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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2012-CA-004988
DIVISION: CV-E

GARY MCCALLA and DIANNE MCCALLA,
a married couple,

Plaintiffs,

v.

E. C. KENYON CONSTRUCTION COMPANY,
INC., a dissolved Florida corporation, DOUGLAS
HERRING, an individual, and TIMOTHY YOUNG,
an individual,

Defendants. /

DEFENDANTS' MOTION IN LIMINE
TO EXCLUDE PLAINTIFF'S SUMMARY

Defendants, Douglas Herring and Timothy Young (the "Defendants"), by and through their undersigned counsel hereby move this Court for entry of an Order in Limine preventing Plaintiff from admitting into evidence the summary attached to the Notice of Intent to Introduce Summary of E.C. Kenyon Construction Co., Inc.'s Financial Transactions into Evidence. As grounds in support thereof, Defendants respectfully state as follows:

1. The underlying action initiated by the Plaintiffs, Gary McCalla and Dianne McCalla (the "Plaintiffs"), is based on allegations of fraudulent transfer of assets from E.C. Kenyon Construction Company, Inc. ("Kenyon") to the Defendants, individually, during the winding down of Kenyon prior to dissolution.

2. The trial in this case is scheduled to commence on April 17, 2017.

3. Plaintiff filed Plaintiff's Notice of Intent to Introduce Summary of E.C. Kenyon Construction Co., Inc.'s Financial Transactions into Evidence dated January 5, 2017 (the

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 04/03/2017 11:45:54 AM

"Notice") under the guise of Fla. Stat. § 90.956. Attached to the Notice was the summary that Plaintiff intends to use and admit as evidence at trial. The Notice and the corresponding exhibits are attached hereto as Exhibit A.

4. Section 90.956 of the Florida Statutes states that "[w]hen it is not convenient to examine in court the contents of voluminous writings . . . a party may present them in the form of a chart, summary, or calculation by calling a qualified witness."

5. The summary submitted by the Plaintiff is essentially an analysis from the accountant, Jack Meeks, Plaintiff's accounting expert. The summary itself reads more as an inadmissible expert report instead of a summary permitted under section 90.956. Thus, the summary should be excluded.

WHEREFORE, in light of the foregoing, Defendants, Douglas Herring and Timothy Young, respectfully request this Court to enter an Order Granting the instant Motion in Limine, thereby precluding Plaintiff from admitting the inadmissible summary attached to the Notice of Intent to Introduce Summary of E.C. Kenyon Construction Co., Inc.'s Financial Transactions into Evidence.

GRAYROBINSON, P.A.

By: /s/ S. Grier Wells
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Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been e-filed via the Florida Courts E-Filing Portal this 31st day of March, 2017, which provides an electronic copy to Peter A. Robertson, Esq. (peter@robertsonfirm.com), William Douglas Stanford, Jr., Esq., (doug@robertsonfirm.com), Thomas J. Tollefsen, Esq. (rom@robertsonfirm.com), Jan C. Tredowski, Esq. (jan@robertsonfirm.com).

/s/ S. Grier Wells____________
Attorney

EXHIBIT A

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FORIDA

GARY MCCALLA and DIANNE
MCCALLA, a married couple,

CASE NO: 16-2012-CA-4988

Plaintiffs,

Vs.

E.C. KENYON CONSTRUCTION
COMPANY, INC., a dissolved Florida
Corporation, DOUGLAS HERRING,
an individual, TIMOTHY YOUNG, and
individual,

Defendants.
_______________________________/

PLAINTIFF'S NOTICE OF INTENT TO INTRODUCE SUMMARY OF E.C. KENYON CONSTRUCTION CO., INC.'S FINANCIAL TRANSACTIONS INTO EVIDENCE

COMES NOW, the Plaintiff, GARY MCCALLA (hereinafter "MCCALLA"), by and through his undersigned attorney, pursuant to Section 90.956, Florida Statutes, and provides notice of his intention to introduce the Summary of E.C. Kenyon Construction Co., Inc.'s Financial Transactions (hereinafter "the SUMMARY") into evidence. In support thereof, MCCALLA would show as follows:

1. "When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant, who has made examination and analysis of the books and figures, may testify as a witness and give summarized statements of what the books show as a result of his investigation, provided the books themselves are accessible to the court and parties." *Scott v. Caldwell, for Use & Benefit of Bay County*, 37 So.2d 85, 88 (Fla. 1948);

2. In the case at bar, the Plaintiff's Expert, Jack Meeks, CPA, has reviewed voluminous financial documents provided by the Defendants and has distilled the information in those documents into a summary. **(See Jack Meeks, CPA's Summary Attached hereto as Exhibit "A.")**

3. Plaintiff intends to introduce the SUMMARY as part of Mr. Meeks' expert testimony.

4. The summarized documents and the SUMMARY are accessible to the Court and the parties.

WHEREFORE, in light of the foregoing, MCCALLA hereby provides notice of his intention to introduce the SUMMARY into evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the **5th** day of **January, 2017**, I electronically filed the above and foregoing with the Clerk of the Court by using the Florida E-Portal System, which will send a notice of electronic filing and a true and accurate copy of the foregoing to the following:

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ATTORNEY FOR PLAINTIFF

McCalla v. E.C. Kenyon Construction Company, Inc. (ECK)
Proof of $627,657 Judgment Collectability

Schedule One

Opinion Number One:

Based on the following analysis and assumptions, the $627,657 judgment would have been collectible at calendar year end December 31, 2007 and during each year through December 31, 2009.

Assumptions:

1. Assumed a $627,657 judgment against ECK existed at June 1, 2008.
2. Assumed any liabilities on ECK's balance sheet are inferior to the above judgment except for any secured debt.

Procedures:

1. I reviewed ECK's unqualified, audited financial statements for the calendar years ended December 31, 2007 through December 31, 2009.
2. I prepared the analysis below from these unqualified, audited financial statements:

Analysis

	December 31, 2007	December 31, 2008	December 31, 2009
Cash and accounts Receivable	$2,801,147	$2,433,750	$2,168,974
Less: secured debt	(247,870)	(239,011)	(229,322)
Cash and accounts receivable less secured debt	2,553,277	2,194,739	1,939,652
Judgment	(627,657)	(627,657)	(627,657)
Excess of cash and accounts receivable over Judgment	$1,925,620	$1,567,082	$1,311,995
Amount of other assets besides cash and accounts receivable	$ 265,621	$ 235,408	$ 238,392

EXHIBIT A

McCalla v. E.C. Kenyon Construction Company, Inc. (ECK)
Analysis of Transfers to Stockholders
after May 1, 2008 (Date of Lawsuit)

Schedule Two

Opinion Number Two:

Based on the following analysis, $661,226 of the $1,083,958 transfers from ECK to its two stockholders, Doug Herring and Timothy Herring, after May 1, 2008 represent transfers fraudulent as to present and future creditors pursuant to Florida Statutes Section 726.105.

Procedures:

1. I reviewed ECK's unqualified, audited financial statements for the calendar years ended December 31, 2007 through December 31, 2009.
2. I reviewed ECK's federal income tax returns for calendar years 2007, 2008 and 2009, personal income tax returns of Douglas Herring and Timothy Young for calendar years 2008, 2009 and 2010 and ECK's internally prepared financial statements and other documents described below.
3. I prepared the notes and analysis below.
4. I prepared the analysis on Schedule Three.

Summary:

Description	Corporate Transfers to Stockholders	Fraudulent Transfers to Stockholders (See Note 7)
Dividends (See Note 1)	$106,000	$106,000
Salaries (See Note 2)	638,255	323,523
Rent on building (See Note 3)	229,413	121,413
Cash surrender value of officer's life insurance policies (See Note 4)	41,788	41,788
Amount due from a related party at December 31, 2009 (See Note 5)	46,502	46,502
Value of two 2004 Lincoln Navigators (See Note 6)	22,000	22,000
Total	$1,083,958	$661,226

Notes and analysis:

1. The stockholders took a $106,000 distribution in Calendar Year ending 2009. (See 2009 Audited Financial Statements, page 4, Statements of Changes in Stockholders' Equity.)

2. Salaries to officers/stockholders are per their Personal Income Tax Returns for 2008, 2009 and 2010 (and attached W-2 statements):

McCalla v. E.C. Kenyon Construction, Company, Inc. (ECK)
Analysis of Transfers to Stockholders
after May 1, 2008 (Date of Lawsuit)

Schedule Two (continued)

	2008	2009	2010	Totals
Douglas Herring	$127,200	$116,880	$ 87,720	$331,800
Timothy Young	127,200	116,880	62,375	306,455
	$254,400	$233,760	$150,095	$638,255

2008: ECK's net income was $190,136 in 2008 per its audited financial statements.

2009: ECK experienced a net loss of $173,428 in 2009 per its audited financial statements. The loss was caused by the salaries of $233,760 paid to the two stockholders. Amount of fraudulent transfer (See Note 7) equals $173,428, the amount of the net loss.

2010: I have the October, November and December, 2010, and the January 2011 internal financial statements for ECK. It appears that sales activity stopped before the 4th quarter of calendar year 2010. Mr. Young received a W-2 in 2010 for $42,400 from Sauer Inc. The net loss for calendar year 2010 per the December 2010 internal profit and loss statement was $383,087. A Form 1045, Application for a Tentative Refund, was prepared for Mr. Herring on June 21, 2011, based on carrying back his 2010 loss to 2008 for income tax purposes. This application requested a refund of $37,452. Mr. Young would probably also have filed a request for refund. Amount of fraudulent transfer (See Note 7) equals $150,095, the amount of salaries paid to the two stockholders in 2010.

Both Mr. Young and Mr. Herring rolled over their 401(k) accounts per their 2010 1040s. See Statement #1 on each 2010 income tax return for specific information. Mr. Young's account had a value of $54,355 and Mr. Herring's account had a value of $89,411. Per the W-2 statements attached to his 1040s, Mr. Herring contributed $15,105, $10,910 and $8,400 in 2008, 2009 and 2010, respectively, to his 401(k) account ($34,415 total). Per the W-2 statements attached to his 1040s, Mr. Young contributed $12,825 in 2008 and zero in 2009 to his 401(k) account.

Summary of portion of salaries paid to the two stockholders in 2008, 2009 and 2010 which is fraudulent (See Note 7):

Year	Total Salaries	Fraudulent Portion of Salaries
2008	$254,400	$ 0
2009	233,760	173,428
2010	150,095	150,095
Total	$638,255	$323,523

McCalla v. E.C. Kenyon Construction, Company, Inc. (ECK)
Analysis of Transfers to Stockholders
after May 1, 2008 (Date of Lawsuit)

Schedule Two (continued)

3. Rent expense for office space paid to TD Leasing, LLC, a partnership owned equally by the stockholders of ECK was as follows:

   CYE 2007 $106,683 plus property taxes, utilities and maintenance[a]
   CYE 2008 $120,000 plus property taxes, utilities and maintenance[b]
   CYE 2009 $72,000 plus property taxes, utilities and maintenance[c]
   CYE 2010 $37,413 plus property taxes, utilities and maintenance[d]

   (a) See 2007 Audited Financial Statements, Page 8, Footnote G (monthly rental of $10,000 plus tax)
   (b) See 2008 Audited Financial Statements, Page 8, Footnote G (monthly rental of $9,517 plus tax)
   (c) See 2009 Audited Financial Statements, Page 9, Footnote G (monthly rental of $6,000 including tax)
   (d) See December 31, 2010 Profit and Loss Statement

   Total base rent paid in fiscal years 2008, 2009 and 2010 above <u>$229,413</u>. The building was purchased by TD Leasing, LLC per County Property Tax Records on July 29, 2005 for $500,000 and sold on May 4, 2011 for $487,500. The rate of return for 2008 approached 24%. See Lease between TD Leasing, LLC and ECK dated December 30, 2005 which provides for a base rental of $72,000 with no provision for increases.

   Given that ECK was responsible for property taxes, utilities and maintenance, a monthly rent of $3,000 would be closer to fair market rent for a building costing $500,000. Such a rent would provide an annual rate of return of approximately 7%. Assuming a fair market rent for the lease is $3,000 per month, rent for fiscal years 2008, 2009, and 2010 would have been $108,000, $121,413 less than was actually paid.

4. There were two officers' life insurance policies disclosed in Footnote D to the 2009 Audited Financial Statements. These two policies had a face amount of $500,000 each with total annual premiums for both policies of $13,028. Cash surrender value of life insurance was $41,788 at December 31, 2009. This asset does not appear on the internally prepared balance sheet for December 2010.

5. Amounts due from a related party at December 31, 2009 were $46,502. (See the 2009 Audited Financial Statements.) This asset does not appear on the internally prepared balance sheet for December 2010.

McCalla v. E.C. Kenyon Construction, Company, Inc. (ECK)
Analysis of Transfers to Stockholders
after May 1, 2008 (Date of Lawsuit)

Schedule Two (continued)

6. There is a detailed fixed asset list as of December 31, 2010, with a total cost of $257,660. There are two 2004 Lincoln Navigators on this list. Each Navigator was purchased in November 2004 for approximately $47,000. One Navigator was transferred to Tim Young and one to Doug Herring in the third or fourth quarter of 2010 (see Deposition of Douglas Herring taken 12/7/2011, pages 12 and 13). An approximate value for the Navigators at the time of transfer is $22,000 ($11,000 each) based on the current Kelly Blue Book value for a 6-year-old Lincoln Navigator with 120,000 miles in good condition.

   In addition, there were sales of assets in 2010 for $900 and in January 2011 for $10,700. No entries had been made to relieve any costs of fixed assets from the books as of January 2011. (See internally prepared financial statements.)

7. Pursuant to Florida Statutes Section 726.105 (1)(a), a transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor. Florida Statutes Section 726.105 (2) delineates 11 factors which may be considered, among others, in determining actual intent under paragraph (1)(a) of Section 726.105. An analysis of these 11 factors as applied to the transfers described above is attached as Schedule Three. Based on Schedule Three, 100% of the transfers described in Notes 1, 4, 5 and 6 and a portion of the transfers described in Notes 2 and 3 are fraudulent as to a creditor pursuant to Florida Statutes Section 726.105 (1)(a).

McCalla v. E.C. Kenyon Construction Company, Inc. (ECK)
Analysis of Florida Statutes Section 726.105
Transfers fraudulent as to present and future creditors

Schedule Three

FS 726.105 (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debt; or ....

FS 726.105 (2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

		Dividend	Salaries	Rent	Cash Surrender Value Life Insurance	Related Party Receivable	Autos
(a)	The transfer was to an insider	Yes	Yes	Yes	Yes	Yes	Yes
(b)	The debtor retained possession or control after transfer	No	No	No	No	No	No
(c)	The transfer was disclosed	Yes	Yes	Yes	No	No	No
(c)	The transfer was concealed	No	No	No	Yes	Yes	Yes
(d)	Before the transfer was made, the debtor had been sued	Yes	Yes	Yes	Yes	Yes	Yes
(e)	The transfer was of substantially all debtor's assets	Yes (FN1)	Yes (FN1)	Yes (FN1)	Yes (FN1)	Yes (FN1)	Yes (FN1)
(f)	The debtor absconded	Yes (FN2)	Yes (FN2)	Yes (FN2)	Yes (FN2)	Yes (FN2)	Yes (FN2)
(g)	The debtor removed or concealed assets	Yes	Yes	Yes	Yes	Yes	Yes
(h)	The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred	No	No (FN 3)	No	No	No	No
(i)	The debtor was insolvent or became insolvent shortly after the transfer was made	Yes (FN4)	Yes (FN4)	Yes (FN4)	Yes (FN4)	Yes (FN4)	Yes (FN4)
(j)	The transfer occurred shortly before or after a substantial debt was incurred	Yes (FN5)	Yes (FN5)	Yes (FN5)	Yes (FN5)	Yes (FN5)	Yes (FN5)
(k)	The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor	No	No	No	No	No	No

Footnotes:

FN1: The transfers taken as a whole equal substantially all of debtor's assets at the time debtor dissolved in November 2010.

McCalla v. E.C. Kenyon Construction Company, Inc. (ECK)
Analysis of Florida Statutes Section 726.105
Transfers fraudulent as to present and future creditors

Schedule Three (continued)

FN2: The debtor essentially absconded by dissolving on November 29, 2010.

FN3: Part or all the salaries paid to ECK's stockholders in 2009 and 2010 caused ECK to incur a net loss for the year.

FN4: The debtor was essentially insolvent at the time it was dissolved following the transfers enumerated and assuming a $627,657 judgment against ECK existed at the time of dissolution.

FN5: The transfers occurred after the stockholders knew of the claim that became the $627,657 judgment against ECK.