Chapter 7 of the United States Bankruptcy Code on October 14, 1997.

2. Betty R. Outen was born on October 3, 1942. She was 55 years old when she filed her bankruptcy petition.

3. On June 22, 1995, Betty R. Outen rolled over an ERISA qualified 401(k) plan as a result of termination of her employment with South Carolina Electric and Gas Company. The Debtor purchased an individual retirement annuity from Mass Mutual Insurance for \$24,991.00, which represented the balance of her 401(k) plan.²

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4. The individual retirement annuity is property of the estate.³ With limited exceptions not applicable in this case, withdrawals without penalty may be made from an individual retirement annuity only after the person has reached the age of 59 1/2.

5. The Debtor is claiming an exemption in the individual retirement annuity pursuant to South Carolina Code § 15-41-30(10)(E)(Supp.1996).

6. The Trustee timely objected to the debtor's claim of an exemption in the individual retirement annuity.

7. The issue to be determined is whether the debtor may exempt the individual retirement annuity pursuant to South Carolina Code § 15-41-30(10)(E)(Supp.1996).

CONCLUSIONS OF LAW

South Carolina Code § 15-41-30(10)(E) exempts "the Debtor's right to receive a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age or length of service . . ." ⁴ Since 1982, this Court has interpreted this provision to stand for the proposition that if there is no current right to receive payment, without the payment of a tax penalty, at the time the bankruptcy petition was filed (i.e. the debtor has not reached the age of 59 & 1/2), the debtor could not claim an exemption in the IRA. See *In re Lowe*, 25 B.R. 86 (Bkrcty.D.S.C.1982), *In re Sopkin*, 57 B.R. 43 (Bkrcty.D.S.C.1985), *In re Sullivan*,



91-03910 (Bkrcty.D.S.C. 9/5/91), and *In re Elsan*, 181 B.R. 848 (Bkrcty.D.S.C.1995). One of the reasons supporting these opinions was that public policy dictates that such an account not be held exempt because it would allow a debtor to convert non-exempt cash to an exempt savings account on the eve of bankruptcy, such account being later revocable at the debtor's discretion.⁵

In those cases, this Court relied on the then prevailing authority, *In re Clark*, 711 F.2d 21 (3rd Cir.1983). In a recent decision, *In re Yuhas*, 104 F.3d 612 (3rd Cir.1997), the Third Circuit Court of Appeals, which found that a debtor's interest in an IRA was excluded from property of the estate pursuant to 11 U.S.C. § 541(c)(2)⁶, stated in a footnote that its decision was fully consistent with *Clark*, so it appears that *Clark* remains the law of the Third Circuit. However, there has been criticism of the *Clark* decision, including the concurring opinion filed by Judge Becker who concurred with the result, but not with the method, as it did not provide protection for self-employed individuals. As Judge Becker stated in a footnote, "perhaps Congress should focus its attention upon these matters; it may not have done so sufficiently when drafting the legislation." *In re Clark*, 711 F.2d at 24 fn. 3.

There are no Fourth Circuit Court of Appeals or Supreme Court opinions directly on

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point; however, three recent cases from the Fifth, Ninth and Second Circuits, *In re Carmichael*, 100 F.3d 375 (5th Cir.1996), *In re Rawlinson*, 209 B.R. 501 (9th Cir. BAP 1997) and *In re Dubroff*, 119 F.3d 75 (2d Cir.1997), have interpreted § 522(d)(10)(E) (which contains nearly identical language to the South Carolina exemption statute) and have found that a present right to receive payments is not necessary in order to exempt an IRA.

In *Carmichael*, the Fifth Circuit noted that the wording of § 522(d)(10)(E) afforded no reason to exclude an otherwise exempt IRA just because there was no current right to receive payments from the IRA inasmuch as it is the debtor's right to receive payments, whether present or future, not the debtor's current right to receive the payment, that is exempt.

Given the Trustee's obfuscation of the issue by arguing the question of "present payments," it is helpful to recognize the distinction between a debtor's right to receive a payment presently (the Trustee's contention) and a debtor's "right to receive . . . a payment" (the plain words of the section) which includes both (1) a debtor's presently vested right to receive a payment in the future and (2) a debtor's right to receive a payment "presently," "currently," or "immediately." We decline the Trustee's invitation to read into the subject section of the Code a restriction to the right to receive payments presently, to the exclusion of a present right to receive payments in the future. The language of the section does not include words like "presently," "currently," or "immediately." Indeed, to infer such would be to exclude from consideration all deferred compensation and retirement accounts that have not yet ripened to current payment status. Again, that which is exempt is the right to receive payments, whether future or present, not merely the current receipt of payments.

In re Carmichael, 100 F.3d at 379. The reasoning in *Carmichael* was followed by the Bankruptcy Appellate Panel for the Ninth Circuit in interpreting a California exemption statute and the Second Circuit in interpreting a New York exemption statute.

The *Carmichael* court rejected the argument that the debtor's ability to receive the funds of her own will destroys exemptibility:

As long as the right to receive a payment under a plan or contract can be triggered by one or more of the five listed events, and is therefore exemptible, the fact that payments can also be triggered by some additional factor — or absence of some additional factor — cannot destroy exemptibility.

Id. See also *In re Conner*, 73 F.3d 258, 260 (9th Cir.) (finding that for purposes of determining whether an ERISA-qualified plan account may be exempt under 541(c)(2) "the Supreme Court appears to have discounted any distinction based on the debtors' control of their assets") (citing *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992)), cert. denied, ___ U.S. ___, 117 S.Ct. 68, 136 L.Ed.2d 29 (1996).

In re Rawlinson, 209 B.R. at 507. Also see *In re Dubroff*, 119 F.3d 75 (2d Cir.1997). These circuit court opinions highlight Congress' concern for the preservation of retirement plans. In fact, the Ninth Circuit addressed the same situation currently before this Court.

There are situations in which an IRA may hold significant assets. For instance, an employee may "roll-over" a company 401(k) plan account to an IRA at the end of employment. The Ninth Circuit has found that a 401(k) plan is not property of the estate. *In re Kincaid*, 917 F.2d 1162 (9th Cir.1990). Thus, if the trustee's contention were to prevail, a debtor who loses her job and moves her retirement funds out of her employer's 401(k) plan into an IRA would likely lose all of her retirement funds if she filed for bankruptcy.

In re Rawlinson, 209 B.R. at 505.

There is other criticism of the Third Circuit's *Clark* decision and its requirement that there be a current right to payments. The Bankruptcy Court for the District of Maine from within the First Circuit has declined to follow *Clark*.

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Under this view, exempting a right to future payments goes too far, providing protection out of a "concern for the debtor's long term security which is absent from the statute." *In re Clark*, 711 F.2d at 23. See also, e.g., *Bohm v. Brewer* (*In re Brewer*), 154 B.R. 209, 213 (Bankr.W.D.Pa. 1993); *In re Chick*, 135 B.R. 201, 203 (Bankr.D.Conn.1991); *In re Heisey*, 88 B.R. at 51. Cf. *In re Velis*, 949 F.2d at 83 (affirming denial of exemption to 63-year-old debtor because payments were not reasonably necessary for support). Although this approach makes the

exemption's application straightforward and simplifies the "reasonably necessary" analysis by limiting consideration to the debtor's existing circumstances, it is flawed for a number of reasons.

First, neither the Code nor Maine's statute limits the exemption to "present," "existing" or "immediate" payment rights. § 522(d)(10)(E); 14 M.R.S.A. § 4422(13)(E). See *In re Hall*, 151 B.R. at 425-27 (proper interpretation of statute demands that IRAs are "similar plans or contracts"); *In re Yee*, 147 B.R. at 625-26 (subject and purpose of § 522(d)(10)(E) look to the future); *In re Cilek*, 115 B.R. at 978-79. The exemption applies to a debtor's "right to receive" a payment. It is forward looking. See *In re Chiz*, 142 B.R. at 593; *In re Hickenbottom*, 143 B.R. at 933 (IRAs designed to function as a substitute for future earnings); *In re Miller*, 33 B.R. 549, 552-53 n. 8 (Bankr.D.Minn.1983) (referring to § 522(d)(10) legislative history and Uniform Exemption Act); *Warren v. Taff* (*In re Taff*), 10 B.R. 101, 107 (Bankr.D.Conn.1981) (setting aside amounts for "special needs" when debtor becomes elderly).

Second, the present right limitation would work inequitable, if not downright strange, results in many cases. The debtor who filed for relief at, say, age 59 would have no resort to the exemption, although one who waited until

age 59 1/2 would be fully entitled to it, subject only to its "reasonably necessary" condition.

Third, characterizing asset accumulation for retirement as a matter of "long term security," e.g., *In re Clark*, 711 F.2d at 23, ignores the reality that, in most instances, individuals must save throughout their working years in order to have funds available for their retirement needs.

In re Bates, 176 B.R. 104 (Bankr.D.Me. 1994).

The Bankruptcy Court for the Western District of Michigan, within the Sixth Circuit, has found that IRAs are exempt under § 522(d)(10)(E) to the extent reasonably necessary for support of the debtor without regard to whether there is a current right to payments.

Given this opinion's limited focus and conclusion regarding the statute itself, factors such as "present right to receive," "control" and "benefits akin to future earnings" as addressed in other reported decisions are superfluous. Under the statute, this judge believes "control" is not important and the debtor's "right to payment" is not limited to "present" right as opposed to some conditional or future right. To the extent such factors may be relevant, this judge is unable to improve the complete and persuasive analysis of Judge Utschig in *American Honda Fin. Corp. v. Cilek* (*In re Cilek*), 115 B.R. 974 (Bankr.W.D.Wis. 1990).

Any concerns about whether a debtor is abusing the bankruptcy system by claiming a questionable IRA exemption may be easily addressed within the confines of the statute rather than by judicially created statutory gloss begetting such "tests" as "present right to payment" or "control". As examples, (1) the amount of an IRA exemption may be limited or nullified by the "reasonably necessary for support" element, or (2) a claimed exemption may be reduced or eliminated by the amount of an avoidable preferential transfer or fraudulent conveyance into the IRA or other plan. *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir.1991) ("We believe it reasonable to

[220 BR 30]

conclude that Congress intended to provide protection against the claims of creditors for a person's interest in pension plans, unless vulnerable to challenge as fraudulent conveyances or voidable preferences.")

In re Hall, 151 B.R. 412, 427 fn. 39 (Bkrty. W.D.Mich.1993). One of the strongest criticisms of the *Clark* decision came from Judge Utschig of the Bankruptcy Court for the Western District of Wisconsin within the Seventh Circuit.

This Court finds no support in the cases cited by the Court of Appeals in *Clark* for a rule which denies exemptions under 11 U.S.C. § 522(d)(10)(E) unless the debtor is receiving payments at the time of filing. *In re*

Mendenhall, 4 B.R. 127 (Bkrty. D.Or.1980) supra, was decided under the Bankruptcy Act; *In re Richard Dale Clark*, 18 B.R. 824 (Bkrty.E.D.Tenn. 1982) supra, was decided under the Tennessee exemption statute; and *Matter of Kochell*, 26 B.R. 86 (Bkrty.W.D.Wis. 1982), supra, was decided on the basis that the pension plans in question were not reasonably necessary for the support of the debtor.

Unlike the Court of Appeals in *Clark*, this Court finds ample concern for the Debtor's long term security in the statute, the legislative history and the decisions of other courts. Both the subject of the statute (i.e., stock bonuses, pensions, profit-sharing plans and annuities) and the purpose of the statute (i.e., exemptions for the basic necessities) look to the future. Even the legislative history speaks of the future when it states: "Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor." H.R.Rep. No. 595, 95th Cong., 1st Sess. 362 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6318. Other courts have also found that Congress intended to look to the debtor's future needs as well as the debtor's current needs. *In re Miller*, 33 B.R. 549 (Bankr.D.Minn.1983); *In re Sheridan*, 38 B.R. 52 (Bankr.D.Vt.1983); *In re Flygstad*, 56 B.R. 884 (Bankr.N.D.Iowa 1986); *In re Grant*, 40 B.R. 612 (Bankr.N.D.Tex.1984); and

Matter of Boon, 90 B.R. 988
(Bankr. W.D.Mo.1987).

In re Cilek, 115 B.R. 974
(Bkrcty.W.D.Wis. 1990). *Clark* has also been
criticized within the Eighth Circuit.

The fourth issue raised by the bank is whether the exemption under Iowa Code § 627.6(9)(e) applies only to present payments due under the profit sharing plan, not to the assets of the plan. This court finds the bank's position without merit. The debtors have "rights in a payment" under the plan regardless of when the payment may be due. This is clearly contemplated by the very nature of the exemptions in Iowa Code § 627.6(9). An interest in future payments necessarily includes an interest in the present assets from which those payments will be made. The exemption therefore applies to all the assets in the fund, not just present payments due. This conclusion is totally consistent with the discussion in *In re Graham*, 726 F.2d 1268 (8th Cir.1984). To the extent *In re Clark*, 711 F.2d 21 (3d Cir. 1983), may support a different conclusion, this court finds it unpersuasive.

In re Pettit, 57 B.R. 362 (S.D.Iowa 1985).

As stated previously, the Fourth Circuit Court of Appeals has not issued an opinion on this precise issue; however, the Fourth Circuit has emphasized the importance of retirement plans and IRAs and the interest of Congress in having individuals properly prepared for their retirement years which are the same concerns addressed in the decisions critical of the *Clark* opinion.

By requiring an otherwise eligible Chapter 13 debtor to withdraw such monies to fund a Chapter 13 plan, we would effectively undercut the very purpose of retirement and pension plans: to ensure that workers have sufficient funds with which to support themselves and their dependents during their retirement years. We agree with the Third Circuit that "Congress has expressed a deep and continuing interest in the preservation of pension plans, and in encouraging retirement savings, as reflected in the statutes which have given us ERISA, Keogh plans and IRAs," *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir.1991). We decline to undercut this clear congressional

[220 BR 31]

purpose by conditioning the availability of Chapter 13 relief on a debtor's agreement to withdraw funds from an IRA prior to the distribution date mandated by the Internal Revenue Code and its accompanying regulations.

In re Neil Solomon, M.D., 67 F.3d 1128 (4th Cir.1995). While the issue in *Solomon* was whether to include funds in IRAs for purposes of the disposable income test in a Chapter 13 plan, we infer, from the Fourth Circuit's emphasis on the policy of encouraging retirement savings in the form of ERISA's, Keogh plans and IRAs, that the Fourth Circuit may follow the Second, Fifth, and Ninth Circuits in not differentiating between the present right to payments and the right to a payment in the future in determining the exemptibility of an IRA.

Accordingly, we will follow the reasoning of the Second, Fifth, and Ninth Circuits and hold that a debtor need not have a present right to receive payments in order to exempt an otherwise qualified IRA pursuant to South Carolina Code § 15-41-30(10)(E)(Supp.1996).⁴ Therefore, the Trustee's Objection to the allowance of the Debtor's claimed exemption in the Individual Retirement Account pursuant to South Carolina Code Ann. § 15-41-30(10)(E) is overruled.⁵

AND IT IS SO ORDERED, EN BANC.

Notes:

¹ No explicit authority exists for a bankruptcy court to sit en banc. C.f. 28 U.S.C. § 46(c); FED.R.APP.P. 35 (giving federal appellate courts the authority to sit en banc). However, bankruptcy judges in a given district may promulgate rules to divide cases and business as they deem appropriate. 28 U.S.C. § 154(a). We believe this statute also gives us the authority to sit en banc. See *In re Ludwick*, 185 B.R. 238 (Bkrcty. W.D.Mich.1995). Based upon the significance of the issue presented and because all three (3) bankruptcy judges in this district have issued opinions on the subject, upon stipulation of the parties, the Court will issue this ruling en banc.

² Neither party took the position that there is a difference between this individual retirement annuity and an individual retirement account; therefore, the Conclusions of Law refer to the plan as an individual retirement account.

³ It should be noted that the parties have stipulated that the IRA is property of the estate and that the sole issue for this Court is whether the IRA may be exempted out of the estate. Therefore, because the parties did not

raise the issue of whether the IRA may be excluded from the estate pursuant to 11 U.S.C. § 541(c), the Court need not decide that issue.

⁴ § 15-41-30(10)(E), Code of Laws of South Carolina (1976) states:

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 any court or bankruptcy proceeding: ...

(10) The debtor's right to receive —

(E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, unless

(i) the 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 the plan or contract arose;

(ii) the payment is on account of age or length of service; and

(iii) the plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

⁵ After bankruptcy the money could be withdrawn with a negligible penalty of ten per cent (10%). See *Lowe*, *supra* at 89.

⁶ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* shall be by section number only.

⁷ The South Carolina Statute does not include a requirement that funds be "reasonably necessary for support of the debtor".

⁸ The Court also notes that two Circuit Courts, the Third (the same circuit that issued the *Clark* decision) and Eleventh Circuits have recently found that IRAs, similar to

qualified Employee Retirement Income Security Act ("ERISA") plans, never become property of the estate pursuant to § 541(c)(2), which provides that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." See *In re Meehan*, 102 F.3d 1209 (11th Cir.1997) and *In re Yuhas*, 104 F.3d 612 (3rd Cir.1997). Such an approach eliminates the issue of exemptibility. Inasmuch as the issue of whether such an IRA is not property of the estate was not raised before this Court, but was the subject of a stipulation between the parties, the Court does not address this issue or these opinions.

9 Inasmuch as this Order overrules past precedents, this ruling shall apply in this case, all future cases and retroactively in any other case still open on direct review, which is not barred by procedural requirements or res judicata. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) and *In re Pope*, 93-71473-D; Adv. Pro. No. 97-80205-W (Bkrcty.D.S.C.12/15/97).

(A60, R106, S70)

AN ACT TO AMEND SECTION 15 41 30, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PROPERTY EXEMPT FROM BANKRUPTCY PROCEEDINGS OR ATTACHMENT, LEVY, AND SALE, SO AS TO EXEMPT INDIVIDUAL RETIREMENT ACCOUNTS, INDIVIDUAL RETIREMENT ANNUITIES, AND INDIVIDUAL RETIREMENT TRUSTS.

Be it enacted by the General Assembly of the State of South Carolina:

Exempt property

SECTION 1. A. Section 15-41-30(10)(E)(iii) of the 1976 Code, as last amended by Act 415 of 1988, is further amended to read:

“(iii) the plan or contract does not qualify under Sections 401(a), 403(a), 403(b), or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), or 409).”

B. Section 15-41-30 of the 1976 Code, as last amended by Act 415 of 1988, is further amended by adding:

“(12) 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. For purposes of this item, ‘Internal Revenue Code’ has the meaning provided in Section 12 6 40(A).

(13) The debtor’s interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.”

Time effective

SECTION 2. This act takes effect upon approval by the Governor.

Ratified the 9th day of June, 1999.

Approved the 11th day of June, 1999.



(A153, R173, S271)

AN ACT TO AMEND SECTION 15-41-30, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO AN INDIVIDUAL RETIREMENT ACCOUNT BEING EXEMPT FROM ATTACHMENT, LEVY, AND SALE, 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.

Be it enacted by the General Assembly of the State of South Carolina:

Individual retirement account exempt from attachment

SECTION 1. Section 15-41-30(A)(13) of the 1976 Code, as last amended by Act 225 of 2008, is further amended to read:

“(13) 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.”

Time effective

SECTION 2. This act takes effect upon approval by the Governor.

Ratified the 8th day of May, 2012.

Approved the 14th day of May, 2012.



1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF GREENWOOD

3

4 FIRST CITIZENS BANK AND
TRUST COMPANY, INC.,

5

Plaintiff,

6

vs.

Case No.: 2009-CP-24-01272

7

8 DORN PROPERTIES, INC.,
HENRY A. DORN, COUNTYBANK,
9 FIRST SOUTH BANK, GREER
STATE BANK AND BRANCH
BANKING AND TRUST COMPANY,

10

Defendants.

11

 ORIGINAL

12

H E A R I N G

13

BEFORE THE HONORABLE CURTIS G. CLARK

14

DATE: Tuesday, March 24, 2015

15

TIME: 10:00 a.m.

16

REPORTED BY: NISHA GORDON
Court Reporter

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2

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12

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14

15 (INDEX AT REAR OF TRANSCRIPT)

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25

1 PROCEEDING 10:00 a.m.

2 THE COURT: This is a matter of First
3 Citizens Bank and Trust Company versus Dorn Properties,
4 Inc., and Henry A. Dorn and others in here. This is a
5 supplemental proceeding on a judgment of collection
6 hearing on a judgment that was rendered against Dorn
7 Properties, Inc., and Henry A. Dorn. The judgment was
8 entered July 14th, 2010, in the amount of \$149,665.92
9 plus interest.

10 We have Attorney Joey Floyd of Bruner,
11 Powell, Wall & Mullins on behalf of First Citizens Bank.
12 Mr. Dorn is present and is represented by his attorney,
13 Tommy Lydon.

14 And I'm not sure I have the formal name for
15 your firm, Mr. Lydon. What's that?

16 MR. LYDON: MGC will do.

17 THE COURT: All right. MGC.

18 All right. And I think we have the players
19 identified in the supplemental proceedings. Basically,
20 it's an opportunity for the plaintiff's attorney to
21 inquire and ask questions about the possibility of
22 assets in here. So it's a fairly one-sided
23 presentation, or a hearing type of thing, from that
24 standpoint.

25 So Mr. Dorn, if you'll raise your right hand

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4

1 for me, please.

2

MR. DORN: (Complying.)

3

HENRY A. DORN, being first duly sworn by
4 the Court, testified as follows:

5

THE COURT: Thank you. If you'll answer
6 any questions or comments.

7

MR. FLOYD: Thank you, Mr. Clark.

8

DIRECT EXAMINATION

9

BY MR. FLOYD:

10

Q. Thank you, Mr. Dorn, for showing up too. I
11 appreciate that.

12

I understand that now is the middle of tax
13 season, and things are a little busy --

14

A. Yeah, real busy.

15

Q. -- with all this sort of stuff. And your
16 lawyer and I have discussed that you didn't have time to
17 pull together all of the documents, but I think you've
18 pulled together some of the documents --

19

A. Yes, sir. I think I've got --

20

Q. -- as best you could.

21

A. -- pretty close to what you wanted.

22

Q. Okay. All right.

23

And are those the documents right there?

24

A. Uh-huh.

25

Q. Can I have those in front of me?

1 A. Sure.

2 Q. Okay. I'll take that.

3 All right. So we'll start off first by --

4 I'll let you tell me. What vehicle did you drive here

5 in today?

6 A. My 2007 Tahoe.

7 Q. Is that your vehicle?

8 A. Yes.

9 Q. Is it in your name?

10 A. Yes.

11 Q. And is it paid for?

12 A. Yes.

13 Q. Okay. And how many miles has it got on it?

14 A. Just about 100,000.

15 Q. What other vehicles do you own an interest

16 in?

17 A. I don't have any more.

18 Q. Have you sold any other vehicles?

19 A. No.

20 Q. Did you buy the Tahoe new in '07?

21 A. I bought it in '06, fall of '06.

22 Q. And you traded in a vehicle, presumably.

23 A. Yeah. Yeah. I think it was a Jeep.

24 Q. That's pretty good if you can remember

25 that.

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6

1 All right. Tell me the banks where you
2 bank currently.

3 A. Park Sterling.

4 Q. Is that here in Greenwood?

5 A. Here in Greenwood.

6 Q. All right. Where else?

7 A. And Bank of America.

8 Q. How many bank accounts do you have at Park
9 Sterling?

10 A. Just one. It's a joint checking account.

11 Q. Is it a joint checking account with your
12 wife?

13 A. With my wife.

14 Q. And approximately how much money do you
15 have in that checking account today?

16 A. A thousand bucks.

17 Q. All right. What do you have at Bank of
18 America?

19 A. Bank of America, I use that like a -- kind
20 of like a trust account. I transfer from my paycheck
21 \$1,000 a month to accumulate for insurance and property
22 taxes. I pay First Citizens on an unsecured loan from
23 that, and it just kind of sits, really until year end,
24 until I pay my taxes.

25 Q. Taxes, as in real estate taxes?

1 A. Real estate taxes.

2 Q. Do you know about how much you have in that
3 account today?

4 A. I paid my property taxes in January. I
5 think I've got like \$900, and the last statement that
6 I've got is in some of this stuff.

7 That's my Park Sterling. I think it's
8 ahead of this one (indicating).

9 Well, it must be this.

10 Q. These all appear to be tax returns.

11 A. Let me...

12 Q. You can just tell me what's in there.

13 A. Okay. There's \$35 in the checking account,
14 and 929 in the savings account.

15 Q. So you have two accounts at Bank of
16 America? A checking and a savings?

17 A. Yeah, I have a checking and a savings.

18 Q. And you only have a joint checking account
19 at Park Sterling, right?

20 A. Right.

21 And those at Bank of America are also
22 joint.

23 Q. Joint with your wife?

24 A. We used to bank there years ago. It was
25 our primary bank years ago.

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8

1 Q. You haven't quit them yet?

2 A. Pretty much.

3 Q. All right. Do you have any other financial
4 accounts?

5 A. No.

6 Q. Some --

7 A. Other than retirement, I have an IRA.

8 Q. Where is your IRA?

9 A. It is with Stifel Nicolaus, and my agent is
10 out of North Augusta.

11 Q. You've got to spell that for me, Stifel.

12 A. S-t-i-f-e-l.

13 Q. Okay.

14 A. Nicolaus is N-i-c-a-l-o-u-s.

15 Q. N-i-c-a-l-u-o?

16 A. L-o-u.

17 Q. L-o-u-s?

18 A. L-o-u-s.

19 Q. All right. And they're in Augusta?

20 A. North Augusta. The agent is Bill Henry.

21 Q. Do you know what street their office is on?

22 A. No. I mean, I can get it. I just don't
23 know that.

24 Q. All right. How much do you have in that
25 IRA?

1 A. I think it's about 162,000. It's a simple
2 IRA.

3 Q. When is the last time you contributed
4 money?

5 A. I do every month. I think the max is
6 fourteen-five a year, so if you divide that by 12,
7 that's what I try to do.

8 Q. You think it's fourteen-five?

9 A. Annual.

10 Q. Annual contribution.

11 Have you maxed out your annual contribution
12 over the past couple of years?

13 A. Yes.

14 Q. Since when?

15 A. Since when have I maxed it?

16 Q. Yes.

17 A. Probably since 2012.

18 Q. Is that when you opened it?

19 A. That is probably when it was transferred.

20 Part of that, it was with some firm out of Anderson. It
21 might have been Edward Jones, but I really can't
22 remember.

23 Q. And did you make contributions in 2011?

24 A. I didn't make any in '11. I made
25 contributions the first part of '10 but not the latter

10

1 part of '10.

2 Q. Perhaps \$7,200 or something like that?

3 A. Something like that.

4 Q. Do you recall when you opened this account?

5 A. The account with Bill Henry was, I think,
6 sometime in '12.

7 Q. When did you start the retirement account?

8 A. Well, I've had a retirement account
9 forever. We started -- with my predecessor firm, we had
10 a 401(k), and then we went from a 401(k) to a simple
11 IRA. And when I left the prior firm, I had a couple of
12 bad years, so I didn't contribute. I had to draw money
13 out of it in 2009.

14 Q. No contributions in '09?

15 A. Very little, but I drew money out about the
16 time the crash hit. And --

17 Q. Do you recall where it was?

18 A. It was actually Park Sterling. That's
19 what -- it was not Edward Jones. It was Park Sterling.

20 Q. And you would have transferred that from
21 Park Sterling to Bill Henry in 2012?

22 A. Right.

23 Q. Where was --

24 A. But it wasn't that much in '12. I mean, I
25 had pulled most of it out to pay debts.

1 Q. When the crash started happening?

2 A. Yeah.

3 Q. Okay. All right.

4 So between Park Sterling's documents and
5 Bill Henry's documents at Stifel Nicolaus, we should be
6 able to tell when you contributed this money?

7 A. Yes.

8 Q. All right. Do you have any retirement
9 vehicles besides this IRA?

10 A. No.

11 Q. Do you have any brokerage accounts or
12 stocks?

13 A. No.

14 Q. All right. So we've gone over the Park
15 Sterling account; the Bank of America accounts, two of
16 them there. We've gone over your IRA. You have no
17 stock or brokerage accounts.

18 Do you have any other financial accounts?

19 A. No.

20 Q. No other financial institutions that you do
21 business with in terms of keeping money or --

22 A. No, nothing.

23 Q. Okay. All right.

24 Tell me about your land or real estate that
25 you own.

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12

1 A. I don't own any real estate now.

2 Q. Do you own your house?

3 A. My wife owns it.

4 Q. Has it always been titled in her name?

5 A. Yes, the last two.

6 Q. When did you buy the current property that
7 you have?

8 A. 2001.

9 Q. And where is your current property?

10 A. My residence? The residence?

11 Q. Yes.

12 A. 222 Jennings Avenue.

13 Q. Is that here in Greenwood?

14 A. Yes, 29649.

15 Q. Is it paid for?

16 A. Yes, sir.

17 Q. Does your wife work?

18 A. She doesn't now.

19 Q. Did she retire?

20 A. Two children, so, yeah, I guess she did. I
21 wouldn't say that in front of her.

22 Q. Absolutely not. I wouldn't.

23 I'm sorry. That was a tough question,
24 given the situation.

25 Did your wife work in the home raising

1 these children?

2 A. Yes.

3 Q. That's my question.

4 A. Yes.

5 Q. And when would she have stopped working
6 outside of the home? I'll clarify that.

7 A. The oldest is 16 that's in the home.

8 Q. Okay.

9 A. She had a really bad pregnancy. She
10 stopped at the doctor's request shortly before she gave
11 birth.

12 Q. So 16, 17 years?

13 A. Yes.

14 Q. Okay. Does your wife own any other
15 property besides the home that you live in?

16 A. She's got a car.

17 Q. Any land, I should say.

18 A. No.

19 Q. But she has a vehicle that she drives?

20 A. Yes.

21 Q. Just one vehicle that she has?

22 A. She has two now. My daughter has -- drives
23 one of them.

24 Q. What are the two vehicles that your wife
25 owns?

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14

1 A. It's a 2009 X5 BMW, and the one that my
2 daughter drives is a 2003 Toyota 4Runner.

3 Q. Did you buy these vehicles?

4 A. She actually took money out of a life
5 insurance policy that she had. She paid off the BMW
6 back in, I think, '11.

7 The Toyota was her sister's that she gave
8 to her for my -- for Elizabeth, my teenage daughter.

9 Q. Do you have any motorcycles?

10 A. No.

11 Q. I know it may sound strange that an
12 accountant would have a motorcycle, but I've seen it
13 before.

14 Do you have any boats?

15 A. I do. I have a 1992 Heritage with a
16 70-horsepower Johnson.

17 Q. It runs?

18 A. I doubt it.

19 Q. When's the last time you used it?

20 A. When my 16-year-old was maybe 5. So it's
21 been a while. It's been sitting out at my
22 brother-in-law's. It's not even in the water.

23 Q. What's the Heritage? Is that like a
24 bass --

25 A. It's --

1 Q. -- fishing boat?

2 A. No, no. It's a pontoon boat.

3 Q. A pontoon boat.

4 A. Uh-huh.

5 Q. Does your brother use it?

6 A. Brother-in-law.

7 Q. Brother-in-law.

8 A. No.

9 Q. Is the boat paid for?

10 A. Yeah.

11 Q. Do you know the value on it?

12 A. I sure don't. Very little, if anything.

13 Q. All right. Curiosity is killing me. Why

14 won't you sell it?

15 A. That's a good question. I just don't know.

16 I'd have to go out there and do some work to it to get

17 it sellable.

18 Q. Where does your brother live?

19 A. He lives on the lake in Laurens County.

20 Q. On Lake Greenwood?

21 A. Lake Greenwood.

22 Q. He lives on the lake, but you never get to

23 your pontoon boat?

24 A. No, no. He and my sister have divorced.

25 They've been divorced for many years.

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16

1 Q. But you kept him as a friend?

2 A. He's an old friend, yeah.

3 Q. Sometimes families throw other family

4 members away like that when they get divorced.

5 A. I haven't thrown him away.

6 Q. Yes.

7 A. I should have but didn't.

8 Q. Yes.

9 But he just lets you keep it there?

10 A. Yeah.

11 Q. Do you have any other boats?

12 A. No.

13 Q. Jet Skis?

14 A. No.

15 Q. Golf carts?

16 A. No.

17 Q. Four-wheelers?

18 A. No.

19 Q. Any other sort of ATVs, stuff like that?

20 A. No.

21 Q. Do you own any other -- you said earlier --

22 I want to make sure I heard it right.

23 You don't own any real estate in your name;

24 is that accurate?

25 A. As far as I know, there's nothing left

1 that's, you know, in my name or Dorn Properties' that
2 hasn't already been foreclosed or deeds in lieu.

3 Q. All right. Tell me about Dorn Properties,
4 Inc. Is it still doing business?

5 A. No. No. I file a no activity every year.
6 I kept it open intentionally because of the judgments,
7 but I just pay the \$25 license fee and file it.

8 Q. Is that to the Department of Revenue?

9 A. Yes. Yeah.

10 Q. Does it have any assets?

11 A. No.

12 Q. Did it ever have any assets?

13 A. Yeah, it had assets. I mean, I had a lot
14 of property at one time, but when the market crashed,
15 it -- I just couldn't --

16 Q. It was a business that was used primarily
17 for holding real estate --

18 A. Yeah.

19 Q. -- buying, selling --

20 A. Right.

21 Q. -- and that sort of stuff?

22 A. That's right.

23 Q. And to the best of your knowledge, there is
24 no real estate left --

25 A. No.

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1 Q. -- in Dorn Properties?

2 A. No.

3 Q. Do you know how many properties you owned

4 at any given -- the most number you got to?

5 A. At any one time?

6 Q. Yes.

7 A. 10, 12 maybe.

8 Q. And what was the value of those 10 or 12
9 properties?

10 A. The net value?

11 Q. Yes.

12 A. Well, as I found out, it wasn't what I
13 thought they were, but when I bought them, the gross
14 value without the debt would have been maybe 4- or
15 5 million.

16 Q. Okay. And the debt surpassed it when the
17 crash happened?

18 A. When it crashed, yeah, the debt surpassed
19 it big time.

20 Q. I see that you've got a list of a few
21 judgments here.

22 A. Yeah. The First Citizens, that property, I
23 borrowed 550 on it, and they sold -- I think they sold
24 the property, because what's left is 140-something.

25 Q. Okay.

1 A. That kind of gives you an idea.

2 Q. And Countybank was the one with the biggest
3 judgment against you?

4 A. Yeah.

5 Q. Have you made any payments towards any
6 judgments?

7 A. No. The only one I've been paying on is
8 First Citizens, and I have a line of credit with Bank of
9 America that I've been making a payment to. That's the
10 only two.

11 Q. What was the line of credit for?

12 A. Just stuff. I mean, I basically put it in
13 Dorn Properties and when I needed it. It wasn't used
14 for any specific thing.

15 Q. Did you at one time have some stocks and
16 that sort of stuff?

17 A. I had a -- my wife and I had a portfolio up
18 to '09 and it had gotten up to maybe 250. And then Park
19 Sterling -- it was securing mortgage loans with Park
20 Sterling, and when the market crashed, they took that.

21 Q. The brokerage account? Was that what it
22 was?

23 A. The brokerage account with Park Sterling.

24 Q. And they took the brokerage account?

25 A. Yeah.

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20

1 Q. All right. Did you ever have an E*TRADE
2 account?

3 A. No, that's my wife. I don't trade.

4 Q. Does your wife have an E*TRADE account?

5 A. She does.

6 Q. Where is she getting money to put in the
7 E*TRADE account?

8 A. Various places. She's gotten monies from
9 her parents over the years. She started off with that
10 little E*TRADE account with not much. She has
11 accumulated some cash prior to us marrying that she
12 still had once we married. She's taken that over the
13 years and did a little investing.

14 She presently has a card-making business
15 that she -- it's like birthday cards, Christmas cards.
16 She designs them and prints them.

17 Q. How old is your wife?

18 A. She will be 50 this year.

19 Q. Do you collect coins?

20 A. No, that was her.

21 Q. She had a coin collection?

22 A. Yeah. No more. It's gone, but she did
23 have some.

24 Q. Did you roll over some money into some sort
25 of annuity in 2013?

1 A. Roll over some? Let me see.

2 I'd really have to look at my underlying
3 documents. I can't -- unless that was something to do
4 with Stifel Nicolaus. It moved from one account to
5 another. I can't remember, but it's a non-taxable
6 event.

7 Q. Is that called a non-taxable event? Is
8 that what --

9 A. Non-taxable exchange.

10 Q. Exchange.

11 A. Right.

12 Q. It's not counted as income, is it?

13 A. No, it's not.

14 Q. All right. Tell me about PARDA Federal
15 Credit Union. Do you know anything about that?

16 A. PARDA? That's the one my wife has a
17 checking account with. That's where she does her
18 business from.

19 Q. Does she bank anywhere else besides PARDA?

20 A. Well, a joint account with me.

21 Q. Uh-huh.

22 A. Yeah.

23 Q. Any besides those two banks --

24 A. No.

25 Q. -- that you're aware of?

22

1 A. No, not that I'm aware of.

2 Q. Energy Transfer Partners, LP, what is that?

3 A. That's a gas -- in fact, I got the K-1 in
4 yesterday. It's a little gas and oil company that was
5 part of her portfolio. I think it had a value of like
6 \$800, the K-1.

7 Q. So that's your wife's investment. Did she
8 invest the money, or did you invest in it?

9 A. No, I didn't. She did.

10 Q. All right. Dorn, Dempsey & Associates, is
11 that your business?

12 A. That's my current business right now.

13 Q. And what does Dorn, Dempsey & Associates
14 do?

15 A. We are accounting and tax.

16 Q. And are you here in Greenwood?

17 A. Uh-huh.

18 Q. Your office is here in Greenwood?

19 A. Yes. 102 Venture Court.

20 Q. And that's you and Mr. Dempsey.

21 A. Correct.

22 Q. Are there any other accountants there?

23 A. We have two more accountants. We have one
24 part-time tax preparer, and we have a receptionist.

25 Q. Is that an entity that is formed there? Is

1 it an LLC?

2 A. It's a corporation.

3 Q. It's a corporation. An S corporation?

4 A. S corporation.

5 Q. So you're a shareholder?

6 A. I'm a shareholder.

7 Q. How many shares do you have?

8 A. I'm 50 percent. Whatever -- I don't

9 remember what we issued, but I'm 50 percent.

10 Q. And Mr. Dempsey being the other 50 percent?

11 A. He's the other 50.

12 Q. No other partners? No other shareholders
13 in the company?

14 A. No. No.

15 Q. Does the company turn a profit every year?

16 A. Yeah. I mean, we -- it flows through on my
17 personal, but, yeah, we do turn a profit. It's a sub S
18 corporation.

19 Q. Okay. I'm going to go ahead and tell you.

20 You're the smartest man in the room when it comes to

21 talking about it, so you may have to explain some of

22 that to me.

23 When you say, "flow through," do you get
24 dividends or --

25 A. I do get dividends. They're not called

24

1 dividends, but that's what they are from my 50 percent.

2 Q. Okay. What do you call it?

3 A. Well, it's called an accumulated earnings
4 account. Okay?

5 Q. All right.

6 A. It's a distribution from the accumulated
7 earnings.

8 Q. And how often do you take distributions?

9 A. Monthly.

10 Q. And what is your average monthly
11 distribution?

12 A. In '13, I had a salary of 65,000, and I had
13 distributions of 100 and -- well, not all of that. I
14 had distributions from Dorn & Dempsey of 126,000, and I
15 had income from -- which we'll get to in a minute, I'm
16 sure -- DNM Enterprises, which is a general partnership
17 in which I own 50 percent of -- of 6,000.

18 The income was 6,007. I take a
19 \$400-a-month distribution.

20 Q. So in 2013, you made right at \$200,000?

21 A. Yeah, which was an extraordinary year. I
22 was personal representative on an estate that settled.

23 Q. Some extra fees?

24 A. Well, the PR fee was extra, and it flowed
25 through, and it was \$68,000.

1 Q. You had a wealthy client who passed.

2 A. I did.

3 Q. All right. You just mentioned a
4 partnership that you had called DNM?

5 A. DNM Enterprises.

6 Q. Tell me about that company.

7 A. Okay. Craig May is the other 50 percent
8 owner. We bought apartment buildings. We formed a
9 partnership and bought apartment buildings. It's a
10 fourplex down close to the hospital here in town.

11 Q. Do you know the address?

12 A. It's Anderson Square Apartments, and I
13 don't know the address.

14 Q. You can get it, I'm sure, though, right?

15 A. Oh, yeah. Yeah.

16 Q. Okay.

17 A. Actually, there's an insurance -- somewhere
18 in here. But it was formed in 1984.

19 Q. It is a partnership, though?

20 A. It's a partnership.

21 Here we go. That's the property tax
22 notice. So there should be an -- tract D, Anderson
23 Square Apartments.

24 Anyway, it's a fourplex. We bought them in
25 '84.

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1 Q. 1520 D Parkway Court?

2 A. Parkway Court. Yeah, that's it.

3 Q. All right.

4 A. We borrowed the money from First Citizens,
5 and we paid those off probably four years ago.

6 Q. How is the property titled?

7 A. I think it's in DNM Enterprises, but it
8 could be in my name and his name. I...

9 Q. You just don't know as you sit here today?

10 A. I just don't know as I sit here.

11 Q. All right. And the assessed tax value is
12 150,200; is that right?

13 A. Yeah, uh-huh.

14 Q. Are there any liens on it that you're aware
15 of?

16 A. No, not that I'm aware of.

17 Q. Are there any other businesses that you own
18 any interest in besides the partnership?

19 A. DNM and Dorn Properties is it now.

20 Q. Dorn & Dempsey, you mean?

21 A. Dorn & Dempsey. I'm sorry.

22 Dorn Properties is still open, but there's
23 no activity.

24 Q. All right. And you call the apartment
25 complex Anderson Square?

1 A. Anderson Square Apartments.

2 Q. Now, why do you only take a distribution of
3 \$400 a month?

4 A. Well, they earned -- my share of the
5 earnings was 6,000, but we try to hold some back because
6 there's always routine maintenance that needs to be
7 done. At some point, the roof is going to have to be
8 replaced. It's just that we're accumulating a little
9 within the account.

10 Q. What do you rent each unit for?

11 A. They rent for 485 a month each. They are
12 managed by Town and Country Property Management, and
13 Town and Country collects the rent. They pay out --

14 Q. Town and Country?

15 A. Property Management.

16 Q. Property Management.

17 Where are they? Are they here in
18 Greenwood?

19 A. They're here in town.

20 Q. Whose company is that?

21 A. Town and Country?

22 Q. Uh-huh.

23 A. Calhoun Mays.

24 Q. Is that Craig's son?

25 A. No. No, I don't think. Well, this is

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1 Calhoun May, I think.

2 THE COURT: It ends with an "S," doesn't
3 it?

4 THE WITNESS: Is it? Well, then Craig is
5 May. It's not the same family.

6 BY MR. FLOYD:

7 Q. Okay. Different family.

8 A. Different family.

9 Q. All right. So they collect the rent, and
10 they --

11 A. They collect the rent. They pay out the --
12 you know, a commission to them. There's some utilities
13 that we pay, and then I pay everything else as far as
14 insurance and property taxes.

15 Q. You mentioned an insurance form. Tell me
16 what all you have insured.

17 A. The house.

18 Q. Your house?

19 A. Right.

20 And three cars. And I think the boat is
21 even insured, Joey. I can't...

22 Q. You don't even get to use it, and you pay
23 insurance on it every year?

24 A. It's just like a liability policy. It's
25 not much.

1 Q. I keep hearing that the happiest two days
2 in a boat owner's life --

3 A. To buy it and sell it.

4 Q. Yes.

5 A. It's a big hole to throw money into.

6 Q. What is this? If you will, just tell me
7 what that is.

8 A. Okay. This is the checking account for
9 First Citizens. And I knew I had already printed that,
10 and I couldn't find it this morning.

11 This is a monthly printout from Bank of
12 America on the checking account, and I printed out a
13 different format. It's got the same information, but
14 it's a little easier to read that one (indicating).

15 Q. Okay.

16 A. That's the 12 monthly statements here, and
17 that's just kind of all of them in one transactional
18 report.

19 Q. Okay. This is the one. The Bank of
20 America account is the one you treat kind of like a
21 trust account, and you --

22 A. Right.

23 Q. -- push \$1000 --

24 A. Escrow account.

25 Q. Escrow account.

30

1 A. Right.

2 Q. Every month you push \$1000 into it.

3 A. Right.

4 Q. What sort of assets does Dorn, Dempsey &
5 Associates have?

6 A. The only thing we have is what we have
7 in -- can I see that?

8 Q. Certainly, yes.

9 A. We have some furniture and fixtures and
10 computers and --

11 Q. Who owns the building?

12 A. It's rented. We rent through Greenwood
13 Rental Agency.

14 Q. Who owns the building; do you know?

15 A. It's some individual out of Greenville, and
16 I don't know who it is, no.

17 The other assets there that's showing on
18 there is just what -- I want to say this right. It's
19 what Argo and Associates, our former partnership,
20 basically took from us when we left.

21 Q. Tell me about that. What is Argo and
22 Associates?

23 A. It was an accounting firm, and they're
24 based out of Anderson. We had a location here, and then
25 when Kevin and I pulled out, I had equity in the real

1 estate, okay, that, basically, they made me pay for.

2 They just took it, so...

3 Q. Really?

4 A. Yeah.

5 Q. When did you have to part -- or did you
6 have to part ways with them, or did you choose to part
7 ways?

8 A. Both. Both. It was --

9 Q. Was it all because of some licensing stuff
10 as well?

11 A. No. No. The licensing stuff came after
12 that.

13 Q. Okay.

14 A. Yeah.

15 Q. Why did they make you leave?

16 A. I think, basically, it was a Countybank
17 lawsuit..

18 Q. Okay.

19 A. I think.

20 Q. Was Countybank a client?

21 A. No.

22 Q. No?

23 A. Uh-uh.

24 Q. Management just didn't like it --

25 A. Uh-uh.

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1 Q. -- something like that?

2 Did they sue Argo and Associates as well?

3 A. Well, that's who they sued.

4 Q. Okay.

5 A. They didn't sue me personally. They

6 sued --

7 Q. The accounting firm?

8 A. The accounting firm.

9 Q. I follow you.

10 Okay. Do you think your interest in Dorn &

11 Dempsey -- it's a P.A.? Is that what it is, Dorn,

12 Dempsey & --

13 A. It was a P.A., but when we lost our

14 license, we went from P.A. just to Inc.

15 Q. Okay. Do you think it's still worth

16 \$100,000, your interest?

17 A. I don't know. It is -- I...

18 Q. It's worth whatever you can make out of

19 it --

20 A. Yeah.

21 Q. -- essentially?

22 A. Yeah, yeah. Exactly.

23 Q. You and your partner?

24 A. Yeah.

25 Q. Have you already filed your 2014 tax

1 returns?

2 A. No. We filed an extension for the
3 corporation, and then it's looking more like we're going
4 to have to file an extension for our personal too.

5 Q. Are you still carrying forward losses?

6 A. Capital losses.

7 Q. Capital losses.

8 A. Yeah.

9 Q. You are?

10 A. Yeah.

11 Q. How long can you carry forward losses?

12 A. Capital losses, you can carry forward
13 indefinitely. Operating losses, which I don't have any
14 operating losses, there's a ten-year maximum of those.

15 Q. On operating losses?

16 A. Uh-huh.

17 Q. But capital losses, you can continue. Is
18 there --

19 A. Yeah, until you --

20 Q. -- a maximum amount?

21 A. You can take \$3,000 a year. You can offset
22 your gains and then take another three.

23 Q. It would be a while before you'd overcome
24 the losses, right?

25 A. Yeah.

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1 Q. And does that mean you can offset your
2 income with the capital losses? Is that what you're
3 telling me?

4 A. Well, you can only use \$3,000. If you look
5 at my tax return, it's probably a \$3,000 capital loss --

6 Q. Okay.

7 A. -- on there, and that's the max allowed by
8 law.

9 Q. Per year?

10 A. Per year.

11 Q. Okay. And I see that you've provided me --
12 this is the partnership return that you've already filed
13 for DNM.

14 A. That's DNM, and I've already filed it,
15 right.

16 Q. Is it called DNM Investments or DNM
17 Enterprises?

18 A. I think it's showing up somewhere as DNM
19 Investments, but I call it DNM Enterprises. It's one of
20 the two. I'm not sure.

21 Q. Okay.

22 A. It is not an LLP, so it's not...

23 Q. It's just a general partnership.

24 A. It's a general partnership, and it's not,
25 you know, licensed with the Secretary of State.

1 Q. Does it have any other assets?

2 A. No, just the building.

3 Q. It's got life insurance policies. Is that
4 what it has?

5 A. Yes. It has a small life insurance policy
6 between Craig and I.

7 Q. On the principals? Is that --

8 A. Yeah. And it's very small. Yes, it does.

9 Q. Are those term policies or do you know?

10 A. They're term.

11 I'll show you. That's where the income and
12 expenses float, right there (indicating).

13 Q. Why aren't you managing it yourself? You
14 don't want to deal with it?

15 A. I didn't want to deal with it. We've had
16 it managed since we had it. It's just easier that way
17 for the 8 percent commission that they select.

18 Q. And they handle collections, and they
19 handle evictions --

20 A. Uh-huh.

21 Q. -- and all that sort of stuff?

22 A. Yes.

23 Q. Have you had to evict any people?

24 A. I don't think we've had to evict any. You
25 know, we've been -- I mean, we've had the same tenants

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1 now for about three years, so we've been very fortunate
2 there.

3 Q. Does it stay rented generally all the time?

4 A. Generally. Over the last two to three
5 years, it's been 100 percent. We went for years when it
6 was 75 percent. We would have one -- one of the units
7 would be vacant.

8 But right now it's 100 percent.

9 Q. What's the SandRidge Mississippian Trust?

10 A. That's like that other one you mentioned.
11 That's coming through fixed.

12 Q. Energy transfer?

13 A. Yeah, yeah. I mean, she only bought like
14 \$500.

15 Q. But they send her a K-1?

16 A. Yeah.

17 Q. What is your wife's average income every
18 year?

19 A. Well, for '14 she's probably going to end
20 up making somewhere around 7- or \$8,000 because of her
21 little business. It's growing pretty good, but...

22 Q. Are there any other sources of income that
23 we haven't talked about today?

24 A. No, no. Dorn & Dempsey and DNM are the
25 only two sources.

1 Q. That you have?

2 A. Yes.

3 Q. Enterprise Products Partners?

4 A. That's Faith's.

5 Q. And you've provided your 2010 through 2013
6 tax returns, correct?

7 A. Right.

8 MR. FLOYD: I can trust you that it's fully
9 copied?

10 MR. LYDON: I have no idea what you're
11 looking at.

12 THE WITNESS: Yeah. That's full copies,
13 sir.

14 BY MR. FLOYD:

15 Q. Okay.

16 A. And that's actually got a bank
17 reconciliation on it and QuickBooks. And then beneath
18 it is the actual statement itself.

19 Q. This calls it Capital Bank, but it's Park
20 Sterling?

21 A. Yeah, because it was Capital Bank prior to
22 Park Sterling, and I just never changed the name of it
23 in QuickBooks.

24 Q. So that was a takeover of some sort?

25 A. Yes.

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1 Q. What is Dorn & Dempsey's bank?

2 A. Wachovia. Or --

3 Q. Wells Fargo?

4 A. It is Wells Fargo, yeah.

5 Q. Do you have health insurance through Dorn &
6 Dempsey?

7 A. Yes.

8 Q. Do you carry your wife on that policy as
9 well?

10 A. I do. I carry my wife and two girls.

11 MR. LYDON: Those are originals, Joey. I
12 didn't get a chance to make copies of those, but...

13 BY MR. FLOYD:

14 Q. Okay. I can make copies and get them back
15 to you if you want me to, or I can give them to Tommy.

16 A. Well --

17 MR. LYDON: Let's let him pay for it.

18 BY MR. FLOYD:

19 Q. Most people want to do that. I would love
20 for Tommy to do it, and you can pay for it, but I'll be
21 glad to just drop it back in the mail to you.

22 Have you talked about all of your assets
23 today?

24 A. Yes.

25 Q. Are you aware of any other assets that you

1 haven't talked about?

2 A. No.

3 Q. Are you the beneficiary of any trust?

4 A. No.

5 Q. Do you have any current lawsuits pending?

6 A. No.

7 Q. Have you recently settled any lawsuits?

8 A. Me, personally? No. I haven't settled any
9 personally. The insurance company for Argo and
10 Associates have settled some suits.

11 Q. They filed suits? The Countybank and that
12 sort of lawsuit?

13 A. Countybank and then there were one, two,
14 three individuals.

15 Q. Three individuals that -- you got sued, or
16 three individuals that sued Argo and Associates?

17 A. That sued Argo and Associates.

18 Q. Okay. And were all those related to
19 whenever you were practicing accounting and that sort of
20 stuff?

21 A. Yeah.

22 Q. Have you ever filed suit personally against
23 anyone or anybody?

24 A. No, sir.

25 Q. Has your wife filed a suit against anyone?

40

1 A. No.

2 Q. A person or a company?

3 A. No.

4 MR. FLOYD: Do you have any questions?

5 MR. LYDON: No questions.

6 MR. FLOYD: No questions.

7 All right. Mr. Clark, there are a couple
8 of assets here I want to talk about, the first one being
9 his interest in DNM Enterprises.

10 There's still a number of questions --
11 Tommy and I talked about this yesterday -- that remain
12 to be answered; and that is, particularly who -- or how
13 the property is titled. I think that may make a
14 difference as to the lienholders that may or may not be
15 on the property.

16 If the property is titled individually,
17 then there are a number of judgment lienholders that may
18 have already attached to the property. If the property
19 is, in fact, not attached or if it's titled in the
20 partnership's name, it may not have these liens attached
21 to the property.

22 And to the extent that I can today, I would
23 like to move to execute and attach that asset and not do
24 anything with it at this point in time because he is
25 making payments to First Citizens, but I do want to

1 preserve First Citizens' position here today on that
2 partnership interest.

3 MR. LYDON: Mr. Floyd and I discussed this
4 yesterday, and the \$400 draw that Mr. Dorn testified to
5 is used to pay his obligation to First Citizens.

6 And so we had offered to formalize that
7 arrangement with a security interest or something like
8 that, but I think what he's proposing accomplishes the
9 same thing. And I think he --

10 MR. FLOYD: It may be a good idea to
11 formalize it, and I need to make sure the people at the
12 bank -- everybody knows what's going on.

13 MR. LYDON: He needs to check with the bank
14 and make sure they're on board. We don't believe the
15 bank wants to turn a performing loan into a
16 non-performing loan by taking this property, but we
17 understand that if it is in the name of DNM Enterprises
18 and there are no liens against it, that it is an
19 unencumbered asset, so to speak.

20 And so we're willing to, you know, continue
21 the arrangement, and, obviously, if First Citizens wants
22 to do more than attach it and try to sell it, they can
23 certainly make that motion or go that route. But at
24 this time, we do not object to it being attached to the
25 extent that --

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1 THE COURT: So -- excuse me. But basically
2 by executing or attachment, you are basically wanting to
3 keep it from being transferred effectively. You're not
4 seeking to --

5 MR. FLOYD: Sell it today? No.

6 THE COURT: Well, no. But you're not
7 getting a receiver or anything to directly receive the
8 income is what I'm trying to --

9 MR. FLOYD: Not today, no, sir. But I
10 just -- and also, I kind of want to put a thumbtack on
11 my client's position as to his partnership interest in
12 that. So I believe first in time is first in right.
13 For that reason, I want to make sure that First Citizens
14 simply preserves its first-in-time position on his
15 partnership interest.

16 THE COURT: All right. Sounds like it's
17 without serious objection at this point in time.

18 MR. LYDON: We don't consent to it, but we
19 understood that that was the situation.

20 THE COURT: All right.

21 MR. FLOYD: And the other asset would be
22 his IRA that he's made these contributions to while the
23 judgment has been pending. I know that Tommy is going
24 to object to this, but I believe that all of those would
25 be fraudulent transfers to his retirement account that

1 we would move to set aside.

2 THE WITNESS: Fraudulent?

3 MR. LYDON: And I would object to that on
4 two grounds. One is -- well, several grounds, but one
5 is, the money that was put in there was earnings of the
6 debtor for his personal services, and therefore, it
7 can't be garnished or seized outside of the IRA.

8 Secondly, money in an IRA is exempt up to a
9 certain amount. I think where you get into a gray area
10 is if a judgment debtor was putting \$50,000 a year into
11 an IRA over and above the allowable amount in order to
12 protect it from -- in order to get it to try to protect
13 it from creditors. But I think, it's my understanding,
14 as long as wages or earnings from personal services and
15 that the amount of the contribution does not exceed the
16 tax-deductible amount under federal law, that it's
17 exempt earnings you put in the IRA, and it's an exempt
18 asset.

19 And so I don't think there's any basis for
20 any law or under the facts of this case for setting
21 aside those transfers.

22 MR. FLOYD: And in brief response -- are
23 you finished?

24 MR. LYDON: Yes.

25 MR. FLOYD: In brief response, I would say

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1 that all money, to a certain extent, is personal -- or
2 money earned for wages and that sort of stuff. I've
3 heard that before, all cash, generally speaking, that
4 people have in their accounts is the direct byproduct of
5 wages that they have earned over the years. And to the
6 extent that there have been contributions, those
7 contributions would have been in cash that was otherwise
8 subject to execution by judgment creditors; therefore,
9 they're subject to being set aside.

10 And I'm certain that we'll have to brief
11 this issue ad nauseam before you in the coming weeks.

12 MR. LYDON: And just, I would -- you know,
13 I would disagree. There's lots of income that's not
14 earnings of the debtor. Rental income would not
15 constitute earnings of the debtor, interest income,
16 dividend income.

17 THE COURT: The past of an income.

18 MR. LYDON: Yes. All of those things are
19 not earnings of the debtor, and I think the statute is
20 pretty clear and the law is pretty clear. There's a
21 distinction between the two.

22 And so there's no indication that any of
23 this money was anything other than earnings of the
24 judgment debtor.

25 MR. FLOYD: And I know that it doesn't

1 surprise you that I disagree with Mr. Lydon, but,
2 however, we will submit our briefs accordingly.

3 THE COURT: All right. I appreciate that.
4 Anything else?

5 MR. FLOYD: Those are the only things that
6 I have today. I would ask that the proceedings be held
7 open so that we could continue further discussions and
8 discovery, Mr. Clark.

9 THE COURT: I'll be glad to hold it open.
10 Any other thing that we need to put on the
11 record today?

12 MR. FLOYD: Not today, I don't think.

13 THE COURT: All right. Thank you everybody
14 for coming.

15 (The proceeding adjourned at approximately
16 10:51 a.m.)

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3/24/2015

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CERTIFICATE OF REPORTER

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I, Nisha Gordon, Court Reporter and Notary
Public for the State of South Carolina at Large, do
hereby certify:

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That the foregoing proceeding was taken before
me on the date and at the time and location stated on
page 1 of this transcript; that all statements made on
the record at the time of the proceeding were recorded
stenographically by me and were thereafter transcribed;
that the foregoing proceeding as typed is a true,
accurate, and complete record of the proceeding to the
best of my ability.

I further certify that I am neither related to
nor counsel for any party to the case pending or
interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 18th of April, 2015, at Simpsonville,
Greenville County, South Carolina.

N. Gordon

Nisha Gordon
Notary Public
State of South Carolina at Large
My Commission Expires:
June 14, 2022



1 I N D E X

2 Page

3 DIRECT EXAMINATION

4 BY MR. FLOYD 4

5 Certificate of Reporter 46

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8 E X H I B I T S

9 (None was proffered.)

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1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF GREENWOOD

3

4 FIRST CITIZENS BANK AND
TRUST COMPANY, INC.,

5 Petitioner,

6 vs.

Case No.: 2009-CP-24-1019

7 KSD, INC., KEVIN S. DEMPSEY,
DAVID SULLIVAN AND KIMBERLY
8 SULLIVAN, COUNTYBANK, FIRST
SOUTH BANK AND CAPITAL BANK,

9

Respondents.

10

11

STATE OF SOUTH CAROLINA

12

COURT OF COMMON PLEAS

COUNTY OF GREENWOOD

13

14 FIRST CITIZENS BANK AND
TRUST COMPANY, INC.,

15

Plaintiff,

16

vs.

Case No.: 2009-CP-24-01272

17

DORN PROPERTIES, INC.,
HENRY A. DORN, COUNTYBANK,
18 FIRST SOUTH BANK, GREER
STATE BANK AND BRANCH
19 BANKING AND TRUST COMPANY,

20

Defendants.

21

22

COMPUSCRIPTS, INC.
Client Focused. Deadline Driven.

23

CHARLESTON COLUMBIA HILTON HEAD GREENVILLE MYRTLE BEACH

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S U P P L E M E N T A L
H E A R I N G

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BEFORE THE HONORABLE CURTIS G. CLARK

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DATE: Tuesday, July 19, 2016

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TIME: 9:30 a.m.

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REPORTED BY: NISHA GORDON
Court Reporter

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1 PROCEEDING 9:30 a.m.

2 THE COURT: We are here on motions in two
3 cases. One case is First Citizens Bank & Trust Company,
4 Incorporated, versus Dorn Properties, Incorporated, and
5 Henry A. Dorn, and it's case number 2009-CP-24-1272.

6 The other case is First Citizens Bank and
7 Trust Company, Incorporated, versus KSD, Inc., and Kevin
8 S. Dempsey, and this is case number 2009-CP-24-1019.

9 At that juncture in these cases, these were
10 started as mortgage foreclosure cases. The foreclosure
11 was granted, property was sold, and a deficiency was
12 requested by First Citizens Bank in both cases, and
13 deficiencies were granted. I don't have a specific
14 amount from you, but my recollection from Mr. Dempsey
15 was somewhere around \$75,000. And from Mr. Dorn, it was
16 more like 130- or 40,000 in here.

17 And subsequent to that deficiency judgment
18 and those amounts being filed in 2010, First Citizens
19 Bank has sought supplemental proceedings or collection
20 on their judgments. And then where we're at today has
21 developed from the supplemental proceedings request,
22 basically to obtain some records at first. I'm not sure
23 if those records -- whether that's still a major issue
24 or not, but, secondly, to possibly set aside some
25 contributions to IRAs by Mr. Dempsey and Mr. Dorn.

1 Is that kind of somewhat --

2 MR. FLOYD: I think that's a fair summary.

3 THE COURT: -- where we're at?

4 Since you represent First Citizens -- now,
5 well, let me go a little further. First Citizens Bank
6 is represented by Joey Floyd of Bruner, Powell, Wall &
7 Mullens.

8 And we have both Mr. Henry Dorn and
9 Mr. Kevin Dempsey present. They're represented by
10 Mr. Thomas E. Lydon of McAngus Goudelock --

11 Am I pronouncing that right?

12 MR. LYDON: (Nodding head.)

13 THE COURT: -- Law Firm in Columbia.

14 Mr. Floyd, you're representing the
15 plaintiff --

16 MR. FLOYD: I do.

17 THE COURT: -- so I'll turn it over to you
18 at this moment.

19 MR. FLOYD: Mr. Lydon and I were just
20 chatting a moment before this hearing started, and he
21 has a motion for a protective order, just to kind of
22 back up a little bit and bring us back to where we are.
23 After the first supplemental proceedings hearing that we
24 had, I noticed the depositions of Mr. Dorn and
25 Mr. Dempsey to get a little more information on their

1 contributions to the IRAs and also submitted, I think,
2 some discovery requests, to which Mr. Lydon objected,
3 and also filed a motion for a protective order.

4 We got the information from Stifel,
5 Nicolaus & Company, I believe is their name -- yes,
6 Stifel, Nicolaus & Company, Inc. -- of the amounts, the
7 actual amounts, that were contributed by Mr. Dorn and
8 Mr. Dempsey to their IRAs post-judgment.

9 Mr. Lydon and I, I think we both agree --
10 and I always hate to say that before he speaks, but I
11 think we've agreed your decision on our motion to
12 execute on the petitioner's, First Citizens Banks',
13 motion to execute on these post-judgment volunteer
14 contributions will necessarily answer the question of
15 whether or not First Citizens could continue its
16 discovery on that issue.

17 That is to say, if you say First Citizens
18 is entitled to execute on those post-judgment voluntary
19 contributions, then that would essentially say that
20 First Citizens would also be entitled to conduct
21 additional discovery depositions and additional written
22 discovery at that time. We may or may not ask Mr. Lydon
23 to update his interrogatories, depending on how things
24 go. So I don't necessarily think that that ruling -- a
25 specific ruling on that motion is necessary, but your

1 answering of the issue or the question before you is --
2 whether or not First Citizens is entitled to execute on
3 those post-judgment contributions will in effect answer
4 that question.

5 And I'll let Mr. Lydon say whether or not I
6 accurately stated it.

7 MR. LYDON: Yes. Mr. Clark, Mr. Lydon for
8 Henry Dorn and Kevin Dempsey.

9 When Mr. Floyd noticed the depositions of
10 Mr. Dorn and Mr. Dempsey, it was clear, and I think it
11 was confirmed by him in e-mails, that his purpose was to
12 inquire about their individual retirement accounts and
13 post-judgment contributions. We didn't have anything to
14 hide, but we also didn't want to waive the argument that
15 those were -- or be deemed to have waived the argument
16 that those were exempt assets that were not subject to
17 execution; and therefore, we filed a motion for a
18 protective order. We did not object to the subpoena
19 that Mr. Floyd issued to that to Stifel Nicolaus, so I
20 believe he was able to get most of the information that
21 he needed.

22 But, again, we didn't want to -- we were
23 not going to participate in depositions on a topic that
24 we believed was beyond the scope of his supplemental
25 proceedings and post-judgment collection efforts.

1 Because he was able to get the information elsewhere, he
2 did push for the depositions or ask for a hearing on the
3 motion for a protective order, and I think that I filed
4 it about a year ago.

5 And then what really brings us here today
6 and what sort of brought the matter to a head is his
7 motion to execute or set aside transfers with respect to
8 the individual retirement accounts. And I would agree
9 that your ruling on whether those retirement accounts
10 are subject to creditors' claims will, for all intents
11 and purposes, resolve all of the motions that are
12 pending in both matters.

13 THE COURT: Okay.

14 MR. FLOYD: So that narrows it down just a
15 little bit for you.

16 THE COURT: Thank you.

17 MR. FLOYD: So now we're here on First
18 Citizens' motion to set aside and execute on the
19 post-judgment contributions. I'm pleased to tell you,
20 you don't have to sit through the same arguments twice.
21 Mr. Lydon and I have agreed to consolidate these
22 arguments for purposes of this hearing and, presumably,
23 the appeal, if there is an appeal, because the issues
24 are the same. The only differences are the amounts of
25 post-judgment contributions for each, the dollar

1 amounts, essentially.

2 THE COURT: And also, presumably
3 Mr. Dempsey, from looking at the affidavit Mr. Lydon
4 filed, is under 59 and a half. I did note that Mr. Dorn
5 admitted he was 63, so he's over 59 and a half. But
6 there would be different standards, presumably, that
7 would potentially apply to any kind of withdrawals
8 because of that.

9 MR. FLOYD: I think it may affect him on
10 the back side, but for purposes of this hearing, whether
11 or not we're entitled to it, I don't know if that
12 necessarily plays into the analysis.

13 THE COURT: All right. For the general
14 question, I agree. So...

15 MR. FLOYD: Am I right on that, Mr. Lydon?

16 MR. LYDON: Yes. I think, you know, under
17 the prior law, there was a distinction between one who
18 had a right to payment who had achieved the age of 59
19 and a half and one who had not. And I think that
20 distinction is gone. I think that the answer to the
21 question is the same for people both under and over 59
22 and a half.

23 I think the debate, the Houten case, sort
24 of did away with that distinction, and the subsequent
25 amendment to the statute by the legislature make it very

1 clear that individual retirement accounts and individual
2 retirement annuities, I think, are both part of the same
3 subsection and are exempt from creditors' claims. So I
4 could look at that, but I think by and large that
5 they're treated the same now.

6 THE COURT: I guess all I'm saying is that
7 there would be an additional layer of penalty
8 potentially that would be imposed on Mr. Dempsey that
9 would not apply to Mr. Dorn.

10 MR. LYDON: Absolutely. Yes, no doubt
11 about that.

12 THE COURT: Other than that, I think
13 you're -- I didn't mean to muddy that water, but that's
14 all I was kind of noting. So...

15 MR. FLOYD: You always think you're
16 prepared and always catch curveballs, no doubt about it.
17 But with that said, I think I'll proceed as planned,
18 unless there's something else that Mr. Lydon wanted to
19 add.

20 MR. LYDON: Go ahead.

21 THE COURT: Yes.

22 MR. FLOYD: In both of these cases,
23 Mr. Clark, we have two judgment debtors who a deficiency
24 judgment was entered against them and in varying amounts
25 since 2010. They have contributed just -- to get rough

1 numbers, Mr. Dorn has contributed roughly \$68,000
2 towards his retirement account. Mr. Dempsey has
3 contributed \$64,000 -- let me make sure I get these
4 numbers close. \$64,000 roughly, based on what I see.

5 The analysis begins with the Homestead
6 Exemption Act, which is found at South Carolina Code
7 15-21-30. The blanket statement that IRAs are exempt is
8 true; however, there is an exception that talks about
9 any claimed exemption may be reduced or eliminated by
10 the amount of the fraudulent conveyance into the
11 individual retirement account. And we have submitted a
12 brief on this, Mr. Clark, and I'm assuming that you have
13 been able to get a copy of it through the courts and all
14 that sort of stuff.

15 So I'm not going to belabor the points, but
16 just going over them, while I do believe -- generally
17 speaking, the corpus of any retirement accounts, IRAs, I
18 believe that that's what should be protected. As far as
19 what you contribute, it is essentially a question of
20 whether or not a judgment debtor -- to boil it down to
21 its simplest terms, can a judgment debtor contribute to
22 his IRA post-judgment, make a voluntary contribution?

23 And in this instance, both of these debtors
24 work for themselves, they own their own company, they
25 choose the amount of money, they have total control of

1 the amount of contributions into their IRA, and they
2 actively contributed to their IRA up through the time
3 frame of when we had supplemental proceedings of when I
4 discovered it, and I'm not exactly sure what they have
5 contributed since the date of the affidavit that's been
6 provided by Stifel Nicolaus outlining the amounts. I
7 think it accurately states how much has been
8 contributed.

9 It's designed to protect the debtors to a
10 certain extent. But this fraudulent conveyance, we have
11 a plethora of case law that discusses what a fraudulent
12 conveyance is. We have a statute, Statute of Elizabeth,
13 and the operative line which it's made to, or for any
14 intent or purpose to delay, hinder, or defraud creditors
15 and others of their just and lawful actions suits,
16 debts, accounts, damages, penalties, and forfeitures.

17 What we have is essentially a debtor who is
18 taking money out of one account that would otherwise be
19 subject to execution and cloaking under another account
20 to try and protect it from execution by giving it this
21 insulated layer and hiding behind an exemption statute,
22 which is a fraudulent conveyance. There are two ways a
23 fraudulent conveyance can be set aside. One, in a
24 situation where there is consideration. And the second
25 situation, where there is no actual consideration.

1 While we can debate whether or not there
2 was consideration, I think the definition of
3 consideration requires two separate parties. In this
4 instance, we have money moving from the left pocket into
5 the right pocket and the right pocket having a zipper
6 and the zipper being the exemption statute saying you
7 can't get to it. But even if you do consider it to be a
8 transfer for consideration, in my brief outline is why
9 that would be a fraudulent conveyance.

10 You also have these things called badges of
11 fraud. Our courts have gone through and outlined, I
12 think, nine badges of fraud. In the case of Coleman
13 versus Daniel, a 1973 case -- and you don't have to
14 check off every single one of those badges of fraud.
15 You just have to show the presence of one.

16 It excites the -- I can't remember the
17 exact -- the presence of a single factor of a badge of
18 fraud may cast suspicion on the transferor's intent, the
19 confluence of several in one transaction generally
20 provides conclusive evidence of an actual intent to
21 defraud.

22 And as I analyzed it and in my brief, I
23 went through each badge of fraud. I believe that we can
24 check off seven of the nine. So there is the confluence
25 of several badges of fraud.

1 While they would say we certainly had no
2 intention of actually doing any fraudulent conveyances
3 of anything of the like, what I think it does show us is
4 that as you analyze these and you try to push them into
5 the pegs of this case, you find that you've got seven of
6 the nine. And the presence of these badges of fraud,
7 they tell us that these are indeed fraudulent
8 conveyances.

9 And as a Master-in-Equity, courts have the
10 inherent power to do all things reasonably necessary to
11 ensure the just result to the fullest extent possible.
12 What we have here are two judgment debtors who have done
13 absolutely nothing to try and make arrangements with or
14 make payments towards a judgment that they have against
15 them, but what they have done is they have taken cash,
16 the money that is otherwise subject, and placed it into
17 an account beyond the reach of a creditor in an effort
18 to hide their assets.

19 I mean, that in and of itself is a
20 fraudulent conveyance when you move assets to protect it
21 from your creditors. So as our motion -- and, again,
22 these are all post-judgment and they're voluntary
23 contributions to their IRAs. These weren't mandatory.
24 These aren't prejudgment.

25 This is not an existing retirement account

1 that hadn't been touched. I'm not trying to get to
2 anything that was already there, the corpus, what
3 existed. Whatever happened before the judgment, I think
4 you can draw a clear line of demarcation. And the
5 question again, as we come back to it, is simply, Can a
6 debtor contribute to his retirement account after a
7 judgment has been entered against him?

8 And I think the answer is no, and that's
9 because I think South Carolina case law requires you to
10 deal with your creditors before you start contributing
11 towards your retirement account. And I'll be happy to
12 respond to Mr. Lydon's argument.

13 THE COURT: Mr. Lydon.

14 MR. LYDON: Mr. Clark, I will not repeat
15 sort of the history of the exemption statute as it
16 relates to IRAs that I put in my memo, except to say
17 that it's very clear that the South Carolina Legislature
18 intends for IRAs to have very broad protection. Most
19 notably, when the statute was initially enacted, it had
20 a limitation in there that IRAs were protected to the
21 extent necessary to reasonably provide for the support
22 of the debtor.

23 A couple of years ago, that was taken out.
24 So there is no cap on what a judgment debtor can have in
25 an IRA. It's fully protected, and whether you think

1 that's fair or unfair, that is the law in South
2 Carolina. It was very clear that the legislature in
3 doing that intended for IRAs to have very broad
4 protection.

5 With respect to the argument presented by
6 First Citizens, the entire premise of their position is
7 flawed. The memo states that the judgment debtors,
8 Mr. Dorn and Mr. Dempsey, converted non-exempt assets to
9 an IRA, conveyed non-exempt assets to an IRA. There's
10 no dispute.

11 In fact, it couldn't be done otherwise,
12 that the IRAs were funded with their earnings. They
13 were earnings that were withheld from the paycheck, and
14 it was with earnings that are exempt from collector
15 claims pursuant to 15-39-410, which says, "The earnings
16 of the judgment debtor cannot be applied to the
17 judgment."

18 So this notion that they have converted a
19 non-exempt asset to an exempt asset, which is the
20 premise of the motion, is flawed from the outset. In
21 fact, if the court were to somehow rule that these were
22 fraudulent conveyances that should be so -- which we
23 obviously strongly disagree with, I don't know that they
24 can get to the money then because it's still earnings of
25 the debtor.

1 So their entire premise that Mr. Dorn and
2 Mr. Dempsey have converted non-exempt assets to the IRA
3 is flawed. This was clearly earnings. And, in fact,
4 you can only fund IRAs to the extent of your earnings.

5 The next argument is that there was no
6 consideration for these transfers. It's our position
7 this is also incorrect. If I have \$5,000 and I give it
8 to my sister and I don't get a note back or anything
9 else in order to avoid creditors, that's a fraudulent
10 transfer. But if I take that same \$5,000 and put it
11 into the bank, that is not a fraudulent transfer because
12 I'm getting consideration. I'm getting a credit in my
13 bank account for \$5,000.

14 So to suggest that there was no
15 consideration for the transfers from the withholding of
16 funds, the withholding of wages from these gentlemen's
17 paychecks and putting it in an IRA, is wrong. And it's
18 important because if there was consideration for the
19 transfer, then there's a much higher level that the
20 creditor has to prove in order to establish something is
21 a fraudulent conveyance, and I'll get to that in a
22 minute.

23 And, in fact, the normal fraudulent
24 conveyance that we all see is what I just said, which is
25 when somebody gives something to a third party to keep

1 it out of the reach of creditors, and then you have a
2 direct action against that person, the recipient, the
3 transfer for that asset. Here, it's clear consideration
4 for the transfer because these gentlemen got credits,
5 dollar for dollar, to their retirement accounts for
6 every contribution they put in.

7 With respect to the intent to defraud
8 creditors, they did not take a non-exempt asset and put
9 it into an IRA, and I believe that that's what the
10 statute is directed to. It talks about a fraudulent
11 conveyance. And that would be, if I inherited -- if
12 I've got judgments against me and I inherited \$50,000
13 and before creditors could get to it I ran off and put
14 it in an IRA, that might be a fraudulent conveyance.

15 And I'll discuss in a minute why it might
16 not be, but that is the type of transaction that I
17 believe that the statute is intended to prevent or at
18 least to get the creditors some protection on, is a
-19 non-exempt asset inheritance or stock or whatever that a
20 judgment debtor takes and puts into a retirement
21 account. And in all likelihood, it would exceed the
22 maximum amount allowed by law, which is what courts look
23 at in determining whether these transfers into
24 retirement accounts are intended to defraud creditors.

25 In this case, neither Mr. Dorn nor

1 Mr. Dempsey contributed more than the amount allowed by
2 law. They did not start making IRA contributions for
3 the first time after these judgments were entered. You
4 know, they're accountants. They understand the wisdom
5 of contributing to retirement accounts, both to defer
6 taxes on the income and also to have the protection when
7 they get to retirement. So as stated in their
8 affidavits, they've been contributing to IRAs long
9 before they formed Dorn & Dempsey and long before these
10 judgments were entered.

11 And so you can't say that in some way they
12 changed their behavior in order to avoid paying
13 creditors' claims. These contributions were no
14 different than what they've been doing for many, many
15 years.

16 As far as my comment about the inheritance
17 in my example of putting an inheritance in an IRA, most
18 of the law -- or the discussion of the law in this area
19 shows up in the bankruptcy court. In South Carolina,
20 our homestead exemption statute is pursuant to federal
21 law, the same exemptions that you're entitled to in
22 bankruptcy.

23 We don't have any cases directly on point
24 that discuss this in South Carolina, but it's my
25 position that the analysis would be essentially the

1 same. And what bankruptcy courts have held, and I cited
2 a couple of them in my memo, is that converting a
3 non-exempt asset to an exempt asset is appropriate asset
4 protection planning. As long as you do it as allowed by
5 law and in accordance with the statute, there's nothing
6 wrong with it.

7 And so in the example of the inheritance, I
8 believe the bankruptcy courts would say if you took that
9 inheritance and you had no equity in your house and you
10 paid the balance on your house down so that you suddenly
11 had 50,000 of equity -- which we know is below the
12 homestead exemption -- that that is perfectly legitimate
13 pre-bankruptcy planning, they call it, perfectly
14 legitimate asset protection. It's allowed by the law.
15 It's not a fraudulent conveyance.

16 Where bankruptcy courts tend to find that
17 there was potentially fraud in connection with asset
18 transfers or asset protection strategies is where at the
19 time the borrower, debtor, got a loan from a bank,
20 they're showing \$50,000 in stocks on their financial
21 statement; something that the lender potentially relied
22 on in making the loan. When they take that asset and
23 turn it into an exempt asset, that's where the
24 bankruptcy courts start to have a little bit of a
25 problem with the notion of defrauding the creditors,

1 because there was a representation made when the loan
2 was made that these individuals owned these assets, and
3 someone lending money could reasonably believe that they
4 may have access to those assets if, in fact, the loan
5 went into default.

6 That's not what we have here. This was
7 never a non-exempt asset in our position, but it
8 certainly was not an asset that even existed at the time
9 First Citizens made these loans. So if you read the
10 bankruptcy court cases when they try to determine
11 whether transfers are fraud when somebody's taking cash
12 that they inherited in using it to buy life insurance,
13 which is a protected asset, or using it to pay down the
14 equity in their house to get within the homestead
15 exemption. And some states have got much larger
16 homestead exemptions than South Carolina. Some of them
17 may even be unlimited for your house itself.

18 So there's a lot of ways that debtors in
19 those states can plan, and the court system said, you
20 know, it's generally okay. That's not fraud, that what
21 the purpose is is asset protection, and there's nothing
22 wrong with that, that the exception statutes allow --
23 that's what they're there for.

24 In this case, Mr. Floyd suggests that these
25 contributions were made to defraud the creditors.

1 Again, they've been making these contributions long
2 before the judgment was ever entered. The purpose was
3 not to defraud the creditors. The purpose was to
4 minimize their current tax liabilities and to save for
5 retirement.

6 And, again, no South Carolina cases on
7 this, but the courts generally say that, you know, we
8 want to protect people. We want to allow them to
9 retire. We don't want people on government assistance
10 for the rest of their lives. And so that's what we have
11 those exemption statutes for, and retirement planning is
12 an appropriate and encouraged vehicle for everybody,
13 including those with judgments against them and those
14 who end up having to file bankruptcy.

15 There's a recent United States Supreme
16 Court case that is not directly on point. That's why I
17 didn't cite it, but the more I read it, the more I
18 thought it really sort of clarified the issue here. In
19 that case, a daughter inherited an IRA from her father,
20 and she didn't file bankruptcy. And the question was
21 whether an inherited IRA was protected from judgment
22 creditors under applicable bankruptcy law.

23 It's not the South Carolina statute, but
24 the general concept is is an inherited IRA protected
25 from creditors, and a couple of the district courts had

1 said -- and appellate courts had said yes, broad
2 protection from IRAs. Others had said no, an inherited
3 IRA is not a retirement savings device. Actually,
4 you're required to withdraw money within five years.
5 It's not really a retirement protection thing. It's
6 just an inherited asset.

7 They made a distinction, however, for
8 spouses. If I was to die and my IRA was rolled over-
9 into my spouse's in accordance with the IRA's rules for
10 rollovers, then it would still be a protected retirement
11 account. They didn't even get into the issue of just an
12 individual's self-funded retirement account because it's
13 no doubt that those assets are protected.

14 So you had a number of courts in and around
15 the country suggesting that even an inherited IRA would
16 be protected from creditor claims. We now know as of
17 two years ago, that is not the case. But an IRA
18 inherited by a spouse, according to that opinion, is
19 protected. And the point is that the United States
20 Supreme Court has granted very broad protection to
21 individual retirement accounts and found them to be
22 subject to a creditor's claim only in the very limited
23 circumstance where the IRA was inherited from someone
24 other than the person's spouse.

25 And so I think that the guidance of the

1 United States Supreme Court -- and if you read about the
2 policies of debtors having fresh starts and not
3 decimating a debtor because of a bad financial decision
4 or the real estate market that crashed or whatever, all
5 of those policy theories and arguments would apply to
6 this situation.

7 One last thing, as I read between the lines
8 of the motion and memo filed by First Citizens, it seems
9 to suggest that this just really isn't fair, that, you
10 know, somebody who's making enough money to contribute
11 to an IRA who has judgments against him really should be
12 putting the money toward the judgments and not toward
13 putting it into their retirement account.

14 But this is not an equitable analysis.
15 This is an interpretation of a statute, which is a
16 question of law. We know -- and I've cited the case --
17 that the exceptions under the South Carolina Exemption
18 Statute are to be liberally construed in favor of the
19 debtors. And, in fact, what First Citizens is asking
20 you to do is to rewrite the statute, to read it such
21 that anyone who has a judgment against them cannot make
22 contributions to a retirement account.

23 And if that's what the legislature had
24 intended -- and I think they've amended the statute two
25 or three times over the last ten years -- that's all

1 they had to put in there, is that, you know, retirement
2 accounts that are funded pre-judgment are protected. But
3 that's not what the statute says at all. The statute
4 says merely -- or broadly that retirement accounts are
5 protected regardless of how much is in them, to the
6 extent they were the result of fraudulent conveyances.

7 And I would say that that's a very, very
8 limited exception, not nearly as broad as First Citizens
9 would have you read it, that all post-judgment
10 contributions are fraudulent conveyances as a matter of
11 law. And I think that as a matter of statutory
12 instructions, it's very clear that the legislature
13 intended to give broad protection to IRAs and that
14 neither of the IRAs in this situation have any of the
15 badges of a fraudulent conveyance.

16 MR. FLOYD: Very briefly. Very briefly.

17 Mr. Lydon has asked you -- or suggested to
18 you that we're asking you to rewrite the statute. And I
19 think Mr. Lydon is asking you to use the backspace key
20 on the keyboard to eliminate that last sentence that
21 talks about fraudulent conveyance. The definition of
22 fraudulent conveyances is established. It tells us
23 everything about consideration.

24 His definition of consideration, I think,
25 totally ignores the definition of consideration in the

1 case law. Under his theory that these are earnings, I'm
2 somewhat surprised by that, because under that theory,
3 no cash could ever be subject to execution because, for
4 the most part, generally speaking, all cash is the
5 subject of earnings. I mean, that's how cash gets into
6 your bank account. It's an earning.

7 You can only fund stock. You can only buy
8 stock. You can only buy cars with cash. You get that
9 from your earnings. So, you know, I disagree with his
10 suggestion that we somehow have a flawed analysis.

11 And this Supreme Court case has nothing to
12 do with this case because it's an inherited IRA. A
13 ruling blessing these contributions gives the green
14 light to all judgment debtors to empty their bank
15 accounts and put all the money they can into retirement
16 accounts and IRAs as soon as a judgment is coming down
17 the pipe or is entered against them.

18 So he's right. If you want to call it a
19 fairness argument, it's not fair that you can take your
20 money and hide it from creditors and put it out of
21 reach. It is an equitable matter. The law is on First
22 Citizens' side, and the equity of the situation is on
23 First Citizens' side.

24 So a ruling in favor of First Citizens is
25 not only statutorily in accordance with case law, it is

1 in line with the equities.

2 MR. LYDON: And if I may briefly respond to
3 one of the comments he made, that a ruling in our favor
4 would authorize or encourage all debtors to empty their
5 bank accounts and put money into IRAs, that's not the
6 facts of this case. That's not our position.

7 And so I disagree with his conclusion that
8 the ruling would somehow allow that type of transaction,
9 because that's certainly not the facts of this case, and
10 nothing in the ruling would need to condone that type of
11 transfer.

12 MR. FLOYD: Might I add one thing?

13 THE COURT: Sure.

14 MR. FLOYD: If it's not the facts of this
15 case, they have money that they can pay. So where is
16 the money? It's in their IRAs.

17 THE COURT: I understand.

18 As I read the Statute of Elizabeth -- and
19 as your memorandum noted -- in determining what
20 constitutes fraudulent conveyance, the Statute of
21 Elizabeth says every gift or transfer made to or for any
22 intent or purpose to delay, hinder, or defraud creditors
23 in here, and it goes on from there, but, to me, the
24 Statute of Elizabeth we've used to try to impute intent,
25 because very rarely have I seen people come in and say,

1 Yes, I've transferred assets to defraud a creditor, and
2 that type of thing. So we're effectively having to kind
3 of impute that intent in here.

4 How does funding, taking advantage of a
5 funding option that an employer provides, impute some
6 kind of fraudulent intent? I know that the specific
7 thing here was an IRA, and there was an exception under
8 15-41-30(13) for IRAs. What if this was contributions
9 to a medical savings account in which, as I understand
10 those -- I've never really participated, but whatever is
11 left over that's not used can potentially at least be
12 passed along back to the employee funding the MSA in
13 that.

14 How would that be different from --

15 MR. FLOYD: We can find guidance. And the
16 answer to your question, in the case of Coleman versus
17 Daniel, the 1973 case, that talks about determining
18 whether a debtor acted with a requisite intent to
19 establish a fraudulent conveyance.

20 Just like you said, very rarely -- and I
21 don't think I've ever seen a debtor come in here and
22 say, Yes, I moved this money to get it out of your reach
23 so you wouldn't get it. I don't think you're ever going
24 to see a debtor stand up and testify that he actually
25 intended to defraud a creditor.

1 So what we do is we look at this Coleman
2 versus Daniel case on page 6, and you look for indicia
3 of fraud. And the court says you have to look at each
4 particular circumstance of the transfer for the badges
5 of fraud. So you have to analyze each one on its own
6 and look at these factors. And, you know, the court
7 said among the generally recognized badges of fraud are
8 the insolvency or indebtedness of the transferral.
9 They're indebted and they're insolvent. They haven't
10 paid any money, and they've testified they don't have
11 any money, and they can't pay any money to First
12 Citizens.

13 The lack of consideration for the
14 conveyance, regardless. If there was consideration, the
15 analysis says it's a fraudulent conveyance. If there
16 wasn't consideration -- which I think the case law
17 clearly says what's required for consideration -- there
18 was no consideration. I maintain there was no
19 consideration for this transfer, or conveyance, into
20 their own retirement account because they took money out
21 of this pocket and they put it over here -- or in this
22 pocket and they put it over here in this one.

23 The relationship between the transferor or
24 and transferee are one in the same. The pendency or
25 threat of litigation. They had a judgment against them.

1 Secrecy or concealment. You know, I don't think they
2 sent a letter.

3 That's a difficult one and this particular
4 circumstance, because they would say we didn't hide
5 anything. We were just doing it. But as the course of
6 this case has kind of wound its way, they've refused to
7 give us the information.

8 Like Mr. Lydon says, he says that we
9 weren't trying to hide anything, but at the same time,
10 they wouldn't let me discover the information. They
11 filed a motion for a protective order, a departure from
12 the usual method of business. Mr. Lydon would say that
13 they've been doing this all along, the transfer of the
14 debtors' entire estate.

15 They have no money, and the reservation of
16 the benefit to the transferor, the transferor is
17 himself. He still has the benefit of that money and the
18 retention by the debtor of the possession of property.
19 They still have possession of it. They've still got it.

20 THE COURT: I understand that the badges of
21 fraud can be attributed to this.

22 And going back to what you said, that
23 basically -- not specifically referring to Mr. Dorn and
24 Mr. Dempsey, but if a debtor who is employed gets a
25 paycheck periodically, weekly, biweekly, monthly,

1 whatever their periodic payments are, why don't we
2 appoint a receiver to just intercept some portion of
3 their pay so that it's not used for whatever purpose in
4 that? Basically, from doing supplemental proceedings,
5 they're directed to bring in bank accounts and paychecks
6 and income tax returns, et cetera, to basically show
7 that there's a stream of income presumably and then to
8 show what, for lack of a better term, the residue
9 currently is from that net stream of income. Is it
10 sitting in a bank account, has it been reduced by six
11 cars, these types of things, or whatever, in here.

12 I know we didn't garnish wages, so I'm
13 not -- I guess maybe I'm splitting a fine hair, but what
14 I'm saying is opposed to garnishing wages. But leaving
15 that distinction aside for the moment, it seems to me
16 like we're trying to direct or move off the table some
17 options that would appear to be legitimate options for
18 an employee. Am I making myself clear on what I'm
19 saying?

20 MR. FLOYD: No. I want to make sure I
21 understand what you're -- if you're asking a question, I
22 want to make sure I understand.

23 In this case, I think you have to look --
24 let me back up by saying I think you have to look at
25 each transfer in and of itself and not make broad-based

1 generalities. What you have to do is say Mr. Dorn and
2 Mr. Dempsey were their own employee. They had their own
3 business. They made the conscious, voluntary decision
4 to put money into their retirement account.

5 That's what I'm trying to tell you. I
6 think each one of these cases that you read that talk
7 about these things, they all talk about you have to look
8 at each circumstance and each transaction.

9 THE COURT: So, basically, if they had
10 taken their paychecks and gone to Harrah's and gambled
11 and lost and they have no money in their bank account,
12 then we wouldn't be here because they have money in
13 their bank account. We're here because they have money
14 in an IRA that First Citizens feels like they're
15 entitled to reach under the statutes. Is that somewhat
16 of an analogy?

17 MR. FLOYD: I think that it is still
18 subject to execution. And that your situation where the
19 money was transferred, presumably they gambled and there
20 was some consideration given to another party, I find it
21 would probably be difficult for you to go get your money
22 from Harrah's, if the creditor tried to get its money
23 from Harrah's, when that money was transferred. But the
24 money is still there. They've retained the benefit of
25 the money.

1 THE COURT: Okay. Anything from you,
2 Mr. Lydon?

3 MR. LYDON: The notion that because they
4 own this entity that somehow changes the analysis, I
5 think is completely incorrect. I mean, all -- I won't
6 say all, but in 2016, you know, most employers have done
7 away with pensions, and it's all based -- there's
8 401(k)s and IRAs. There may be a small matching
9 component to it, but any contribution I make to my
10 401(k) at work or somebody else is a voluntary
11 contribution.

12 And so the fact that they are owners of the
13 business, I don't see how that changes the analysis at
14 all. It's the same as the person who works for Blue
15 Cross Blue Shield who voluntarily puts in a thousand
16 dollars a month into their 401(k), IRA -- I guess it
17 would be a 401(k) for something like that. So I don't
18 see how that changes the analysis.

19 And I liked your question, because I was
20 going to make this point, and I didn't because it seemed
21 kind of cavalier. But the fact of the matter is you're
22 right. If the law in South Carolina was to be that you
23 couldn't make post-judgment contributions to retirement
24 accounts, then I think our debtors would be encouraged
25 to go to Harrah's and put it all in the slot machines

1 and try and win the big numbers so they could pay the
2 judgments off, but clearly that's not in anybody's best
3 interest, other than maybe Harrah's. And the best
4 interest, you know, is to encourage people to continue
5 to fund their retirement accounts within the limitations
6 imposed by federal law.

7 THE COURT: And this is for either one or
8 both of y'all, you gentlemen in here. I understand that
9 at least some portion of these contributions are under a
10 simple IRA program, which includes, to some extent, an
11 employer match, is First Citizens' claim; that they're
12 entitled to whatever employer match that goes into their
13 IRA account or --

14 MR. FLOYD: As I understand it, the money
15 that you see is the money that the employee contributed.

16 THE COURT: Okay.

17 MR. LYDON: Yes, I think the number he got
18 from Stifel Nicolaus is this gross contributions that
19 were made into their respective accounts. Our
20 affidavits that we submitted set forth the amount that
21 they personally contributed out of their wages into
22 those accounts. It's not a huge difference, I don't
23 think, but it is a difference.

24 THE COURT: And we have no knowledge since
25 your motion to quash, et cetera, what activity may have

1 gone on in the IRA. So in theory, at least, depending
2 on how funds were invested, there might not be
3 sufficient assets in the IRA to --

4 MR. FLOYD: There are sufficient assets
5 available in the IRA --

6 THE COURT: Okay.

7 MR. FLOYD: -- as we sit here today.

8 THE COURT: All right.

9 MR. FLOYD: To my understanding. If they
10 want to correct me on that, that's fine.

11 MR. LYDON: I'm not sure I understand the
12 question.

13 MR. FLOYD: Is there money in the IRA
14 that --

15 THE COURT: Basically, I'm saying that one
16 of the things that hasn't come up is the activity or the
17 history of the IRA and whatever investments that had
18 been made of the IRA funds such that --

19 MR. LYDON: Have they made bad investments
20 and then lost all of the money? No. I don't think
21 that's -- my guess is that being accountants, they're --

22 THE COURT: Hopefully that's not the case
23 to anybody's benefit.

24 MR. LYDON: They're not notoriously -- it's
25 pretty hard to lose all your money in an IRA. I guess

1 you could, but...

2 THE COURT: Or not necessarily all, but at
3 least have it reduced in value such that --

4 MR. LYDON: Right, right.

5 THE COURT: All right. Well, based on what
6 I've read and heard and thought and scratched on my head
7 and other parts of my anatomy in here in trying to think
8 this thing through, I just don't feel -- I feel like,
9 number one, this was a slippery slope in here, that if
10 we look at contributions, you know, then we get into the
11 question of well, would the creditor, First Citizens in
12 this case, be entitled to the interest that's been
13 earned on some of those contributions to the IRA. The
14 subsection in here, 15-41-30(13), basically says, "The
15 debtor's right to receive individual retirement
16 accounts..."

17 I think, there's been some question at
18 least alluded to, not necessarily as part of this
19 proceeding -- but what I've seen and read is -- and I
20 think some of the history was -- that you had to,
21 impliedly, at least be at least 59 and a half and have a
22 right to withdraw funds. And the question is whether
23 funds were purposefully not being withdrawn that could
24 have been withdrawn otherwise and being made available.

25 To me, the bigger thing now is further down

1 where it says a claimed exemption may be reduced or
2 eliminated by the amount of fraudulent conveyance into
3 the IRA or the plan. That's, I think, where Mr. Floyd
4 and First Citizens are hanging their hats, saying that,
5 basically, contributions post-judgment effectively are a
6 fraudulent conveyance in here. And I'm not sure that I
7 personally read that that way or agree with that.

8 I think that he's exercising a right of an
9 employee to make a contribution to an IRA, as Mr. Lydon
10 has stated in here, that if they had made significantly
11 large contributions to be over and above the annual
12 amount that could be put in, quite possibly that would
13 be considered a fraudulent conveyance in here. If they
14 had sold a piece of property and put the proceeds into
15 an IRA, that would be a fraudulent conveyance.

16 I could see some of the badges of fraud
17 applying to the circumstances and being so that it might
18 potentially be considered or very likely be considered a
19 fraudulent conveyance. Exercising an option that an
20 employee -- whether the employee is a co-owner of the
21 business or owner of the business, as well as other
22 employees, because presumably there are other
23 employees -- and everybody who is an employee has some
24 right of participating in at least the simple IRA. But
25 at least on the simple, maybe not a personal IRA -- that

1 would be up to them as individuals. But at least on a
2 simple IRA, they would have that same option or same
3 right to contribute.

4 It's not just somehow set up for key people
5 who are owners. And it's been done -- even the program
6 is set up to avoid some kind -- or make some kind of
7 fraudulent protection in here.

8 So I think both of you gentlemen have done
9 excellent jobs, and I definitely appreciate the
10 memorandums that you did. It's very enlightening. I've
11 been holding supplemental proceedings hearings since
12 1987, and, generally, they're pretty perfunctory on
13 this.

14 We come in, we check on bank accounts and
15 assets, and kind of go on home. And this one has gotten
16 much beyond that and has caused me to review this
17 statute and look at it and scratch my head, like I said,
18 and trying to think through what are the options here
19 and what is the intent of legislature in this. And I
20 don't really, Mr. Floyd, see --

21 MR. FLOYD: I understand.

22 THE COURT: -- any of the legislatures
23 seeking to reach retirement funds. So I'm going to deny
24 the motion from First Citizens to levy on the
25 contributions to the IRA funds in here.

1 Hopefully that's correct, and if y'all
2 appeal it, we'll --

3 MR. FLOYD: I understand and respectfully
4 disagree.

5 THE COURT: -- find out in that.

6 MR. FLOYD: Sure.

7 THE COURT: And I understand that you
8 respectfully disagree and --

9 MR. FLOYD: What do they say? With all due
10 respect.

11 THE COURT: So in here, you both did an
12 excellent job in spelling out everything and
13 articulating everything today --

14 MR. FLOYD: Very good.

15 THE COURT: -- on this, and I do appreciate
16 all the effort on your part. It's made it easier for
17 me. This is not an area that I've had a lot of formal
18 training in. Most of it's been, like I said,
19 seat-of-the-pants experience in holding the hearings
20 over the years. And Mr. Lydon, will you prepare an
21 order --

22 MR. LYDON: I will.

23 THE COURT: -- and send a copy to Mr. Floyd
24 and --

25 MR. LYDON: I'll prepare one order with

1 both captions on there.

2 MR. FLOYD: Suits me fine.

3 MR. LYDON: We can file it in both cases.

4 MR. FLOYD: If you can also put notes
5 talking about the numbers, if you don't mind.

6 MR. LYDON: Okay.

7 MR. FLOYD: Just so we can address the
8 numbers, so that I'll have that.

9 MR. LYDON: Okay.

10 THE COURT: Anything else that we need to
11 discuss?

12 MR. LYDON: I don't think so.

13 MR. FLOYD: Thank you for your time.

14 THE COURT: All right. We're off the
15 record then. Thank you.

16 (The proceeding concluded at approximately
17 10:24 a.m.)

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7/19/2016

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1 CERTIFICATE OF REPORTER

2 I, Nisha Gordon, Court Reporter and Notary
3 Public for the State of South Carolina at Large, do
hereby certify:

4 That the foregoing proceeding was taken before
me on the date and at the time and location stated on
5 page 1 of this transcript; that all statements made on
the record at the time of the proceeding were recorded
6 stenographically by me and were thereafter transcribed;
that the foregoing proceeding as typed is a true,
7 accurate, and complete record of the proceeding to the
best of my ability.

8
9 I further certify that I am neither related to
nor counsel for any party to the case pending or
interested in the events thereof.

10
11 Witness my hand, I have hereunto affixed my
official seal this 9th of August, 2016, at Simpsonville,
Greenville County, South Carolina.

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Nisha Gordon

Nisha Gordon
Notary Public
State of South Carolina at Large
My Commission Expires:
June 14, 2022



COPY

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)
First Citizens Bank and Trust)
Company, Inc.,)
Plaintiff,)
v.)
Dorn Properties, Inc. and)
Henry A. Dorn,)
Defendants.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2009-CP-24-1272

AFFIDAVIT OF HENRY A. DORN

FILED COMMON PLEAS
6TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2016 JUL -7 PM 2:11

Personally appeared before me, Henry A. Dorn, being first duly sworn, deposes and states as follows:

1. I am 63 years old and competent to testify to the matters set forth in this affidavit.
2. I have been employed by Dorn, Dempsey & Associates, Inc. since June 1, 2010.

Prior to June 1, 2010, I was employed by Green and Company for 29 years.

3. Since 2010, I have contributed, through salary deferral, to Dorn, Dempsey & Associates, Inc. employer sponsored retirement plan, SIMPLE IRA, the following amounts for the respective tax years:

Year 2010 \$3,233.00

Year 2011 \$13,083.00

Year 2012 \$14,000.00

Year 2013 \$14,500.00

Year 2014 \$14,500.00

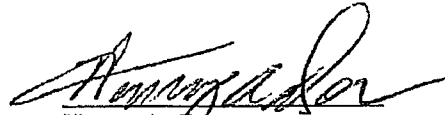
Year 2015 \$2,417.00

4. None of my contributions to the SIMPLE IRA at Dorn, Dempsey & Associates

have exceeded the maximum amount allowed by law.

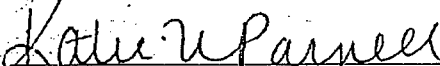
5. During the time I was employed at Green and Company, its employees were offered the opportunity to contribute to a SIMPLE IRA.

6. As an employee at Green and Company, I regularly contributed through salary deferrals to the SIMPLE IRA offered to its employees.


Henry A. Dorn

SWORN TO AND SUBSCRIBED BEFORE ME

This 29th day of June, 2016


Notary Public for South Carolina

My Commission Expires: August 8, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

FEB 08 2017

SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court Of Common Pleas

The Honorable Curtis G. Clark, Master-in-Equity

Case No.: 2009-CP-24-01272

Appellate Case No.: 2016-001972

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

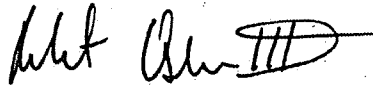
vs.

Dorn Properties, Inc. and Henry A. Dorn.....Respondents.

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.

BRUNER, POWELL, WALL & MULLINS, LLC



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Columbia, SC

January 20, 2017