Docket No.: 700-287

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To the Honorable Commissioner of P

e attached original documents or copy thereof.

1. Name of conveying party(ies):
Terk Technologies, Inc.

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Additional names(s) of conveying party(ies) ☐ Yes ☒ No

3. Nature of conveyance:

☐ Assignment ☐ Merger

☐ Security Agreement ☐ Change of Name

☒ Other **Order and Memorandum Opinion**

Execution Date: **December 22, 2000**

ddress of receiving party(ies):

Name: **Devan Dockery**

Address: **Route 8**

Box 14

7 27 2001

City: **Defuniak Springs** State/Prov.: **FL**

Country: **US** ZIP: **32433**

Additional name(s) & address(es) ☐ Yes ☒ No

4. Application number(s) or registration numbers(s):

If this document is being filed together with a new application, the execution date of the application is:

Patent Application No. Filing date

B. Patent No.(s)

4,809,359
D310,367
5,142,397

Additional numbers ☐ Yes ☒ No

5. Name and address of party to whom correspondence concerning document should be mailed:

Name: **Anthony R. Barkume**

Registration No. **33,831**

Address: **Greenberg Traurig, LLP**

200 Park Avenue

City: **New York** State/Prov.: **NY**

Country: **US** ZIP: **10166**

6. Total number of applications and patents involved: **3**

7. Total fee (37 CFR 3.41):.....$ **120.00**

☐ Enclosed - Any excess or insufficiency should be credited or debited to deposit account

☒ Authorized to be charged to deposit account

8. Deposit account number:

50-1561

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9. Statement and signature.

To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Anthony R. Barkume — Name of Person Signing

Signature

June 25, 2001 — Date

Total number of pages including cover sheet, attachments, and **22**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

TERK TECHNOLOGIES CORP.

Plaintiff,

v. CASE NO. 3:00cv42/RV/MD

WINDMASTER MANUFACTURING COMPANY, DEVAN DOCKERY, RF HOME PRODUCTS, INC., JEREMY DOCKERY, RUTH DOCKERY, DENZEL DOCKERY, DANNY TAYLOR, CONNIE TAYLOR, MILES DOCKERY, CARRIE BOWERS, and RYAN DOCKERY,

Defendants.

ORDER AND MEMORANDUM OPINION

I. BACKGROUND

This is an action brought against Devan Dockery ("Devan"), Windmaster Manufacturing Co. ("Windmaster"), RF Home Products, Inc. ("RF Home") and several Dockery family transferees under Florida's Uniform Fraudulent Transfer Act, Chapter 726.101 et seq., Florida Statutes (2000).[1] Plaintiff Terk Technologies Inc. ("Terk") seeks to set aside several transfers of real estate and an annuity policy established by

[1]Defendant transferees include: Devan's parents, Ruth and Denzel Dockery; Devan's sister and brother-in-law, Connie and Danny Taylor; and Devan's children, Jeremy Dockery, Miles Dockery, Carrie Bowers, and Ryan Dockery.

12-26-00 CPD

Copies faxed + mailed to: Linscott, Richard, Solkino, Campbell, White

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Devan as fraudulent.[2]

This case was tried to the Court, without a jury. As required by Rule 52, Federal Rules of Civil Procedure, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

The primary transfers at issue in this case are several real estate transfers to members of the Dockery family and money transfers to an annuity established by Devan. The annuity agreement was compound and included a plan to incorporate RF Home as a vehicle for conducting the business of Windmaster. Therefore, the circumstances surrounding RF Home's incorporation and operation directly relate to the validity of the contested annuity. However, to understand all of these transfers, it is necessary to first summarize the original source of the dispute between the parties.

Devan Dockery operated a small television and satellite dish business in

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[2]In his pleadings, Devan asserted a counterclaim against Terk alleging unfair trade practices and tortious interference with commercial relations. However, it appears that Devan waived this claim because he presented no evidence or argument on this issue at trial. Therefore, to the extent Devan continues to make this counterclaim, I find against him.

The counterclaim seems to be based on an interpleader action pending in the District Court in Maryland. Terk asserts that Devan has failed to allege and prove a business relationship in which he has legal rights.

The parties have not addressed which state's law of tortious interference applies to this action. See Mezroub v. Capella, 702 So. 2d 562, 564 (Fla. 2d DCA 1997) (noting that "the significant relationship test from the Restatement (Second) of Conflict of Laws, . . . should be used to determine where a cause of action arises"). Nevertheless, the elements of tortious interference in Florida and Maryland are similar, though expressed slightly differently, in that they each require proof of injury to a business relationship. Cf. Manor Inc., v. Ethan Allen Inc., 991 F.2d 1533, 1541 (11th Cir. 1993) (noting that Florida law requires "the existence of a business relationship under which the plaintiff has legal rights"); Volckak v. Washington County Hosp. Ass'n, 723 A.2d 463, 479 (Md. App. 1999) (requiring a willful act calculated to cause damage to the plaintiffs in their lawful business). Regardless of which law is applied, Devan has failed to prove the necessary harm to a business relationship.

DeFuniak Springs, Florida. He had only a high school education, but was talented and innovative in creating some new ways of doing things related to the television business. In 1989, he was granted a patent on technology he invented that was incorporated into an electronic device called the "Doc-On Remote Extender." In 1990, Devan was granted another patent for a design covering the look or shape of the remote extender.[3] Subsequently, Devan operated his business as Windmaster Manufacturing Co., a sole-proprietorship, to produce, market, and sell the remote extender, and to enter into licensing agreements with other companies to permit use of the patented technology. His annual income expanded more than twenty-fold in two years, and then even more. Although not incorporated, he did often use "Inc." in the name of his business.

In January 1995, Devan filed an action in the United States District Court for the Eastern District of Michigan alleging that Terk had infringed upon the design patent held by Devan. Terk then filed a separate action in New York against Devan, seeking a declaratory judgment that it was not infringing on the patent. In June of 1996, Devan and Terk reached a settlement that resulted in the dismissal of both of the legal actions. The settlement agreement allowed Terk to market the remote extenders, provided that it purchase them at a price of $17.95 per unit from Windmaster.

In 1997, a dispute arose between Devan and Terk with regard to the enforcement of the settlement agreement. Apparently, Devan insisted that Terk buy in case or larger lots, while Terk wanted to make small quantity purchases. This dispute resulted in Terk filing another lawsuit in the District Court for the Eastern District of Michigan against Devan and Windmaster for a breach of the settlement agreement. By agreement of the parties, the court submitted the matter to arbitration in the summer of 1999. On December 3, 1999, the arbitration panel ruled against

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[3]The Doc-On Remote Extender attaches directly to infrared remote controls and converts the infrared signals to UHF signals, enabling the remote controls to operate in remote locations beyond the direct line of sight of the controlled products.

Devan and awarded Terk damages of $6,758,433, plus interest and costs ("arbitration award"). Subsequently, on February 2, 2000, the court in Michigan entered a judgment accepting and confirming the arbitration award.

Despite Devan's invention of useful, and seemingly highly profitable, consumer technology, his business experience was limited, and he neglected to incorporate his business. Moreover, during the time period in which he engaged in litigation with Terk, Devan suffered serious health problems, which included kidney cancer and an enlarged heart. Although suddenly a rich man, his physical condition was precarious. Devan contends that, as a result of his deteriorating health, he made plans to retire and spend the majority of his time in the Cayman Islands. In 1995, Devan bought a house and opened a Barclays Bank account in the Cayman Islands,[4] and in late 1999 and early 2000, Devan began transferring most of his assets to his bank accounts in the Cayman Islands and to an annuity.[5]

Devan believed that he would prevail in the Michigan arbitration. He owned the patents and had the contracts for manufacturing a product with 300% profit margins. Yet on December 3, 1999, the arbitration panel ruled against him. Devan testified that after the arbitration award, he quickly needed to accumulate funds for the attorney's fees that he had incurred and would incur in the future. It is apparent, however, that he decided to liquidate his assets as quickly as possible. Devan entered into several transactions with his sister, brother-in-law, and parents to sell the real estate he owned in Florida.

On December 10, 1999, Devan sold twelve vacant subdivision lots in Walton

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[4]Devan still owns a home in Walton County, Florida. In November 1999, Devan purchased a lot in the Cayman Islands in the name of LD Enterprises, Ltd., a Cayman Island corporation of which Devan is the sole-shareholder. All of Devan's bank accounts in the Cayman Islands are in Devan's name, except for the account in the name of LD Enterprises, Ltd.

[5]Currently, an action is pending in the Cayman Islands in which Terk seeks to execute on Devan's assets in that country.

County, Florida, to defendants Connie and Danny Taylor, his sister and brother-in-law, for $24,000 ($2,000/lot), an amount in excess of the fair market value. On that same day, Devan approached his father, defendant Denzel Dockery ("Denzel"), and discussed borrowing money to help pay Devan's attorneys fees. Denzel testified that he asked Devan for collateral and that Devan proposed to sell his parents the land and commercial buildings out of which Windmaster operated on Highway 83 in Walton County, as well as several lots near the beach in Flamingo Village in Walton County. Denzel Dockery paid Devan $100,000 for the Highway 83 property; and Ruth Dockery, Devan's mother, paid Devan $93,000 for the Flamingo Village lots.[6] Additionally, Devan assigned two promissory notes and mortgages on December 10 and 14, 1999, to his parents in exchange for $22,000. Devan, eventually, wired this money to the Cayman Islands.[7]

On December 14, 1999, Devan also deeded four lots to his children. Devan testified that, prior to the arbitration award, he had made the decision to deed the lots to his children as Christmas gifts. However, he did not sign the deeds until after the

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[6]The parties dispute the value of the parcels. Using the comparable sales approach, plaintiff's expert, Terry Hoffman, appraised the Highway 83 property at a value of $170,000 and the Flamingo Village property at a value of $138,000. The parties agreed that $138,000 fairly represented the value of the Flamingo Village properties. In appraising the Highway 83 property, Hoffman used comparable sales in Pensacola, not DeFuniak Springs. I conclude that his valuation methodology resulted in an overvaluation of the property. The defendants' expert, Terry E. Hatcher, appraised the Highway 83 property at a value between $106,000 and $111,000, and determined that the best estimate of the property was $110,000. I find that $110,000 was a fair estimate of fair market value of the property at the end of 1999.

[7]Also, in December 1999, Devan sold several cars in an attempt to raise funds for attorneys fees and litigation costs. He sold one car to Tommy Thomas Chevrolet, and four cars to his brother Darrel Dockery for $54,000. Ultimately, these funds were transferred to the Cayman Islands.

rendering of the award.[8]

Prior to December 3, 1999, Devan had taken steps to establish an annuity in the Cayman Islands. In late 1996 or early 1997, Devan met Barry Benjamin at a social event in the Cayman Islands. Benjamin is the president of International Insurance Management Corporation, as well as Dumas Holdings, Inc. ("Dumas") and Star Insurance Company ("Star").[9] After general discussions about conducting business out of the Cayman Islands, Devan eventually agreed with Benjamin to establish an annuity in the Cayman Islands with Star Insurance Company.

Ultimately, the assets related to the annuity included Devan's patents, assets held by RF Home, an airplane held in the name of Star Arrow, and $525,000 in premiums. The annuity became effective on January 5, 2000, pending Devan's payment of a cash premium. The minimum premium for a Star annuity policy was $50,000, though Devan's initial payment in January 2000 was $300,000. On March 10, 2000, Benjamin executed an endorsement that enlarged the annuity and increased the premium to $525,000.[10]

On October 21, 1999, Devan had a document prepared by his sister, Connie Taylor, that transferred the two patents to Dumas as partial payment for the annuity. However, it was not until February 2000 that Devan hired an attorney to handle the official patent transfer with the United States Patent and Trademark Office. Devan

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[8]The children have voluntarily assigned the deeds to these lots back to Devan, and Devan's attorney holds these deeds in escrow awaiting directions from this Court.

[9]International Insurance has owned Star Insurance since approximately 1996, and Star has a 100% beneficial ownership interest in Dumas.

[10]The extra $225,000 came from RF Home in February 2000. The maturity date of the annuity was December 18, 2018, but Devan could execute an endorsement changing the maturity date, so long as not to within five years of establishing the annuity. The agreed fee for the annuity was a one percent set-up charge and one percent per annum. The one percent was calculated only on the $300,000 premium because Benjamin was not willing to assign a cash value to the patent. Star received approximately $6,000 for establishing the annuity.

and Benjamin testified that the delay in effectuating the transfer of the patents was not material to the annuity because the essential asset of the annuity was the cash contribution. I find that the October 21, 1999, document was an effective transfer for purposes of this case, even though the official registration was not made until later. In a letter dated November 3, 1999, Benjamin informed Devan of the approval of this planned transfer, outlined the plan to establish an operating company in Florida, and provided for Devan to serve as a consultant for the new operating company.

As stated in the letter dated November 3, 1999, Windmaster's inventory and accounts receivable initially were transferred to Dumas, which formed RF Home as an agent in the United States to hold the assets and to continue to manufacture and sell the products previously marketed by Windmaster.[11] Currently, RF Home sells the remote extender under verbal authority from Benjamin with no fee or written agreement, and Dumas retains the authority to terminate the license at any time.

From late 1999 until the incorporation of RF Home, Robert Dolatowski[12] ran the day-to-day business operations of Windmaster. In the second or third week in January, Devan told Dolatowski that he had sold Windmaster to Dumas, that Dumas wished to continue business as usual, and that Devan had recommended Dolatowski

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[11]At the time that Windmaster transferred its assets to RF Home, Windmaster had accounts with Hughes Electronics ("Hughes") and some manufacturing was in process subject to a letter of credit. The value received for Windmaster's inventory was RF Home's sale proceeds, less fifty percent of the profit margin, to be paid to Star Insurance Company for the benefit of Devan's annuity. Additionally, on January 19, 2000, Devan received a promissory note for $24,966.93 in exchange for Windmaster's office equipment. No payments would be due under the promissory note until December 31, 2010, and interest was at six and one-half percent.

[12]Robert Dolatowski is the President of RF Home, a position he has held with the corporation since its inception in January 2000. He had held a similar management position at Windmaster.

as the president of the new company.[13] Benjamin's first conversation with Dolatowski confirmed Dolatowski's appointment as president of RF Home and his salary. However, neither Devan nor Benjamin told Dolatowski of Devan's annuity or of the relationship of Devan to RF Home.

Under a lease with Denzel and Ruth Dockery, RF Home continues to conduct business out of Windmaster's previous office in DeFuniak Springs. Actually, little physical activity is now conducted at the office, because the products are manufactured in Asia and shipped directly from there to customers. Neither the methods of operation nor Dolatowski's duties changed when RF Home assumed the business from Windmaster. Devan remained involved with the business to the same degree as he had in late 1999, in that he came into the office occasionally. The only real difference was that Devan no longer made the final decisions, as he had in 1999. If allowed to continue its business, Dolatowski estimated that RF Home could increase its annual sales to approximately $3,000,000 to $4,000,000. As of the date of trial, RF Home had made $1,700,000 in sales and had approximately $500,000 in purchase orders for the year.[14]

Because neither Dumas nor Star was prepared to fund the business of RF Home, Devan established letters of credit on behalf of RF Home in order to continue the manufacturing of inventory by RF Home's supplier, Ewig Industries ("Ewig").[15] Under the letter of credit, Devan was able to purchase the products manufactured by Ewig. RF Home then sold the products and split the profits with Devan, whose half of the profits went to Dumas for the Star annuity.

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[13]The delay in notifying Dolatowski was apparently because Dolatowski had been at a trade show in Las Vegas.

[14]Of the $1.7 million in sales this year, purchase orders to Windmaster, but filled by RF Home, accounted for $1.5 million.

[15]Ewig is a Chinese company that manufactures the remote extender for RF Home, and previously for Windmaster.

When Devan told Dolatowski that a letter of credit would finance RF Home's initial purchases, Dolatowski was aware of a letter of credit with Regions Bank, and he testified that he thought that Dumas would establish a letter of credit in the Cayman Islands. In January 2000, Regions Bank paid two drafts by Ewig on a letter of credit established by Devan. In each of these transactions, RF Home received the products purchased. On January 6, 2000, Devan established another letter of credit at Barclays Bank in the Cayman Islands, on which Ewig drew in March and April.[16] However, after April 2000, RF Home paid with its retained profits for its future deliveries from Ewig, because Devan decided to no longer fund RF Home's letter of credit at Barclays Bank and Dumas chose to not establish such credit for RF Home.

To reimburse purchases of inventory made under the letters of credit, a check for $225,000 was sent to Dumas on February 25, 2000. At the time the check was sent, Dolatowski had no indication that Dumas was involved in an annuity with Devan, and Dolatowski believed that Dumas had established the letter of credit in the Cayman Islands. Dumas ultimately credited this $225,000 to Devan's annuity premium, after the check was held in a money market account awaiting bank clearance. On March 10, 2000, the day after the bank declared the funds good, Benjamin executed an endorsement that raised the annuity's premium to $525,000.

The consulting agreement with Devan was made a part of the annuity arrangement. Star was a passive investor and had no one with experience to monitor the business of RF Home. An engagement letter was never sent to Devan, and Benjamin was of the impression that Dumas could stop payments to Devan for consulting at anytime. Nevertheless, until directed otherwise, Dolatowski was free to make the payments to Devan if he felt that they were necessary. Pursuant to the consulting agreement, RF Home made two such payments to Devan. However, at

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[16] Though this letter of credit was to initially expire on February 15, 2000, on January 24, 2000, Devan sent a letter to Barclays Bank to amend the letter of credit and extend the expiration date to April 15, 2000. (P. Ex. 174)

Dolatowski's recommendation, Benjamin sent a letter to Devan terminating his consulting services on August 1, 2000.

Though RF Home and its significant profits represent the largest asset of the annuity, annuity funds also were "invested" in an airplane, at Devan's recommendation. The airplane was supposedly to generate profits by way of lease payments by Devan at fair market value. Devan made arrangements to purchase the airplane for $200,000. Dumas provided $180,000 of the purchase price and Devan provided the additional $20,000, as his first payment under the anticipated lease. The purchase was closed after January 5, 2000. However, Devan testified that he had entered into the contract to buy the aircraft in either November or December of 1999. Though the terms of the lease were never formalized, the aircraft was in Devan's control for more than sixty days. However, when Benjamin learned of Devan's legal problems, Benjamin decided to sell the airplane and to not enter into the lease arrangement due to concerns about Devan's ability to pay.[17]

In addition to the real estate transfers and the annuity, Devan engaged in several other transactions that may relate, even if indirectly, to Devan's intent in entering into the primary transfers at issue in this case. In May 1997, Devan had obtained a $210,000 mortgage on his house in Walton County, Florida, which he invested in the stock market. After realizing significant losses in the stock market, Devan said he decided to withdraw his funds from the market and repay the mortgage on his home in November 1999.[18] In addition, Devan transferred substantial amounts of money from his bank and securities accounts in the United States to accounts in

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[17]The aircraft remains in the Cayman Islands and is for sale by Dumas. At the time of trial, the asking price was $213,000.

[18]On November 10, 1999, Devan authorized two wire transfers to Homeside Lending to satisfy a portion of his home mortgage. Devan claims that at the time he repaid the mortgage, he was unaware of Florida's homestead exemption, which protects a primary residence (homestead) from the claims of creditors.

the Cayman Islands from the fall of 1999 through the summer of 2000.[19] However, Devan contends that he was not trying to hide any of these assets. I conclude that many of the transfers were an attempt to remove assets beyond Terk's legal reach in levying and executing the judgment lien. Nevertheless, all actions, agreements, and transfers before December 3, 1999, were not.

III. CONCLUSIONS OF LAW

This Court has jurisdiction over this action pursuant to Title 28, United States Code, Section 1332. Florida's Uniform Fraudulent Transfer Act applies to these claims.

A. Fraudulent Transfers

Under Florida's Uniform Fraudulent Transfer Act, transfers made by a debtor may be set aside if made with the actual intent to defraud or under circumstances suggesting constructive fraud. Under section 726.105(1)(a), a transfer will be set aside as fraudulent when made with the "actual intent to hinder, delay, or defraud." § 726.105(1)(a), Fla. Stat. (2000).[20] The Florida Legislature has identified a non-exclusive list of "badges of fraud" to guide the determination of whether a transfer

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[19]Devan testified that he no longer maintains active bank accounts in excess of $20,000 in the United States. All of his accounts are in the Cayman Islands and Hong Kong. Devan has three bank accounts in the Cayman Islands, which have been frozen. At the time of trial, he had approximately $12,000 in the Cayman National Bank, two accounts at Barclays Bank in the amounts of $205,000 and $69,000 respectively, and $20,000 to $25,000 in the Bank of Canada.

[20]§ 726.105(1)(a) provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > (a) With actual intent to hinder, delay, or defraud any creditor of the debtor . . .

was made with the actual intent to hinder, delay, or defraud. See §726.105(2)(a)-(k), Fla. Stat. (2000). These principles are intended to guide a court's determination and a "single badge of fraud will not generally support a finding that a conveyance was made with actual fraudulent intent." See Myers v. Brook, 708 So. 2d 607, 610 (Fla. 2d DCA 1998); see also Harper v. United States, 769 F. Supp. 362, 367 (M.D. Fla. 1991) (citing United States v. Fernon, 640 F.2d 609, 613 n.10 (5th Cir. 1981)).

Sections 726.105(1)(b) and 726.106 address the circumstances in which a transfer can be constructively fraudulent, without the badges of fraudulent intent. "To establish constructive fraud, the plaintiff must show that the debtor did not receive reasonably equivalent value in exchange for the transfer." Myers v. Brook, 708 So. 2d 607, 610 (2d DCA Fla. 1998). Sections 726.105(1)(b) and 726.106 address transfers made by a debtor without receiving reasonably equivalent value while the debtor was insolvent or while the debtor intended to incur or should have believed that he would incur debts beyond his ability to pay them as they came due. See In re Goldberg, 229 B. R. 877, 884 (S.D. Fla. 1998).[21]

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[21] § 726.105(1)(b), Fla. Stat. (2000) provides, in pertinent part:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> . . .
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

§ 726.106, Fla. Stat. (2000) provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the

The pivotal date for determining whether the transfers were undertaken with fraudulent intent is December 3, 1999, because that was the day that the arbitration panel entered the arbitration award against Devan. Actions taken by Devan prior to December 3, 1999, do not demonstrate fraudulent intent because I conclude that he did not anticipate that the arbitration panel would rule against him prior to that day. However, the actions taken by Devan after December 3, 1999, call into question his motivations because these actions appear to have been taken in an effort to hide assets from Terk.

Though the real estate transactions entered into by Devan after December 3, 1999, were taken to minimize the effect of the arbitration award, most of these transactions were for full and fair consideration. Devan received no real benefit from entering into these transactions. However, the transfers of real estate made by Devan to his children were made with the actual intent to hinder, delay, and defraud Terk's collection of its arbitration award. Several badges of fraud exist with respect to these transfers, including the fact that Devan's children are insiders, Devan had been sued by Terk, and these transfers occurred shortly after a substantial debt, the arbitration award, was incurred. See §726.105(2)(a)(d)(j). Most notably, these were gifts and Devan received no consideration for these transfers. See §726.105(2)(h). See In re Lazar, 81 B.R. 148, 151 (S.D. Fla. 1998) (finding that transfers to family members for no consideration with other badges of fraud evidenced debtor's intent to hinder, delay,

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> transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
> (2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

and defraud creditors). Therefore, these transfers to Devan's children must be set aside.

The transfers made to Devan's parents, sister, and brother-in-law were made with neither the actual intent to defraud nor under circumstances of constructive fraud. The value of the twelve lots sold to his sister and brother-in-law was actually less than they paid. The value of the property bought by his parents, while contested at trial, was approximately the amount they paid. Thus, I conclude that Devan received fair market value for these conveyances. Though these transfers ware marked by some badges of fraud,[22] several badges of fraud were notably absent, such as the fact that Devan did not retain possession of the properties, the transfers were not concealed, and Devan received adequate consideration in return for these transfers. The effect was a conversion of the assets into cash, and the plaintiff is actively pursuing those funds in the Cayman islands.

Even if Devan made the transfers to his parents, sister, and brother-in-law with the actual intent to defraud, the good faith defense of Section 726.109(1) applies to those transfers. That section states:

> (1) A transfer or obligation is not voidable under s. 726.105(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

§ 726.109, Fla. Stat. (2000).[23]

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[22]Among the badges of fraud present were that the transfers were made to insiders, Devan had been sued prior to the transfers, and the transfers occurred shortly after Devan incurred a substantial debt. §726.105(2)(a)(d)(j). Also, the arbitration award rendered Devan insolvent under the terms of the statute. See §726.105(2)(i). Under Chapter 726, a debtor is insolvent if "the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation" §726.103(1); and a presumption of insolvency exists if the debtor "is generally not paying his or her debts as they become due." §726.103(2).

[23]"A debtor may convey its assets to a creditor to satisfy its antecedent debts, even if the debtor intended to defeat the claims of other creditors and the creditor had

I find that Devan's parents, sister, and brother-in-law entered these transactions in good faith and paid reasonably equivalent value for the properties received. Even if Devan possessed a fraudulent intent, such an intent was not shared by these defendants. Therefore, I find that Denzel and Ruth Dockery and Connie and Danny Taylor entered into these transactions in good faith. Pursuant to Section 726.109(1), these transfers are not voidable under Section 726.105(1)(a).

Moreover, I find that, because Devan's parents, sister, and brother-in-law took the properties in good faith and for reasonably equivalent value, they are entitled to a lien under Section 726.109(4), Florida Statutes (2000), if they should be required to reconvey, to the extent of the amounts paid by them.

Terk contends that these transferees lacked the good faith necessary for these defenses because a prudent person would have inquired further as to the reason for these transactions. See United States v. Romano, 757 F. Supp. 1331, 1338 (M.D. Fla. 1989) (stating that good faith cannot exist when transferee knew of such facts or circumstances that would have induced ordinary person to make inquiry and when such inquiry would have discovered debtor's fraudulent intent). However, I disagree with Terk's position under the facts of this case. Due to this and related litigation, both parties have incurred very substantial attorneys fees. Devan told his family that he needed to sell these properties to raise money to pay these fees. Any further inquiry would have only reaffirmed the family's knowledge that Devan had very substantial legal expenses. Even if they had known of the arbitration award, the transferees could have believed, reasonably and in good faith, that they were helping Devan with legal fees rather than attempting to shelter assets from Terk. Moreover,

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knowledge of such intention. The transfer becomes fraudulent, however, if the creditor actually participates in the debtor's fraudulent purpose, provided such a purpose exists." Mission Bay Campland, Inc. v. Sumner, 731 F.2d 768, 772 (11th Cir. 1984) (citing Miles v. Katz, 405 So. 2d 750, 751 (Fla. 4th DCA 1981)); see also Nelson v. Spiegel, 529 So.2d 311, 312 (Fla. 4th DCA 1988); Nelson v. Cravero Constr., Inc., 117 So.2d 764, 766 (Fla. 3d DCA 1960).

as I have previously found, these transferees received these properties in good faith and for full and fair consideration.

The major transfers at issue relate to the annuity established by Devan. With respect to the annuity, Section 222.14, Florida Statutes (2000) establishes the following exemption from attachment for annuity contracts:

> The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected for the benefit of such creditor.

However, the statute goes on to provide that "an exemption from attachment, garnishment, or legal process provided by this chapter is not effective if it results from a fraudulent transfer or conveyance as provided in chapter 726." § 222.29, Fla. Stat. (2000). The statute also defines fraudulent conversions:

> (1) As used in this section, "conversion" means every mode, direct or indirect, absolute or conditional, of changing or disposing of an asset, such that the products or proceeds of the asset become immune or exempt by law from claims of creditors of the debtor and the products or proceeds of the asset remain property of the debtor. . . .
>
> (2) Any conversion by a debtor of an asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the creditor, whether the creditor's claim to the asset arose before or after the conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor.

§ 222.30(1)(2), Fla. Stat. (2000). See also In re Levine, 134 F.3d 1046, 1051 (11th Cir. 1998).

The primary issue with respect to the annuity is whether Devan converted his patents, Windmaster/RF Home's assets, and several hundred thousand dollars of his funds from non-exempt to exempt assets with the actual intent to hinder, delay, or defraud. The assignment prepared by Devan in October, Benjamin's November letter, and Benjamin's testimony demonstrate that the transfer of the patents and $50,000 of the initial premium to the annuity were agreed upon before the critical date of December 3, 1999.

In addition, the $225,000 paid by RF Home and credited by Dumas to the annuity was not fraudulent because it was a legitimate repayment of the letters of credit for RF Home's benefit. How to treat these funds presents a problem. They were Devan's funds advanced to RH Home for business reasons, but RH Home is owned by Dumas and is operated to partially fund the annuity. Devan contractually receives income from RF Home. I treat this amount as properly credited to the annuity.

It is apparent that $250,000 of the $300,000 premium paid in January 2000 must be set aside as a fraudulent conversion. The $300,000 premium was paid by Devan after the rendering of the arbitration award, even though Star only required a $50,000 minimum premium. The minimum $50,000 payment toward the annuity is not a fraudulent conversion because it was the minimum payment required under the agreement reached between Devan and Benjamin prior to December 3, 1999. However, the payment of the additional $250,000 after the rendering of the arbitration award was intended to hinder, delay, and defraud Terk. Therefore, $250,000 of the $300,000 premium must be set aside.

Terk also contends that RF Home's assets should be made available for execution because RF Home is really the alter-ego of Devan. The primary factor in determining whether a corporation is an alter-ego is whether an individual exercises complete domination and control over the corporation so that the corporation is rendered a mere conduit for the individual's personal benefit. See Seminole Boatyard,

Inc. v. Christoph, 715 So. 2d 987 (Fla. 4th DCA 1998); Church of Scientology v. Blackman, 446 So. 2d 190, 192 (Fla. 4th DCA 1984); see also 8 Fla. Jur. 2d Bus. Rel. 21 (1996). The owner of RF Home stock is Dumas, and the management is now in the hands of Benjamin and Dolatowski. Devan is no longer receiving a salary. Under these circumstances, RF Home cannot be considered as Devan's alter ego.

It is obvious, however, that RF Home is just Windmaster in another form. It was established after December 3, 1999, and cannot be deemed a part of the initial annuity agreement. As a going business concern, it must be treated as a fraudulent transfer from Devan through Benjamin and Dumas. That will be set aside, and RF Home will be subject to Terk's judgment. RF Home will be required to pay Dumas a reasonable and fair license fee for all products manufactured and sold under the patents at issue since its inception.

Terk also contends that Devan's fraudulent intent in establishing the annuity is demonstrated by other transactions entered into by Devan, such as the airplane that Devan persuaded Star to purchase for Devan's use. I agree that Devan attempted to use the annuity arrangement to allow him to have an aircraft for his own personal use, and not subject to Terk's judgment. However, Devan did pay $20,000 and was to pay regular lease payments. Moreover, once doubts arose concerning Devan's ability to make lease payments, Benjamin protected the investment by terminating the arrangement with Devan and putting the airplane up for sale.

Terk also asserts that Devan's repayment of the mortgage on his home suggests a scheme on Devan's part to fraudulently convert non-exempt assets to exempt assets. I agree that the mortgage repayment is suspicious. However, this repayment is not evidence of fraudulent intent because Devan repaid this mortgage prior to the critical date of December 3, 1999. Therefore, these transactions do not establish that the annuity and related transfers were undertaken to defraud Terk.

In summary, I conclude that the only real estate transactions required to be undone as fraudulent are the lots conveyed to Devan's children. They are subject to

Terk's judgment lien and should be conveyed to Terk. The annuity agreement predated the arbitration award, as did the patents transfer. Other transactions made after December 3, 1999, are fraudulent and must be set aside: $250,000 of the premium of $300,000 paid in January 2000, and the transfer of the Windmaster assets and business of RF Home. The letter of credit amount of $225,000, which is an asset of RF Home's applied toward the annuity, was not fraudulent and will not be set aside or ordered out of the annuity fund. Likewise, the $50,000 premium paid pursuant to the prior agreement will not be set aside.

B. Periodic Payments of Future Damages

Devan requests authorization to make periodic future payments of the judgment pursuant to Section 768.78, Florida Statutes (2000). Terk contends that Devan is not entitled to make periodic payments because the judgment is not the result of a cause of action brought under Chapter 768 of the Florida Statutes. I agree. The judgment involved here is a lump sum amount, and is not one for future economic damages.

C. Value of a Beneficial Interest in the Annuity

Devan contends that a beneficial interest in the annuity sought by Terk, if granted, will award Terk a windfall in excess of the arbitration award. Since I have concluded that the annuity was not established with fraudulent intent, Terk is not entitled to the beneficial interest that it has requested. The patents were properly assigned to Dumas for purposes of the annuity, so they are removed from any "windfall." Therefore, I need not address Devan's argument that the judgment entered by the District Court in Michigan confirmed $6,756,433 as Terk's loss of future profits.[24]

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[24]In the interest of completeness, I will briefly discuss the issue. Devan argues that collateral and judicial estoppel permit Terk to recover only the future economic losses it represented in the arbitration and that were confirmed by the District Court in Michigan. Devan contends that the beneficial value of the patents to Terk is $17,437,115. Devan reaches this conclusion on the assumption that if Terk had a beneficial ownership of the patents, then Terk could acquire at cost the remote extenders that it markets.

IV CONCLUSION.

For the above reasons, it is ORDERED that the properties transferred to Devan's children (the deeds to which are now held in escrow), the ownership (stock) of RF Home, and the $250,000 that Devan fraudulently transferred to Dumas in the form of an annuity premium be immediately transferred to Terk in partial satisfaction of its judgment; all other transactions at issue in this litigation are determined to be non-fraudulent.

DONE AND ORDERED this 22nd day of December, 2000.

ROGER VINSON
Chief United States District Judge

The doctrine of judicial estoppel "'is applied to the calculated assertion of divergent sworn positions'" and is "'designed to prevent parties from making a mockery of justice by inconsistent pleadings.'" Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1217 (11th Cir. 1997) (quoting McKinnon v. Blue Cross & Blue Shield, 935 F.2d 187, 1192 (11th Cir. 1991)). In the Eleventh Circuit, an arbitration proceeding can have collateral estoppel effect, if it afforded the basic elements of adjudicatory procedure. See id.; Benjamin v. Traffic Exec. Ass'n Eastern R.R., 869 F.2d 107, 110-11 (11th Cir. 1989). While there may be some inconsistency in Terk's position, I do not find that judicial estoppel applies here.

In opposition, Terk contends that a beneficial interest in the annuity would only allow Terk to sell the annuity and, by way of such a sale, to only realize the remainder of the $6,758,433 to which it is entitled. Though Terk is not entitled to a 100% beneficial interest in the annuity, I agree that if the annuity was sold, Terk could not receive more than its judgment.