

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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MARK BROCKLEY and,  
ANNESSE BROCKLEY,  
Plaintiffs and Appellants,

vs.

APPEAL NO. 29915

MERRILL ELLIS, RONALD  
GUTMAN, CLARENCE GRIFFIN  
and GG&E LLC,  
Defendants and Appellees.

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APPEAL FROM THE CIRCUIT COURT  
FOR THE FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

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HONORABLE ERIC J. STRAWN  
Circuit Court Judge

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BRIEF OF APPELLANTS MARK BROCKLEY AND ANNESSE BROCKLEY

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### **PRELIMINARY STATEMENT**

This is an appeal from the Lawrence County Circuit Court, Fourth Judicial Circuit, Orders refusing to hold either Appellee in civil contempt of court for failure to comply with a charging order. Appellants Mark Brockley and Annesse Brockley will be referred to as "Brockleys." Appellees will be referred to as follows: Hickoks Hotel & Suites, LLC, shall be "Hickoks," Michael Trucano, shall be "Trucano," and the Michael J. Trucano Living Trust shall be "Trust." References to the settled record will be "SR." Trucano's deposition will be referred to as "TD," followed by the page and line numbers. Trucano deposition exhibits will be referred to as "TDE," followed by the exhibit number. Hearing transcripts will be referred to as follows: October 20, 2021, as "MH1," October 22, 2021, as "MH2," November 24, 2021, as "MH3," and December 15, 2021, as "MH4."

### **JURISDICTIONAL STATEMENT**

On April 15, 2015, Circuit Court Judge Michelle K. Comer, Judge, entered a Judgment ("Judgment") in the amount of \$1,548,504.61 in favor of Brockleys. (SR 113). A Corrected Charging Order ("Charging Order") at issue in this appeal was entered February 3, 2017, (SR 209), as a lien against the distributional interest of Clarence Griffin ("Clarence") in N.M.D. Ventures, LLC, ("NMD"), a gaming limited liability company that owned and operated Hickoks casino in Deadwood. (TDE 1). NMD subsequently changed its name to Hickoks Hotel & Suites, LLC, on February 4, 2019. (TDE 3). After Hickoks' casino was sold on December 29, 2020, without payment of the Charging Order, Brockleys applied for and Judge Comer entered an Order to Show Cause against Hickoks Hotel and Suites, LLC, Trucano, Trust and Kimberly L. Griffin ("Kimberly,")



the latter personally and as a representative of the Estate of Clarence Griffin. (“Estate”).  
(SR 334).

On December 13, 2021, Circuit Court Judge Eric J. Strawn, entered an *Order Denying Motion to Hold Michael J. Trucano and Michael J. Trucano Living Trust in Contempt of Court*. (SR 904). January 21, 2022, Judge Strawn entered his *Order Denying Plaintiffs’ Motion for Contempt set forth in the Order to Show Cause Against Hickoks Hotel and Suites, LLC, and Findings of Fact and Conclusions of Law*.

(SR 932, 934). Notice of Appeal was filed on February 18, 2022. (SR 1014). Brockleys rely on SDCL § 15-26A-3 and § 15-26A-4 in support of this Appeal.

### **STATEMENT OF ISSUES**

- I. AS ESTATES BY THE ENTIRETIES DO NOT EXIST IN SOUTH DAKOTA, IS THE ATTEMPTED TRANSFER OF AN INTEREST IN A SOUTH DAKOTA LLC BY ONE FLORIDA RESIDENT OWNER TO HIS SPOUSE “AS TENANCY BY THE ENTIRETIES” EFFECTIVE TO AVOID A CHARGING ORDER UNDER THE FACTS OF THIS CASE?

The trial court determined that Florida law governs the joint ownership interest of South Dakota LLC distributional interests.

*Estate of Hoffman*, 2002 S.D. 129, 653 N.W.2d 94  
*Peterson v. Issenhuth*, 2014 S.D. 1, 842 N.W.2d 351  
*Schimke v. Karlstad*, 87 S.D. 349, 208 N.W.2d 710 (1973)

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SDCL § 54-3-16

- II. WAS THE ATTEMPTED TRANSFER OF GRIFFIN’S INTEREST VOID FOR FAILURE TO COMPLY WITH THE LLC’S CHARGING ORDER AND STATE LAW?

The trial court determined that the transfer was valid without addressing the failure to comply.

*Farm Bureau Life Ins. Co. v. Dolly*, 2018 S.D. 28, 910 N.W.2d 196

*Schwan v. Burgdorf*, et al., 2016 S.D. 45

*State v. Bosworth*, 2017 S.D. 43, 899 N.W.2d 691

SDCL § 42-7B-7

SDCL § 42-7B-11

SDCL § 47-34A-101

SDCL § 47-34A-501through § 47-34A-504

III. WAS THE REFUSAL TO COMPLY WITH THE CORRECTED CHARGING ORDER WILLFUL OR CONTUMACIOUS, REQUIRING THE COURT TO FIND HICKOKS AND/OR TRUCANO IN CONTEMPT OF COURT

The trial court found that all elements of civil contempt of court were present except the element of the willful or contumacious failure to comply, and refused to hold Trucano or Hickoks in contempt of court.

*Keller v. Keller*, 2003 S.D. 36, 660 N.W.2d 619

*Metzger v. Metzger*, 2021 S.D. 23

*Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, 729 N.W.2d 335

*Talbert v. Talbert*, 290 N.W.2d 862 (S.D. 1980)

SDCL § 47-34A-504

SDCL § 47-34A-509(c)

**STATEMENT OF THE CASE**

This case involved the improper application of Florida law to ownership of personal property in South Dakota. It also involves, as a case of first impression, the enforcement of a charging order regarding a limited liability company. Because of the improper transfer of a membership interest pursuant to an assignment, the funds which should have been available to pay pursuant to the charging order were instead transferred and siphoned off.

This lawsuit involves post-judgment collection proceedings of the April 15, 2015,

\$1,548,504.61 Judgment in favor of Brockleys. Griffin was one of the Judgment debtors. (SR 113). Brockleys obtained partial satisfaction of judgment on the judgment debt. (SR 183). Brockleys obtained a charging order from Judge Comer as a lien on Griffin's interest in NMD pursuant to SDCL § 47-34A-504<sup>1</sup>. (SR 209). After Hickoks was sold in December of 2020, without payment of the Charging Order, Judge Comer entered an Order to Show Cause against Trucano, his Trust, Hickoks and Kimberly (both personally and as a representative of the Estate of Clarence Griffin). (SR 334). Kimberly could not be found to serve with the Order to Show Cause. Judge Comer subsequently entered a Voluntary Recusal due to a conflict. (SR 359).

After hearings on October 20, October 22 and November 24, 2021, Judge Strawn entered his December 13, 2021, Order declining to hold Trucano and his Trust in

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<sup>1</sup> 47-34A-504. Rights of creditor

(a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, and following notice to the limited liability company of such application, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment.

(b) A charging order constitutes a lien on the judgment debtor's distributional interest.

(c) A distributional interest in a limited liability company which is charged may be redeemed:

(1) By the judgment debtor;

(2) With property other than the company's property, by one or more of the other members; or

(3) With the company's property, but only if permitted by the operating agreement.

(d) This chapter does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.

(e) This section provides the exclusive remedy that a judgment creditor of a member's distributional interest or a member's assignee may use to satisfy a judgment out of the judgment debtor's interest in a limited liability company. No other remedy, including foreclosure on the member's distributional interest or a court order for directions, accounts, and inquiries that the debtor, member might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the limited liability company.

(f) No creditor of a member or a member's assignee has any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the company.

(g) This section applies to single member limited liability companies in

contempt. (SR 904). On January 21, 2022, after a December 15, 2021, Hearing, Judge Strawn entered an Order declining to hold Hickoks in contempt. (SR 932). Notice of Entry of both Orders was filed and served on February 10, 2022. (SR 973). Brockleys' Motion for Reconsideration filed February 9, 2022, was not addressed. (SR 939).

### **STATEMENT OF THE FACTS**

On October 1, 2014, Brockleys initiated an action against Merrill Ellis, Ronald Gutman, Clarence Griffin and GG&E LLC to collect on a defaulted contract for deed for Deadwood real estate sold to them by Brockleys. On April 15, 2015, Brockleys obtained a \$1,548,504.61 Judgment against Ellis, Gutman, Griffin and GG&E LLC. A partial satisfaction was filed on July 29, 2015, in the amount of \$1,903.51. (SR 180). GG&E, LLC, a/k/a G SQUARED, LLC, paid \$751,744.49, as appears in the Partial Satisfaction of May 10, 2016. (SR 183). As of December 31, 2016, the total amount due, including post-judgment interest, was \$1,029,259.41. (SR 225).

As shown by the Charging Order, as of December 31, 2016, the total amount due from Griffin to Brockleys was \$1,029,259.41. With post judgment interest at 10% per annum<sup>2</sup>, as of the December 29, 2020, closing the amount owed to Brockleys was

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addition to limited liability companies with more than one member.

<sup>2</sup> 54-3-5.1. Interest on judgments, statutory liens and inverse condemnations

Interest is payable on all judgments and statutory liens, exclusive of real estate mortgages and security agreements under Title 57A, and exclusive of support debts or judgments under §25-7A-14, at the Category B rate of interest as established in §54-3-16 from and after the date of judgment and date of filing statutory lien. On all judgments arising from inverse condemnation actions, interest is payable at the Category A rate of interest as established by §54-3-16.

54-3-16. Official state interest rates

\$1,440,963.17. However, the remainder of the funds available for distribution at the conclusion of the closing, \$1,135,686.61, was wired on December 29, 2020, to a Hickoks' bank account in Seminole, Florida, at Trucano's written instruction, rather than paid over to Brockleys. (SR 731, Affidavit of Attorney with Attachments of Documents Ordered by the Court, Paragraph 6; Affidavit Exhibit 1, Outgoing Wire Form, First Home Outgoing Wire Instructions and Dakota Title Authorization to Disburse Proceeds).

A charging order against the interest of Griffin in NMD was served upon Trucano and Griffin on or about December 30, 2016. (SR 202). An application for a Corrected Charging Order (at issue here) was made on or about February 2, 2017, with notice provided to NMD and Trucano, its registered agent and Managing Member. (SR 214). No objection was filed or appearance made with respect to the Charging Order. The Charging Order at issue was entered on February 3, 2017, updating the total amount due. (SR 209). Notice of Entry of that Charging Order was served that date upon Griffin, his attorney and Trucano, as registered agent of NMD. The Charging Order stated in pertinent part that:

1. The interest of Defendant Clarence Griffin in N.M.D. Venture, LLC is hereby subjected to a Charging Order in favor of and for the benefit of the Brockleys;
2. Distributions owed or payable to said Defendant by N.M.D. Venture, LLC must be paid directly to Brockleys;
3. N.M.D. Venture, LLC will be discharged from its obligations to Plaintiffs to the extent of any amounts so paid to Plaintiffs until the Judgment entered against the Defendants in this cause is paid in full;

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The official state interest rates, as referenced throughout the South Dakota Codified Laws, are as follows:

...  
(2) Category B rate of interest is ten percent per year; ...

and

4. Upon service of a true and correct copy of this Charging Order upon the Defendant Clarence Griffin, said Defendant shall deliver to Plaintiffs, through their attorneys, true copies of the operating agreement and true copies of any other agreements or documents evidencing or affecting the interest of said Defendant Clarence Griffin in N.M.D. Venture, LLC, and any distributions due or to become due to Defendant Clarence Griffin by reason of said Defendant's interest in N.M.D. Venture, LLC, regardless of the denomination of said distribution. (SR 209, p. 2)

Hickoks entered into a Purchase and Sale Agreement to sell its assets to SRK Development, Inc. on December 6, 2019. (SR 225, Exhibit 8). On July 21, 2020, N.M.D. (Hickoks), Griffin, Kimberly and Trucano executed an Agreement entitled *Agreement--Hickoks Hotel & Suites, LLC f/k/a N.M.D. Venture, LLC and The Michael J. Trucano Living Trust Under Date of February 9, 2015*, assigning Trucano's 50% interest in NMD to his Living Trust to be transferred upon closing of the sale. Under this Agreement, Hickoks, Griffin and Kimberly were required to hold Trucano and his Trust harmless and indemnify them for any loss on account of the Charging Order. (SR 225).

Closing on the sale of Hickoks occurred through Dakota Title Company, Spearfish, SD, ("Dakota Title"), on December 29, 2020. Griffin died on December 14, 2020, at Sarasota, Florida, 15 days prior to the closing. Brockleys received no prior notice of the sale or closing.

After discovering that the closing had occurred, Brockleys obtained the records of the sale from Dakota Title by subpoena. (SR 225, Exhibit 3). This included the Borrower's Final Settlement Statement, dated December 29, 2020, (SR 225, Exhibit 6), emails between Trucano's attorney, Richard Pluimer ("Pluimer") and Dakota Title closing agent Christina Marta ("Marta") dated December 28, 2020, (SR 225, Exhibit 7);

the Purchase and Sale Agreement dated December 6, 2019, (SR 225, Exhibit 8); Seller's Final Settlement Statement dated December 29, 2020, (SR 225, Exhibit 9); a Single Ledger Balance, dated December 29, 2020, (SR 225, Exhibit 10); and the Title Commitment, dated November 23, 2020. (SR 225, Exhibit 11). Haven L. Stuck, ("Stuck") who represented Hickocks and Kimberly, and Pluimer, who represented Trucano and Trust, were present at the closing. (SR 843).

Hickocks' property sold for \$4,529,088.73. (TDE 14). Proceeds of the sale were distributed as follows:

\$1,965,215.54	First Interstate Bank - Hickoks' Mortgage loan
\$ 51,055.79	Estimated Taxes
\$ 234,450.00	Commissions
\$ 6,994.19	Escrow/Title and Recording Charges
\$2,271,373.21	Balance due to Seller

Upon closing, \$1,135,686.61 of the \$2,271,373.21 net proceeds was paid to Trucano's Trust and \$1,135,686.61 was wired by Dakota Title to a bank account in Florida under the name of Hickoks, rather than Hickocks' bank account in Deadwood, South Dakota, on the instruction of Stuck. (SR 843). The Florida Account was subsequently cleaned out by Kimberly. (SR 844). Brockleys received nothing, in violation of the Charging Order.

Trucano, Trust, and Hickoks assert that on March 30, 2015, on the date of the prior Summary Judgment Hearing and two weeks before the trial court entered its Judgment, Griffin transferred his membership share to Griffin and Kimberly. (SR 225, Exhibit 7, pp. 4- 8, December 28, 2020, emails between Pluimer and Marta). No Certificate of Membership has ever been produced, nor any proof that the change was approved by the South Dakota Gaming Commission. (SR 977). Hickoks continues as a

registered and active limited liability company in South Dakota.

## **ARGUMENT AND AUTHORITY**

### **Standard of review.**

On appeal the trial court's findings of fact are reviewed under the clearly erroneous standard of review. *Myers v. Eich*, 2006 S.D. 69, ¶18, 720 N.W.2d 76, 82 (additional citations omitted). Conclusions of law are reviewed under the de novo standard of review. *Credit Collections Services, Inc. v. Pesicka*, 2006 S.D. 81, ¶5, 721 N.W.2d 474, 476. Mixed questions of law and fact are reviewed de novo. *Johnson v. Light*, 2006 S.D. 88, ¶10, 723 N.W.2d 125, 127. *Northstream Inv., Inc. v. 1804 Country Store Co.*, 2007 S.D. 93, ¶8; 739 N.W.2d 44

... "On review, this Court defers to the circuit court, as fact finder, to determine the credibility of witnesses and the weight to be given to their testimony." *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 26, 784 N.W.2d 499, 511. *Peterson v. Issenhuth*, 2014 S.D. 1, ¶15.

### **I. AS ESTATES BY THE ENTIRETIES DO NOT EXIST IN SOUTH DAKOTA, THE ATTEMPTED TRANSFER OF AN INTEREST IN A SOUTH DAKOTA LLC BY A FLORIDA RESIDENT OWNER TO HIS SPOUSE "AS TENANCY BY THE ENTIRETIES" CANNOT AVOID A CHARGING ORDER.**

In the Findings of Fact and Conclusions of Law promulgated by Hickoks and entered by the Court without modification, the Court found that the ownership by Griffin and his wife of the membership interest in Hickoks was controlled by Florida law. (SR 934; Hickok's FF/CL Conclusions 6-10). Brockleys assign Findings 3<sup>3</sup>, 10<sup>4</sup>, 15<sup>5</sup> as an abuse of discretion regarding the findings of fact and Conclusions 6-10<sup>6</sup> as error of law as

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<sup>3</sup> 3. On March 30, 2015, Defendant Clarence Griffin (Griffin) transferred his membership interest in Hickoks from himself to both he and his wife, Kimberly Griffin (Kimberly), to be held as Tenants by the Entirety.

<sup>4</sup> 10. Following the redemption Kimberly became the sole member of Hickoks.

<sup>5</sup> 15. Hickoks did not willfully, or contumaciously, ignore or violate the Charging order by disbursing the funds from the Hickoks bank account to sole remaining member, Kimberly.

<sup>6</sup> 6. Although South Dakota does not recognize Tenants by the Entirety,



explained below, applicable to all three issues.

The Court's error, as set forth in Conclusion of Law #6, is rooted in referencing the words "tenants by the entirety" in SDCL §§ 29A-6-302<sup>7</sup> (regarding registration of a security) and 48-7A-202<sup>8</sup> (regarding formation of a partnership). No authority was presented to establish the assertion that tenancy by the entirety may be created in South

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other jurisdictions do, and South Dakota recognizes the ability of non-residents of this state to hold personal property interests as Tenants by the Entirety, under the laws of the individual's domicile jurisdiction. SDCL § 29A-6-302, and SDCL § 48-7A-202.

7. The purpose of civil contempt is to compel compliance with a court's order. "Its sanction is coercive." See *Harksen v. Peska*, 2001 S.D. 75, 22,630 N.W.2d 98, 102- 03.

8. There are four required elements for a finding of civil contempt: "(1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order." See *Hiller v. Hiller*, 2018 S.D. 74, ¶ 20, 919 N.W.2d 548, 554.

9. Defendant Mr. Griffin and his spouse Ms. Griffin had the ability to, and did, hold the Hickoks membership interest through Tenants by the Entirety, under the law of their domicile state, Florida.

10. Such rights and obligations of Tenants by the Entirety ownership are governed by the laws of the state of Florida. SDCL § 43-1-7.

<sup>7</sup> 29A-6-302. Registration in beneficiary form-Sale or joint tenancy ownership

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as *tenants by the entirety*, or as owners of community property held in survivorship form, and not as tenants in common. (Emphasis added).

<sup>8</sup> 48-7A-202. Formation of partnership

(a) Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter.

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, *tenancy by the entirety*, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.... (Emphasis added).

Dakota; further, neither statute is remotely applicable to the facts.

South Dakota Codified Laws § 43-2-9 provides that "...[a]ny person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state, except as provided in § 43-2A-2<sup>9</sup> (alien ownership of agricultural land)." No case law exists in South Dakota addressing § 43-2-9. "When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Farm Bureau Life Ins. Co. v. Dolly*, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 200. One can hold property *within this state* except as provided in § 43-2A-2. This does *not* authorize categorizing ownership of the personal property involved in this case under the laws of Florida.

Tenancy by the entirety does not exist in South Dakota. Under SDCL 43-2-11:

The ownership of property by several persons is either:

- (1) Of joint interests;
- (2) Of partnership interests; or
- (3) Of interests in common.

As far back as 1973, this Court ruled:

By both the reasoning of the Nebraska Supreme Court and the force of the statutes which have been with us since early territorial days, we conclude that estates by the entirety do not exist in this state.

*Schimke v. Karlstad*, 87 S.D. 349, 208 N.W.2d 710 (1973) at 87 S.D. 357. Section 43-2-11 has been the law in this state since 1877, last codified in 1939. *Schimke* provided a thoughtful analysis determining that the legislature never intended to provide for such an

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<sup>9</sup> 43-2A-2. Maximum alien ownership of agricultural land-Exceptions  
No alien, who is not a resident of this state, of some state or territory of the United States or of the District of Columbia; and no foreign government shall hereafter acquire agricultural lands, or any interest therein, exceeding one hundred sixty acres, except such as may be acquired by devise or inheritance, and such as may be held as security for indebtedness. The provisions of this section do not apply

interest. The *Schimke* court recognized the autonomy of both spouses; that “Married Women’s Acts” serve to provide that each spouse has his or her own interest, or, as set forth in SDCL § 25-2-4:

Neither husband nor wife has any interest in the property of the other, excepting their respective rights for support as specifically provided by law, and except that neither can be excluded from the other's dwelling.

After dismissing the tenancy-by-the-entireties claim, the best that Griffin and Kimberly could attempt to argue is a joint tenancy in the distributional interest. That argument also fails. In South Dakota:

A joint tenancy exists when the four unities of time, title, interest, and possession are present. See *Zulk v. Zulk*, 502 N.W.2d 116, 118 (S.D. 1993) (citations omitted).

*Estate of Hoffman*, 2002 S.D. 129, at ¶9, 653 N.W.2d 94. In Florida the concept of joint tenancy, a bedrock principle of property ownership in South Dakota, is not recognized as a legitimate ownership right.

689.15 Estates by survivorship.—The doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state; that is to say, except in cases of estates by entirety, a devise, transfer or conveyance heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship; and in cases of estates by entirety, the tenants, upon dissolution of marriage, shall become tenants in common.

Further, contrary to South Dakota’s four unities, Florida has an additional two:

1) unity of possession (joint ownership and control); 2) unity of interest (the interests in the property must be identical); 3) unity of title (the interests must have originated in the same instrument); 4) unity of time (the interests must have commenced simultaneously); 5) survivorship; and 6) unity of marriage (the parties must be married at the time the property became titled in their joint names).

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to citizens, foreign governments or subjects of a foreign country whose right to hold land are secured by treaty.

*First Nat'l Bank v. Hector Supply Co.*, 254 So. 2d 777 (Fla. 1971), cited in *Sitomer v. Orlan*, 660 So.2d 1111 (Fla. 4th D.C.A. 1995). Unlike South Dakota, in Florida a tenancy by the entireties cannot be terminated by one joint tenant transferring his or her interest to another. *Lerner v. Lerner*, 113 So.2d 212 (Fla. 2d D.C.A. 1959).

As noted previously, Hickoks has argued that tenancy by the entireties exists in South Dakota by relying on two statutes: SDCL § 29A-6-302 and § 48-7A-202. Neither statute is applicable. Hickoks is not arguing that there was a non-probate transfer of a security interest or that Griffin created a partnership with Kimberly under the Uniform Partnership Act. The trial court nonetheless accepted this rationale in its Conclusion of Law number 6 (SR 934), in apparently deciding that South Dakota statute allows Florida law to control here.

Hickoks' reliance on *Peterson v. Feldman*, 2010 S.D. 53, 784 N.W.2d 493 to support its theory that Florida law applies is misplaced. *Peterson* is a *forum non conveniens* case and is inapposite to the facts in this case.

As to the applicable specific ownership interest in an LLC, South Dakota statute provides:

47-34A-501. Member's distributional interest

(a) A member is not a co-owner of, and has no transferable interest in, property of a limited liability company.

(b) A *distributional interest* in a limited liability company is personal property and, subject to §47-34A-502 and §47-34A-503, may be transferred in whole or in part.

(c) An operating agreement may provide that a distributional interest may be evidenced by a certificate of the interest issued by the limited liability company and, subject to §47-34A-503, may also provide for the transfer of any interest represented by the certificate. (Emphasis added).

South Dakota statute draws a distinction between a *distributional* interest and a

*membership* interest.<sup>10</sup> A distributional interest is personal property, SDCL § 43-2-9.

That statute provides specifically for the ownership of personal property by persons not citizens of South Dakota.

The trial court acceptance of Hickoks' assertion that ownership follows the owner and is subject to the laws of the owner's domicile (MH3 17:9-18:4) is a clear error of law. Hickoks cited a portion of SDCL § 43-1-7 to the trial court, (MH4 38:12-17), which adopted Hickoks' reasoning without considering the whole of the statute. The statute, S.D.C.L. § 43-1-7, *in toto* provides:

43-1-7. Law governing personal property

*If there is no law to the contrary in the place where personal property is situated*, it is deemed to follow the person of its owner and is governed by the law of his domicile.

(Emphasis added).

There is clearly "law to the contrary" in South Dakota. The LLC was formed in South Dakota. (SR 622, Exhibit S-A1, 13:9-21, Exhibit S-A2). The member shares were initially issued in South Dakota. (SR 622). At all times, up until the transfer of proceeds out of the state, the business was conducted solely in South Dakota. (MH2 12:15-18). The 2015 Assignment purporting to transfer half of Griffin's membership interest to his wife to defeat creditor claims was executed and located in South Dakota. (SR 375, Exhibit B). The trial court wrongly relied on the Florida residency of Griffin and Kimberly to conclude that Florida law controls the ownership of South Dakota LLC interests.

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<sup>10</sup> e.g., 47-34A-502. Transfer of distributional interest

A transfer of a distributional interest does not entitle the transferee to become or to exercise any rights of a member. A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled.

The personal property at issue here is either a member interest or a distributional interest in a South Dakota LLC. South Dakota has scant law on LLCs. However, other states which have addressed these issues. *See, Jpmorgan v. Chase Bank, N.A., v. McClure, et. al*, 393 P.3d 955 (Colo. 2017). In *Jpmorgan*, the Court held that the member’s interest in an LLC is located where the LLC was formed, citing *Koh v. Inno-Pacific Holdings, Ltd.*, 114 Wash.App. 268, 54 P.3d 1270 (2002). It reasoned that the charging order is directed at the LLC.

“Accordingly, we deem it more appropriate to place the membership interest in the state in which the LLC, and thus the membership interest, was created, as opposed to in whatever state the debtor-member happens to be domiciled at a given time.” *Id.* at ¶24.

Further, the court felt that justice and convenience “militate in favor of locating the membership interest in the state in which the LLC was formed. To conclude otherwise...could result in substantial uncertainty and confusion.” *Id.* at ¶ 25.

The analysis is sound and applicable in this case. The ownership of the LLC interest at issue here is governed by the laws of the State of South Dakota, not the laws of Florida. The trial court’s application of Florida law is a clear error of law.

Nor can Griffin succeed in arguing that a joint tenancy exists under these facts. Even assuming, *arguendo*, that Florida law applied to the ownership, Hickoks cannot get around *Beal Bank, SB v. Almand and Associates, etc., et al.*, 710 So. 2d 608, 610 (Fla. 5th D.C.A. 1998), which found that the law of tenancy by the entireties with respect to personal property is thin at best, and that, at least with respect to a bank account as personal property, just adding a name does *not* satisfy the unity of time. Similarly, the unities are not satisfied in the present context in transferring half of Griffin’s “ownership”

to Kimberly. If Hickoks' reliance on Florida law were appropriate, the unity of time in Florida requires that the tenants obtain the same thing at the same time. Just adding a name (in that case to a bank account) and announcing that it is now a tenancy by the entireties was found *not* to create such tenancy. This is in accord with South Dakota's case law. *Farmers State Bank of Winner v Westrum*, 341 N.W.2d 631 (SD 1983).

Since the attempted transfer did not create a tenancy by the entireties, and it did not have the requisite four unities, the best Griffin could have accomplished then was to create a tenancy in common in the distributional interest he had in Hickoks. Thus, the trial court erred as a matter of law in finding that Florida law controls the ownership of any interest. Since Griffin is now dead, his estate is properly the "owner," not Kimberly Griffin. Given the errors of law, Brockleys are entitled to reversal on this issue with instructions to enter Conclusions of Law in compliance with South Dakota law.

## **II: THE ATTEMPTED TRANSFER OF GRIFFIN'S INTEREST WAS VOID FOR FAILURE TO COMPLY WITH THE LLC'S CHARGING ORDER AND STATE LAW.**

The document relied upon by Trucano and Hickoks for transfer of Griffin's membership interest is the "*Assignment of Membership Interest in N.M.D. Venture, LLC, Assignee's Consent to and Acceptance of the Terms of the N.M.D. Venture, LLC Operating Agreement and Amendment Thereof, Including Consent to the Transfer of Membership Interest by the Continuing Member*" (hereinafter "Assignment" for purposes of discussion) (SR 622; TDE7). In that Assignment Griffin refers to a 50% membership interest in the LLC, and that he desires to assign the "Membership Interest" to himself and Kimberly and, by such assignment create a tenancy by the entireties (*Id.*).

The Assignment of Griffin's interest itself does not refer to an assignment of a

distributional interest. Griffin's attempt to transfer his interest is void as a matter of law because it fails to comply with both the Charging Order and South Dakota law. As set forth in Issue I, it is the *distributional interest* which is personal property subject to transfer, SDCL § 47-34A-501. Further, such transfer doesn't entitle a transferee to become a member, SDCL § 47-34A-502. Interestingly, the next section, § 47-34A-503, sets forth the procedure for providing any membership interest in an LLC. Specifically, subsection (a) provides:

(a) A transferee of a distributional interest may become a member of a limited liability company if and to the extent that the transferor gives the transferee the right in accordance with authority described in the operating agreement or all other members consent.

The second half of the Assignment purports to set out the consent and acceptance of the operating agreement. However, it fails to follow either statute or the operating agreement. The consent sets forth:

- A. The Assignees (Griffin and Kimberly) accept the terms and conditions of the operating agreement;
- B. They agree to cooperate with Trucano to document their assignment and waive any right of first refusal; and
- C. They amend Section 5.08 of the operating agreement with respect to death or divorce of a member;
- D. In consideration, the *Assignees* waive any restriction (not defined, but for reference to the right of first refusal).

Nowhere in that Exhibit, however, did anyone attempt to waive Section 5.01 of the Operating Agreement, which provides:

Section 5.01 Restrictions on Transfer. Each Member agrees not to sell, assign, pledge, encumber, or otherwise transfer (collectively "Transfer") his/her/its Membership Interest, or any portion thereof or interest therein, or to withdraw from the Company, except as provided in this Article. Any Transfer or attempted withdrawal other than as permitted by this Article shall be null and void. Any Transfer is subject to the approval of the South Dakota Commission on Gaming. Upon the Transfer by a Member



of all of his/her/its membership Interest in a manner permitted or required pursuant to the provisions of this Article, such Member shall be deemed to have withdrawn as a Member and shall have no further rights as a Member hereunder. (SR 375, Exhibit E).

The trial court was provided with the Supplemental Affidavit in Support of Motion for Reconsideration of Orders filed in this matter (SR 844). In it and attached thereto was uncontroverted evidence that neither Trucano nor Hickoks sought approval from the South Dakota Commission on Gaming. Such approval wouldn't be waivable in any event. As set forth in the Affidavit, Commission approval is as set forth in SDCL §§ 42-7B-7 and 42-7B-11 and required by ARSD 20:18:06:08<sup>11</sup>. (SR 844).

As further shown, Kimberly, the successor in interest, was aware of this requirement, insofar as she was a part of the process for obtaining ownership in a completely different LLC doing business in Deadwood. (SR 844), and so understood the necessity of that process.

Thus, the attempted transfer and creation of a tenancy by the entireties not only fails as a matter of South Dakota law as set forth above, the same was invalid because it was not properly completed pursuant to the regulations and statutes regarding gaming. As provided in the Operating Agreement, the attempted transfer is null and void, meaning that all of Griffin's interest remains intact. And were it to be determined that the transfer of ownership was complete, there was never a transfer of the *distributional interest*, which remains intact.

The trial court had before it both facts and law proving that the attempted transfer

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<sup>11</sup> 20:18:06:08. Transfers of interest. No person may sell, lease, purchase, convey, or acquire an interest in a retail licensee or operator licensee without the prior approval of the commission.

was not proper. Instead, the Court erred as a matter of law in its ruling. The trial judge stated on the record that he has reviewed all of the file and documents filed in this action (MH1 2:24-25; MH4 39:11-15). The pertinent statutory authority was presented.

However, the trial court failed to consider the language of the statutes construing the ownership and transfer of distributional interests pursuant to South Dakota statute, as outlined above. Statutes enacted must mean something. *State v. Bosworth*, 2017 S.D. 43, in citing *Pitt-Hart v. Sanford Med. Ctr.*, 2016 S.D. 33, ¶ 13, 878 N.W.2d 406, 411, stated “[w]e assume that the Legislature intended that no part of its statutory scheme be rendered mere surplusage.” Further this Court “assume[s] that statutes mean what they say and that the legislators have said what they meant.” *State v. Bordeaux*, 2006 S.D. 12, ¶ 8, 710 N.W.2d 169, 172 (quoting *Crescent Elec. Supply Co. v. Nerison*, 89 S.D. 203, 210, 232 N.W.2d 76, 80 (1975)),” *Schwan v. Burgdorf, et al.*, 2016 S.D. 45.

Both Trucano and Hickoks argued that there was no distribution because half of the net proceeds from the sale of the assets of Hickoks was deposited into an account upon completion of the sale. The relevant definitions regarding a distribution are contained in SDCL § 47-34A-101 Definitions:

(5) "Distribution" means a transfer of money, property, or other benefit from a limited liability company to a member in the member's capacity as a member or to a transferee of the member's distributional interest;

(6) "Distributional interest" means all of a member's interest in distributions by the limited liability company;

....

(20) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law;

(21) "Transferee" means a person to which all or part of a distributional interest has been transferred, whether or not the transferor is a member.

The definitional provisions are unambiguous and do not require a check to be written to Griffin to constitute a distribution. As noted in *Farm Bureau Life Ins. Co. v. Dolly*, 2018 S.D. 28, ¶ 9.

"When the language in a statute is clear, certain[,] and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Rowley v. S.D. Bd. of Pardons & Paroles*, 2013 S.D. 6, ¶ 7, 826 N.W.2d 360, 363-64 (quoting *In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7, 814 N.W.2d 141, 143).

The 2015 transfer attempted by Griffin and, ultimately, Kimberly, Trucano and Hickoks, was null and void, thus all of Griffin's interest remains intact. Even if the transfer of Griffin's membership interest is considered by this Court to be proper, there was no transfer of his *distributional* interest, which distributional interest in South Dakota remains in full force and effect. Our statutes must be recognized and upheld in order not to render them meaningless. Brockleys are entitled to reversal on this issue with instructions to hold Hickoks and Trucano in contempt, which contempt can be purged by payment of the amount of the LLC's distribution to Brockleys with costs, expenses and such other relief as this Court deems appropriate, to include consideration of attorney's fees under the trial court's contempt powers.

### **III. THE REFUSAL TO COMPLY WITH THE CORRECTED CHARGING ORDER WAS WILLFUL OR CONTUMACIOUS AND REQUIRED THE COURT TO FIND HICKOKS AND/OR TRUCANO IN CONTEMPT OF COURT.**

Because the circuit court relied on the fact that Trucano and Hickoks complied with Florida law and, therefore, their actions were not willful or contumacious, the trial court failed to hold either Trucano or Hickoks in contempt of the Charging Order. The four elements required to demonstrate civil contempt of court are:

- (1) existence of an order,
- (2) knowledge of that order,
- (3) ability to comply with the order, and
- (4) willful or contumacious disobedience.

*Talbert v. Talbert*, 290 N.W.2d 862, 864 (S.D. 1980), citing *Hanisch v. Hanisch*, 273 N.W.2d 188 (S.D. 1979). The purpose of a civil contempt proceeding is to force a party “to comply with orders and decrees issued by a court in a civil action for the benefit of an opposing party.” *Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, ¶ 23, 729 N.W.2d 335, 344 (quoting *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 2003 S.D. 45, ¶ 14, 661 N.W.2d 719, 723). Contempt proceedings, as noted in *Farmer v. Farmer*, 2020 S.D. 46, are reviewed using the following standards:

[¶19] A circuit court's findings of fact will not be set aside unless clearly erroneous. *Keller v. Keller*, 2003 S.D. 36, ¶ 8, 660 N.W.2d 619, 622 (per curiam). When considering a court's order of contempt, “[t]he appropriate remedy or punishment for contempt of court lies within the sound discretion of the trial court” and is therefore reviewed for an abuse of discretion. *Id.* However, we review a court's conclusions of law de novo. *Harsken v. Peska*, 2001 S.D. 75, ¶ 9, 630 N.W.2d 98, 101.

As to the elements of contempt of court, the essential facts are largely undisputed. The parties have agreed—and the trial court found—that the Charging Order is a valid order; that all persons had knowledge of that order; and that all persons had the ability to comply with the Order. The trial court’s oral findings of fact of November 24, 2021, found that both Trucano and Hickoks met all the elements of contempt of court except the last element - *willfulness or contumaciousness*. (MH3 pages 25:24—27:1). The trial court then adopted, whole cloth and over objection by Brockleys, the Findings of Fact and Conclusions of Law proposed by Hickoks which, in Finding of Fact 15<sup>12</sup>, determined that

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<sup>12</sup> 15. Hickoks did not willfully, or contumaciously, ignore or violate the Charging order by disbursing the funds from the Hickoks bank account

willfulness or contumaciousness did not occur in the distribution of proceeds. (SR 934).

In both instances, the trial court's finding presumed the failure of both to comply with the Charging Order.

The trial court failed to consider significant facts which point toward the willful or contumacious actions of both Hickoks and Trucano. It is important to reiterate that the trial court stated it reviewed all the records and documents on file, including the argument of counsel. The trial court should have considered the following in its analysis:

(1) The Corrected Charging Order requires, at paragraph numbered 4:

Upon service of a true and correct copy of this Charging Order upon the Defendant Clarence Griffin, Said Defendant shall deliver to Plaintiffs, through their attorneys, true copies of the operating agreement and true copies of any other agreements or documents evidencing or affecting the interest of said Defendant Clarence Griffin in N.M.D. Venture, LLC, and any distributions due or to become due to Defendant Clarence Griffin by reason of said Defendant's interest in N.M.D. Venture, LLC, regardless of the denomination of said distribution.

It should be noted that, at the time this Order was entered, counsel for Griffin was Haven Stuck, who represented Griffin and GG&E, LLC in the original suit. Mr. Stuck and his firm also represent Hickoks in this action. There is nothing in the record indicating that counsel was not representing Griffin up to his date of death. (MH3 39:1-3). The same counsel representing Griffin and the LLC at the time had, from February 3, 2017 until the date of Griffin's death, ample opportunity to provide to Plaintiff the information he had with respect to the sale of the LLC but failed to do so. To claim it was the Defendant's obligation but not the LLC's obligation is to ignore the simple fact that the same attorney represented both.

(2) The 2015 Assignment. While this predates the Corrected Charging Order, it

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to sole remaining member, Ms. Griffin.

is a part of the pattern demonstrated to defeat Plaintiff's ability to collect on a debt owed by Griffin. A Motion for Summary Judgment was made and set for hearing on or about March 12, 2015. (SR 78). The Motion for Summary Judgment was dated March 12, 2015, signed by counsel for Plaintiffs who now is employed by the same firm as Hickok's attorney. An objection was filed on behalf of all defendants except Ronald Gutman on March 26, 2015. Notices of hearing were served on March 12, 2015, and March 25, 2015. (SR 78, 85). Said summary judgment was noticed for hearing on The Assignment is dated and signed March 30, 2015. (SR 341). This is the same date the Summary Judgment hearing was held, ruling generally against Griffin and the other Defendants. This Assignment was executed March 30, 2015, on the same day as the hearing was held. The Assignment purports to give Griffin's 50% stake in the LLC to his wife and him as tenants by the entireties, thus attempting to protect his ownership interest from Plaintiffs as creditors. On April 15, 2015, two weeks after the Agreement was entered, Summary Judgment was entered. (SR 113). All of this information was presented to the trial court, which didn't properly consider the facts surrounding the Assignment. Rather, the trial court, at finding of fact number 3, made the conclusory statement that Griffin transferred his interest to his wife and himself as tenants by the entirety. (SR 934). This is, again, a clear error of law.

(3) The July, 2020, Agreement. On July 21, 2020, Hickoks and Trucano, in contemplation of the sale of the assets of Hickoks, entered into an Agreement, referring to a Purchase Agreement reached with a purchaser. (SR 375, Exhibit F). In that Agreement, Trucano, as co-Trustee of his Living Trust, Trucano, as managing member of Hickoks, and Trucano, as managing member and Co-Trustee, agreed, to the sale of assets. That

Agreement also provided an Indemnification as follows:

4. Indemnification: In consideration for Trucano's sale of all of its right, title and interest in the Company at closing, Company agrees to indemnify Trucano as follows:

A. The Company, and Clarence Griffin and Kimberly L. Griffin, husband and wife, as tenants by the entirety, jointly and severally, shall defend, indemnify and hold harmless Trucano from any and all claims, demands, causes of action, liability, loss, damage (including injury to persons or property) arising out of any obligation of the Company or Clarence Griffin, individually, with specific reference to a Charging Order entered in Case 40CIV14-000320 on behalf of Mark Brockley and Annesse Brockley, against, among others, Clarence Griffin. This indemnification is not limited to such Charging Order but shall be inclusive of any and all business activities conducted by Hickoks Hotel & Suites, LLC from and after the date of redemption.

B. The obligation of Company and Clarence Griffin and Kimberly L. Griffin, husband and wife, as tenants by the entirety, to indemnify and hold harmless Trucano shall extend to and include, without limitation, the payment of all awards, decrees, attorney's fees, related costs or expenses (including any penalties or fines), judgments, and any reimbursements for all legal expenses and costs incurred by it. To the same extent, this indemnification applies to all costs and expenses, including legal expenses and costs incurred by Trucano either in connection with the operation of the Company after the date of redemption or in enforcement of this Agreement.

C. Company, Clarence Griffin and Kimberly L. Griffin, husband and wife, as tenants by the entirety and The Michael J. Trucano Living Trust under date of February 9, 2015 agree that this Agreement shall inure to the benefit of and may be enforced by Trucano, its successors and assigns, and shall be binding upon and enforceable against the Company, Clarence Griffin and Kimberly L. Griffin, husband and wife, as tenants by the entirety and individually, their respective legal representatives, successors and assigns.

Subsection A relates specifically to the Charging Order and recognizes Brockleys'

interest, recognizes that Trucano wishes to wash his hands of the Charging Order and, in fact, signals that in the event Brockleys decide to enforce the Charging Order, Hickoks, Griffin and Kimberly Griffin will provide cover for Trucano. It is important to note that

Trucano was acting in his own personal interest as well as that of a member of the LLC.

The explanation by Trucano and his counsel was exposed in the October 22, 2021 hearing before the trial court, in which Trucano's counsel stated:

“Of course by -- I mean, because this was made, like, six months or so before the closing actually occurred, but a closing was pending. The company didn't know whether this sale would be closed or that they would put it back on the market if it didn't, but we knew the company was in the business of selling its assets. And this was intended to allow Mr. Trucano to retire, to get out of the gaming business, hotel business, hospitality business in Deadwood, receive fair value for his interest in the company, and to move on.

“But, yes, we knew that Mr. Brockley was holding a charging order against Mr. Griffin, and that was part of the reason, quite honestly, that Mr. Trucano wanted out of any further business dealings with either Mr. Brockley or Mr. Griffin. Just wanted to retire.

“So we knew -- and I'll say "we" because I drafted the contracts. We knew that there was a possibility that even though the deal was structured so that Mr. Brockley had absolutely no interest in anything, in any money that we were effecting by the transaction, we knew that despite that, there was a high likelihood, a reasonably high likelihood that he was going to find some bizarre way to try to come after Griffin through Trucano.”

(MH2 pages 39:8-40:5).

Trucano wanted to extract himself personally from being responsible, as a member of the LLC to honor the Charging Order, so that he could retire. “A member of a member-managed company does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the member's own interest,” SDCL § 47-34A-409(e). However, a member owes a duty of care to the company in the conduct of winding up company business to the extent that the member is refrained from “engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law,” § 47-34A-409(c). The Charging Order remains a lien issued by the court by operation of law under SDCL § 47-34A-504. No law



allows a member to ignore a charging order without penalty.

(4) The sale of Hickoks. The sale of all of Hickoks' assets was contemplated as early as "a couple of years probably before it sold." (TD 40:12-13). A formal sale agreement was entered into on or about December 6, 2019. (SR 225, Exhibit 8). Once again, Stuck, the attorney for both Griffin and Hickoks, was involved in the sale. Again, the obligation to notify Brockleys as required by the Charging Order was intentionally ignored by both Griffin and Hickoks. (TD 58:9-59:6). As the filings from the title company clearly demonstrate, Jennifer Whitehouse, handling the closing of the sale, received instruction from Stuck to wire the non-Trucano half of the net proceeds to a bank in Seminole, Florida. (SR 833). Stuck concurred that, as the attorney for Hickoks, he did convey those instructions. (SR 843). Trucano and his counsel were aware, prior to the exodus of the funds to Florida, that the same was contemplated before closing. (MH3 pages 3:9-6:21, SR 839 ¶3). The flow of money was before the trial court. (SR 844). Getting around the Charging Order was contemplated by Trucano and Hickoks, including Kimberly Griffin who was by then presumably the other holder of a member share and who was living in Florida at the time. The records before the trial court plainly set out that Trucano was aware of the impending transfer of funds; that Hickoks directed it; that the funds were funneled away from the reach of the Charging Order; and that over the subsequent four months the funds were depleted. Without doubt, both Trucano and Hickoks knew this was happening or likely to happen. And at no time did anyone advise Brockleys of the same. Both Trucano and Hickoks willfully violated the Charging Order by letting those funds, in excess of one point one million dollars, leave the state.

Trucano's actions are attributable to Hickoks. Trucano ran the LLC, was

registered agent and managing member, executed all relevant documents, including the final sale documents. Trucano was actively involved in all stages of the sale of Hickoks at all times, and was represented by counsel. Further, he was particularly concerned about the terms of the Charging Order, Brockleys intention of enforcing the Charging Order, and Trucano's desire to be indemnified by Griffin or Kimberly for violation of the Charging Order. (SR 225, Exhibit 8).

In determining the element of "willful or contumacious" refusal to comply with the Charging Order, the trial court is required to consider this element in the first instance. *Metzger v. Metzger*, 2021 S.D. 23, ¶ 19. General, conclusory statements won't be sufficient to address the issue of contempt, including the "willful or contumacious" element. Although the facts are quite different from this case, this Court, in *Keller v. Keller*, 2003 S.D. 36, at ¶ 12, stated:

"The findings reflect that her own conduct justified the finding of contempt and her attempt to cast blame elsewhere is no excuse as a matter of law."

Like *Keller*, Hickoks and Trucano had the ability to comply simply by paying the distributional interest of Griffin to Plaintiffs. Absent that, they could have left the funds in South Dakota. In each case, they *should* have notified Plaintiffs so that they had a meaningful opportunity to enforce the Charging Order. It was not by accident that neither Hickoks nor Trucano did any of this. To the contrary, they affirmatively, *willfully* refused to comply with the terms of the Charging Order, preferring their own putative member over a valid court order.

Neither Hickoks nor Trucano have ever argued that the Charging Order was anything but clear and unambiguous, *Harksen v. Peska*, 2001 S.D. 75, 630 N.W.2d 98, or

that the person to whom the Order was directed didn't know exactly what duties or obligations were imposed on him, *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 2003 S.D. 45, 661 N.W.2d 719.

In *Myhre v. Myhre*, 206 N.W. 2d 905 (SD 1980), the Court, in quoting *Malec v. Malec*, 196 Neb. 533, 244 N.W.2d 82 (1976) stated:

“A party is not in contempt of court for a failure to comply with an order directing him to pay money unless... his refusal was willful, contumacious, and without just and reasonable grounds.”

*Id.* at 244 N.W.2d 86. The basis on which the trial court found this element was not willful or contumacious is because the trial court incorrectly applied Florida law, a conclusion that is neither just nor reasonable.

A survey of cases in South Dakota demonstrates that the correct phrase—willful *or* contumacious—is generally recited as the fourth element of contempt. However, trial courts often recite findings requiring conduct to be willful *and* contumacious, which is an inappropriate standard. The element is stated in the disjunctive: the act is willful *or* it is contumacious. It is apparent that the failure of Hickoks or Trucano to comply with the Charging Order was willful.

This Court's rules of statutory interpretation are well settled. "In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *Id.* ¶ 11, 932 N.W.2d at 139 (quoting *State v. Bowers*, 2018 S.D. 50, ¶ 16, 915 N.W.2d 161, 166).

*State v. Thoman*, 2021 S.D. 10, ¶ 17.

The concept of “willful” is determined by common sense and ordinary meaning. While our statutes may not be replete with the definition of “willful”, we do have some statutory direction. For instance, SDCL § 37-5B-1(31), defining “willfully” in respect to

Franchise Investment states as follows:

(31) "Willfully," if applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. The term does not require any intent to violate law, or to injure another, or to acquire any advantage;

The definition of "willful" appears to be context-dependent. In its ordinary interpretation, Merriam-Webster defines "willful" as "done deliberately: Intentional"<sup>13</sup>. There is no reason to interpret "willful" as in any other manner than its ordinary context. As to "contumacious," the "circuit court has inherent power to enforce the terms of its orders." *State v. Gullickson*, 2003 S.D. 32, ¶ 19. The conduct of Hickoks and Trucano clearly demonstrates the requisite contempt for the court's Charging Order. Trucano's claimed intentional ignorance cannot constitute absolution.

The undisputed facts establish as a matter of fact and law that the refusal of Hickoks and Trucano to follow the Charging Order was willful, intentional, in knowing and direct violation of the Charging Order and contumacious. Hickoks and Trucano engaged in a scheme to attempt to avoid the application of the Charging Order. There was no accident or innocence by any definition, and their conduct must be condemned to enforce the legislative language and intent to provide a creditor's remedy against an LLC member. Brockleys are entitled to reversal on this issue with instructions to hold Hickoks and Trucano in contempt, which contempt can be purged by payment of the amount of the LLC's distribution to Brockleys with costs, expenses and such other relief as this Court deems appropriate to include consideration of attorney's fees under the trial

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<sup>13</sup> <https://www.merriam-webster.com/dictionary/willful#:~:text=Legal%20Definition%20of%20willful%20%3A%20not%20accidental%20%3A,of%20others%20willful%20injury%20Other%20Words%20from%20willful.>

court's contempt powers.

### **CONCLUSION**

The trial court's failure to enforce the Corrected Charging Order deprived Brockleys of the precise, albeit narrow, remedy our legislature has established. In order to enforce their rights under South Dakota law, Brockleys are entitled to an order finding Trucano and Hickoks in contempt of the Corrected Charging Order. Brockleys request that this Court reverse the trial court's orders and remand this case to the circuit court, directing the trial court to hold Trucano and/or Hickoks in contempt and provide the terms for them to purge themselves of contempt as set forth above.

Dated this 18th day of May, 2022.

CLAGGETT & DILL, PROF. LLC.

---

Jon W. Dill  
Attorneys for Appellants  
212 E. Colorado Blvd.  
Spearfish, S.D. 57783  
(605) 642-7708  
(605) 642-7709 fax  
[jond@claggettanddill.com](mailto:jond@claggettanddill.com)

### **REQUEST FOR ORAL ARGUMENT**

Brockleys hereby request that this matter be set for oral arguments pursuant to SDCL 15-26A-82.

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Jon W. Dill

# **APPENDIX**

## **APPENDIX**

1.	Order Denying Motion to Hold Michael J. Trucano and Michael J. Trucano Living Trust in Contempt of Court .....	001
2.	Order Denying Plaintiffs’ Motion for Contempt set forth in the Order to Show Cause Against Hickoks Hotel and Suites, LLC.....	003
3.	Findings of Fact and Conclusions of Law.....	005
4.	Corrected Charging Order.....	010
5.	Affidavit of Attorney with Attachments of Documents Ordered by the Court, Affidavit Exhibit 1, Outgoing Wire Form, First Home Outgoing Wire Instructions and Dakota Title Authorization to Disburse Proceeds.....	012
6.	October 20, 2021, Motion Hearing transcript page 2.....	018
7.	October 22, 2021, Motion Hearing transcript pages 12, 39-40.....	020
8.	November 24, 2021, Motion Hearing transcript pages 3, 17-18, 25-27, 39.....	024
9.	December 15, 2021, Motion Hearing transcript pages 38-39.....	033





1. The Plaintiffs' Motion to hold Michael Trucano, personally and on behalf of the Michael Trucano J. Living Trust in Contempt of the Court Order regarding the Amended Charging Order is DENIED; and

2. As the Court finds this to be a close case, no attorney fees and costs will be assessed against the Plaintiffs in this matter in favor of Michael Trucano and/or the Michael J. Trucano Living Trust, or against Michael Trucano and/or the Michael J. Trucano Living Trust in favor of the Plaintiffs.

12/13/2021 1:28:47 PM

BY THE COURT:



Eric J. Strawn  
Circuit Court Judge

ATTEST: CAROL LATUSECK, CLERK

BY: KRISTIE GIBBENS, DEPUTY



STATE OF SOUTH DAKOTA    )  
  )ss  
COUNTY OF LAWRENCE        )

IN CIRCUIT COURT  
  
FOURTH JUDICIAL CIRCUIT

MARK BROCKLEY and ANNESSE  
BROCKLEY, husband and wife,  
  
  Plaintiffs,

vs.

MERRILL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN and GG&E, LLC,  
A.K.A. G SQUARED, LLC, a South  
Dakota Limited liability company,  
  
Defendants.

40CIV14-000320

**Order Denying Plaintiffs’  
Motion for Contempt set forth in the  
Order to Show Cause  
Against Hickok’s Hotel and Suites, LLC**

Plaintiffs’ Motion for Order to Show Cause filed on April 15, 2021, requests Hickoks Hotel and Suites, LLC, show cause why it should not be held in contempt of Court for violating the South Dakota Court’s amended Charging Order filed on February 3, 2017. The matter came on for hearing before the Honorable Eric J. Strawn on December 15, 2021, in the courtroom of the Lawrence County Courthouse in Deadwood, South Dakota; the Plaintiffs Mark Brockley and Annesse Brockley (“Plaintiffs”) appeared personally (Mark Brockley) and through their South Dakota attorney John W. Dill of Claggett & Dill, Prof. LLC. Hickoks Hotel and Suites, LLC f/k/a N.M.D. Venture, LLC, a South Dakota limited liability company, and non-party to the above titled action (“Hickoks”), appeared by and through its South Dakota attorneys Aaron T. Galloway and Haven L. Stuck of Lynn, Jackson, Shultz & Lebrun, P.C.

The Court having heard the arguments, considered and reviewed the documents provided, entered its Findings of Fact and Conclusions of law, and further being fully advised as to the premises, now does hereby:

ORDER that Plaintiffs' request in its Motion for Order to Show Cause to hold Hickok's Hotel and Suites, LLC, f/k/a N.M.D. Venture, LLC, in contempt of the Charging Order dated February 3, 2017, is hereby DENIED, and it is further

ORDERED that no attorney fees and costs will be assessed against either Plaintiffs or Hickoks Hotel and Suites, LLC.

Dated this 21<sup>st</sup> day of January, 2022.

BY THE COURT:

  
Eric J. Strawn, Circuit Court Judge

ATTEST: CAROL LATUSECK, CLERK

BY: KRISTIE GIBBENS, DEPUTY



STATE OF SOUTH DAKOTA )  
 )ss  
COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT

<p>MARK BROCKLEY and ANNESSE BROCKLEY, husband and wife,</p> <p style="text-align: right;">Plaintiffs,</p> <p>vs.</p> <p>MERRILL ELLIS, RONALD GUTMAN, CLARENCE GRIFFIN and GG&amp;E, LLC, A.K.A. G SQUARED, LLC, a South Dakota Limited liability company,</p> <p>Defendants.</p>	<p style="text-align: center;">40CIV14-000320</p> <p style="text-align: center;"><b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b></p>
--	---

THIS MATTER having come on for hearing on Plaintiff's Motion for Order to Show Cause before the Court on December 15, 2021, and the Plaintiffs Mark Brockley and Annesse Brockley ("Plaintiffs") appearing personally (Mark Brockley) and through their South Dakota attorney John W. Dill of Claggett and Dill, Prof. LLC, and Hickoks Hotel and Suites, LLC f/k/a N.M.D. Venture, LLC, a South Dakota limited liability company, and non-party to the above titled action ("Hickoks"), appearing by and through its South Dakota attorneys, Aaron T. Galloway and Haven L. Stuck of Lynn, Jackson, Shultz & Lebrun, P.C., and the Court having heard the arguments and considered and reviewed the documents provided, and the Court being fully advised as to the premises, hereby makes and enters the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. Plaintiffs filed their Motion for Order to Show Cause on April 15, 2021, and the Court issued an Order to Show cause against various individuals and entities, including Hickoks, on April 21, 2021.

2. Hickoks is a South Dakota limited liability company.

3. On March 30, 2015, Defendant Clarence Griffin ("Mr. Griffin") transferred his membership interest in Hickoks from himself to both he and his wife, Kimberly Griffin ("Ms. Griffin"), to be held as Tenants by the Entirety.

4. At the time of the 2015 transfer, Mr. Griffin and Ms. Griffin were residents of the state of Florida.

5. Mr. Griffin was a member of Hickoks until his death on December 14, 2020.

6. Ms. Griffin has remained a resident of the state of Florida.

7. On December 30, 2016, the Court issued a Charging Order, in favor of the Plaintiffs, on the distributional interest of Mr. Griffin in Hickoks (at the time known as N.M.D. Venture, LLC).

8. On February 3, 2017, a corrected Charging Order was issued by the Court ("Charging Order") and served upon Hickoks.

9. On December 29, 2020, Hickoks closed on a sale of its assets. Funds were allocated to comply with a redemption agreement with another member, and the balance of funds deposited into a Hickoks bank account.

10. Following the redemption Ms. Griffin became the sole member of Hickoks.

11. The funds deposited into the Hickoks bank account were ultimately disbursed to Ms. Griffin.
12. Ms. Griffin is not named in the Charging Order.
13. Hickoks had knowledge of the existence of the Charging Order.
14. With the funds in the Hickoks bank account, Hickoks had the ability to comply with the Charging Order.
15. Hickoks did not willfully, or contumaciously, ignore or violate the Charging order by disbursing the funds from the Hickoks bank account to sole remaining member, Ms. Griffin.
16. To the extent any of these Findings of Fact are in fact Conclusions of Law, they should be considered as such.

### **CONCLUSIONS OF LAW**

1. To the extent any of these Conclusions of Law are in fact Findings of Fact, they should be considered as such.
2. This Court has personal jurisdiction over the Plaintiffs and Hickoks as a South Dakota limited liability company, and subject matter jurisdiction over the issue of this contempt matter relating to these parties.
3. A membership interest in a South Dakota limited liability company is a personal property interest. SDCL § 43-1-3, and SDCL § 47-34A-501(b).
4. The Charging Order constitutes a lien on the distributional interest of the judgment debtor. SDCL § 47-34A-504(b).

5. As a personal property interest, the membership interest in Hickoks "...is deemed to follow the person of its owner and is governed by the law of his domicile." SDCL § 43-1-7.

6. Although South Dakota does not recognize Tenants by the Entirety, other jurisdictions do, and South Dakota recognizes the ability of non-residents of this state to hold personal property interests as Tenants by the Entirety, under the laws of the individual's domicile jurisdiction. SDCL § 29A-6-302, and SDCL § 48-7A-202.

7. The purpose of civil contempt is to compel compliance with a court's order. "Its sanction is coercive." *See Harksen v. Peska*, 2001 S.D. 75, 22, 630 N.W.2d 98, 102-03.

8. There are four required elements for a finding of civil contempt: "(1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order." *See Hiller v. Hiller*, 2018 S.D. 74, 20, 919 N.W.2d 548, 554.

9. Defendant Mr. Griffin and his spouse Ms. Griffin had the ability to, and did, hold the Hickoks membership interest through Tenants by the Entirety, under the law of their domicile state, Florida.

10. Such rights and obligations of Tenants by the Entirety ownership are governed by the laws of the state of Florida. SDCL § 43-1-7.

11. The Court concludes that: (1) the Charging Order is valid and remains in existence; (2) at all times relevant to this matter Hickoks has had knowledge of the Charging Order; and (3) once the asset sale funds were deposited into its company

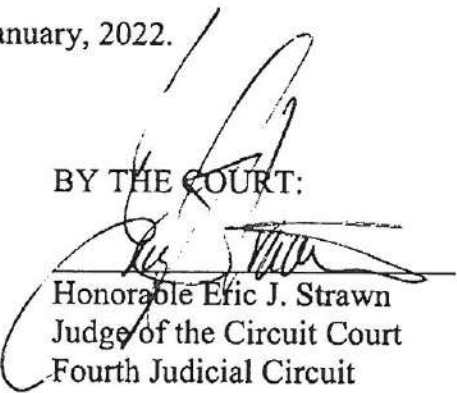
account on December 29, 2020, Hickoks had the ability to comply with the Charging Order.

12. The Court concludes that the fourth prong of civil contempt, as to Hickoks, has not been met in that Hickoks did not willfully or contumaciously disobey the Charging Order. The distribution from Hickoks was to Ms. Griffin, as the sole remaining member of the company, and not to the judgment debtor named in the Charging Order, Defendant Mr. Griffin.

13. The Court concludes that Hickoks is not in contempt of Court, and the Plaintiffs' Motion for Order to Show Cause to hold Hickoks in contempt is DENIED.

Dated this 21<sup>st</sup> day of January, 2022.

BY THE COURT:

  
Honorable Eric J. Strawn  
Judge of the Circuit Court  
Fourth Judicial Circuit

ATTEST:

CAROL LATUSECK BY KRISTIE GIBBENS

Clerk of Court





STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
MARK BROCKLEY,	)	40CIV14-000320
ANNESSE BROCKLEY	)	
Plaintiffs,	)	
	)	<b>CORRECTED</b>
vs.	)	<b>CHARGING ORDER</b>
	)	
MERRIL ELLIS, RONALD GUTMAN,	)	
CLARENCE GRIFFIN, & GG&E LLC	)	
Defendants.	)	
	)	

This matter has come before this Court pursuant to the APPLICATION FOR CHARGING ORDER made by the Plaintiffs above-named, seeking a Charging Order as set forth in said APPLICATION.

This Court finds that on April 15, 2015, Plaintiff received a judgment against the Defendants above-named in the principal sum of \$1,548,504.61, with interest accruing thereon at the rate of 10% per annum on the unpaid balance. A partial satisfaction of judgment in the amount of \$1,903.51 was made on July 29, 2015. A partial satisfaction of judgment in the amount of \$751,744.49 was made on May 6, 2016. As of December 31, 2016, the total amount due, including post-judgment interest is \$1,029,259.41.

The Court further finds that the Defendant Clarence Griffin is a member in a Limited Liability Company known as N.M.D. Venture, LLC which operates in Lawrence County, South Dakota.

The Court further finds that the Plaintiffs are entitled as a matter of right by reason of the judgment against said Defendant to a Charging Order against the nonexempt interest of the Defendant Clarence Griffin in N.M.D. Venture, LLC.

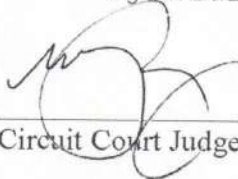
For good cause shown, and upon the pleadings and documents in this matter, it is hereby ORDERED as follows:

1. The interest of Defendant Clarence Griffin in N.M.D. Venture, LLC is hereby subjected to a Charging Order in favor of and for the benefit of the Plaintiffs;
2. Distributions owed or payable to said Defendant by N.M.D. Venture, LLC must be paid directly to Plaintiffs;
3. N.M.D. Venture, LLC will be discharged from its obligations to Plaintiffs to the extent of any amounts so paid to Plaintiffs until the Judgment entered against the Defendants in this cause is paid in full; and
4. Upon service of a true and correct copy of this Charging Order upon the Defendant Clarence Griffin, said Defendant shall deliver to Plaintiffs, through their attorneys, true copies of the operating agreement and true copies of any other agreements or documents evidencing or affecting the interest of said Defendant Clarence Griffin in N.M.D. Venture, LLC, and any distributions due or to become due to Defendant Clarence Griffin by reason of said Defendant's interest in N.M.D. Venture, LLC, regardless of the denomination of said distribution.

Dated this 3rd day of **February**, 2017.

BY THE COURT:

Signed: 2/3/2017 9:54:15 AM

  
Circuit Court Judge

ATTEST:

**Carol Latuseck**

Clerk of Courts

By



(SEAL)

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

COUNTY OF LAWRENCE

):SS

FOURTH JUDICIAL CIRCUIT

MARK BROCKLEY,  
ANNESSE BROCKLEY  
Plaintiffs,

)

40CIV14-000320

)

)

)

vs.

)

**AFFIDAVIT OF ATTORNEY WITH  
ATTACHMENTS OF DOCUMENTS  
ORDERED BY THE COURT**

)

)

)

MERRIL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN, & GG&E LLC  
Defendants.

)

)

)

)

STATE OF SOUTH DAKOTA

)

COUNTY OF LAWRENCE

):SS

)

Jon W. Dill, after being first duly sworn upon his oath, deposes and states that he makes this Affidavit in good faith and not for any improper purpose.

1. This matter was heard on October 20, 2021 and October 22, 2021, pursuant to an Order to Show Cause with reference to an Amended Charging Order entered herein, and the failure of Hickok's Hotel & Suites, LLC (formerly known as N.M.D. Venture, LLC) to enforce the same against the distributional interest of Clarence "Nick" Griffin upon the sale of the assets of Hickok's.

2. During the course of the hearing on the latter date the Court indicated it would execute an Order compelling Dakota Title Company to turn over certain records relating to the December 29, 2020, closing of the sale of the assets of Hickok's Hotel & Suites, LLC, and, more specifically, the disposition of the proceeds of the sale.

3. More particularly, based upon information presented to the Court, the Court deemed it important to know whether the proceeds subject to the Amended Charging Order at issue here were transmitted by wire transfer to a local bank or, as alleged, to a bank in Florida.

4. Pursuant to the Court's Order, on November 3, 2021, Christina Marta, Chief Executive Officer of Dakota Title, transmitted to your Affiant, Richard A. Pluimer and Haven Stuck, 94 pages of documents, including a copy of the Court's executed Order.

5. Attached hereto and incorporated by reference is Exhibit 1. This is comprised of pages 27 through 29 of the documents submitted by Dakota Title. These are singled out because your Affiant believes these directly address the Court's line of inquiry and concern.

6. According page 1 (27 of the 94 total pages) the "Outgoing Wire Form," the amount of \$1,135,686.61 was to be wired from First Interstate Bank to an account known as "Hickoks Hotel & Suites, LLC."

7. Page 2 (28 of 94) is the "Incoming Wire Instructions," showing the funds were to be wired to the identified bank in Seminole, Florida, in the name ("beneficiary") of "Hickoks Hotel & Suites, LLC."

8. Page 3 (29 of 94) shows that Mike Trucano was in fact--and contrary to his assertions at the October 22, 2020, hearing--the person who authorized that transmittal from the closing agent (Dakota Title) to the named bank in Seminole Florida.

9. Attached hereto and marked as Exhibit 2 is the whole of the 94 page submission by Dakota Title.

10. On November 9, 2021, your Affiant spoke with Jennifer Whitehouse a closing agent with Dakota Title and the person whose notation and initials are on the second page of Exhibit 1

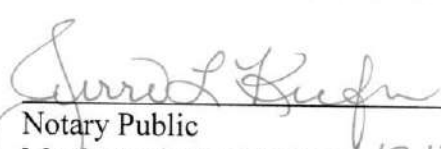
(28 of 94). Ms. Whitehouse verified that the funds were wired from Dakota Title directly to First Home Bank in Seminole, Florida.

11. Page 3 of the 94 page Exhibit 2 shows that, the persons attending the closing of the sale were: Jim Trucano, who, upon information and belief, was the real estate agent for the Seller; Mike Trucano, who was the sole member present from Hickok's Hotel & Suites, LLC, and, apparently, in his capacity as trustee of his living trust; Richard Pluimer, the attorney for Mike Trucano and his living trust; Haven Stuck, the attorney for Hickok's Hotel & Suites, LLC; Tim Rutjes, managing member of SRK Development, LLC, Buyer; Steve Slowey, from SRK Development, LLC; and Mike Perceovich, account representative for The Real Estate center of Lead-Deadwood.

Dated this 9<sup>th</sup> day of November, 2021.

  
Jon W. Dill

Subscribed and sworn to before me this 9<sup>th</sup> day of November, 2021.

  
Notary Public

My Commission Expires: 12.13.2024



## Outgoing Wire Form

Settlement Agent Name: Dakota Title  
Ledger ID: 0850-19  
Settlement Date: 12/29/20  
Buyer/Borrower: DHIH, LLC  
Seller: N.M.D. Venture, LLC  
Ledger Comment:  
Property Address: 685 Main Street, Deadwood, SD 57732

Trust Account Code: FIB6412  
Trust Account Bank Name: First Interstate Bank  
Trust Account Number: 0101566412

Transaction Date: 12/29/20  
Trust Accounting Date: 12/29/20  
Reference Number: 2581  
Payee Name: Hickoks Hotel & Suites, LLC Amount: \$1,135,686.61  
Funds Applied Towards: Apply to Closing \$1,135,686.61  
Type of Funds Received: Wire  
Memo: Closing Proceeds

### Wire Transfer Source

Trust Account Code: FIB6412  
Trust Account Bank Name: First Interstate Bank  
Trust Account Number: 0101566412

### Wire Transfer Destination

Type of Funds Received: Wire  
Bank Name:  
ABA Routing Number:  
Credit Account Name: Hickoks Hotel & Suites, LLC  
Credit Account Number:  
Bank Sequence Number:  
Federal Reference Number:  
Special Instructions:  
Further Credit:  
Memo: Closing Proceeds

### Bookkeeper Use Only

<b>Wire Release</b> Bank Contact: Account No.: Test Code: Sequence/Reference: Releaser Signature:	Time: Date:	<b>Verification</b> Time: Date: Name of Authorized Person: Wire Verifier Signature:
--	----------------	---

### County Bookkeeping Copy

**EXHIBIT**

1

exhibitsticker.com



**Incoming Wire Instructions**



**Domestic Incoming**


Beneficiary Bank Name: First Home Bank  
Beneficiary Bank Address: 9190 Seminole Blvd  
CITY, STATE, ZIP: Seminole, FL 33772  
ROUTING NUMBER: 063114551  
Beneficiary Name: Hickoks Hotel & Suites, LLC  
Beneficiary Address: 685 Main Street, Deadwood, SD 57732  
Beneficiary Account #: 0056545650

**International Incoming Wire Instructions**

Correspondent Bank: First National Bankers Bank  
Correspondent Bank Address: 605 Crescent Executive Court Ste 224  
Lake Mary, FL 32746  
Correspondent Bank Swift Code: FRNAUS44  
Correspondent Routing Number: 065403370

Beneficiary Bank Name: First Home Bank  
Beneficiary Bank Address: 9190 Seminole Blvd  
CITY, STATE, ZIP: Seminole, FL 33772  
ROUTING NUMBER: 063114551

Beneficiary Name:  
Beneficiary Address:  
Beneficiary Account #:  
FOR FUTHER CREDIT TO:

12/29  
Verified w/ Susan  
White  




### AUTHORIZATION TO DISBURSE PROCEEDS

Date: December 29, 2020 Property Address: 685 Main Street, Deadwood, SD 57732

The undersigned hereby authorize and direct **Dakota Title** to disburse proceeds from the sale of the above-referenced property as follows:

☒ Check at Closing, or will be picked up by: check for Trust

☐ Send check by Regular Mail to the following address:

☐ Send check by Overnight Mail to the following address: (\$25 Courier Fee will apply)

☒ Wire all proceeds to the following account: (\$25 Wire Fee will apply) for Hickoks portion

Bank Name: \_\_\_\_\_  
ABA Routing No.: \_\_\_\_\_  
Account No.: \_\_\_\_\_  
Account Name: \_\_\_\_\_

#### For Split Proceeds Only:

The undersigned hereby authorize and direct **Dakota Title** to split the proceeds of sale as follows:  
(If desired, attach additional forms with Wiring Instructions - \$25 Wire Fee applied for each wire transfer.)

\$ \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_ to \_\_\_\_\_  
\$ \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_ to \_\_\_\_\_

#### Acknowledged and agreed:

Hickoks Hotel & Suites, LLC

BY: [Signature]  
Michael Trucano  
Member

Contact Information: (For communication regarding disbursement delays, discrepancies, etc...)

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

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STATE OF SOUTH DAKOTA )  
 )  
 COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
 FOURTH JUDICIAL CIRCUIT

\_\_\_\_\_  
**MARK BROCKLEY, ANNESSE  
 BROCKLEY,**

Plaintiffs,

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
 CLARENCE GRIFFIN & GG&E,  
 LLC,**

Defendants.  
 \_\_\_\_\_

Motion for Contempt  
 Hearing

CIV. 14-320

BEFORE: **THE HONORABLE ERIC J. STRAWN**  
 Circuit Court Judge  
 Deadwood, South Dakota  
 October 20, 2021, at 3:00 p.m.

APPEARANCES:

For the Plaintiffs: **MR. JON DILL**  
 Claggett & Dill  
 212 E Colorado Blvd  
 Spearfish, South Dakota 57783

For the Defendants: **MR. HAVEN L. STUCK**  
 (Telephonic) Lynn, Jackson, Shultz & Lebrun, P.C.  
 P.O. Box 8250  
 Rapid City, South Dakota 57709

For the Interested **MR. RICHARD PLUIMER**  
 Party, Mr. Michael Attorney at Law  
 J. Trucano: 1130 North Main Street, #2  
 Spearfish, South Dakota 57783

1 (WHEREUPON, the following proceedings were duly  
2 had:)

3 **THE COURT:** All right. Good afternoon, ladies and  
4 gentlemen. This is the date and time set for a motions  
5 hearing in the matter of Mark Brockley, Annesse Brockley  
6 versus, and I want to say it's Merrill Ellis, Ron Gutman,  
7 Clarence Griffin, and GG&E, LLC.

8 Today, Mr. Claggett -- actually, Mr. Dill appears on  
9 behalf of the plaintiffs and we have Mr. Stuck appearing  
10 telephonically.

11 Is Mr. Natvig here today? No. Mr. Pluimer represents  
12 an interested party, and he is --

13 **MR. PLUIMER:** I appear -- thank you, Your Honor. I appear  
14 specially on behalf of Michael J. Trucano and Michael J.  
15 Trucano Living Trust.

16 **THE COURT:** All right. Thank you, Mr. Pluimer.

17 The record should reflect that we have Mr. Dill's  
18 client here in the courtroom, and we have Mr. Trucano here  
19 as well.

20 Mr. Stuck appears telephonically, but he is not making  
21 an appearance for any other purpose but just to listen in,  
22 so we will not be asking him questions as I rotate through  
23 this.

24 This Court has reviewed the file in its entirety and  
25 reviewed the corresponding affidavits and the motions.

STATE OF SOUTH DAKOTA )  
 )  
 COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
 FOURTH JUDICIAL CIRCUIT

\_\_\_\_\_  
**MARK BROCKLEY, ANNESSE  
 BROCKLEY,**

Plaintiffs,

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
 CLARENCE GRIFFIN & GG&E,  
 LLC,**

Defendants.  
 \_\_\_\_\_

Motion for Contempt  
 Hearing

CIV. 14-320

BEFORE: **THE HONORABLE ERIC J. STRAWN**  
 Circuit Court Judge  
 Deadwood, South Dakota  
 October 22, 2021, at 9:00 a.m.

APPEARANCES:

For the Plaintiffs: **MR. JON DILL**  
 Claggett & Dill  
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For the Defendants: **MR. HAVEN L. STUCK**  
 Lynn, Jackson, Shultz & Lebrun, P.C.  
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 Rapid City, South Dakota 57709

For the Interested Party, Mr. Michael J. Trucano: **MR. RICHARD PLUIMER**  
 Attorney at Law  
 1130 North Main Street, #2  
 Spearfish, South Dakota 57783

1       **MR. DILL:** I believe that's -- with all due respect, Your  
2 Honor, I see where you're going, but I believe that's a  
3 false narrative. And I believe it's a false narrative  
4 because we don't get to set down and the title company does  
5 not timestamp at this date on this time and at this second  
6 this form was signed. Then at this date, this time, hour,  
7 and second this form was signed. It doesn't work that way.

8           Their agreement says, we're doing this closing and  
9 want to close this. Simultaneously, all these things  
10 happened. That was the agreement that they entered into in  
11 July. So to say, well, physically, yeah, we can understand  
12 you can't sign five things all at once, we get that. But  
13 that's irrelevant. Again, I believe that's a false  
14 narrative.

15       **THE COURT:** Okay. Well, with that -- so, now, one last  
16 question. Is the LLC still currently operating as an LLC?  
17 Is it still recognized in South Dakota?

18       **MR. DILL:** It is.

19       **THE COURT:** Does the LLC have any funding at this time?

20       **MR. DILL:** We've subpoenaed those records and we don't  
21 know. But we do know from the deposition that we took of  
22 Mr. Trucano that the only thing that would be left is --  
23 and the dollar amount is 1.135 million. According to him,  
24 that would be the only thing that would be left in the LLC,  
25 if that's there.

1 charging order or some other means by which the creditors  
2 would come after Griffin's portion of the LLC.

3 **MR. PLUMER:** Exhibit A is right here today. Mr. Trucano  
4 has had to go through a spurious, frivolous claim and that  
5 is exactly what was discussed, that was exactly what was  
6 anticipated, and that was exactly for the reason for the  
7 indemnification clause.

8 Of course by -- I mean, because this was made, like,  
9 six months or so before the closing actually occurred, but  
10 a closing was pending. The company didn't know whether  
11 this sale would be closed or that they would put it back on  
12 the market if it didn't, but we knew the company was in the  
13 business of selling its assets. And this was intended to  
14 allow Mr. Trucano to retire, to get out of the gaming  
15 business, hotel business, hospitality business in Deadwood,  
16 receive fair value for his interest in the company, and to  
17 move on.

18 But, yes, we knew that Mr. Brockley was holding a  
19 charging order against Mr. Griffin, and that was part of  
20 the reason, quite honestly, that Mr. Trucano wanted out of  
21 any further business dealings with either Mr. Brockley or  
22 Mr. Griffin. Just wanted to retire.

23 So we knew -- and I'll say "we" because I drafted the  
24 contracts. We knew that there was a possibility that even  
25 though the deal was structured so that Mr. Brockley had

1 absolutely no interest in anything, in any money that we  
2 were effecting by the transaction, we knew that despite  
3 that, there was a high likelihood, a reasonably high  
4 likelihood that he was going to find some bizarre way to  
5 try to come after Griffin through Trucano.

6 And that's the reason the document was drafted. It  
7 was not to avoid the charging order. Matter of fact, the  
8 deal was specifically structured so that the charging order  
9 remained fully in effect, at least from my perspective.

10 The money did not go to Mr. Brockley. It did not go  
11 to any third party. It wasn't secreted off by Mr. Trucano  
12 by any means. It went to Hickok's. Hickok's is who's  
13 responsible for compliance of the charging order, and they  
14 had now approximately 1.3 or 1.5 -- I don't know. I'm  
15 sorry for that -- of money from the sale of the assets.

16 But where this thing gets so far off track is  
17 counsel's ludicrous claim about Brockley's entitlement to  
18 be paid anything out of this transaction. He says, well,  
19 Mr. Brockley has a lien. We've conceded all along that the  
20 charging order gives Mr. Brockley a lien against Nick  
21 Griffin's distributional interest. The same statute says  
22 he has no other remedy, he's not entitled to exercise any  
23 other remedy, and clearly he has no claim, legal or  
24 equitable, against the assets of Hickok's.

25 So Mr. Trucano did nothing other than what his

STATE OF SOUTH DAKOTA )  
 )  
 COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
 FOURTH JUDICIAL CIRCUIT

**MARK BROCKLEY, ANNESSE  
 BROCKLEY,**

Plaintiffs,

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
 CLARENCE GRIFFIN & GG&E,  
 LLC,**

Defendants.

Motion for Contempt  
 Hearing

CIV. 14-320

BEFORE: **THE HONORABLE ERIC J. STRAWN**  
 Circuit Court Judge  
 Deadwood, South Dakota  
 November 24, 2021, at 10:00 a.m.

APPEARANCES:

For the Plaintiffs: **MR. JON DILL**  
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For the Defendants: **MR. HAVEN L. STUCK**  
 Lynn, Jackson, Shultz & Lebrun, P.C.  
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 Rapid City, South Dakota 57709

For the Interested Party, Mr. Michael J. Trucano: **MR. RICHARD PLUIMER**  
 Attorney at Law  
 1130 North Main Street, #2  
 Spearfish, South Dakota 57783

1 where we are in this case with regard to the order to show  
2 cause and then, Mr. Pluimer, I'll allow you to make your  
3 comments.

4 Mr. Stuck does not actually appear today in any  
5 capacity, but he is here as basically an observer to what's  
6 happening in these proceedings.

7 Mr. Dill?

8 **MR. DILL:** Thank you, Judge.

9 Yes, as the Court indicated, pursuant to the order  
10 that we got to make sure we could timely get the documents  
11 from Dakota Title, they were received. They were all  
12 filed. I think we filed them as a confidential document  
13 because of all of the banking information and all of that,  
14 and I understand that Mr. Pluimer and Mr. Stuck also got  
15 copies.

16 I reviewed those documents. I filed an affidavit with  
17 the Court, and I'll highlight it. There were three pages  
18 that were attached to that affidavit that I highlighted.  
19 The first one was that Mr. Trucano, himself, signed the  
20 authorization for transfer of funds, and then we have the  
21 authorization and then we have the notification that the  
22 funds went straight to Florida.

23 Now, I understand what the Court indicated off the  
24 record and I understand what Ms. Whitehouse's affidavit  
25 provides, which is basically that Mr. Trucano didn't have



1 any idea. Now, this is all while he is still the managing  
2 member of Hickok's. Okay?

3 So I'm looking at the supplemental affidavit that Mr.  
4 Trucano filed with the long explanation about the contacts  
5 that he had that morning with Kim Griffin and her attorneys  
6 and Mr. Pluimer, and then he claims he just signed  
7 everything and left.

8 **THE COURT:** Well, doesn't he say that he signed all the  
9 documents that related to a transfer to the bank in  
10 Deadwood? When I'm reading his affidavit, that's what I'm  
11 getting from it. That he was with -- left with the  
12 understanding that all the money was being -- going  
13 directly to the bank in Deadwood and that, when he left,  
14 that's what he thought he was signing.

15 **MR. DILL:** But here's the other part of the affidavit that  
16 we have to focus on. If you look at paragraph 3, I think,  
17 of his affidavit, and he starts with going through all of  
18 the conversations that they had with Kim Griffin, her  
19 attorney. They wanted his social security number to  
20 establish a Florida account. He indicates, well, I was a  
21 little bit concerned about all of this. And this actually  
22 kind of harkens back to the last argument in the last  
23 hearing we had that Mr. Plumier made when he says, we knew  
24 something like this was going to happen and, you know, my  
25 thought was: What? Try to enforce a Court's charging

1 order?

2 They knew all along, all along that that charging  
3 order's there. He knows it; they know it. His concern he  
4 references here, Well, I'm uncomfortable about it. I mean,  
5 what's this going to do with the charging order? Which  
6 even up until that point he still could have let somebody  
7 know that that charging order was there. And when I say  
8 charging order, I'm referring to the amended charging  
9 order.

10 All along that charging order -- amended charging  
11 order is in his mind, and he's still the managing member of  
12 Hickok's when all of this stuff is taking place. So for  
13 him to come back and say, "I didn't know they were going to  
14 do that," that's shoddy business practice at best because  
15 he's not a shoddy businessman. They knew what was going to  
16 be happening here. Okay?

17 So he and his -- he and his attorney are claiming  
18 they're troubled by all of this, and up until the time the  
19 checks were written, they still never produced any  
20 information regarding, you know, there is an amended  
21 charging order out there. Maybe we should deal with that.  
22 And they didn't do it.

23 So we received the banking funds that were attached to  
24 my last affidavit because down in Florida -- and I think I  
25 indicated to the Court before, we're trying to get that

1 banking information down in Florida, and it was subpoenaed  
2 through an attorney down in Florida. And we received that  
3 information, and we showed just what we were concerned  
4 about. That money was transferred to Florida and it was  
5 stripped out. There's nothing left there and we knew that  
6 was going to happen. If that money leaves the state, we  
7 know that's going to happen.

8 And Trucano knew that money was going to be leaving  
9 the state. How did he know? Because he said he was  
10 concerned they were going to be doing something like that.

11 He knew that's what was being planned and yet he  
12 didn't raise that charging order. Instead, he just kind of  
13 washes his hands of it and says, "I don't know." And that  
14 defies logic to the extent that he's still the managing  
15 member of Hickok's and yet he's pretending he doesn't know  
16 what's happening with Hickok's.

17 So when we separate the wheat from the chaff, we know  
18 that Trucano knew all along about this amended charging  
19 order. He knew the intent to ship this money out. He sat  
20 on that because, at the end of the day, he chose his  
21 partner over the Court's order.

22 **THE COURT:** Now, let me ask a real quick question, Mr.  
23 Dill.

24 We're assuming, and what you're doing is you're taking  
25 information that has been received in the affidavit and

1 was in a different direction.

2 **MR. DILL:** I understand that. And believe me, that's still  
3 being pursued, but our position is that does not let  
4 Hickok's and that does not let Mr. Trucano off the hook.

5 **THE COURT:** Right. And we don't have a representative for  
6 Hickok's here; is that correct? I mean, who was  
7 representing, as an attorney, Hickok's, LLC, at the time  
8 that Trucano had sold his shares?

9 **MR. DILL:** I think Mr. Stuck was at the time.

10 **THE COURT:** Okay.

11 **MR. DILL:** And I don't know -- I can't -- I think -- I  
12 don't remember if I was told or I got the sense that once  
13 this deal closed, that Mr. Stuck is not necessarily  
14 representing Hickok's anymore. I'm not sure.

15 **THE COURT:** Well, is Hickok's, LLC, as of the date of  
16 closing, is it still an ongoing venture in the state of  
17 South Dakota, Mr. Stuck? Do you know whether or not the  
18 LLC is still in existence as of today?

19 **MR. STUCK:** The LLC, yes, is still a South Dakota LLC.

20 **THE COURT:** And do you represent the LLC as of today?

21 **MR. STUCK:** In South Dakota, yes.

22 **THE COURT:** All right. That's all the Court needs at this  
23 point in time. I'm going to make a ruling.

24 The Court has heard testimony -- well, has heard  
25 almost testimony from Mr. Trucano. This is an order to

1 show cause. There is a requirement that there would be  
2 production and evidence of a valid order, and this Court --  
3 in this case this Court finds that a valid order has been  
4 demonstrated by the petitioning parties and that is the  
5 amended charging order.

6 There is a requirement that the parties have an  
7 ability to comply with that. Based on the evidence that's  
8 been provided in the affidavits, it does appear that both  
9 Hickok's, LLC, and Mr. Trucano had an ability to comply  
10 with the charging order.

11 There is a requirement that the Court find that there  
12 be willful or contumaciousness in disobeying that order.  
13 This Court finds, based on all of the exhibits, especially  
14 those that have been released and filed on the 10th of  
15 November, that as to Hickok's, LLC, there has been a  
16 willful disobedience of the order.

17 With regard to Mr. Trucano, this Court finds there has  
18 not been an establishment that Mr. Trucano willfully or  
19 contumaciously violated this or disobeyed this order.

20 I need to make sure that the factor that there's a  
21 knowledge of the Court order is also part of this. The  
22 Court finds that both the LLC and Mr. Trucano did have  
23 knowledge of the Court order.

24 With that, the Court then denies the order to show  
25 cause or order for contempt being sought as against Mr.

1 Trucano.

2 This is a very close case, which required this Court  
3 to investigate, and even up to this point, Mr. Trucano, in  
4 his position, was -- we still really don't even know what  
5 had happened with regard to that transaction; and,  
6 therefore, attorney's fees will not be awarded on either  
7 side as to the case against Mr. Trucano. We'll use the  
8 American rule, which requires that the parties in the  
9 action take care of their own attorney's fees.

10 Mr. Pluimer, you are free to go if you wish or if you  
11 would like to see how the Court is going to dispose of the  
12 issue of the contempt by Hickok's, you can stick around  
13 with your client.

14 **MR. PLUIMER:** Thank you, but I've got to get Thanksgiving  
15 on the table, so...

16 **THE COURT:** All right. You're free to go then.

17 **MR. PLUIMER:** Okay. One thing I would inquire. Does the  
18 Court wish me to draft an order or do you want to have that  
19 smart young man to your right do so?

20 **THE COURT:** You know what? Why don't we since you're the  
21 prevailing party, and then we can have Mr. Dill put his  
22 input into what the order looks like. I want to make sure  
23 that it's clean all the way through, so I will allow you to  
24 prepare the order. I would also make specific findings if  
25 you want to put those in as well.

1 **MR. STUCK:** Now, I'm not sure I understood. We represent  
2 the LLC. We don't represent Kim Griffin or Nick Griffin,  
3 so...

4 **THE COURT:** But who is the LLC right now? It's a sole  
5 member; correct?

6 **MR. STUCK:** Right.

7 **THE COURT:** And who's the sole member at this point in  
8 time?

9 **MR. STUCK:** Right.

10 **THE COURT:** But you represent the LLC --

11 **MR. STUCK:** Exactly.

12 **THE COURT:** -- and its member, its sole member is Kim.

13 **MR. STUCK:** Yes.

14 **THE COURT:** The only way to get out of the contempt posture  
15 -- the only one that drew the money was Kim. As far as we  
16 know, based on what it looks like in the distributions that  
17 were made in Florida, the only one that drew on the account  
18 was Kim, the sole member, so someone is acting as a member  
19 within the LLC and you represent the LLC. To take the LLC  
20 out of that contempt posture, you need to have the sole  
21 member testify as to why she did not willfully and  
22 contumaciously violate this order, this charging order.

23 I don't -- maybe I'm not seeing -- well, I'll let  
24 you --

25 **MR. STUCK:** Well, what I would, I guess, suggest is that we

STATE OF SOUTH DAKOTA )  
 )  
 COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
 FOURTH JUDICIAL CIRCUIT

\_\_\_\_\_  
**MARK BROCKLEY, ANNESSE  
 BROCKLEY,**

Plaintiffs,

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
 CLARENCE GRIFFIN & GG&E,  
 LLC,**

Defendants.  
 \_\_\_\_\_

Motion for Contempt  
 Hearing

CIV. 14-320

BEFORE: **THE HONORABLE ERIC J. STRAWN**  
 Circuit Court Judge  
 Deadwood, South Dakota  
 December 15, 2021, at 1:00 p.m.

APPEARANCES:

For the Plaintiffs: **MR. JON DILL**  
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For the Defendants: **MR. HAVEN L. STUCK**  
 &  
**MR. AARON T. GALLOWAY**  
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1 are actually led by a Florida Court, a 2015 Middle District  
2 of Florida decision, Wells Fargo Bank versus Barber. And  
3 that had to do with an LLC that was created in the  
4 Caribbean Island nation of Nevis, but the residents were in  
5 the state of Florida and they were the membership interest  
6 owners. And so the Florida Court in its line of cases  
7 stated, "Membership interest in a limited liability company  
8 is intangible personal property, which accompanies the  
9 person of the owner." So that's Florida law, "accompanies  
10 the person of the owner."

11 It sounds very familiar to South Dakota's law under  
12 43-1-7. "Personal property interest is deemed to follow  
13 the person of its owner and is governed," so that -- that  
14 membership interest and any questions that arise out of  
15 that personal property membership interest are governed by  
16 the law of his domicile. Again, South Dakota Codified Law  
17 37-1-7. 43. Excuse me, 43-1-7.

18 So if we distill this down to the question of the LLC  
19 in South Dakota under South Dakota law, did it will fully  
20 violate the charging order? The charging order clearly  
21 states, "The interest of Defendant Clarence Griffin in  
22 N.M.D. Venture" -- which was the formerly known as Hickok's  
23 here today -- "is hereby subjected to a charging order in  
24 favor of and for the benefit of the Plaintiffs.  
25 Distributions owed or payable to said Defendant by N.M.D.

1 Venture, LLC, must be paid directly to Plaintiffs."

2 There was no distribution by Hickok's to Clarence  
3 Griffin under the charging order. If there's a question  
4 remaining as to the propriety or efficacy of the LLC  
5 distributing to the surviving spouse under tenancy by the  
6 entirety, a transfer-on-death benefit, that question should  
7 be under Florida law, as set forth by South Dakota statute,  
8 to be answered by Florida court in that open and pending  
9 case, and it looks like the parties are going down that  
10 path currently.

11 **THE COURT:** This Court has heard lengthy arguments for well  
12 over an hour now. I've taken in all of the information  
13 that's been provided through briefs and through exhibits  
14 that's previously been placed on the record here on this  
15 file.

16 The Court finds that there is a valid charging order  
17 which required the LLC to stop payment to Clarence Griffin  
18 if a distribution is made and make that payment to the  
19 Brockleys. Court finds that that order was valid. It's  
20 been -- in fact, it's not even been challenged. The  
21 validity has not been challenged by either party.

22 The Court finds that there was an ability to comply  
23 with the charging order. The Court finds that -- with  
24 regard to the distribution that was made to Ms. Griffin,  
25 the Court finds that there has not been a showing that she

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

MARK BROCKLEY and ANNESSE BROCKLEY,  
*Plaintiffs/Appellants,*

v.

MERRILL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN and GG&E, LLC,  
*Defendants/Appellees.*

---

Appeal No. 29915

Appeal from Circuit Court, Fourth Judicial Circuit,  
Lawrence County, South Dakota  
The Honorable Eric J. Strawn, Presiding

---

**BRIEF OF APPELLEE, N.M.D. VENTURE, LLC (N/K/A/ HICKOKS  
HOTEL AND SUITES, LLC)**

---

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NOTICE OF APPEAL FILED February 22, 2022

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SDCL § 47-34A-502 .....	18, 19
SDCL § 47-34A-504 .....	8
SDCL § 48-7A-202 .....	1, 9, 12, 13
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### **Other Authorities**

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CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX & BUSINESS LAW ¶ 5.14[2][c][iii] (2017).....	14

## **JURISDICTIONAL STATEMENT**

Appellee, Hickoks Hotel & Suites, LLC (“Hickoks” or “LLC”) agrees with the jurisdictional statement proffered by Appellants, Mark Brockley and Annesse Brockley (“Brockleys”), in so far as the Court has jurisdiction over this appeal pursuant to SDCL § 15-26A-3. Hickoks agrees that Appellants timely filed their Notice of Appeal.

## **STATEMENT OF THE ISSUES**

1. Whether the circuit court erred in recognizing Kimberly’s sole membership/ownership of Hickoks following the death of Clarence?

*Beal Bank, SSB v. Almand & Associates*, 780 So.2d 45 (Fla. 2001)  
SDCL § 29A-6-302  
SDCL § 48-7A-202  
SDCL § 54-8A-1

2. Whether the circuit court erred in concluding Hickoks was not in violation of the Charging Order and not in contempt?

*Hiller v. Hiller*, 2018 S.D. 74, 919 N.W.2d 548

## **REQUEST FOR ORAL ARGUMENT**

Hickoks respectfully requests the privilege of appearing before the Court for oral argument.



## **STATEMENT OF THE CASE**

On April 15, 2015, Brockleys obtained a judgment against Clarence Griffin (“Clarence”), the late husband of Kimberly Griffin (“Kimberly”) and member of a limited liability company, N.M.D, Venture, LLC (n/k/a Hickoks) (hereinafter referred to as “Hickoks” unless otherwise noted). The circuit court entered a Charging Order,<sup>1</sup> directing, *inter alia*, that Clarence’s interest in Hickoks was subject to the Charging Order and that distributions owed or payable to Clarence by Hickoks should be paid directly to Brockleys. Upon Clarence’s death, his interest in Hickoks transferred to Kimberly, by operation of law, as the two owned Hickoks as tenants by the entirety under Florida law, the state of their residence and domicile.

When Hickoks sold its assets, the balance of the sale was placed in Hickoks’ account, which Brockleys claim was in violation of the Charging Order. Brockleys obtained an Order to Show Cause for a determination of whether Hickoks violated the Charging Order and was in contempt of court. Because Clarence had passed away, and no distribution to Clarence was made that was subject to the Charging Order, the sale proceeds were properly deposited with Hickoks in its company bank account. The circuit court held that Hickoks was not in violation of the Charging Order and entered an Order Denying Plaintiff’s

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<sup>1</sup> A Charging Order was entered on December 30, 2016, and a Corrected Charging Order was entered on February 11, 2017. The Corrected Charging Order is referred to herein simply by “Charging Order” unless otherwise noted.

Motion for Contempt set forth in the Order to Show Cause Against Hickok's Hotel & Suites, LLC. Findings of Fact and Conclusions of Law were filed on February 10, 2022, and Notice of Entry of Order was filed the same day. Brockleys timely filed their Notice of Appeal.

### **STATEMENT OF THE FACTS**

In 2004, Brockleys entered into a Contract for Deed with Allan Rosenfeld and John McGill, whereby Rosenfeld and McGill agreed to purchase real property located in Deadwood, Lawrence County, South Dakota. CR 3, 10-16.<sup>2</sup> The purchase price was \$2,000,000, to be paid in 240 consecutive monthly installments of \$17,994.52, commencing on July 1, 2004. CR 3, 11. The default provision of the Contract for Deed contains a forfeiture provision, providing that should the buyers fail to cure any default defined under the Contract for Deed within 30 days after receiving such notice, the Brockleys may elect to accelerate the outstanding amount owed and foreclose under the agreement. CR 13. Rosenfeld and McGill agreed to "jointly and severally guarantee the performance of all the terms, covenants and conditions of this contract required to be performed by the buyers." CR 14.

McGill later quitclaimed all his interest in the subject property to Rosenfeld. CR 17-20. By Assignment of Contract for Deed ("Assignment"),

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<sup>2</sup> All citations are to the certified record, as prepared and paginated by the Clerk of Courts. Citations are denoted at "CR" following by the appropriate page number assigned by the clerk.

dated August 31, 2007, Rosenfeld transferred his interest in the Contract for Deed and subject property to “GG & E, LLC, a South Dakota Limited Liability Company.”<sup>3</sup> CR 17-20. Under the plain language of the Assignment, GG & E was the only assignee. CR 17. The members of GG & E, Ronald Gutman, Clarence Griffin and Merrill Ellis, individually, were not assignees. CR 17.

Brockleys and GG & E also executed a Consent to Assignment (“Consent”) on that same day. CR 22-24. The Consent provided that Ellis, Gutman and Clarence agreed “to be personally obligated for any amounts due under the contract for deed.” CR 22, ¶ 2. The last regular payment made on the Contract for Deed was on June 3, 2014. CR 22, ¶ 17.

On March 30, 2015, Clarence transferred his 50% membership interest in N.M.D. Venture, LLC (n/k/a Hickoks)<sup>4</sup> to himself and his spouse, Kimberly L. Griffin, husband and wife, as tenants by the entireties, under Florida law. CR 344-348. This assignment was memorialized by the Assignment of Membership Interest in N.M.D. Venture, LLC, Assignees’ Consent to and Acceptance of the Terms of the N.M.D. Venture, LLC, Operating Agreement and Amendment Thereof, Including Consent to the Transfer of Membership Interest by the Continuing Member (“Assignment of Membership Interest”). CR 344-348. At

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<sup>3</sup> GG & E, LLC, filed a Certificate of Amendment to the Articles of Organization with the Secretary of State, amending its name to G Squared, LLC.

<sup>4</sup> On January 29, 2019, N.M.D. Venture, LLC, filed a name change with the South Dakota Secretary of State, changing its name to Hickoks.

the time of the assignment made pursuant to Florida law, both Clarence and Kimberly were residents of and domiciled in the state of Florida. CR 935. Kimberly has remained a resident and domiciliary of Florida since that time. CR 935.

Brockleys obtained a judgment against GG & E, and against Ellis, Gutman, and Clarence, individually, in the amount of \$1,548,504.61, plus post-judgment interest. CR 113-114. After receiving partial satisfaction of that judgment in the amount of \$751,744.49, Brockleys applied for a Charging Order for the remaining balance, plus interest. CR 194-195. The circuit court ordered, *inter alia*, that Clarence's interest in N.M.D Venture, LLC (n/k/a Hickoks) was subject to a Charging Order and that distributions owed or payable to Clarence by N.M.D. Venture (Hickoks) should be paid directly to Brockleys. CR 200-201. A Corrected Charging Order, correcting the total amount still due and owing, was entered on February 11, 2017. CR 209-210.

Clarence died on December 14, 2020. CR 935, ¶ 5. Upon his death, his interest in Hickoks, owned by him and his wife Kimberly as tenants by the entirety, remained wholly, by operation of Florida law, with Kimberly, Clarence's surviving spouse as the surviving tenant by the entirety. CR 935, ¶¶ 3, 10.

On December 29, 2020, Hickoks sold its assets to SRK Development, LLC. CR 935, ¶ 9. The funds from that sale were allocated to comply with a redemption agreement with another member of the LLC, the Michael J. Trucano Living Trust

("Trucano Trust"). CR 376. As did Clarence, Michael Trucano ("Trucano") also transferred ownership of his membership interest in Hickoks in 2015 for estate planning purposes. CR 375-378. Thereafter his portion was owned by the Trucano Trust and subject to the redemption of his ownership upon sale, as the redemption agreement required. CR 377. The balance of the funds from the sale were deposited into a Hickoks bank account. CR 377. At that time, Kimberly was the sole member of Hickoks, the other member, her husband Clarence having passed away prior to the sale. CR 935, ¶ 10. Kimberly, a resident and domiciliary of Florida, was not a judgment debtor and not subject to the Charging Order. CR 936, ¶ 12.

On April 21, 2021, the circuit court issued an Order to Show Cause, directing the Trucano Trust, Hickoks, and Kimberly to show cause why they should not be held in contempt of court for violating the Charging Order. CR 334-335. In response, at the hearing on the matter, Hickoks explained to the circuit court:

So about the same time in that documentation that's in the court record, the parties determined that, for estate planning purposes, they were going to move their membership interests out of themselves as individuals for estate planning and into -- and into other vehicles.

Mr. Trucano, a South Dakota resident, put his membership interest into the Michael Trucano Trust, revokable living trust.

Mr. Griffin, a Florida resident, put his [membership interest in Hickoks] in with his wife's name in tenants by the entirety. And so that was the estate plan purpose and that's completely allowable under South Dakota law, and that's how the LLC viewed the

ownership interests for purposes of determination of who owned what and the jurisdiction where they owned it in.

And so when it comes down to it, at the end of the day, the LLC took the disbursement of funds from the sale, put it into an LLC account. And in the LLC's mind, any distribution that was made thereafter could not go to the judgment debtor subject to the charging order, Mr. Griffin. One, because that would have violated the charging order; but, two, Mr. Griffin was deceased. There could be no distribution to him. And South Dakota law is clear under 47-34A that it's a dist -- it's a right. The creditor has a right and a lien on the distributional interest of the judgment debtor, which did not happen here.

\* \* \*

There's a valid order, South Dakota order. That's the charging order. The LLC had knowledge of the order, of the charging order. Had -- the funds had come in. Had there been a distribution or a disbursement to judgment debtor, Clarence Griffin, had the ability to comply. But the fourth issue, the fourth element, willful or contumacious, there was not a willful ignoring of the order because there could not be a distribution to Clarence Griffin and the judgment -- the charging order clearly states that the judgment debtor, subject to the charging order, is Clarence Griffin. Distribution was not made to Clarence Griffin. If there's a question as to whether any further distribution to Clarence Griffin's surviving spouse would violate that order or somehow be tied in to that distributional interest, that is a personal -- a personal property nature with a LLC membership interest under Florida law, and there's currently an action going on in furtherance of that as we speak under Florida 12th District in Sarasota County.

CR 1193-1195.

In separate Orders, the circuit court denied Brockley's Motion for Order to Show Cause, concluding Trucano and the Trucano Trust were not in contempt, and later concluding Hickoks was not in contempt. CR 904-905, CR 932-933.

The circuit court issued Findings of Fact and Conclusions of Law. CR 934-938.

As to Hickoks, the circuit court found, in relevant part:

3. On March 30, 2015, Defendant Clarence Griffin ("Mr. Griffin") transferred his membership interest in Hickoks from himself to both he and his wife, Kimberly Griffin ("Ms. Griffin"), to be held as Tenants by the Entirety.

4. At the time of the 2015 transfer, Mr. Griffin and Ms. Griffin were residents of the state of Florida.

\* \* \*

6. Ms. Griffin has remained a resident of the state of Florida.

\* \* \*

9. On December 29, 2020, Hickoks closed on a sale of its assets. Funds were allocated to comply with a redemption agreement with another member, and the balance of funds deposited into a Hickoks bank account.

10. Following the redemption Ms. Griffin became the sole member of Hickoks.

11. The funds deposited into the Hickoks bank account were ultimately disbursed to Ms. Griffin.

12. Ms. Griffin is not named in the Charging Order.

CR 934-936. The circuit court concluded, in relevant part:

3. A membership interest in a South Dakota limited liability company is a personal property interest. SDCL § 43-1-3, and SDCL § 47-34A-501(b).

4. The Charging Order constitutes a lien on the distributional interest of the judgment debtor. SDCL § 47-34A-504(b).

5. As a personal property interest, the membership interest in Hickoks " ... is deemed to follow the person of its owner and is governed by the law of his domicile." SDCL § 43-1-7.

6. Although South Dakota does not recognize Tenants by the Entirety, other jurisdictions do, and South Dakota recognizes the ability of non-residents of this state to hold personal property interests as Tenants by the Entirety, under the laws of the individual's domicile jurisdiction. SDCL § 29A-6-302, and SDCL § 48-7A-202.

\* \* \*

9. Defendant Mr. Griffin and his spouse Ms. Griffin had the ability to, and did, hold the Hickoks membership interest through Tenants by the Entirety, under the law of their domicile state, Florida.

10. Such rights and obligations of Tenants by the Entirety ownership are governed by the laws of the state of Florida. SDCL § 43-1-7.

11. The Court concludes that: (1) the Charging Order is valid and remains in existence; (2) at all times relevant to this matter Hickoks has had knowledge of the Charging Order; and (3) once the asset sale funds were deposited into its company account on December 29, 2020, Hickoks had the ability to comply with the Charging Order.

12. The Court concludes that the fourth prong of civil contempt, as to Hickoks, has not been met in that Hickoks did not willfully or contumaciously disobey the Charging Order. The distribution from Hickoks was to Ms. Griffin, as the sole remaining member of the company, and not to the judgment debtor named in the Charging Order, Defendant Mr. Griffin.

13. The Court concludes that Hickoks is not in contempt of Court, and the Plaintiffs' Motion for Order to Show Cause to hold Hickoks in contempt is DENIED.

CR 936-938.

Brockleys appeal from the circuit court's Order, arguing (1) the transfer of Hickoks to Clarence and Kimberly as tenants by the entireties "cannot avoid" the Charging Order; (2) the attempted transfer of Clarence's interest in Hickoks to Kimberly as tenants by the entireties was "void" for failure to comply with the Charging Order and state law; and (3) the refusal



to comply with the Charging Order was willful or contumacious and in contempt of court. CR 1017-1018; Brockleys' Brief.

These issues are simplified and addressed as follows: (1) whether the circuit court erred in recognizing Kimberly's sole membership/ownership of Hickoks following the death of Clarence; and (2) whether the circuit court erred in concluding Hickoks was not in violation of the Charging Order and not in contempt.

## **ARGUMENT AND AUTHORITIES**

### **Standards of Review**

The Court's standards of review for the matters in this appeal are well-settled:

“We have held that a trial court's findings of fact will not be disturbed unless they are clearly erroneous.” *Fanning v. Iversen*, 535 N.W.2d 770, 773 (S.D.1995) (quoting *Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D.1994)). Clear error is shown only when, after review of all the evidence, “we are left with a definite and firm conviction that a mistake has been made.” *Id.* (citing *Cordell v. Codington County*, 526 N.W.2d 115, 116 (S.D.1994)).

*Brummer v. Stokebrand*, 1999 S.D. 137, ¶ 5, 601 N.W.2d 619, 621. ““A trial court's findings in a contempt action are also reviewed under the clearly erroneous standard.” *Id.* ‘Conclusions of law are reviewed de novo.’ *Id.* Statutes are interpreted “under a de novo standard of review without deference to the decision of the trial court.”” *Id.* (internal and other citations omitted).

Brockleys claim an “abuse of discretion” as to Findings of Fact Nos. 3, 10 and 15, and “error of law” as to Conclusions of Law Nos. 6 through 10. The standard of review applicable to findings of facts, however, is clearly erroneous and not an abuse of discretion. In any event, Brockleys have not demonstrated either that the circuit court’s factual findings were clearly erroneous or that its legal conclusions were incorrect. Accordingly, and for the reasons explained below, the circuit court’s Order should be affirmed.

**A. The Circuit Court Correctly Recognized  
Kimberly’s Sole Membership/Ownership of Hickoks**

**1. The Assignment was a Valid Transfer to Kimberly as Tenants by the Entirety**

As noted, the circuit court found that under Florida law, Clarence transferred his membership interest in Hickoks to himself and Kimberly, as tenants by the entireties. Tenants by the entireties is not an avenue to hold property in South Dakota. *See e.g. Schimke v. Karlstad*, 208 N.W.2d 710, 714 (S.D. 1973). However, such an estate does exist in other states, and significant to this case, exists in Florida. *See e.g. Beal Bank, SSB v. Almand & Associates*, 780 So.2d 45, 54 (Fla. 2001). Significantly and indisputably, when Clarence transferred his membership in Hickoks to himself and Kimberly, as tenants by the entireties, they were both residents and domiciliaries of Florida, and Kimberly remains so today.

The first error Brockleys assign relates to the circuit court’s tenancy by the entireties finding, but it is based on Brockleys’ misinterpretation of the circuit

court's conclusion. Brockleys assert that the circuit court found that "tenancy by the entireties may be created in South Dakota." The circuit court never made that finding or conclusion, nor did it conclude that Florida law applies to this case. *See* Brockley's Brief, p. 13. Consequently, much of Brockleys' argument regarding whether a person can create such a tenancy under South Dakota law is off base and irrelevant. *See* Brockleys' Brief, pp. 11-13.

Rather, the circuit court held that although South Dakota does not recognize tenants by the entirety, "South Dakota recognizes the ability of a non-resident of this state to hold personal property interest as Tenants by the Entirety, under the laws of the individual's domicile jurisdiction." CR 937. The circuit court's actual conclusion is supported by several South Dakota statutes.

There is no dispute that an estate of tenancy by the entireties cannot be created under South Dakota law; however, there can also be no dispute that the South Dakota legislature contemplated the creation of tenancy by the entireties under other states' laws and that such an estate is recognized and enforceable.

Tenancy by the entireties is recognized by South Dakota's legislature in SDCL §§ 29A-6-302, 48-7A-202, and 54-8A-1. SDCL § 29A-6-302 provides:

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, *as tenants by the entireties*, or as owners of community property held in survivorship form, and not as tenants in common.

(emphasis added). The statute relating to the formation of a partnership also refers to and contemplates tenancy by the entirety:

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, *tenancy by the entirety*, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(emphasis added). And, in the Uniform Fraudulent Transfer Act, codified at SDCL § 54-8A, an “asset” is defined, but specifically excludes “*any interest in property held in tenancy by the entirety* to the extent it is not subject to process by a creditor holding a claim against only one tenant.” (emphasis added).

Contrary to Brockleys’ assertion, Hickoks never argued that these statutes had applicability beyond the fact that they show South Dakota’s recognition of tenancy by the entirety. *See* Brockleys’ Brief, p. 13. Further, the circuit court never found those statutes had applicability beyond the conclusion that “South Dakota recognizes the ability of non-residents of this state to hold personal property interests as Tenants by the Entirety, under the laws of the individual’s domicile jurisdiction.” CR 937 (citing SDCL § 29A-6-302 and 48-7A-202).

Brockleys then argue the circuit court erred in concluding that “ownership follows the owner and is subject to the laws of the owner’s domicile,” and claims the circuit court’s reliance on SDCL § 43-1-7 was error. To be sure, the circuit court did conclude that the membership interest in Hickok’s is personal property and is accordingly, deemed to follow its owner and is governed by the law of

his/her domicile. CR 937 (citing SDCL § 43-1-7). SDCL § 43-1-7 provides: “if there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner and is governed by the law of his domicile.” Brockleys claim there is “clearly ‘law to the contrary’ in South Dakota.” However, Brockleys never actually cite any South Dakota law to the contrary; rather, they rely on a clearly distinguishable case from Colorado, *JPMorgan Chase Bank, N.A. v. McClure*, 393 P.3d 955, 959 (Colo. 2017). *See* Brockleys’ Brief, p. 15.

In that case, the court held, “that for purposes of determining the enforceability of a charging order, a member’s membership interest is located where the LLC was formed.” In support of that limited conclusion, the court cited to *Koh v. Inno-Pacific Holdings, Ltd*, 54 P.3d 1270 (Wash. Ct. App. 2002) and to CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX & BUSINESS LAW ¶ 5.14[2][c][iii] (2017), which noted a “member’s interest in an LLC is personal property and, moreover, intangible property. For purposes of jurisdiction, that property must be ‘located’ somewhere. According to partnership precedent, the proper location is the state whose LLC act created the entity (and thereby gave rise to the interest).” *McClure*, 393 P.3d at 959. In the present case, there are no questions regarding *enforceability* of the Charging Order or *jurisdiction*, and *McClure* and the authorities it relied upon are, therefore, inapposite.

Based on this one extra-jurisdictional case, Brockleys contend the “ownership of the LLC interest at issue here is governed by the laws of the of the State of South Dakota, not the laws of Florida.” The infirmity with that argument is, of course, that Kimberly’s ownership was through tenancy by the entirety, which everyone agrees does not exist under South Dakota law. As such, there is no South Dakota law to apply in determining whether the tenancy by the entirety was properly created. Thus, as to that issue – whether a tenancy by the entirety was properly created – the law of Florida, where the estate was created, must apply. Brockleys’ argument that under Florida law, the “attempted transfer did not create a tenancy by the entirety” is simply incorrect and unsupported by applicable law.

In support of their argument, although they state that South Dakota law applies, Brockleys rely entirely on a Florida case – *Beal Bank, SSB v. Almand & Assoc.*, 710 So.2d 608 (Fl. Dist. Ct. 1998). That case was quashed in part and its precedential value is therefore questionable. *See Beal Bank, SSB v. Almand*, 710 So.2d 608 (Fl. Dist. Ct. 1998 (Decision Approved in Part, Quashed in Part)). In the Florida Supreme Court’s later consideration of that case, it held, “[a] conveyance to spouses as husband and wife creates an estate by the entirety in the absence of express language showing a contrary intent.”<sup>5</sup> *Beal Bank, SSB*, 780 So.2d at 54.

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<sup>5</sup> In this case, the Florida Supreme Court explained that at one time, the presumption in favor of finding a tenancy by the entirety applied only to real property, but not to personal property. However, the court held in *Beal Bank, SSB*, 780 So. 2d at 57, that the presumption applies with equal force to personal property: “we conclude that stronger

Brockleys have not provided any evidence in the form of “express language” showing a contrary intent either to the circuit court or to this Court. In fact, Brockleys never even made this argument to the circuit court. *See* CR 349-353, 906-912, 1059-1228 (all devoid of these arguments). Accordingly, not only is the record devoid of any evidence to support a showing of “contrary intent,” but such an argument has been waived for failure to raise it with the circuit court. *See Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742, 755 (“An issue not raised at the trial court level cannot be raised for the first time on appeal.”); *Cain v. Fortis Ins. Co.*, 2005 S.D. 39, ¶ 22, 694 N.W.2d 709, 714 (“Since these issues are raised for the first time on appeal, we need not consider them. . . . For an appellate court to consider issues and make a decision on an incomplete record on questions raised before it for the first time would, in many instances, result in injustice, and for that reason courts ordinarily decline to review questions raised for the first time in the appellate court. . . . This Court has often said that ‘[a]n issue not raised at the trial court level cannot be raised for the first time on appeal.’”) (internal citations omitted).

In any event, the express language plainly evidences the intent to create a tenancy by the entireties, as the Assignment states, “as Tenants by the Entirety.”

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policy considerations favor allowing the presumption in favor of a tenancy by the entireties when a married couple jointly owns personal property. In fact, other jurisdictions apply a presumption in favor of a tenancy by the entireties to both real property and personal property.” *Id.* (other citations omitted).

For all these reasons, the Assignment by Clarence to himself and Kimberly, as tenants by the entireties, is valid and there is no just reason, nor legal authority, allowing the Court to disregard that transfer. Kimberly, as the surviving spouse, is now the sole member/owner of Hickoks, as the circuit court concluded, and as Brockleys expressly conceded at the December 15<sup>th</sup> hearing. CR 1214-1216. Kimberly is not subject to the Charging Order, and there was no violation of that Charging Order. The circuit court's findings and conclusions should be affirmed.

2. The Assignment Was Not Void for  
Failure to Comply with the Charging Order or State Law

Brockleys next attempt to avoid the legal and valid transfer of Clarence's membership interest to Kimberly by claiming it is "void as a matter of law because it fails to comply with both the Charging Order and South Dakota law." Notably, none of the arguments advanced by Brockleys in this portion of the Brief (pp. 17 through 20), were considered by the circuit court.<sup>6</sup> See CR 349-353, 906-912, 1059-1228 (all devoid of these arguments). As such, the Court should disregard these arguments. See *Action Mech., Inc.*, 2002 S.D. 121, ¶ 50, 652 N.W.2d at 755 ("An issue not raised at the trial court level cannot be raised for the first time on appeal."); *Cain*, 2005 S.D. 39, ¶ 22, 694 N.W.2d at 714.

First, it should be noted that the Assignment of Membership Interest, transferring Clarence's membership to him and Kimberly, as tenants by the

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<sup>6</sup> Brockleys first raised these issues *after* the circuit court entered its Findings of Fact and Conclusions of Law, in its Brief in Support of Motion for Reconsideration, which the circuit court did not entertain.



entireties, *preceded* the Charging Order. The Assignment of Membership Interest is dated March 30, 2015 (CR 344-348), and the first Charging Order was not entered until December 30, 2016 (CR 200) and the Corrected Charging Order was not entered until February 3, 2017. CR 209.

In support of their argument that the Assignment of Membership Interest from Clarence to himself and Kimberly, as tenants by the entireties, is void, Brockleys argue first that “it is the *distributional interest*” that is the personal property subject to transfer, citing SDCL § 47-34A-501, but that such transfer does not “entitle a transferee to become a member,” citing SDCL §47-34A-502. While not altogether clear, it appears that Brockleys claim that the Assignment of Membership Interest transferred only the membership interest, but that it did *not* transfer the distributional interest (the members’ right to distributions from the LLC, Hickoks). Brockley’s argument, however, misses the mark and is not supported by any applicable authorities.

Under South Dakota law, SDCL Ch. 47-34A, the Revised Uniform Limited Liability Company Act (the “Act”), the rights to distributions from a limited liability company and, indeed, a “distributional interest,” rests with a member by the nature of his or her membership. “Distributional interest means all of a member’s interest in distributions by the limited liability company.” SDCL 47-34A-101(6). Further, under the Act, a “[d]istribution means a transfer of money, property, or other benefit from a limited liability company to a member in the member’s capacity as a member or to a transferee of the member’s distributional

interest.” SDCL § 47-34A-101(5). “Transferee means a person to which all or part of a distributional interest has been transferred, whether or not the transferor is a member.” SDCL § 47-34A-101(21).

A “distributional interest” can be transferred from a member to a non-member. However, as Brockleys recognize, receipt of a “distributional interest,” does not automatically make the recipient a member of the limited liability company. *See* SDCL 47-34A-502. Thus, a member may transfer some or all of his/her *distributional interest*, without the recipient becoming a member; but, if a member transfers his/her *membership* (all or part), then the distributional interest follows. In other words, a transfer of membership automatically includes the distributional interest, but a transfer of distributional interest may or may not also transfer membership along with it.

In fact, the Operating Agreement that Brockleys reference and rely on for other portions of their argument, clarifies the issue. The Operating Agreement defines Membership Interest: “[t]he interest of a Member in the Company shall be referred to as a ‘Membership Interest’ which shall mean the percentage of profits, losses, and distributions a Member is entitled to receive under this Agreement.” CR 398. Thus, the Operating Agreement specifically defines “Membership Interest” as including the distributional interest.

Further, the March 2015 Assignment of Membership Interest refers to the transfer of the “Membership Interest” as a capitalized and defined term. CR 344-348. This is done throughout the Assignment, including notably, and for

avoidance of doubt, in the introductory paragraph and in the PREMISES paragraphs. CR 344. Accordingly, there can be no question that Clarence transferred his Membership Interest to himself and Kimberly, as tenants by the entireties. Counsel for Brockleys even argued that was the case at the December hearing, where he agreed that Kimberly became the sole member of Hickoks. CR 1214-1216. For all these reasons, Brockleys' argument is flatly contradicted by both the facts and pertinent authorities.

Brockleys next argue the March 2015 Assignment of Membership Interest is void because of "Restrictions on Transfer" Section 5.01 of the Operating Agreement. As Brockleys note in their Brief, that section of the Operating Agreement provides that the members agree not to sell, assign, pledge, encumber, or otherwise transfer their membership interest, "except as provided in this Article." Brockleys incorrectly claim that there has been no waiver of that section. In fact, page 3, Section II(D) of the Assignment of Membership Interest, specifically states "...the Continuing Member (Trucano) hereby *consents* to the foregoing assignment, *waives* any statutory restriction or other restriction (such as, but not limited to, the right of first refusal..." (emphasis added). Such a blanket waiver by the only other member at the time was more than sufficient to waive the restrictions on transfer section of the Operating Agreement.

Brockleys also claim the transfer to Kimberly was ineffectual because neither Trucano nor Hickoks sought approval from the South Dakota Commission on Gaming, citing SDCL 42-7B-7 and -11 and ARSD 20:18:06:08. Again, there

was a blanket waiver of the restrictions on transfer, including a waiver of “any statutory restriction or other restriction.” Such a broad waiver encompasses the approval of the gaming commission. In any event, this is not Brockleys’ argument to make; only the gaming commission is affected by the approval or lack thereof, and only the gaming commission has the power to enforce its rules and regulations. *See e.g.* SDCL 42-7B-7 (giving the gaming commission the power to “apply for injunctive or declaratory relief to enforce the provisions of this chapter and any rules promulgated thereunder.”). And, more importantly, any failure to obtain approval from the gaming commission simply does not affect the validity of the transfer.

Brockleys’ final argument in their attempt to avoid the consequences of the lawful transfer to Kimberly is to claim that there was a “distribution” in violation of the Charging Order. The facts do not support this argument. Upon closing the sale of Hickoks, the sale proceeds were allocated as follows: (i) 50% of the proceeds went to redeem the ownership of the Trucano Trust, which was not a “distribution” to a member, but payment for his ownership; and (ii) the other 50% of the proceeds were deposited into an LLC corporate account with 1st Home Bank in Florida. Neither was a “distribution” to a member, a term that is specifically defined by South Dakota statute.

SDCL 47-34A-101 states in relevant part: “Distribution means a transfer of money, property, or other benefit from a limited liability company to a member in the member’s capacity as a member...” This language clearly does not fit either

(i) or (ii), set forth above. Kimberly's later distribution from Hickoks to herself as the sole remaining member of the LLC (which Brockleys' counsel acknowledged at the December 15<sup>th</sup> hearing) is also not in violation the Charging Order because, according to the plain terms of the Charging Order, neither Hickoks nor Kimberly were subject to the Charging Order – only Clarence was.

In short, Brockleys have provided no facts nor any legal authorities that call into question the circuit court's finding that the Assignment of Membership Interest was in any way ineffectual. As a result, and following Clarence's death, the Assignment of Membership Interest properly made Kimberly the sole member of Hickoks, neither of whom were subject to the Charging Order.

**B. The Circuit Court Correctly Concluded Hickoks  
Was Not in Violation of the Charging Order and Not in Contempt**

The circuit court concluded, *inter alia*, that because the distribution from Hickoks was made to Kimberly, who was *not* subject to the Charging Order, that there was no violation of it. CR 938, ¶ 12. Accordingly, the circuit court concluded the fourth prong of proving civil contempt – willful or contumacious disobedience – was not established. In reaching those conclusions, the circuit court found that Clarence transferred his membership interest in Hickoks to himself and Kimberly, as tenants by the entireties, which Brockleys have not, and cannot, prove was erroneous. Further, it is beyond dispute that Kimberly was not subject to the Charging Order. These two facts, which remain established, provide the basis for the circuit court's conclusions that Hickoks did not violate the

Charging Order and was not in contempt. The facts upon which these conclusions are based are correct, and the circuit court's conclusions are likewise correct.

There are two varieties of contempt power – civil contempt and criminal contempt. *See Hiller v. Hiller*, 2018 S.D. 74, ¶ 20, 919 N.W.2d 548, 554. Civil contempt power, which is at issue here, is designed “to force a party ‘to comply with orders and decrees issued by a court in a civil action[.]’” *Id.* (emphasis added) (other citations omitted). Civil contempt “seeks to compel ‘the person to act in accordance with the court’s order,’ rather than to punish for past conduct.” *Id.* (other citations omitted). There are four required elements for a finding of civil contempt: “(1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order.” *Id.* (other citations omitted). Brockleys have not established willful or contumacious disobedience of the Charging Order, the fourth of the required elements, as the circuit court concluded and as explained below.

As noted, the Charging Order clearly provides that Brockleys are entitled to a judgment, but *only* against Clarence Griffin’s nonexempt interest in Hickoks. The Charging Order clearly states, “[d]istributions owed or payable to [Clarence Griffin] by [Hickoks] must be paid directly to [Brockleys].” Very simply put, there was no distribution owed or payable to Clarence and therefore, nothing that was required to be paid directly to Brockleys.

The funds received from the December 29, 2020 asset sale were utilized to redeem the Trucano Trust interest in Hickoks, with the entirety of the remaining funds placed in a corporate bank account for Hickoks. At a later time, the funds in

Hickoks' bank account were withdrawn by the remaining and sole member of Hickoks, Kimberly Griffin. Kimberly is not, nor was she ever, a "judgment debtor" under the Charging Order or under SDCL Chap. 47-34A. Withdrawal of the funds by Kimberly was not a "willful or contumacious" act in violation of the Charging Order.

Brockleys' recitation of the circumstances surrounding the representation of Hickoks and Clarence, the 2015 Assignment of Membership Interest, and the 2020 Agreement (*see* Brockleys' Brief, pp. 22-25) are simply irrelevant to the validity of the assignment. To be sure, this case is simply an effort to enforce the Charging Order; that is, Brockleys seek the monies received from the sale of Hickoks. As such, the question is whether Hickoks' and/or Kimberly's failure to direct payment from the sale to Brockleys was in violation of the Charging Order. The answer to that question is simply, no. Such payment legally was directed to the company bank account, and subsequently disbursed to Kimberly, who was at the time, the only member of Hickoks, and who was unquestionably not subject to the Charging Order.

While Brockleys make some veiled accusations of misdeeds surrounding the Assignment of Membership Interest, claiming Hickoks and Trucano engaged in a "scheme to attempt to avoid the application of the Charging Order" (Brockleys' Brief, p. 29), such formal allegations have never been made (which would, in any event, be fruitless). Accordingly, no discovery has been conducted regarding such claims, and the circuit court has never had the occasion to rule on such claims. And, significantly, the Assignment of Membership Interest was

made *prior to* the existence of any Charging Order. Brockleys' recitation of facts and related arguments are irrelevant to the only question before this Court – whether Hickoks violated the Charging Order.<sup>7</sup>

In short, Brockleys have not and cannot demonstrate that Hickocks is in contempt for violating the Charging Order, as there has been no willful or contumacious disobedience of the Charging Order. While Brockleys attempt in earnest to confuse the issue, the reason there was no disobedience of the Charging Order is very simple – the only debtor subject to the Charging Order was Clarence, who never received any funds. Rather, only Kimberly received disbursement of funds as a member, but she was indisputably not subject to the Charging Order.

Brockleys' final argument is that Hickoks ignored the Charging Order's requirement that it notify them of the sale of Hickoks. Brockleys' Brief, pp. 26-27. However, the Charging Order does not require Hickoks to notify Brockleys of the sale; it requires only that Hickoks pay Brockleys directly for any “[d]istributions owed or payable to [Clarence Griffin].” CR 210. Thus, not only was Hickoks not required to notify Brockleys of the sale, but it was also not required to pay the sale proceeds to Brockleys, as such proceeds were not “owed or payable to Clarence Griffin,” as he was deceased at the time of the sale and

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<sup>7</sup> Brockleys' arguments on pages 24-25 of their Brief are also irrelevant, as they pertain only to Trucano, and no response from Hickoks is necessary.



Kimberly was the only remaining member of Hickoks, but not subject to the Charging Order.

In short, the Charging Order, which is narrow in scope, simply directs that any distributions payable to Clarence Griffin were to be paid directly to Brockleys instead. After Clarence's death, however, there were no distributions payable to Clarence Griffin. Indisputably, Kimberly was not subject to the Charging Order and the sale proceeds were properly placed in a company bank account, wherein she remained the sole member of Hickoks. There was no violation of the Charging Order, willfully, contumaciously, or otherwise. The circuit court properly concluded Hickoks was not in contempt of court and properly denied the Order to Show Cause.

### **CONCLUSION**

For all these reasons, Hickoks respectfully requests that the Court affirm the circuit court's Findings of Fact and Conclusions of Law and its Order, dated January 21, 2022.

Respectfully submitted this 30<sup>th</sup> day of June, 2022.

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### **CERTIFICATE OF COMPLIANCE**

This Brief is compliant with the length requirements of SDCL § 15-26A66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Brief Appellee, N.M.D. Venture, LLC (n/k/a Hickoks Hotel and Suites, LLC) contains 6,786 words as counted by Microsoft Word.

LYNN, JACKSON, SHULTZ & LEBRUN,  
P.C.

/s/ Aaron T. Galloway

Aaron T. Galloway

### **CERTIFICATE OF SERVICE**

Aaron T. Galloway, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 30<sup>th</sup> day of June, 2022, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of the foregoing in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Aaron T. Galloway  
Aaron T. Galloway

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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APPEAL NO. #29915

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MARK BROCKLEY and  
ANNESSE BROCKLEY,

Plaintiffs/Appellants,

vs.

MERRILL ELLIS, RONALD GUTMAN, CLARENCE GRIFFIN and GG&E, LLC,

Defendants/Appellees.

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APPEAL FROM THE CIRCUIT COURT  
FOR THE FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

---

THE HONORABLE ERIC J. STRAWN  
Circuit Court Judge

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BRIEF OF APPELLEE MIKE TRUCANO a/k/a MICHAEL J. TRUCANO, personally  
and as a Trustee for the Michael J. Trucano Living Trust

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NOTICE OF APPEAL FILED: February 22, 2022

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## **PRELIMINARY STATEMENT**

This is an appeal of two orders from the Lawrence County Circuit Court, Fourth Judicial Circuit, holding that the Appellees, including Trucano and the Trust, did not violate a charging order applied to the distributional interest of one member of a South Dakota limited liability company. Trucano will use the same references used by Appellants. Appellants Mark Brockley and Annesse Brockley will be referred to as “Brockleys.” Hickok’s Hotel & Suites, LLC will be “Hickok’s,” Michael J. Trucano, personally and on behalf of the Michael J. Trucano Living Trust, will be “Trucano,” and the Michael J. Trucano Living Trust will be “Trust.” The Settled Record will be “SR.” Trucano’s deposition will be “TD” followed by page and line numbers. Trucano Deposition Exhibits will be “TDE.” Hearing transcripts will be “MH1” for the October 22, 2021 hearing and “MH2” for the November 24, 2021 hearing. Documents in Appellant’s Appendix will cited as “Brockleys App.” followed by the appendix number. Documents in Trucano’s Appendix will be “Trucano App.” followed by the appendix number.

## **JURISDICTIONAL STATEMENT**

On April 15, 2015, Circuit Court Judge Michelle K. Comer entered a judgment in the matter of *Mark Brockley, et al. v. Merrill Ellis, et al.*, 40CIV14-320, in the amount of \$1,548,504.61 against Merrill Ellis, Ronald Gutman, Clarence Griffin, and GG&E LLC. SR 113. On December 29, 2016, Judge Comer entered a Charging Order regarding Clarence (“Nick”) Griffin’s interest in N.M.D. Ventures, LLC (“NMD”) and directing “[d]istributions owed and payable to said [Griffin] by N.M.D. Venture, LLC must be paid



directly to Plaintiffs[.]” SR 200. On February 3, 2017, Judge Comer entered a Corrected Charging Order adjusting the principal amount owed on the judgment. SR 209.

In April 2021, Judge Comer entered a Show Cause Order against Trucano, the Trust, Hickok’s Hotel and Suites, LLC (formerly NMD), and Kimberly Griffin (personally and as representative of the Estate of Clarence Griffin). SR 334. Judge Comer recused herself, and the case was assigned to Circuit Court Judge Eric Strawn. On December 13, 2021, Judge Strawn entered an Order Denying Motion to Hold Michael J. Trucano and Michael J. Trucano Living Trust in Contempt of Court. SR 904 (Brockleys App. 1). On January 21, 2022, Judge Strawn entered an Order Denying Plaintiffs’ Motion for Contempt set forth in the Order to Show Cause Against Hickok’s Hotel and Suites, LLC. SR 932 (Brockleys App. 2). Notice of Entry of both orders was filed on February 10, 2022. SR 973, 1001. Appellants filed their Notice of Appeal on February 18, 2022. SR 1014. Appellee Trucano does not dispute that Appellants’ appeal is timely and that S.D.C.L. §§ 15-26A-3 and 15-26A-4 apply to this appeal.

### **STATEMENT OF LEGAL ISSUES**

#### **I. Whether a transfer of an interest in a South Dakota Limited Liability Company between spouses “as tenancy by the entireties” is lawful under South Dakota law.**

The Trial Court found that Hickok’s did not violate the Corrected Charging Order when it distributed funds to Kimberly Griffin. The issue of whether estates by the entireties exist in South Dakota is not relevant to and has no bearing on whether Trucano and the Trust complied with the Corrected Charging Order.

*Gul v. Center for Family Medicine*, 2009 S.D. 12, 762 N.W.2d 629

*City of Rapid City v. Big Sky, LLC*, 2018 S.D. 45, 914 N.W.2d 541

S.D.C.L. § 47-34A-303(a)

**II. Whether the transfer of Griffin's interest was void for failing to comply with the Corrected Charging Order and South Dakota Law.**

The Trial Court found that Hickok's did not violate the Corrected Charging Order when it distributed funds to Kimberly Griffin. The issue of whether the transfer of Griffin's interest was void for failing to comply with the Corrected Charging Order or South Dakota law is not relevant to and has no bearing on whether Trucano or the Trust complied with the Corrected Charging Order.

*Gul v. Center for Family Medicine*, 2009 S.D. 12, 762 N.W.2d 629

*City of Rapid City v. Big Sky, LLC*, 2018 S.D. 45, 914 N.W.2d 541

S.D.C.L. § 47-34A-303(a)

**III. Whether Trucano and the Trust complied with the Corrected Charging Order during the sale of Hickok's Hotel & Suites, LLC's on December 29, 2020, including Hickok's redemption of the Trust's interest in the LLC.**

The Trial Court ruled that Trucano and the Trust did not violate the Corrected Charging Order during the sale of Hickok's assets on December 29, 2020, and entered an Order Denying Motion to Hold Michael Trucano and Michael J. Trucano Living in Contempt of Court.

*Taylor v. Taylor*, 2019 S.D. 27, 928 N.W.2d 458

S.D.C.L. § 47-34A-101(5) and (6)

S.D.C.L. § 47-34A-504

S.D.C.L. § 47-34A-601(3)

## STATEMENT OF THE CASE AND FACTS

This appeal concerns two orders issued by Circuit Court Judge Eric Strawn from the Seventh Judicial Circuit in the matter of *Mark Brockley, et al. v. Merrill Ellis, et al.*, 40CIV14-320. Prior to Judge Strawn, Circuit Court Judge Michelle Comer presided over the *Brockley* matter.

### **I. The *Brockley* Matter**

On April 15, 2015, Circuit Court Judge Michelle K. Comer entered a judgment in the *Brockley* matter in the amount of \$1,548,504.61 against Merrill Ellis, Ronald Gutman, Clarence (“Nick”) Griffin, and GG&E LLC. SR 113. On December 29, 2016, Judge Comer entered a Charging Order regarding Nick Griffin’s interest in N.M.D. Ventures, LLC (“NMD”) and directing “[d]istributions owed and payable to said [Nick Griffin] by N.M.D. Venture, LLC must be paid directly to Plaintiffs[.]” SR 200. On February 3, 2017, Judge Comer entered a Corrected Charging Order adjusting the principal amount owed on the judgment. *Brockleys App. 4*. In February 2017, *Brockleys* served Trucano with the Corrected Charging Order as the registered agent for NMD. *Trucano App. 3* (TD 35:25; 36:1-11).

Pursuant to the Court’s 2017 Corrected Charging Order, any distribution from NMD made to Griffin must have been paid directly to Plaintiffs. Corrected Charging Order ¶¶ 1-2. Trucano and the Trust were not parties to the *Brockley* matter and were not subject to the Court’s Corrected Charging Order. The Trust’s former distributional interest in NMD was not subject to the Corrected Charging Order. The Corrected Charging Order did not prohibit Hickok’s from buying the Trust’s ownership interest in the LLC, or prohibit Hickok’s from selling its assets.

## **II. NMD/Hickok's and the Sale of the Deadwood Property**

In 2011, Trucano and Nick Griffin organized NMD to purchase and operate a hotel and casino located 685 Main Street, Deadwood, SD 57732 (“Deadwood Property”). Trucano App. 3 (TD 11:3-25; 12:1-25; 13:1-25); Trucano App. 2 (Trucano Aff. ¶ 9). From 2011 to 2015, Trucano was a 50% owner of NMD and in 2015 Trucano transferred his ownership interest to the Trust. Trucano App. 2 (Trucano Aff. ¶¶ 2-3). Trucano is a co-trustee for the Michael J. Trucano Living Trust under date of February 9, 2015. *Id.* ¶ 1. Trucano served as the registered agent for NMD from 2014 to December 18, 2020. *Id.* ¶ 12. In November 2016, before any charging order was entered regarding Nick Griffin’s distributional interest, NMD made distributions to its then members. Trucano App. 4 (Trucano Supp. Aff. ¶ 4-5). Other than the November 2016 distribution, NMD did not issue distributions to its members. *Id.* ¶ 6. On February 4, 2019, NMD changed its name to Hickok’s Hotel & Suites, LLC (“Hickok’s”). Trucano App. 2 (Trucano Aff. ¶ 6).

On July 21, 2020, Hickok’s and the Trust executed a Redemption Agreement wherein the Trust agreed to sell, and Hickok’s agreed to redeem the Trust’s 50% ownership interest in the LLC by paying the Trust 50% of the proceeds from selling the Deadwood Property. The Trust would then assign its 50% ownership interest back to Hickok’s. Trucano App. 2 (Trucano Aff. ¶ 10).

On December 6, 2019, Hickok’s executed a Purchase and Sale Agreement with SRK Development, LLC to sell the Deadwood Property. Trucano App. 2 (Trucano Aff. ¶ 11). On December 14, 2020, Nick Griffin died in Sarasota, Florida. Brockleys App. 3 (Findings of Fact ¶ 5). On December 18, 2020, Hickok’s replaced Trucano as the registered agent with Registered Agents, Inc. Trucano App. 2 (Trucano Aff. ¶ 13). On

December 29, 2020, Hickok's executed an LLC Resolution to Sell Real Estate to sell the Deadwood Property to DHIH, LLC (later assigned to SRK Development, LLC); Hickok's executed a Unanimous Consent in Lieu of Membership Meeting to memorialize the sale of the 685 Main Street, Deadwood, SD property to SRK Development, LLC; Hickok's and SRK Development LLC closed on the sale of the Deadwood Property, and Hickok's executed a Warranty Deed conveying the 685 Main Street, Deadwood, SD property to DHIH, LLC; the Trust and Hickok's executed an Assignment of Full Interest and Resignation wherein the Trust agreed to transfer, assign and convey all right, title, and interest in the LLC to Hickok's, and Trucano resigned any and all positions previously held with the LLC including any right or interest in any management of the LLC. The Trust appointed Hickok's to transfer the Trust's 50% interest on Hickok's books; and the Trust executed an Assignment of Membership Interest and transferred its 50% ownership interest in the LLC to Hickok's. Pursuant to the Assignment of Membership Interest, the Trust appointed the members of Hickok's to transfer the Trust's 50% interest on Hickok's books. *Id.* ¶¶ 14-19.

Pursuant to the Redemption Agreement, at closing, Hickok's redeemed the Trust's 50% ownership interest by paying 50% of the proceeds from the sale of the Deadwood Property to the Trust. The remaining 50% of the proceeds was supposed to be wired directly to Hickok's bank account. Trucano Aff. ¶ 20.

Prior to closing, on December 29, 2020, Kimberly Griffin and two attorneys from Florida called Trucano and Trucano's attorney. Trucano App. 6 (Trucano 2nd Supp. Aff. ¶¶ 2-3). Griffin and the two Florida attorneys requested that Trucano set up a new bank account in Florida in the name of Hickok's to receive Hickok's portion of the sale

proceeds. *Id.* Trucano did not comply with the request, and instead Trucano provided them with Hickok's bank wire transfer information for the account in Deadwood. *Id.* ¶ 5. Trucano also contacted Hickok's banker in Deadwood and asked him to provide the wire transfer instructions to Dakota Title, the title company assisting with the sale. *Id.* ¶ 6. Trucano's attorney also confirmed with the closing agent that the Trust would receive a separate check for the redemption of the Trust's membership interest and that funds due to Hickok's would be wire transferred to the Deadwood bank. *Id.* ¶ 7.

At the closing, Trucano, Trucano's attorney, and Hickok's attorney, Haven Stuck, were present. Trucano App. 6 (Trucano 2nd Supp. Aff. ¶ 8). Trucano signed the required closing documents, including a final settlement statement, which provided that all of Hickok's proceeds were to be wire transferred to Hickok's Hotel & Suites, LLC. *Id.* ¶ 8. Trucano also signed a Sellers Lien Affidavit, wherein Trucano stated that there were no liens or mechanic's liens on the Deadwood Property, other than as disclosed to the Title company. *See* Trucano App. 1 (Exh. 9 to Affidavit of Plaintiffs re: Sale of Hotel and Corrected Charging Order). Regarding sale proceeds, Trucano and his attorney instructed Dakota Title to wire Hickok's portion of the sale proceeds to the LLC's bank account at First Interstate Bank in Deadwood. Trucano App. 7 (Whitehouse Aff. ¶¶ 4-6). Dakota Title confirmed that it had received the wiring instructions for the proceeds to be sent to First Interstate Bank in Deadwood. *Id.* ¶ 6. None of the documents signed by Trucano stated that Hickok's proceeds would go to an account in Florida. Trucano App. 9 (MH2 8:24-25, 9:1-4). After signing the closing documents, Trucano and his attorney left Dakota Title. Trucano App. 6 (Trucano 2nd Supp. Aff. ¶ 9).

After Trucano and his attorney left Dakota Title, Hickok's attorney, Haven Stuck, provided alternative wiring instructions to Dakota Title. Trucano App. 8 (Stuck Affidavit ¶ 2). Stuck informed Dakota Title to wire Hickok's portion of the sale proceeds to an account with First Home Bank in Seminole, Florida. Dakota Title complied with Stuck's wiring instructions. Trucano App. 7 (Whitehouse Aff. ¶¶ 7-8). Dakota Title did not discuss the change in wire transfer instructions with Trucano or Trucano's attorney before completing the transfer. Whitehouse Aff. ¶ 9; *see also* Stuck Aff. ¶ 2 ("Trucano and Pluimer] were not aware of the wiring instructions to First Home Bank.").

After the closing of the sale and execution of terms pursuant to the Redemption Agreement, the Trust was no longer a member of Hickok's. Trucano App. 2 (Trucano Aff. ¶ 21). Trucano and the Trust had no knowledge whether Hickok's distributed any of the LLC's assets to Nick Griffin or his estate after closing on December 29, 2020 because Trucano and the Trust were no longer involved in the LLC's business affairs. *Id.* ¶ 23.

### **III. Show Cause Order**

On April 16, 2021, Appellants filed a Motion for an Order to Show Cause seeking to hold Trucano, the Trust, Hickok's, and Kimberly Griffin (personally and as representative of the Estate of Nick) in contempt for allegedly violating the Corrected Charging Order and seeking to have Trucano, the Trust, Hickok's, and Kimberly Griffin pay what was allegedly owed to Brockleys by Nick Griffin. SR 223. On April 21, 2021, Judge Comer entered an Order to Show Cause. SR 334. Judge Comer later recused herself, and the case was assigned to Circuit Court Judge Eric Strawn. On August 2, 2021, Trucano filed a Motion to Dismiss and Motion to Quash the Show Cause Order and

a Memorandum in support of the motions. SR 362, 367. Brockleys filed their response to Trucano's motions. SR 457, 461.

Judge Strawn heard oral argument on October 20, October 22, and November 24, 2021 for that portion of the Show Cause Order asserted against Trucano and the Trust. At the October 22nd hearing, the Trial Court ordered Dakota Title to provide the wiring instructions regarding Hickok's portion of the sale from December 29, 2020. Trucano App. 5 (MH1 57:10-20). Dakota Title complied with the order. Trucano App. 9 (MH2 2:13-20).

On November 10, 2021, Jennifer Whitehouse, closing agent with Dakota Title, also provided an affidavit regarding the events that transpired at the closing on December 29, 2020. Whitehouse stated, in part, that on the morning of December 29, 2020, she received wire transfer instructions from First Interstate Bank in Deadwood, "as they were the bank that was to receive the sale proceeds attributable to Hickok's, after first paying amounts due to the Michael J. Trucano Living Trust." Whitehouse attached the Wire Transfer Instructions to her affidavit as Exhibit A. Trucano App. 7 (Whitehouse Aff. ¶ 4). Around noon on December 29, 2020, Whitehouse exchanged emails and voicemails with Trucano's attorney "verifying closing document, transfer documents and the manner of payment to Mr. Trucano for the portion payable to his Trust and the wire transfer to First Interstate Bank in Deadwood for the portion of proceeds payable to Hickok's." *Id.* ¶ 5. Whitehouse confirmed that she had received the wire transfer instructions for Hickok's proceeds to be sent to First Interstate Bank in Deadwood. *Id.* ¶ 6. Shortly following the closing, Whitehouse was approached by Hickok's attorney, Haven Stuck, with different wire transfer directions from those that First Interstate Bank had provided. Stuck asked



Whitehouse to contact a bank in Seminole, Florida to confirm the accuracy of the new instructions, which Whitehouse did. *Id.* ¶ 7. The new instructions from Stuck were to wire transfer Hickok’s portion of the sale proceeds to Hickok’s LLC account at First Home Bank in Florida. Whitehouse followed Mr. Stuck’s instructions believing that Stuck represented Hickok’s. *Id.* ¶ 8. Whitehouse did not discuss the change in wire instructions with Trucano or Trucano’s attorney because Whitehouse believed that Stuck had the authority of Hickok’s to provide alternate instructions. *Id.* ¶ 9.

On November 15, 2021, Attorney Haven Stuck filed an affidavit agreeing with Whitehouse’s affidavit as to Stuck’s actions. Trucano App. 8 (Stuck Aff. ¶ 1). Stuck also stated that Dakota Title was given wiring instructions to an account of Hickok’s at First Home Bank, in Seminole, Florida. At the time Dakota Title received the instructions to wire the proceeds to the Florida account, Trucano and Trucano’s attorney had left the closing and they were not aware of the wiring instructions to First Home Bank. *Id.* ¶ 2.

At the November 24, 2021, hearing, the Trial Court made several oral rulings about whether Trucano and the Trust violated the Corrected Charging Order. First, the Trial Court ruled that a deposit into an LLC’s bank account is not a distribution until a member requests that money to leave the LLC. Trucano App. 9 (MH2 21:16-25). Here, Trucano arranged for the proceeds of the December 29th sale of Hickok’s assets to go to a bank account in Deadwood (MH2 23:12-19), and the transfer of those proceeds to Hickok’s bank account was not a distribution to Hickok’s members. MH2 22:20-25; 23:1-4; *see also* MH2 31:13-16 (“I don’t think that the depositing of sale proceeds into one or many accounts in and of itself qualifies as a distribution as the Court has already ruled.”). The Trial Court found that Trucano did “what a good business person would

do[.]" and cut off Kimberly Griffin's attempt to have the proceeds wired to a Florida bank account. MH2 7:7-9. Trucano advised Griffin and her attorneys "that [he] was not comfortable or willing to participate in the requested action to set up the new Florida account[.]" and Brockleys agreed, "That's what we want him to do." MH2 7:17-22.

Regarding the four elements of contempt, the Trial Court found that there was a valid order (the Corrected Charging Order), that Trucano had the ability to comply with that order,<sup>1</sup> and that Trucano had knowledge of the order. MH2 25:24-25; 26:1-23. For the fourth element – willful or contumacious disobedience of the order - the Trial Court found that "there has not been an establishment that Mr. Trucano willfully or contumaciously violated this or disobeyed this order." MH2 26:17-19. On December 13, 2021, the Trial Court entered an order incorporating its oral Findings of Fact and Conclusions of Law from the hearings and denied Brockleys' motion to hold Trucano and Trust in contempt. SR 904.

On January 21, 2022, Judge Strawn entered an Order Denying Plaintiffs' Motion for Contempt set forth in the Order to Show Cause Against Hickok's Hotel and Suites, LLC. SR 932.

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<sup>1</sup> The Trial Court was correct in its finding of "ability" to the point during the closing where Trucano and the Trust's interest was redeemed, accompanied by Trucano's surrender of any management control or ownership interest. Such occurred during the simultaneous closing of the Hickok's asset sale on the afternoon of December 29, 2020. Trucano App. 2 (Trucano Aff. ¶¶ 18-21) (explaining that Hickok's redeemed the Trust's interest in the LLC on December 29, 2020, and Trucano resigned any and all positions previously held with the LLC). Thereafter, Trucano had no management authority of any kind, thus no "ability to comply" with the Corrected Charging Order. The LLC's "distribution" to Griffin began on January 5, 2021 well after Trucano's departure from the LLC. *See* SR 856 (First Home Bank statements for Hickok's Hotel & Suites, LLC showing a deposit of \$1,135,671.61 on December 29, 2020 and beginning January 5, 2021, Kimberly Griffin wrote a check to herself for \$1,000,000).

## ARGUMENT AND AUTHORITIES

The Court reviews a trial court's findings as to contempt under a clearly erroneous standard. *Taylor v. Taylor*, 2019 S.D. 27, ¶ 15, 928 N.W.2d 458, 465. "The trial court's findings of fact are presumptively correct, and the burden is upon appellant to show error." *Id.* When applying the clearly erroneous standard, the Court will overturn the findings of the trial court only when, after review of all the evidence, the Court is left with a definite and firm conviction that a mistake has been made. *Peska Properties, Inc. v. Northern Rental Corp.*, 2022 S.D. 33, ¶ 20, --- N.W.2d ---. The Court defers to a trial court, as fact finder, to determine the credibility of witnesses and the weight to be given to their testimony. *Peterson v. Issenhuth*, 2014 S.D. 1, ¶ 15, 842 N.W.2d 351.

A trial court's conclusions of law are reviewed under the *de novo* standard of review. *Credit Collection Servs., Inc. v. Pesicka*, 2006 S.D. 81, ¶ 5, 721 N.W.2d 474, 476. Statutory interpretation presents a question of law reviewable *de novo*. *McLaen v. White Township*, 2022 S.D. 26, ¶ 30, --- N.W.2d ---.

### **I. ISSUES I AND II ARE NOT RELEVANT TO AND HAVE NO BEARING ON WHETHER TRUCANO AND THE TRUST COMPLIED WITH THE CORRECTED CHARGING ORDER.**

Brockleys argue that Nick Griffin's transfer of his interest in Hickok's to himself and his wife, Kimberly Griffin, as tenants by the entirety was void. According to Brockleys, South Dakota does not recognize tenancies of the entirety, the transfer did not comply with the Corrected Charging Order, and Hickok's did not obtain the approval of the South Dakota Gaming Commission. Appellants' Brief, 9-20. To the extent Brockleys' arguments in Issues I and II attempt to attribute liability to Trucano or the Trust, Brockleys waived those issues on appeal. Brockleys did not question the Griffin transfer

during the hearings on whether Trucano and the Trust complied with the Corrected Charging Order. Accordingly, any attempt by Brockleys to rope Trucano and the Trust into Issues I and II should be ignored by the Court because these issues were not presented to the Trial Court before the Trial Court entered its Order Denying Motion to Hold Michael Trucano and Michael J. Trucano Living in Contempt of Court on December 13, 2021. *See Gul v. Center for Family Medicine*, 2009 S.D. 12 ¶ 20 n. 7, 762 N.W.2d 629, 635.

Moreover, to the extent Brockleys attempt to impute liability on Trucano or the Trust personally for Hickok's duty and obligation to comply with the Corrected Charging Order, South Dakota law rejects such claims. Members and managers of LLCs are not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager. S.D.C.L. § 47-34A-303(a); *see also City of Rapid City v. Big Sky, LLC*, 2018 S.D. 45, ¶ 18, 914 N.W.2d 541, 547.

Even if Brockleys receive a favorable ruling from the Court on these issues, and Nick Griffin's interest in Hickok's is now held by his estate as argued by Brockleys (Brief at 16), the Trust was no longer a member of Hickok's as of December 29, 2020. A charging order is applicable to single member LLCs. *See* S.D.C.L. § 47-34A-504(g). The Court's ruling on Griffin's interest is not relevant to and has no bearing on whether Trucano and the Trust complied the Corrected Charging Order before the Trust's interest was redeemed by Hickok's.

## **II. TRUCANO AND THE TRUST COMPLIED WITH THE CORRECTED CHARGING ORDER**

The Trial Court correctly determined that Trucano and Trust complied with the Corrected Charging Order and denied Brockleys contempt motion. "The purpose of the

civil contempt power is to force a party to comply with orders and decrees issued by a court in a civil action....” *Taylor v. Taylor*, 2019 S.D. 27, ¶ 39, 928 N.W.2d 458, 470-71 (citation and quotation marks omitted) “The required elements for ... civil contempt are (1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order.” *Id.* (citations omitted). The Trial Court found, and Trucano does not dispute, that Brockley’s established the first three elements, while Trucano held management authority, and the Trust held the membership interest. Thereafter, as previously noted, Trucano and the Trust had no “ability to comply” with the Corrected Charging Order. *See supra* note 1.

Brockleys have several theories as to the fourth element for Trucano and Trust, none of which pass muster after a review of the facts and law presented to the Trial Court. Trucano and the Trust complied with the Corrected Charging Order, and the Trial Court correctly concluded the same.

A court may charge the distributional interest of a judgment debtor/LLC member to satisfy a judgment. SDCL § 47-34A-504(a). A charging order is a lien on the judgment debtor/LLC member’s distributional interest (SDCL § 47-34A-504(b)), as opposed to the assets of the LLC. A charging order is the exclusive remedy of a judgment creditor to satisfy a judgment out of the debtor’s interest in an LLC. SDCL § 47-34A-504(e). “No other remedy, including foreclosure on the member’s distributional interest or a court order for directions, accounts, and inquiries that the debtor, member might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest” in the LLC. *Id.* A creditor has no right to obtain possession of, or

otherwise exercise legal or equitable remedies with respect to, the LLC's property. SDCL § 47-34A-504(f).

A "distributional interest" in an LLC is "all of a member's interest in distributions by the limited liability company." SDCL § 47-34A-101(5). A "distribution" is "a transfer of money, property, or other benefit from a limited liability company *to a member* in the member's capacity as a member or to a transferee of the member's distributional interest." SDCL § 47-34A-101(6) (emphasis added).

The Corrected Charging Order stated that Nick Griffin's distributional interest was subject to a charge, and "[d]istributions owed or payable to said [Griffin] by [Hickok's] must be paid directly to [Brockleys]." Once Hickok's was served with the first charging order in December 2016, Hickok's did not issue a distribution to its members. Then comes the December 29, 2020 sale of the Deadwood Property. There are several important points about the Corrected Charging Order and how the December 29th sale was structured to comply with the order. First, the Corrected Charging Order was a lien on Griffin's distributional interest in Hickok's; the order was *not* a lien on Hickok's or Hickok's assets and did not apply to the Trust's interest in Hickok's. Second, Trucano took cautious and reasonable steps to ensure that Hickok's share of the proceeds were wire transferred to the LLC's bank account in Deadwood, which also was not a distribution. Third, Hickok's redemption of the Trust's interest and Hickok's indemnification of Trucano and the Trust did not violate Corrected Charging Order.

**a. The Charging Order did not prevent Hickok's from selling assets, nor did the order require Hickok's to notify Brockleys of any sale.**

By its terms and according to SDCL §47-34A-504(e-f), the Corrected Charging Order did not affect Hickok's assets or otherwise create a lien on Hickok's assets. The

LLC was free to conduct its business, including buying and selling real and personal property. Brockleys claim that Hickok's had an obligation to notify Brockleys of the sale of the Deadwood Property. Brief at 26. The Corrected Charging Order did not require any notice be provided for the sale of Hickok's assets, and Brockleys cite no other authority for such a proposition. The failure to cite authority waives this argument on appeal. *See Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60, ¶ 30, 627 N.W.2d 396, 401. The order only required Hickok's to pay Brockleys directly for any distribution owed to Nick Griffin. Accordingly, Trucano had no obligation to notify Dakota Title about the charging order and because Hickok's was selling its assets, Trucano properly stated that there were no liens on Hickok's property other than as disclosed to the Title company. Up until the Trust ceased to be a member of Hickok's, and while Trucano was able to exercise management authority, Trucano made arrangements for Hickok's sale proceeds to be deposited in the LLC's bank account in Deadwood. As the Trial Court correctly determined, depositing sale proceeds in an LLC bank account is not a distribution. Accordingly, Brockleys were not entitled to notice regarding the Deadwood Property sale. The Court should find that Trucano did not violate the Corrected Charging Order when Hickok's sold its assets and did not notify Brockleys.

**b. Trucano did “what a good business person would do” and took cautious and reasonable steps to ensure Hickok's share of the proceeds were wired to Hickok's bank account in Deadwood.**

As detailed above, leading up to the closing on December 29, 2020, Trucano and his attorney took several steps to ensure that Dakota Title wired Hickok's share of the sale proceeds to Hickok's bank account in Deadwood. On the date of closing, Kimberly Griffin and her attorneys from Florida called Trucano to have him set up a bank account

in Florida and have Dakota Title wire the proceeds to that account. The Trial Court correctly concluded that Trucano did “what a good business person would do and cut it off. Talks to his attorney. ...and advised them that [he] was not comfortable or willing to participate in the requested action to set up the new Florida account.” Trucano App. 9 (MH2 7:7-9, 17-21). After the call with Kimberly Griffin, Trucano’s attorney confirmed with Dakota Title that Hickok’s proceeds were to be wired to Hickok’s bank account with First Interstate Bank in Deadwood. Dakota Title confirmed that it received the wiring instructions. Trucano signed the Final Settlement Statement which stated that the proceeds would go to Hickok’s. Trucano left the closing at Dakota Title believing the proceeds would be wired to the Deadwood bank account, consistent with the instructions given by Trucano and Trucano’s attorney.

On appeal, Brockleys falsely claim that the proceeds were sent to the bank in Florida “at Trucano’s written instruction[.]” Brief at 6. The undisputed record before the Trial Court showed that Trucano instructed Dakota Title to wire Hickok’s proceeds to Hickok’s account with First Interstate Bank in Deadwood. Rather, it was Hickok’s attorney, Mr. Stuck, that changed those wiring instructions after Trucano had closed on the Redemption Agreement with Hickok’s (which included a resignation of any management authority), left the closing, when Hickok’s attorney convinced Dakota Title to wire the proceeds to a Hickok’s account in Florida.

Brockleys then claim that Trucano was aware that Hickok’s proceeds would be sent to Florida instead of Deadwood to circumvent the Corrected Charging Order, and Trucano violated the order by letting the proceeds leave the state. Brief 26-27. First, Brockleys argument is factually inaccurate. As stated in three individual’s affidavits,



Trucano was not aware that Hickok's attorney, Haven Stuck, changed the wire transfer instructions *after* Trucano left Dakota Title. If sending Hickok's proceeds to Florida violated the Corrected Charging Order, Trucano took no part in that action. The Trial Court considered Brockley's argument that Trucano knew about the transfer to Florida even after going to great lengths to have the proceeds wired to the Deadwood account. The Trial Court correctly rejected Brockley's "spin" of the undisputed facts and found that Trucano did what a good business person would do. MH2 6:22-25; 7:1-21. The Court should find that the Trial Court did not err when it determined that Trucano acted like a good business person and did not violate the Corrected Charging Order.

**c. Hickok's redemption of the Trust's interest and Hickok's indemnification of Trucano and the Trust did not violate Corrected Charging Order.**

Nothing in the Corrected Charging Order prevented Hickok's and the Trust from executing the Redemption Agreement. The Corrected Charging Order did not put a lien on the Trust's interest in Hickok's, nor is Trucano named or specifically charged with any duty in the order. Pursuant to the Redemption Agreement, at closing, Hickok's redeemed the Trust's 50% ownership interest by paying 50% of the proceeds from the sale of the Deadwood property to the Trust. The remaining 50% of the proceeds was wired directly to Hickok's account. The Redemption Agreement included an indemnification clause holding Trucano and the Trust harmless from any claims and damages arising out of any obligation of Hickok's or Nick Griffin's with respect to the Corrected Charging Order.

Brockleys claim Trucano violated his duty of care to Hickok's by entering into the Redemption Agreement, citing SDCL §§ 47-34A-409(e) and 47-34A-409(c). Brief at

25-26. Brockleys never made a “duty of care” argument to the Trial Court, therefore the Court should not address this argument for the first time on appeal. *See Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425.

Brockleys also claim the Redemption Agreement showed the Trucano wanted to “wash his hands of the Charging Order” and somehow “extract” himself from complying with the order, implying a nefarious intent into Trucano’s actions. Brief at 25. As stated in detail above, Trucano complied with the Corrected Charging Order, did what a good business person would have done, and took several steps to ensure the proceeds from the sale of the Deadwood Property were deposited into Hickok’s bank account in Deadwood. Accordingly, whatever nefarious intent Brockleys read into the Redemption Agreement is contradicted by the clear and undisputed facts accepted by the Trial Court. The Court should find that Trial Court did not err when it determined that Trucano took reasonable steps to ensure Hickok’s proceeds were deposited into Hickok’s Deadwood account. Brockleys conjecture and nefarious inferences do not and cannot satisfy the clearly erroneous standard of proof required in this appeal.

**d. The Remainder of Brockley’s Claims are Meritless.**

Brockleys misstate the Trial Court record and Trial Court’s order regarding Trucano and the Trust. Brockleys claim “Because the circuit court relied on the fact that Trucano and Hickoks complied with Florida law and, therefore, their actions were not willful or contumacious , the trial court failed to hold Trucano or Hickoks in contempt of the Charging Order.” Brief at 21. The Trial Court’s order regarding Trucano and the Trust made no mention of applying Florida law to somehow find that Trucano did not violate the Corrected Charging Order. The Trial Court also made no oral findings at the

hearings involving Trucano on the issue of whether Florida law applied. Brockleys also failed to cite any document or transcript in support of this argument.

Brockleys also claim, “The trial court’s oral findings of fact of November 24, 2021, found that both Trucano and Hickoks met all the elements of contempt of court except the last element – willfulness or contumaciousness.” Brief at 21; *see also* Brief at 27-30 (explaining willfulness and contumaciousness). Brockleys imply that the Trial Court concluded that Trucano violated the charging order, but the violation was not willful or contumacious. To be clear, the Trial Court made no such finding. The Trial Court said, “As to Mr. Trucano, this Court finds there has not been establishment that Mr. Trucano willfully or contumaciously violated this or disobeyed this order.” MH2 26:17-19. The Trial Court also ruled that a deposit into an LLC’s bank account is not a distribution until a member requests that money to leave the LLC. MH2 21:16-25. Trucano arranged for the proceeds of the December 29th sale of Hickok’s assets to go to a bank account in Deadwood (MH2 23:12-19), and the transfer of those proceeds to Hickok’s bank account was not a distribution to Hickok’s members. MH2 22:20-25; 23:1-4; *see also* MH2 31:13-16 (“I don’t think that the depositing of sale proceeds into one or many accounts in and of itself qualifies as a distribution as the Court has already ruled.”). Therefore, as the Trial Court correctly found, Trucano did not violate the Corrected Charging Order.

## **CONCLUSION**

Trucano and the Trust complied with the Corrected Charging Order. Hickok’s assets were not subject to the Corrected Charging Order, accordingly Brockleys were not entitled to any notice of the sale of the Deadwood Property. The sale of Hickok’s assets

on December 29, 2020, was not a distribution subject to the Corrected Charging Order. Moreover, Trucano took reasonable and cautious steps to ensure the proceeds of the December 29th sale would be deposited in Hickok's bank account in Deadwood and not distributed to the remaining members of the LLC consistent with the Corrected Charging Order. It was Hickok's attorney, Haven Stuck, that directed the proceeds to be wired to the Florida bank account only after Trucano left the title company after signing the closing documents.

Failing to acknowledge that no facts or law support the Brockleys claims against Trucano and the Trust, Brockley engages in a "whack a mole" approach. Brockleys' case is best described by Rudy Giuliani's alleged statement "We have many theories; we just don't have any evidence." The essential facts have been clear throughout this case. Trucano planned the asset sale to preserve Hickok's share of closing proceeds in the Hickok's Deadwood bank account. Ergo, no distribution which would implicate the Corrected Charging Order, and preserve all rights of each party to pursue any claims to the proceeds. So long as Trucano had management authority, the sale and closing proceeded accordingly. It was only following the closing of the asset sale and the redemption of the Trust membership interest, at which time Trucano resigned from all management responsibilities, no longer having any interest in Hickok's, when Hickok's attorney surreptitiously altered the planned and authorized closing process.

It was only when Hickok's and Griffin rescinded all Trucano instructions for the deposit to the LLC Deadwood bank account, and requested the Title Company transfer Hickok proceeds to a new LLC account in Florida, under the sole control of Griffin, that these issues arise. It is uncontroverted, despite Brockleys' efforts to the contrary, that the

alternate wire transfer to the new Florida account, was authorized solely by Hickok's/Griffin legal counsel, Mr. Stuck, after the Trucano interest was redeemed and transferred to the LC, and Trucano and his attorney had left the closing.

The only two witnesses/participants in the "Florida plan," Ms. Whitehouse (title company closing agent) and Mr. Stuck (counsel for Hickok's and Griffin) both provided uncontroverted affidavit testimony that Trucano was not aware of nor participated in the Florida bank plan, having departed the closing office before such plan was discussed or implemented. Mr. Trucano had no knowledge of nor participation in the Griffin distribution which took place on January 5, 2021, well after the effective date of the Trucano resignation of any management authority. Ignoring uncontroverted facts and clear law, Brockleys can, in no manner, meet the heavy burden of proof they bear.

The Trial Court correctly found that Trucano and the Trust complied with the Charging Order. The Trial Court's factual findings regarding Trucano's actions were supported by the evidence and were not clearly erroneous. The Trial Court's legal conclusions were also consistent with South Dakota Codified Law regarding LLCs and charging orders. Accordingly, the Court should affirm the Trial Court's Order Denying Motion to Hold Michael J. Trucano and Michael J. Trucano Living Trust in Contempt of Court.

### **ORAL ARGUMENT**

The undersigned does not believe that this case merits oral argument, but the undersigned will participate if requested to do so.

Respectfully submitted this 27<sup>th</sup> day of June, 2022.

RICHARD PLUIMER, PLLC

A handwritten signature in black ink, appearing to read 'R. Pluimer', is positioned above a horizontal line.

RICHARD A. PLUIMER

Attorney for Appellee Mike Trucano a/k/a  
Michael J. Trucano, personally and as  
Trustee for the Michael J. Trucano Living  
Trust

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# **APPENDIX**

## APPENDIX

1.	Affidavit of Plaintiffs re: Sale of Hotel and Corrected Charging Order .....	1-6
a.	Exhibit 9 – Seller’s Final Settlement Statement dated December 29, 2020, including Sellers Lien Affidavit .....	7-17
2.	Affidavit of Michael J. Trucano dated August 2, 2021 .....	18-22
a.	Exhibit K – Seller’s Final Settlement Statement dated December 29, 2020 .....	23
3.	Transcript of Deposition of Michael J. Trucano taken August 30, 2021 .....	24-28
4.	Supplemental Affidavit of Michael J. Trucano dated October 14, 2021 .....	29-30
5.	Transcript of Motion for Contempt Hearing dated October 22, 2021 .....	31-32
6.	Second Supplemental Affidavit of Michael J. Trucano dated November 10, 2021 .....	33-35
7.	Affidavit of Jennifer Whitehouse dated November 10, 2021 .....	36-41
8.	Affidavit of Haven Stuck dated November 11, 2021 .....	42
9.	Transcript of Motion for Contempt Hearing dated November 24, 2021 .....	43-54



STATE OF SOUTH DAKOTA

COUNTY OF LAWRENCE

)  
)SS  
)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

MARK BROCKLEY,  
ANNESSE BROCKLEY  
Plaintiffs,

vs.

MERRIL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN, & GG&E LLC  
Defendants.

40CIV14-000320  
**AFFIDAVIT OF PLAINTIFFS RE:  
SALE OF HOTEL AND  
CORRECTED CHARGING ORDER**

State of South Dakota )  
:SS  
County of Lawrence )

Jon W. Dill, being first duly sworn upon oath, deposes and states that:

1. I am one of the attorneys for the Plaintiffs.
2. A Charging Order was entered in this action on December 30, 2016.
3. It was served upon Mike Trucano and Clarence Griffin on or about December 30, 2016.
4. A Corrected Charging Order was entered in this action on February 3, 2017.
5. It was served upon Mike Trucano and Clarence Griffen on or about February 3, 2017.
6. According to the Corrected Charging Order, (attached hereto, marked Exhibit 1, and

incorporated herein by reference) this Court found that:

- ...on April 15, 2015, Plaintiff received a judgment against the Defendants above-named in the principal sum of \$1,548,504.61, with interest accruing thereon at the rate of 10% per annum on the unpaid balance.
- A partial satisfaction of judgment in the amount of \$1,903.51 was made on July 29, 2015.
- A partial satisfaction of judgment in the amount of \$751,744.49 was made on May 6, 2016.

- As of December 31, 2016, the total amount due, including post-judgment interest is \$1,029,259.41.
  - ...Defendant Clarence Griffin is a member in a Limited Liability Company known as N.M.D. Venture, LLC which operates in Lawrence County, South Dakota.
  - ...Plaintiffs are entitled as a matter of right by reason of the judgment against said Defendant to a Charging Order against the nonexempt interest of the Defendant Clarence Griffin in N.M.D. Venture, LLC.
7. Also, according to the Corrected Charging Order, this Court **ORDERED that:**
1. The interest of Defendant Clarence Griffin in N.M.D. Venture, LLC is hereby subjected to a Charging Order in favor of and for the benefit of the Plaintiffs;
  2. Distributions owed or payable to said Defendant by N.M.D. Venture, LLC must be paid directly to Plaintiffs;
  3. N.M.D. Venture, LLC will be discharged from its obligations to Plaintiffs to the extent of any amounts so paid to Plaintiffs until the Judgment entered against the Defendants in this cause is paid in full; and
  4. Upon service of a true and correct copy of this Charging Order upon the Defendant Clarence Griffin, said Defendant shall deliver to Plaintiffs, through their attorneys, true copies of the operating agreement and true copies of any other agreements or documents evidencing or affecting the interest of said Defendant Clarence Griffin in N.M.D. Venture, LLC, and any distributions due or to become due to Defendant Clarence Griffin by reason of said Defendant's interest in N.M.D. Venture, LLC, regardless of the denomination of said distribution.
8. N.M.D. Venture, LLC, changed its name to Hickoks Hotel & Suites, LLC, on or about January 29, 2019. The Articles of Amendment filed with the SD Secretary of State are attached hereto, marked Exhibit 2, and incorporated herein by reference.
9. Plaintiffs have learned that closing for the sale of Hickoks Hotel & Suites, LLC, was through Dakota Title Company, Spearfish, SD, on or about December 29, 2020.
10. Plaintiffs thereafter subpoenaed the records of the sale from the Dakota Title Company. The

served and filed Subpoena is attached hereto, marked Exhibit 3, and incorporated herein by reference.

11. These subpoenaed documents were produced by Dakota Title Company, clearly admissible under SDCL 19-19-803, are itemized below and attached hereto, marked exhibits 4-11, and incorporated herein by reference:

Exhibit 4: Dakota Title cover letter, dated March 25, 2021;

Exhibit 5: Application for Amended Articles of Organization with corresponding documents;

Exhibit 6: Borrower's Final Settlement Statement, dated December 29, 2020;

Exhibit 7: Emails between Richard Pluimer and Christina Marta, dated December 28, 2020;

Exhibit 8: Purchase and Sale Agreement, dated December 6, 2019;

Exhibit 9: Seller's Final Settlement Statement; dated December 29, 2020;

Exhibit 10: Single Leger Balance, dated December 29, 2020; and

Exhibit 11: Title Commitment, dated November 23, 2020.

12. The Affidavit in the Seller's Final Settlement Statement executed by Mike Trucano for closing (Exhibit 9, pages 3-5) swears that no liens existed.
13. However, the Charging Order is a lien by operation of law.
14. Plaintiffs are entitled to get paid from the interest of Clarence Griffin in N.M.D. Venture, LLC, a/k/a Hickoks Hotel & Suites, LLC.
15. Under SDCL 47-34A-404.1, (c)(8), the matters of a member-or manager-managed company's business requiring the consent of all of the members include the "...use of the company's property to redeem an interest subject to a charging order."
16. Under SDCL 47-34A-504, enumerating the rights of a creditor:

(a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, and following notice to the limited liability company of such application, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment.

(b) A charging order constitutes a lien on the judgment debtor's distributional interest.

(c) A distributional interest in a limited liability company which is charged may be redeemed:

(1) By the judgment debtor;

(2) With property other than the company's property, by one or more of the other members; or

(3) With the company's property, but only if permitted by the operating agreement.

(d) This chapter does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.

(e) This section provides the exclusive remedy that a judgment creditor of a member's distributional interest or a member's assignee may use to satisfy a judgment out of the judgment debtor's interest in a limited liability company. No other remedy, including foreclosure on the member's distributional interest or a court order for directions, accounts, and inquiries that the debtor, member might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the limited liability company.

(f) No creditor of a member or a member's assignee has any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the company.

(g) This section applies to single member limited liability companies in addition to limited liability companies with more than one member.

17. Under SDCL 48-7A-504. Partner's transferable interest subject to charging order.

(a) On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require.

(b) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

- (c) At any time before foreclosure, an interest charged may be redeemed:
  - (1) By the judgment debtor;
  - (2) With property other than partnership property, by one or more of the other partners; or
  - (3) With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.
- (d) This chapter does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.
- (e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.

18. Pursuant to SDCL 48-7A-505, Satisfaction of judgment out of judgment debtor's transferable interest in limited liability partnership:

- (a) On application by a judgment creditor of a partner in a limited liability partnership or of a partner's transferee, and following notice to the limited liability partnership of the application, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment.
- (b) A charging order constitutes a lien on the judgment debtor's transferable interest in the limited liability partnership.
- (c) An interest which is charged may be redeemed:
  - (1) By the judgment debtor;
  - (2) With property other than the limited liability partnership's property, by one or more of the other partners; or
  - (3) With the partnership's property, but only if permitted by the partnership agreement.
- (d) This chapter does not deprive a partner of a right under exemption laws with respect to the partner's transferable interest in the partnership.
- (e) This section provides the exclusive remedy by which a judgment creditor of a partner in a limited liability partnership or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the limited liability partnership. No other remedy, including foreclosure of the partner's transferable interest or a court order for directions, accounts, and inquiries that the debtor partner might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the limited liability partnership.
- (f) No creditor of a partner in a limited liability partnership, or a partner's assignee, has any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of a limited liability partnership.

19. Upon information and belief, Clarence "Nick" Griffin died on December 14, 2020, at Sarasota, Florida, prior to the closing referenced above, and Nick Griffen may have added

his wife, Kimberly L. Griffen, to his membership share prior to the sale, as is more fully referenced at pp. 4- 8 of the attached Exhibit 7: Emails between Richard Pluimer and Christina Marta, dated December 28, 2020. Further, that no probate has begun.

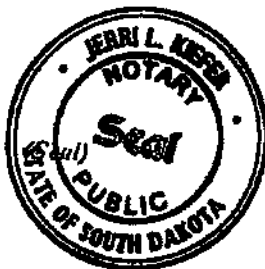
**WHEREFORE**, Plaintiffs pray the Court enter its Order requiring Mike Trucano, a/k/a Michael J. Trucano to appear, personally and as a Trustee for the Michael J. Trucano Living Trust, and Hickocks Hotel and Suites, LLC, and Kimberly L. Griffen to personally appear, each to show cause why:


1. They should not, jointly and severally, be held in contempt;
2. They should not, jointly and severally, be required to immediately pay Plaintiffs the full amount due Plaintiffs;
3. They should not, jointly and severally, be required to immediately pay Plaintiffs' attorney's fees, costs, expenses and other disbursements;
4. The Court should not enter such other and further relief against them as it deems proper.

Dated this 15 day of April, 2021.

  
Jon W. Dill

Subscribed and sworn to me to before me this 15 day of April, 2021.



  
Notary Public - South Dakota  
My commission expires: 12.13.2024

# Seller's Final Settlement Statement

Dakota Title  
137 E. Colorado Blvd.  
Spearfish, SD 57783  
Phone: 605-717-1000 Fax: 605-559-0165

Settlement Date: 12/29/2020  
Escrow officer/Closer: Jennifer Whitehouse  
Order Number: 0850-19  
Borrower: DHM, LLC  
2501 31st Street  
Yankton, SD 57078  
Seller: N.M.D. Venture, LLC  
Hickoks Hotel & Suites, LLC  
PO Box 68  
Deadwood, SD 57732  
Michael J. Trucano Living Trust  
PO Box 68  
Deadwood, SD 57732  
Property location: 685 Main Street  
Deadwood, SD 57732

	Debit	Seller	Credit
<b>Financial Consideration</b>			
Sale Price of Property			
Provisions/Adjustments			4,400,000.00
Operations Settlement			
Estimated 2020 RE Taxes - Buyer to Pay in 2021/30025-01800-075-00 01/01/20 - 12/30/20	51,055.79		129,088.73
<b>Commissions</b>			
Commission Listing Broker to Keller Williams Realty Black Hills		110,000.00	
Commission Listing Broker (Sales Tax) to Keller Williams Realty Black Hills		7,150.00	
Commission Selling Broker to Real Estate Center of Lead-Deadwood		110,000.00	
Commission Selling Broker (Sales Tax) to Real Estate Center of Lead-Deadwood		7,150.00	
Transaction Fee Listing Broker to Keller Williams Realty Black Hills		150.00	
<b>Escrow/Title Charges</b>			
Closing Fee to Dakota Title		318.50	
Owner's Title Insurance to Dakota Title Coverage: 4,000,000.00 Premium: 5,349.38 Version: ALTA Owners Policy (08/17/06)		2,674.69	
<b>Recording Charges</b>			
State Transfer Fee to Lawrence County Register of Deeds		4,000.00	
<b>Payoffs</b>			
Payoff of First Mortgage Loan to First Interstate Bank Loan Payoff	1,885,215.54		1,885,215.54
Total Payoff	1,885,215.54		
<b>Subtotals</b>			
Balance Due TO Seller	2,267,715.62	4,529,088.73	
<b>TOTALS</b>		2,271,373.21	
	4,529,088.73	4,529,088.73	

Seller

Hickoks Hotel & Suites, LLC

BY:   
Michael J. Trucano  
Member

  
Settlement Agent

Printed on 12/29/20 at 8:05:30AM by Jennifer



0850-19 / 103

**LLC RESOLUTION**  
**Resolution to Sell Real Estate**

WHEREAS, the Limited Liability Company known as Hickoks Hotel & Suites, LLC has certain real estate that it desires to sell; be it:

RESOLVED, that the Limited Liability Company is selling the real property legally described as:

Tract A and Tract C of the plat of Tracts A, B and C, located in Lots 8, 9 and 10, and a portion of Lots 6 and 7, Block 18, and a portion of M.S. 72, all located in the City of Deadwood, Lawrence County, South Dakota, according to plat recorded as Document No. 1991-02086.

Also known as (physical address): 685 Main Street, Deadwood, SD 57732

For the amount of \$4,400,000.00 (Four Million Four Hundred Thousand And No/100 Dollars) as set forth in an executed purchase agreement between the above mentioned Limited Liability Company and:

DHII, LLC (Buyers)

Dated: December 15, 2019

The Undersigned hereby certifies that he is the duly elected and qualified Member of aforementioned Limited Liability Company and that he is authorized to act in accordance with this resolution and that said resolution is now in full force and effect without modification or rescission.

IN WITNESS WHEREOF, I have executed my name as Member on this 29 day of Dec, 2020.

Michael Trucano  
Print Name

  
Signature

Member  
Title





File No.: 0850-19

## SELLERS LIEN AFFIDAVIT

NOTE: Complete all provisions which apply.

State of South Dakota

County of Lawrence

}  
}  
} ss

I/we, (owners), being sworn according to law, say under oath that:

1. I/we are the sole owners of the real estate and improvements ("Property") located at:  
685 Main Street, Deadwood, SD 57732

### Marital Status:

2. I/we have been and are now (being the time and date that I/we are signing this Affidavit) married to each other. If not married, so state here:

### Liens:

3. In this Affidavit, a lien is a legal claim of another against property for (a) the payment of a debt or (b) the performance of an obligation. Examples of liens are (a) a judgment of a court for the payment of money owed, (b) a mortgage on real estate given as security for a loan, (c) an obligation owing to a contractor, subcontractor or other mechanic who has furnished labor or material for the improvement of real estate and for which money is owed, and (d) taxes and assessments assessed against real estate. There are no liens against the Property as a result of (a) debts that I/we owe or (b) obligations I/we have undertaken, except:

- (a) Real Estate taxes and assessments for this year which have been prorated / not prorated as per purchase agreement
- (b) Other

### No Mechanic's Liens; Rights to Liens:

4. During the last 120 days prior to the date I/we have signed this Affidavit, I/we have made no repairs, additions, or improvements, nor ordered or contracted for any labor or materials to be performed or furnished to the Property, which have not been paid in full. I/we do not owe any money for improvements, labor or materials performed on or furnished to the Property within 120 days immediately preceding the date of this Affidavit. Nor have I/we received any notice from anyone claiming to have not been paid in full, and there are no outstanding or disputed claims for any such work or item. No such work is now in progress.
5. I/we have fully paid for all fixtures, appliances, or other personal property attached to or otherwise used with the improvements on the Property.

*[Signature]*  
Initials

137 E. Colorado Blvd., Spearfish, SD 57783  
P: 605-717-1000 | F: 605-559-0165 | [www.DakotaTitle.com](http://www.DakotaTitle.com)

Sellers Lien Affidavit

0850-19

**No Pending Governmental Improvements:**

6. There has been no work done, and I/we have not received any notice that any work is to be done, by the City or County, or any sewer district or other governmental authority, or at its direction, in connection with the installation of sewer, water, curbs, sidewalks, streets or alleys, or repairs or improvements thereto.

**No Nuisance or Condemnation:**

7. I/we have not received any notice from any governmental authority for the removal or abatement of any nuisance or any notice of condemnation or other exercise of the power of eminent domain, or for the violation of any Zoning Regulations concerning the Property.

**Boundary Lines, etc.:**

8. All of the utilities and improvements concerning the Property are located within the boundary lines of the subject real estate or within lands dedicated to public use or within recorded easements for the same. There have been no violations of any restrictions affecting the Property. There are no disputes with any adjoining property owners as to the location of property lines or the encroachment of any improvements.

**No Lawsuits:**

9. There are no pending lawsuits against us in any court. I/we have not received notice of any lawsuits pending against us.

**No Bankruptcy or Receivership:**

10. I/we are not a debtor in any proceeding under the bankruptcy laws of the United States, and no bankruptcy or insolvency proceedings have been started by or against us. No receiver or trustee has ever been appointed to take possession of the Property. Our sale of the Property is not made for the purpose of hindering, delaying or defrauding any of our creditors.

**Easements:**

11. In this Affidavit, an easement is a right given to another for a specific and limited use of real estate. An example of an easement is a right given to a utility company to maintain poles on the property. I/we have not given anyone any unrecorded easements affecting the Property. Nor have I/we given anyone any other unrecorded rights or interests in the Property, such as land contracts, mortgages, deeds, options, leases or licenses to use any part of the Property.

**Liens Affecting Similar Names:**

12. Our attention has been called to the liens listed below. The liens listed below are for debts or obligations of others with names similar to or the same as ours. I/we are not the same person as named in the following liens: (If none, state "NONE") *None*

**Reliance By & Obligations To Mortgagee & Title Insurance Company: (If Applicable)**

13. I/we know that "Mortgagee" is making a loan to the "Mortgagor(s)" of the Property, and that without said loan I/we, the Sellers, would not now be closing the sale of the Property and would not now be receiving the sale proceeds (either directly by payment to us, or indirectly by payment to one or more of our lenders). I/we know that in deciding whether or not to make the loan to our Purchasers the Mortgagee is relying on the truth of the statements made by us in this Affidavit.

I/we also know that Dakota Title is insuring the title to the Property for the Mortgagee because the Mortgagee requires that the title be insurable and that it be insured before it makes the loan to the Purchasers of our

137 E. Colorado Blvd., Spearfish, SD 57783  
P: 605-717-1000 | F: 605-559-0165 | [www.DakotaTitle.com](http://www.DakotaTitle.com)

Sellers Lien Affidavit

0250-10

Property, and before it accepts the Property as security for its loan. I/we know that the Purchasers may also be insuring their title to the Property. I/we know that in deciding whether or not to insure the title for the Mortgagee, and for the Purchasers, Dakota Title is relying on the truth of the statements made by us in the Affidavit.

It is with knowledge of the reliance by the Mortgagee and by the Title Insurance Company, and it is in consideration of and as an inducement to the making of the loan and of the insuring of the title so that I/we can benefit by the sale of the Property, that I/we acknowledge and agree that I/we are and will continue to also be directly liable to the Mortgagee and to Dakota Title for any loss or damage either or both may suffer should any of the statements made by us in this Affidavit be not true.

Penalty of Perjury:

14. I/we know that I/we shall be bounded by this Affidavit under the penalties of perjury.

Hickoks Hotel & Suites, LLC

BY: Michael Prucano

Michael Prucano  
Member

SWORN TO and subscribed in my presence this 29 day of December, 2020.

[Signature]  
NOTARY PUBLIC

My Commission Expires: March 3, 2023



Sellers Lien Affidavit

137 E. Colorado Blvd., Spearfish, SD 57783  
P: 605-717-1000 | F: 605-659-0165 | [www.DakotaTitle.com](http://www.DakotaTitle.com)

0850-18



## AUTHORIZATION TO DISBURSE PROCEEDS

Date: December 29, 2020 Property Address: 685 Main Street, Deadwood, SD 57732

The undersigned hereby authorize and direct **Dakota Title** to disburse proceeds from the sale of the above-referenced property as follows:

☒ Check at Closing, or will be picked up by: Check for Trust

☐ Send check by Regular Mail to the following address:

☐ Send check by Overnight Mail to the following address: *(\$25 Courier Fee will apply)*

☒ Wire all proceeds to the following account: *(\$25 Wire Fee will apply)* for Hickoks portion

Bank Name: \_\_\_\_\_

ABA Routing No.: \_\_\_\_\_

Account No.: \_\_\_\_\_

Account Name: \_\_\_\_\_

### For Split Proceeds Only:

The undersigned hereby authorize and direct **Dakota Title** to split the proceeds of sale as follows:  
(If desired, attach additional forms with Wiring Instructions - \$25 Wire Fee applied for each wire transfer.)

\$ \_\_\_\_\_ to \_\_\_\_\_

\$ \_\_\_\_\_ to \_\_\_\_\_

\$ \_\_\_\_\_ to \_\_\_\_\_

\$ \_\_\_\_\_ to \_\_\_\_\_

### Acknowledged and agreed:

Hickoks Hotel & Suites, LLC

BY: [Signature]  
Michael Luciano  
Member

Contact Information: (For communication regarding disbursement delays, discrepancies, etc...)

Phone: \_\_\_\_\_ Email: \_\_\_\_\_



**1099-S CERTIFICATION FORM**  
(As required by the Internal Revenue Service)

Section 6045 of the Internal Revenue Code, as amended by the Tax reform Act of 1997, requires the reporting of certain information to the IRS on real estate transactions. The information may also be sent to other third parties. You are required by law to provide Dakota Title with your correct taxpayer identification number. If you do not provide Dakota Title with your correct tax payer identification number, you may be subject to civil or criminal penalties imposed by law.

File No.: 0850-19

Gross Sales Proceeds: \$4,400,000.00

Common Address of Property Sold: 685 Main Street, Deadwood, SD 57732

Seller: Hickoks Hotel & Suites, LLC

TAX ID: 45-3658643

Proceeds: 50%  
100.00%

**Check Appropriate Category:**

☐ Principal Residence

☒ Other Real Estate

☐ Tax Exempt

☐ Check here if the Transferor received or will receive property or services as part of consideration. (1031 Exchange)

**CERTIFICATION OF EXEMPTION FOR  
THE SALE OR EXCHANGE OF A PRINCIPAL RESIDENCE**

(Only complete this portion if you have checked "Principal Residence" above)

TRUE FALSE Check true or false for assurances (1) through (4)

- ☒ (1) I owned and used the residence as my principal residence for periods aggregating 2 years or more during the 5-year period ending on the date of the sale or exchange of the residence.
- ☐ (2) I have not sold or exchanged another principal residence during the 2 year period ending on the date of the sale or exchange of the residence (not taking into account any sale or exchange before May 7, 1997.)
- ☐ (3) No portion of the residence has been used for business or rental purposes by me (or my spouse if I am married) after May 6, 1997.
- ☐ (4) At least one of the following three statements applies:  
The sale or exchange is of the entire residence for \$250,000.00 or less.  
OR  
I am married, the sale or exchange is of the entire residence for \$500,000.00 or less, and the gain on the sale or exchange of the entire residence is \$250,000.00 or less.  
OR  
I am married, the sale or exchange is of the entire residence for \$500,000.00 or less, and (a) I intend to file a joint return for the year of sale or exchange, (b) my spouse also used the residence as his or her principal residence for periods aggregating 2 years or more during the 5-year period ending on the date of the sale or exchange of the residence, and (c) my spouse also has not sold or exchanged another principal residence during the 2-year period ending on the date of the sale or exchange of the residence (not taking into account any sale or exchange before May 7, 1997).

Under penalties of perjury, I certify that all the above information is true as the end of the day of the sale or Exchange.

Date: 12-29-20

Hickoks Hotel & Suites, LLC

BY: Michael Mancano  
Michael Mancano  
Member

137 E. Colorado Blvd., Spearfish, SD 57783  
P: 605-717-1000 | F: 605-558-0165 | [www.DakotaTitle.com](http://www.DakotaTitle.com)

1099-S Certification (New)

0850-19



**1099-S CERTIFICATION FORM**  
(As required by the Internal Revenue Service)

Section 6045 of the Internal Revenue Code, as amended by the Tax reform Act of 1997, requires the reporting of certain information to the IRS on real estate transactions. The information may also be sent to other third parties. You are required by law to provide Dakota Title with your correct taxpayer identification number. If you do not provide Dakota Title with your correct tax payer identification number, you may be subject to civil or criminal penalties imposed by law.

File No.: 0850-19

Gross Sales Proceeds: \$4,400,000.00

Common Address of Property Sold: 685 Main Street, Deadwood, SD 57732

Seller: Michael J. Trucano Living Trust TAX ID: [REDACTED]

Proceeds: 50.00%

**Check Appropriate Category:**

☐ Principal Residence

☒ Other Real Estate

☐ Tax Exempt

☐ Check here if the Transferor received or will receive property or services as part of consideration. (1031 Exchange)

**CERTIFICATION OF EXEMPTION FOR  
THE SALE OR EXCHANGE OF A PRINCIPAL RESIDENCE**  
(Only complete this portion if you have checked "Principal Residence" above)

TRUE FALSE Check true or false for assurances (1) through (4)

- ☒ (1) I owned and used the residence as my principal residence for periods aggregating 2 years or more during the 5-year period ending on the date of the sale or exchange of the residence.
- ☐ (2) I have not sold or exchanged another principal residence during the 2 year period ending on the date of the sale or exchange of the residence. (not taking into account any sale or exchange before May 7, 1997.)
- ☐ (3) No portion of the residence has been used for business or rental purposes by me (or my spouse if I am married) after May 6, 1997.
- ☐ (4) At least one of the following three statements applies:  
The sale or exchange is of the entire residence for \$250,000.00 or less.  
OR  
I am married, the sale or exchange is of the entire residence for \$500,000.00 or less, and the gain on the sale or exchange of the entire residence is \$250,000.00 or less.  
OR  
I am married, the sale or exchange is of the entire residence for \$500,000.00 or less, and (a) I intend to file a joint return for the year of sale or exchange, (b) my spouse also used the residence as his or her principal residence for periods aggregating 2 years or more during the 5-year period ending on the date of the sale or exchange of the residence, and (c) my spouse also has not sold or exchanged another principal residence during the 2-year period ending on the date of the sale or exchange of the residence (not taking into account any sale or exchange before May 7, 1997).

**Certification**

Under penalties of perjury, I certify that all the above information is true as the end of the day of the sale or Exchange.

Date: 12-29-20

Michael J. Trucano Living Trust

BY: [Signature]  
Michael J. Trucano, Trustee

137 E. Colorado Blvd., Spearfish, SD 57783  
P: 605-717-1000 | F: 605-559-0165 | [www.DakotaTitle.com](http://www.DakotaTitle.com)

1099-S Certification (New)

0850-19

Prepared By:  
RICHARD FLUIMER, PROF. L.L.C.  
1130 North Main St., Suite 2  
Spearfish, SD 57783  
Telephone: (605) 722-9008

Certified to be a True and Correct Copy  
of the Original sent to the Register of  
Deeds for Recording Purposes.  
Dakota Title

**WARRANTY DEED**

**HICKOKS HOTEL & SUITES, LLC f/k/a N.M.D. VENTURE, LLC**, a South Dakota Limited Liability Company, *Grantor*, of 685 Main Street, Deadwood, SD 57732, for and in consideration of One Dollar (\$1.00) and other good and valuable consideration, **GRANTS, CONVEYS AND WARRANTS TO DHH, LLC**, a South Dakota Limited Liability Company, *Grantee*, of 2501 31<sup>st</sup> Street, Yankton, SD 57078, the following described real estate in the County of Lawrence in the State of South Dakota, to-wit:

Tract A and Tract C of the plat of Tracts A, B and C, located in Lots 8, 9 and 10, and a portion of Lots 6 and 7, Block 18, and a portion of M.S. 72, all located in the City of Deadwood, Lawrence County, South Dakota, according to plat recorded as Document No. 1991-02086, including all improvements and appurtenances and subject to all reservations, easements, covenants, restrictions and rights of way, expressly conveyed or reserved in prior grants and/or deeds, or created by operation of Federal or State law.

Dated this 29 day of December, 2020.

**HICKOKS HOTEL & SUITES, LLC f/k/a  
N.M.D. VENTURE, LLC**

By:

*Michael J. Trucano*  
**MICHAEL J. TRUCANO LIVING TRUST,**  
Under Trust Dated February 9, 2015,  
Managing Member / Michael J. Trucano Co-Trustee

STATE OF SOUTH DAKOTA

COUNTY OF LAWRENCE

)  
)SS.  
)

On this, the 29 day of December, 2020, before me, the undersigned Notary Public, personally appeared Michael J. Trucano, Co-Trustee of the Michael J. Trucano Living Trust under date of February 9, 2015, Managing Member of HICKOKS HOTEL & SUITES, LLC f/k/a N.M.D. VENTURE, LLC and that he as Co-Trustee of the trust, being authorized so to do, executed the foregoing deed for the purposes therein contained, by signing the name of the Trust as Managing Member of the LLC.  
IN WITNESS WHEREOF, I hereunto set my hand and official seal.



*Michael J. Trucano*  
NOTARY PUBLIC  
My Commission Expires 11/13/2023

# **CERTIFICATE OF REAL ESTATE VALUE** SDCL 7-9-7 ARSD 44:04:01:06.01

COURTHOUSE USE ONLY	
BOOK PAGE	RATIO CARD

Certificate of Real Estate Value form must be filed with any deed or contract for deed dated after July 1, 1988 used in the purchase, exchange, transfer or assignment of interest in real property.

- This form is required for all deeds (warranty deed, quit claim deed, grantor's deed, sheriff's deed, trustee's deed, mineral deed and similar instruments). It is also required for a contract for deed, a memorandum of a contract for deed, addenda to contract for deed, and notice of contract for deed. **NOT NEEDED FOR:** Divorce Decree, Probate Decree, Easement, Transfer on Death Deed, or instruments to the State of South Dakota conveying highway right-of-way (SDCL 7-9-7.3)
- The buyer/grantee must use a mailing address. It will be used for tax notices.
- The box labeled Owner Occupied is important! - Applies to sales, gifts, estate distributions, and any other transfer to a person (the grantee) who will occupy the property as a principal residence. It will allow the grantee, if eligible, to maintain the classification of owner-occupied on the property and receive the lower property tax rate for the property. If the box is completed, it must be completed by and contain the grantee signature only. In the event of multiple grantees, only one grantee should sign. This box cannot be signed by an agent of the grantee.

## **APPLICANT INFORMATION** \* Designates required fields

SELLER(S)/GRANTOR(S) *		PHONE NUMBER *		EMAIL	
Hickok's Hotel & Suites, LLC f/k/a NMD Venture, LLC					
MAILING ADDRESS *		CITY *	STATE *	ZIP CODE *	
685 Main Street		Deadwood	SD	57732	
BUYER(S)/GRANTEE(S) *		PHONE NUMBER *		EMAIL	
DHIH, LLC					
MAILING ADDRESS *		CITY *	STATE *	ZIP CODE *	
2301 31st Street		Yankton	SD	57078	
NEW MAILING ADDRESS (if changed)		CITY	STATE	ZIP CODE	
same					
LEGAL DESCRIPTION * (copy description from document you are recording or attach an exhibit with the legal description)					
Tract A and Tract C of the plat of Tracts A, B and C, located in Lots 8, 9 and 10, and a portion of Lots 6 and 7, Block 18, and a portion of M.S. 72, all located in the City of Deadwood, Lawrence County, South Dakota, according to plat recorded as Document No. 1991-02086.					


## **INSTRUMENT INFORMATION** (document being recorded) \* This section is required in full

DATE OF INSTRUMENT <b>12-29-20</b> DATE	TYPE OF INSTRUMENT:	CONTRACT FOR DEED ( )	QUIT CLAIM DEED ( )	EXECUTOR'S DEED ( )
		WARRANTY DEED ( <input checked="" type="radio"/> )	MINERAL DEED ( )	TRUSTEE'S DEED ( )
		OTHER ( ) - SPECIFY: _____		
DOES THE INSTRUMENT CHANGE WHO IS RESPONSIBLE FOR PAYMENT OF REAL ESTATE TAXES? YES ( <input checked="" type="radio"/> ) NO ( )				



<p>• WAS THIS PROPERTY OFFERED FOR SALE TO THE GENERAL PUBLIC? YES <input checked="" type="radio"/> NO ( )</p> <p>• RELATIONSHIP BETWEEN GRANTEE AND GRANTOR NO <input checked="" type="radio"/> YES ( ) STATE RELATIONSHIP: _____</p> <p>• WAS THIS PROPERTY SOLD BY: OWNER ( ) AGENT <input checked="" type="radio"/></p> <p>List any major items of personal property and their value which were included in the total purchase price. (i.e. furniture, inventory, crops, leases, franchises): FF&amp;E _____</p>	<p>• ACTUAL CONSIDERATION EXCHANGED \$ <u>4,400,000.00</u></p> <p>• ADJUSTED PRICE PAID FOR REAL ESTATE \$ <u>4,000,000.00</u> <small>(actual consideration less amount paid for major items of personal property as listed below)</small></p>
<p>IF TRANSACTION WAS A SALE, WAS THE SELLER PAID IN FULL BY OR AT THE TIME OF THE SALE? YES <input checked="" type="radio"/> NO ( )</p> <p>• IF NO, HOW WILL THE SELLER BE PAID THE UNPAID BALANCE? _____</p>	
<p>INTEREST RATE: _____%      PAYMENT FREQUENCY: _____ MONTHLY ( ) YEARLY ( )      NO. OF PAYMENTS: _____</p> <p>DOWN PAYMENT: \$ _____ BALLOON PAYMENT (if any): \$ _____</p>	

BY SIGNING THIS DOCUMENT, I CERTIFY THAT I AM AUTHORIZED TO SIGN AND THAT THE ABOVE INFORMATION IS TRUE AND CORRECT.

SIGNATURE (Seller, Buyer, or Agent) * 	TITLE _____	DATE * <u>12/29/20</u>
--	----------------	---------------------------

**OWNER-OCCUPIED** (This box to be completed by one Grantee only)

PROPERTY IS CURRENTLY CLASSIFIED AS OWNER-OCCUPIED	YES ( ) NO ( )	COUNTY _____
I WILL OCCUPY THIS PROPERTY ON _____	DATE _____	<p>These items are important to complete for property to continue to be classified as owner occupied for a lower property tax rate.</p>
PROPERTY WILL BE MY PRINCIPAL RESIDENCE ON THE ABOVE STATED DATE	YES ( ) NO ( )	
I OWN ANOTHER RESIDENTIAL PROPERTY IN THE UNITED STATES	YES ( ) NO ( ) IF YES - _____	
GRANTEE SIGNATURE _____	DATE _____	CITY _____ STATE _____

**DIRECTOR OF EQUALIZATION OFFICE USE ONLY FOR OWNER OCCUPIED SECTION**

GRANTEE OF PROPERTY NAME: \_\_\_\_\_

THE REQUEST FOR PROPERTY TO BE CLASSIFIED AS OWNER OCCUPIED IS:  
( ) APPROVED ( ) DENIED ( ) ACKNOWLEDGE RECEIPT: Your request will be reviewed \_\_\_\_\_

REASON FOR DENIAL \_\_\_\_\_

DIRECTOR OF EQUALIZATION OFFICE SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

STATE OF SOUTH DAKOTA )  
 )SS.  
COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT

**MARK BROCKLEY and  
ANNESSE BROCKLEY,**

Plaintiffs,

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN & GG&E, LLC,**

Defendants.

40CIV14-000320

**AFFIDAVIT OF MICHAEL J. TRUCANO**

State of South Dakota )  
 )ss.  
County of Lawrence )

The undersigned, Michael J. Trucano, being first duly sworn upon his oath deposes and states as follows:

1. I am a co-trustee for the Michael J. Trucano Living Trust under date of February 9, 2015 (hereinafter the "Trust").

2. From 2011 to June 6, 2015, I was personally the owner in Hickok's Hotel and Suites, LLC.

3. From June 6, 2015 to December 29, 2020, the Trust was a 50% owner in Hickok's Hotel and Suites, LLC (hereinafter "Hickok's") (formerly known as N.M.D. Ventures, LLC). Exhibit A.

4. From 2011 to March 30, 2015 Clarence A. Griffin was a 50% owner in Hickok's. From March 30, 2015 to December 29, 2020 Clarence A. Griffin and Kimberly L. Griffin, husband and wife as tenants by the entirety, were a 50% owner in Hickok's. Exhibit B.

5. On December 30, 2016, I received, as the Registered Agent of Hickok's, a copy of a Charging Order against Clarence A. Griffin. Exhibit C.

6. Hickok's was previously known as N.M.D. Ventures, LLC. On February 4, 2019, N.M.D amended its Articles of Organization to change its name to Hickok's Hotel & Suites, LLC. Attached as Exhibit D is a true and accurate copy of the Application for Amended Articles of Organization and Certificate of Amendment

7. Attached as Exhibit E is a true and accurate copy of the Operating Agreement for Hickok's.

8. Hickok's did business as "Hickok's Hotel and Casino."

9. Hickok's owned real estate and operated a hotel and casino located at 685 Main Street, Deadwood, SD 57732.

10. On July 21, 2020, Hickok's and the Trust executed an agreement wherein the LLC agreed to redeem the Trust's 50% ownership interest in the LLC (hereinafter the "Redemption Agreement"). Hickok's agreed to redeem the Trust's ownership interest by paying the Trust 50% of the proceeds from selling the 685 Main Street, Deadwood, SD property. The Trust would then assign its 50% ownership interest to Hickok's. Attached as Exhibit F is a true and accurate copy of the July 21, 2020 Redemption Agreement.

11. On December 6, 2019, Hickok's executed a Purchase and Sale Agreement with SRK Development, LLC to sell the 685 Main Street, Deadwood, SD property. This purchase agreement was extended seven (7) times: 1/20/20, 4/29/20, 6/30/20, 7/17/20, 8/29/20, 10/26/20, and 11/23/20. Attached as Exhibit G is a true and accurate copy of the December 6, 2019 Purchase and Sale Agreement and associated extensions.

12. From November 15, 2014 until December 18, 2020, I was the registered agent for N.M.D./Hickok's.

13. On December 18, 2020, Hickok's replaced me as the registered agent. The registered agent for Hickok's is Registered Agents, Inc. Attached as Exhibit H is a true and accurate copy of the Statement of Change dated December 18, 2020 filed with the South Dakota Secretary of State changing the registered agent for Hickok's.

14. On December 29, 2020, Hickok's executed a LLC Resolution to Sell Real Estate to sell the 685 Main Street, Deadwood, SD property to DHIH, LLC (later assigned to SRK Development, LLC). Attached as Exhibit I is a true and accurate copy of the December 29, 2020 LLC Resolution to Sell Real Estate.

15. On December 29, 2020, Hickok's executed a Unanimous Consent in Lieu of Membership Meeting to memorialize the sale of the 685 Main Street, Deadwood, SD property to SRK Development, LLC. Attached as Exhibit J is a true and accurate copy of the December 29, 2020 Unanimous Consent in Lieu of Membership Meeting.

16. On December 29, 2020, Hickok's Hotel and Suites, LLC and SRK Development LLC closed on the sale of the 685 Main Street, Deadwood, SD property. Attached as Exhibit K is a true and accurate copy of the December 29, 2020 Seller's Final Settlement Statement.

17. On December 29, 2020, Hickok's executed a Warranty Deed conveying the 685 Main Street, Deadwood, SD property to DHIH, LLC. Attached as Exhibit L is a true and accurate copy of the Warranty Deed.

18. On December 29, 2020, the Trust and Hickok's executed an Assignment of Full Interest and Resignation wherein the Trust agreed to transfer, assign and convey all right, title, and interest in the LLC to Hickok's, and Trucano resigned any and all positions previously held with the LLC including any right or interest in any management of the LLC. The Trust appointed Hickok's to transfer the Trust's 50% interest on the books of the LLC. Attached as Exhibit M is a true and accurate copy of the Assignment of Full Interest and Resignation.

19. On December 29, 2020, the Trust executed an Assignment of Membership Interest and transferred its 50% ownership interest in Hickok's to Hickok's. Pursuant to the Assignment of Membership Interest, the Trust appointed the members of Hickok's to transfer the Trust's 50% interest on Hickok's books. Attached as Exhibit N is a true and accurate copy of the Assignment of Membership Interest.

20. Pursuant to the Redemption Agreement, at closing, Hickok's redeemed the Trust's 50% ownership interest by paying 50% of the proceeds from selling the 685 Main Street, Deadwood, SD property to the Trust. Fifty percent of the sale proceeds were issued to the Trust by Check. The remaining 50% of the proceeds were wired directly to Hickok's account. Attached as Exhibit O is a true and accurate copy of the Single Ledger Balance Sheet prepared by Dakota Title showing the split of the proceeds as between Hickok's and the Trust.

21. As of December 29, 2020, the Trust was no longer a member of Hickok's Hotel & Suites, LLC.

22. To my knowledge, as of December 29, 2020, the sole remaining member of Hickok's was Clarence Griffin and Kimberly Griffin, husband and wife as Tenants by the Entirety.

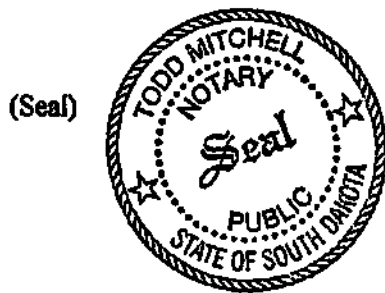
23. Since December 29, 2020, I have no knowledge whether Hickok's Hotel & Suites, LLC distributed any of the LLC's assets to the sole remaining member because I was no longer involved in the LLC's business affairs.

24. During my ten (10) year tenure as an owner of Hickok's, no money was ever distributed to any member, including myself. I took my responsibility as the local member charged with managing the operation, along with the Judge's Charging Order, very seriously. I considered both Mark Brockley and Clarence Griffin to be my friends. I spoke to no avail with both men on many occasions over the years about settling their differences. Realizing that I could not resolve their problem, along with my desire to retire, any potential sale was structured so that my responsibility to the LLC and the Judge's Charging Order would not be compromised.

Dated this 2<sup>nd</sup> day of August, 2021.

  
MICHAEL J. TRUCANO

Subscribed and sworn to before me this 2<sup>nd</sup> day of August, 2021.



  
NOTARY PUBLIC  
My Commission Expires: 7-21-2022

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2<sup>nd</sup> day of August, 2021, a true and correct copy of the Affidavit of Michael J. Trucano was served in the following manner upon the following persons, by placing the same in the service indicated, postage prepaid as applicable, addressed as follows:

Jon W. Dill  
Claggett & Dill, Prof. LLC  
212 E. Colorado Blvd.  
Spearfish, SD 57783  
Telephone: (605) 642-7708  
Email: jond@claggettanddill.com  
*Attorney for Plaintiffs*

☐ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Delivery  
☒ Odyssey File and Serve  
☐ Email

Aaron T. Galloway  
Haven Stuck  
Lynn, Jackson, Shultz & Lebrun, P.C.  
909 St. Joseph St., Ste. 800  
P.O. Box 8250  
Rapid City, SD 57701  
Telephone 605-342-2592  
agalloway@lynnjackson.com  
hstuck@lynnjackson.com

☐ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Delivery  
☒ Odyssey File and Serve  
☐ Email

**RICHARD PLUIMER, PLLC**

By:



Richard A. Pluimer  
Attorney for Michael J. Trucano  
PO Box 988  
Spearfish, SD 57783  
Telephone: (605) 641-3378  
rpluimer@pluimerlaw.com

EXHIBIT ~~F~~ K

## Seller's Final Settlement Statement

Dakota Title  
 137 E. Colorado Blvd.  
 Spearfish, SD 57783  
 Phone: 605-717-1000 Fax: 605-559-0165

Settlement Date: 12/28/2020  
 Escrow officer/Closer: Jennifer Whitehouse  
 Order Number: 0850-19  
 Borrower: OHM, LLC  
 2801 31st Street  
 Yankton, SD 57978  
 Seller: N.M.D. Venture, LLC  
 Hickoks Hotel & Suites, LLC  
 PO Box 68  
 Deadwood, SD 57732  
 Michael J. Trucano Living Trust  
 PO Box 68  
 Deadwood, SD 57732  
 Property location: 685 Main Street  
 Deadwood, SD 57732

	Debit	Seller Credit
Financial Consideration		
Sale Price of Property		4,400,000.00
Prorations/Adjustments		
Operations Settlement		128,088.73
Estimated 2020 RE Taxes - Buyer to Pay in 2021/30025-01800-075-00 01/01/20 - 12/31/20	51,056.79	
Commissions		
Commission Listing Broker to Keller Williams Realty Black Hills	110,000.00	
Commission Listing Broker (Sales Tax) to Keller Williams Realty Black Hills	7,150.00	
Commission Selling Broker to Real Estate Center of Lead-Deadwood	110,000.00	
Commission Selling Broker (Sales Tax) to Real Estate Center of Lead-Deadwood	7,150.00	
Transaction Fee Listing Broker to Keller Williams Realty Black Hills	150.00	
Escrow/Title Charges		
Closing Fee to Dakota Title	318.50	
Owner's Title Insurance to Dakota Title Coverage: 4,000,000.00 Premium: 5,349.38 Version: ALTA Owners Policy (09/17/00)	2,674.89	
Recording Charges		
State Transfer Fee to Lawrence County Register of Deeds	4,000.00	
Payoffs		
Payoff of First Mortgage Loan to First Interstate Bank Loan Payoff 1,965,215.54	1,965,215.54	
Total Payoff 1,965,215.54		
Subtotal	2,257,715.32	4,528,088.73
Balance Due TO Seller	2,271,373.21	
TOTALS	4,529,088.73	4,528,088.73

Seller

Hickoks Hotel &amp; Suites, LLC

BY:   
 Michael J. Trucano  
 Member

  
 Settlement Agent

Printed on 12/29/20 at 3:05:30PM by Jennifer



0350.19 / 103

1 STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT  
 )  
 2 COUNTY OF LAWRENCE ) FOURTH JUDICIAL CIRCUIT

3  
 4 MARK BROCKLEY,  
 ANNESSE BROCKLEY,  
 5 Plaintiffs,  
 6 vs.  
 7 MERRIL ELLIS, RONALD GUTMAN,  
 CLARENCE GRIFFIN, & GG&E  
 8 LLC,  
 9 Defendants.  
 10

) 40CIV14-000320  
 )  
 ) Deposition of:  
 ) MICHAEL TRUCANO  
 )  
 )  
 )  
 )  
 )  
 )

11 DATE: August 30, 2021, at 10:00 a.m.

12 PLACE: Claggett & Dill  
 212 E. Colorado Boulevard  
 13 Spearfish, SD 57783

14 APPEARANCES:

15 FOR THE PLAINTIFFS: MR. JON W. DILL  
 Claggett & Dill  
 16 Attorneys at Law  
 212 E. Colorado Boulevard  
 17 Spearfish, SD 57783

18 FOR THE DEFENDANTS: MR. HAVEN L. STUCK  
 Lynn, Jackson, Shultz & Lebrun  
 19 Attorneys at Law  
 909 St. Joseph Street, 8th Floor  
 20 Rapid City, SD 57701

21 FOR MICHAEL TRUCANO: MR. RICHARD A. PLUIMER  
 Attorney at Law  
 22 1130 N. Main Street, #2  
 23 Spearfish, SD 57783

24 Also Present: Mark Brockley  
 25



<p style="text-align: right;">8</p> <p>1 A Among other things, so...</p> <p>2 Q How many businesses do you figure you've started?</p> <p>3 A I don't know that I've started any businesses. I</p> <p>4 purchased a lot of business.</p> <p>5 Q Okay.</p> <p>6 A But I don't recall ever starting a business --</p> <p>7 Q Okay.</p> <p>8 A -- from the ground up.</p> <p>9 Q When you acquired businesses, did you seek competent</p> <p>10 financial advice?</p> <p>11 A Certainly, yes.</p> <p>12 Q Competent tax advice, accountants?</p> <p>13 A Yes.</p> <p>14 Q Competent legal advice to make sure the documents are</p> <p>15 in order?</p> <p>16 A Yes.</p> <p>17 Q Okay. All of the businesses that you acquired, were</p> <p>18 they all LLCs or corporations or sole</p> <p>19 proprietorships?</p> <p>20 A Probably, you know, a few of each, you know. Some of</p> <p>21 each.</p> <p>22 Q Okay. So any idea in how many businesses you've been</p> <p>23 a part of the sale of the business?</p> <p>24 A I think I've sold nearly everything now, so I'm</p> <p>25 guessing four or five or six.</p>	<p style="text-align: right;">10</p> <p>1 Q Would you consider the sale of a business a major</p> <p>2 decision?</p> <p>3 A Yes.</p> <p>4 Q How about acquiring significant assets, say, a</p> <p>5 building, is that a major decision?</p> <p>6 A Certainly.</p> <p>7 Q Would selling a major asset, say, a building, a major</p> <p>8 decision?</p> <p>9 A Yes.</p> <p>10 Q Have you held offices in corporate -- in corporations</p> <p>11 or LLCs?</p> <p>12 A I have.</p> <p>13 Q Okay. Have you been president of any?</p> <p>14 A I have.</p> <p>15 Q Vice president?</p> <p>16 A I don't know.</p> <p>17 Q Treasurer or secretary?</p> <p>18 A I don't remember if I was that.</p> <p>19 Q Okay. You've been a registered agent?</p> <p>20 A Yes.</p> <p>21 Q Let's talk a little bit about Hickok's in Deadwood.</p> <p>22 What is your understanding of the history of how</p> <p>23 Hickok's in Deadwood started?</p> <p>24 A I don't -- I don't know how that -- I don't know how</p> <p>25 that started.</p>
<p style="text-align: right;">9</p> <p>1 Q Do you have any of those businesses that are still</p> <p>2 operating that you have any kind of financial</p> <p>3 interest in?</p> <p>4 A That have been sold?</p> <p>5 Q Yes.</p> <p>6 A No.</p> <p>7 Q Is it fair to say that you're an experienced,</p> <p>8 knowledgeable businessman?</p> <p>9 A Experienced, yes. Knowledgeable, sometimes I</p> <p>10 question.</p> <p>11 Q You would hope so?</p> <p>12 A I would hope so, yes.</p> <p>13 Q Okay. Is it fair to say that you're pretty careful</p> <p>14 about keeping track of the operation of your</p> <p>15 businesses?</p> <p>16 A I try to, yes.</p> <p>17 Q Have you normally been involved in the major</p> <p>18 decisions regarding the operation of the businesses?</p> <p>19 A Yes.</p> <p>20 Q And so, for example, you never sold a business</p> <p>21 without knowing you were selling one?</p> <p>22 A Correct, yes.</p> <p>23 Q Okay. Would you consider the acquisition of a</p> <p>24 business a major decision?</p> <p>25 A Yes.</p>	<p style="text-align: right;">11</p> <p>1 Q Okay. But you didn't start that business?</p> <p>2 A I did not, no.</p> <p>3 Q Okay. You acquired the business?</p> <p>4 A Yes.</p> <p>5 Q How did that acquisition take place?</p> <p>6 A The owner prior to -- prior -- the prior owner gave</p> <p>7 it back to the bank, to the lender. And the lender</p> <p>8 came to me and, you know, asked if, you know, we</p> <p>9 would be interested in -- for about a year we leased</p> <p>10 the property from the bank while they were trying to</p> <p>11 clear title so that they could sell the property to</p> <p>12 us.</p> <p>13 Q So you say you leased the building. Did you lease</p> <p>14 the business, too?</p> <p>15 A Likely not, no. I mean, we leased the building and</p> <p>16 we had, you know, operated the business --</p> <p>17 Q Okay.</p> <p>18 A -- so...</p> <p>19 Q Did you operate the business before the building went</p> <p>20 back to the bank?</p> <p>21 A No. No.</p> <p>22 Q So the bank approached you to lease the building.</p> <p>23 Who approached you regarding taking over the</p> <p>24 business?</p> <p>25 A As I recall, the business and the building were both</p>

12

1 -- belonged to the bank at that time --

2 Q Okay.

3 A -- so...

4 Q And this was back in the '90s?

5 A No.

6 Q The early 2000s?

7 A **This would have been, I think, 2010 or 2011.**

8 Q Okay. Oh, and the address for Hickok's, was that 685

9 Main Street?

10 A Yes.

11 Q Has that address ever changed?

12 A No.

13 Q And there's no other Hickok's in Deadwood, as I

14 understand?

15 A **There was for a while. The old Best Western, when it**

16 **went back to the bank, the bank opened that as the**

17 **Best Western Hickok House and that created some**

18 **problems for us. But other than those two, I'm not**

19 **aware of any other Hickok.**

20 Q Okay. There was a Hickok's, Inc. that was registered

21 with the Secretary of State. Do you remember that?

22 A **Yeah. That was not us.**

23 Q Right. That was not you.

24 But you did business as Hickok's, that is the

25 business, while that was still out there?

13

1 A **You know, the entity may have still been out there,**

2 **but we never did business as Hickok's, Inc.**

3 Q You didn't strike any deals with whoever owned the

4 corporation, say, Can we use the name, for example?

5 A **No. No. As a matter of fact, the bank sold us the**

6 **name in the bill of sale --**

7 Q Okay.

8 A **-- when we purchased the property.**

9 Q Now, when you purchased the property, did you

10 purchase it as individuals or did you purchase it as

11 an incorporated entity?

12 A **We purchased it as an LLC, I believe.**

13 Q And is that N.M.D. Venture?

14 A **N.M.D. Venture, LLC, yes.**

15 Q Okay. So -- and I know we've all seen all these

16 documents. This is Deposition Exhibit 1. This is a

17 copy of the Articles of Organization.

18 And is that -- does that look to be a true and

19 accurate depiction of the Articles of Organization of

20 N.M.D. Venture, LLC?

21 A Yes.

22 Q Okay. You had Pete Fuller prepare this for you?

23 A **Yes, he did.**

24 Q And this was in 2011?

25 A Yes.

14

1 Q What does N.M.D. stand for?

2 A **It stands for Nick, Mike, and Dakam.**

3 Q And is Nick Nick Griffin?

4 A Yes.

5 Q And Mike is you?

6 A Yes.

7 Q And the last name Dakam, how do you spell that?

8 A **D-A-K-A-M.**

9 Q And who was that?

10 A **He was a third partner. He worked in and out of the**

11 **gaming business in Deadwood for a few years.**

12 Q Okay.

13 A **And he had some experience in restaurants, in**

14 **casinos, and he was briefly a partner -- or a member**

15 **of the LLC.**

16 Q Okay. At some point he became no longer a member?

17 A Yes.

18 Q Okay. Do you remember when that was?

19 A **Around the time that we closed on the loan, which**

20 **would have been late '11 or early '12. He did not**

21 **want to put in his share of the down payment and**

22 **personally guarantee the --**

23 Q Okay.

24 A **-- balance and so -- so he was -- you know.**

25 Q So the other two of you --

15

1 A Yes.

2 Q -- opted to let him out?

3 A Yes.

4 Q Okay. So in the year 2012 through 2018, you were the

5 registered agent for N.M.D. Ventures?

6 A Yes.

7 Q And you're the one that filed the annual reports?

8 A Yes.

9 Q Here is Defendant's Deposition Exhibit 2.

10 Could you take a look at those and let me know if

11 those are true and correct copies of the annual

12 reports?

13 MR. DILL: Did I give you two copies of those,

14 Haven?

15 MR. STUCK: What's that?

16 MR. DILL: Do you have two sets of that?

17 A **The first two, yeah, are signed.**

18 MR. STUCK: Oh.

19 MR. DILL: I'm sorry.

20 A **'12 and '13 are -- and then '14. Yes. Those appear**

21 **to be annual reports.**

22 Q Okay. Well, you pointed something out and that was

23 that on 2013 Michelle Jacobs signed that?

24 A Um-hmm.

25 Q Do you know who Michelle Jacobs is?



32

1 **my legal counsel.**

2 **Q** And as you pointed out then, in June of 2015 you

3 assigned your interest to the living trust, is that

4 correct?

5 **A Yes.**

6 **Q** Okay. This would be Deposition Exhibit 8. And,

7 again, I'm going to apologize. From June of 2015 on,

8 if I refer to your member interest, I'm referring to

9 the Michael J. Trucano living trust ownership of the

10 membership.

11 And so that was assigned as of June 6 of 2015.

12 Does that look to be right?

13 **A Yes.**

14 **Q** And I see on page A-3, and this was someone's Exhibit

15 A, I think that might have been yours attached to

16 your affidavit on the third page. It says, I

17 Clarence Griffin, acknowledge and approve of Mike

18 Trucano's transfer of membership to his living trust.

19 Now, at that point is that -- do you recall

20 getting that email?

21 **A I do, yes.**

22 **Q** At that point, actually, he wasn't the only owner.

23 It was he and his wife Kimberly.

24 Did Kimberly ever sign off anything?

25 **A Not that I know of, no.**

33

1 **Q** In fact, when you dealt with Nick throughout this

2 whole process even up until his death, you actually

3 dealt with him. You didn't really deal with Kim, did

4 you?

5 **A That's correct.**

6 **Q** Okay. Now we're going to move on to the Charging

7 Order that was in existence. Now, we understand what

8 we're here dealing with today has to do with a

9 lawsuit that neither you nor N.M.D. Venture was a

10 party, okay?

11 There was an application for a Charging Order

12 that was made and you received a copy. Do you recall

13 that? Let me give you deposition Exhibit 9 and take

14 a look at it.

15 **A Thank you.**

16 **Q** Yep. And see if you recall that.

17 **A And, yes, I do recall this.**

18 **Q** Okay. In fact, on the last page it shows that you

19 were served by this office. You were sent -- as

20 registered agent of N.M.D. Venture, you were sent a

21 copy of this stuff?

22 **MR. PLUIMER:** I'm going to object to using the

23 word served as calling for a legal conclusion.

24 **MR. DILL:** Objection noted.

25 **Q** You received these?

34

1 **A Yes.**

2 **Q** And as nearly as you can tell, you received them

3 contemporaneously, give or take a couple of days,

4 from the day they were sent out?

5 **A Yes.**

6 **Q** Okay. And when you got this application for Charging

7 Order, did you make any appearance in the court file

8 or object to it in any way?

9 **A No.**

10 **Q** So then, ultimately, a Charging Order was entered

11 December 30th of 2016. And this is deposition

12 Exhibit 10. And --

13 **MR. PLUIMER:** Excuse me. I recall an earlier

14 Charging Order that predates the application and the

15 Charging Order filed December 30th.

16 **MR. DILL:** There was a subsequent one.

17 **MR. PLUIMER:** Not that I'm -- a predecessor one.

18 It was directed to the Sheriff to levy on the assets

19 of Hickok's. I spoke with your partner about it. I

20 spoke with the Sheriff about it. So there was a

21 prior Charging Order.

22 **MR. DILL:** Okay. Should we go off the record

23 here for a second?

24 (A discussion was held off the record.)

25 **MR. DILL:** We're back on the record again.

35

1 **Q** (BY MR. DILL) Mr. Plummer pointed out, and I don't

2 have the specific recollection regarding a prior

3 Charging Order, but is it fair to state that a

4 Charging Order itself before then was ever served on

5 you?

6 **A I don't remember.**

7 **Q** Okay. Is this the first one that you do recall?

8 **A Yes.**

9 **Q** Okay. And this was -- I'll use the term served

10 because we have a certificate of service, but this

11 was mailed out to you on December 30th of 2016?

12 **A Okay.**

13 **Q** Does that sound right?

14 **A Sounds -- sounds right, yes.**

15 **Q** Subsequently, a -- oh, and once you got the Charging

16 Order, did you file an objection?

17 **MR. PLUIMER:** Objection, assumes facts not in

18 evidence that he could have filed an objection. He

19 said he wasn't a party.

20 **MR. DILL:** Well, I understand that. I understand

21 that.

22 **Q** But my question is, did you ever file an objection

23 with the Court for getting a Charging Order?

24 **A No.**

25 **Q** Okay. There was a corrected Charging Order then that

<p style="text-align: right;">36</p> <p>1 was done in February of 2017 and that changed -- or</p> <p>2 that corrected the dollar amount in the Charging</p> <p>3 Order. Do you recall getting this?</p> <p>4 <b>A I don't deny getting it but I -- again, I don't</b></p> <p>5 <b>remember.</b></p> <p>6 <b>Q</b> Okay. But assuming the certificate of service is</p> <p>7 accurate, it was sent to you as a registered agent,</p> <p>8 that would have been appropriate?</p> <p>9 <b>A Yes.</b></p> <p>10 <b>Q</b> And it was sent to 685 Main Street, Deadwood?</p> <p>11 <b>A Yes.</b></p> <p>12 <b>Q</b> So that would have been appropriate?</p> <p>13 <b>A Yes.</b></p> <p>14 <b>Q</b> So from that date until today, you've never raised</p> <p>15 with anybody the question that you ever got it, is</p> <p>16 that right?</p> <p>17 <b>A Yes.</b></p> <p>18 <b>Q</b> Okay. Then that one you never filed any objections</p> <p>19 to. So at that point -- and I'm going to be talking</p> <p>20 about the February 2017. At that point you knew</p> <p>21 there was a Charging Order out there?</p> <p>22 <b>A Yes.</b></p> <p>23 <b>Q</b> Did you -- are you familiar with Charging Orders?</p> <p>24 <b>A I was not until I called my attorney and said --</b></p> <p>25 <b>Q</b> Okay.</p>	<p style="text-align: right;">38</p> <p>1 <b>Q</b> Did you have conversations with Mark Brockley over</p> <p>2 this deal? And I'm assuming we're talking about the</p> <p>3 debt that's owed by Nick Griffin.</p> <p>4 Did you talk with him in the last year about</p> <p>5 that?</p> <p>6 <b>A In the last year?</b></p> <p>7 <b>Q</b> Yes.</p> <p>8 <b>A Yes.</b></p> <p>9 <b>Q</b> Did you ever text with him or email with him?</p> <p>10 <b>A Yeah. He would text me and I would respond to some</b></p> <p>11 <b>texts.</b></p> <p>12 <b>Q</b> Okay. And was this after the Charging Order was in</p> <p>13 place?</p> <p>14 <b>A Likely was, yes. Yeah.</b></p> <p>15 <b>Q</b> So when you talked to Mark Brockley, did you know the</p> <p>16 Charging Order was in place?</p> <p>17 <b>A I did.</b></p> <p>18 <b>Q</b> Okay. Did you ever specifically discuss the Charging</p> <p>19 Order with him?</p> <p>20 <b>A I don't remember ever specifically talking about the</b></p> <p>21 <b>Charging Order with Mark, no.</b></p> <p>22 <b>Q</b> Okay. You considered him a friend, is that correct?</p> <p>23 <b>A I did.</b></p> <p>24 <b>Q</b> In the affidavit that you filed that was dated August</p> <p>25 2nd, at paragraph 24, it's the last paragraph, you</p>
<p style="text-align: right;">37</p> <p>1 <b>A -- What should I do?</b></p> <p>2 <b>Q</b> And I'm assuming he explained to you that that</p> <p>3 Charging Order is a lien?</p> <p>4 MR. PLUIMER: Objection, calls for a legal</p> <p>5 conclusion. Misstates the law.</p> <p>6 <b>Q</b> You said you sought the advice of your legal counsel.</p> <p>7 Did he explain what it is?</p> <p>8 <b>A As I recall, he said, As long as -- you know, You're</b></p> <p>9 <b>fine as long as you can't pay if -- if Nick is to</b></p> <p>10 <b>receive any money from the business, it needs to go</b></p> <p>11 <b>to Mark. So if you pay any money to Nick, it must go</b></p> <p>12 <b>to Mark.</b></p> <p>13 <b>Q</b> Okay.</p> <p>14 <b>A As long as you don't pay money to Nick, you're okay.</b></p> <p>15 <b>Q</b> So -- I'm glad you're helping me with my segue quite</p> <p>16 nicely. I appreciate it.</p> <p>17 Let's talk about Mark. We're talking about Mark</p> <p>18 Brockley who's sitting opposite the table to you.</p> <p>19 And you've known him for how long?</p> <p>20 <b>A I've known Mark for 25 years probably.</b></p> <p>21 <b>Q</b> Okay. And how is it that you know him?</p> <p>22 <b>A Just through various businesses that he has had in</b></p> <p>23 <b>Deadwood and Mark would call me from time to time</b></p> <p>24 <b>over this Hickok's deal and we would visit with what</b></p> <p>25 <b>was going on with us, so...</b></p>	<p style="text-align: right;">39</p> <p>1 stated, I'm quoting, During my ten-year tenure as an</p> <p>2 owner of Hickok's no money was ever distributed to</p> <p>3 any member including myself. I took my</p> <p>4 responsibility as the local member charged with</p> <p>5 managing the operation along with the judge's</p> <p>6 Charging Order very seriously. I considered both</p> <p>7 Mark Brockley and Clarence Griffin to be my friends.</p> <p>8 I spoke to no avail with both men on many occasions</p> <p>9 over the years about settling their differences.</p> <p>10 Realizing that I could not resolve their problem,</p> <p>11 along with my desire to retire, any potential sale</p> <p>12 was structured so that my responsibility to the LLC</p> <p>13 and the Judge's Charging Order would not be</p> <p>14 compromised.</p> <p>15 Is that a correct reading of your statement in</p> <p>16 your affidavit?</p> <p>17 <b>A Yes, it is.</b></p> <p>18 <b>Q</b> Okay. And so the problem you realized that could not</p> <p>19 be resolved was?</p> <p>20 <b>A The problem with the amounts that Nick owed Mark.</b></p> <p>21 <b>Q</b> Okay. You were aware that that amount was pretty</p> <p>22 substantial?</p> <p>23 <b>A I was.</b></p> <p>24 <b>Q</b> And were you aware of the problem before the February</p> <p>25 3rd, 2017, Charging Order served on you?</p>

STATE OF SOUTH DAKOTA     )  
  )ss.  
COUNTY OF LAWRENCE     )

IN CIRCUIT COURT  
  
FOURTH JUDICIAL CIRCUIT

**MARK BROCKLEY and  
ANNESSE BROCKLEY,**

Plaintiffs,

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN & GG&E, LLC,**

Defendants.

40CIV14-000320

**SUPPLEMENTAL AFFIDAVIT OF  
MICHAEL J. TRUCANO**

State of South Dakota     )  
  )ss.  
County of Lawrence     )

The undersigned, Michael J. Trucano, being first duly sworn upon his oath deposes and states as follows:

1. On August 2, 2021 I submitted an Affidavit in support of my Notice of Special Appearance, Motion to Dismiss and Motion to Quash Motion for Order to Show Cause

2. Subsequent to that Affidavit, I was subpoenaed as a witness for a deposition by Plaintiffs' attorneys, which deposition took place on August 30, 2021. The deposition transcript of my deposition is attached hereto as Exhibit "S-A" and is a true and correct copy of the original transcript. The transcript is filed to supplement the August 2, 2021, Affidavit and is incorporated herein by reference.

3. By means of this Supplemental Affidavit, I also wish to correct my prior Affidavit and deposition transcript.

4. I previously testified in the initial Affidavit and deposition that at no time was any distribution made to Mr. Griffin. (Affidavit ¶ 24; Deposition 43:8-12; 48:14-15). That testimony was incorrect. Subsequent to the initial Affidavit, I reviewed company minutes dated November 28, 2016, some months before I became aware of the Corrected Charging Order dated February 3,



2017. (See Deposition Ex. D11). The minutes of November 28, 2016 are attached hereto as Exhibit S-B, and incorporated herein by reference.

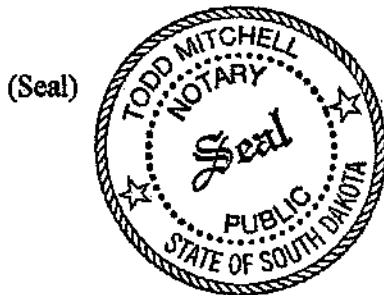
5. I apologize to the Court and Counsel for this error on my part.

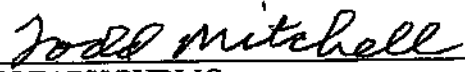
6. The substance of my testimony remains the same, however, in that no distribution was made by Hickok's or me to Mr. Griffin, or his successors, from the notice of the Corrected Charging Order to the termination of my interest in Hickok's on December 29, 2020.

Dated this 14 day of October, 2021.

  
MICHAEL J. TRUCANO

Subscribed and sworn to before me this 14 day of October, 2021.



  
NOTARY PUBLIC  
My Commission Expires: 7-21-2022

1 STATE OF SOUTH DAKOTA )  
 2 COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
 FOURTH JUDICIAL CIRCUIT

4 \_\_\_\_\_ )  
 5 **MARK BROCKLEY, ANNESSE** )  
 6 **BROCKLEY,** )  
 7 Plaintiffs, )  
 8 vs. )  
 9 **MERRIL ELLIS, RONALD GUTMAN,** )  
 10 **CLARENCE GRIFFIN & GG&E,** )  
 11 **LLC,** )  
 12 Defendants. )

Motion for Contempt  
 Hearing

CIV. 14-320

BEFORE: **THE HONORABLE ERIC J. STRAWN**  
 Circuit Court Judge  
 Deadwood, South Dakota  
 October 22, 2021, at 9:00 a.m.

APPEARANCES:

For the Plaintiffs: **MR. JON DILL**  
 Claggett & Dill  
 212 E Colorado Blvd  
 Spearfish, South Dakota 57783

For the Defendants: **MR. HAVEN L. STUCK**  
 Lynn, Jackson, Shultz & Lebrun, P.C.  
 P.O. Box 8250  
 Rapid City, South Dakota 57709

For the Interested Party, Mr. Michael J. Trucano: **MR. RICHARD PLUIMER**  
 Attorney at Law  
 1130 North Main Street, #2  
 Spearfish, South Dakota 57783

1     **MR. DILL:** I think that's the Court's discretion, but I  
2     suspect what will happen is Mr. Trucano will say, "Well, I  
3     didn't know anything about it." Well, that's not going to  
4     get us anywhere. We've got his deposition testimony. And,  
5     again, ultimately he doesn't have to say, I intended to  
6     highball this money and do this stuff. The Court can infer  
7     that from all the facts. His getting up and the  
8     self-serving statement, I didn't know about it, I would  
9     concede that's what he would testify to.

10    **THE COURT:** Let's just -- here's what I'm going to do. I'm  
11    going to authorize an order to the title company. I want  
12    to know that transaction number, if it was initiated by the  
13    title company to the Sarasota account, and I'm going to  
14    hold my decision in abeyance.

15         In fact, what I'm going to do is I'm just going to  
16    continue this matter. I'm going to give you another date,  
17    and if that comes back in where it shows that the title  
18    company made a distribution or made a deposit, wire  
19    transfer to Sarasota account, we will deal specifically  
20    with that and I'll allow testimony from the parties.

21    **MR. PLUIMER:** That's what Mr. Trucano's proposed testimony  
22    here today would specifically deal with.

23    **THE COURT:** Yeah. Let's go, first of all, ensure that we  
24    have a clean record with regard to that wire transfer.

25         Mr. Dill, the Court hereby authorizes you to prepare



STATE OF SOUTH DAKOTA     )  
  )ss.  
COUNTY OF LAWRENCE     )

IN CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT

**MARK BROCKLEY and  
ANNESSE BROCKLEY,**

**Plaintiffs,**

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN & GG&E, LLC,**

**Defendants.**

40CIV14-000320

**SECOND  
SUPPLEMENTAL AFFIDAVIT OF  
MICHAEL J. TRUCANO**

State of South Dakota     )  
  )ss.  
County of Lawrence     )

The undersigned, Michael J. Trucano, being first duly sworn upon his oath deposes and states as follows:

1. This Affidavit will address the events of the closing date for the sale of Hickoks Hotel and Casino, LLC on December 29, 2020.

2. Late in the morning of December 29, 2020, at or around 10:00 o'clock am, I received a phone call from Mrs. Kim Griffin and two Florida attorneys who were with her for the call. They were calling to request that I set up a new bank account in Florida in the name of Hickoks Hotel and Casino, LLC. As soon as I understood the purpose of the call, I put the call on hold and patched in my Attorney, Mr. Pluimer.

3. The Florida attorneys and Mrs. Griffin asked me to use the LLC tax ID number and my social security number to establish the Florida account. The Florida attorneys explained that they had made arrangements to handle setting up the new account and obtaining my signature card authorization strictly by email or fax. I wasn't certain that the Charging Order would be violated by a transfer to a new Hickoks Hotel and Suites, LLC as long as there was no distribution to Mr. Griffin. I didn't want to make that call and was uncomfortable with the

request to assist in setting up the Florida account. I preferred that the proceeds were transferred into the existing Deadwood account.

4. Mr. Pluimer and I terminated the call, indicating we would need to discuss the request and call them back. We did so.

5. We then return called the Florida attorneys and Mrs. Griffin. I advised them that I was not comfortable or willing to participate in the requested action to set up the new Florida account. This was based on my own judgement and the advice received from Mr. Pluimer. The attorneys were very upset with me and Mr. Pluimer. The call ended with me providing the Deadwood bank wire transfer information. At that point I was quite sure that the funds would be wire transferred to the Deadwood account.

6. Both Mr. Pluimer and I were troubled by the calls. While we had provided Mrs. Griffin and the Florida attorneys with the information to arrange for the wire transfer to the Deadwood bank, we were uncertain whether they would do so. I then contacted our Deadwood banker and asked him to provide the wire transfer instructions to Dakota Title. He did so. See Exhibit A attached and incorporated herein.

7. Mr. Pluimer, my attorney, also felt that we should reconfirm instructions with the closing agent, that I would be issued a separate check for the redemption of my membership interest and my resignation from any authority previously held in Hickoks. The funds due Hickoks Hotel and Suites, LLC would be wire transferred to the Deadwood bank. Mr. Pluimer did so both by voice mail and emails to and from the closing agent and confirmed each instruction with the closing agent.

8. I attended the closing with my attorney, Mr. Pluimer. Attorney Haven Stuck was also present. I signed all required closing documents. I signed the final settlement statement which provided that all Hickoks proceeds were wire transferred to Hickoks Hotel and Suites LLC. I had no reason to believe that the wire transfer would not be transferred to the Deadwood Bank as previously agreed with the closing agent.

9. Mr. Pluimer and I left the closing satisfied that all arrangements had been followed as agreed. I was satisfied that I had fulfilled any duties I might have had to the LLC ensuring that the Charging Order had not been violated during my tenure.

10. At no time, before, during or after closing, (until recently) did I learn that during closing Mr. Stuck provided the closing agent alternative wire transfer instructions to transfer the

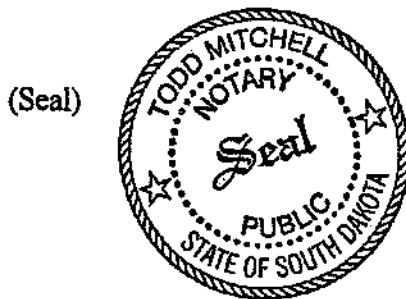
funds to a Florida bank. Neither I nor Mr. Pluimer, my attorney, had been advised, consulted or in any manner notified of this unauthorized action.

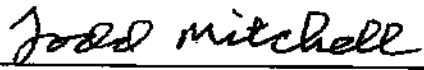
11. I did not discuss the telephone conversation of the morning of closing with Mrs. Griffin and the Florida attorneys with the closing agent, Jennifer Whitehouse, or anyone else at Dakota Title. I believed that the issue discussed had been resolved.

Dated this 10 day of November, 2021.

  
MICHAEL J. TRUCANO

Subscribed and sworn to before me this 10 day of November, 2021.



  
NOTARY PUBLIC  
My Commission Expires: 7-21-2022

STATE OF SOUTH DAKOTA     )  
  )ss.  
COUNTY OF LAWRENCE     )

IN CIRCUIT COURT  
  
FOURTH JUDICIAL CIRCUIT

**MARK BROCKLEY and  
ANNESSE BROCKLEY,**

Plaintiffs,

vs.

**MERRIL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN & GG&E, LLC,**

Defendants.

40CIV14-000320

**AFFIDAVIT OF  
JENNIFER WHITEHOUSE**

State of South Dakota     )  
  )ss.  
County of Lawrence     )

The undersigned, Jennifer Whitehouse, being first duly sworn upon her oath deposes and states as follows:

1. I am a closing agent for Dakota Title, 137 E. Colorado Blvd., Spearfish, SD 57783.
2. I was the designated agent for Dakota Title in connection with a closing involving DHIH, LLC (as Buyer of the Hickok's property) and N.M.D. Venture, LLC (now known as Hickok's Hotel and Suites LLC) ("Hickok's").
3. The closing referred to in Paragraph 2, took place at the office of Dakota Title in Spearfish, South Dakota at 1:30 pm on December 29, 2020. Mike Trucano, Richard Pluimer, Jim Trucano, and Haven Stuck were present on behalf of Sellers.
4. On the morning of December 29, 2020 I had received wire transfer instructions from First Interstate Bank in Deadwood as they were the bank that was to receive the sale proceeds attributable to Hickok's, after first paying amounts due to the Michael J Trucano Living Trust.

The Wire Transfer Instructions are attached hereto and marked as Exhibit A. All Exhibits attached to this Affidavit are incorporated in this Affidavit by reference.

5. At approximately noon, prior to closing, I had exchanges with Mr. Pluimer involving voice mails and emails. Mr. Pluimer was verifying closing documents, transfer documents and the manner of payment to Mr. Trucano for the portion payable to his Trust and the wire transfer to First Interstate Bank in Deadwood for the portion of proceeds payable to Hickok's .

6. During those exchanges I assured Mr. Pluimer that I had received his voice mail "about wire transfer of the N.M.D. funds to the Deadwood Bank account". I confirmed that I had received his voice mail and had "received the wire instructions from the bank." (Exhibit B attached) Note: Only the relevant portion of the email string of 12/29 is attached. The balance of the email string will be supplied upon request

7. On the morning of closing, I received a call from Mr. Stuck who told me that he represented Hickock's. He advised that he would be attending closing and asked for the time. Sometime during the closing, I was approached by Mr. Stuck with different wire transfer directions from those the Deadwood Bank had provided earlier in the day. (Exhibit A) Mr. Stuck asked me to contact the Seminole, Florida bank to confirm the accuracy of the instructions, which we did, according to the handwritten note on Exhibit C, attached.

8. The new instructions from Mr. Stuck were to wire transfer Hickok's portion of closing proceeds to First Home Bank in Seminole, Florida. (Exhibit C) After closing, I followed those new instructions believing Mr. Stuck and his statement that he was acting on behalf of Hickok's.

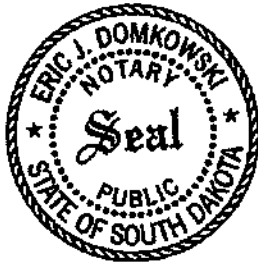
9. I did not discuss the change in wire transfer instructions with either Mr. Trucano or Mr. Pluimer, based on my belief that Mr. Stuck had the authority of Hickok's to provide alternate instructions.

Dated this 10 day of November, 2021.

  
JENNIFER WHITEHOUSE

Subscribed and sworn to before me this 10 day of November, 2021.

(Seal)



  
NOTARY PUBLIC  
My Commission Expires: 5/12/2026

Mike

This is what you asked for I believe. Let me know if you need anything else.

Thanks!

**Shawn Rost**

**SOUTH DAKOTA MARKET**

**605-716-8928**

**605-645-4502**

[shawn.rost@fib.com](mailto:shawn.rost@fib.com)

[firstinterstate.com](http://firstinterstate.com)

**From:** Shanna Bridenstine <[Shanna.Bridenstine@fib.com](mailto:Shanna.Bridenstine@fib.com)>  
**Sent:** Tuesday, December 29, 2020 10:48 AM  
**To:** [jennifer@dakotatitle.com](mailto:jennifer@dakotatitle.com)  
**Subject:** Hickoks

Wiring information for Hickoks is as follows:

Account name: NMD Venture LLC

Physical Address: 681 Main St. Deadwood, SD 57732

Bank Name: First Interstate Bank

Routing #: 082901683

Account number #: ██████ 34518

Let me know if you need anything else.



"If people concentrated on the really important things in life, there'd be a shortage of fishing poles," - Doug Larson.

Richard Plumer

Richard Plumer, Prof. L.L.C.  
1130 North Main Street, Suite 2  
Spearfish, SD 57783  
Phone: (605) 722-9008  
Email: rplumer@plumerlaw.com  
Web: http://www.plumerlaw.com/

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THANK YOU

(Quoted text hidden)

Richard Plumer <rplumer@plumerlaw.com>  
To: Jennifer Whitehouse <jennifer@dakotafille.com>

Tue, Dec 29, 2020 at 11:49 AM

Jennifer: Did you get my message about wire transfer of the NMD funds to the Deadwood Bank account?

Please note: Our office will close permanently due to Richard's Retirement on December 31, 2020.

"If people concentrated on the really important things in life, there'd be a shortage of fishing poles," - Doug Larson.

Richard Plumer

Richard Plumer, Prof. L.L.C.  
1130 North Main Street, Suite 2  
Spearfish, SD 57783  
Phone: (605) 722-9008  
Email: rplumer@plumerlaw.com  
Web: http://www.plumerlaw.com/

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THANK YOU

(Quoted text hidden)

Jennifer Whitehouse <jennifer@dakotafille.com>  
To: Richard Plumer <rplumer@plumerlaw.com>

Tue, Dec 29, 2020 at 12:09 PM

Yes, I sure did and I received the wire instructions from the bank.

Thanks!

(Quoted text hidden)

Richard Plumer <rplumer@plumerlaw.com>  
To: Jennifer Whitehouse <jennifer@dakotafille.com>

Tue, Dec 29, 2020 at 12:09 PM

Give me a call when you have a minute. Just want to make sure I have all the documents required for closing.

Please note: Our office will close permanently due to Richard's Retirement on December 31, 2020.





Incoming Wire Instructions



Domestic Incoming

Beneficiary Bank Name: First Home Bank  
Beneficiary Bank Address: 9190 Seminole Blvd  
CITY, STATE, ZIP: Seminole, FL 33772  
ROUTING NUMBER: 063114551  
Beneficiary Name: Hickoks Hotel & Suites, LLC  
Beneficiary Address: 685 Main Street, Deadwood, SD 57732  
Beneficiary Account #: ~~XXXX~~ 45650

International Incoming Wire Instructions

Correspondent Bank: First National Bankers Bank  
Correspondent Bank Address: 605 Crescent Executive Court Ste 224  
Lake Mary, FL 32746  
Correspondent Bank Swift Code: FRNAUS44  
Correspondent Routing Number: 065403370

Beneficiary Bank Name: First Home Bank  
Beneficiary Bank Address: 9190 Seminole Blvd  
CITY, STATE, ZIP: Seminole, FL 33772  
ROUTING NUMBER: 063114551

Beneficiary Name:  
Beneficiary Address:  
Beneficiary Account #:  
FOR FUTHER CREDIT TO:

12/29  
Verified w/ Susan  
White  
*[Signature]*



$$\begin{pmatrix} ) \\ ) : SS \\ ) \end{pmatrix}$$

IN CIRCUIT COURT

COUNTY OF LAWRENCE

FOURTH JUDICIAL CIRCUIT

**MARK BROCKLEY,  
ANNESSE BROCKLEY,  
Plaintiffs,**

40CIV14-000320

**vs.**

## AFFIDVIT OF HAVEN L. STUCK

**MERRIL ELLIS, RONALD GUTMAN,  
CLARENCE GRIFFIN, & GG&E LLC,  
Defendants.**

State of South Dakota :  
County of Pennington : ss

Haven L. Stuck, being first duly sworn on oath, deposes and states:

1. I agree with the statements in the Affidavit of Jennifer Whitehouse as they relate to me (paragraphs 7 and 8).

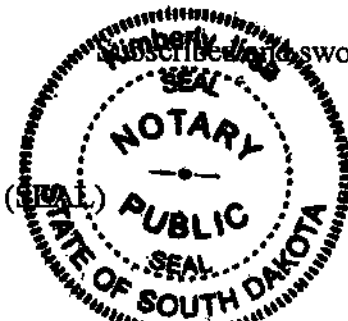
2. Dakota Title was given wiring instructions to the account of Hickoks Hotel and Suites, LLC, at First Home Bank, Seminole, Florida. At the time Dakota Title received the instructions, Mike Trucano and Dick Pluimer had left the closing. They were not aware of the wiring instructions to First Home Bank.

Dated this 11<sup>th</sup> day of November, 2021.

Haven L. Stuck  
909 St. Joseph Street, Suite 800  
Rapid City, SD 57701-3301  
605-342-2592

Subscribed and sworn to before me this 11th day of November, 2021.

Notary Public, South Dakota  
My Commission Expires: 11-19-2025



1 STATE OF SOUTH DAKOTA )  
 2 COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
 FOURTH JUDICIAL CIRCUIT

4 \_\_\_\_\_ )  
 5 **MARK BROCKLEY, ANNESSE** )  
 6 **BROCKLEY,** )

7 Plaintiffs, )

8 vs. )

9 **MERRIL ELLIS, RONALD GUTMAN,** )  
 10 **CLARENCE GRIFFIN & GG&E,** )  
 11 **LLC,** )

12 Defendants. )

Motion for Contempt  
 Hearing

CIV. 14-320

13 BEFORE: **THE HONORABLE ERIC J. STRAWN**  
 14 Circuit Court Judge  
 15 Deadwood, South Dakota  
 16 November 24, 2021, at 10:00 a.m.

17 APPEARANCES:

18 For the Plaintiffs: **MR. JON DILL**  
 19 Claggett & Dill  
 20 212 E Colorado Blvd  
 21 Spearfish, South Dakota 57783

22 For the Defendants: **MR. HAVEN L. STUCK**  
 23 Lynn, Jackson, Shultz & Lebrun, P.C.  
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 25 Rapid City, South Dakota 57709

For the Interested Party, Mr. Michael J. Trucano: **MR. RICHARD PLUIMER**  
 Attorney at Law  
 1130 North Main Street, #2  
 Spearfish, South Dakota 57783

1 (WHEREUPON, the following proceedings were duly  
2 had:)

3 **THE COURT:** This is the date and time set for a motions  
4 hearing in the matter of Brockley v. Gutman. This is  
5 actually a charging order order to show cause.

6 Mr. Dill is here representing the plaintiffs, the  
7 Brockleys. And we have Mr. Pluimer here representing Mr.  
8 Trucano. We have Mr. Stuck here also in the courtroom.

9 The previous hearing the Court had Mr. Trucano on the  
10 stand and he was being direct-examined by Mr. Pluimer. We  
11 had an issue -- you were ready to present direct exam.

12 **MR. PLUIMER:** Yeah. We never got to it.

13 **THE COURT:** The Court then, after discussion with counsel,  
14 allowed Mr. Dill to inquire with the title company, and an  
15 order was issued that required the title company to divulge  
16 its documents that it had with regard to the closing of  
17 that day.

18 In addition to those documents, Ms. Whitehouse, who  
19 was the closing agent at that date, had provided an  
20 affidavit. That's been filed as well.

21 We also have an affidavit that was filed by Mr.  
22 Trucano and Mr. Pluimer.

23 We have an affidavit that was filed by Mr. Stuck as  
24 well.

25 So I'm going to allow Mr. Dill to give a direction of

1 banking information down in Florida, and it was subpoenaed  
2 through an attorney down in Florida. And we received that  
3 information, and we showed just what we were concerned  
4 about. That money was transferred to Florida and it was  
5 stripped out. There's nothing left there and we knew that  
6 was going to happen. If that money leaves the state, we  
7 know that's going to happen.

8 And Trucano knew that money was going to be leaving  
9 the state. How did he know? Because he said he was  
10 concerned they were going to be doing something like that.

11 He knew that's what was being planned and yet he  
12 didn't raise that charging order. Instead, he just kind of  
13 washes his hands of it and says, "I don't know." And that  
14 defies logic to the extent that he's still the managing  
15 member of Hickok's and yet he's pretending he doesn't know  
16 what's happening with Hickok's.

17 So when we separate the wheat from the chaff, we know  
18 that Trucano knew all along about this amended charging  
19 order. He knew the intent to ship this money out. He sat  
20 on that because, at the end of the day, he chose his  
21 partner over the Court's order.

22 **THE COURT:** Now, let me ask a real quick question, Mr.  
23 Dill.

24 We're assuming, and what you're doing is you're taking  
25 information that has been received in the affidavit and



1 you're putting a spin on it that this is what it looks  
2 like. It looks like it because we haven't had him testify  
3 that he knew that. That he knew that these guys were going  
4 to basically ship it all the way down to Florida because  
5 he's the managing partner, he's the business manager. So  
6 the only way for them to get the money, by his  
7 understanding, is if he does the authorization, and he does  
8 what a good business person would do and cuts it off.  
9 Talks to his attorney. Mr. Pluimer says back, "Didn't feel  
10 comfortable with this. We walked away from that. We  
11 didn't want to do that," which is what they're supposed to  
12 do; correct?

13 You don't want them to say, "Yep. We're signing on  
14 the line. Money goes to Florida." You would want Trucano  
15 to say, "I feel concerned about this. I'm calling my  
16 attorney." The attorney then, on paragraph number 5, with  
17 Mr. Trucano states, "We then returned calls to the Florida  
18 attorneys and Ms. Griffin. I advised them I was not  
19 comfortable or willing to participate in the requested  
20 action to set up the new Florida account." That's what we  
21 want him to do; correct?

22 **MR. DILL:** That's what we want him to do.

23 **THE COURT:** Okay. So he did what we wanted him to do, and  
24 any business practice where there is a charging order out  
25 there, he stopped it. Then if he's the only one that would

1 normally be able to tell where the funds go, because as you  
2 say he's the business -- he signs all the documents for it  
3 to go to the Deadwood account, and he walks away.

4 Someone else authorized this. I don't know how. I  
5 don't know what agency this individual had. And we're  
6 talking about Stuck. How did Stuck get the change from the  
7 Florida attorneys in there? That's someone else's frame;  
8 that's someone else's action. Not Trucano's.

9 So I'm wondering where, in an order to show cause  
10 where we have to say that it was contumacious or willful  
11 that you get any one of those prongs just in this scenario.

12 Go ahead.

13 **MR. DILL:** Okay. Thank you.

14 A couple of things. First of all, again, at the time  
15 this all takes place, at the time Mike Trucano, not  
16 somebody on his behalf, Mike Trucano's name appears on the  
17 authorization, Mike Trucano is one of two members of that  
18 LLC. The other one is down in Florida. Mike Trucano, as  
19 the document shows, is the one that was there at the  
20 closing. Mike Trucano signed all of this. He authorized  
21 all of this. And everything that takes place with him as  
22 the managing member is with his hand. Okay?

23 Now --

24 **THE COURT:** So let me ask one more question so I make sure  
25 I get this clear for the record. All -- he signs all the



1 documents. Do those documents that he signs say  
2 specifically that the money's to go to Florida?

3 **MR. DILL:** No, but they don't say they're supposed to stay  
4 in Deadwood either. That authorization for transfer  
5 doesn't say the money stays in Deadwood. It says I'm  
6 authorizing this transfer of funds, and then the next thing  
7 that happens is it's transferred to Florida.

8 Now, here's the other part of this, and this is the  
9 most important part here. I think it goes without saying  
10 that Hickok's is in contempt of court of this amended  
11 charging order. I don't think there's any question any  
12 reasonable person would raise with respect to the LLC  
13 itself being in contempt because that amended charging  
14 order's there.

15 The question is whether Mr. Trucano personally should  
16 be responsible, and I submit to the Court, because even  
17 looking at his affidavit, all of his concerns, that he  
18 references the amended charging order. "I was concerned  
19 about this." He knew it, and what was the one thing that  
20 he could have done that he didn't do? Told somebody about  
21 that amended charging order.

22 So instead of letting him off the hook for saying he  
23 didn't sign a document that says the money goes to Florida,  
24 we need to hold him responsible because he chose his friend  
25 and partner over that amended charging order. He never



1 Trucano's social security number.

2 **THE COURT:** Okay. So is it out of the course of business  
3 practice that you're only allowed to have a single bank  
4 account for or per entity?

5 **MR. DILL:** No, not as far as I know.

6 **THE COURT:** So you could have multiple bank accounts in  
7 multiple states; correct?

8 **MR. DILL:** Sure.

9 **THE COURT:** And if the money was going into a valid LLC  
10 banking account, although Trucano didn't like that idea,  
11 but it went to an actual bank account in the name of the  
12 LLC, then the Deadwood bank account and the Florida bank  
13 account are deemed essentially the same pot for the LLC;  
14 correct?

15 **MR. DILL:** Okay.

16 **THE COURT:** So if it had made it to Florida, it wasn't  
17 until Griffin, widow Griffin came in and pulled the money  
18 out. And I don't know how she did it, but that's where the  
19 distribution made it, that's where the claim for the money  
20 that was left in there. If the LLC has two accounts or a  
21 hundred accounts and it was distributed to a hundred  
22 different accounts throughout the United States, until a  
23 distribution is made to a member --

24 **MR. DILL:** Right.

25 **THE COURT:** -- that wasn't -- it wasn't made to a member.

1 It was made to a bank account in Florida. They're one of  
2 the same if there were a hundred bank accounts if it was  
3 divided up. Ms. Widow Griffin there's no doubt went out  
4 and created a distribution. By whatever mechanism, she was  
5 able to withdraw money. That's where the distribution  
6 occurred in Florida, but it could have been New York, it  
7 could have been anywhere else.

8 That's what I'm trying to wrap my head around is how  
9 the distribution basically -- actually, how the money's  
10 going from the sale proceeds going into a bank account --  
11 well, let's assume that -- let's assume that the Florida  
12 account didn't -- wasn't even created and it was only  
13 deposited in Deadwood and Griffin -- Ms. Widow Griffin was  
14 able to pull that money out. If the money had gone into  
15 the Deadwood bank account, would it have been deemed a  
16 distribution in your eyes?

17 **MR. DILL:** You know, that's hard to say. I kind of feel  
18 like this is the Supreme Court and arguing hypotheticals.  
19 It's hard to say.

20 **THE COURT:** Right. Well, we're kind of dealing with  
21 hypotheticals here because we're dealing with, if the money  
22 was done correctly and went into the LLC's only account in  
23 Deadwood, assuming that the Florida account hadn't been  
24 created, then it was not a distribution. It was only a  
25 distribution until widow Griffin came in and made the



1 distribution. So if it went to one account or a thousand  
2 accounts, it's still not a distribution until someone comes  
3 in and requests the money to come out on their behalf, and  
4 that's where the Court is sitting.

5 I'm trying to wrap my head around why -- what you're  
6 saying is that because it went to Florida account -- and,  
7 again, there's a nefariousness about that. It looks like  
8 fraud -- defrauding creditors. That's what it looks like  
9 to the Court, but it looks like it was created by the  
10 Griffins --

11 **MR. DILL:** Right.

12 **THE COURT:** -- and not necessarily Trucano knowing what was  
13 going on because he intended for that money to go back into  
14 Deadwood. From what I can see in his affidavit, which was  
15 under oath, and also the deposition, his intention was --  
16 or his understanding was the money was going to go into the  
17 bank account in Deadwood, and so long as no money went to a  
18 member, it's not a distribution. That's how the Court sees  
19 it.

20 **MR. DILL:** Right. No, I understand what you're saying,  
21 Judge, and my response is -- and it seems like it's been so  
22 many months ago since we first dealt with this, but my  
23 response is, when you go back to statute -- and I'm trying  
24 to find that language -- there's a definition of  
25 distribution, which isn't limited solely to when somebody

1 was in a different direction.

2 **MR. DILL:** I understand that. And believe me, that's still  
3 being pursued, but our position is that does not let  
4 Hickok's and that does not let Mr. Trucano off the hook.

5 **THE COURT:** Right. And we don't have a representative for  
6 Hickok's here; is that correct? I mean, who was  
7 representing, as an attorney, Hickok's, LLC, at the time  
8 that Trucano had sold his shares?

9 **MR. DILL:** I think Mr. Stuck was at the time.

10 **THE COURT:** Okay.

11 **MR. DILL:** And I don't know -- I can't -- I think -- I  
12 don't remember if I was told or I got the sense that once  
13 this deal closed, that Mr. Stuck is not necessarily  
14 representing Hickok's anymore. I'm not sure.

15 **THE COURT:** Well, is Hickok's, LLC, as of the date of  
16 closing, is it still an ongoing venture in the state of  
17 South Dakota, Mr. Stuck? Do you know whether or not the  
18 LLC is still in existence as of today?

19 **MR. STUCK:** The LLC, yes, is still a South Dakota LLC.

20 **THE COURT:** And do you represent the LLC as of today?

21 **MR. STUCK:** In South Dakota, yes.

22 **THE COURT:** All right. That's all the Court needs at this  
23 point in time. I'm going to make a ruling.

24 The Court has heard testimony -- well, has heard  
25 almost testimony from Mr. Trucano. This is an order to



1 show cause. There is a requirement that there would be  
2 production and evidence of a valid order, and this Court --  
3 in this case this Court finds that a valid order has been  
4 demonstrated by the petitioning parties and that is the  
5 amended charging order.

6 There is a requirement that the parties have an  
7 ability to comply with that. Based on the evidence that's  
8 been provided in the affidavits, it does appear that both  
9 Hickok's, LLC, and Mr. Trucano had an ability to comply  
10 with the charging order.

11 There is a requirement that the Court find that there  
12 be willful or contumaciousness in disobeying that order.  
13 This Court finds, based on all of the exhibits, especially  
14 those that have been released and filed on the 10th of  
15 November, that as to Hickok's, LLC, there has been a  
16 willful disobedience of the order.

17 With regard to Mr. Trucano, this Court finds there has  
18 not been an establishment that Mr. Trucano willfully or  
19 contumaciously violated this or disobeyed this order.

20 I need to make sure that the factor that there's a  
21 knowledge of the Court order is also part of this. The  
22 Court finds that both the LLC and Mr. Trucano did have  
23 knowledge of the Court order.

24 With that, the Court then denies the order to show  
25 cause or order for contempt being sought as against Mr.

1 with the charging order has a lien on the distribution.  
2 That means that if there was a distribution made that the  
3 charging order would attach to, that goes -- those proceeds  
4 that were distributed would be subject to a lien of Mr.  
5 Brockley. But -- so it's not an issue of the LLC doing  
6 something that they shouldn't of or, yeah, being able to  
7 recover the money --

8 **THE COURT:** Well, if the LLC made a distribution to its  
9 member subject to a charging order that required them that  
10 they honor a lien against it, doesn't the LLC have some  
11 responsibility to recover the funds that were made?  
12 Because I don't know how Ms. Griffin would have received it  
13 other than a distribution. I don't think that the  
14 depositing of sale proceeds into one or many accounts in  
15 and of itself qualifies as a distribution as the Court has  
16 already ruled. But once the money is given to the member,  
17 there's no doubt in my mind and statute clearly says that  
18 that is a distribution.

19 **MR. STUCK:** Yes.

20 **THE COURT:** So how then can we pull this LLC out of  
21 contempt?

22 And we'll go back and discuss that. Mr. Dill, you can  
23 shore up -- maybe we have to start this all over again with  
24 regard to the enforcement of the action against -- an order  
25 to show cause as to the LLC.

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

MARK BROCKLEY and,  
ANNESSE BROCKLEY,  
Plaintiffs and Appellants,

vs.

APPEAL NO. 29915

MERRILL ELLIS, RONALD  
GUTMAN, CLARENCE GRIFFIN  
and GG&E LLC,  
Defendants and Appellees.

---

APPEAL FROM THE CIRCUIT COURT  
FOR THE FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

---

HONORABLE ERIC J. STRAWN  
Circuit Court Judge

---

REPLY BRIEF OF APPELLANTS MARK BROCKLEY AND ANNESSE BROCKLEY

---

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NOTICE OF APPEAL FILED: February 22, 2022



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## **PRELIMINARY STATEMENT**

Appellants Mark Brockley and Annesse Brockley (“Brockleys”) incorporate and rely upon the Preliminary Statement in their Opening Brief. References to Brockleys’ Opening Brief will be “BB.” References to Michael Trucano’s Brief will be referred to as “TB.” References to Hickok’s Opening Brief will be “HB.” References will be to page numbers.

## **JURISDICTIONAL STATEMENT**

Brockleys incorporate and rely upon the Jurisdictional Statement in their Opening Brief. (BB 1).

## **STATEMENT OF ISSUES**

- I. AS ESTATES BY THE ENTIRETIES DO NOT EXIST IN SOUTH DAKOTA, IS THE ATTEMPTED TRANSFER OF AN INTEREST IN A SOUTH DAKOTA LLC BY ONE FLORIDA RESIDENT OWNER TO HIS SPOUSE “AS TENANCY BY THE ENTIRETIES” EFFECTIVE TO AVOID THE CHARGING ORDER UNDER THE FACTS OF THIS CASE?

The trial court determined that Florida law governs the joint ownership interest of South Dakota LLC distributional interests.

*Estate of Hoffman*, 2002 S.D. 129, 653 N.W.2d 94  
*Peterson v. Issenhuth*, 2014 S.D. 1, 842 N.W.2d 351  
*Schimke v. Karlstad*, 87 S.D. 349, 208 N.W.2d 710 (1973)

FLA. STAT § 689.15  
SDCL § 43-1-7  
SDCL § 43-2-9  
SDCL § 43-2-11  
SDCL § 47-34A-501  
SDCL § 47-34A-504  
SDCL § 54-3-5.1  
SDCL § 54-3-16

- II. WAS THE ATTEMPTED TRANSFER OF GRIFFIN’S INTEREST VOID FOR FAILURE TO COMPLY WITH THE LLC’S CHARGING ORDER AND STATE LAW?

The trial court determined that the transfer was valid without addressing the failure to comply.

*Farm Bureau Life Ins. Co. v. Dolly*, 2018 S.D. 28, 910 N.W.2d 196

*Schwan v. Burgdorf, et al.*, 2016 S.D. 45

*State v. Bosworth*, 2017 S.D. 43, 899 N.W.2d 691

SDCL § 42-7B-7

SDCL § 42-7B-11

SDCL § 47-34A-101

SDCL § 47-34A-501 through § 47-34A-504

III. WAS THE REFUSAL TO COMPLY WITH THE CORRECTED CHARGING ORDER WILLFUL OR CONTUMACIOUS, REQUIRING THE COURT TO FIND HICKOKS AND/OR TRUCANO IN CONTEMPT OF COURT?

The trial court found that all elements of civil contempt of court were present except the element of the willful or contumacious failure to comply, and refused to hold Trucano or Hickoks in contempt of court.

*Keller v. Keller*, 2003 S.D. 36, 660 N.W.2d 619

*Metzger v. Metzger*, 2021 S.D. 23

*Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, 729 N.W.2d 335

*Talbert v. Talbert*, 290 N.W.2d 862 (S.D. 1980)

SDCL § 47-34A-504

SDCL § 47-34A-509(c)

**STATEMENT OF THE CASE**

Brockleys incorporate and rely upon their Statements of the Case and Facts in their Opening Brief. (BB 3-8).

**ARGUMENT AND AUTHORITY**

**Standard of Review.** The Standard of Review is set forth on page 9 of Brockleys' Opening Brief and incorporated herein by reference. (BB 9).

I. AS ESTATES BY THE ENTIRETIES DO NOT EXIST IN SOUTH DAKOTA, THE ATTEMPTED TRANSFER OF AN INTEREST IN A SOUTH DAKOTA LLC BY A FLORIDA RESIDENT OWNER TO HIS SPOUSE "AS TENANCY BY THE ENTIRETIES" CANNOT AVOID THE CHARGING ORDER.

Brockleys incorporate their argument on this issue set forth on pages 9-16 of their Opening Brief. The proper application of SDCL § 43-1-7 is at issue. As noted by

Brockleys:

The trial court acceptance of Hickoks' assertion that ownership follows the owner and is subject to the laws of the owner's domicile (MH3 17:9-18:4) is a clear error of law. Hickoks cited a portion of SDCL § 43-1-7 to the trial court, (MH4 38:12-17), which adopted Hickoks' reasoning without considering the whole of the statute. The statute, S.D.C.L. § 43-1-7, *in toto* provides:

43-1-7. Law governing personal property  
*If there is no law to the contrary in the place where personal property is situated*, it is deemed to follow the person of its owner and is governed by the law of his domicile.

(Emphasis added). (BB 14).

The abbreviated portion of SDCL § 43-1-7 Hickoks cited to the trial court and Hickok's argument based on the partial citation was:

"Personal property interest is deemed to follow the person of its owner and is governed," so that – that membership interest and any questions that arise out of that personal property membership interest are governed by the law of his domicile. (MH4 38:12-16).

Hickoks then only presented the *exception* to the court, not the rule. Citing only this portion of the statute was beneficial to Hickoks' interest, but hardly constitutes candor. Consistent with this tactic, Hickoks now asserts that "Brockleys never actually cite any South Dakota law to the contrary" with respect to SDCL § 43-1-7. (HB 14). This is at best willful blindness.

As noted in Brockley's Opening Brief, the "...LLC was formed in South Dakota. (SR 622, Exhibit S-A1, 13:9-21, Exhibit S-A2)" "...its member shares were initially issued in South Dakota. (SR 622)," "...until the transfer of proceeds out of the state, the business was conducted solely in South Dakota. (MH2 12:15-18)" "...and the 2015 Assignment purporting to transfer half of Griffin's membership interest to his wife to

defeat creditor claims was executed and located in South Dakota. (SR 375, Exhibit B).” (BB 14). Brockleys’ Opening Brief is replete with South Dakota law, from the formation and operation of the LLC to the Charging Order to application of our law to the facts. Florida law has no application whatsoever to this case.

Hickoks further takes umbrage with citing sources outside of South Dakota, particularly *JPMorgan Chase Bank, N.M. v McClure*, 393 P.3d 955 (Colo. 2017), and its analysis of determining situs of ownership of LLC member interests. As a survey of South Dakota cases reveals, and as argued by Appellant, there is no case law developing the law of Limited Liability Companies in South Dakota. It appears Hickoks’ real problem with the case cited is that it is directly on point, whereas Hickoks has provided no countervailing analysis.

Hickoks next argues that *McClure* is inapposite because there are no questions regarding enforceability of the Charging Order or jurisdiction. Yet, Hickoks simultaneously argues that Florida law (jurisdiction) must apply because the makers of the agreement to transfer Griffin’s interest was done by Florida residents. It must be borne in mind that the purported transfer of Griffin’s interest to himself and Kimberly as tenants by the entirety was done when the lawsuit against Griffin and his partners was about to be determined pursuant to a Summary Judgment Motion against them. (SR 113, 375, Exhibit B)

Hickoks suggests that SDCL §§ 29A-6-302<sup>1</sup> and 48-7A-202<sup>2</sup> support its

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<sup>1</sup> 29A-6-302. Registration in beneficiary form-Sale or joint tenancy ownership

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entirety, or as owners of community property held in

contention that it was perfectly acceptable for Griffin and his wife to create a tenancy by the entireties to own the member share originally obtained by Griffin. However, this is not an instance in which a security is being registered in this state for sale in an estate, nor is it touching on the creation of a partnership pursuant to the Uniform Partnership Act adopted in South Dakota. As to the last statute, Hickoks' argument is specious. § 48-7A-202(c)(1) declares that "...tenancy by the entireties... does not by itself establish a partnership..." This declaration does not authorize creating a tenancy by the entireties and neither Hickoks nor Trucano produced *any* authority to the contrary.

At the conclusion of the second hearing the trial judge first indicated Hickoks was in contempt. (MH3 28:19-22). Subsequently, after Hickoks' counsel argued that, although it received notice of the hearing and briefed the issue, and although counsel for Hickoks was in attendance at all hearings, (MH1 1, MH2 1, MH3 1, MH4 1), the trial court felt there was sufficient notice given, but would set yet another hearing out of an abundance of caution. (MH3 43:17-44:5). However, at the final December 15, 2021, hearing the trial court contravened its earlier decision and refused to hold Hickoks in contempt based on the application of Florida law on tenancy by the entireties. (MH4 39:11-40:13). This, Brockleys have assigned as error.

## **II: THE ATTEMPTED TRANSFER OF GRIFFIN'S INTEREST WAS VOID FOR**

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survivorship form, and not as tenants in common.

<sup>2</sup> 48-7A-202. Formation of partnership

(a) Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

...

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

...

## **FAILURE TO COMPLY WITH THE LLC'S CHARGING ORDER AND STATE LAW.**

Brockleys incorporate their argument on this issue set forth on pages 16-20 of their Opening Brief.

Trucano, in his brief, asserts without reference to the record that this issue is irrelevant because he claims the transfer wasn't raised at the hearings held before the trial judge. (TB 12, 13). This is wildly inaccurate and unsupportable. The issue of the transfer was precisely what was addressed in Brockleys' filings and in each hearing. (BB, Issue II, pp. 16-20). This issue is closely tied to Issue I to the extent that the attempted transfer was through a vehicle contrived among Griffin, Kimberly and Trucano.

Hickoks, on the other hand, claims that the issue wasn't raised until a Motion for Reconsideration was made "which the court did not entertain." (HB page 17 and footnote). Brockleys filed and served that Motion on February 9, 2022 (SR 939). What Hickoks *didn't* disclose to this Court, however, was that both Hickoks and Trucano issued Notices of Entry of Order the next day, (SR 1000, 1001), presumably to foreclose the trial judge from entertaining the Motion for Reconsideration. The information provided by the Motion for Reconsideration was supplemental to the hearings held, and did not discuss new theories of recovery.

Both Trucano and Hickoks would distort the language in SDCL Chapter 47-34A in general and section 47-34A-101 in particular regarding transfers and distribution, solely to get around the timeline of actions taken by Trucano and Hickoks. Moreover, neither Trucano nor Hickoks cites any case from any jurisdiction which supports their attempted distortion of our statutory language. Trucano argues that Brockleys are trying



to attach assets of the LLC. That is clearly not the case. The distributional interest, along with the definitions of “distribution” and “transfer,” are the relevant considerations.

Brockleys merely rely on the plain language of the statutes.

The fact remains that proceeds of the sale of the assets of the LLC were distributed by Hickoks. Beginning approximately six months prior to the closing of the sale of the assets Trucano, as the only managing member of Hickoks, signed off on all the documentation for the sale. Trucano would have this Court accept that, at the closing, he merely signed documents and walked away, professing ignorance of what his on LLC was up to, even though his signature appears on the documents and, as attorneys often proclaim, “the documents speak for themselves.”

**III. THE REFUSAL TO COMPLY WITH THE CORRECTED CHARGING ORDER WAS WILLFUL OR CONTUMACIOUS AND REQUIRED THE COURT TO FIND HICKOKS AND/OR TRUCANO IN CONTEMPT OF COURT.**

Brockleys incorporate their argument on this issue set forth on pages 20-30 of their Opening Brief. (BB 20-30).

It appears that Trucano’s claim is, ultimately, that he “did what a good business person would have done, and took several steps to ensure the proceeds from the sale of the Deadwood property were deposited into Hickok’s [sic] bank account in Deadwood.” (TB 23). Trucano disingenuously glosses over or omits the indemnity agreement he signed months before, acknowledging that distribution of funds would be problematic. Trucano also forgets that his signature is the one that appears on the “Dakota Title Authorization to Disburse Proceeds” (SR 844, Exhibit 1). Trucano conveniently forgets that, up until the sale was completed and he got his half of the money, he was still the managing member of Hickoks, responsible for its activities. Rather, Trucano claims he “took several steps” to insure the proceeds were deposited into Hickoks bank in Deadwood. What Trucano did was to protect himself first, willfully ignoring his responsibilities, particularly to the Charging Order. In furtherance of his plan to “wash

his hands” of the situation, knowing that there would be a problem with depositing the sales proceeds check and addressing the Charging Order, Trucano obtained indemnification provisions in the July 21, 2020, “Agreement” (Affidavit of Michael J. Trucano, SR 375, Exhibit F) from Griffin and Kimberly. Trucano’s attorney admitted that he had drafted the contracts, which includes the “Agreement.” (MH2 pages 39:8-40:5). In Trucano’s brief, he essentially argues he signed documents, got his money and left. (TB 16-17). It is hardly the innocent act of “a good business person.” Instead these were contrived efforts to circumvent the Charging Order.

Hickoks claims it didn’t violate the Charging Order, asserting it simply distributed the funds to Kimberly. (HB 22). Like Trucano, Hickoks takes a much more limited view of the definition of a distribution than the statute provides. Further, Hickoks claims “the funds were withdrawn by the remaining and sole member of Hickoks, Kimberly Griffin.” (HB 24). Yet, Trucano himself throws Hickoks and its counsel under the bus, by stating a change in banks was done by Hickoks’ counsel. Recalling that the same attorney represented Griffin in the original lawsuit, during these proceedings up to the time of his death AND Hickoks, it defies logic, reason and the facts as contained in the record that Hickoks can now pass the buck and say it didn’t do anything. Hickoks, in fact, insured the money left the state and the Charging Order was defied.

### **CONCLUSION**

The arguments of Trucano and Hickoks are without merit. The trial court clearly erred as a matter of law in failing to find Trucano and Hickoks in contempt. When Trucano and Hickoks erroneously refer to Brockleys’ failure to cite authority, this should be that authority; this is that case to be cited. In order to enforce Brockleys’ rights under

South Dakota law, Trucano and Hickoks must be held in contempt of the Corrected Charging Order. Brockleys pray that this Court reverse the trial court's orders and remand this case to the circuit court, directing the trial court to hold Trucano and/or Hickoks in contempt and provide the terms for them to purge themselves of contempt as set forth above.

Dated this 25<sup>th</sup> day of July, 2022.

CLAGGETT & DILL, PROF. LLC.

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