IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D23-0152
L.T. CASE NO. 2018-000931-CA-01 (44)

JOHN W. SCHMITZ and LUCILA SCHMITZ,

Appellants,

v.

DOROTHY JOAN SCHMITZ, *et. al.*,

Appellees.
_____ /

MOTION TO DISMISS APPEALS DUE TO APPELLANT'S FAILURE TO COMPLY WITH TRIAL COURT'S ORDERS AND ADJUDICATION OF CONTEMPT

Pursuant to the Florida Rules of Appellate Procedure, Appellees/Cross-Appellants ("Appellees") move to dismiss the Appeals filed by John W. Schmitz in Case Nos. 3D21-1083, 3D23-0152, and 3D23-0402. In support, the Appellees state:

1. The rule in Florida is as follows: Where the appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, either entertain or dismiss an appeal. However, where a dismissal is ordered, it is mandatory that the disobedient appellant be given a period of grace, prior to the effective date of the dismissal, in which to comply with the disobeyed order. *See Gazil v. Gazil*, 343

So. 2d 595 (Fla. 1977); *see also Davidson v. Davidson*, 501 So. 2d 603 (Fla. 1987) (affirming dismissal of appeal due to appellant's failure to comply with trial court order relating to discovery in aid of execution); *Segall v. Downtown Associates*, 546 So. 2d 11 (Fla. 3d DCA 1989) (dismissing appeal of final judgment after appellant was adjudged to be in contempt of court due to failure to comply with trial court orders relating to discovery in aid of execution.); *McLemore v. McLemore*, 567 So. 2d 23 (Fla. 1st DCA 1990) (dismissing appeal of contempt order due to husband's failure to comply therewith because a litigant "cannot invoke the authority of [the appellate courts] at the same time he is scorning the rulings of the trial court"); *Rodriguez v. Rodriguez*, 640 So. 2d 133 (Fla. 3d DCA 1994) (where the appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, either entertain or dismiss an appeal). For the reasons that follow, the rule should be applied here, and the Appeals filed by John W. Schmitz should be dismissed.[1]

[1] Although the Orders to Show Cause discussed at paragraphs 14 and 17, *infra*, were directed to both John and Lucila Schmitz, Lucila Schmitz has not yet been held in contempt.

2. Following the entry of the Amended Final Judgment that is the subject of Appeal 3D21-1083, Appellees levied upon John W. Schmitz's ("John") shareholder and membership interests in his various companies, including Schmitz Realty Company. John neither requested nor posted a supersedeas bond.

3. On July 28, 2022, August 2, 2022, and August 18, 2022, the parties appeared before the trial court for an evidentiary hearing on several matters: (i) John and Lucila Schmitz's ("Lucila") motion for the return of the foregoing share/membership certificates and (ii) the Appellees' request that the trial court set aside John's fraudulent transfer of Schmitz Realty Company's interest in another affiliated company, Peacock Real Estate, LLC ("Peacock Real Estate"), to John and Lucila's children.

4. At the conclusion of the hearing, the trial court ruled that John's shares in Schmitz Realty Company were owned by John and Lucila as joint tenants with right of survivorship (and thus, that John's 50% ownership interest in that entity could be reached by the Appellees). The trial court further ruled that the transfer of Schmitz's Realty Company's interest in Peacock Real Estate "ha[d] many of the indicia of fraud on creditors"; "that there was no logical reason" for

the transfer to have occurred; and that "the only reasonable explanation" for the transfer was that John and Lucila "were attempting to avoid . . . what turned out to be an imminent judgment . . . they made the assets harder to reach . . ."

5. Thereafter, while the parties awaited the entry of the order that became the subject of Appeal 3D23-0152, John and Lucila, acting through Peacock Real Estate, filed a Motion to Permit Sale of Real Property: the real property located at 220 NW Peacock Blvd., Port St. Lucie, Florida 34986 (the "Peacock Property").

6. The Appellees objected to the sale of Peacock Real Estate's sole asset. They argued that, based on the evidence adduced at the evidentiary hearing, the trial court's award of the relief requested at the hearing was imminent. As a result, the Appellees would become 50% owners of Schmitz Realty Company and thus, 50% owners of Peacock Real Estate with an equal right to participate in the management of the company and to vote upon any sale. Appellees argued that to permit the sale to occur would be to allow John and

Lucila to liquidate yet another asset that was subject to Appellees' collection efforts, as well as Appeal 3D21-1083.[2]

7. The trial court agreed. Although it entered an Order Granting Peacock Real Estate, LLC's Motion to Permit Sale of Real Property (the "Order Authorizing Sale"), a true and correct copy of which is attached hereto as Exhibit "A", it specifically required that the "Net Proceeds" (as described in the Order Authorizing Sale) received by Peacock Real Estate be deposited in the John and Lucila's lawyer's trust account (Brito, PLLC) pending further court order, thereby preserving the Net Proceeds until such time that ownership of John's interest in Schmitz Realty Company and thus, in Peacock Real Estate, was fully determined.

8. On December 28, 2022, the trial court entered Findings of Fact and Conclusions of Law, granting the relief requested by the Appellees. That Order, which has not been stayed, is the subject of Appeal 3D23-0152. By way of that Order, the trial court restored ownership of Peacock Real Estate (and the Peacock Property) to Schmitz Realty Company and authorized the sale of John's

[2] *See* Initial Brief on Cross-Appeal at p. 69-73.

ownership interests in Schmitz Realty Company and thus, in Peacock Real Estate. (See Exhibit "B" at ¶¶ 25, 42, and 58).[3]

9. On February 16, 2023, the trial court entered an Order directing the Sheriff's sale to go forward, a true and correct copy of which is attached hereto as Exhibit "C". That Order, which has not been stayed, is the subject of Appeal 3D23-0402. Accordingly, on May 10, 2023, the Sheriff's sale was conducted. Appellees were the successful bidders at the sale and became 50% owners of Schmitz Realty Company and, in turn, 50% owners of Peacock Real Estate. A true and correct copy of the Sheriff's Bill of Sale is attached hereto as Exhibit "D".

10. On June 8, 2023, while conducting a review of the Public Records of St. Lucie County, Florida, the undersigned counsel discovered that the Peacock Property had been sold on or about April 13, 2023.

11. On June 9, 2023, undersigned counsel contacted counsel for John, Lucila, and their companies, Alejandro Brito, to confirm

[3] This Court took judicial notice of the December 28, 2022 Order pursuant to its February 15, 2023 Order granting the parties' Agreed Motion for Judicial Notice .

that the Net Proceeds had been placed in his firm's trust account as ordered. Mr. Brito advised that his firm was not in possession of the Net Proceeds. Counsel for Nancy Cook memorialized the conversation, placed counsel on notice that Peacock Real Estate (and its principals, John and Lucila) were in violation of the Order Authorizing Sale, and demanded compliance with the Order Authorizing Sale.

12. On June 19, 2023, Appellees filed their Motion to Compel Compliance with Court Order and for Sanctions in the trial court (the "Motion to Compel"). Shortly thereafter, opposing counsel provided Appellees with the Settlement Statement for the sale of the Peacock Property. The Settlement Statement revealed that the Net Proceeds received by Peacock Real Estate – but not deposited into Brito PLLC's trust account – exceeded $1 million.

13. John had intentionally and without excuse refused to comply with Order Authorizing Sale – a plainly contemptuous act. See § 38.23, Fla. Stat. ("A refusal to obey any legal order, mandate or decree, made or given by a judge relative to any of the business of the court, after due notice thereof, is a contempt, punishable accordingly."); *see also M.W. v. Loftheim,* 855 So. 2d 683, 684 (Fla.

2d DCA 2003) ("Contempt is an act calculated to embarrass, hinder, or obstruct the trial court in the administration of justice or which is calculated to lessen its authority or dignity."); *Nastasi v. Thomas*, 88 So. 3d 407 (Fla. 4th DCA 2012) (contempt sanctions are appropriate when a court order has been violated). Accordingly, the Appellees filed a Verified Motion for Order to Show Cause, asking the trial court to enter an order directing John to appear and show cause why he should not be held in contempt for his failure to comply with the Order Authorizing Sale.

14. On July 8, 2023, the trial court entered its Order granting Appellees' request (the "First Order to Show Cause"), a true and correct copy of which is attached hereto as Exhibit "E". The First Order to Show Cause (i) directed John and Lucila to deposit 100% of the Net Proceeds into the Brito, PLLC trust account within 7 days and (ii) directed Brito, PLLC to provide Appellees' attorneys with an accounting reflecting any and all disbursements and subsequent transfers of the Net Proceeds and the ultimate recipients thereof.

15. John and Lucila failed to deposit 100% of the Net Proceeds into the Brito, PLLC trust account as ordered. The accounting provided by Brito, PLLC showed why: 100% of the Net Proceeds paid

to Peacock Real Estate had been immediately distributed. The majority of the funds were paid to John's "alter egos", Schmitz Realty Company and Schmitz Properties, Inc., and to insiders, including Lucila (directly implicating the issues raised by Appeal 3D21-1083), John and Lucila's children, and their attorneys, Brito, PLLC and Kula & Associates, P.A.[4]

16. On August 2, 2023, the parties appeared before the trial court for a return on the First Order to Show Cause. At the conclusion of the evidentiary hearing, the trial court ruled:

> So I find that Mr. Schmitz has not shown cause why he should not be held in contempt. I do find that his acts were willful and contumacious and I will adjudicate him in contempt of Court.
>
> * * *
>
> So as far as penalty here, the penalty is that he is ordered to take whatever steps he needs to take in order to deposit $755,407.21 in the trust account of counsel . . . He shall have 30 days in which to make that deposit and if he fails to do so then I will issue a writ of bodily attachment, swear on a warrant, and will order him to be incarcerated until such time as he complies with that order . . .

[4] Both attorneys refused to return the funds. Brito, PLLC has since moved to withdraw as counsel for John and Lucila at the trial level.

17. The trial court further ruled that it would be *sua sponte* entering a *separate* order to show cause directed to John and Lucila having transferred $253,950 of the Net Proceeds to Schmitz Realty Company (the "Second Order to Show Cause"). The Second Order to Show Cause, a true and correct copy of which is attached hereto as Exhibit "F", was entered on August 3, 2023, and directed that John and Lucila appear and show cause why they should not be held in contempt for allowing Schmitz Realty Company to retain those funds. The trial court provided John and Lucila with 5 days to purge that order, which deadline was ultimately extended to August 21, 2023.

18. On August 12, 2023, the trial court entered a written Order Finding John W. Schmitz in Contempt (the "Contempt Order"):

> . . . this Court finds that John W. Schmitz has failed to show cause why he should not be held in contempt. The Court finds that his violation of the Order Authorizing Sale was willful and contumacious and adjudicates him to be in contempt of Court.
>
> * * *
>
> John W. Schmitz may purge himself of contempt by depositing $755,407.21 – an amount which this Court finds that he has the present ability to pay – into the Brito, PLLC trust account within 30 days, on or before September 1, 2023 . . . Should he fail to do so, judgment creditors may petition this Court to issue a writ of bodily attachment for his arrest, and

> he will be taken into custody by the Miami-Dade County Sheriff and confined in the county jail until such time that he purges himself of contempt by fully complying by paying the purge amount.

(Exhibit "G")

19. The $755,407.21 purge amount was calculated by reducing the full amount of the "Net Proceeds", $1,065,407.21, by the $310,000 allegedly deposited into the Brito, PLLC trust account in advance of the August 2, 2023 hearing. Of the remaining $755,407.21, the only funds that have been returned to date are the $225,000 in Net Proceeds paid to John and Lucila's daughter, Alexandra Wenzke, which is presently being held in Holland & Knight's trust account. Thus, $530,407.21 remains outstanding and uncured. Neither the Second Order to Show Cause, which required the return of the $253,950 paid to Schmitz Realty Company be deposited into the Brito, PLLC trust account, nor the Contempt Order have been complied with.

20. Both contempt orders involve issues that directly related to the subject Appeals. John's sale of the Peacock Property and subsequent fraudulent transfers of the Net Proceeds implicate the same Peacock Property that Appellees have alleged should have been

restored to Schmitz Development Company through rescission in Appeal 3D21-1083. Both contempt orders flow from John and Lucila's ongoing refusal to recognize the December 28, 2022 and February 16, 2023 Orders, which are the Orders under appeal in Appeals 3D23-0152 and 3D23-0402.

21. John and Lucila have failed and/or refused to comply with the Order Authorizing Sale, the First Order to Show Cause, the Second Order to Show Cause, and the Contempt Order, and have failed to pay the money necessary to purge the trial court's finding of contempt. As a result of their continually wanton and willful misconduct, and the uncured finding of contempt against John, Appellees respectfully request that this Honorable Court exercise its discretion and dismiss John's Appeals in Case Nos. 3D21-1083, 3D23-0152, and 3D23-0402.[5]

22. Undersigned counsel has conferred with counsel for Appellants, Elliot Kula, who has indicated that the Appellants object to the relief sought in this motion.

---

[5] Before the return on the Second Order to Show Cause directed to both John and Lucila could be set for hearing, their trial counsel, Brito, PLLC, moved to withdraw.

WHEREFORE, Appellees respectfully request that this Court dismiss John W. Schmitz's Appeals, and any other such relief as this Court deems just and proper.

Respectfully submitted,

By: *Michael P. Hamaway*
MICHAEL P. HAMAWAY
Florida Bar No.: 081302
mhamaway@mbhlawyer.com
SETH A. KUPILIK
Florida Bar No.: 126728
skupilik@mbhlawyer.com
MOMBACH, BOYLE, HARDIN & SIMMONS, P.A.
100 NE Third Avenue,
Suite 1000
Fort Lauderdale, Florida 33301
Telephone: (954) 467-2200

-and-

BRUCE S. ROGOW
Florida Bar No. 067999
brogow@rogowlaw.com
BRUCE S. ROGOW, P.A.
P.O. Box 749
Cedar Mountain, NC 28718

TARA A. CAMPION
Florida Bar No. 90944
tcampion@rogowlaw.com
BRUCE S. ROGOW, P.A.
1199 S. Federal Hwy., #212
Boca Raton, FL 33432
Counsel for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the court via the Florida Courts E-filing Portal on September 12, 2023, which will transmit a service copy to all counsel of record listed below.

Elliot B. Kula, Esq.
W. Aaron Daniel, Esq.
KULA & ASSOCIATES, P.A.
Counsel for Appellant/Cross-Appellees
John W. Schmitz and Lucila Schmitz
11900 Biscayne Blvd., Ste. 310
Miami, FL 33181
eservice@kulalegal.com
elliott@kulalegal.com
aaron@kulalegal.com
william@kulalegal.com

Alejandro Brito, Esq.
Cecilia S. Miranda, Esq.
BRITO, PLLC
Counsel for Plaintiffs/Counter-Defendants
John and Lucila Schmitz
2121 Ponce de Leon Boulevard
Suite 650
Coral Gables, FL 33134
abrito@britopllc.com
cmiranda@britopllc.com
apiriou@britopllc.com

Deborah Baker, Esq.
GREENSPOON MARDER, LLP
Counsel for Schmitz Development Company
600 Brickell Avenue, Suite 3600
Miami, Florida 33131
Deborah.baker@gmlaw.com
alejandra.albuerne@gmlaw.com

Jose A. Casal, Esq.
J. Raul Cosio, Esq.
Rebecca J. Canamero, Esq.
HOLLAND & KNIGHT L.L.P.
Counsel for Cheryl Schmitz, individually and as Co-Trustee of the Michael D. Schmitz GST Non-Exempt Marital Trust Dated 1/18/2000
701 Brickell Avenue, Suite 3300
Miami, Florida 33131
Jose.Casal@hklaw.com
Raul.Cosio@hklaw.com
Rebecca.Canamero@hklaw.com

/s/Michael P. Hamaway
MICHAEL P. HAMAWAY
Florida Bar No.: 081302

EXHIBIT “A”

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2018-000931-CA-01
SECTION: CA44
JUDGE: Alan Fine

Schmitz Development Company et al

Plaintiff(s)

vs.

Dorothy Joan Schmitz et al

Defendant(s)

_____/

ORDER GRANTING PEACOCK REAL ESTATE, LLC'S MOTION TO PERMIT SALE OF REAL PROPERTY

THIS CAUSE came before the Court upon Non-Party Peacock Real Estate, LLC's Motion to Permit Sale of Real Property (the "Motion"), having reviewed the Motion and being otherwise fully advised in the Premises, it is hereby **ORDERED AND ADJUDGED** that:

1. The Motion is **GRANTED**.

2. Peacock Real Estate, LLC is entitled to proceed with the sale of real property located at 220 NW Peacock Boulevard, Port St. Lucie, Florida 34986 (the "Property").

3. Specifically, Peacock Real Estate, LLC is entitled to complete the requirements delineated in Schedule B-1 of the American Land Title Association Commitment prepared by Old Republic National Title Insurance Company, which is attached hereto as **Exhibit "A."**

4. The "Net Proceeds" from the sale of the Property shall be all monies received at the closing of the sale by Peacock Real Estate, LLC after the following has been paid by the closing agent: (a) the existing mortgage of approximately $600,000; (b) any outstanding taxes (or proration thereof) pertaining to the Property; (c) any outstanding fees of St. Lucie West

Commercial Association, Inc. (or proration thereof) pertaining to the Property; (d) the real estate commission due from Peacock Real Estate, LLC to SLC Commercial upon closing, none of which shall be paid to or benefit, whether directly or indirectly, John Schmitz; and (e) other standard closing costs, such as the fee(s) of the title company, the $3,500 fee to Penalver & Penalver, P.A., any and all expenses where Seller is obligated to pay in accordance to the contract and/or any prorations that may reasonably be made upon closing. A copy of this Order shall be provided by Alejandro Brito, counsel for John Schmitz, to any brokers and realtors involved in this sale, with a copy of the transmittal provided to counsel for the Judgment Creditors.

5. A copy of the fully executed closing statement shall be provided to counsel for the Judgment Creditors. The "Net Proceeds" received by Peacock Real Estate, as reflected on the closing statement, shall be deposited and held in the Brito, PLLC trust account pending further Order of the Court.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 14th day of November, 2022.

2018-000931-CA-01 11-14-2022 2:44 PM
Hon. Alan Fine

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
Alec Michael Puig, alec.puig@hklaw.com
Alec Michael Puig, julia.frow@hklaw.com
Alejandro Brito, abrito@britopllc.com

Alejandro Brito, apiriou@britopllc.com
Andrew R Herron, gservice@homerbonner.com
Carlos D Lerman, Carlos@lwlawfla.com
Carlos D Lerman, Lizbeth@lwlawfla.com
Carlos D Lerman, Ina@lwlawfla.com
Cbl Section 44 Case Mgr, cbl44@jud11.flcourts.org
Cecilia Sofia Miranda, cmiranda@britopllc.com
Cora L. Lane, clane@burr.com
Cora Lane, WF.FL.Garnishment@burr.com
Cora Lane, clane@burr.com
Cristina Alonso, alonso@alonsoappeals.com
Cristina Alonso, cschmidle@alonsoappeals.com
David R. Softness, david@softnesslaw.com
David R. Softness, mari@softnesslaw.com
Deborah Bari Baker, deborah.baker@gmlaw.com
Deborah Bari Baker, alejandra.albuerne@gmlaw.com
Diana Carolina de Flores, LegalDepartment@citynational.com
Diana Carolina de Flores, Diana.deFlores@citynational.com
J Raul Cosio, raul.cosio@hklaw.com
J Raul Cosio, elaine.starling@hklaw.com
Jacky Beda, jbeda@zarcolaw.com
Jacky Beda, sarrastia@zarcolaw.com
Jason R Alderman, jalderman@thealdermanlawfirm.com
Jason R Alderman, cpengel@thealdermanlawfirm.com
Jason R Alderman, service@thealdermanlawfirm.com
Jose A Casal, jose.casal@hklaw.com
Jose A Casal, josie.vila@hklaw.com
KIM ARTHUR, Kim@frankelpa.com
Michael P. Hamaway Esq., mhamaway@mbhlawyer.com
Michael P. Hamaway Esq., tperez@mbhlawyer.com
Patrick Hayden Lane, plane@bml.law
Rachel Elizabeth Walker, rachel.walker@gmlaw.com
Rebecca J. Canamero, rebecca.canamero@hklaw.com
Rebecca J. Canamero, carla.cosio@hklaw.com
Rebecca J. Canamero, denise.perlich@hklaw.com
Robert P. Frankel, robert@frankelpa.com
Robert P. Frankel, documents@frankelpa.com
Robert P. Frankel, lana@frankelpa.com
Ronald Gache, rgache@logs.com
Ronald Gache, ssimon@logs.com
Ronald Gache, jcosner@logs.com
Seth Andrew Kupilik, skupilik@mbhlawyer.com
Seth Andrew Kupilik, tperez@mbhlawyer.com
Stephen J. Simmons, ssimmons@mbhlawyer.com
Stephen J. Simmons, daurand@mbhlawyer.com
Stephen J. Simmons, cromain@mbhlawyer.com
Stuart I. Grossman, sig@lklsg.com

Stuart I. Grossman, acd@lklsg.com
William E Pruitt, jknight@pruittpruittlaw.com
William Patrick Ayers, WF.FL.GARNISHMENT@BURR.COM

Physically Served:

EXHIBIT “B”

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2018-000931-CA-01
SECTION: CA44
JUDGE: Alan Fine

Schmitz Development Company et al

Plaintiff(s)

vs.

Dorothy Joan Schmitz et al

Defendant(s)

_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court on July 28, 2022, August 2, 2022, and August 18, 2022, for an evidentiary hearing on the following motions: (1) Lucila Schmitz and John W. Schmitz's Motion to Return Stock Certificates Not Subject to Levy; (2) the Judgment Creditors' Joint Motion for Proceedings Supplementary as to Schmitz Realty Company, Schmitz Properties, Inc., and John W. Schmitz, II; (3) Schmitz Realty Company's Motion to Permit Disbursement of Escrowed Sale Proceeds; and (4) the Judgment Creditors' Motion for Charging Order.

THE COURT, having considered the record, having taken testimony, having heard argument of counsel, and having considered the applicable law, it is hereupon

ORDERED AND ADJUDGED as follows:

I. Background Facts and Procedural History

1. On April 8, 2021, following a non-jury trial, this Court entered an Amended Final Judgment in the above-styled cause in favor of the Judgment Creditors and against Judgment Debtor, John W. Schmitz, in the total amount of $4,512,908.55, plus interest at the rate(s) provided for by Section 55.03, Florida Statutes. The Amended Final Judgment remains unsatisfied

and is not currently the subject of a motion for new trial, a motion for rehearing, or a stay on appeal of the Amended Final Judgment.

2. On April 14, 2021, the following judgment lien certificates were filed against John W. Schmitz with the Florida Department of State, which judgment lien certificates remain unsatisfied:

    a. Document Number J21000162242 in the amount of $566,804.09, plus interest;

    b. Document Number J21000162259 in the amount of $566,804.09, plus interest; and

    c. Document Number J21000162267 in the amount of $3,496,104.46, plus interest.

3. On August 18, 2021, the Judgment Creditors obtained Executions to enforce the Amended Final Judgment from the Clerk of the Court. The Executions are valid and outstanding.

A. Facts Pertinent to the Motion to Return Share Certificates Not Subject to Levy

4. On August 18, 2021, this Court entered a Break Order authorizing the Miami-Dade County Sheriff to enter John and Lucila Schmitz's residence in order to levy upon the following property: "Any and all stock certificates of Schmitz Realty Company, however titled" and "Any and all stock certificates containing the name JOHN W. SCHMITZ, however titled."

5. In accordance with the Break Order, the Miami-Dade County Sheriff seized the following stock/membership certificates, which certificates are currently in the possession of the Sheriff:

    a. Membership Certificate No. 1 for Peacock Real Estate, LLC, titled in the name of Schmitz Properties, Inc. (Counter-Defendants' Exhibit 13)

b. Stock Certificate No. 3 for Schmitz Properties, Inc., titled in the name of the John W. Schmitz, II Trust (Counter-Defendants' Exhibit 6)

c. Stock Certificate No. 1 for Schmitz Properties, Inc., titled in the name of the Alexandra Schmitz Trust (Counter-Defendants' Exhibit 7)

d. Stock Certificate No. 4 for Schmitz Development Company, titled in the name of John W. Schmitz and Lucila Schmitz in joint trust with right of survivorship (Counter-Defendants' Exhibit 12)

e. Stock Certificate No. 1 for Schmitz Realty Company, titled in the name of John W. Schmitz and Lucila Schmitz [in] joint trust with right of survivorship (Counter-Defendants' Exhibit 2)

f. Stock Certificate No. 31 for Schmitz Oil Company, titled in the name of John W. Schmitz and Lucila Schmitz (Counter-Defendants' Exhibit 4)

g. Membership Certificate No. 1 for SDC St. Lucie Partners, LLC, titled in the name of Schmitz Realty Company (Counter-Defendants' Exhibit 11)

h. Membership Certificate No. 1 for American Hospitality, LLC, titled in the name of Schmitz Realty Company (Counter-Defendants' Exhibit 10)

i. Stock Certificate No. 1 for Schmitz Development Company, titled in the name of John W. Schmitz (Counter-Defendants' Exhibit 5)

j. Stock Certificate No. 1 for John W. Schmitz, P.A., titled in the name of John W. Schmitz (Counter-Defendants' Exhibit 3)

6. On August 31, 2021, John and Lucila Schmitz filed their Motion to Return Stock Certificates

Not Subject to Levy. On September 20, 2021, John and Lucila Schmitz filed a Supplement to Their Motion to Return Stock Certificates Not Subject to Levy. With the exception of Stock Certificate No. 1 for John W. Schmitz, P.A., which is owned by John W. Schmitz, individually, John and Lucila Schmitz claimed that the certificates were either owned by John and Lucila Schmitz as tenants by the entireties, or by non-judgment debtors, and were thus not subject to execution.

7. Notably, John W. Schmitz did not comply with the requirements of Section 56.15, Florida Statutes, which states:

> If any execution issues illegally, the judgment debtor may obtain a stay by making and delivering an affidavit to the officer having the execution, stating the illegality and whether any part of the execution is due, with a bond with surety payable to the judgment creditor in double the amount of the execution or the part of which a stay is sought conditioned to pay the execution or part claimed to be illegal and any damages for delay if the affidavit is not well founded. On receipt of such affidavit and bond the officer shall stay proceedings on the execution and return the bond and affidavit to the court from which the execution issued. The court shall pass on the question of illegality as soon as possible. If the execution is adjudged illegal in any part, the court shall stay it as to the part but if it is adjudged legal in whole or in part, the court shall enter judgment against the principal and surety on such bond for the amount of so much of the execution as is adjudged to be legal and execution shall issue thereon.

8. Similarly, neither Lucila Schmitz, the purported "Joint Trust with Right of Survivorship," nor any other person or entity claiming ownership of the certificates complied with the requirements of Section 56.16, Florida Statutes, which states:

> If any person, including a person to whom a Notice to Appear has been issued pursuant to s. 56.29(2), other than the judgment debtor claims any property levied on, he or she may obtain possession of the property by filing with the officer having the execution an affidavit by the claimant, or the claimant's agent or attorney, that the property claimed belongs to the claimant and by furnishing the officer a bond with surety to be approved by the officer in favor of the judgment creditor in double the value of the goods claimed as the value is fixed by the officer and conditioned to deliver said property on demand of said officer if it is adjudged to be the property of

the judgment debtor and to pay the judgment creditor all damages found against the claimant if it appears that the claim was interposed for the purpose of delay.

9. No party filed an affidavit with the Miami-Dade County Sheriff claiming that the Execution was improperly issued or claiming ownership of the certificates, nor did any party post a bond as contemplated by the foregoing statutes.

B. <u>Facts Pertinent to the Joint Motion for Proceedings Supplementary</u>

10. Despite the able efforts of counsel for the Judgment Debtors, the evidence submitted during the evidentiary hearings conducted by the Undersigned, and considering the findings of fact made by the predecessor judge) reveals duplicitous conduct rarely seen in the light of day.

11. On December 17, 2019, just one month prior to the trial in this cause, John W. Schmitz caused Schmitz Properties, Inc. to sell the commercial property located at 835 W. Main Street, Lewisville, Texas 75067 (the "Lewisville Property") to an unrelated third party, ostensibly as part of a Section 1031 tax-deferred exchange.

12. At the time of the sale, John W. Schmitz was an officer, director, and shareholder of Schmitz Properties, Inc. John and Lucila Schmitz had obtained a 50% shareholder interest in Schmitz Properties, Inc. from their son, John W. Schmitz, II ("John Jr."), who had transferred the shares to them "in joint trust with right of survivorship" on or about April 7, 2010. (*See* Counter-Plaintiffs' Exhibits 29 and 30). However, on December 31, 2019, immediately following the sale of the Lewisville Property (and less than a month before trial), John W. Schmitz transferred the 50% shareholder interest back to John Jr. (*See* Counter-Plaintiffs' Exhibit 33).

13. Following John W. Schmitz's transfer of the 50% interest in Schmitz Properties, Inc. to his son, on April 3, 2020 (less than two months after trial), John W. Schmitz then caused his Florida real estate brokerage company, Schmitz Realty Company, to sell to Schmitz

Properties, Inc. 100% of the membership interests of Peacock Real Estate, LLC, which owns the property located at 220 NW Peacock Boulevard, Port St. Lucie, Florida 34986 (the "Peacock Property").

14. At the time of the above-referenced transfers, John W. Schmitz was indebted to the Judgment Creditors in an amount in excess of three million dollars.

C. Facts Pertinent to the Motion to Permit Disbursement of Escrowed Sale Proceeds

15. On August 25, 2021, the Judgment Creditors filed a Motion to Escrow Sale Proceeds Pending Determination of Proceedings Supplementary. By way of their Motion, the Judgment Creditors sought the entry of an order directing that certain sale proceeds (which Schmitz Realty Company was set to receive upon the sale of real property in Port St. Lucie, Florida) be held in escrow pending this Court's determination on the proceedings supplementary. Because Schmitz Realty Company holds a 20% membership interest in the seller entity, St. Lucie Hospitality, LLC, and because, as discussed, *infra*, John W. Schmitz's shareholder interest in Schmitz Realty Company was subject to execution (and was the subject of the Court's Break Order), the Judgment Creditors argued that funds should be held in escrow pending a final disposition of the Schmitz Realty Company shares.

16. On September 10, 2021 (after the Schmitz Realty Company share certificate had been levied upon), the Court entered its Order Granting Motion to Escrow Sale Proceeds Pending Determination of Proceedings Supplementary, directing that "[a]ny sale proceeds owed, or due to be paid to, John W. Schmitz and/or Schmitz Realty Company from St. Lucie Hospitality, LLC's sale of the property located at 1901 NW Courtyard Circle, Port St. Lucie, Florida 34986 shall be held in escrow by the closing agent pending further order of the Court." As a result, $169,031.25 in sale proceeds due and owing to Schmitz Realty Company are presently being held in the escrow account of the closing agent for the sale,

D. Facts Pertinent to the Motion for Charging Order

17. On October 26, 2021, the Judgment Creditors filed a Motion for Charging Order, seeking the entry of a charging order against John W. Schmitz's stated five percent membership interest in American Hospitality, LLC, and directing that American Hospitality, LLC pay over to the Judgment Creditors any and all distributions from American Hospitality, LLC that would otherwise be paid to John W. Schmitz.

18. At the hearing, the Judgment Creditors presented unrebutted evidence in the form of American Hospitality, LLC's Schedule K-1's for 2020, reflecting that John W. Schmitz owns a five percent membership interest in American Hospitality. (Counter-Plaintiffs' Exhibit 99). John W. Schmitz's testimony confirmed the existence of the membership interest:

Q. Mr. Schmitz, I'm going to show you what has been admitted into evidence as Exhibit 99. The K-1's for American Hospitality, LLC show Schmitz Realty Company as a 90 percent owner, correct?

A. Yes.

Q. And then if you turn further into the K-1 that's issued to you, that reflects you, John W. Schmitz individually as a five percent owner, correct?

A. Yes.

II. Conclusions of Law as to the Motion to Return Share Certificates Not Subject to Levy and the Alleged "Joint Trust with Right of Survivorship"

A. The Alleged "Joint Trust with Right of Survivorship"

19. Throughout this case, John and Lucila Schmitz have consistently alleged that their shares in Schmitz Development Company, Schmitz Realty Company (which previously owned 100% of the membership interests in Peacock Real Estate, LLC and owns 90% of the membership interests in American Hospitality, LLC (*see* Counter-Plaintiffs' Exhibit 99)), and Peacock Real Estate, LLC were owned by John W. Schmitz and Lucila Schmitz "in joint trust with right of survivorship." (*See*, e.g., Counter-Plaintiffs' Exhibit 28).

20. John W. Schmitz testified that he used the term "joint trust with right of survivorship" on the share certificates in reliance on a Merrill Lynch bank statement dated December 31, 1980, showing an account held in the name of "Mr. John W. Schmitz & Mrs. Lucila Schmitz JTWROS." (Counter-Defendants' Exhibit 23). However, on the evidence presented – the testimony of Mr. Schmitz and the Merrill Lynch documentation provided, including the definitional sections – the Court finds that the "JTWROS" acronym contained on the Merrill Lynch statement stands for "Joint Tenants with Right of Survivorship." For that reason, and those that follow, it is the Court's finding that the Schmitz Realty Company shares and the Schmitz Properties, Inc. shares are owned by John W. Schmitz and Lucila Schmitz as joint *tenants* with right of survivorship.

21. To establish a joint tenancy, there must be four unities present: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests must be identical); (3) unity of title (the interests must have originated in the same instrument); and (4) unity of time (the interests must have commenced simultaneously). *See Beal Bank SSB v. Almand and Associates*, 780 So. 2d 45, 52-53 (Fla. 2001). As to the Schmitz Realty Company and Schmitz Properties, Inc. shares, the Court finds that the four unities are present.

22. This Court rejects John and Lucila Schmitz's assertion that the share certificates are actually owned by them as tenants by the entireties. There can be no tenancy by the entireties where there is express language showing a contrary intent. *See In re Suggs' Estate,* 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981) ("A conveyance to spouses as husband and wife creates an estate by the entirety in the absence of express language showing a contrary intent."). Titling the share certificates in the name of John W. Schmitz and Lucila Schmitz in joint trust with right of survivorship, coupled with John W. Schmitz's testimony that it was his belief that he was creating a trust upon doing so, is clear evidence of contrary intent and precludes a finding that the shares are held as tenants by the entireties.

23. Additionally, the evidence established that John W. Schmitz, a lawyer, was and is aware of what a tenancy by the entireties is and that it is distinguishable from any other form of joint ownership. Just by way of example, in the Fact Information Sheet that John W. Schmitz completed pursuant to the Amended Final Judgment, he asserted that all of his bank accounts were held "in tenancy by the entireties ***or*** in joint trust with right of survivorship by John W. Schmitz and Lucila Schmitz." (Counter-Plaintiffs' Exhibit 35) (emphasis supplied). Similarly, he claimed that any real estate that he owned was held "directly or indirectly with [his] wife in joint trust with right of survivorship ***or*** in tenancy by the entireties." (*Id.*) (emphasis supplied).

24. Despite issuing the shares in the name of the "joint trust with right of survivorship," the Court finds that John W. Schmitz failed to create a valid trust. First, a "joint trust with right of survivorship" is neither a trust recognized by the Florida Trust Code, Section 736.0101-1512, Florida Statutes, nor a form of joint ownership recognized either at common law or by the Florida Statutes. Second, given John W. Schmitz's concession that there is no written trust agreement establishing the "joint trust with right of survivorship," it could only be an oral trust, the existence of which John and Lucila Schmitz failed to prove by clear and convincing evidence. *See* § 736.0407, Florida Statutes ("[A] trust need not be evidenced by a

trust instrument but the creation of an oral trust and its terms may be established only by clear and convincing evidence."). To the contrary, Lucila Schmitz herself testified at the hearing that "[t]here's no trust." Third, in order to create a valid trust, there must be a trustee. *See Bay Biscayne Co. v. Baile*, 75 So. 860, 868 (Fla. 1917) ("In order to create the trust . . . there must be a trustee."). At the hearing, however, John W. Schmitz testified that there is no trustee of the alleged "joint trust with right of survivorship." Accordingly, the alleged "joint trust with right of survivorship" fails as a matter of law.

25. Thus, this Court finds that there is no "joint trust with right of survivorship," and that the Schmitz Realty Company and Schmitz Properties, Inc. shares are owned by John W. Schmitz and Lucila Schmitz as joint tenants with right of survivorship. John W. Schmitz's shareholder interests in Schmitz Realty Company and Schmitz Properties, Inc. are subject to execution. *See Hurlbert v. Shackleton*, 560 So. 2d 1276, 1278 (Fla. 1st DCA 1990) ("A joint tenant whose interest is w.r.o.s. has an interest that is subject to execution on a judgment lien."). Accordingly, John and Lucila Schmitz's Motion to Return Share Certificates Not Subject to Levy is **DENIED** with respect to Stock Certificate No. 1 for Schmitz Realty Company, titled in the name of John W. Schmitz and Lucila Schmitz [in] joint trust with right of survivorship. (Counter-Defendants' Exhibit 2). Within 20 days, John W. Schmitz, as President of Schmitz Realty Company, shall mark Stock Certificate No. 1 cancelled in the Schmitz Realty Company stock ledger and issue two new share certificates for Schmitz Realty Company: one share certificate representing 500 shares and titled in the name of John W. Schmitz, and another share certificate representing the remaining 500 shares and titled in the name of Lucila Schmitz, and deliver the share certificate representing his 500 shares to the Miami Dade County Sheriff to be sold, together with Stock Certificate No. 1, in partial satisfaction of the Amended Final Judgment..

B. <u>The Schmitz Development Company Shares Are Not Held in a Joint Tenancy</u>

26. The record evidence demonstrates that Schmitz Development Company ("SDC") was previously owned in three equal parts of 33 1/3% by: (a) Thomas Schmitz, (b) Michael D. Schmitz, and (c) John W. Schmitz.

27. In or about February 18, 2000, Thomas Schmitz, Michael D. Schmitz and John W. Schmitz all signed an Amendment to the SDC Shareholders Agreement which reflected the agreement of all shareholders of SDC that John was permitted and entitled to jointly own his interests in SDC with his wife, Lucila. *See* Pl's Ex 54.

28. The 2000 Amendment to the Shareholders Agreement expressly states "John may transfer his shares in the Company (the 'Shares') to John W. Schmitz and Lucila Schmitz, his wife, in joint trust with right of survivorship . . ." *Id.*

29. After Thomas Schmitz and Michael Schmitz passed away, the ownership of SDC was owned in three equal parts of 33 1/3% by:

a. Dorothy Joan Schmitz, individually and as the Executrix of the Estate of Thomas Schmitz and in her claimed capacity as Trustee of the Thomas Schmitz Family Trust;

b. Cheryl Schmitz, individually and as Co-Trustee of the Michael D. Schmitz GST Non-Exempt Marital Trust Dated 1/18/2000, and The Northern Trust Company, as Co-Trustee of the Michael D. Schmitz GST Non-Exempt Marital Trust Dated 1/18/2000; and

c. John Schmitz and Lucila Schmitz, in Joint Trust with Right of Survivorship.

30. Unlike the share certificates referenced in paragraph 24 above, this Court finds that Stock Certificate No. 4 for Schmitz Development Company, titled in the name of John W. Schmitz and Lucila Schmitz in joint trust with right of survivorship, cannot, as a matter of law, be owned as joint tenants with right of survivorship. Again, to establish a joint tenancy, there must be four unities present: (1) unity of possession (joint ownership and control); (2) unity

of interest (the interests must be identical); (3) unity of title (the interests must have originated in the same instrument); and (4) unity of time (the interests must have commenced simultaneously). *See Beal Bank,* 780 So. 2d at 52-53. Here, evidence was presented that John W. Schmitz was the original owner of the one-third shareholder interest in Schmitz Development Company, having received 333 and 1/3rd shares in his own name on May 29, 1992. (*See* Counter-Plaintiffs' Exhibit 53). Evidence was presented, and the Court finds, that the transfer of John W. Schmitz's shareholder interest to John W. Schmitz and Lucila Schmitz in joint trust with right of survivorship was conditioned upon Lucila Schmitz not having any right to vote the shares. (*See* Counter-Defendants' Exhibit 54). Thus, the unity of interest is likewise lacking.

31. In addition to the foregoing findings showing why the Schmitz Development Company shares cannot be held in a joint tenancy, this Court cannot ignore John W. Schmitz's own testimony that, by titling the shares in the name of John W. Schmitz and Lucila Schmitz in joint trust with right of survivorship, it was his belief that he was creating a trust. Nor can this Court ignore that, with respect to the Schmitz Development Company shares, John W. Schmitz testified that he was the "settlor" of the "joint trust with right of survivorship":

> **Q. Who was the settlor of the trust?**
>
> A. It varies. In the case of Schmitz Realty Company, it was my wife and I because we both were incorporators of the company and then we're at [sic] shareholders of the company from the inception.
>
> In the case of Schmitz Development Company, it's different, because I was the owner of the shares prior to my transfer of the shares to John and Lucila with right of survivorship.
>
> **Q. Meaning you were the ultimate settlor of the trust as it relates to that**

particular stock certificate?

A. Yes.

Q. And you are saying that each time you sign a stock certificate you are creating a new trust?

A. I thought so.

32. The court finds that no trusts were created. The law is clear that where an owner of property attempts to make a transfer in trust, but the intended transfer is not effective, no express trust is created, and the property remains in the owner free of trust. *See* Restatement (Third) of Trusts § 16 cmt. b (2022); *see also Flinn v. Van Devere*, 502 So. 2d 454 (Fla. 3d DCA 1986) (Property owned by decedent was not validly transferred to trust she established during her lifetime and thus remained an asset of her estate). This Court has already determined that there is no "joint trust with right of survivorship" and thus, John W. Schmitz's attempt to transfer the shares into the "joint trust" necessarily fails. Accordingly, the Court finds that because John W. Schmitz's attempt to transfer his shareholder interest in Schmitz Development Company into trust failed, the shares remain the sole property of John W. Schmitz.

33. Finally, principles of judicial estoppel preclude this Court from making a finding that the Schmitz Development Company shares are owned by John W. Schmitz and Lucila Schmitz as joint tenants with right of survivorship. The doctrine of judicial estoppel provides that "[o]ne who assumes a particular position or theory in a case is judicially estopped in a later phase of that same case, or in another case, from asserting any other or inconsistent position toward the same parties and subject matter." *Whittingham v. HSBS Bank USA, NA as Trustee*

for Holders of Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-OA1, 275 So. 3d 850, 852 (Fla. 5th DCA 2019) (citations omitted). In Florida, judicial estoppel encompasses the following four elements:

> [1] A claim or position successfully maintained in a former action or judicial proceedings [2] bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, [3] to the prejudice of the adverse party, [4] where the parties are the same in both actions, subject to the "special fairness and policy considerations" exception to the mutuality of parties requirement.

Salazar-Abreu v. Walt Disney Parks and Resorts U.S., Inc., 277 So. 3d 629, 631 (Fla. 5th DCA 2018) (citation omitted). Those elements are clearly met here.

34. As to the first element (successfully maintaining a claim or position), John and Lucila Schmitz successfully maintained their prior position that Lucila Schmitz had no independent basis – other than through the "joint trust with right of survivorship" – to claim ownership of the Schmitz Development Company shares. Despite finding that Lucila Schmitz had "participated in, benefited from, and assisted in concealing [John W. Schmitz's] various acts of misconduct," the trial court declined to enter judgment against her and/or to impose a constructive trust over her alleged interest in the shares, limiting its constructive trust remedy to "the shares of stock in Schmitz Development Company ***owned by John Schmitz***." (Emphasis supplied).

35. At the March 12, 2021, hearing in this cause, this Court made clear that had Lucila Schmitz alleged that she had any direct interest in the shares, ***it would have extended the scope of the constructive trust to reach that interest***:

> MR BRITO: It's our position, Judge, that Your Honor entered an order which imposed the constructive trust on John's shares. It is our position based upon the record evidence, and we've attached the documents to [our] motion as well, that John and

his two brothers, while they were alive, signed a document that is unchallenged, that specifically stated that John could transfer his shares into a trust held by him and his wife jointly with the right of – by the entirety.

* * *

Irrespective of that, they now want to say, Well we can go after "John's shares," quote/unquote, when in reality it's not John's shares. John has an interest in that trust which owns the shares . . .

* * *

THE COURT: What I'm hearing – but what I'm hearing, and I find it to be interesting is, is that, you know, Mr. Casal seems to think that somehow Mr. John Schmitz has set up a situation where he's holding his assets, the stocks in trust, and he's taking the position that you can't get access to them because they're part of a trust, which means that my judgment becomes absolutely meaningless, because he will never have to pay a dime, because all of the – all of his shares are held in trust.

I don't remember – and again, I asked the question about this trust that I think Lucila Schmitz – I think at some point somebody argued that she owns a portion of the company. Because I didn't enter a judgment against Lucila Schmitz, because I said there's no basis for me to enter that judgment.

So I was thinking to myself, well, what is the basis for me to enter a judgment? And I asked about this quote/unquote, "trust," and whether or not there was evidence that it existed. And I think the answer I got was that there is no evidence that it exists.

And so if that is, in fact, the answer, if, in fact, there was a trust, and those assets were in a trust, then I needed to really know that so that when I was making my decision, my decision was – because in other words – and, I'm sorry, I'm mentally kind of correcting myself, I wouldn't have created a situation where John Schmitz was never going to be put in a position to ever pay back the money that I find that he improperly took from the company. Why would I ever do that?

* * *

MR. BRITO: Your Honor's question to me was, does Lucila own shares through any independent [means]? That, to me, means did she acquire shares in her own individual name separate and apart from what's been presented to the court?

And the answer then and the answer now is the same. The answer is no, she did not buy in, or was awarded, or was given shares in Schmitz Development Company in her individual name. That has never been the case and that's the truth . . .

* * *

THE COURT: Well, the other thing I also need to make clear and express to you what my intentions were, I – if I had known, and I'm just being very candid, because I try to let you all know what I'm thinking. If I had known that the judgment was not going to be executed against the shares of John Schmitz, I'm not sure whether or not my decision would have been different in several regards.

> I'm being honest. I did not know – and the only reason I ask that question wasn't even for John, ***it was so I could determine whether or not there was something that I could – that I could levy against Lucila Schmitz. Because from what I understood, she – she had no independent ownership interest in terms of the shares. And so there was no need for me to impose a constructive trust as it relates to her***, and that's why I asked it.

(Emphasis supplied).

36. A similar colloquy occurred at the March 23, 2021, hearing, with the Court expressing that had Lucila Schmitz alleged that she had an interest in the shares, ***it would entered judgment against her***:

> THE COURT: What I don't understand, Mr. Brito, is that – doesn't there have to by some outward objective manifestation that these are how the shares are being held? In other words, are you suggesting to me that there doesn't have to be an actual trust instrument where the shares are being held? It's just that John and Lucila have to basically understand that that's the way the shares are being held[?]
>
> And it doesn't matter if nobody else understands that the shares were transferred and that's how they're being held because I don't remember – and I'm saying that I don't remember anybody arguing any of this to me or anybody presenting to me – even when I asked a question – I asked a question. And I said, Is there any evidence in this record that there is a trust?
>
> And I think – and, again, I think nobody said to me, yes, there is. These shares are being held in a trust, and here's our evidence that the shares are being held in a trust. ***And it's why I didn't take any action as it relates to – well, actually it's – why I declined to take any action [as] to Lucila, I believe, is because nobody told me she owned anything or had any***

right to anything and – but I'm sorry, Mr. Brito, to interrupt you.

MR. BRITO No. It's perfectly fine, Your Honor. And just to kind of drill down on what you just said, what I think Your Honor had asked was in relation to whether or not Lucila Schmitz had any independent basis for ownership of shares. And so we have not played hide the ball with respect to the existence of the trust.

* * *

I interpreted your question a little differently in terms of does Lucila have an independent basis, and she does not. The only basis upon which she has ownership, if you will, is through this trust. ***She does not independently from the trust own any shares.*** The trust owns the shares. That has been since the case was initiated before I was even involved. And so that's where I think the Court was focusing on in making a determination thereafter. ***But it really wasn't is there a trust, but rather does Lucila have shares in her own name, and that is still none. She does not have shares in her name.***

(Emphasis supplied).

37. While this Court previously rejected John and Lucila Schmitz's claims regarding the alleged "joint trust with right of survivorship," it relied upon their arguments both as to the trust's existence and that Lucila Schmitz did not have a direct ownership interest in the Schmitz Development Company shares in failing to impose a constructive trust over her alleged shareholder interest. This Court imposed a constructive trust over "the shares of stock in SDC owned by John Schmitz" to secure the repayment of the millions of dollars owed by John W. Schmitz to the Judgment Creditors. It did not intend for Lucila Schmitz to reap the

benefits attendant to being a shareholder in the company, as she would if this Court determines that she owns a 50% interest in the shares. This Court declines to disturb its prior ruling.

38. As to the second element (taking a clearly conflicting position), John and Lucila Schmitz have clearly taken an inconsistent position with respect to how the Schmitz Development Company shares are held. They initially claimed that the shares were owned in "joint trust with right of survivorship," then testified at the hearing that the shares are held as tenants by the entireties. A finding that the shares are held as joint tenants with right of survivorship would be legally erroneous and would reward John and Lucila Schmitz for taking shifting, inconsistent positions.

39. As to the third element (prejudice to the adverse party), the prejudice that will result to the Judgment Creditors if this Court finds that the shares are owned by anyone other than John W. Schmitz, individually, would be profound. The effectiveness of a constructive trust, which was intended to ensure John W. Schmitz's satisfaction of the Amended Final Judgment, would be severely hampered and the likelihood of the Judgment Creditors collecting upon their judgment would be greatly diminished. The third element is also met.

40. Finally, as to the fourth element (the parties are the same), judicial estoppel applies not just to subsequent proceedings, but also, ". . . in a later phase of th[e] same case . . ." *Whittingham*, 275 So. 3d at 852 (citations omitted). The fourth element is met as well.

41. For all of these reasons, this Court finds that Stock Certificate No. 4 for Schmitz Development Company, titled in the name of John W. Schmitz and Lucila Schmitz in joint trust with right of survivorship, is owned by John W. Schmitz, individually. Accordingly, John and Lucila Schmitz's Motion to Return Share Certificates Not Subject to Levy is **DENIED** as to this share certificate. The Court directs that the Miami Dade County Sheriff conduct a sheriff sale with respect to Stock Certificate No. 4 in partial satisfaction of the

Amended Final Judgment.

C. The Remaining Stock/Membership Certificates

42. As to the remaining stock/membership certificates, John and Lucila Schmitz's Motion to Return Share Certificates Not Subject to Levy is **DENIED** as to those membership certificates owned by Schmitz Realty Company, namely, Membership Certificate No. 1 for SDC St. Lucie Partners, LLC, and Membership Certificate No. 1 for American Hospitality, LLC. In addition to Schmitz Realty Company's failure to comply with Section 56.16, Florida Statutes, this Court has determined that John W. Schmitz's shareholder interest in Schmitz Realty Company is subject to execution, and the purchaser of that interest at sheriff's sale will ultimately obtain an interest in these entities as well. As such, and so as to prevent any further transfers of executable assets, this Court directs that the Miami Dade County Sheriff retain these membership certificates pending further order of this Court. Additionally, and for the reasons discussed *infra*, John and Lucila Schmitz's Motion to Return Share Certificates Not Subject to Levy is **DENIED** with respect to Membership Certificate No. 1 for Peacock Real Estate, LLC, which was fraudulently transferred from Schmitz Realty Company to Schmitz Properties, Inc. This Court likewise directs that the Miami Dade County Sheriff retain this membership interest pending further order of the Court.

43. As to Stock Certificate No. 1 for John W. Schmitz, P.A., titled in the name of John W. Schmitz, individually, John and Lucila Schmitz argue that the share certificate cannot be sold at auction because John W. Schmitz, P.A. is a law firm (because there is a possibility that it might be sold to a non-lawyer). That is incorrect. Rule 4-1.17 of the Rules Regulating the Florida Bar applies only where a lawyer or law firm seek to sell a law practice, ***not*** in the case of a forced sale conducted to satisfy a levying creditor's judgment. *See Street v. Sugerman*, 202 So. 2d 749 (Fla. 1967). As a result, John and Lucila Schmitz's Motion to Return Share Certificates Not Subject to Levy is **DENIED** as to this share certificate. The

Court directs that the Miami Dade County Sheriff conduct a sheriff sale with respect to Stock Certificate No. 1 in partial satisfaction of the Amended Final Judgment.

44. The remaining share certificates are either no longer operative share certificates (Counter-Defendants' Exhibits 5, 6, 7) or, in the case of Stock Certificate No. 31 for Schmitz Oil Company (Counter-Defendants' Exhibit 4), are share certificates for a defunct entity. As a result, John and Lucila Schmitz's motion for the return of these share certificates be returned is therefore denied as moot. Additionally, and as set forth above, no party claiming ownership of these share certificates complied with Sections 56.15 or 56.16, Florida Statutes, by filing an affidavit with the Miami Dade County Sheriff and posting a bond. Accordingly, John and Lucila Schmitz's Motion to Return Share Certificates Not Subject to Levy is **DENIED** as to Stock Certificate No. 3 for Schmitz Properties, Inc., titled in the name of the John W. Schmitz, II Trust, Stock Certificate No. 1 for Schmitz Properties, Inc., titled in the name of the Alexandra Schmitz Trust, Stock Certificate No. 31 for Schmitz Oil Company, titled in the name of John W. Schmitz and Lucila Schmitz, and Stock Certificate No. 1 for Schmitz Development Company, titled in the name of John W. Schmitz. The Court directs that the Miami Dade County Sheriff conduct a sheriff sale with respect to these share certificates in partial satisfaction of the Amended Final Judgment.

III. Conclusions of Law as to the Joint Motion for Proceedings Supplementary and Schmitz Properties, Inc. and Schmitz Realty Company as the "Alter Egos" of John W. Schmitz

A. The Transfer of the Schmitz Properties, Inc. Shares

45. The Court now turns to the transfer of John and Lucila Schmitz's transfer of their 50% shareholder interest in Schmitz Properties, Inc. to their son, John Jr. As set forth above, John Jr. transferred his shareholder interest in Schmitz Properties, Inc. to John W. Schmitz and Lucila Schmitz in joint trust with right of survivorship on or about April 7, 2010. A series of letter agreements executed at or around the time of the 2010 transfer state that the transfer was made "in return for the cancellation of more than one hundred thousand dollars of [John Jr.'s] debts to [his] parents, John W. Schmitz and Lucila Schmitz," and obligated John Jr. to pay John and Lucila Schmitz "$100,000, plus 5% annual interest" in order to exercise his "ongoing option" to repurchase the shares. (Counter-Plaintiffs' Exhibits 30 and 32). At the hearing, however, John Jr. testified that he did not owe $100,000 to his parents and that the cancellation of the alleged debts "really didn't happen."

46. While John Jr. testified that he had *later* incurred a debt with his parents, his claim that "[his] debt to [his] parents was satisfied" because he had "assigned" certain payments that he had been receiving from Schmitz Properties, Inc. to John and Lucila Schmitz is not logical or credible that there was a repayment. (Counter-Plaintiffs' Exhibit 62). At the hearing, John Jr. conceded that these payments were shareholder dividend payments and that, following the transfer, he was no longer entitled to receive them:

Q. And you would agree with me, after you transferred your shares to your parents pursuant to this agreement, you no longer were entitled to receive the dividends that you had previously been receiving, correct?

A. Correct.

Q. And in fact, from this point forward you stopped receiving those dividends, correct?

A. Correct.

47. At the hearing, John and Lucila Schmitz claimed that there had been no transfer of the shares – and thus no transfer to set aside – because the share certificate had not been endorsed over to them. Like John Jr.'s assertion that the debt owed to his parents had been "repaid," that claim is simply not credible in light of the unrebutted evidence that John and Lucila Schmitz claimed ownership of the shares in their federal tax returns from 2010 through 2019. (Judgment Creditors' Exhibits 35-43). As such, John and Lucila Schmitz, not John Jr., were the shareholders entitled to the dividend payments. Since there was no evidence of repayment, the Court finds that there was no repayment, and thus no consideration paid for the December 2019 transfer of the shares in Schmitz Properties, Inc. to John Jr.

48. Accordingly, the Court finds that the transfer of John and Lucila Schmitz's interest in Schmitz Properties, Inc. to John Jr. was a fraudulent transfer. The transfer is hereby deemed void. *See* § 56.29(3)(b), Fla. Stat. John and Lucila Schmitz as joint tenants with right of survivorship are still the owners of the shares, and the interest of John W. Schmitz is reachable. Within 20 days, John W. Schmitz, as President of Schmitz Properties, Inc., shall mark Stock Certificate No. 5 for Schmitz Properties, Inc., titled in the name of John W. Schmitz, II, cancelled in the Schmitz Properties, Inc. stock ledger and issue two new share certificates for Schmitz Properties, Inc.: one share certificate representing 250 shares and titled in the name of John W. Schmitz, and another share certificate representing 250 shares and titled in the name of Lucila Schmitz, and deliver the share certificate representing his 250 shares to the Miami Dade County Sheriff to be sold in partial satisfaction of the Amended Final Judgment.

B. The Transfer of the Peacock Real Estate, LLC Membership Interest and Schmitz Properties, Inc. and Schmitz Realty Company as the "Alter Egos" of John W. Schmitz

49. With respect to Schmitz Realty Company's transfer of its 100% membership interest in Peacock Real Estate, LLC to Schmitz Properties, Inc., for the following reasons, this Court rejects John and Lucila Schmitz's argument that simply because Schmitz Realty Company is not a judgment debtor, this transfer does not fall within the purview of Section 56.29, Florida Statutes. As set forth by the Third District Court of Appeal:

> A corporation's veil will be pierced where the corporation's controlling shareholder formed or ***used*** the corporation to defraud creditors by evading liability for preexisting obligations. . . The usual result of piercing the corporate veil is that the controlling shareholder or shareholders become liable for corporate liabilities . . . The remedy is equally available, however, to hold the corporation liable for the debts of the controlling shareholders where the shareholders have formed or used the corporation to secrete assets and thereby avoid preexisting personal liability . . . Where a creditor proves that a controlling shareholder organized or used the corporation to deceive or defraud his personal creditors, the separate corporate existence will be disregarded and the corporation shareholder will be treated as one and the same . . . once a sufficient showing has been made that the corporation is the alter ego of the debtor, the corporation is treated as the debtor and its property may be attached to ensure that the final judgment will be satisfied should the creditor ultimately prevail.

Estudios, Proyectos e Inversiones de Centro America, S.A. (EPICA) v. Swiss Bank Corp. (Overseas) S.A., 507 So. 2d 1119, 1120-21 (Fla. 3d DCA 1987) (citations omitted) (emphasis supplied).

50. To determine whether an entity can be treated as the judgment debtor's alter ego, such that the assets of the entity can be accessed to satisfy a judgment and fraudulent transfers from that entity can be treated as transfers by the judgment debtor, courts have looked at the level of control the judgment debtor exercises over the entity and the judgment debtor's use of that entity. For example, alter ego entities can include companies of which the judgment debtor is the "de facto owner" and controls the disposition of assets that were, in whole or in part, the judgment debtor's property otherwise amenable to execution. *See LB Judgment*

Holdings, LLC v. Boschetti, 271 So. 3d 115, 120 (Fla. 3d DCA 2019).

51. Here, the level of control that John W. Schmitz exercised over Schmitz Properties, Inc. and Schmitz Realty Company – the two entities involved in the 1031 exchange referenced above – was absolute. John W. Schmitz was, and still is, the President and a director in sole control of both companies. As to Schmitz Properties, Inc., Lucila Schmitz testified that John W. Schmitz "runs the company" and that he does "everything to – to make it work." She further testified that their children, the ostensible "owners" of the company, have never had role in the management of the company. That testimony was corroborated by both John Jr. and Alexandra Wenzke. As to Schmitz Realty Company, John W. Schmitz testified that he has always been the President of that company and that, for those companies for which Schmitz Realty Company is the managing member, he manages those entities in his capacity as President of Schmitz Realty Company. Again, although Lucila Schmitz is ostensibly a shareholder and director of Schmitz Realty Company, her control over the company is non-existent; she testified that when John W. Schmitz tells her to sign something, she simply signs it.

52. John W. Schmitz's absolute control over these entities was undisputed. However, this Court is mindful that control, standing alone, may be insufficient to pierce the corporate veil. It is reasonable to believe that in a situation where, as here, the husband is the primary breadwinner, the husband would manage and make decisions on behalf of the family business. Nor would the attempt to create an asset for the benefit of his children – or to transfer stock to them – at a time that he was not indebted to judgment creditors (like in 1987) be indicia of fraud. That said, this Court must look not only to the level of control that John W. Schmitz exercised over these entities, but the purposes for which they were ***used***. *See LB Judgment Holdings*, 271 So. 3d at 120 (Fla. 3d DCA 2019). As set forth above, "a corporation's veil will be pierced where the corporation's controlling shareholder formed

or used the corporation to defraud creditors by evading liability for preexisting obligations." *EPICA*, 507 So. 2d at 1120 (emphasis added). This is because courts recognize that a judgment creditor "need not stand by as a judgment debtor transfers or controls assets in a scheme to avoid the application of the assets to the judgment debt." *LB Judgment*, 271 So. 3d at 121. In the context of proceedings supplementary, courts have explained that "in cases alleging alter ego liability, the description requirement of section 56.29(2) is satisfied if the judgment creditor describes any property of an alter ego of the judgment debtor not exempt from execution in the hands of any person, or any property, debt, or other obligation due to an alter ego of the judgment debtor which may be applied toward the satisfaction of the judgment." *Longo v. Associated Limousine Services, Inc.*, 236 So.3d 1115, 1120 (Fla. 4th DCA 2018). Here, there can be no doubt that John W. Schmitz used Schmitz Properties, Inc. and Schmitz Realty Company to defraud the Judgment Creditors to evade liability and/or collectability on the impending judgment, such that these entities must be treated as the "alter egos" of John W. Schmitz. *See EPICA*, 507 So. 2d at 1120.

53. With respect to the sale of the Lewisville Property (which occurred less than one month before trial), John W. Schmitz executed all of the documents necessary to complete the sale, and all documents necessary to facilitate the 1031 exchange, on behalf of Schmitz Properties, Inc. (Counter-Plaintiffs' Exhibits 44, 48, 72, 73, 75, 101, 102, 103, 104, 105, 106, and 107). Moreover, although Schmitz Realty Company is not a licensed Texas real estate brokerage, nor is John W. Schmitz licensed to practice law in Texas, John W. Schmitz ensured that Schmitz Realty Company received a $102,500 "Brokerage Fee" on the sale (despite three other brokers receiving a total of $131,000 in commissions), and that he himself received a $5,000 legal fee (despite Schmitz Properties, Inc. having retained separate counsel, to which it paid $21,225 in attorney's fees on the sale). (*See* Counter-Plaintiffs' Exhibit 72). Finally, Schmitz Properties, Inc.'s other shareholders, John Jr. and Alexandra Wenzke, both testified that they did not even know that Schmitz Properties, Inc. had sold the Lewisville Property

until being served with subpoenas for deposition in this matter, much less that all of the net sale proceeds had been paid to Schmitz Realty Company and used to pay John and Lucila Schmitz's personal expenses.

54. Likewise, with respect to Schmitz Realty Company's post-trial sale of the Peacock Real Estate, LLC membership interest (which, as discussed *infra*, was disguised to appear like a legitimate sale of real property), with the exception of the Commercial Contract (which Lucila Schmitz testified that she signed at his direction), John W. Schmitz likewise executed all of the documents necessary to complete the sale on behalf of Schmitz Realty Company (*see* Counter-Plaintiffs' Exhibits 18, 19, 20, 21), determined both the purchase price and the price that Schmitz Properties, Inc. would pay, and his law firm acted as the Settlement Agent for the transaction.

55. The Court finds that this purported 1031 exchange was "made or contrived by the judgment debtor to delay, hinder, or defraud creditors." § 56.29(3)(b), Florida Statutes; *see also EPICA*, 507 So. 2d at 1120. The following indicia of fraud inform the Court's decision:

    a. The Lewisville Property was sold less than three weeks before trial, without the knowledge or prior approval of Schmitz Properties, Inc.'s shareholders, and was not sold for a legitimate business purpose. To the contrary, Lucila Schmitz testified that the Lewisville Property was sold because John and Lucila Schmitz needed money to pay their personal expenses, including attorney's fees, real estate taxes on their personal residence, and over $300,000 in personal credit card bills.

    b. The membership interest in Peacock Real Estate, LLC – an asset of Schmitz Realty Company that was thus subject to execution – was sold approximately two months after trial, and for less than reasonably equivalent value. Not only was the membership interest sold for $214,000 less than the appraised value of the real estate owned by Peacock Real Estate, LLC (*see* Counter-Plaintiffs' Exhibit 45), but Schmitz Properties, Inc. did not assume the mortgage on the property, which had a $721,254.90 balance at the time of the sale.

    c. The sale of the membership interest in Peacock Real Estate, LLC was structured as a

sale of real property, which would have triggered the "due on sale" clause in Peacock Real Estate, LLC's mortgage. (Counter-Plaintiffs' Exhibit 49). However, John W. Schmitz did not advise the mortgagee bank that the sale had occurred nor record the Warranty Deed memorializing the sale. (*See* Counter-Plaintiffs' Exhibit 21).

d. Although there were claims pending against Peacock Real Estate, LLC at the time of the sale, John W. Schmitz executed a Closing Affidavit which states that "[t]here are no matters pending against the Seller that could give rise to a lien that would attach to the property . . ." and that "[t]here are no actions or proceedings now pending in any State or Federal Court to which the Seller is a party . . ." (Counter-Defendants' Exhibit 18).

e. Although they had transferred their shareholder interest in Schmitz Properties, Inc. to John Jr. prior to the sale, both John and Lucila Schmitz executed Non-Representation Disclosure, Indemnification and Hold Harmless Affidavits stating that they remained shareholders of Schmitz Properties, Inc., and indemnifying the law firm that had prepared the conveyance documents for any claims arising out of the transaction. (Counter-Defendants' Exhibits 22 and 23).

f. The Judgment Creditors' expert, David Goldweitz, testified that Schmitz Realty Company had no legitimate business reason to participate in this 1031 exchange because it received no tax benefit. In fact, Mr. Goldweitz testified that Schmitz Realty Company had to recognize over $700,000 in taxable gain, and that no reasonably prudent businessman acting in the best interests of Schmitz Realty Company would have engaged in this transaction.

g. Mr. Goldweitz likewise testified that Schmitz Properties, Inc. had no legitimate reason to participate in this 1031 exchange. Schmitz Properties, Inc. sold a Texas property more valuable than the real property owned by Peacock Real Estate, LLC, which Texas property was occupied by an excellent tenant with 200 locations in 12 states. In exchange, it received the membership interest in Peacock Real Estate, LLC, whose sole asset is a property worth half a million dollars less than the Lewisville Property, occupied by a restaurant tenant with just three locations, all located in central Florida. Moreover, Mr. Goldweitz testified that had this transaction been documented correctly, "Schmitz Properties would have had to have recognized at least a half million dollars in taxable gain and probably greater than that."

h. Finally, Mr. Goldweitz testified that the only beneficiaries of this 1031 exchange were John and Lucila Schmitz, who received all of the sale proceeds from the transaction.

56. The Court finds that there was no logical or legal justification for this 1031 exchange to be entered into. The only reasonable explanation, especially considering how the ultimate funds were used (to benefit John and Lucila Schmitz personally), is that John W. Schmitz was attempting to avoid an imminent judgment and to make the Peacock Real Estate, LLC membership interest harder to reach.

57. The record is replete with other evidence that John W. Schmitz has used Schmitz Realty Company, specifically, as a vehicle to perpetuate still more frauds upon the Judgment Creditors, for decades. As set forth in the Court's Second Amended Findings of Fact and Conclusions of Law from Non-Jury Trial, which resulted in the entry of a $4.5 million judgment against John W. Schmitz:

a. From May 2007 until his removal as President of the company in July 2018, John W. Schmitz caused Schmitz Development Company to make $213,668.24 in "rent" payments to "P&P Brickell" – a fictitious entity owned by Schmitz Realty Company – for the use of a room in his home, while simultaneously paying rent to various third parties for office space. John W. Schmitz's use of the name "P&P Brickell" was part of a "fictitious vendor scheme," designed to make the payments look like legitimate rent payments to Schmitz Development Company's former landlord, Penalver & Penalver, with offices on Brickell Avenue, and to disguise that Schmitz Realty Company was the true recipient of the "rents."

b. The Schmitz Development Company shareholder agreement precluded John W. Schmitz's receipt of real estate commissions on any transaction involving the company. Despite same, from December 1999 through December 2017, John W. Schmitz caused Schmitz Realty Company to receive $425,198.11 in unauthorized commissions and referral fees.

c. John W. Schmitz caused Schmitz Development Company to make interest free loans to SDC St. Lucie Partners, LLC – an entity for which Schmitz Realty Company is a 16.67% owner – and "fraudulently concealed these interest-free loans from [Schmitz

Development Company's] other shareholders and directors" by failing to disclose the identity of the borrower or John and Lucila Schmitz's interest therein.

d. In July 2007, John W. Schmitz misappropriated $91,300 in sale proceeds from the sale of Schmitz Development Company property in Port St. Lucie, Florida, with the full amount going to Schmitz Realty Company to pay down its subsidiary's mortgage debt. Again, the Court found that "John Schmitz and Lucila Schmitz failed to carry their burden of proving that this transaction was not fraudulently concealed from [Schmitz Development Company's] other shareholders and directors."

e. John W. Schmitz caused Schmitz Development Company to sell real property located in Las Vegas, Nevada as part of a 1031 exchange, and used the proceeds to purchase a failing restaurant building owned by John and Lucila Schmitz's company, despite the operator of the restaurant (again, John and Lucila Schmitz's company) having lost over $800,000 in the previous four years. From the sale proceeds, "$464,782.54 . . . was used to pay off interest-free loans that John Schmitz had caused [Schmitz Development Company] to make to . . . Schmitz Realty Company." The Court found that "nearly every aspect of this series of transactions was fraudulently concealed from [Schmitz Development Company's] other shareholders and directors."

58. For these reasons, the Court finds that Schmitz Properties, Inc. and Schmitz Realty Company are the alter egos of John W. Schmitz. Schmitz Realty Company's transfer of the membership interests in Peacock Real Estate, LLC to Schmitz Properties, Inc. is thus deemed to be a transfer by the judgment debtor, John W. Schmitz. The Court finds that this transfer was a fraudulent transfer insofar as it was made "made or contrived by the judgment debtor to delay, hinder, or defraud creditors," Section 56.29(3)(b), Florida Statutes, and it must therefore be set aside. Accordingly, the transfer of Schmitz Realty Company's membership interest in Peacock Real Estate, LLC to Schmitz Properties, Inc. is hereby deemed void, and the membership interest thus remains the property of Schmitz Realty Company. *See id.* This Court has determined that John W. Schmitz's shareholder interest in Schmitz Realty Company is subject to execution, and the purchaser of Membership Certificate No. 1 for Peacock Real Estate, LLC at sheriff's sale will ultimately obtain an interest in this entity as

well. As such, and so as to prevent any further transfers of executable assets, this Court directs that the Miami Dade County Sheriff retain this membership certificate pending further order of this Court.

IV. Conclusions of Law as to the Motion to Permit Disbursement of Escrowed Sale Proceeds

59. As set forth above, on September 10, 2021, the Court entered an Order Granting Motion to Escrow Sale Proceeds Pending Determination of Proceedings Supplementary, and directing that "[a]ny sale proceeds owed, or due to be paid to, John W. Schmitz and/or Schmitz Realty Company from St. Lucie Hospitality, LLC's sale of the property located at 1901 NW Courtyard Circle, Port St. Lucie, Florida 34986 shall be held in escrow by the closing agent pending further order of the Court." It was the Court's intention to ensure that these funds be paid out to the owner(s) of Schmitz Realty Company following a determination as to who owned the shares.

60. This Court has determined that John W. Schmitz's 50% shareholder interest in Schmitz Realty Company is subject to execution and has ordered John W. Schmitz to issue a new share certificate in his individual name and deliver that share certificate to the Miami Dade County Sheriff to be sold in partial satisfaction of the Amended Final Judgment. In order to preserve the value of the shares pending the sheriff's sale, the Court finds that the funds should remain in escrow pending the completion of the sale, and then distributed in equal amounts to the ultimate shareholder(s). Accordingly, Schmitz Realty Company's Motion to Permit Disbursement of Escrowed Sale Proceeds is hereby **DENIED**. The Court directs Lerman & Whitebrook, P.A. to continue to hold the $169,031.25 in sale proceeds due and owing to Schmitz Realty Company in escrow pending the sale of the newly issued share certificate representing John W. Schmitz's 50% shareholder interest, whereupon Lerman & Whitebrook, P.A. is directed to distribute the sale proceeds to the ultimate shareholder(s) in

equal amounts, or as otherwise ordered by this Court.

V. Conclusions of Law as to the Motion for Charging Order

61. Section 605.0503(1), Florida Statutes, states:

> On application to a court of competent jurisdiction by a judgment creditor of a member or a transferee, the court may enter a charging order against the transferable interest of the member or transferee for payment of the unsatisfied amount of the judgment with interest. Except as provided in subsection (5), a charging order constitutes a lien upon a judgment debtor's transferable interest and requires the limited liability company to pay over to the judgment creditor a distribution that would otherwise be paid to the judgment debtor.

62. "[A] charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's transferee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company." § 605.0503(3), Florida Statutes.

63. As set forth above, the evidence of John W. Schmitz's individual ownership interest in a five percent membership interest in American Hospitality, LLC went unrebutted, and was confirmed by John W. Schmitz's own testimony. (*See* Counter-Plaintiffs' Exhibit 99). Accordingly, the Judgment Creditors' Motion for Charging Order is hereby **GRANTED**. This Court shall enter a separate charging order as against John W. Schmitz's five percent membership interest in American Hospitality, LLC, directing that American Hospitality, LLC pay over to the Judgment Creditors any and all distributions from American Hospitality, LLC that would otherwise be paid to John W. Schmitz. The Judgment Creditors are directed to submit a proposed charging order for entry by the Court.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 28th day of December, 2022.

2018-000931-CA-01 12-28-2022 4:37 PM
Hon. Alan Fine

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
Alec Michael Puig, alec.puig@hklaw.com
Alec Michael Puig, julia.frow@hklaw.com
Alejandro Brito, abrito@britopllc.com
Alejandro Brito, apiriou@britopllc.com
Andrew R Herron, gservice@homerbonner.com
Carlos D Lerman, Carlos@lwlawfla.com
Carlos D Lerman, Lizbeth@lwlawfla.com
Carlos D Lerman, Ina@lwlawfla.com
Cbl Section 44 Case Mgr, cbl44@jud11.flcourts.org
Cecilia Sofia Miranda, cmiranda@britopllc.com
Cora L. Lane, clane@burr.com
Cora Lane, WF.FL.Garnishment@burr.com
Cora Lane, clane@burr.com
Cristina Alonso, alonso@alonsoappeals.com
Cristina Alonso, cschmidle@alonsoappeals.com
David R. Softness, david@softnesslaw.com
David R. Softness, mari@softnesslaw.com
Deborah Bari Baker, deborah.baker@gmlaw.com
Deborah Bari Baker, alejandra.albuerne@gmlaw.com
Diana Carolina de Flores, LegalDepartment@citynational.com
Diana Carolina de Flores, Diana.deFlores@citynational.com
J Raul Cosio, raul.cosio@hklaw.com
J Raul Cosio, elaine.starling@hklaw.com
Jacky Beda, jbeda@zarcolaw.com
Jacky Beda, sarrastia@zarcolaw.com
Jason R Alderman, jalderman@thealdermanlawfirm.com
Jason R Alderman, cpengel@thealdermanlawfirm.com

Jason R Alderman, service@thealdermanlawfirm.com
Jose A Casal, jose.casal@hklaw.com
Jose A Casal, josie.vila@hklaw.com
KIM ARTHUR, Kim@frankelpa.com
Michael P. Hamaway Esq., mhamaway@mbhlawyer.com
Michael P. Hamaway Esq., tperez@mbhlawyer.com
Patrick Hayden Lane, plane@bml.law
Rachel Elizabeth Walker, rachel.walker@gmlaw.com
Rebecca J. Canamero, rebecca.canamero@hklaw.com
Rebecca J. Canamero, carla.cosio@hklaw.com
Rebecca J. Canamero, denise.perlich@hklaw.com
Robert P. Frankel, robert@frankelpa.com
Robert P. Frankel, documents@frankelpa.com
Robert P. Frankel, lana@frankelpa.com
Ronald Gache, rgache@logs.com
Ronald Gache, ssimon@logs.com
Ronald Gache, jcosner@logs.com
Seth Andrew Kupilik, skupilik@mbhlawyer.com
Seth Andrew Kupilik, tperez@mbhlawyer.com
Stephen J. Simmons, ssimmons@mbhlawyer.com
Stephen J. Simmons, daurand@mbhlawyer.com
Stephen J. Simmons, cromain@mbhlawyer.com
Stuart I. Grossman, sig@lklsg.com
Stuart I. Grossman, acd@lklsg.com
William E Pruitt, jknight@pruittpruittlaw.com
William Patrick Ayers, WF.FL.GARNISHMENT@BURR.COM

Physically Served:

EXHIBIT “C”

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2018-000931-CA-01
SECTION: CA44
JUDGE: Alan Fine

Schmitz Development Company et al

Plaintiff(s)

vs.

Cheryl Schmitz et al

Defendant(s)

_____/

ORDER ON MOTION TO HOLD JUDGMENT DEBTOR IN CONTEMPT OR, ALTERNATIVELY, FOR ORDER AUTHORIZING SALE OF SHARE CERTIFICATES

THIS CAUSE came before the Court on February 15, 2023 for a hearing on the Judgment Creditors' Motion to Hold Judgment Creditor in Contempt or, Alternatively, for Order Authorizing Sale of Share Certificates (the "Motion"), and the Court, having reviewed the Motion, having heard argument of counsel, and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion is **GRANTED IN PART and DENIED IN PART**.

2. The Court does not hold Judgment Debtor John W. Schmitz in civil contempt.

3. It is hereby declared that:

a. Stock Certificate No. 1 for Schmitz Realty Company, titled in the name of John W. Schmitz and Lucila Schmitz [in] joint trust with right of survivorship, represents John W. Schmitz's 500 shares in Schmitz Realty Company; and

b. Stock Certificate No. 3 for Schmitz Properties, Inc., titled in the name of the John W. Schmitz, II Trust, represents John W. Schmitz's 250 shares in Schmitz Properties, Inc.

4. The Miami Dade County Sheriff shall conduct a sheriff sale in accordance with this Court's December 28, 2022 Order with respect to all share certificates in its possession in partial satisfaction of the Amended Final Judgment.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 15th day of February, 2023.

2018-000931-CA-01 02-15-2023 11:48 PM
Hon. Alan Fine

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
Alec Michael Puig, alec.puig@hklaw.com
Alec Michael Puig, julia.frow@hklaw.com
Alejandro Brito, abrito@britopllc.com
Alejandro Brito, apiriou@britopllc.com
Alejandro Brito, dpadron@britopllc.com
Andrew R Herron, gservice@homerbonner.com
Carlos D Lerman, Carlos@lwlawfla.com
Carlos D Lerman, Lizbeth@lwlawfla.com
Carlos D Lerman, Ina@lwlawfla.com
Cbl Section 44 Case Mgr, cbl44@jud11.flcourts.org
Cecilia Sofia Miranda, cmiranda@britopllc.com
Cora L. Lane, clane@burr.com
Cora Lane, WF.FL.Garnishment@burr.com
Cora Lane, clane@burr.com
Cristina Alonso, alonso@alonsoappeals.com
Cristina Alonso, cschmidle@alonsoappeals.com
David R. Softness, david@softnesslaw.com
David R. Softness, mari@softnesslaw.com
Deborah Bari Baker, deborah.baker@gmlaw.com
Deborah Bari Baker, alejandra.albuerne@gmlaw.com
Diana Carolina de Flores, LegalDepartment@citynational.com
Diana Carolina de Flores, Diana.deFlores@citynational.com
Elliot B Kula, elliot@kulalegal.com

Elliot B Kula, eservice@kulalegal.com
J Raul Cosio, raul.cosio@hklaw.com
J Raul Cosio, elaine.starling@hklaw.com
Jacky Beda, jbeda@zarcolaw.com
Jacky Beda, sarrastia@zarcolaw.com
Jason R Alderman, jalderman@thealdermanlawfirm.com
Jason R Alderman, cpengel@thealdermanlawfirm.com
Jason R Alderman, service@thealdermanlawfirm.com
Javier A. Lopez Esq., jal@kttlaw.com
Javier A. Lopez Esq., ya@kttlaw.com
Javier A. Lopez Esq., service@kttlaw.com
Jose A Casal, jose.casal@hklaw.com
Jose A Casal, josie.vila@hklaw.com
KIM ARTHUR, Kim@frankelpa.com
Michael P. Hamaway Esq., mhamaway@mbhlawyer.com
Michael P. Hamaway Esq., tperez@mbhlawyer.com
Patrick Hayden Lane, plane@bml.law
Rachel Elizabeth Walker, rachel.walker@gmlaw.com
Rebecca J. Canamero, rebecca.canamero@hklaw.com
Rebecca J. Canamero, carla.cosio@hklaw.com
Rebecca J. Canamero, denise.perlich@hklaw.com
Robert P. Frankel, robert@frankelpa.com
Robert P. Frankel, documents@frankelpa.com
Robert P. Frankel, lana@frankelpa.com
Ronald Gache, rgache@logs.com
Ronald Gache, ssimon@logs.com
Ronald Gache, jcosner@logs.com
Seth Andrew Kupilik, skupilik@mbhlawyer.com
Seth Andrew Kupilik, tperez@mbhlawyer.com
Stephen J. Simmons, ssimmons@mbhlawyer.com
Stephen J. Simmons, daurand@mbhlawyer.com
Stephen J. Simmons, cromain@mbhlawyer.com
Stuart I. Grossman, sig@lklsg.com
Stuart I. Grossman, acd@lklsg.com
William E Pruitt, jknight@pruittpruittlaw.com
William Patrick Ayers, WF.FL.GARNISHMENT@BURR.COM

Physically Served:

EXHIBIT “D”

SHERIFF'S BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that ALFREDO RAMIREZ III, Sheriff of Miami-Dade County, Florida, as party of the first part, by virtue of two (2) writs of execution issued out of and under the seal of the Circuit Court in and for Miami-Dade County, Florida, dated the 19 day of August, A.D. 2020 at the suit of Schmitz Development Company, as Illinois corporation, et al., Plaintiff/Counter-Defendants v. Dorothy Joan Schmitz, individually and as the Executrix of the Estate of Thomas Schmitz and in her capacity as Trustee of the Thomas Schmitz Family Trust, et.al., Defendant/Counter-Plaintiffs, Schmitz Development Company, as Illinois corporation, Cross-Plaintiff, v. John W. Schmitz, et. al., Cross-Defendants, did levy upon and seize all the right, title and interest of said Counter-defendant/Cross-Defendant, John W. Schmitz, in and to the following describe property, to wit:

1. **#1 SDC ST. LUCIE PARTNERS, LLC | SCHMITZ REALTY CO. - UNITS 25**
2. **#1 AMERICAN HOSPITALITY, LLC | SCHMITZ REALTY COMPANY - UNITS 100**
3. **#1 SCHMITZ REALTY COMPANY | JOHN W. SCHMITZ & LUCILA SCHMITZ - SHARES 1000**
4. **#1 JOHN W. SCHMITZ, P.A. | JOHN W. SCHMITZ - SHARES 1000**
5. **#4 SCHMITZ DEVELOPMENT COMPANY | JOHN W. SCHMITZ & LUCILA SCHMITZ - SHARES 333 1/3**
6. **#1 SCHMITZ PROPERTIES, INC. | JOHN W. SCHMITZ - SHARES 250**
7. **#3 SCHMITZ PROPERTIES, INC. | JOHN W. SCHMITZ - SHARES 250**
8. **#1 SCHMITZ DEVELOPMENT COMPANY | JOHN W. SCHMITZ - SHARES 333 1/3**
9. **#31 SCHMITZ OIL COMPANY | JOHN W. SCHMITZ & LUCILA SCHMITZ – SHARES 235 1/3**
10. **#1 PEACOCK REAL ESTATE, LLC | SCHMITZ REALTY COMPANY – UNITS 100 %**

AND, on the 10 day of May, A.D. 2023, sold the said property at public auction at 601 NW 1 Court 9th Floor in the City of Miami, in said County and State; after having advertised said property for sale, in manner and form as required by the Statutes in such cases made and provided, in the Miami Daily Business Review, a newspaper of general circulation published in said County once a week for four (4) weeks preceding date of sale; and that at such sale, the said property was struck off to the said part ies of the second part, Schmitz Development Company, Nancy Cook and Cheryl Schmitz,
for the sum of TEN DOLLARS AND NO CENT ($10.00)

, being the highest bidder therefore, and that being the highest bid for same.

NOW THIS INDENTURE WITNESSETH: That the said party of the first part, as Sheriff as aforesaid, by virtue of the said writs of execution and in pursuance of the Statute in such cases made and provided, and in consideration of the sum of money so bid as aforesaid, and in hand paid to the said party of the first part by the

said part ies of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, transferred and delivered, and by these presents, does grant, bargain, sell, transfer and deliver unto the part ies of the second part Schmitz Development Company, Nancy Cook and Cheryl Schmitz , all the right, title and interest of said Counter-defendant/Cross-Defendant, John W. Schmitz, in and to the property heretofore described.

TO HAVE AND TO HOLD the said described property unto the said part ies of the second part, as fully and absolutely as the said party of the first part, can or should convey by virtue of said writs of execution and the laws relating thereto.

IN TESTIMONY WHEREOF, the said party of the first part as Sheriff aforesaid, has hereunto set his hand and affixed the seal the 10 day of May, A.D. 2023.

SIGNED, SEALED AND DELIVERED
IN OUR PRESENCE:

Charlean Johnson

Lisandra Rosales

ALFREDO RAMIREZ III
Sheriff of Miami-Dade County, Florida

By: _____ D.S. (SEAL)
Sergeant E. Valdes
Court Services Bureau

STATE OF FLORIDA)
) ss
COUNTY OF MIAMI-DADE)

BE IT REMEMBERED, that on this 10 day of May, A.D. 2023, before me, Sergeant E. Valdes, Deputy Sheriff of Miami-Dade County, Florida, described in and who executed the foregoing instrument of writing, and he did acknowledge that he signed, sealed, and delivered the same of his own free will and accord, for the uses and purposes therein expressed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and notarial seal the day and year last above written.

Notary Public, State of Florida at Large

JADA FULTON
NOTARY PUBLIC
MY COMMISSION EXPIRES 4-1-2025
STATE OF FLORIDA
COMMISSION NUMBER HH 334251

X Personally known
___ Produced_
as identification

EXHIBIT “E”

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2018-000931-CA-01
SECTION: CA44
JUDGE: Lisa Walsh

Schmitz Development Company et al

Plaintiff(s)

vs.

Cheryl Schmitz et al

Defendant(s)

_____/

ORDER GRANTING JUDGMENT CREDITORS' MOTION TO COMPEL COMPLIANCE WITH COURT ORDER AND VERIFIED MOTION FOR ORDER TO SHOW CAUSE

THIS CAUSE came before the Court on July 5, 2023 for a hearing on the Judgment Creditors, Schmitz Development Company, Nancy J. Cook, as the Personal Representative of the Estate of Dorothy Joan Schmitz and in her capacity as Successor Trustee of the Thomas Schmitz Family Trust, and Cheryl Schmitz, individually and as Co-Trustee of the Michael D. Schmitz GST Non-Exempt Marital Trust Dated 1/18/2000's Motion to Compel Compliance with Court Order and for Sanctions and Verified Motion for Order to Show Cause (collectively, the "Motions"), and the Court, having reviewed the Motions and John Schmitz and Lucila Schmitz's Omnibus Memorandum of Law in Opposition thereto (the "Memo of Law"), having heard argument of counsel, and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. The Motions are **GRANTED**, as follows:
    a. Within seven (7) days, John Schmitz and Lucila Schmitz shall deposit $1,065,407.21, which sum totals 100% of the "Net Proceeds" from Peacock Real Estate, LLC's sale of the real property located at 220 NW Peacock Boulevard, Port St. Lucie, Florida 34986,

as that term is defined in this Court's Order Granting Peacock Real Estate, LLC's Motion to Permit Sale of Real Property (the "Order Authorizing Sale"), into the Brito, PLLC trust account.

b. Within 48 hours, counsel for John Schmitz and Lucila Schmitz shall provide the Judgment Creditors' attorneys with an accounting reflecting any and all disbursements and subsequent transfers of the Net Proceeds and the ultimate recipients thereof, including the "multiple parties" referenced in the Memo of Law.

c. John Schmitz is hereby ordered to appear for an in person, evidentiary hearing on a date to be scheduled following a consultation among the parties, and to show cause why he should not be held in contempt for his failure to comply with the Order Authorizing Sale.

d. Counsel for John Schmitz shall **forthwith** serve a copy of this order as well as any notice of hearing for evidentiary hearing on the court's order to show cause. Counsel shall also add John Schmitz to the clerk's electronic service list.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 8th day of July, 2023.

2018-000931-CA-01 07-08-2023 4:20 PM
Hon. Lisa Walsh

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
Alec Michael Puig, alec.puig@hklaw.com
Alec Michael Puig, julia.frow@hklaw.com
Alejandro Brito, abrito@britopllc.com
Alejandro Brito, apiriou@britopllc.com
Alejandro Brito, dpadron@britopllc.com

Andrew R Herron, gservice@homerbonner.com
Carlos D Lerman, Carlos@lwlawfla.com
Carlos D Lerman, Lizbeth@lwlawfla.com
Carlos D Lerman, Ina@lwlawfla.com
Cbl Section 44 Case Mgr, cbl44@jud11.flcourts.org
Cecilia Sofia Miranda, cmiranda@britopllc.com
Cecilia Sofia Miranda, lcoello@britopllc.com
Cora L. Lane, clane@burr.com
Cora Lane, WF.FL.Garnishment@burr.com
Cora Lane, clane@burr.com
Cristina Alonso, alonso@alonsoappeals.com
Cristina Alonso, cschmidle@alonsoappeals.com
David R. Softness, david@softnesslaw.com
David R. Softness, mari@softnesslaw.com
Deborah Bari Baker, deborah.baker@gmlaw.com
Deborah Bari Baker, alejandra.albuerne@gmlaw.com
Diana Carolina de Flores, LegalDepartment@citynational.com
Diana Carolina de Flores, Diana.deFlores@citynational.com
Elliot B Kula, elliot@kulalegal.com
Elliot B Kula, eservice@kulalegal.com
J Raul Cosio, raul.cosio@hklaw.com
J Raul Cosio, elaine.starling@hklaw.com
Jacky Beda, jbeda@zarcolaw.com
Jacky Beda, sarrastia@zarcolaw.com
Jason R Alderman, jalderman@thealdermanlawfirm.com
Jason R Alderman, jason-alderman-0923@ecf.pacerpro.com
Jason R Alderman, service@thealdermanlawfirm.com
Jose A Casal, jose.casal@hklaw.com
Jose A Casal, josie.vila@hklaw.com
KIM ARTHUR, Kim@frankelpa.com
Michael P. Hamaway Esq., mhamaway@mbhlawyer.com
Michael P. Hamaway Esq., tperez@mbhlawyer.com
Patrick Hayden Lane, plane@bml.law
Rachel Elizabeth Walker, rachel.walker@gmlaw.com
Rebecca J. Canamero, rebecca.canamero@hklaw.com
Rebecca J. Canamero, carla.cosio@hklaw.com
Rebecca J. Canamero, denise.perlich@hklaw.com
Robert P. Frankel, robert@frankelpa.com
Robert P. Frankel, documents@frankelpa.com
Robert P. Frankel, lana@frankelpa.com
Ronald Gache, rgache@logs.com
Ronald Gache, ssimon@logs.com
Ronald Gache, jcosner@logs.com
Seth Andrew Kupilik, skupilik@mbhlawyer.com
Seth Andrew Kupilik, tperez@mbhlawyer.com
Stephen J. Simmons, ssimmons@mbhlawyer.com
Stephen J. Simmons, daurand@mbhlawyer.com

Stephen J. Simmons, cromain@mbhlawyer.com
Stuart I. Grossman, sig@lklsg.com
Stuart I. Grossman, acd@lklsg.com
William E Pruitt, jknight@pruittpruittlaw.com
William Patrick Ayers, WF.FL.GARNISHMENT@BURR.COM

Physically Served:

EXHIBIT “F”

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2018-000931-CA-01
SECTION: CA44
JUDGE: Lisa Walsh

Schmitz Development Company et al

Plaintiff(s)

vs.

Cheryl Schmitz et al

Defendant(s)

_____/

ORDER TO SHOW CAUSE

On July 8, 2023, this Court entered its ORDER GRANTING JUDGMENT CREDITORS' MOTION TO COMPEL COMPLIANCE WITH COURT ORDER AND VERIFIED MOTION FOR ORDER TO SHOW CAUSE (DE 1289)

The court heard evidence on August 2, 2023 on the DE 1289 order to show cause why Debtors should not be held in contempt for violating Judge Fine's court order (DE 1217), entered November 14, 2022. Judge Fine's order permitted the sale of real property held by another corporate entity (the "Peacock" property) on the condition that the debtors place proceeds from the sale of this property in the trust account of debtor's counsel. The proceeds from the sale were to remain in the debtors' attorney's trust account until the court could determine how proceeds from the sale would be distributed.

A month later, on December 28, 2022, Judge Fine entered Findings of Fact and Conclusions of Law in a lengthy order (DE 1238) in which Judge Fine found:

> 58. . . . that Schmitz Properties, Inc. and Schmitz Realty Company are the alter egos of John W. Schmitz. Schmitz Realty Company's transfer of the membership interests in Peacock Real Estate, LLC to Schmitz Properties, Inc. is thus deemed to be a transfer by the judgment debtor, John W. Schmitz. The Court finds that this transfer was a fraudulent transfer insofar as it was made "made or contrived by the judgment debtor to delay, hinder, or defraud creditors," Section 56.29(3)(b), Florida Statutes, and it must therefore be set aside. Accordingly, the transfer of Schmitz Realty Company's membership interest in Peacock Real Estate, LLC to Schmitz Properties, Inc. is hereby deemed void, and the membership interest thus remains the property of Schmitz Realty Company This court ordered Judgment Debtors and Judgment Debtor John Schmitz' wife to return proceeds of a sale of property returned to his counsel's trust account.

Three months later, John Schmitz sold the Peacock entities and distributed the proceeds to his children, his wife, his companies, and others.

This Court issued an order to show cause (DE 1289) why the judgment debtors should not be held in contempt for violating Judge Fine's order. In the body of the order, I also compelled John and Lucila Schmitz, to return the proceeds of the sale to the attorney's trust account.

At the hearing, evidence was presented that the sum of $250,000 plus $3,950 from the sale proceeds was transferred from Schmitz Properties to Schmitz Realty Company. These funds have not been returned to the trust account as ordered by this Court in DE 1289. As set forth in Judge Fine's Findings of Fact and Conclusions of Law (DE 1238), both Schmitz entities are the alter ego of John Schmitz.

No evidence was provided on August 2, 2023 why such funds were not returned as ordered (DE 1289). Mr. Schmitz merely testified that his wife handles the accounts of Schmitz Realty.

Judgment Debtors John Schmitz and Lucila Schmitz are ordered to show cause why they should not be held in contempt for failure to obey court order (DE 1289) in allowing Schmitz Realty Company to retain $253,950 of the sale proceeds from the Peacock sale. This violated DE 1289 which required:

> The Motions are GRANTED, as follows: Within seven (7) days, John Schmitz and Lucila Schmitz shall deposit $1,065,407.21, which sum totals 100% of the "Net Proceeds" from Peacock Real Estate, LLC's sale of the real property located at 220 NW Peacock Boulevard, Port St. Lucie, Florida 34986, as that term is defined in this Court's Order Granting Peacock Real Estate, LLC's Motion to Permit Sale of Real Property (the "Order Authorizing Sale"), into the Brito, PLLC trust account.

The debtors shall show cause at a hearing (which shall be mutually coordinated by counsel), why they should not be held in contempt of court.

The debtors may purge this order by partially complying with DE 1289 and returning $253,950 to the Brito trust account within 5 days of this order. John Schmitz is on the court's service list for this case and has thus been served by email.

Creditor's counsel shall serve this order upon Debtors John Schmitz and Lucila Schmitz forthwith upon receipt.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 3rd day of August, 2023.

2018-000931-CA-01 08-03-2023 10:47 AM
Hon. Lisa Walsh

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
Alec Michael Puig, alec.puig@hklaw.com
Alec Michael Puig, julia.frow@hklaw.com
Alejandro Brito, abrito@britopllc.com
Alejandro Brito, apiriou@britopllc.com
Alejandro Brito, dpadron@britopllc.com
Andrew R Herron, gservice@homerbonner.com
Carlos D Lerman, Carlos@lwlawfla.com
Carlos D Lerman, Lizbeth@lwlawfla.com
Carlos D Lerman, Pleadings@lwlawfla.com
Cbl Section 44 Case Mgr, cbl44@jud11.flcourts.org
Cecilia Sofia Miranda, cmiranda@britopllc.com
Cecilia Sofia Miranda, lcoello@britopllc.com
Cora L. Lane, clane@burr.com
Cora Lane, WF.FL.Garnishment@burr.com
Cora Lane, clane@burr.com
Cristina Alonso, alonso@alonsoappeals.com
Cristina Alonso, cschmidle@alonsoappeals.com
David R. Softness, david@softnesslaw.com
David R. Softness, mari@softnesslaw.com
Deborah Bari Baker, deborah.baker@gmlaw.com
Deborah Bari Baker, alejandra.albuerne@gmlaw.com
Diana Carolina de Flores, LegalDepartment@citynational.com
Diana Carolina de Flores, Diana.deFlores@citynational.com
Elliot B Kula, elliot@kulalegal.com
Elliot B Kula, eservice@kulalegal.com
J Raul Cosio, raul.cosio@hklaw.com

J Raul Cosio, elaine.starling@hklaw.com
Jacky Beda, jbeda@zarcolaw.com
Jacky Beda, sarrastia@zarcolaw.com
Jason R Alderman, jalderman@thealdermanlawfirm.com
Jason R Alderman, jason-alderman-0923@ecf.pacerpro.com
Jason R Alderman, service@thealdermanlawfirm.com
John Schmitz, schmitzcompanies@aol.com
Jose A Casal, jose.casal@hklaw.com
Jose A Casal, josie.vila@hklaw.com
KIM ARTHUR, Kim@frankelpa.com
Michael P. Hamaway Esq., mhamaway@mbhlawyer.com
Michael P. Hamaway Esq., tperez@mbhlawyer.com
Patrick Hayden Lane, plane@bml.law
Rachel Elizabeth Walker, rachel.walker@gmlaw.com
Rebecca J. Canamero, rebecca.canamero@hklaw.com
Rebecca J. Canamero, carla.cosio@hklaw.com
Rebecca J. Canamero, denise.perlich@hklaw.com
Robert P. Frankel, robert@frankelpa.com
Robert P. Frankel, documents@frankelpa.com
Robert P. Frankel, lana@frankelpa.com
Ronald Gache, rgache@logs.com
Ronald Gache, ssimon@logs.com
Ronald Gache, jcosner@logs.com
Ross R Hartog, litservice@mrthlaw.com
Ross R Hartog, rhartog@mrthlaw.com
Seth Andrew Kupilik, skupilik@mbhlawyer.com
Seth Andrew Kupilik, tperez@mbhlawyer.com
Stephen J. Simmons, ssimmons@mbhlawyer.com
Stephen J. Simmons, daurand@mbhlawyer.com
Stephen J. Simmons, cromain@mbhlawyer.com
Stuart I. Grossman, sig@lklsg.com
Stuart I. Grossman, acd@lklsg.com
William E Pruitt, jknight@pruittpruittlaw.com
William Patrick Ayers, WF.FL.GARNISHMENT@BURR.COM

Physically Served:

EXHIBIT “G”

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2018-000931-CA-01
SECTION: CA44
JUDGE: Lisa Walsh

Schmitz Development Company et al

Plaintiff(s)

vs.

Cheryl Schmitz et al

Defendant(s)

_____/

ORDER FINDING JOHN W. SCHMITZ IN CONTEMPT

On July 8, 2023, this Court entered its Order Granting Judgment Creditors' Motion to Compel Compliance with Court Order and Verified Motion for Order to Show Cause dated July 8, 2023 (DE 1289) (the "Order to Show Cause").

This Court heard evidence on August 2, 2023 on the Order to Show Cause why the Judgment Debtor, John W. Schmitz, should not be held in contempt for violating Judge Fine's Order Granting Peacock Real Estate, LLC's Motion to Permit Sale of Real Property dated November 14, 2022 (DE 1217) (the "Order Authorizing Sale"). The Order Authorizing Sale permitted Peacock Real Estate, LLC – a company under John W. Schmitz's control – to sell the real property located at 220 NW Peacock Blvd., Port St. Lucie, FL 34986 (the "Peacock Property") on the condition that the "Net Proceeds" from the sale of the Peacock Property be deposited and held in the trust account of John and Lucila Schmitz's attorneys, Brito, PLLC, pending further order of Court. John W. Schmitz testified that he had received a copy of the Order Authorizing Sale and that he understood its contents.

A month later, on December 28, 2022, Judge Fine entered Findings of Fact and Conclusions of Law in a lengthy order (DE 1238) in which Judge Fine found:

> 58. . . . that Schmitz Properties, Inc. and Schmitz Realty Company are the alter egos of John W. Schmitz. Schmitz Realty Company's transfer of the membership interests in Peacock Real Estate, LLC to Schmitz Properties, Inc. is thus deemed to be a transfer by the judgment debtor, John W. Schmitz. The Court finds that this transfer was a fraudulent transfer insofar as it was made "made or contrived by the judgment debtor to delay, hinder, or defraud creditors," Section 56.29(3)(b), Florida Statutes, and it must therefore be set aside. Accordingly, the transfer of Schmitz Realty Company's membership interest in Peacock Real Estate, LLC to Schmitz Properties, Inc. is hereby deemed void, and the membership interest thus remains the property of Schmitz Realty Company.

John W. Schmitz testified that he had received a copy of DE 1238 and that he understood its contents.

On April 13, 2023, John W. Schmitz caused Peacock Real Estate, LLC to sell the Peacock Property to a third party. According to Mr. Schmitz, he "forgot" about Judge Fine's order. It should be noted that Judge Fine entered his order granting the Peacock entity's motion -- an entity also owned by John Schmitz.

While John Schmitz has some memory problems, this Court categorically rejects his testimony that he "forgot" the order requiring him to deposit the funds in his lawyer's trust account. John Schmitz negotiated a purchase price. John W. Schmitz testified that he was able to sign all of the documents necessary to close the transaction, and that he understood their contents. (*See* **Judgment Creditors' Exhibits A, B, C, D**). Those closing documents included a "Seller's Disbursement Authorization Form" that directed the escrow agent, Liberty Title Company of America, Inc., to distribute the Net Proceeds of the sale to Peacock Real Estate, LLC's bank account at First Horizon Bank. (**Judgment Creditors' Exhibit D**). John W. Schmitz testified that he had the ability to direct the Net Proceeds into Brito, PLLC's trust account, but that he instead directed Liberty Title Company of America, Inc. to pay the funds to Peacock Real Estate, LLC – a direct violation of the Order Authorizing Sale.

The $1,065,407.21 in Net Proceeds was immediately distributed, with $914,713.31 being

transferred to John W. Schmitz's wife, his children, his attorneys, and his companies. (*See* **Judgment Creditors' Exhibits E and F**). At the evidentiary hearing, John W. Schmitz testified that he authorized these disbursements, and that Lucila Schmitz had caused the payments to be made.

On July 8, 2023, this Court entered the Order to Show Cause. The Order to Show Cause directed John W. Schmitz to appear and show cause why he should not be held in contempt for his failure to comply with the Order Authorizing Sale (DE 1217). The Order to Show Cause also directed John and Lucila Schmitz to deposit the full amount of the Net Proceeds, $1,065,407.21, into the Brito, PLLC trust account within 7 days. They failed to do so.

"Where a court order and its violation are established or admitted the burden is on the accused to show facts which would excuse his default." *See In Interest of S.L.T.*, 180 So. 2d 374, 379 (Fla. 2d DCA 1965). Here, that John W. Schmitz violated the Order Authorizing Sale was undisputed and thus, the burden shifted to John W. Schmitz to establish that said violation was not willful. The Court finds that John W. Schmitz failed to carry that burden.

This Court has considered the testimony of John W. Schmitz and finds that there is no competent evidence to support John W. Schmitz's claim that he is suffering from early-stage Alzheimer's disease. The Court accepts that John Schmitz has some short-term memory loss. The Court finds John W. Schmitz's testimony that he "forgot" about the Order Authorizing Sale to be lacking in credibility and unworthy of belief.

He was able to testify about real estate transactions had occurred three years ago, in 2020 and the history of Schmitz Properties, Inc. He was able to testify about this litigation and specific representations that had been made by the Judgment Creditors' counsel. He was able to recount with specificity exactly what had happened at the closing of the sale of the Peacock Property.

The evidence reflects that John W. Schmitz is an extremely high-functioning individual with a

keen intellect and sophisticated business acumen. The evidence reflects that John W. Schmitz is still conducting business on behalf of himself and his family. To accept that he simply "forgot" about the critical order (an order he sought from the court) curtailing his ability to distribute sale proceeds which enabled him to quickly disburse the proceeds to family, his own entities, and others would require an impossible suspension of disbelief.

Additionally, the Court notes that Judge Fine's Findings of Fact and Conclusions of Law found that Schmitz Properties, Inc. and Schmitz Realty Company are the "alter egos" of John W. Schmitz. The evidence reflects not only that Mr. Schmitz was aware of that Order, but that he became hysterical upon receiving it. (*See* **Plaintiffs' Exhibit 5**). In the three months that followed, John W. Schmitz facilitated the sale of the Peacock Property.

The Court finds it highly relevant that the majority of the Net Proceeds were distributed to John W. Schmitz's wife, his children, and his companies. The recipients of and the timing of the distributions reflect that it was John W. Schmitz's intent to distribute the entirety of the Net Proceeds immediately following the sale to keep the proceeds out of the reach of the Judgment Creditors, and that he thus willfully violated the Order Authorizing Sale.

For all of these reasons, this Court finds that John W. Schmitz has failed to show cause why he should not be held in contempt. The Court finds that his violation of the Order Authorizing Sale was willful and contumacious and adjudicates him to be in contempt of Court.

Mr. Schmitz's counsel asked for a time certain for him to be able to comply and argued against imposing any kind of incarceration penalty. Mr. Schmitz did not refute creditor's counsel's representation that he has other assets sufficient to satisfy the lost proceeds.

John W. Schmitz may purge himself of contempt by depositing $755,407.21 – an amount which this Court finds that he has the present ability to pay – into the Brito, PLLC trust account within 30 days, on or before September 1, 2023. *See Elliott v. Bradshaw*, 59 So. 3d 1182 (Fla. 4th DCA 2011) (". . . courts have recognized that the assets of close friends and family members may be considered in determining present ability to pay a purge."); *Sibley v. Silbey*, 833 So. 2d 847 ("In these circumstances, which demonstrate the very epitome of a willful, contemptuous refusal to obey a binding order of court, the rule that all sums from whatever source available to the contemnor-obligor must be considered to determine his "ability to pay" is peculiarly relevant."). Should he fail to do so, judgment creditors may petition this Court to issue a writ of bodily

attachment for his arrest, and he will be taken into custody by the Miami-Dade County Sheriff and confined in the county jail until such time that he purges himself of contempt by fully complying by paying the purge amount.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 12th day of August, 2023.

2018-000931-CA-01 08-12-2023 4:01 PM
Hon. Lisa Walsh

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
Alec Michael Puig, alec.puig@hklaw.com
Alec Michael Puig, julia.frow@hklaw.com
Alejandro Brito, abrito@britopllc.com
Alejandro Brito, apiriou@britopllc.com
Alejandro Brito, dpadron@britopllc.com
Andrew R Herron, gservice@homerbonner.com
Carlos D Lerman, Carlos@lwlawfla.com
Carlos D Lerman, Lizbeth@lwlawfla.com
Carlos D Lerman, Pleadings@lwlawfla.com
Cbl Section 44 Case Mgr, cbl44@jud11.flcourts.org
Cecilia Sofia Miranda, cmiranda@britopllc.com
Cecilia Sofia Miranda, lcoello@britopllc.com
Cora L. Lane, clane@burr.com
Cora Lane, WF.FL.Garnishment@burr.com
Cora Lane, clane@burr.com
Cristina Alonso, alonso@alonsoappeals.com
Cristina Alonso, cschmidle@alonsoappeals.com
David R. Softness, david@softnesslaw.com
David R. Softness, mari@softnesslaw.com
Deborah Bari Baker, deborah.baker@gmlaw.com
Deborah Bari Baker, alejandra.albuerne@gmlaw.com
Diana Carolina de Flores, LegalDepartment@citynational.com

Diana Carolina de Flores, Diana.deFlores@citynational.com
Elliot B Kula, elliot@kulalegal.com
Elliot B Kula, eservice@kulalegal.com
J Raul Cosio, raul.cosio@hklaw.com
J Raul Cosio, elaine.starling@hklaw.com
Jacky Beda, jbeda@zarcolaw.com
Jacky Beda, sarrastia@zarcolaw.com
Jason R Alderman, jalderman@thealdermanlawfirm.com
Jason R Alderman, jason-alderman-0923@ecf.pacerpro.com
Jason R Alderman, service@thealdermanlawfirm.com
John Schmitz, schmitzcompanies@aol.com
Jose A Casal, jose.casal@hklaw.com
Jose A Casal, josie.vila@hklaw.com
KIM ARTHUR, Kim@frankelpa.com
Michael P. Hamaway Esq., mhamaway@mbhlawyer.com
Michael P. Hamaway Esq., tperez@mbhlawyer.com
Patrick Hayden Lane, plane@bml.law
Rachel Elizabeth Walker, rachel.walker@gmlaw.com
Rebecca J. Canamero, rebecca.canamero@hklaw.com
Rebecca J. Canamero, carla.cosio@hklaw.com
Rebecca J. Canamero, denise.perlich@hklaw.com
Robert P. Frankel, robert@frankelpa.com
Robert P. Frankel, documents@frankelpa.com
Robert P. Frankel, lana@frankelpa.com
Ronald Gache, rgache@logs.com
Ronald Gache, ssimon@logs.com
Ronald Gache, jcosner@logs.com
Ross R Hartog, litservice@mrthlaw.com
Ross R Hartog, rhartog@mrthlaw.com
Seth Andrew Kupilik, skupilik@mbhlawyer.com
Seth Andrew Kupilik, tperez@mbhlawyer.com
Stephen J. Simmons, ssimmons@mbhlawyer.com
Stephen J. Simmons, daurand@mbhlawyer.com
Stephen J. Simmons, cromain@mbhlawyer.com
Stuart I. Grossman, sig@lklsg.com
Stuart I. Grossman, acd@lklsg.com
William E Pruitt, jknight@pruittpruittlaw.com
William Patrick Ayers, WF.FL.GARNISHMENT@BURR.COM

Physically Served: