UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Ronald Friedman, as trustee for the SportCo Creditor's Liquidation Trust, Plaintiff, v. Wellspring Capital Management, LLC, Wellspring Capital Partners IV, L.P., WCM Genpar IV, L.P., WCM Genpar IV GP, LLC, Alexander E. Carles, Bradley Johnson, F. Hewitt Grant, Charles E. Walker, Jr., Todd Boehly, Bernard Ziomek, and Andrew Kupchik, Defendants.	Adversary No. 19-80071-dd **CHARLES E. WALKER, JR.'S MOTION TO DISMISS**

Charles E. Walker, Jr. ("Mr. Walker") hereby respectfully moves this court to dismiss with the claims asserted against him in the First Amended Complaint [Doc No. 58] pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012(b)(6) with prejudice (the "Motion").

I. INTRODUCTION

Friedman attempts to bring a fraud action against Mr. Walker under S.C. Code Ann. § 27-23-10, et seq. (the "Statute of Elizabeth") and pursuant to 11 U.S.C. §§ 544(b) & 550. Specifically, Friedman contends that a trust formed by certain creditors of a company called SportCo Holdings, Inc. is entitled to receive $95,422.57 from Mr. Walker because it now stands in the shoes of a lender known as Prospect Capital Corporation ("Prospect), which filed a meritless lawsuit against Mr. Walker in Lexington County in May 2019. Friedman, at Prospect's direction, has parroted Prospect's allegations and claimed Mr. Walker "fraudulently" received two distributions – one in the amount of $66,684.06 in 2012 ("2012 Walker Distribution") and the other in the amount of $28,738.51 in 2013 ("2013 Walker Distribution") – in violation of the Statute of Elizabeth.

Friedman decries the distributions received by Mr. Walker (together the "Walker Distributions") as "fraud" even while: (1) he admits that Prospect and other lenders provided $280

million in loans in 2012 for the explicit purpose of making the 2012 Walker Distribution, among others; and (2) he admits that Prospect provided an additional $60 million in loans in 2013 or the explicit purpose of making the 2013 Walker Distribution, among others. In so doing, Friedman attempts to stand equity on its head, and so his equitable claims against Mr. Walker must fail.

Friedman fails to allege facts to establish that either of the Walker Distributions was made without the consent, participation, ratification, and full knowledge of any lender for whom Friedman predominantly prosecutes this case. Indeed, Friedman's allegations belie any inference other than Prospect consented to, participated in, and ratified with knowledge of all pertinent facts the Walker Distributions. Friedman also fails to allege that, *because of either of the Walker Distributions*, any debtor was rendered insolvent or unable to pay its debts when they were due. Even the inference that a sophisticated group of lenders capable of extending $340,000,000 dollars in loans would make such loans to borrowers who could be rendered incapable of repaying its debts after $95,423 of distributions is too implausible to entertain.

Friedman makes no allegation that Mr. Walker played any role in either the issuance of the Walker Distributions or the insolvency of any debtor at least five (5) years later. Friedman concedes that the 2012 Walker Distribution was less than .05% of the distributions made with Prospect and other lender's approval in 2012, and that distribution was less than .024% of the amount of the 2012 Loans. Friedman further concedes that the 2013 Walker Distribution is less than .053% of the distributions made with Prospect and other lender's approval in 2013, and that distribution was less than .048% of the amount of the 2013 Loan made by Prospect. Friedman alleges no facts to show that the comparatively miniscule amount of the Walker Distributions left Ellett or any debtor unable to perform or impaired in any way. His claims against Mr. Walker are meritless, and Mr. Walker should be dismissed and permitted to seek an award of fees and costs.

II. FACTUAL BACKGROUND

In 2012, Prospect and other Lenders provided Ellett Brothers, LLC ("Ellett") and its subsidiaries a $280 million dollar loan ("2012 Loan"); SportCo made provided a guarantee agreement for the 2012 Loan. [Id. ¶ 35.] The 2012 Lenders required that SportCo's shareholders, including Mr. Walker, receive a distribution from the 2012 Loan. [Doc. No. 89-1.] In 2013, Prospect provided Ellett and its operating subsidiaries another $60 million dollar loan ("2013 Loan") with the agreement of other lenders, and SportCo provided a guarantee agreement for the 2013 Loan. [Doc. No. 58 ¶ 38.] Again, Prospect specifically agreed that SportCo's shareholders, including Mr. Walker, would receive a distribution from the 2013 Loan. [Id. ¶ 39; Doc. No. 89-2.]

SportCo owned 100% of United Sporting Company, Inc. ("United"), which owned 100% owner of Ellett. [Id. ¶ 19.] In 2012 and 2013, Friedman alleges that Mr. Walker had a small equity interest in SportCo. [Id. ¶ 15.] Mr. Walker received the 2012 Walker Distribution at the time of the closing of the 2012 Loan and the 2013 Walker Distribution at the time of the closing of the 2013 Loan [Id. ¶¶ 15, 37, 40]

Friedman's narrative in the First Amended Complaint then leaps forward to 2018, when another defendant in this action notified Prospect Ellett would default on a $4.7 million dollar interest payment due in the second quarter of 2018. [Id. ¶ 44.] Friedman does not even allege that Mr. Walker has employment, office, agency or other relationship with any other debtor or Defendant as of that date. On December 31, 2018, the borrowers defaulted on the 2012 Loans and 2013 Loans. [Id. ¶ 66.] Prospect filed this suit on May 23, 2019, and on June 10, 2019, SportCo, United, Ellett, and other affiliated entities[1] filed bankruptcy in Delaware (the "Bankruptcy")[2]. [Id.]

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[1] Bonitz Brothers, Inc.; Evans Sports, Inc.; Jerry's Sports, Inc.; Outdoor Sports Headquarters, Inc.; Quality Boxes, Inc.; and Simmons Guns Specialties, Inc. [Doc. No. 58, ¶ 1 and FN 1.]

[2] Case 19-11299-LSS in the United States Bankruptcy Court for the District of Delaware.

III. LEGAL STANDARD

Fed. R. Civ. P. 12(b)(6) governs motions to dismiss for "failure to state a claim upon which relief can be granted." *See also* Fed. R. Bankr.P. 7012 (making Federal Rule of Civil Procedure 12 applicable in adversary proceedings before a bankruptcy court); In re Warren, 486 B.R. 704, 706 (D.S.C. 2013). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. Papasan v. Allain, 478 U.S. 265, 283 (1986). The motion should be granted unless the complaint "states a plausible claim for relief." Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012). In considering a Rule 12(b)(6) motion, the Court "must accept as true all of the factual allegations contained in the complaint," drawing "all reasonable inferences" in the non-moving party's favor. E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 (4th Cir. 2011). The court is not obligated to assume the veracity of the legal conclusions drawn from the facts alleged. Adcock v. Freightliner LLC, 550 F.3d 369, 374 (4th Cir. 2008).

The complaint must contain sufficient factual allegations, taken as true, "to raise a right to relief above the speculative level" and "nudge [the] claims across the line from conceivable to plausible." Vitol, S.A. v. Primerose Shipping Co., 708 F.3d 527, 543 (4th Cir. 2013). The facial plausibility standard requires pleading of "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Clatterbuck v. City of Charlottesville, 708 F.3d 549, 554 (4th Cir. 2013). The plausibility requirement imposes not a probability requirement but rather a mandate that a plaintiff "demonstrate more than a 'sheer possibility that a defendant has acted unlawfully.'" Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (quoting Iqbal, 556 U.S. at 678). Accordingly, a complaint is insufficient if it relies upon "naked assertions" and "unadorned conclusory allegations" devoid of "factual enhancement." Id. (citations omitted). The complaint must present "'enough facts to raise a

reasonable expectation that discovery will reveal evidence' of the alleged activity." US Airline Pilots Ass'n v. Awappa, LLC, 615 F.3d 312, 317 (4th Cir. 2010).

In addition to the complaint, the court will also examine "documents incorporated into the complaint by reference," as well as those matters properly subject to judicial notice. Clatterbuck, 708 F.3d at 557 (citations omitted); see also Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc., 576 F.3d 172, 176 (4th Cir. 2009) (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

Because Friedman's claims against Mr. Walker under S.C. Code Ann. § 27-23-10 are claims for fraud, his claim is subject to Fed. R. Civ. P. 9(b), which requires that he plead fraud with particularity. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999); Fed. R. Bankr. P. 7009. The Complaint must specify the details of the alleged fraud — including, for example, the time, place, particular individuals involved, and specific conduct at issue. *See* id.; *see also* Luce v. Edelstein, 802 F.2d 49, 54 n. 1 (2d Cir. 1986). Rule 9(b) has four purposes: (1) the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of; (2) the rule exists to protect defendants from frivolous suits; (3) the rule eliminates fraud actions in which all the facts are learned after discovery; and (4) the rule protects defendants from harm to their goodwill and reputation. Harrison, 176 F.3d at 784; In re Derivium Capital, LLC, 380 B.R. 429, 437 (Bankr. D.S.C. 2006).

IV. ARGUMENT

Plainly stated, Friedman has failed to, and cannot, state a claim against Mr. Walker. Friedman claims standing to bring this action against Mr. Walker as trustee for the SportCo Creditor's Liquidation Trust (the "Trust") and under 11 U.S.C. §§ 544 and 550. [Doc. No. 58 ¶ 6.] The Trust is provided for in the Fourth Amended Combined Disclosure Statement and Joint

Chapter 11 Plan of Liquidation (the "Plan", Doc. No. 525 & 525-1 in the Bankruptcy).

Under the two-pronged step of 11 U.S.C. § 544, Friedman must stand in the shoes of a specific triggering unsecured creditor (1) who held an allowable *unsecured* claim on the Debtors' Petition Date and (2) that could have asserted the claims set forth in the Complaint under applicable state law. In re J.R. Deans Co., Inc., 249 B.R. at 129. Friedman states he is standing in the shoes of Prospect and fails to adequately plead any other triggering creditor; therefore, as a threshold matter, Friedman has failed to allege sufficient facts to demonstrate that he is standing in the shoes of an *unsecured* creditor who held an allowable unsecured claim on the Debtors' Petition Date. Specifically, Friedman is estopped from claiming that Prospect was an unsecured creditor as of the date of the Petition in the Bankruptcy because Prospect and the Debtors in the Bankruptcy previously stipulated, and Judge Silverstein ordered, that Prospect was a *secured* creditor on the date of the Petition. For the sake of brevity and to avoid repetition, Mr. Walker hereby joins in the Motion to Dismiss filed by the Wellspring Defendant, together with its supporting memorandum, to the extent it argues that Friedman has failed to allege a triggering creditor, requiring dismissal for Freidman's failure to state a claim.

In the event that Friedman has standing to bring this action, he nevertheless has failed to state a claim against Mr. Walker in numerous ways, and because his current allegations foreclose the possibility of doing so, Mr. Walker should be dismissed from this action with prejudice.

A. New York law controls and bars Friedman's claims against Mr. Walker.

Generally, under South Carolina's choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) (citing Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349, 358 (S.C. 2002)). Because federal courts apply the choice of law principles

of the state within which they sit, this Court will apply South Carolina's choice of law principles. *See In re Infinity Bus. Grp., Inc.*, 497 B.R. 794, 804 (Bankr. D.S.C. 2013) (citing *In re Merritt Dredging Co.*, 839 F.2d 203, 205–06 (4th Cir. 1988)).

Both the 2012 Loan and the 2013 Loan include a New York choice of law provision [Doc. No. 89-1 § 14.20; Doc. No. 89-2, ¶ 8.] Prospect further represented and agreed that New York law would govern "any claims sounding in contract or tort arising out of the subject matter" of the Agreement. [Doc. No. 89-3, p. 1.] Because the loan documents for the 2012 and 2013 Loans state that the shareholders of Sportco would receive a distribution from the Loan Agreements by receiving dividend payments from loan proceeds, Mr. Walker is a third-party beneficiary of the Loan Agreements' choice of law provision designating New York law.

Applying New York law, Friedman has not stated and cannot state a claim for fraudulent conveyance against Mr. Walker. Under New York's Debtor and Creditor Law ("DCL"), a transfer is deemed to be constructively fraudulent where the transfer is made without "fair consideration" *and* one of the following conditions is met: (1) the transferor is insolvent or will be rendered insolvent by the transfer in question; (2) the transferor is engaged in or is about to engage in a business transaction for which its remaining property constitutes "unreasonably small capital"; or (3) the transferor believes that it will incur debts beyond its ability to pay. DCL §§ 273–75. Friedman makes no attempt to plead facts sufficient to state a claim under New York law.

Friedman never alleges that Ellett or the other borrowers were insolvent, had unreasonably small capital, or believed that they would incur debts beyond their ability to pay. To the contrary, Friedman concedes that Ellett and the borrowers were solvent and operated for years after the transactions. [Doc. No. 58 ¶¶ 31–32; Doc. No. 89-1 § 8.1.11; Doc. No. 89-2 ¶ 2(M)). Friedman even claims that Ellett experienced notable success following the transfers. [Doc. No. 58 ¶¶ 31–

32.] Nothing in the Complaint suggests that either Ellett or any other debtor was doomed to fail or otherwise struggling to stay solvent following the transactions. Without pleading these facts, Friedman's allegations are insufficient under New York law and should be dismissed.

For the sake of brevity, Mr. Walker hereby joins in the Motions to Dismiss filed by other Defendants in this action to the extent that those Motions contend that Friedman's fraudulence conveyance claims are barred under New York law.

B. Equity cannot avail Friedman when Prospect made the 2012 Loan and 2013 Loan for the express purpose for the Walker Distributions, amongst others, and when Prospect failed to seek or obtain even a limited guarantee from Mr. Walker.

Even assuming that Mr. Friedman is correct and South Carolina law applies to his claims against Mr. Walker, the Statute of Elizabeth states in relevant part:

> Every … transfer ... 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….

S.C. Code Ann. § 27-23-10(A).

First, South Carolina's courts have plainly stated that an action to set aside a conveyance under the Statute of Elizabeth is an equitable action. Oskin v. Johnson, 735 S.E.2d 459, 463 (S.C. 2012); First Citizens Bank & Tr. Co., Inc. v. Park at Durbin Creek, LLC, 797 S.E.2d 409, 412 (S.C. Ct. App. 2017). A court of equity should scrutinize the conduct of the plaintiff with the utmost care, to ascertain he has done everything which ought to have been done to secure the action requested. Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455, 465 (1903). Likewise, as this court has recognized, "Equity does not favor a negligent party." In re Houston, 409 B.R. 799, 811 (Bankr. D.S.C. 2009) (Duncan, J.).

Despite this, Friedman fails to allege that Prospect or any other 2012 Lender asked for, sought or included any requirement in the loan transaction that Mr. Walker personally guarantee any portion of the either the 2012 Loan or the 2013 Loan. Friedman would have this court construe the Statute of Elizabeth as a means to relieve a sophisticated lender's obligation to underwrite and secure appropriate guarantee agreements when it makes a loan. Further Friedman would have this court use the Statute of Elizabeth as an equitable device to convert shareholders into personal guarantors for corporate debt to the extent of their distributions if and when the borrower or guarantors are later unable to pay a loan, even in the absence of any fraud and when a stated purpose of that loan was to make the distribution to the shareholder. No South Carolina court has construed the Statute of Elizabeth so broadly, and equity does not provide relief to sophisticated commercial lenders who fail to take reasonable steps to protect their own interest. Therefore, Friedman's claims against Mr. Walker must fail.

Second, it has always been the law in South Carolina that if a party to a transaction "becomes acquainted with the fraud before completing his bargain and chooses to go on, a court of equity will not help him." Mitchell v. Pinckney, 13 S.C. 203, 212–13 (1880) (further citations omitted); *see also* In re Ducate, 369 B.R. 251, 260-61 (Bankr. D.S.C. 2007) (Duncan, J.) (holding "it would be unjust" for a creditor to avoid a transfer, even one that is voluntary, as fraudulent "if the creditor knew or should have known of the transfer before the debt was incurred.").

Despite this, Friedman has failed to allege sufficient facts to establish that equity will allow a lender to later rake back a distribution that was specifically contemplated as a purpose of the loan transaction itself, even in the absence of any fraud. When the 2012 Lenders and Prospect knowingly entered into the transaction with the borrowers and guarantors for the purpose of paying a dividend to SportCo's shareholders, it knowingly and calculatedly took the risk that the

borrowers and the guarantors might default on the loans. Indeed, there can be no doubt that Prospect explicitly ratified the 2012 Walker Distribution both prior to its making and again a few months after it occurred by making another loan for the purpose of the 2013 Walker Distribution. [Doc. No. 89-1 and 89-2.] Equity does not allow Friedman, standing in the shoes of Prospect or any lender, to now cry "fraud" and cause Mr. Walker to forfeit a distribution that Friedman's predecessors in interest explicitly contemplated at the time of creating each of the debts. Therefore, Friedman's claims against Mr. Walker must fail.

Third, as between Mr. Walker and Friedman's predecessors, Friedman's allegations prove his predecessors are more to blame for the distributions than Mr. Walker, as Prospect and the debtors participated in the loan transaction and knew that the distributions would be made to Mr. Walker prior to that occurrence without his involvement. Friedman does not allege that Mr. Walker had any decision-making authority of any kind to cause either the 2012 Walker Distribution or the 2013 Walker Distribution to occur, or that he even knew it would occur. Likewise, Friedman does not contend that Mr. Walker received the distribution with any knowledge or belief that, at some point years into the future, a borrower or guarantor under the 2012 or 2013 loans would be unable to repay the entire loan amount because he received less than $100,000 in distributions years earlier. Friedman can possess no better claim than he received from his predecessors. Smith v. Am. Founders Fin. Corp., 365 B.R. 647, 659 (S.D. Tex. 2007). The allegations of the First Amended Complaint only support the inference that Mr. Walker has cleaner hands than Friedman received from his predecessors, and therefore his claims against Mr. Walker must fail.

Finally, the court should find persuasive the decisions of other bankruptcy courts that have refused to allow lenders such as Freidman's predecessors to pursue fraudulent conveyance actions when the lender has entered into the debt with full knowledge of the purpose of the transaction.

U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc., 479 B.R. 405, 410 (N.D. Tex. 2012); In re Crescent Res. Litig Trust ex rel Bernstein v. Duke Energy Corp., 500 B.R. 464, 479 (W.D. Tx 2013); In re Lyondell Chem. Co., 503 B.R. 348, 384–85 (Bankr. S.D.N.Y. 2014), *as corrected* (Jan. 16, 2014) *and abrogated on other grounds*, 818 F.3d 98 (2d Cir. 2016). For all of these reasons, Friedman has failed to state a claim against Mr. Walker.

C. Even if equity would allow Friedman to bring these claims, Friedman fails to plead facts with sufficient particularity to demonstrate that either of the Walker Distributions violate the Statute of Elizabeth.

To effectuate the Statute of Elizabeth's purpose, South Carolina law draws a distinction between existing creditors and subsequent creditors. Subsequent creditors may only have a transfer set aside upon a showing of actual fraud, *i.e.*, when "(1) the conveyance was 'voluntary,' that is, without consideration, and (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors." *See* In re Ducate, 369 B.R. at 258. Existing creditors may have transfers set aside this same theory of actual fraud, or they may rely upon constructive fraud. Id. To plead constructive fraud, an existing creditor must show that the transfer was voluntary and that "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." Id.

First, Friedman makes no effort to allege any actual fraud committed by Mr. Walker, and he could not do so because his other allegations are inconsistent with any actual fraud by Mr. Walker and fail to demonstrate compliance with the law applicable to distributions. Specifically, under South Carolina law, distributions to shareholders are only prohibited if, after such distributions, the corporation is not able to pay its debts as they become due in the usual course of business or its assets are less than the sum of its total liabilities, as of the date the distributions are

made. S.C. Code § 33–6–400(c), (e); In re Hoffman Assocs., Inc., 194 B.R. 943, 961–62 (Bankr. D.S.C. 1995). Likewise, under Delaware law, directors may declare and pay dividends either out of the corporation's surplus or, if the corporation has no surplus, out of its net profits. 8 Del. C. § 170(a). Friedman's allegations preclude the inference that either Walker Distribution could be fraud.

Therefore, Friedman tries to state a claim as an existing creditor and tries to characterize the Walker Distributions as voluntary or gratuitous transfers. However, Friedman fails to make any allegations specific to the Walker Distributions, and what general statement he does make are conclusory. Despite being in full control of the debtors and their records as provided in the Plan, Friedman fails to plead sufficient facts surrounding the terms of Mr. Walker's employment; the entities for whom Mr. Walker worked; the nature of his employment duties; or the reason he was provided either of the Walker Distributions. Therefore, Friedman fails to plead with requisite particularity facts to establish that Mr. Walker failed to provide any consideration for either the 2012 Walker Distribution or the 2013 Walker Distribution. Friedman's conclusory allegations are insufficient to demonstrate that either Walker Distribution was voluntary or gratuitous.

Second, even assuming that Friedman is correct and both of the Walker Distributions are voluntary conveyances, Friedman still fails to adequately state facts sufficient to establish the Walker Distributions violate the Statute of Elizabeth. Friedman facts alleged show that Prospect became a creditor only because of the 2012 Loan. Given that Prospect became a creditor through its knowing participation in the 2012 Loan and the contemporaneous distribution Friedman now challenges as fraudulent, and Friedman alleged no facts demonstrating that Prospect was a creditor before those transactions were completed, Friedman must be required to plead actual fraud under the Statute of Elizabeth as a subsequent creditor who has notice of the allegedly objectionable

transaction when making its decision to extend credit to the borrower. Such a subsequent creditor "can have no ground upon which he can say that a gift [the alleged fraudulent transfer] is a fraud upon him." In re Ducate, 369 B.R. at 260 (quoting Walker, Evans & Cogswell v. Bollmann Bros., 22 S.C. 512, 528 (1885)); *see also* Eigleberger v. Kibler, 10 S.C. Eq. 113, 120 (S.C. Ct App. 1833) (creditors "with a full knowledge of the conveyance" who "stood by for near ten years" before bringing claim were not entitled to relief).

Indeed, this Court recognized in *In re Ducate* that "it would be *unjust* to allow a subsequent creditor to avoid a transfer, even one that is voluntary, as fraudulent if the creditor knew or should have known of the transfer before the debt was incurred." 369 B.R. at 260–61 (emphasis added); *see also* Jackson v. Pyler, 17 S.E. 255, 256 (S.C. 1893) ("[I]t is unquestionably true that the mere fact that a deed is without consideration . . . will not render it fraudulent as to subsequent creditors, especially where they have notice . . . ."). Because Prospect properly characterized as a subsequent creditor, Friedman's claims against Mr. Walker must be dismissed, because Friedman's allegations that the Walker Distributions were made without consideration [Doc. No. 58 ¶¶ 37, 40] are inadequate to state a claim for fraudulent conveyance. In re Ducate, 369 B.R. at 259 (subsequent creditor must establish lack of consideration and actual fraud to prevail).

D. In the alternative, Friedman has failed to state a claim against Mr. Walker that would entitled Friedman to receive an award of attorneys' fees or punitive damages.

South Carolina follows what is known as the "American Rule" which is the practice that each party pays its own attorneys' fees. Judy v. Judy, 742 S.E.2d 672, 676 (S.C. Ct. App. 2013). South Carolina courts have explicitly refused to award attorneys' fees in Statute of Elizabeth cases. Id. In Judy, the South Carolina Court of Appeals held it was an abuse of discretion to award a plaintiff attorneys' fees in a Statute of Elizabeth case, as such an award violates the clear intent of

the South Carolina legislature. 742 S.E.2d at 676-77. Therefore, in the alternative that Friedman is permitted to continue to pursue any claim against Mr. Walker, Friedman's claim for an award of attorneys' fees from Mr. Walker must be dismissed with prejudice.

Likewise, as pointed out above, an action under the Statute of Elizabeth is an action in equity. South Carolina has long recognized that, in actions seeking equitable relief, punitive damages are unavailable to a plaintiff. Hale v. Finn, 388 S.C. 79, 92, 694 S.E.2d 51, 58 (Ct. App. 2010); Welborn v. Dixon, 49 S.E. 232, 235 (S.C. 1904) (stating "punitive damages cannot be awarded on the equity side of the court"); Harper v. Ethridge, 123, 348 S.E.2d 374, 380 (S.C. Ct. App. 1986) (noting in an action involving both legal and equitable causes of action that "the evidence on punitive damages would be irrelevant to the equitable claims"). Therefore, Friedman's claim for punitive damages against Mr. Walker must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Charles E. Walker, Jr. requests that the Court dismiss the First Amended Complaint against him, with prejudice, and that he be permitted to apply for an award of attorney's fees and costs under applicable statute and court rule.

s/Shaun C. Blake
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