IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-TS-01700

CHARLES TIMOTHY WEST, WEST QUALITY FOOD SERVICES, INC., COASTAL EXPRESS, INC., WEST LEASING COMPANY, WEST BROTHERS LEASING COMPANY, WEST FAMILY LEASING COMPANY and WEST INVESTMENTS, LLC — APPELLANTS

v.

DEBORAH GAYLE THORNTON WEST — APPELLEE

Consolidated with:
2002-IA-01158-SCT

DEBORAH GAYLE THORNTON WEST — APPELLANT

v.

CHARLES TIMOTHY WEST — APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

BRIEF OF APPELLEE/CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

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I. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Deborah Gayle Thornton West - Appellee/Cross-Appellant;

Patrick F. McAllister - Attorney for Appellee/Cross-Appellant;

William B. Pemberton, II - Trial Attorney for Appellee/Cross-Appellant;

Charles Timothy West - Appellant;

Terry L. Caves - Attorney for Appellant;

Jerry D. Sharp - Attorney for Appellant;

West Quality Food Services, Inc. - Appellant;

Coastal Express, Inc.- Appellant ;

West Leasing Company - Appellant;

West Brothers Leasing Company - Appellant;

West Family Leasing Company - Appellant;

West Investments, LLC - Appellant; and,

James Robert Sullivan, Jr. - Attorney for Appellants.

Respectfully submitted,

/s/ Patrick F. McAllister

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1. The chancellor erred in holding the West Quality Food Service, Inc. shareholder agreement prevented Tim from conveying to Debbie an equitable interest in West Quality Food Services, Inc., Coastal Express, Inc., West Leasing Company, West Brothers Leasing Company, and West Family Leasing Company ("the West Entities") as provided by the PSA.

2. The chancellor erred in failing to find that Tim owes a fiduciary duty to Debbie and erred in failing to conclude Tim breached his fiduciary duty to Debbie by granting a lien on her equitable interest in the West Entities.

3. The chancellor erred in failing to impose a constructive trust in favor of Debbie.

4. The chancellor erred in holding that the "Coastal loans" to Tim and "113 account" payments made on Tim's behalf for his personal expenses were loans rather than constructive distributions in which Debbie was entitled to share under the terms of the PSA.

5. The chancellor erred in calculating the amount of past due alimony owed to Debbie.

6. The chancellor erred in finding that Tim's breach of his obligation to Debbie under a December 1, 1993 Death Benefit Agreement ("DBA") was moot.

7. The chancellor erred in finding that distribution of real property to Tim, which Tim used as his contribution to obtain his interest in West Investments, was not an event that would entitle Debbie to an interest in West Investments.

8. The chancellor erred in establishing a retroactive date for child support payments owed by Debbie to Tim.

9. While the chancellor properly awarded Debbie attorneys fees, it erred in holding that the award of attorneys fees would not bear interest under Miss. Code Ann. §75-17-7.

10. The chancellor erred in granting the West Entities' motion to dismiss.

11. The chancellor erred in granting the West Entities' motion for attorneys fees.

12. Debbie is entitled to an award of attorneys fees on this appeal.

V. STATEMENT OF THE CASE

A. Nature of the Case.

This case is before the Court on an appeal and cross appeal from a Judgment and various orders of the Chancery Court of Jones County regarding the obligations of Deborah Gayle Thornton West ("Debbie") and Charles Timothy West ("Tim") under their Property Settlement Agreement ("PSA") incorporated into a 1994 Final Judgment of Divorce-Irreconcilable Differences. The case has previously been before the Court in *West v. West*, 891 So.2d 203(Miss. 2004)("*West I*").

B. Course of Proceedings and Disposition Below.

This contentious case has a long history. On November 8, 1994, the Chancery Court entered a "Final Judgment of Divorce, Irreconcilable Differences." (A.R.E.1-22)[1]. Incorporated into the Final Judgment was the parties' Property Settlement Agreement ("PSA"). (A.R.E.6-22).

Debbie filed a contempt action on June 12, 2000. After a trial in April 2001, the chancellor issued a Judgment on April 30, 2002, (CP.273-74), voiding the alimony provisions of the PSA, and an "Interlocutory Order" on July 8, 2002, (CP. 290-93), voiding the division of marital assets provisions of the PSA. Following Debbie's interlocutory appeal, this Court issued *West I* on December 4, 2004. *West I* held the PSA was unambiguous as to the parties' marital property, Tim's income, and Debbie's access to financial information regarding Tim's various forms of income, *West I* ¶19. The Court held Debbie was entitled to "equally share" Tim's interests in the West Entities, and was entitled to review corporate financial information which would affect her agreed entitlement

[1]Appellee has used the following abbreviations in referring to the record on appeal: CP - clerk's papers; R.E. - record excerpts filed by Appellant Tim West; A.R.E. record excerpts filed by Appellee; T1. - first trial and motion transcripts; T2 - second trial and motion transcripts; T1.Ex. - first trial exhibits; T2.Ex. - second trial exhibits.

to his various forms of income. *West I* at ¶16-17. This Court recognized that "loans" to Tim from the West Entities, may constitute fraudulent transfers under Mississippi law. *West I* at ¶44-47.

West I was remanded to consider, "among other issues" the following:

> (1) whether there was a material change in circumstances which clearly resulted in an inability to pay, justifying Tim's refusal to pay periodic alimony to Debbie; (2) whether, under the property settlement agreement, Debbie was entitled to a portion of the $411,000.00 in "loans" from West Quality to Tim; (3) whether Tim breached his obligation to Debbie under a pre-divorce death benefit agreement; and (4) whether Debbie was entitled to attorneys fees on her contempt action and for fees she incurred on appeal. *West I*, ¶ 50.

Following remand, Debbie filed a motion to impose a constructive trust on May 24, 2005. (A.R.E. 23-29). The motion was denied on August 4, 2005. (A.R.E. 708-11). Debbie also filed an amended complaint joining the West Entities as defendants asserting that transfers from the West Entities to Tim as "loans" or "account receivables" payments were constructive distributions and fraudulent conveyances. Debbie also asserted Tim owed her a fiduciary duty and which he breached by converting her share of distributions from the West Entities to his own benefit, and by granting a security interest to West Quality on property which Debbie equitably owns. Debbie also asserted a civil conspiracy between Tim and the West Entities to avoid paying Debbie her share of distributions in the West Entities generated by her equitable interest in those entities. (R.E. 114-126).

Tim's September 2006 amended answer and counterclaim alleged his alimony obligation to Debbie should be modified to a fixed monthly amount, that he should be awarded child support for the parties' minor child. He also sought declaratory judgment regarding the disputed "loans" and account receivables. Tim again claimed Debbie was not entitled to any portion of distributions from the West Entities, that Debbie had no equitable interest in the West Entities and that Tim was entitled to a monetary judgment from Debbie for overpayment of alimony. (CP 995-1018).

The West Entities filed a motion to dismiss in January 2007. (A.R.E. 34-39). On February 1, 2007, the chancellor granted the West Entities' motion to dismiss on the basis that money loaned

by a corporation to a shareholder cannot, as a matter of law, be a fraudulent conveyance. (A.R.E.176-180). The chancellor awarded the West Entities' attorneys fees, (R.E. 83-85), but as of the date of this appeal the chancellor had not awarded a specific amount of attorneys fees to the West Entities.

Following 13 days of trial between February 13, 2007 and September 13, 2007, the chancellor issued his opinion on April 10, 2008, (R.E. 36-87), and a Final Judgment on May 9, 2008. (R.E. 19-26). The Judgment held the1994 Judgment of Divorce was enforceable and recognized the PSA provided that Tim transferred to Debbie "a one-half (½) vested equitable ownership interest in said properties." (R.E. 19-20). While holding that Tim was barred from re-litigating issues decided in *West I*, the chancellor held the 1993 West Quality Food Service, Inc. stock agreement prohibited Tim from transferring an equitable interest in the West Entities to Debbie. The chancellor held Debbie was only entitled to half of the proceeds from any sale of Tim's interests in the West Entities or a transfer if the restrictions contained in the stock agreement were lifted in the future. (R.E. 20). The chancellor characterized Debbie's interest as a "contingent interest." (T2.164, 168-69, 196).

The Judgment awarded Debbie $558,808.00 in past due alimony through December 31, 2005, at 7% per annum interest and reserved ruling on the past due alimony due after December 31, 2005, found Tim in contempt and awarded Debbie $262,468.43 in attorneys fees. (R.E. 25). On September 18, 2008, the chancellor awarded additional past due alimony of $11,984.00 from January 1, 2006 to June 30, 2008. (R.E.27).

The chancellor rejected Debbie's claim that the "Coastal loans" and "113 account receivable" payments were constructive distributions and held all transfers to be loans (R.E. 22, 55-65), found that Tim breached his obligation to provide Debbie with financial information required by the PSA, and found that Tim breached his obligation to maintain certain life insurance policies. (R.E.23-24, 71-74). While the chancellor found that Tim breached his obligations to Debbie under the December

12, 1993 Death Benefit Agreement ("DBA"), he concluded Tim's breach was moot since the DBA had been terminated over Tim's objection in 2006. (R.E.24, 774-75).

Following the Judgment, the parties and the West Entities all filed post-trial motions to alter or amend the Judgment. On September 18, 2008, the chancellor denied all post-trial motions. (CP. 2310-13, 2315). Tim and the West Entities filed notices of appeal. (CP. 2328, 2332). Debbie filed a notice of cross-appeal. (CP.2338-39).

C. Statement of Facts.

The statement of fact contained in Tim's brief correctly sets forth the marital history of the parties, the remand instructions of this Court in *West I*, and the contentions of the parties on *West II*, with the exception of Debbie's claim that Tim owed a fiduciary duty to Debbie and breached his duty. (App. 3-4). The remaining facts recited by Tim are unsupported by the record as a whole.

Tim is employed by West Quality Food Services, Inc. (T1.407; T2.195). On remand, Tim sought a modification to reduce his alimony. (CP.1003). At trial, Tim requested that the chancellor convert his obligation from a percentage of his business and employment income to a fixed monthly amount, (T2.1020), and continued to claim he had no obligation to pay Debbie any portion of his distributions despite this Court's holding in *West I*. (CP. 1004).

Tim claimed he was entitled to a modification based on a change in his financial status, a change in health status and a change in Debbie's financial status. (App.13-19). Debbie asserted Tim's modification claim was barred by the "clean hands" doctrine since he failed to fully performed his obligations or failed to prove his performance was wholly impossible. (CP.1009). Tim admitted he had the ability to pay the sums due Debbie as they accrued. (T2.1261). Tim dissipated vast sumss between 2000 and 2005 on things such as gambling expenses, automobile purchases, extravagant clothing purchases for his current wife, an in-house masseuse, nail care, cosmetics, body wrap treatments, salons, plastic surgery expenses, cash withdrawals, and $434,507.04 which Tim had "no

idea" where the money went. (T2.Ex. 48; T2.1212, 1455-1458). Tim also took numerous vacation trips to various domestic and foreign locales. (T.1209-1215; T2.Ex. 44, 45)

Tim claimed his removal from the West Quality board in October 2006 reduced his income by $60,0000 annually. (T2.Ex.7). He also claimed his business distributions "dried up" between 2000 and 2005. (T2.922). Tim's financial statements reflect his net worth increased from $3,308,733 in 1999 to $4,117,108 in August 2006, even though his 2006 statement fails to include his interest in West Investments. (T2.Exs.6, 125). While Tim claimed his distributions "dried up," his tax returns and K-1s which reflect distributions of $1,021,264 from 2000 to 2005. (T2.Exs. 37). Tim's salary also increased from $117,497 in 2004 to $155,977 in 2007. (T2.Ex. 37, CP 2261). Tim's bank statements reflect he deposited $1,981,203.50 from January 2000 to May 2006. (T2.Ex. 47). West Quality was also paying substantial personal expenses of Tim through his "113 account." (Exs.T2 180, 59, 60). Between January 2000 to November 2006, Tim received $3,983,461.12, either directly or indirectly as a payment by the West Entities for his personal expenses. (T2.Ex. 183).

While the mental health professionals concluded Tim suffered from depression, they disagreed about the severity of Tim's depression, with diagnoses ranging from "chronic, but mild levels of depression" (T2.Ex. T2.96, p.10 of 36) "generalized anxiety and depression"(T2.781) to a "major depressive episode, severe, alcohol dependence." (T2.Ex. 96, p.6 of 36). The professionals agreed Tim's depression was *solely* related to his dispute with Debbie. (T2.981, T2.1002; T2.Ex. 96, page 5 of 36; T2.Ex. 97, 6/28/05 notes). Tim's depression is not disabling. (T2.Ex. 98).

Tim's depression had no effect on his salary, distributions or on the personal expenses that West Quality paid for him through his 113 account. (T2.Exs. 60, 61, 100, 180, 183). In addition to his employment at West Quality, Tim also has provided highly technical expert consulting services at $400.00 per hour. (T2.1244-46). Tim has no unpaid medical bills.

Tim's claim that his monthly expenses exceed his income is based on his 8.05s, which are not supported by the evidence. Tim's 8.05s are materially false in that they reflect debts for property which Tim claims are owned by his current wife, including automobiles, real property and a separate business. (T.2Ex. 3A; T2.1250-54, 1257). Tim also listed expenses paid for by West Quality as his monthly expenses. (T2.1233-41). Tim's 8.05s also misstate his monthly tax obligations (T2.Ex. 3A, 3B, 195). While Tim claimed his monthly tax deductions to be $7,854.41, (T2.Ex. 195), his itemized pay stub (T2.Ex. 196) reflects that Tim's actual itemized deductions were $1,076.38. Tim admitted the tax deductions reflected on his third 8.05 were inaccurate. (T2.1714-17). Tim's 8.05s also fail to include his 22.5% interest in West Investments as an asset. (Exs. 3A, 3B and 195; T2.1722). His 8.05s also fail to include some of his distributions. (T2.1717-18).

Tim's claims regarding advice of counsel are unsupported by the record. One of Tim's former attorneys, Dennis Sharp, testified that he thought the PSA was unenforceable, (T2.889), despite this Court's ruling in *West I*. Tim testified that all of Sharp's advice to him was contained in Sharp's letter of January 28, 2000. (T2.Ex. 146; T2.1099). Sharp's letter did not advise Tim to stop making payments and Sharp testified that Tim's unilateral reduction in payments was "inconsistent" with his advice to Tim. (T2.891-93). Tim's factual claims regarding the advice James Becker, his 2001 trial counsel, is also unsupported by the record. Becker testified that he never instructed Tim to stop paying Debbie, but he did advise Tim to save as much as he could in the event this Court upheld the PSA. (T2.Ex.185, P.16-19). Becker specifically advised Tim that if this Court enforced the PSA, he "could have a substantial amount of back alimony to pay, as well as continue to have your business holdings encumbered." (T2.Ex.186). Tim admitted that he never saved any funds to pay the past due alimony despite Becker's advice to do so. (T2.1440).

Tim's claim regarding Debbie's financial status is also unsupported by the record. The proof showed that at the time of trial, she was sleeping on the floor of her office and she had no health

insurance due to her dire financial circumstances. (T2.1493-95). While she has received funds from Tim since 2005, following a remand by this Court, she had to sell her home to pay for IRS liens and make payment on her attorneys and expert fees. She was unable to pay normal living expenses. (T2.1500-1501,1505-08). She has no medical insurance, life insurance, dental insurance or retirement funds. (T2.1511). Debbie incurred $465,445.12 in attorney fees through the end of the remand trial, exclusive of expert fees. (T2.Ex.105, 106, 197). She was paying counsel $3,000 per month towards the substantial amount she owes, since her attorneys advised her that they would not continue to work without some payment. (T2.1501). Debbie has no ability to pay the substantial amounts owed in legal fees. (T2.1512-13).

VI. SUMMARY OF ARGUMENT

The chancellor correctly applied the law of the case doctrine because this case it involves the same parties, the same facts and the same issues. Tim raised the same issues in the first trial and offered identical exhibits in both trials in support of his claim. No new facts were presented by Tim.

The chancellor correctly denied Tim's request for a modification and held him in contempt. Tim failed to prove a change which resulted from after-arising circumstances, not reasonably anticipated at the time of the agreement. Tim's modification request was based upon his own bad faith actions. At trial, Tim admitted he had the ability to pay and abandoned inability to pay as a defense to the contempt claim. (T2.1261). The chancellor also correctly found that Tim continued his breach of the PSA by failing to provide Debbie with financial information and by failing to maintain insurance policies required by the PSA.

The chancellor properly awarded Debbie attorneys fees and interest on unpaid alimony required by the PSA since Tim was in contempt. Tim's claim regarding Debbie's ability to pay counsel is specious. Debbie's only income is from payments under the PSA. Tim's strategy throughout this matter has been to "bleed her dry" by forcing Debbie to use the limited funds she

receives to pay counsel to protect her rights while having his own legal fees paid by West Quality. Interest accrues on each unpaid support payment at the legal rate of interest from the date each delinquent payment was due and the chancellor properly awarded interest on the unpaid alimony.

Tim holds legal title to Debbie's equitable interest in the West Entities. The chancellor erred in failing to find that Tim owed a fiduciary duty to Debbie, and that he breached his duty by granting liens to West Quality on property Debbie equitably owned without her consent. The chancellor erred in failing to impose a constructive trust on the stock and partnership interest in which Tim holds legal title, but which are equitably owned by Debbie. The chancellor should have imposed a constructive trust since Tim is holding legal title and is receiving the benefits derived from the legal title, while refusing to provide Debbie with the benefits of her equitably owned property.

The chancellor erred in characterizing Debbie's interest in stock and limited partnerships held by Tim as a "contingent interest." (T2.164, 168-69, 196). In *West I,* this Court held the PSA is unambiguous. The PSA states: "it is the intention of both parties, to make a present transfer to Wife of a one-half (½) vested equitable ownership interest in said properties as a division of martial (sic) assets, while married, and this Agreement constitutes an existing equitable lien to Wife of one-half (½) of said properties." (R.E. 15-16). This Court held Debbie was "entitled to equally share" Tim's stock and limited partnership interests in the West Entities. *West I* at ¶16, 17.

The chancellor erred in finding the "Coastal loans" and Tim's "113 account receivables" were loans rather than constructive distributions. Tim and his brothers control the West Entities; the amounts advanced was of significant magnitude, exceeding $1,400,000; there was no limitation on the amounts advanced; there was no valid security given for the funds advanced; there was no set maturity date; there was no effort to force repayment; Tim was not in a position to repay the loans; and, there was no proof of substantial repayment by Tim other than by "journal entities" which Tim knew nothing about.

The chancellor erred in calculating the amount of past due alimony owed to Debbie. The chancellor found that since Tim's "113 account receivables" constituted a true loan, payments in the form of distributions which were used to reduce the balance of Tim's 113 account must be included in determining the alimony arrearage. However, the chancellor failed to include distributions used to reduce Tim's 113 account in determining the alimony arrearage. The chancellor's judgment should be reversed and rendered to increase the amount of past due alimony through December 31, 2005 from $558,808 to $806,099. The chancellor also erred in calculating past due alimony from January 1, 2006 through June 30, 2008. The chancellor should have found that Debbie was entitled to additional past-due alimony for that period in the amount of $327,253, plus interest.

While the chancellor properly awarded Debbie attorneys fees, he erred in failing to order that the award of attorneys fees in the Final Judgment would bear interest from the date of the Judgment as provided by Miss. Code Ann. §75-17-7.

The chancellor correctly found that Tim breached the Death Benefit Agreement ("DBA") by removing Debbie as the sole beneficiary, but erred in holding Tim's breach of the DBA was moot. The DBA provided for a non-assignable death benefit to Tim's designated beneficiary. It does not provide for a unilateral termination by West Quality. Debbie had a vested ownership interest in the DBA which could not be changed by Tim or West Quality without her consent.

The chancellor erred in awarding child support payments to Tim retroactive to July 1, 2001. In his post-remand pleadings, Tim argued that the payments should be retroactive to December 2007. However, the Court's Judgment made the payments retroactive to July 1, 2001, since Tim, through attorney Robert Sullivan, who actually represents the West Entities and not Tim, filed a motion seeking modification of child support in July 2001. Tim's July 2001 claim for modification was abandoned, since Tim made no effort to prosecute or appeal his initial claim for support.

The chancellor erred in granting the West Entities motion to dismiss. In *West I,* ¶44, this Court held transfers from the West Entities to Tim may be fraudulent conveyances. The West Entities were proper defendants to Debbie's fraudulent conveyance claim. There is no legal basis for the chancellor's holding that a loan from a corporation to a shareholder cannot be a fraudulent conveyance as a matter of law.

The chancellor erred in awarding attorneys fees to the West Entities since the motion to dismiss was granted in error. Even if the chancellor correctly granted the motion to dismiss, Debbie had some hope of success in asserting a fraudulent conveyance claim against the West entities based upon *West I,* which held that the transfers at issue may have been fraudulent conveyances.

VII. LEGAL ARGUMENT

A. Standard of Review.

This Court will not disturb the findings of a chancellor when supported by substantial evidence, unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied, *Sanderson v. Sanderson,* 824 So.2d 623, 625-626 (Miss. 2002). However, it will not hesitate to reverse should it find that the chancellor was manifestly wrong, abused its discretion, or applied an erroneous legal standard. *Brown v. Brown,* 817 So.2d 588, ¶6 (Miss. App.2002). Further, this Court applies a *de novo* standard of review regarding legal questions. *Wilburn v. Wilburn,* 991 So.2d 1185, 1190 (Miss. 2008).

B. The chancellor correctly applied the "law of the case" doctrine.

Tim and the West Entities[2] claim the chancellor erred in applying the law of the case doctrine regarding Debbie's interest in stock and limited partnership marital assets, and in finding that Debbie

[2]The West Entities filed their brief on June 1, 2009. The West Entities' brief essentially tracks and duplicates the arguments made by Tim in his principal brief on the law of the case and the failure of the chancellor to void a portion of the PSA. Debbie's brief and argument on those issues is in response to the briefs of both Tim and the West Entities.

was entitled to share in stock and limited partnership distributions paid to Tim. Tim makes three arguments: a portion of ¶17 in *West I* constituted dictum (App. 22-24[3]; App.WE. 12-20); the parties, facts and issues were different in *West II* (App. 24-27); and, application of the law of the case doctrine leads to "unjust results or manifest injustice." (App. 27-29).

The "law of the case" rests upon principles of res judicata. *Continental Turpentine and Rosin Co., et al. v. Gulf Naval Stores Co.*, 142 So.2d 200, 206 (Miss. 1962). Once a controlling decision is established, it is the law of the case between the same parties in the same case so long as there is a similarity of facts. *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991, ¶97 (Miss. 1997).

The issues of what constituted the parties' marital assets and what Debbie was entitled to receive under the PSA were the critical issues resolved in *West I.* The PSA provides that Tim and Debbie agreed to "share equally" Tim's business and employment income and apportion the parties taxes in such a way that "each party will net the same amount." (A.R.E. 10-11).

The PSA states that Debbie "is entitled to and shall be vested with one-half (½) of all existing marital assets, including, but not necessarily limited to, stocks, limited partnerships and business assets." It further provides that "[Tim] acknowledges, and it is the intention of both parties, to make a present transfer to [Debbie] of a one-half (½) vested equitable ownership interest in said properties as a division of martial (sic) assets, while married, and this Agreement constitutes an existing equitable lien to [Debbie] of one-half (½) of said properties." (A.R.E. 15-16).

In *West I,* this Court carefully considered the PSA and held the provisions regarding alimony and division of marital assets meant exactly what the parties stated in their agreement, noting that "the general purpose of the agreement was for Tim to provide one-half of his various forms of income to Debbie." Regarding the division of marital property, this Court found "Debbie is entitled

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[3]References to Tim's Brief are abbreviated as "App. ___." References to the West Entities Brief are abbreviated as "App.WE. ___."

to one-half of all existing marital assets, including, but not limited to, stocks, limited partnerships, and business assets." Finally, the Court specifically found that Debbie was entitled to share Tim's interest in the West Entities: "[t]he only remaining assets within the *parties' definition of marital assets* are Tim's interests in [the West Entities]. Pursuant to the terms of the [PSA], *Debbie is entitled to equally share these assets. . .*" *West I*, ¶16,17 (emphasis added).

This holding is the central ruling in *West I* and is obviously not dictum, but rather, the unanimous decision of this Court in *West I.* On remand, the chancellor correctly recognized the parties definition of their marital assets was binding on the parties:

> THE COURT: Well, it doesn't matter if they were marital assets or not at pre-divorce. What matters is what the agreement says. And if they agreed on a division of assets which were non-marital, they have a perfect right to contract to do that. And I don't think I can go behind the agreement and start saying, well, wait a minute, his interest in West Quality Foods was non-marital or this portion of it was non-marital. Because by virtue of this contract, it became marital is what I'm saying. I don't think I can go behind the contract as to specific assets mentioned in this contract (T2.17)

The parties, facts and issues in *West I* are the same as in *West II.* The parties at trial were the same since the West Entities were dismissed before trial commenced in *West II.* Even if the West Entities remained as defendants in *West II*, it would only be for purposes of determining the validity of Debbie's fraudulent conveyance claim. The facts were the same. Tim's testimony and exhibits regarding his marital property claim are virtually identical. (*compare,* T1.Exs. 101-105,108 -109 with T2.Exs. 128 - 132, 136; *compare*, T1. 406-07 with T2.1054-57). Tim's testimony regarding his distribution claim was also virtually identical. (Compare, T1404-05 with T2.1065-66). These were the primary issues resolved in *West I.*

Tim's claim regarding the additional matters litigated by the parties in *West II* misses the mark completely. The chancellor considered additional issues in *West II.* However, Tim is not complaining about the new issues raised in *West II*, but the effect of this Court's ruling in *West I*

regarding how marital assets were determined and his claim regarding business income in form of distributions. Those issues were decided in *West I* and are controlled by the law of the case.

Tim and the West Entities also claim that application of the law of the case would be "manifestly unjust." In *Brewer v. Browning*, 115 Miss. 358, 364, 76 So. 267, 269 (1917), this Court held that it may reverse a prior decision on a second appeal if the first decision was "manifestly wrong." However, there is nothing in *West I* that is "manifestly wrong."

Tim's claims regarding the tax effect of the PSA was considered and rejected in *West I*, ¶25-27. Tim's argument for the "unjust" application of the law of the case is based on the purported difficulty in calculating the amount due under the PSA. The PSA provides the parties will receive the same net income after taxes and obligated them to "cooperate fully in achieving that stated goal." Debbie's expert calculated the alimony arrearage based on Tim's tax returns and K-1s, which are subject to ready verification. (T2. 563-566; T2Ex.101A and 101B). In contrast, Tim's experts used an analysis intended to minimize the sums due Debbie by characterizing distributions as "cash distributions" "non-cash distributions", "tax distributions" and "journal entries." (T2. 552, 811-817). The characterization of Tim's distributions as reflected on his K-1s as something other than distributions is an issue to be considered by this Court in determining whether the chancellor awarded the correct amount of past due alimony to Debbie as discussed below. It is not a basis for finding that application of the law of the case doctrine would be manifestly wrong.

This Court held that the PSA was "neither procedurally nor substantively unconscionable." *West I*, ¶27. Tim's claim that *West I* was "manifestly unjust" is simply part of his continuing refusal to accept the ruling in *West I*. Changing the argument from "the PSA is unconscionable" to "the PSA is manifestly unjust," does not alter the outcome or this Court's ruling in *West I*.

1. *Tim's claim that Debbie is not entitled to a share of Tim's distributions under the PSA is barred under the law of the case.*

Tim claims the PSA was never intended to reach distributions from the West Entities. This Court has already determined that "the general purpose of the agreement was for Tim to provide one-half of his various forms of income" *West I*, ¶16 and that Tim "agreed to give Debbie 50% of his diverse forms of income" *West I*, ¶25. This Court held that Tim breached the PSA when he unilaterally stopped paying Debbie her share of distributions in 2000, *West I*, ¶ ¶ 2, 3.

Debbie received her share of business distributions from the parties' divorce in 1994 until Tim stopped paying Debbie business distributions in 2000. (T1.Ex.38-40, 49, 58, 67,78; T2. Exs. 99,118,119,121124,153). In response to Tim's arguments in *West I* that he never intended Debbie to receive any portion of distributions, this Court held:

> Nothing demonstrates the overall clarity of Tim and Debbie's agreement more plainly than the simple fact that they managed to comply with the agreed property settlement agreement for over five years before Tim decided he would no longer respect the agreement. However vague, unintelligible, and contrary to his original intent Tim may now try to cast the substantive provisions of the property settlement agreement, the extrinsic evidence of his compliance with the provisions for nearly a decade eviscerates this argument of any credibility. *West I*, ¶18.

Tim's claim is barred by the law of the case doctrine. Tim's failure to accept the decision in *West I* is best exemplified by his claim that Debbie owes him $257,830.00 in overpayment of alimony based on a "scenario" proposed by James Koerber. (App. 31). What Tim fails to mention is that Koerber testified that a calculation based on how the parties complied with the agreement for five years, as addressed in *West I*, would have to include Tim's distributions. (T2.782).

2. *Tim's claim regarding the parties' definition of marital assets is barred by the law of the case doctrine.*

Tim also attempts to re-litigate what constituted marital assets. (App. 35-36). As discussed above, that issue was decided in *West I*, ¶16,17. The chancellor recognized the same point on

remand. (T2.17). Tim's argument is barred by the law of the case doctrine and should be summarily rejected by this Court.

C. The chancellor did not err in failing to void the PSA due to the West Quality shareholder agreement, but did err in refusing to find that Debbie had an equitable interest in the West Entities as provided by the PSA.

The PSA provides that Tim transferred to Debbie "a one-half (½) vested equitable ownership interest" in the West Entities and that the PSA constituted "an existing equitable lien to Wife of one-half (½) of said properties." (A.R.E. 15-16). This Court considered this provision and held it was unambiguous, noting Debbie was entitled to "equally share" Tim's interest in the West Entities. *West I*, ¶16, 17.

On remand, the chancellor recognized this provision, but concluded the 1993 West Quality stock agreement (R.E. 42-45) prohibited Tim from transferring an equitable interest in the West Entities to Debbie. The chancellor characterized Debbie's interest as a "contingent interest." (T2.164, 168-69, 196). Tim, the West Entities and Debbie all appealed the chancellor's ruling.

The West Entities and Tim argue, as Tim did in *West I*, (T1.46, 50-51), the chancellor should have voided the division of marital assets provision of the PSA since Tim's transfer of an equitable interest was barred by the West Quality shareholder agreement, the by-laws of Coastal Express and the limited partnership agreements of the West limited partnerships. (App.31-35; App.WE. 20-24).

The chancellor erred in limiting Debbie's interest to a "contingent interest." The chancellor cited no authority for his conclusion that Debbie only had a contingent interest. Under Mississippi law, a present right to a future possession, even if that right may be defeated by some future event, contingent or certain, is a vested right. In contrast, a contingent right is one subject to a condition is precedent which cannot vest until that contingency has happened or been performed. *In re Estate of Anderson*, 541 So.2d 423, 428 (Miss. 1989). Here, the PSA provided that Tim conveyed to

Debbie "a one-half (½) vested equitable ownership interest in said properties as a division of marital assets, while married, and this Agreement constitutes an existing equitable lien to Wife of one-half (½) of said properties." (A.R.E.15-16). Debbie has a vested equitable interest as opposed to a contingent interest.

The West Quality stock agreement (T2.Ex. 66, R.E.163-83), by-laws of Coastal Express (T2.Ex. 70, R.E.225-33) and the limited partnership agreements of West Leasing Company, West Brothers Leasing Company, and West Family Leasing Company (T2.Exs. 67,68, 69, R.E.184-97,198-210, 211-24) do not prohibit the transfer of an equitable interest. The stock agreement simply provides that before a transfer of stock is registered on the corporate stock ledger, the transferee must give the corporation a right of first purchase. (R.E. 165-66). The Coastal Express, Inc. by-laws provide, in part, as follows: "Section 8. All sales or transfers of stock are subject to the prior approval of the Board of Directors of Coastal Express, Inc." (R.E. 226).

The limited partnership documents for West Leasing Company ,West Family Leasing Company, and West Brothers Leasing Company (T2.Exs. 67, 68, and 69) contain identical provisions which provide that if a partner desires to transfer his partnership interest to a third party without the consent of the Partnership, the remaining limited partners have a right of first refusal before the transfer becomes effective. (R.E. 186-93, 199-206, 212-19, Art. 11, §11.2). In the case of transfers by "any voluntary or involuntary manner . . . under judicial order . . . " the purchaser is required to grant the remaining partners an option to purchase on the same terms as if the selling partner had died. (R.E. Art. 11, §11.6). Article 11, §11.3 provides for a 120 day option to the remaining partners and the family of the deceased partner on the death of a partner. Under §11.3, the purchase price for the limited partnership interests is the appraised fair market value of the partnership interest, with the purchase price paid in ten annual installments under an interest bearing promissory note secured by the partnership asset. (See, T2.Exs. 67, 68, 69).

Corporations may impose restrictions on the transfer or registration of shares of stock on their books through its articles of incorporation, bylaws or by agreement. A restriction may obligate a shareholder to first offer the shares to the corporation or other shareholders, obligate the corporation or other shareholders to purchase the stock, require that the corporation approve a transfer, if not manifestly unreasonable, or prohibit the transfer of shares to certain persons or classes of persons, if not manifestly unreasonable. Miss. Code Ann. §79-4-6.27; *Fayard v. Fayard*, 293 So.2d 421,423-24 (Miss. 1974). Similarly, a limited partnership interest is assignable except to the extent as provided by the limited partnership agreement. Miss. Code Ann. §79-14-702.

The *Fayard* Court held the following should be considered in determining whether a restriction is an unreasonable restraint on alienation, and therefore, unenforceable:

> (1) The size of the corporation, (2) the degree of restraint on the power to alienate, (3) the time the restriction is to remain in effect, (4) the method used in determining the transfer price of shares, (5) the likelihood of the restrictions contributing to the attainment of corporate objectives, (6) the possibility that a hostile shareholder would injure the corporation and (7) the likelihood of the restriction promoting the best interest of the enterprise as a whole. *Fayard* at 424.

No evidence was offered at trial why the absolute bar on transfers of Coastal Express stock without the consent of the corporation's board of directors was required, particularly in light of the "first option" restrictions in the stock agreement and limited partnership agreements. The restriction contained in the Coastal by-laws is manifestly unreasonable since it absolutely prohibits transfers to third parties without the prior approval of the Board of Directors. The degree of restraint is absolute, the restriction is unlimited in time, there is no method for determining the transfer price of shares and there is no evidence that the restriction would contribute to the attainment of corporate objectives. There is no basis for finding that a transfer of stock would result in an injury to the corporation or promote the best interests of the corporation.

More importantly, Tim had not transferred or disposed of legal title to any share of stock or limited partnership interest to Debbie. Tim is the registered owner of the West Entities interests.

Debbie does not own any shares of stock or limited partnership interest, but rather, owns an equitable interest in half of the stock and limited partnership interest held by Tim for her use and benefit. Since legal title to the stock and limited partnership interests are held by Tim, Debbie's equitable interest has no effect on the ownership or management of the West Entities. Debbie has no ability to control the affairs of the corporations or partnerships as a stockholder or limited partner.

Mississippi law expressly recognizes that, notwithstanding conveyance restrictions placed on stock by a corporation or its shareholders, a stockholder can convey an equitable interest in stock subject to a stock restriction agreement while retaining legal title as the stockholder on the books of the corporation. In *Burns v. Burns*, 789 So.2d 94, ¶ 21 (Miss. App. 2000), the Court held:

> Although predating the *Fayard [v. Fayard*, 293 So.2d 421 (Miss. 1074)] opinion, the Mississippi Supreme Court discussed a restriction which was closely analogous to the restriction on the present stock certificate. *See Jackson Opera House Co. v. Cox*, 188 Miss. 237, 192 So. 293 (1939); *Scherk v. Montgomery*, 81 Miss. 426, 33 So. 507 (1903). In both of these cases, the Mississippi Supreme Court determined that "any person entitled to a certificate of stock in a corporation may assign his right, and the assignment is good between the parties, *although not evidenced by a transfer on the stock of the company." Jackson Opera House*, 188 Miss. at 250-51, 192 So. at 295 9 (citing *Scherk*, 81 Miss. at 429, 33 So. at 508) (emphasis supplied by *Burns* Court). "We cannot support the contention that a sale of the stock, as between the parties, cannot be made except by actual transfer on the books of the company. This is for the convenience of the corporation ..." *Scherk*, 81 Miss. at 437, 33 So. at 508.

That is exactly the situation here. Tim transferred an equitable ownership interest in the West Entities to Debbie before the parties divorced. The transfer of an equitable ownership interest in the West Entities is enforceable. Debbie is entitled to the benefits of her equitable ownership interest, including all distributions and other benefits paid to Tim as the legal holder of her equitable interest. The holding in *Burns* is consistent with treatise law.[4]

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[4]See, Fletcher, *Cyc. Corporations* §5497(between a transferor and a transferee, the transfer of an interest not registered on the corporate stock ledger gives the transferee a "perfect equitable title."); Rhodes, *Transfer of Stock*, 6th ed.(1985), §4:3("It is recognized everywhere that, as between the record holder and his assignee, complete title is vested in the assignee without a transfer of the stock on the books of the corporation.")

Tim's reliance on *Warman Broadcasting, Inc. v. NAACP Special Contribution Fund*, 30 Pa.D & C.3d 648 (Penn. Com. Pleas, Fayette Cty., 1983) and *Central State Bank v. Albright*, 737 P.2d 65 (Kan. App. 1987) misses the mark. *Warman* is an un-appealed decision from a Pennsylvania trial court with no precedential value. Further, it involved the transfer of legal title to stock, not the transfer of an equitable interest. It has no application here. *Albright* held a lien granted to a bank on stock in a professional dentistry corporation was void since Kansas law limited transfer of professional corporation stock to a "qualified person," defined as "any natural person licensed to practice the same type of profession which any professional corporation is authorized to practice." *Albright*, at 177-78, citing K.S.A. §17-2712. The West Entities are not professional corporations. *Albright* adds nothing to an analysis of this issue.

While *Warman* and *Albright* provide no guidance, courts addressing this issue have held that a divorce judgment can transfer equitable title to stock notwithstanding the existence of a stock restriction agreement. In *McGinnis v. McGinnis*, 920 S.W.2d 68, 69-71 (Ky. App. 1995) the court held a transfer restriction on closely held stock does not prevent a husband from transferring an equitable interest in the stock to a wife as part of a divorce proceeding. In *Park Bancorporation v. Sletteland*, 513 N.W.2d 609, (Wisc. App. 1994) the court held a former spouse had an equitable ownership interest in stock by virtue of the parties property settlement agreement in their divorce action, even though his former spouse retained legal title to the stock.

While the chancellor correctly held Debbie had an interest in the West Entities, he committed manifest error in construing her interest to be a "contingent interest" instead of an equitable interest with an equitable lien as provided by the PSA.

D. The chancellor correctly found Tim in contempt.

1. *Inability to pay*

This Court instructed the chancellor to determine whether Tim should be held in contempt for his failure to abide by the terms of the PSA and should whether there had been a material change in circumstances which clearly resulted Tim's inability to pay. *West I*, ¶ 50). Tim abandoned his inability to pay as a defense during the remand hearing:

> The Court: Listen to this. They are not asserting inability to pay alimony as a defense to the claim for contempt. Is that a correct statement, Mr. Caves?
> Mr. Caves: Yes, sir. (T2.1261).

Based on Tim's admission that he had the ability to pay as provided by the PSA, the chancellor properly found Tim in civil contempt.

2. *Advice of Counsel*

In an effort to avoid contempt, Tim seeks to blame on his prior counsel, claiming that one of his former attorneys, Dennis Sharp, advised him to unilaterally stop paying Debbie the portion of his income derived from corporate and partnership distributions his business in 2000. (App. at 45-46). Tim testified Sharp's advice to him was contained in a letter dated January 28, 2000. (T2.Ex. 146) (T2.1099). Sharp's letter does not advise Tim to unilaterally stop making payments. In fact, Sharp testified that Tim's unilateral reduction in payments was "inconsistent" with the advice contained in his letter to Tim. (T2.892-93). Sharp testified that he had no recollection of instructing Tim to unilaterally stop paying what was owed under the PSA. (T2.891-93). Sharp had no recollection of how many times he talked to Tim or of even meeting Tim. (T2.889). There is no basis for Tim's claim that he relied on Sharp's advice in failing to meet his obligations.

Tim also argues he also relied on advice of James Becker, his trial counsel in *West I.* (App. at 46). However, Becker testified that he never instructed Tim to stop paying Debbie. (T2.Ex.185, P.16-17). Becker further testified that he advised Tim to save as much as he could in the event this

Court upheld the PSA. (T2.Ex.185, P.18-19; T2.Ex.186). Tim admitted that he never saved anything to pay the past due alimony despite Becker's advice, (T2.1440), and instead squandered vast sums on items such as internet gambling, in-house massages, and $434,507.04 which he had "no idea" where or what it was spent on. (T2.1212, 1455-1458; T2.Ex. 48).

Advice of counsel is not a defense to contempt, but may be taken into consideration in determining whether a defaulting party should be held in contempt. *Ladner v. Ladner*, 206 So.2d 620, 623 (Miss. 1968); *Matter of Estate of Holloway,* 631 So.2d 127, 134 (Miss. 1993); *Smith v. Little*, 843 So.2d 735, ¶10 (Miss. App. 2003). In *R.K. v. J.K.*, 946 So.2d 764, ¶42 (Miss. 2007), the Court held a chancellor has the discretion to not hold a parent in contempt who relied on advice of counsel, citing *Mizell v. Mizell*, 708 So.2d 55 (Miss. 1998).

Contempt is a fact issue decided on a case-by-case basis, *R.K v. J.K.*, at ¶39. Chancellors have substantial discretion in deciding whether a party should be held in contempt. Here, the chancellor properly exercised his discretion in rejecting Tim's advice of counsel defense to the contempt claim. The chancellor's finding was amply supported in the record as discussed above. As noted by the chancellor, (R.E. 69), even if Tim believed the amount he had been paying was incorrectly calculated, he could have filed a modification claim. He failed to do so and therefore had to "make out a clear case of inability to pay", which he failed to do. *Howard v. Howard*, 913 So.2d 1030, ¶17 (Miss. App. 2005).

3. *Reliance on the chancellor's 2002 judgment.*

Tim also argues, without citation of any authority, that he was entitled to rely on the chancellor's prior judgment voiding the alimony and division of marital assets provisions of the PSA as a defense to the contempt citation. In *Lebleu v. Jim Murphy & Associates, Inc.* 557 So.2d 526, 529 (Miss. 1990) this Court held the effect of an unqualified reversal of a judgment is to nullify it completely and to leave the case standing as if the judgment had never been rendered. The same rule

applies here. This Court's ruling in *West I* was a general and unqualified reversal of the lower court's judgment voiding the alimony and division of marital assets provision of the PSA. The effect of *West I* was as if the chancellor's judgment and interlocutory order "had never existed."

The chancellor properly relied on *Lebleu* to reject Tim's defense to the contempt action based on the prior judgment of the chancellor, (R.E. 71). There was no manifest error in the chancellor's determination that Tim was in contempt. The contempt citation should be affirmed by the Court.

E. The chancellor correctly denied Tim's request for modification.

Tim argues the chancellor erred in failing to grant his request for a modification. (App. 15-20). Tim correctly notes the chancellor held the PSA was self-modifying. (R.E. 42). This Court reached the same conclusion in *West I*, ¶30, noting, the PSA "appropriately contained an escalation clause, protecting both Debbie and Tim in the case that Tim's salary fluctuates during the prescribed time for payment of alimony." Tim argues that he should have been granted a modification due to his decreased earning capacity, an adverse change in his health and a decrease in Debbie's expenses.

1. *The chancellor did not apply an erroneous legal standard.*

Tim claims the chancellor erred in failing to address the "*Armstrong* factors" in considering his modification claim. A chancellor is required to specifically consider and apply the factors discussed in *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993) when determining alimony upon granting a divorce. However, the standard for a modification is whether there has been a material change in circumstances since the date of the award, instead of a balancing of the *Armstrong* factors. *Reid v. Reid*, 998 So.2d 1032, ¶22-23 (Miss. App. 2008). The chancellor did not commit manifest error in failing to make specific findings regarding the *Armstrong* factors.

To prevail on his modification claim, Tim had to prove, by clear and convincing evidence, there had been "some change which resulted from 'after-arising circumstances of the parties not reasonably anticipated at the time of the agreement' and furthermore, the change must 'be one that

could not have been anticipated by the parties at the time of the original decree.'" *Makamson v. Makamson*, 928 So.2d 218, ¶8 (Miss. 2006). Additionally, the grounds claimed for modification must not be caused by the willful or bad faith actions of the complaining party. *Dill v. Dill*, 908 So.2d 198, ¶10 (Miss. 2005). Tim failed to meet his burden of proof.

2. *Tim lacked "clean hands" and was not entitled to a modification.*

Tim's modification claim should be barred by the "clean hands" doctrine. (CP.1009). The chancellor failed to make a finding on whether Tim's modification claim was barred by the "clean hands" doctrine. Where no finding of facts are in the record, this Court presumes the chancellor resolved all finding in favor of the appellee. *Rogers v. Rogers*, 662 So.2d 1111, 1116 (Miss. 1995).

Before reaching the merits of a modification claim, a party seeking modification must establish his "clean hands." If a party is in substantial arrears of his obligations under a PSA, and fails to prove either compliance with the PSA or that compliance was wholly impossible, a court must find he has "unclean hands" and deny the modification request. Proof that performance was "wholly impossible" must be made with particularity and not in general terms. *James v. James,* 724 So.2d 1098, ¶ 21-22 (Miss.1998); *Harris v. Harris*, 879 So.2d 457 , ¶28 (Miss. App. 2004).

The personal bills of a payor do not justify a default unless the payment was necessary to continue the payor's business or occupation "because his wife's right to alimony is a prior and paramount claim on his earnings." *Gregg v. Montgomery,* 587 So.2d 928, 932 (Miss.1991). To prove impossibility of performance a party must prove "he earned all he could, that he lived economically, and paid all surplus money above a living on the alimony decreed to his wife." *Howard v. Howard, supra* at ¶26-27 (*Miss. App. 2005*); *Lane v. Lane,* 850 So.2d 122, 126 (Miss. App. 2002). Monies spent for discretionary personal expenses is evidence that a party seeking a modification failed to show it was "wholly impossible" to meet his obligations. *Harris, supra* at ¶32.

Ability or inability to pay is also established by showing income, assets, liabilities and net worth. *Nicholas v. Nicholas,* 841 So.2d 1208, ¶22 (Miss. 2003).

As noted in *West I,* Tim failed to perform his obligations under the PSA. *West I,* ¶¶ 2,3. Thus, the issue is whether Tim proved it was "wholly impossible" to perform his obligations under the PSA "with particularity and not in general terms." Tim admitted he had the ability to pay the sums due Debbie as they accrued. (T2.1261). Tim also failed to prove his performance was impossible with particularity. In fact, Tim dissipated hundreds of thousands of dollars between 2000 and 2005, including *$434,507.04 of which Tim testified he had "no idea" where the money went.* (T2.Ex.48; T2.1212, 1455-1458). While Tim claimed he was unable to take trips between 1999 and "here recently," (T2.927), the evidence was that he took numerous vacation trips to Destin, Disney World, Las Vegas, Park City, Utah, Key West, Talladega, Cancun, Daytona Beach, Pensacola, St. Marteen's in the Caribbean, the Virgin Islands and elsewhere. (T2.1209-1215; T2.Ex. 44, 45). Tim failed to fully perform his obligations under the PSA and failed to prove with particularity that his performance was impossible. He lacks "clean hands and his claim for modification should have been denied by the chancellor on that basis before the merits of his claim was even considered.

3. *Change in Tim's financial status.*

The parties anticipated that Tim's income would fluctuate at the time of their divorce, which is why payments to Debbie were based upon a percentage of income rather than a fixed amount. As this Court noted, this provision was intended to protect Tim if his income decreased and protect Debbie in the event Tim's income increased. *West I,* ¶30. The chancellor correctly determined the PSA to be self-modifying. (R.E.76).

Tim makes two claims regarding his financial status, first, his removal from the West Quality board in October 2006 resulted in lost income of $60,000 annually and second, that his distributions "dried up." The stated reason for Tim's removal from the board was that "by entering into this PSA

agreement Tim West clearly violated the preexisting stock agreement." (T2.Ex.7, p.2). Interestingly, the board minutes contemplate that Tim would be returned to the board at "such time the litigation involving the Corporation is resolved and Tim is capable of resuming his position by fulfilling his job responsibilities and duties." (T2.Ex.7, p.3). As the chancellor noted, since Tim was no longer receiving a board member payment, his obligation to Debbie decreased accordingly, which is exactly how the PSA was intended to work by the parties. (R.E. 76).

While Tim stopped receiving a board fee in October 2006, his salary increased significantly from $117,497 in 2004 to $130,286 in 2005 to $155,325 in 2006 to $155,977 in 2007. (T2.Ex. 37, CP.2261). A summary of deposits into Tim's bank account reveals that Tim deposited $1,981,203.50 into his personal bank account from January 2000 to May 2006, an average monthly deposit of $26,190. (T2.Ex. 47). In addition to his salary and distributions, Tim also received the benefit of an additional $358,490 in payments from West Quality in 2006 alone on his "113 account." (T2.Exs.59, 60, 180). Between January 2000 to November 2006, Tim received $3,983,461.12, either directly, or indirectly, as payments by the West Entities for his personal expenses. (T2.Ex. 183). Tim also received a "non-cash" distribution of $696,000 on December 25, 2006 in addition to his other distributions in 2006. (CP 2263).

Tim's claim that his distributions "dried up" is contradicted by his K-1s and tax returns which reflect distributions to Tim from 2000 to 2005 of $1,021,264. (T2.Exs.37). Tim also received $475,864 in distributions in 2006 and $115,997 in distributions in 2007 (CP.2261).

Tim's net worth also increased from $3,308,733 on December 31, 1999, (T2.Ex. 125), to $4,117,108 in August 31, 2006, (T2.Ex. 6). Tim's assets also increased from $4,072,894 in December 1999 to $6,120,293 in August 2006, even though the financial statements value his interests in the West Entities as "book value," rather than fair market value, and his 2006 financial

statement fails to include his interest in West Investments.[5] Of his $2,003,185 in liabilities listed in his August 2006 financial statement, $1,587,127 consisted of the Coastal loans and his 113 account which Debbie contends are actually constructive distributions as discussed below.

Tim claims he depleted his savings to pay experts, sold a motorcycle and a motorhome "in order to defend the litigation, " (T2.917-21) and was "worse off" financially in 2007 than he was in 1999. (T2.917-21, 926-27). Those claims are unsupported by the record. In fact, Tim admitted that he had not personally paid any attorneys fees and had no idea how much he owed his attorney. (T2.1225-27). He also admitted his standard of living had not changed from 1999 to 2007. (T2.925-26). Tim's received, directly and indirectly, $3,983,461.02 from January 2000 to November 2006, while increasing his net worth from $3,308,733 to $4,117,108. The evidence shows Tim was better off, not worse off, financially, as he claimed.

The proof also established that following *West I,* Tim began transferring and purchasing assets in his current wife's name. Tim paid $183,000 for a business called Bayou Gourmet Foods and put it in his current wife's name as a "gift." (T2.1257-58). After purchasing the business Tim then "loaned" it an additional $31,000 to $41,000. (T2.1257-1260). Tim's August 2006 financial statement reflected that he owned $35,000 in automobiles. (T2.Ex. 6). Yet his September 2006 8.05 only reflects two automobiles owned by his current wife. (T.2Ex. 3A). At trial, Tim admitted he paid for both automobiles, as well as automobile expenses for his current wife's children. (T2.1250-54). Tim's 8.05 also reflects a piece of property titled in his wife's name, with a claim she paid for the property. (T2.Ex. 3A). However, Tim admitted that he paid for the property and placed it in his

[5] West Investments owns a half interest in a condominium located in Park City, Utah, purchased for $250,000 (T2.213). West Investments also owns a 50% interest in Best Outdoor, LLC which owns interests in other entities. (T2.213-21; Exs. 18-21). Best Outdoor, LLC had assets valued at $1,719,506.11 and a 2006 net income of $344,439.02 through August 2006. (T2.Ex. 18). West Investments also has a 50% interest in West Mohawk, LLC, which owns a Laundromat and two carwash businesses and a separate vending business called Let's Vend. (T2.221). West Mohawk had assets of $1,071,781.41 with a 2006 net income of $22,407.57 through August 2006. (T2.Ex. 23). Lets Vend has assets of $133,175.12. (T2.Ex. 24).

wife's name. (T2.1248). In April 2006, Tim's wife withdrew $20,000 from a joint bank account with Tim and opened an account solely in her name, (T2.1450), even though as Tim put it, "I make the money; she spends a lot of it."(T2.1232).[6] From April 2006 forward, Tim's payroll checks have deposited into his current wife's account. (T2.1146). The account agreement reflects that Tim is an authorized signer but not an account owner. (T2.Ex. 49). Tim claims he was removed from the account since he did not "want to deal with finances." (T2.1451). Tim claims the funds he earns which are deposited into his wife's account are owned by her. (T2.14651-52). Tim also made a "gift" of a 2.5% interest in West Investments to Childress, one of his experts in this case. (T2.1200).

As noted in *Turner v. Turner*, 744 So.2d 332, ¶14 (Miss. App. 1999), the voluntary transfer of assets by a husband to a new wife raises "the inference of bad faith." Further, the failure of a party to make a full and truthful disclosure of financial information in an 8.05, is an independent ground for contempt since it is effectively "perpetuating a fraud on the court by failing to disclose accurate financial information." *Kalman v. Kalman*, 905 So.2d 760, ¶11(Miss. 2004). Tim's actions in transferring assets to his wife and in failing to make accurate disclosures on his 8.05, provide further support for the chancellor's denial of Tim's modification request.

4. *Change in Tim's mental status.*

Tim also claimed he was entitled to a modification based on his depression. The mental health professionals who examined Tim concluded that Tim did suffer from some degree of depression, although they disagreed about the severity of Tim's depression.[7] The professionals

[6]Tim and his current wife, Theresa, file joint tax returns. Tim's statement that he makes the money is supported by their joint tax returns which reflect no income earned by Theresa from 2000 to 2005. (T2.Exs. 25, 27, 29, 31, 33, 35)

[7]Dr. Danford characterized Tim as having "generalized anxiety and depression"(T2.781). Dr. Welch's psychiatric evaluation at Pine Grove diagnosed Tim with a "major depressive episode, severe, alcohol dependence." (T2.Ex. 96, p.6 of 36). Dr. Paterson's psychological evaluation at Pine Grove found that Tim had "chronic, but mild levels of depression" with a diagnosis of "adjustment disorder with anxiety and depressed mood, dysthymic disorder." (Ex.T2.96, p. 10 of 36). Dr. Hiatt's records make consistent references to Tim's "depression" (T2.Ex. 97) and Dr. Dees diagnosed Tim with "dysthymia" but noted that his "symptoms do not meet the level of severe depression." (T2.Ex. 98).

agreed Tim's depression was *solely* related to this litigation and began immediately after this Court's decision in *West I*. Dr. Danford, Tim's treating doctor, testified this litigation was, in Tim's mind, "his only problem." (T2.981), and that "wanting out of the deal with ex-wife" was Tim's main motivation. (T2.1002-03). The records from Tim's brief hospitalization at Pine Grove note "[t]his gentleman's main difficulty is that he has been married three times and he apparently signed an agreement with his first wife that is quite burdensome to him." (T2.Ex. 96, page 5 of 36). The Pine Grove records also reflect Tim's motivation was to avoid his obligations under the PSA: "[h]e [Tim] indicated that he had signed a form agreeing to split his earnings with her, but now is wanting out of the deal." (T2.Ex. 96, page 8 of 36). Dr. Wood Hiatt began seeing Tim in June 2005 at the request of Tim's attorney. Dr. Hiatt's stated he was seeing Tim due to the "legal battle with his first wife" and that "the issue came to a head in the December 2004 Mississippi Supreme Court decision which upheld her right to continue to demand half of his income." (T2.Ex. 97, 6/28/05 notes).

Tim was also ordered to undergo an independent medical examination by Jesse F. Dees, a clinical psychologist. Dr. Dees' report noted that Tim had an onset of "clinically significant depression in 2004, associated with litigation with his first wife." Dr. Dees concluded that while Tim was depressed, "his current symptoms do not meet the level of severe depression and they would not meet the level of impairment consistent with disability." (T2.Ex. 98).

Tim's depression has not had any effect on the salary he is paid by West Quality, the personal expenses that West Quality pays for him through his 113 account or his business distributions. He continues to be employed at West Quality and his salary increased from $109,927 in 2004 to $155,520 in 2006. (T2.Ex. 100, Ex.3A, 3B). West Quality also pays for Tim's automobile and related expenses in addition to the expenses on his 113 account. (T2.1208, 1250). Tim not only continues to work at West Quality, he also provided highly technical expert consulting services at

$400.00 per hour. (T2.1244-46). Tim's short hospitalization at Pine Grove was completely paid for by his West Quality health insurance. (T2.1377; T2.Ex.96, p.2–8)).

A change in mental status may, under some limited circumstances, warrant a modification. In *Profilet v. Profilet*, 826 So.2d 91, ¶9 (Miss. 2002) this Court held a deterioration of mental status to the extent that a party was receiving disability payments, with multiple hospitalizations and substantial medical unpaid debts, was insufficient to establish that the change could not have been reasonably anticipated. In *Poole v. Poole*, 701 So.2d 813 (Miss.1997) this Court rejected a modification claim from a doctor who claimed he was depressed and drank heavily, and that his condition adversely affected his income, even though he had significant income. *Poole* at ¶ ¶6, 10, 14. In affirming the modification denial, this Court held the doctor continued to be able to work and had substantial income and investments. *Poole* at ¶20-22.

Tim's depression had no effect on his income. He continues to be employed by West Quality. He earns a significant and increasing salary and holds significant assets. The sole source of Tim's depression is his unhappiness in being required to meet his obligations under the PSA. Parties signing a PSA should reasonably anticipate they will be required to comply with the agreement, absent some after-arising circumstances. Tim should have "reasonably anticipated" he would be required to comply with the PSA. Simply because Tim is unhappy and depressed as a result of being ordered to comply with the PSA is not grounds for modification of the agreement.

5. *Change in Debbie's financial status.*

Tim also argues that an increase in expenses for the parties minor child, Marcy, supported his claim for a modification. Tim testified the increased expenses were reflected on T2.Ex.145 (T2.1093-94). The listed items cover a time frame from 2003 to 2006. While Tim did not total the expenses listed in T2.Ex.145, the total for all expenses appears to be $7,258.70, or approximately $1,814 per year. The "increased expenses" include items such fast food charges at Krystal,

McDonald's and Applebee's and gasoline charges. These are clearly not the "extraordinary medical, psychological, educational or dental expenses" contemplated by Miss. Code Ann. § 43-19-101, nor would those expenses form the basis for a modification of Tim's obligations to Debbie in light of the chancellor's award of child support payments to Tim from Debbie.

Tim claims his 8.05 statements proved his monthly expenses exceed his income. (App. 18). Tim submitted three different 8.05 forms. One in September 2006 (T2.Ex. 3A), a second in February 2007 (T2.Ex.3B), and a third in September 2007 (T2.Ex. 195). As discussed above, Tim's 8.05s contain numerous inaccuracies. Tim admitted his 8.05s included the personal expenses of his current wife as well as his own. (T2.1232). Tim admitted his 8.05s include life insurance premiums which are paid by West Quality, but are reflected on his 8.05s as a monthly obligation paid by Tim. (T2.1233-41). Tim's 8.05s also include automobile payments for automobiles owned by his current wife, (T2.1250-51). Tim included monthly note payments for Bayou Gourmet Foods, a business he purchased as a "gift" for his current wife. (T2.1257). In his first 8.05, Tim listed itemized monthly tax and social security deductions of $1,780.00 (T2.Ex. 3A). In his second 8.05, Tim itemized the deductions at $1,481.97.(T2.Ex. 3B). In his third 8.05, Tim itemized the same deductions at $7,854.41. (T2.Ex. 195). However, Tim's September 6, 2007 itemized paystub, (T2.Ex.196), reflects that his actual itemized deductions are $1,076.38. Tim admitted the tax deductions reflected on his third 8.05 were not accurate. (T2.1714-17). As discussed above, Tim's 8.05s also fail to include his 22.5% interest in West Investments as an asset. (Exs. 3A, 3B and 195).

Tim also argues that Debbie's expenses have decreased and she has potential income of $60,000.00 as a realtor. (App. 18-19). Debbie obtained a Florida real estate license in 2004. (T2.14191). Unfortunately, despite her efforts to start a career, Debbie has not been financially successful as a realtor, losing $16,000 in 2004. (T2.Exs.86-92; T2.1509). Debbie submits the Court can take also judicial notice of the current financial crisis which has devastated the real estate market

since 2007. In fact, Debbie was sleeping on the floor of her office and she had no health insurance. (T2.1493-95). While she has received funds from Tim since 2005, following a remand by this Court, she had to sell her home to pay for IRS liens and make payment on her attorneys and expert fees. She was unable to pay normal living expenses. (T2.1500-1501, 1505-08). She has no medical insurance, life insurance, dental insurance or retirement funds. (T2.1511). Debbie is currently paying counsel $3,000 per month, as well as paying her experts throughout this litigation, in an effort to protect her rights under the PSA. (T2.1512-13).

It is true that Tim's actions during the course of this litigation have cost Debbie her home, possessions and savings, and forced her to significantly change her lifestyle to survive Tim's unrelenting attempt to avoid his obligations. Debbie submits that Tim has engaged in a consistent pattern since 2000 to force Debbie to incur substantial attorneys and expert fees, while having his own attorneys and expert fees paid by West Quality, in an effort to bleed her dry and force her to abandon her effort to enforce the PSA.

Tim failed to prove, by clear and convincing evidence, a change resulting from 'after-arising circumstances of the parties not reasonably anticipated at the time of the agreement, that could not have been anticipated by the parties at the time of the original decree. The chancellor was well within his discretion in denying Tim's claim for a modification.

F. The chancellor correctly held that Tim breached the life insurance provision of the PSA and that Debbie should not be held in contempt for withdrawing the cash value from some policies.

Article III(J) of the PSA provides as follows:

> J. Life Insurance: All life insurance policies covering the life of Husband or Wife, now in force, shall be maintained by Husband death benefits shall be paid to the Wife. Wife shall pay one-half of the premiums on the policy with Franklin Life Insurance Company of $260.00 per month. The cash value of this policy may be withdrawn only by the signatures of Husband and Wife. (A.R.E. 17).

Exhibits 78 and 150 describes the life policies on the parties in place as of the date of the PSA, October 19, 1994. (T2.Exs. 78, 150). The following Franklin Life policies were in place in 1994, and subject to the life insurance provisions in the PSA:

Policy	Date	Amount	Beneficiary	Owner	Premium
5542346	6/19/89	$500,000	Debbie	Debbie	$6,900/ annually
5491604	11/7/88	$100,000	Debbie	Debbie	$103.75/monthly
5404084	12/2/87	$50,000	Debbie	Debbie	$50.75/monthly
5317122	1/7/87	$150,000	Debbie	Debbie	$140.75/monthly

Tim acknowledged his obligation to pay the Franklin Life policy no. 5542346, with an annual premium, and one half of the premiums on the Franklin Life policies with monthly premiums, but admitted he breached his obligation. (T2.1025-26). Tim testified that he paid the monthly premium on the Franklin Life policy no.5404084, (T2.1026), but admitted that Debbie was paying the monthly premiums on the remaining Franklin policies (5491604 and 5317122) and that she was paying more than one-half of the monthly premiums she was required to pay under the PSA. (T2.1459-61)

Tim claimed he stopped paying any premiums in 2002, since he did not know what to pay, he believed the chancellor's judgment voided his obligations under the PSA, and that he relied on advice of counsel. (T2.1028). Tim's claims are without merit. The chancellor's decision only voided the alimony and division assets provisions of the PSA, not the remaining provisions of the PSA. Becker, Tim's counsel at the time, advised Tim all remaining provisions of the PSA were in full force and effect. (T2.Ex.185 at 14-15). As discussed above, advice of counsel is generally not a defense to a contempt action, but it may be taken into consideration by a chancellor in determining whether a defaulting party should be held in contempt. *Ladner, supra*, *R.K. v. J.K., supra.* Advice of counsel is not *carte blanche* to unilaterally avoid a contractual obligation.

Debbie, not Tim, made the premium payments on two of the policies nos. 5491604 and 5317122, with a combined monthly premium of $244.50. (T2.1566-1567; T2.Ex.80). After Tim's default, Debbie continued to pay the premiums until June 2003. After Tim breached the PSA,

Debbie withdraw the cash value from those policies to pay for basic living expenses and to continue making premium payments on the policies. (T2.1567-1573; T2.Ex. 80). During the time Debbie made cash withdrawals Tim received cash payments of $521,081 in 2002 and $307,415 in 2003, plus the payments for his personal expenses as reflected in his 113 account, (T2.Ex.37), but only paid Debbie $20,473 in 2002 and $8,000 in 2003 (T2.Ex. 100).

The chancellor determined Tim breached the PSA's insurance provision when he stopped making premium payments and found that Debbie was entitled to the cash value as the owner of the policies. (R.E. 73-74). However, since the PSA was unclear as to what policy or policies Debbie was supposed to contribute towards the premium, the chancellor held that Tim was required to obtain a term policy or policies in the total amount in effect at the time the PSA was entered, with Debbie to pay $130.00 monthly towards the premium(s) as provided by the PSA, which is consistent with the insurance provision. (R.E. 73-74).

This Court will not reverse a chancellor if his findings are supported by credible evidence. *Harris v. Harris*, 988 So.2d 376, ¶1 (Miss. 2008). If a chancellor determines a provision is ambiguous, it should be interpreted in a reasonable manner. *Harris, supra* at ¶ 9-10. A chancellor also has the authority to "fashion an equitable remedy" if unforeseen circumstances frustrate the purpose of the parties' agreement. Bell, *Mississippi Family Law*, §6.12[3] (1st ed. 2005).

The chancellor's interpretation and resolution of the insurance provision was reasonable and equitable. Tim breached the PSA when he stopped making premium payments. Debbie withdrew the cash value, but only from the policies that she paid the premiums on, and then only to pay the premiums due and for basic living expenses. The chancellor's decision to require Tim to obtain the insurance coverage as required, but only in the form of a term policy or polices since the cash value had been withdrawn, was a reasonable, equitable remedy within the discretion of the chancellor. That finding is not manifestly wrong, or clearly erroneous. It should be affirmed by this Court.

G. The chancellor correctly held that Tim breached his duty to provide Debbie with the financial information required by the PSA.

The PSA requires Tim to provide Debbie with financial information on a quarterly basis in order for her to be currently informed of Tim's complex financial status. (A.R.E. 13). This Court held Debbie is entitled to access "those documents revealing financial information (including any corporate documents relating to distribution or salary) which would positively or negatively affect her agreed entitlement to Tim's various forms of income." *West I*, ¶49. Tim claims the chancellor erred in finding that he breached his obligation to provide Debbie by claiming he provided Debbie with financial prior to his breach of the PSA in 2000. (App. 42-43). Tim also claims that he did not materially breach the PSA when he failed to provide the required financial information. (App. 43).

Tim claims the only financial information he has access to is his tax return which he provided to Debbie. (T2.1080-81). Incredibly, Tim denied having access to his own 113 statement which reflects advances made by West Quality for Tim's personal expenses, his own 1099 tax statements, and any information regarding tax payments made by West Quality on his behalf. Tim even claimed he could not provide the 1099 he received for consulting work since once he provided it to the West Quality accountant, it became privileged information of the West Entities. (T2.1089-01). As a shareholder Tim is entitled to review and copy corporate financial records and all records regarding his own interest. Miss. Code Ann. §79-4-16.02. His claims to the contrary are specious.

Childress admitted that he was instructed by West Quality to not provide to Debbie any corporate minutes or financial statements. (T2.426). At the same time, Childress testified that in order to verify the accuracy of his calculations, it is necessary to know what distributions were paid to Tim directly, what distributions were paid to reimburse Tim's 113 account for taxes that were paid, what distributions were paid to reimburse Tim's 113 account for things other than taxes, what the parties' actual taxes are and exactly when any distributions, including distributions to Tim's 113

account, were made. (T2.505-07). Koerber, Tim's second expert, stated the same information would be needed to verify any calculation. (T2.832-36).

The chancellor's finding that Tim breached his duty to provide Debbie with the financial information contained in the PSA is supported by the record and should be affirmed by this Court.

H. The chancellor correctly awarded Debbie attorneys fees, but erred in failing to award interest on the fees awarded from the date of the Final Judgment.

Tim claims the chancellor erred in awarding attorneys fees to Debbie since he should not have been found in contempt and since Debbie has sufficient income to pay attorneys fees. (App. 47-48). Debbie's counsel sought total attorneys fees of $465,445.12. (T2.Ex.105, 106, 197). The chancellor awarded $262,568.53 in attorney fees.

An award of attorney fees in a divorce matter is within the chancellor's discretion. *Grant v. Grant,* 765 So.2d 1263, ¶14 (Miss. 2000). In cases where a party has been held in contempt, attorney fees should be awarded to the party that has been forced to seek enforcement of the court's judgment. *Elliott v. Rogers*, 775 So.2d, 1285, ¶25 (Miss. 2001), citing *Varner v. Varner*, 666 So.2d 493, 498 (Miss. 1995). The chancellor held Tim in contempt and his decision to award attorneys fees was well within his discretion and should be affirmed.

Debbie put on evidence as to each of the factors the chancellor should have considered under *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982) in determining the amount of the fee to be awarded. (T2.1625-76). The chancellor carefully considered the *McKee* factors in determining the amount of fees to be awarded. (R.E. 80-82). The chancellor's decision as to the quantum of fees was supported by substantial credible evidence in the record and should be affirmed.

Even in the absence of a successful contempt action a court may award attorneys fees in a domestic relations matter if a party is unable to financially pay his or her own fees, taking into consideration a disparity in the relative financial positions of the parties. *LaRue v. LaRue*, 969 So.2d 99, ¶42, (Miss. App. 2007). Debbie proved an inability to pay attorneys fees. She is a struggling real

estate agent with virtually no income in addition to the alimony she receives from Tim. (T2.Exs. 87-92). As discussed above, there is also an overwhelming disparity in the relative financial positions of the parties. The chancellor's award of attorney fees is supported by substantial credible evidence.

While the chancellor correctly awarded attorneys fees to Debbie, he erred in failing to assess post-judgment interest on the award of attorney fees. (R.E.47, 25). Pursuant to Miss. Code Ann. §75-17-7 any monetary judgment is required to bear interest at a per annum rate set by the court. An award of attorneys fees following a finding of contempt constitutes a monetary judgment. *Murray v. Murray*, 754 So.2d 1200, ¶9 (Miss. 2000). This Court should reverse and render the chancellor's failure to award interest from and after the date of judgment on the attorneys fees awarded to Debbie and hold that the award of attorneys fees shall bear interest from and after the date of the Final Judgment at the rate of 7% per annum until paid.

I. The chancellor correctly awarded pre-judgment interest on the past due alimony.

Tim claims the chancellor erred in assessing interest on the past due alimony since he disputed he owed any back due alimony and he disputed the amount of past due amount alimony, (App. 48-49), citing *Microtek Med. Inc. v. 3M Co.*, 942 So.2d 122 (Miss. 2006). The Court clarified *Microtek* in *Upchurch Plumbing, Inc. V. Greenwood Utilis. Comm'n,* 964 So.2d 1100, ¶41-43 (Miss. 2007), holding that prejudgment may be awarded "in those cases where the amount due is liquidated when the claim is originally made or where the denial of a claim is frivolous or in bad faith."

Interest on the past due alimony is due not on general principles of prejudgment interest, but rather on the basis that Debbie obtained a vested right in each alimony payment when it came due and she is entitled to interest on each payment. This Court held in *Lewis v. Lewis*, 586 So.2d 740, 742-43 (Miss. 1991) as follows:

> It is settled beyond question by the decisions of this Court that, after alimony has accrued, there is a vested right thereto, and that interest is allowed thereon. [internal

citations omitted]. *Lewis v. Lewis,* 213 Miss. 434, 57 So.2d 163 (1952).

Both of Tim's experts, Childress and Koerber, calculated that Tim owed Debbie in excess of $558,000 through December 31, 2005 (T2.Ex.175).[8] The chancellor noted the same, finding, "Tim did continue the litigation after remand by the Supreme Court despite clear language from the Supreme Court that it had concluded that the parties had operated under the [PSA] since it was entered and Tim's accountant made the calculations as to what Debbie was entitled to share." (R.E. 48-49). The chancellor's award of interest on unpaid alimony is supported by substantial credible evidence in the record and should be affirmed.

J. The chancellor erred in failing to hold that Tim owes a fiduciary duty to Debbie and in failing to find that Tim breached his fiduciary duty by purporting to grant liens to West Quality Food Service, Inc. on Debbie's equitable ownership interest in the West Entities.

Debbie asserted that Tim owes her a fiduciary duty as the legal owner of her beneficial interest in the stock and limited partnership interests of the West Entities. (R.E.121-22). While the chancellor recognized Debbie's claim, (R.E. 39), he did not address the merits of her claim, although the issue was raised numerous times. (T2.41, 55, 100, 158, 179, 1832, 1851, 1864-66, 1870-74). Debbie's post-trial motion also raised this issue, (CP. 2156-57), but the chancellor denied the motion without making any findings regarding her claim. (CP.2315). Whether a fiduciary relationship exists or was breached are questions of law subject to *de novo* review by this Court. *Herrington v. Bodman,* 674 So.2d 1245, 1248 (Miss. 1996); *Peoples Bank & Trust Co. v. Cermack*, 658 So.2d 1352, 1358 (Miss. 1995).

While Tim claimed Debbie fabricated from whole cloth "this fictional concept called equitable ownership that does not exist in the State of Mississippi," (T2.137), Mississippi recognizes

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[8]While Debbie contends that Koerber and Childress failed to include sums in their past due alimony calculations through December 31, 2005, Childress calculated $570,312 was due. (T2.Ex.175, p.2) Koerber originally calculated $534,480 was due, but revised his calculation to reflect that $558,808 was due. (T2.Ex. 175, p. 1, T2.Ex.194).

a division between legal and equitable title to property, with one person holding legal title while another holds equitable title. In such cases the individual holding legal title holds it "for the use and benefit of another . . ." *Simmons v. Simmons*, 724 So.2d 1054, 1057, (Miss. 1998); *Ford v. American Home Fire Ins. Co.*, 192 Miss. 277, 5 So.2d 416, 417 (1942). The holder of legal title to corporate stock owes a fiduciary duty to the beneficial owner or pledgee of the stock. *Gibson v. Manual*, 534 So.2d 199, 202, (Miss. 1988). As noted above, a stockholder can convey an equitable interest in stock subject to a stock restriction agreement while retaining legal title as the stockholder on the books of the corporation. *Burns, supra* at ¶ 21.

In *Retzer v. Retzer*, 578 So.2d 580, 594-95, (Miss. 1990) this Court held that a spouse in control of a closely held corporation owed a fiduciary duty to the former spouse in the management of her interest.[9] The same principle applies here. As a fiduciary, Tim owed Debbie a duty of loyalty and care to avoid dissipation of the assets or distributions in which he held legal title, but which Debbie owned an equitable interest.

In *Sletteland, supra*, a Wisconsin appellate court, considered a similar issue. A husband obtained an equitable interest in stock owned by a wife in a divorce. *Id.* at ¶41-43. The court held the wife could not commit waste by selling the stock since it would result in a substantial diminution of the husband's equitable interest. *Id.* at ¶51. The purported lien from Tim to West Quality on Debbie's equitable interest in some of the West Entities constitutes a substantial diminution in the value of her interest, and constitutes a breach of his fiduciary duty to Debbie.

Tim also breached his fiduciary duty to Debbie by dissipating hundreds of thousands of dollars in distributions that were owed to Debbie and by failing to provide Debbie with her share of distributions. (T2.Exs.48, 71). The chancellor should have held that Tim breached his duty by dissipating Debbie's equitable interest in distributions of cash, real property, life insurance policies,

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[9]Also see, *Queenan v. Queenan*, 492 So.2d 902, 912 (La. App. 1986) (holding a that a fiduciary relationship exists between former spouses that both have interest in a partnership or corporate property.)

"loans" and "account receivables" for his personal use. This Court should reverse and render on this issue, finding that Tim owes Debbie a fiduciary duty and breached his fiduciary duty to her. The Court should order Tim to pay Debbie her half interest in any past or future distribution, whether made in cash, by "journal entry", distribution of real or personal property, or by any other method. The Court should also set aside any purported pledge by Tim of Debbie's equitable interest in the West Entities or remand that issue for consideration by the chancellor.

K. The chancellor erred in failing to impose a constructive trust on Tim's stock and limited partnership interest in the West Entities.

Debbie sought to impose a constructive trust on her equitable interest in the West Entities since Tim breached his fiduciary duty to her by failing to provide her with her share of distributions paid to him by the West Entities and by purporting to grant liens to West Quality on her equitable interest in return for payments used by Tim for his personal benefit. (A.R.E. 23-29). The chancellor denied Debbie's motion without explanation. The chancellor did order that one-half of Tim's future "actual cash distributions" be paid in the registry of the chancery court. (A.R.E. 30-33).

The determination of the existence of a constructive trust is a matter of law. *McNeil v. Hester*, 753 So.2d 1057, 1063 (Miss. 2000) and, therefore, must be considered *de novo* by this Court. A constructive trust may be imposed for an equitable owner's benefit when the individual holding legal title, and receiving benefits derived from the legal title, refuses to provide the equitable owner with the benefits of the property. *Sojourner v. Sojourner*, 153 So.2d 803, 808 (1963).

The purpose of a constructive trust is to prevent unjust enrichment. *Calcote v. Calcote*, 583 So.2d 197, 199 (Miss. 1991). As noted in *Alvarez v. Coleman*, 642 So.2d 361, 367 (Miss. 1994), "[a]ny transaction may provide an appropriate setting for creating a constructive trust; their forms and varieties are 'practically without limit.'[citations omitted]. In *Allred v. Fairchild*, 785 So.2d 1064 (Miss. App. 2001) the Court held "[t]he lack of any intention to fulfill an agreement is strong evidence that a constructive trust would be appropriate. '[A] constructive trust will be raised where

at the time the promise is made the grantee does not intend to perform it..."", citing *Sojourner* at 153 So.2d at 807. In *Alvarez*, the Court imposed a constructive trust on property since the wills entered into between a husband and wife were evidence of an agreement between them concerning the disposition of their property. *Alvarez*, *supra* at 386. The same circumstances are present here.

Despite this Court's holding that Debbie is entitled to "equally share" Tim's interest in the West Entities, *West I*, ¶17, Tim has continued to breach his fiduciary duty to Debbie by failing to protect her equitable interest and by refusing to even acknowledge his obligation to pay Debbie the distribution income generated by her equitable interest in the West Entities. As an equitable owner, Debbie is entitled to the distribution income generated by her assets and protection from dissipation of her assets by Tim. Further, Tim is unjustly enriching himself by converting her share of the West Entities distributions for his own benefit and by accepting monies for his personal expenses from the West Entities, which Tim and the West Entities characterized as "account receivables," and then pledging Debbie's equitable interest in the West Entities as collateral for the "account receivables" without her knowledge or consent. Tim's actions, with the active cooperation of the West Entities, constitutes waste and have resulted in a severe diminution of Debbie's equitable interest.

Tim has no intention of meeting his fiduciary duty and he will continue to convert Debbie's share of the West Entities distributions to his own benefit unless a constructive trust is imposed. Debbie submits the Court should reverse and render the chancellor's refusal to impose a constructive trust and remand with instructions to the chancellor to impose a constructive trust on Tim's interests in the West Entities and to set aside West Quality's purported lien on Debbie's equitable interest.

L. The chancellor erred in holding that the "Coastal loans" to Tim and "113 account receivables" payments made on Tim's behalf for his personal expenses were true loans rather than constructive distributions.

This Court instructed the chancellor to determine if Debbie was entitled to a portion of the $411,000.00 in "Coastal loans" from West Quality to Tim using the analysis set forth by the Fifth

Circuit in *Alterman Foods, Inc. v. United States,* 505 F.2d 873, 877 n.7 (5th Cir. 1974). *West I,* ¶50.[10] In *Alterman, supra* at 876, the Court held "'it is not the jury's function to determine whether the undisputed operative facts add up to debt or equity. This is a question of law.'" citing *Berkowitz v United States*, 411 F.2d 818, 821 (5th Cir. 1969). Since the operative facts here are undisputed, this issue is a question of law and should be considered *de novo* by this Court.

On remand, Debbie discovered that in addition to the Coastal loans, the West Quality shareholders received vast sums from West Quality since 1999 to pay their personal income taxes, insurance premiums, legal fees and other personal expenses. The payments were carried on the West Quality books as account receivables, referred to as "113 accounts." (T2.Exs. 58, 60; T2.235-36, 822, 854-55, 1135). A total of $2,672,643.88 was paid by West Quality through August 7, 2006 for the shareholders' personal expenses. (T2.Ex. 58). A total of $1,156,223.06 was paid for Tim's personal expenses as of November 15, 2006, (T2.Ex. 60), with additional amounts paid thereafter. (T2.495-96, 1420). Tim testified he did not know his 113 account balance at trial. (T2.1411).

The West Quality shareholder agreement, (T2.Ex.66, Art. 12), provides that "[I]n no event shall the corporation distribute less than 55% of corporate income that is taxable to its shareholders for any taxable year." Dick West ("Dick"), West Quality's CEO and Tim's brother, admitted this provision was being breached by West Quality and its shareholders. (T2.230-33).

The chancellor found the Coastal loans were true loans since Tim "had no control over whether West Quality Food Services made the loan to him and he in turn made the loan to Coastal Express;" the loans were for legitimate business purposes and tax reasons; the shareholders did not receive a personal benefit from the loans; interest was charged on the loans; and the shareholders pledged their interest in West Quality as security. (R.E. 59-60). The chancellor made similar findings regarding Tim's "113 account", holding that Tim had no control over whether West Quality

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[10]On remand Debbie limited her claim regarding the Coastal loans to the loans made by West Quality to Tim following the parties divorce in 2004, (T2.Ex. 101), totaling $345,000.

would advance monies for his personal expenses. Tim pledged his stock as collateral, and the corporation forced Tim to repay the loans by making him turn over his tax refunds. (R.E. 65).

Dick admitted the shareholders determined whether funds disbursed by West Quality were carried on the books as distributions or account receivables. (T2.248). While Dick testified in his deposition that Tim determined what items were added to his 113 account,(T2.241-43), at trial he claimed board action was required if a payment on behalf of a shareholder was for "something significant." (T2.241). Dick admitted that there are no board minutes regarding any 113 advances. (T2.245). Tim's testimony was similar. (T2.1412-16). While Tim and Dick claimed the West Quality board, which consisted of West family members, approved all transactions regarding the Coastal loans and 113 accounts, they admitted there are no board minutes regarding any of the 113 account advances. (T2.245, 338, 1416). Dick summed up this omission as follows:

> We don't make board minutes for everything that we do. But we get together as a board and we make decisions and we all know what those decisions are. See, as a closely held company, you normally don't have to answer to people on the outside for your internal actions. Normally we don't have to do that. (T2.338).

Tim expressed the same sentiment, testifying:

> Well, it's a family. That's what it is.
> Well, my question ---
> We do what we want to do. It's a family. (T2.1406).

Courts have consistently held that transactions involving closely held family corporations and their shareholders, "are subject to special scrutiny, particularly where the shareholders actively participate in the management of the corporation." *Dillin v. United States*, 433 F.2d 1097, 1103 (5th Cir. 1970). The transactions here should have been subject to "special scrutiny" since the only shareholders are West family members who actively participate in the management of the West Entities. (T2.269-70; 1418-19). While Tim and Dick testified it was their intent to repay the Coastal loans and 113 advances, the declaration by a shareholder of an intent to repay at some point in the future is insufficient evidence to prove a payment constitutes a loan. *Alterman, supra* at 875-876.

Dolese v. United States, 605 F.2d 1146, 1154 (10th Cir. 1979), *cert. den.* 445 U.S. 961 (1980), involved similar facts, arising out of an acrimonious divorce. The assets at issue were the husband's closely held corporations, which paid for his legal fees in the divorce action, as well as his cars, personal taxes, insurance and miscellaneous expenses. While the husband had a substantial net worth, his assets consisted of his interest in corporations. The payments were carried by the corporations as account receivables. The husband claimed he made payments on the account receivables as evidenced by substantial credits against the account receivables owed to the corporations. He also claimed the account receivables were loans since the corporation charged interest on the outstanding balance. *Dolese, supra* at 1048-1053. While acknowledging that some factors may indicate a loan, the court rejected all the husband's arguments holding the payments were constructive distributions, noting "whereas withdrawal of reasonable amounts are countenanced as a loan if other loan factors are present, excessive and continuous diversion of corporate funds into the controlling shareholder's pocket takes on a different character. There is a principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered." *Dolese* at 1154.

The facts here are very similar to *Dolese*. Tim's primary assets are his interest in the West Entities. (See, T2.Exs. 4-6, 112, 125,and 134.) West Quality paid for Tim's legal fees, personal taxes, insurance premiums and other personal expenses, which were carried on the books as account receivables. (Exs. 58, 60). In November 2006, Tim 113 account receivable balance was $1,156,233 (T2.Ex. 60), with additional, but unknown, amounts added to his 113 account thereafter. (T2.495-96, 1420). Tim also claims to owe a total of $761,759 in principal and interest on the Coastal loans as of August 31, 2006 (T2.Ex. 6). Tim's financial statements reflect no assets to pay his alleged debt to West Quality other than his interests in the West Entities. (T2.Exs. 4-6, 112, 125, and 134). Tim claimed that since interest was being booked, and since "credits" were made by West Quality to his 113 account, the loans and account receivables were true loans. This Court should reach the same conclusion as the *Dolese* court and find the transfers at issue to be constructive distributions.

Jacques v. Commissioner, 935 F.2d 104, 106 (6th Cir. 1991), held that by characterizing a payment as a loan, shareholders could make substantial withdraws from a corporation and avoid tax liability, while postponing indefinitely repayment of the "loan." The principle is the same here. Debbie is entitled to a share of distributions under the PSA. Tim, with the cooperation of West Quality, has obtained substantial sums from West Quality in the form of "loans" or "account receivables," while violating the distribution requirement of the West Quality shareholder agreement, (T2.Ex. 66, Art. 12), and has avoided paying Debbie her share of those distributions.

The *Alterman* factors are as follows:

> (1) the extent to which the shareholder controls the corporation; (2) the earnings and dividend history of the corporation; (3) the magnitude of the advances; (4) whether a ceiling existed to limit the amount the corporation advanced; (5) whether or not security was given for the loan; (6) whether there was a set maturity date; (7) whether the corporation ever undertook to force repayment; (8) whether the shareholder was in a position to repay the advances; and (9) whether there was any indication the shareholder attempted to repay the advances. *West, supra* ¶45.[11]

An analysis of the *Alterman* factors establishes that the chancellor's conclusion the transactions were loans and not constructive distributions was clearly erroneous.

1. *Control of the corporation.*

Tim and his three brothers each own 24% of West Quality. The remaining 4% is owned equally by Tim's parents, Vic and Louise West. (T2.Ex. 41). Tim claimed he is a minority shareholder with no control of West Quality, (T2.1418-19), but admitted that as a closely held corporation, "the family" controls West Quality. (T2.1419). Dick acknowledged the West Quality shareholders decided whether a payment from West Quality to the shareholders would be listed as a "loan" or "distribution" on the books of West Quality. (T2.248).

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[11]In addressing the *Alterman* factors, the Supreme Court noted that the second factor did not apply in the case of a subchapter S corporation, like West Quality. *West, supra* ¶46.

In cases with multiple shareholders in a closely held family corporation, each of whom receive funds which are characterized as loans on the records of the corporation, all of the shareholders are held to be in control of the corporation. *Epps v. Commissioner*, 1995 Tax Ct. Memo LEXIS 294, *10 (1995); *Baird v. Commissioner*, 1955 U.S. Tax Ct. LEXIS 35, 15* - 16*(1955). *Alterman* held that each of the brothers who were active in the business and served as executive officers for subsidiaries controlled the parent corporation. *Id.* at 875, 878.

Tim, as well as his brothers, are in control of West Quality since they own and control all aspects of West Quality, with complete authority to make decisions regarding the timing, amount and use of funds distributed and characterized as loans or account receivables. The chancellor's finding on this factor was clearly erroneous and the result of manifest error. This factor indicates the Coastal loans and 113 advances are constructive distributions.

2. *The magnitude of the advances.*

In *West I* this Court noted the Coastal loans were "certainly one of great magnitude." *West I*, ¶47. The amount owed by Tim on the Coastal loans is identical to that owed by his brothers and mother. (T2.Ex. 65). Tim's 113 account through November 15, 2006 was $1,156,223.06. (T2.Ex. 60). While the chancellor did not make a finding on this factor, the amounts at issue clearly indicate. the Coastal loans and 113 advances were constructive distributions.

3. *Whether a ceiling existed to limit the amount the corporation advanced.*

Tim testified in his deposition there was no limit on the amount West Quality would advance to shareholders. (T2.1401-02). At trial, he claimed he later learned West Quality had a "rule" that limited shareholders to borrowing 60% of the book value of their stock. (T2.1402). Childress made the same claim, but admitted that the stockholder agreement does not contain a borrowing limit and that he was informed of the 60% rule one month prior to trial. (T2.449-50). Dick made the same claim, (T2.Ex. 66, T2.245), but admitted there are no board minutes regarding that limitation and there is no borrowing limitation in the West Quality shareholder agreement. (T2.246-47).

Tim testified the "60% rule" applied to all the shareholders, (T2.1405), but admitted the amount owed by V.C. West in his 113 account significantly exceeded the supposed 60% limit. (T2.1406). Dick also admitted if the shareholders decided to loan more money to themselves through West Quality, they would do so. (T2.247).

While the chancellor acknowledged that the shareholders "broke their rules" he concluded that the West Entities can violate their own rules and Debbie had no standing to object. (R.E. 65). Debbie submits the chancellor missed the point. The issue is not whether the shareholders have to comply with straw rules they create on the eve of trial to bolster Tim's position at trial, but rather, is there objective evidence of a borrowing ceiling on loans to shareholders. The chancellor's finding on this factor was clearly erroneous and the result of manifest error. This factor indicates the Coastal loans and 113 advances are constructive distributions.

4. *Whether security was given for the loan.*

Tim claims the Coastal loans and his 113 account are secured by the terms of the by-laws of Coastal Express and West Quality (Exs. T2.70, 72). He also claims that a "security agreement" constitutes a pledge of his West Quality stock. (T2.Ex. 71). No evidence was offered at trial establishing that West Quality had perfected a security interest in Tim's shares of West Quality or in any of the other West Entities under Miss. Code Ann. §§75-9-203(b) and 75-8-301.

More importantly, courts considering this issue have consistently rejected claims that an alleged security interest in the closely held corporation providing the questioned funds to the shareholder constitutes true security. In *Dietrick v. Commissioner*, 881 F.2d 336,340 (6th Cir. 1989), a shareholder made the same argument, finding that monies claimed as a loan were a distribution where "there was no collateral securing the 'loan' other than the taxpayer's shares in the corporation..." Since the only purported security was Tim's interest in some of the West Entities, Debbie submits that this *Alterman* factor indicates that the funds at issue are constructive distributions and not loans. The chancellor's finding on this factor was clearly erroneous.

5. *Whether there was a set maturity date.*

The Coastal loans (T2.Exs. 161-164) are demand notes without a stated maturity date. The 113 accounts have no notes executed by the shareholders as obligations to West Quality. According to Dick, Koerber and Tim, the monies owed on the113 account are owed on "demand" without a maturity date. (T2.253, 857, 1442-43). The lack of a maturity date for the loans and 113 accounts indicates the payments are constructive distributions and not loans. The chancellor committed manifest error in failing to find this factor indicates the payments are constructive distributions.

6. *Whether the corporation ever undertook to force repayment.*

While the chancellor made no finding on whether West Quality ever undertook to force repayment on the Coastal notes, he held West Quality forced repayment on the 113 account by requiring Tim to turn over his tax refunds for application to his 113 account. (R.E. 65).

Tim admitted that West Quality had taken no action to collect the Coastal loans or the 113 account. (T2.1443-46). Dick admitted West Quality had taken no action to collect the Coastal notes (T2.256), and had never attempted to sue any shareholder for amounts owed on the 113 accounts or execute on any pledged collateral. (T2.254-56). Dick claimed West Quality forced the shareholders to apply tax refunds generated by a one time interest rate swap to their 113 account. (T2.254-55). However, his testimony made it clear that the decision to apply the tax refund was not an action by West Quality, but rather an agreement by the shareholders, where the West Quality shareholders had "gotten together as a group and have determined that when the tax -- when tax refunds came in, that those would all be applied to113 accounts." (T2.255). Further, West Quality did not require that Tim pay all of income tax refunds to West Quality for application to his 113 account. (T2.Ex. 173, T2.541-48; 1112-13). Dick admitted that the payment generated by the interest rate swap was the only payment he had ever made on his 113 account. (T2.243-45). He also admitted that there are no West Quality board minutes reflecting any action by West Quality to collect sums due on the shareholders' 113 account. (T2.255-56).

Tim also claimed West Quality forced him to apply $80,000 in capital distributions in the form of "journal entries" from West Quality, but the remaining shareholders were not required to apply the distributions to their 113 balances. (T2.1051-52). There are no board minutes or any other indication the journal entry credits were the result of any collection effort by West Quality.

West Quality never took any action to force repayment of the Coastal loans from the shareholders, nor could it do so without the consent of the shareholders. Since the Coastal loans are demand notes, they were due and payable on the date of execution and the statute of limitations began to run on that date. *USF&G Co. v. Krebs*, 190 So.2d 857 (Miss.1966); *Belhaven College v. Downing*, 62 So.2d 372 (Miss. 1953). Under Miss. Code Ann.. §75-3-118 the applicable statute of limitations for a negotiable promissory note is six years. Since the last note was executed on December 29, 1997, an action to collect the notes was time barred under the statute of limitations on December 29, 2003. The shareholders have an absolute defense to any action by West Quality to collect the notes. Tim, as Debbie's fiduciary, would have a duty to protect her equitable interest by asserting a statute of limitations defense to any collection attempt. *Retzer, supra.*

The statute of limitations would also bar collection of most of the sums allegedly due in Tim's 113 account. Miss. Code Ann. §15-1-29. No suit was filed, no demand letter was submitted, nor were there any board minutes indicating that West Quality was contemplating any action against Tim to force repayment of the Coastal loans or 113 account. There is simply no objective evidence indicating that West Quality attempted to force repayment of the Coastal notes or the 113 account. The chancellor's finding on this factor was clearly erroneous and the result of manifest error.

7. *Whether the shareholder was in a position to repay the advances.*

The chancellor concluded that Tim was in a position to repay the 113 account. (R.E. 65). According to Dick, all of the shareholders were in a position to repay the Coastal loans and 113 monies except Tim. (T2.333). However, Tim's financial statements reflect a steady increase in his

net worth from $1,738,500 in July 1995 to $4,117,108 in August 2006. (T2.Ex. 182)[12]. As noted by this Court, "Tim's testimony indicates that he is not in a position to pay back the loan; however, his 1999 statement of financial condition states that his net worth is $5,123,764.00. This evidences an ability to at least begin making some payments on the loan." *West I*, ¶47.

8. *Whether there was any indication the shareholders attempted to repay the advances.*

As acknowledged by Dick and Tim, no payments have been made on the Coastal loans. However, there have been credits in the amount of $411,852.07 to Tim's 113 account. (T2.Exs. 60, 170). The chancellor found the credits to be evidence of payments by Tim. (R.E. 65).

Of the total credits to Tim's 113 account, $157,124.80 was in the form of "journal entries" (T2.Exs. 41, 60, 61, 170, 181) and $133,424.30 was from a tax refund generated by a voluntary one time interest rate swap. (T2.244). The only check actually written by Tim as a payment to his 113 account was a single check for $16,575.70 on December 15, 2004, which was used to round off the tax refund generated by the interest rate swap to $150,000. (T2.Ex. 171, Ex. 48, tab 1 "total debits to West Quality Food Service"). Tim did not produce any records regarding the source of the remaining credits to Tim's 113 account, but his bank statements and his testimony made clear he did not pay the remaining credits. (T2.Ex. 48, tab 1; T2.1119-22, 1454).

Tim admitted he had no knowledge of his supposed "payments:"

Q. Well, what happened to the thirty-one thousand two hundred and eighty-three dollars?
A. I guess it was a journal entry in the 113. I didn't get any cash.
Q. So it's your contention that a journal entry doesn't count in determining what your distributions are?
A. I don't have any control over those things.
Q. So are you saying that the payments that you're claiming you made, you don't have any control over the payments that are journal entries?
A. No.
Q. You don't direct that those payments are made
A. No.

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[12]In considering Tim's financial statements, it is important to note that his statement values his interest in the West Entities at "book value" and not fair market value. Further, the vast majority of Tim's liabilities consist of the Coastal loans and 113 advances. (T2.Exs. 4, 5, and 6).

Q. So the payments that are made on your behalf, you know nothing about?
A. A lot of cases I don't know anything about them. Like income tax, they pay them. I don't — you know, I don't get lost in that stuff. They pay them. I -- you know, I sign my tax returns. (T2.1109).

Tim admitted the shareholders had life insurance premiums paid for by West Quality, but claimed "it was a board decision. I had nothing to do with it." (T2.1046). However, there are no board minutes reflecting this decision. Tim makes the same claim regarding his personal income taxes paid by West Quality: "There's a -- that the money was -- I don't actually know how they were paid. West Quality wrote the checks, I'm sure, charged them against my 113 account. I never received any of it in cash. And again, that's a board decision. I don't have anything to do with that." (T2.1047). Since Tim was on the West Quality board until October 23, 2006, (T2.Ex. 7), his lack of knowledge regarding decisions made when he was on the board raises a significant question of his credibility, or of the validity of actions by the West Quality board, or both.

The credits to Tim's113 account do not reflect a plan or intention to make regular payments to reduce the debt, which indicates the payments on Tim's behalf were constructive distributions, not loans. *Baird, supra* at **18. There is no repayment schedule or final maturity date, which also indicates a distribution, not a loan. *Alterman, supra* at 878. If the intent was to use income tax refunds to reduce the 113 debt, all refunds should have been used for that purpose, but the record is clear that Tim received $99,906.30 in income tax refunds through 2005 and an additional $75,000 tax refund for 2006 that was kept by Tim for his own benefit and not applied to his 113 account. (T2.Ex. 172, 173, T2.1118; A.R.E. 173-75).

The vast majority of credits to Tim's 113 account were made through "journal entries" or by a tax refund generated by West Quality's decision to take a substantial tax loss by a voluntary interest rate swap. Payments based on the decisions of the corporation, like credits based on an income tax refund caused by a decision of the corporation to take a tax loss, rather than regular, reoccurring payments from the shareholders, also indicates that funds paid to or for the

shareholders are constructive distributions, not loans. *Nix v. Commissioner*, 1982 Tax Ct. Memo LEXIS 418 (1982).

Courts have also consistently rejected claims from shareholders that "payments" in the form of journal entry credits on an account receivable are proof of true loans since a journal entry is simply a shift from one corporate account to another corporate account and is not an indication of a plan of repayment by the shareholder. *Baird, supra,* *18-*19; *Georgiou v. Commissioner*, 1995 Tax Ct. Memo LEXIS 540, *37 (1995); *Boecking v. Commissioner,* 1993 Tax Ct. Memo LEXIS 506, *22-*23 (1993); *Epps v. Commissioner*, 1995 Tax Ct. Memo LEXIS 294, *14 (1995). Further, even if payments are made, but an ever-increasing balance is owed, which occurred here, the funds at issue are deemed to distributions and not loans. *Baird, supra* at **22; *Colley v. Commissioner*, 1980 Tax Ct. Memo LEXIS 481, *34 (1980).

The credits to Tim's 113 account do not indicate a plan or intention to make regular, periodic payments to reduce the 113 account. There is no repayment schedule and no final maturity date. As Tim admitted, he did not direct the "payments," and he had no knowledge of the "payments" he supposedly made. (T2.1109). The chancellor's finding on this factor was clearly erroneous and the result of manifest error.

9. *Reliance on factors other than the Alterman factors.*

In finding the payments at issue were true loans, the chancellor noted the payments were reflected as loans on West Quality's records, were not listed as income on Tim's tax return, and the loans were disproportionate to the shareholders ownership interest. (R.E. 59-60,65). Courts considering these same factors have consistently rejected claims that those factors establish payments as true loans instead of constructive distributions.

The courts in *Lenzen v. Commissioner*, 2005 Tax. Ct. Memo LEXIS 120 *17 (2005); *Nix, supra*; *Boecking, supra* at * 20-21; and *Roschuni v. Commissioner,* 1958 U.S. Tax Ct. LEXIS 219, (1958) *aff'd. per curiam* 271 F.2d 267 (5th Cir. 1959), *cert. den.*, 362 U.S.988 (1960) all held that

non-proportionate payments to shareholders are not evidence that payments are true loans and not constructive distributions.. Courts have also rejected claims that a corporation's internal records and tax returns are evidence that a payment is a true loan. *Alterman, supra* at 879; *Crowley v. Commissioner,* 962 F.2d 1077, 1078 (1st Cir. 1997) and *Boecking, supra*, *21.

Additionally, payments for business purposes are considered constructive distributions where there is personal benefit to the shareholder. *Busch v. Commissioner*, 728 F.2d 945, 950 (7th Cir. 1984); *Alterman, supra* at 875. Here, the chancellor concluded the Coastal loans were true loans since there was a legitimate business purpose for the loan. (R.E. 59). However, Childress admitted that the method of investing funds in Coastal was intended solely to provide the shareholders with a personal tax benefit for the funds transferred. (T2.352-53; T2.Ex. 64).

Further, even if the Coastal funds were initially for a legitimate business purpose, those advances should be construed as constructive distributions when subsequent developments establish that no payments are actually paid on demand notes, no schedule of payments exists, no definite maturity date, no definite obligation to repay, and where collection of the notes could only be enforced by the payors. *Dillin, supra* at 1101-03. That is precisely the situation here.

Where a corporation does not make distributions while earning significant income with significant retained earnings, payments to shareholders characterized as loans on the books of the corporation will be treated as distributions. *Williams v. Commissioner*, 627 F.2d 1032, 1035 (10th Cir. 1980); *Alterman, supra* at 879; *Lewis v. Commissioner*, 1985 Tax Ct. Memo LEXIS 67, *10 (1985). Here, while West Quality made some distributions, it failed to distribute 55% of net income as required by the shareholder agreement, (T2.Ex. 66, p.16). Further, West Quality's retained earnings increased from $21,011,853 in 2003 to $26,189,299 in 2005, (T2.Ex. 110; T2.209), and its net income averaged $1,414,607 from 2000 to 2005, even though there was a net loss in 2003 due to the voluntary interest rate swap payment. (T2.Exs. 8-11, 110).

The chancellor was clearly erroneous and committed manifest error in failing to find the Coastal loans and 113 advances were constructive distributions as a matter of law. This Court should reverse and render finding that Tim's Coastal loans and 113 account receivables were constructive distributions as a matter of law.

M. The chancellor erred in calculating the amount of past due alimony owed to Debbie.

This Court determined in *West I* that the alimony and division of marital assets provisions of the PSA are unambiguous.[13] The alimony provision of the PSA provides that Tim and Debbie will equally share Tim's employment and business income with the income apportioned so each party will net the same amount. (A.R.E. 10-11). Prior to 1999, the parties cooperated to insure that Tim's business and employment income was equally shared, as evidenced by the "levelizations" which were prepared for the parties by the Horne CPA group. (T2.Exs. 99, 121,124,153).

As discussed above, the West Quality stock agreement provides for a minimum distribution of 55% of corporate income annually. (T2.Ex. 66, Art.XII). If distributions were made to the shareholders as required by the terms of the agreement, with each paying his own taxes from the funds distributed, the calculation of the amounts due Debbie would be straightforward. The parties would simply prepare an annual "levelization" as they did between 1994 and 1999 to ensure that "each party will net the same amount" from the shared business and employment income. However, the West Quality shareholders have ignored the distribution provision of their agreement to Debbie's detriment. (T2.232-33;1384-88). Rather than making required distributions, Tim and the remaining shareholders have engaged in a complex scheme to pay the personal expenses of Tim and the other shareholders through a series of "loans", "account receivables," "non-cash distributions" and "journal entries," while minimizing Tim's "cash distributions" to be shared with Debbie.

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[13]The Court did determine that whether the PSA provided for periodic or lump sum alimony was ambiguous and resolved that ambiguity by finding that the alimony provision was for periodic alimony. West I, ¶23.

The issue of how alimony should be calculated is intertwined with whether the Coastal loans and113 account payments are constructive distributions. Tim argued that Debbie wanted to "double-dip" by claiming a share of the Coastal loans and 113 distributions and also share of credits to those accounts. (T2.779). In fact, Debbie acknowledges she is not entitled to have the Coastal loans and advances on Tim's 113 account construed as constructive distributions, and also share in journal entries used to credit Tim's Coastal loans or 113 account. At the same time, Tim is not entitled to claim the Coastal loans and 113 account payments are true loans in which Debbie has no interest, and also claim Debbie has no interest in distributions that are used to credit the Coastal loans and 113 account by making "journal entries" or "non-cash distributions." Either the Coastal loans and 113 account advances must be considered constructive distributions at the time those are made, or the "journal entries" used to credit the Coastal loans and 113 account advances must be considered distributions subject to the alimony provision of the PSA.

If this Court determines the Coastal loans and 113 accounts are constructive distributions, with Debbie being entitled to half of the constructive distributions at the time the distributions are made, she would not be entitled to claim a share in subsequent "journal entries," "non-cash distributions" or "tax distributions" which are used to credit Tim's Coastal loans or 113 account. If this Court determines the Coastal loans and 113 accounts are true loans rather than constructive distributions, Debbie should be entitled to share in any distributions, whether characterized "journal entries," "non-cash distributions" or "tax distributions", at the time the distribution is made and used to credit the Coastal loans or 113 account.

1. *Determining the calculation formula.*

While each of the parties' experts concluded that Tim's arrearage was in excess of $550,000, they each calculated a different amount of past due alimony. The essential difference between the expert opinions was how Tim's income was calculated. Debbie's expert, Elbert Bivins, used Tim's federal tax returns and K-1s, which reflected his actual distributions and actual taxes paid, to

determine the net amount of Tim's business and employment income. Both of Tim's experts, James Koerber and David Childress, deducted "non-cash" distributions, and "tax distributions" from Tim's distributions as reflected on his K-1s from the West Entities. They also failed to include tax refunds paid to Tim in making their calculations. (*See*, T2.Ex.175, a summary of the expert calculations, Bivins' calculation at T2.Ex. 101, p. 3; Koerber's calculations at T2.Ex. 102, Appx. B, Sch. 2, and Ex. 194; and Childress' calculation at T2.Ex. 100.)

Bivins testified his arrearage calculation was based on information from Tim's federal tax returns and K-1 records, which was subject to ready verification and which were attached to his report. (T2.Ex. 101-A; T2.562-67). Bivins testified that from an accounting standpoint, he could not verify a calculation which excluded "tax distributions" or "non-cash" distributions since he had no basis to determine the accuracy of how the distributions were being calculated. (T2.571-75, 579-80). Bivins calculated the arrearage due Debbie through December 31, 2005, before interest, at $685,471.(T2.Ex. 101-A, page 3).

Tim's first accounting expert, Koerber, calculated the alimony arrearage through December 31, 2005 at $558,808[14], before interest, using Tim's "cash distributions," rather than his actual distributions as reflected on Tim's K-1s. (T2.Ex.175, page 3). Koerber excluded "journal entry" distributions of real property valued at $29,253, a life insurance policy conveyed to Tim valued at $100,805, distributions to Tim that were used to repay West Quality for Tim's various personal expenses totaling $80,000, and a distribution to Tim of $284,527 as reflected on Tim's K-1s from West Quality in 2000. (T2.Ex.102, Appendix A, Schedule 2). Koerber testified the "journal entries" distributions were not included in his alimony calculation since they were not "cash in [Tim's] pocket" (T2.817), even though he admitted that Tim received the benefit of the "journal entry" distributions in the form of real property, a life insurance policy and payment of personal expenses.

[14]Koerber initially calculated the alimony arrearage to be $534,480, (T2.Ex. 175, page 3), but following his testimony, he submitted a supplemental calculation, (T2.Ex. 194), which increased the arrearage to $558,808.

(T2.805-09). Koerber also excluded a distribution of $284,527 to Tim in 2000 as a "tax distribution," but admitted the distribution was not included as a tax payment on Tim's 113 account statement, (T2.Ex. 60), or on a summary of credits which Tim claimed was made to his 113 account through journal entries. (T2.Ex.170; T2.806-07,1118). Tim and Childress both testified that Exhibits 60 and 170 accurately set forth all credits to Tim's 113 account. (T2.1052-53; 374-75).

Koerber excluded Tim's tax refunds from the alimony calculation since the refund did not constitute "income" even though it was "cash in the pocket", (T2.844-47). Koerber admitted it "may be right" to include the tax refunds retained by Tim in the alimony calculation. (T2.848). Between 2000 and 2005 Tim received tax refunds from the IRS totaling $324,906.30. (T2.Ex. 173). Of the total income tax refunds received by Tim, he turned $225,000.00 over to West Quality for application to his "113 account" for taxes paid by West Quality on his behalf and retained the remaining $99,906.30. (T2.Ex. 173). Tim testified that the remaining amount of $99,906.30 was deposited into his personal bank account and used for his personal expenditures. (T2.1113-16).[15]

Koerber admitted that Tim's distributions used to credit his 113 account, must be included in the alimony calculation if the chancellor determined the 113 account receivables were true loans:

> THE COURT: Hold it and let me clarify what he's saying. If the Court classifies the 113s as distributions and she gets paid alimony because it's a distribution, then any money that Tim gets in the future by way of distribution which he uses to pay that money back to West, she shouldn't get any part of it.
>
> A. That's correct, Your Honor. Because she would end up doubling up.
>
> THE COURT: Right. Now, assuming that the 113 accounts is considered by the Court to be loans, not distributions and not subject to the alimony calculation, then in the future, any distribution to Tim from the corporation would be considered in the alimony in which distributions are covered, even though Tim has to use it all to pay back the loans.
>
> A. Yes, Your Honor. (T2.779-80).

[15]As noted above, Tim also received an IRS refund in the amount of $174, 631 on October 29, 2007 for his 2006 taxes. Tim applied $ 98,871 of the refund to his 113 account and used the balance to purchase a certificate of deposit in his current wife's name for $75,000. (A.R.E. 172-175).

Tim's second accounting expert and the West Quality CFO, Childress, calculated the alimony arrearage through December 31, 2005 to be $573,157, before interest. (T2.Ex.175, page 2). Childress testified that distributions to Tim used solely to pay his taxes, or "tax distributions" should be excluded from the alimony calculation since those sums repaid tax payments made by West Quality on Tim's behalf and since those sums had been previously excluded by the parties. (T2.503-04) Childress also testified that Tim's income tax refunds which were not used as a credit in Tim's "113 account" should be included in the arrearage calculation. (T2.515-16). Childress initially testified that all of Tim's tax refunds were paid by Tim to West Quality for application to Tim's 113 account, but admitted that he was not aware of which of Tim's tax refunds were credited against Tim's "113 account" and which were used by Tim. (T2.Ex. 173, T2.541-48). It is undisputed Tim received $99,906.30 in income tax refunds which not credited to his 113 account through 2005 and additional $75,000 in October 2007 for his 2006 taxes. (T2.Ex. 173; A.R.E. 172-75).

Childress initially claimed distributions to Tim of real property, insurance and funds used to reimburse Tim's 113 account for non-tax expenses were included in his alimony arrearage calculation, (T2.500), but admitted he was not sure if those distributions were included. (T2.504). Childress admitted those amounts should be included in the arrearage calculation. (T2.512-13). As made clear by Tim's testimony, Childress' calculation failed to include "non-tax" distributions to Tim of real property, an insurance policy and distribution of funds used to reimburse Tim's 113 account for Tim's personal non-tax related expenses paid by West Quality, even though he admittedly received the benefit of those distributions. (T2.1139-1149, *Compare*, Childress' "non-tax distributions," T2.Ex. 175, p.2, with Tim's total distributions. T2.Ex. 181).

The chancellor adopted Koerber's calculation and awarded Debbie $558,808 in past due alimony for January 1, 2000 to December 31, 2005. (R.E. 21) and $11,984.00 in past due alimony from January 1, 2006 to June 30, 2008. (A.R.E. 278). Debbie submits the chancellor should have adopted Bivins' calculation method since it was the only calculation method which used verifiable

sources of information. However, even accepting the modified Koerber's method as stated by the chancellor in his opinion, the chancellor erred in calculating the amount of past due alimony.

2. *Correction of past due alimony from January 1, 2000 to December 31, 2005.*

The chancellor held "any distributions paid by West Quality on Tim's behalf which have been and are added to his 113 account or as a loan payment must be included in the alimony arrearage calculation, except for payments made by West Quality directly to the Internal Revenue Service and the Mississippi State Tax Commission." (R.E. 20). Under that holding, the arrearage calculation should have included the "journal entry" distributions of real property valued at $29,253[16], the journal entry regarding a life insurance policy conveyed to Tim valued at $100,805, distributions to Tim that were used to repay West Quality for Tim's various personal expenses totaling $80,000, and a distribution to Tim of $284,527 as reflected on Tim's K-1s from West Quality in 2000. (T2.Exs. 181, 194). Since the chancellor required the inclusion of the "journal entries" which Koerber excluded in making his calculation, the past due alimony should be increased to include those items.

The chancellor also erred in excluding income tax refunds paid to Tim, but not credited to Tim's 113 account for tax payments advanced by West Quality. The PSA provides the parties will " share equally [Tim's] employment and business income . . . in such a way that each party will net the same amount." As Childress and Koerber recognized, (T2.515-16, 848), a calculation of net income must include tax refunds consumed by Tim. Otherwise, the parties will not be receiving the same amount of net income. Tim could avoid his obligation to Debbie by having West Quality overpay his taxes in order to obtain a refund which would then be excluded from the alimony

[16]In section "O" below, Debbie contends the chancellor erred in finding that she was not entitled to share in Tim's interest in West Investments since the real property distributions were contributed by Tim to obtain his interest. If Debbie is entitled to an interest in West Investments, she acknowledges that she would not be entitled to an increase in the amount of past due alimony based on the real property distribution.

calculation required under the PSA.[17] Tim received total tax refunds between 2000 and 2005 of $324,906.30. (T2.Ex. 173). Of the tax refunds received, Tim paid $225,000.00 to West Quality to credit to his "113 account" and retained the remaining $99,906.30. (T2.Ex. 173). Debbie submits that the amount retained by Tim, $99,906.30 should be included in the past due alimony calculation.

Using the method of calculation established by the Judgment and including the tax refunds retained by Tim, Debbie submits the past due alimony calculation from January 1, 2000 to December 31, 2005 should be corrected as follows:

Koerber's original base arrearage calculation:	$558,808	(T2.Ex. 194)
50% of $29,253 real estate distributions:	$14,626	(T2.Ex. 181)
50% of $100,805 life insurance distribution:	$50,402	(T2.Ex. 181)
50% of $80,000 journal entry distribution:	$40,000	(T2.Ex. 181)
50% of $284,527 journal entry distribution:	$142,263	(T2.Ex. 181)
50% of $99,906 in tax refunds:	$49,953	(T2.Ex. 173)
Total arrearage:	**$856,052**	

The chancellor's determination of the past due alimony owed Debbie through December 31, 2005 was clearly erroneous and the result of manifest error. This Court should reverse and render, finding a total alimony arrearage due Debbie through December 31, 2005 of $856,052.

3. *Correction of the past due alimony from January 1, 2006 to June 30, 2008.*

Since the trial record did not contain Tim's financial information after December 31, 2005, the chancellor instructed Tim to provide Debbie with the necessary information to calculate the due alimony from January 1, 2006 to June 30, 2008 using Koerber's method. (R.E. 21). In July 2008 Debbie filed a motion to determine the past due alimony through June 30, 2008 seeking past due alimony based on distributions paid to or on Tim's behalf from January 1, 2006 to June 30, 2008. (A.R.E. 262-77). Based on the records provided by Tim, Debbie sought $675,051 in additional past due alimony if "tax distributions" were included and $289,753 if "tax distributions" were excluded.

[17]That is exactly what has occurred. Tim received an IRS refund on October 29, 2007 in the amount of $174,631 for his 2006 taxes. Of the total refund, $ 98,871 was applied to Tim's 113 account and Tim used the balance to purchase a certificate of deposit in his current wife's name for $75,000. (A.R.E. 172-175).

(A.R.E. 268-71). Tim asserted Debbie was entitled to an additional $4,855. (CP.2295-03). The chancellor awarded Debbie past-due alimony of $11,984.00. (A.R.E. 278).

Tim received "capital distributions" between January 1, 2006 and June 30, 2008 of $1,072,748.89. (A.R.E. 272). West Quality characterized the distributions as "cash" distributions of $28,748.89, and "non-cash" distributions of $1,044,000. Finally, the "non-cash" distributions were broken down into "non-cash" distributions to "pay taxes" of $624,908.37 and "non-cash" distributions to "pay note interest" of $385,523.50 and to "pay 113 interest" of $33,568.13 (A.R.E. 272) Tim also received a $48,000 distribution on March 7, 2007 was "credited as payment on loans previously made to Charles T. West and charged to his 113 account." (A.R.E. 274).

Bivins prepared two separate past due alimony calculations, one based on all distributions and a second calculation which excluded "tax distributions." (A.R.E. 266-71). Childress' calculation excluded all "non-cash" distributions. (CP.2301-03). Childress testified that the difference between the Bivins' calculations and his own was how the "non-cash" distributions were considered. (T2.1900, 1911-12). Since the chancellor's Judgment had excluded Tim's tax refunds from consideration in the alimony calculation, no evidence was submitted regarding the net amount of Tim's actual taxes or the refunds paid to Tim although it is undisputed that in October 2007 Tim received a tax refund of $174,631 for his 2006 taxes. Tim applied $98,871 of the refund to his 113 account and used $75,000 to purchase a certificate of deposit in his wife's name. (A.R.E. 172-175).

Childress testified West Quality determines whether "non-cash" distributions are applied to taxes advanced by West Quality for Tim or for Tim's other personal expenses. (T2.1902, 1909). Childress claimed that "non-cash" interest payments for Tim's Coastal loans and 113 account should be excluded even though he claimed the interest accrued on Tim's personal obligation. (T2.1912-15). The chancellor held distributions paid by West Quality on Tim's behalf which were added to his 113 account or characterized as a loan payment must be included in the alimony arrearage calculation." (R.E. 21). Tim received "non-cash" distributions totaling $467,091.63 between

January 1, 2006 and June 30, 2008 which were credited against his 113 account or a payment on his Coastal loans and those distributions should be included in the alimony calculation. (A.R.E. 272-74).

The records produced do not reflect the "non-cash" distributions characterized as "tax payments" or "interest" payments were paid to the Internal Revenue Service or the Mississippi State Tax Commission. If those distributions were actually used to repay West Quality for taxes paid on Tim's behalf, Debbie acknowledges those payments should be excluded from the arrearage calculation. Since the chancellor determined that Tim's Coastal loans and 113 account receivables were true loans rather that constructive distributions, those amounts must be included in the past-due alimony calculation through June 30, 2008. Debbie submits the determination of her past due alimony through June 30, 2008, was clearly erroneous and the result of manifest error. Debbie submits this Court should reverse and render, finding that Tim is in arrears on his alimony obligation to Debbie from January 1, 2006 to June 30, 2008, in the amount of $289,753, plus one half of the income tax refund consumed by Tim in the amount of $75,000, for a total of $327,253, plus interest at the rate ordered by the chancellor.

N. The chancellor erred in holding that while Tim breached his obligation to Debbie under the December 1, 1993 Death Benefit Agreement ("DBA"), his breach of the DBA was moot.

This Court instructed the chancellor to determine "whether Tim breached his obligation to Debbie under a pre-divorce death benefit agreement." *West I*, ¶50. The chancellor concluded Tim breached the DBA, but the breach was moot since the DBA had been terminated. (R.E.74-75). The DBA provides a non-assignable death benefit from West Quality to Tim's designated beneficiary.(T2.Ex.74, ¶3). The DBA may only be amended "by a written Agreement signed by the parties." (T2.Ex.74, ¶8).

In October 1994, Tim designated Debbie as the beneficiary under the DBA and acknowledged the designation "may not be changed without the written agreement of both parties." (T2.Ex. 75). Tim breached the DBA on December 12, 1997, by designating his then wife, Stephanie

Rebecca West, as an additional beneficiary. (T2.Ex. 76). On September 12, 2006, West Quality board voted to terminate the DBA. Tim voted against cancellation of the DBA. (T2.Ex. 77, T2.274, 1023). Tim admitted he breached the beneficiary designation agreement. (T2.1464).

In *Stepson v. Brand*, 213 Miss. 826, 58 So.2d 18 (1952) this Court considered a similar question. There, an insurance policy was issued to an employee providing that the employee had the right to change beneficiaries. The employee designated his wife as beneficiary and gave her the policy. Thereafter, the employee designated another person as beneficiary without the wife's consent. After the employee died, both parties claimed the policy benefits. *Stepson* at 19-20. This Court held that if an owner waives the right to change the beneficiary by gift or contract, "the beneficiary secures a vested interest which may not be defeated by the insured attempting to change the beneficiary." *Stepson.* at 21-22.

West Quality acknowledged Debbie could not be removed as beneficiary without her written consent by its acknowledgment of the beneficiary designation. (T2.Ex. 75). Tim and Debbie agreed by contract that the beneficiary designation could not be changed without her written consent. That gave Debbie a vested interest in the DBA. Debbie can not be deprived of her vested interest in the DBA without her consent. *First-Columbus Nat'l Bank v. D. S. Pate Lumber Co.*, 163 Miss. 691, 141 So. 767, 768 (1932). Debbie obtained a completed vested interest in the DBA at the time the designation of beneficiary was executed, which could not be defeated by Tim's subsequent action.

Further, West Quality's unilateral cancellation of the DBA does not deprive Debbie of her vested interest so long as Tim is employed by West Quality. The DBA provides it will remain in force so long as Tim is employed by West Quality and that it "may be amended only by written agreement signed by the parties." (T2.Ex. 74, ¶8). There is no written agreement amending or terminating the DBA signed by West Quality and Tim. Since Tim did not agree to a termination of the DBA, West Quality's unilateral attempt to terminate the DBA is a legal nullity.

Nor can Tim terminate the DBA without Debbie's written consent. *Mutual Benefit Life Insurance Co. v. Willoughby*, 99 Miss. 98, 54 So. 834, 835 (1910). *Willoughby* held an insurance contract is taken out for the benefit of the beneficiary who "is in every true sense the owner of the policy." As the beneficial owner, the beneficiary is entitled to recover on the policy notwithstanding the insured's attempt to cancel the policy without the beneficiary's agreement. *Id.* at 835.

Debbie obtained a vested ownership interest in the DBA by virtue of the designation of beneficiary. The Designation provides that Debbie's interest in the DBA could not be changed without her written consent. West Quality could not unilaterally terminate the DBA since it does not allow for an amendment without the written consent of all parties. As the "true owner" of the DBA, Debbie's rights to benefits under the DBA cannot be altered without her written consent, notwithstanding any action of Tim or West Quality, so long as Tim is employed by West Quality.

The chancellor's holding on this issue was clearly erroneous and the result of manifest error. This Court should reverse and render, holding that Debbie's rights under the DBA shall remain in full force and effect so long as Tim is employed by West Quality.

O. The chancellor erred in holding that the distribution of real property to Tim, which Tim used as his contribution to obtain his interest in West Investments, LLC, was not an event that would entitle Debbie to an interest in West Investments, LLC.

Debbie asserts she is entitled to half of Tim's interest in West Investments, LLC since he obtained the interest by contributing real property he received as a distribution from West Quality which he did not share with Debbie.[18] (R.E. 120). The chancellor, without citation of any authority, held that Debbie failed to present evidence regarding the value of the real property and that the transaction was not an event that would entitle her to an interest in West Investments. (R.E. 75).

[18]As noted above in section "M.2," Debbie acknowledges she is not entitled to both an increase in the past due alimony and half of Tim's interest in West Investments, but she is entitled to one or the other. If Debbie is entitled to an increase in the amount of past due alimony based on the real property distribution, she acknowledges that she would not be entitled to half of Tim's interest in West Investments.

The value of the real property distribution is undisputed. In December 2002 and 2003, Tim received distributions of real property valued at $11,578 and $17,675. (T2.Exs. 40, 141, 181; T2.816-17). Tim conveyed his interest in the property to West Investments, LLC. The West Investments operating agreement does not reflect any contribution from Tim forhis interest in West Investments. (T2.Ex.14). Dick testified the real property identified on Exhibit 40 were conveyed by the West brothers, including Tim, as their contribution to West Investments. (T2.210-11).

Debbie owns an equitable interest in Tim's shares in West Quality. Tim, as Debbie's fiduciary, had a duty manage her equitable interest and provide her with relevant information regarding distributions to which she was entitled to share. *Retzer, supra.* Tim breached his duty by converting Debbie's portion of the real estate distribution and conveying it to West Investments as his membership contribution without her knowledge or consent. To prevent Tim's unjust enrichment by converting Debbie's interest in the real estate distributions, Tim should be compelled to convey to Debbie the fruits of his conversion, which would be half of his interest in West Investments. *Allgood v. Allgood*, 473 So.2d 416, 421 (Miss. 1985).

The chancellor erred in finding that Debbie failed to present evidence regarding the value of the real property. Debbie's interest in the real property attached at the time it was distributed to Tim. Debbie's interest followed the distribution into West Investments. The chancellor's finding that Debbie had no interest in West Investments was clearly erroneous and is manifestly wrong and should be reversed and remanded by this Court.

P. The chancellor erred in its establishment of the retroactive date for child support payments owed by Debbie to Tim.

The chancellor awarded Tim monthly child support payments from Debbie in the monthly amount of $637.00 as a setoff against what Tim owes Debbie monthly in alimony payments. The chancellor ordered the support payments to be retroactive to the date Tim first filed a pleading seeking child support from Debbie. (R.E.46). On September 27, 2006, Tim filed a counterclaim to

Debbie's amended complaint asserting "[Tim] requests the Court to determine an amount of child support and to order [Debbie] to [pay Tim] child support for the support and maintenance of the parties' minor child; or in the alternative, that a material change in circumstances has occurred justifying the Court to order [Debbie] to pay child support to [Tim]." (CP.1003-04). Tim did not assert a claim that child support payments be made retroactive.

The chancellor's Final Judgment made the payments retroactive to July 1, 2001 since James Sullivan[19] filed a pleading on Tim's behalf seeking child support payments in June 2001. (R.E.25). While Debbie is not appealing the chancellor's award of child support payments, she respectfully submits that the chancellor erred in making the support payments retroactive to June 2001.

In a Consent Judgment April 12, 2001, Tim agreed to furnish all child support payments. (CP.183-84). Shortly thereafter, Tim filed a contempt action on June 27, 2001 seeking child support payments. (CP.198-200). Tim never brought his complaint up for hearing, never or proved asserted any specific change in circumstances that would warrant a modification of the April 12, 2001 Consent Judgment, and never offered any evidence regarding any change in circumstances that occurred in June 2001. Further, the chancellor's April 30, 2002 Judgment did not include an award of child support payments. (CP. 273-74). Following Debbie's interlocutory appeal, Tim never asserted that he was entitled to child support payments by a cross-appeal.

In *Lawrence v. Lawrence*, 574 So.2d 1376, 1384 (Miss. 1991), this Court held that a chancellor has the discretion to order a modification to increase child support payments to the date of the modification request. However, no authority supports the proposition that a chancellor has the discretion to make child support payments retroactive to date before support payments were ever

[19]Mr. Sullivan has never made an entry of appearance on behalf of Tim in this action. Tim was represented in this action by the law firm of Watkins & Eager from 2001 until 2006. However, Sullivan did file a pleading seeking, *inter alia*, child support payments from Debbie in June 2001. Mr. Sullivan is counsel for the West Entities in this matter.

ordered by the chancellor. Further, by virtue of his failure to prosecute or appeal his initial claim for support, Tim abandoned his claim. *McDonald v. Tiebauer*, 939 So.2d 749, ¶7 (Miss.2005).

Based on the failure of Tim to prosecute his initial claim for support payments, Debbie submits the chancellor committed manifest error in making child support payments retroactive to June 27, 2001. Debbie submits the award of child support payments should not be retroactive prior to April 10, 2008, the date the chancellor first awarded Tim support payments from Debbie. (R.E. 76-80). Alternatively, the child support award should only be retroactive to September 27, 2006, when Tim asserted he should be awarded support payments following remand.

Q. The chancellor erred in granting the West Entities motion to dismiss.

In the context of discussing whether the Coastal loans could be constructive distributions, this Court noted a spouse seeking to recover alimony is within the protection of Mississippi law regarding fraudulent transfers, whether a transfer was made before or after a judgment for alimony. While actions to set aside fraudulent conveyances normally apply when a spouse transfers property to another person, the Court also held a transfer to a spouse may also be a fraudulent transfer if the offending spouse is on the receiving end of a conveyance of property to which the other spouse appears reasonably entitled to under an alimony agreement. *West I,* ¶44-45.

After remand, Debbie joined the West Entities and asserted the Coastal loans and "113 account receivables" constituted fraudulent conveyances to Tim intended to deprive Debbie of her share of distribution payments by characterizing the payments as loans instead of distributions. (R.E.123). Debbie joined the West Entities since both a grantor and a grantee to a conveyance alleged to constitute a "fraudulent conveyance" are proper parties to a fraudulent conveyance claim. *Murray v. Murray*, 358 So.2d 723, 725 (Miss. 1978). In January 2007, the West Entities move to dismiss the fraudulent conveyance claim asserting that it failed to allege fraud with specificity as required by M.R.Civ.P. 9(b). (A.R.E. 34-39).

The chancellor held the transfers may have been intended by Tim to be a fraudulent transfers, but that loans from a corporation to a shareholder "in no way, shape, form, or fashion can rise to the level of proof required to show a fraudulent conveyance - or a fraudulent transfer by the corporations." (A.R.E. 176-80; T2.191). The chancellor also found that while Debbie should have considered filing a fraudulent conveyance claim, she should have determined it had no possibility of success since the payments to shareholders were non-proportional. (R.E.84). The chancellor also held that "any fraud committed by the West Entities was not pled with particularity" and that a claim against the West Entities could have been sought by a "wage withholding order." (R.E. 84).

A motion to dismiss raises an issue of law. *Young v. North Mississippi Medical Center*, 783 So.2d 661, 663 (¶ 7) (Miss. 2001), and is reviewed *de novo* by this Court. *Wells v. Panola County Board of Education*, 645 So.2d 883, 888 (Miss. 1994). In considering a motion to dismiss, the allegations of the amended complaint must be taken as true. The motion should only be granted if it appears beyond a reasonable doubt that no set of facts could be proved in support of the claim. *Missala Marine Services, Inc. v. Odom*, 861 So.2d 290, ¶12 (Miss. 2003).

This Court has never applied Rule 9(b) in the context of a fraudulent conveyance claim. In *Catchings v. Manlove*, 39 Miss. 655, 668 (1861), this Court noted that a voluntary assignment by an insolvent debtor is fraudulent per se as to existing creditors, whether made with a fraudulent intent or not. Courts have generally held that Rule 9(b) does not apply to a fraudulent conveyance action. *Nesco, Inc. v. Fairley Cisco,* 2005 U.S. Dist. Lexis 36189, *8 (S.D. Ga. 2005); *China Resource Products (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 788 F. Supp. 815, 819 (D. Del. 1992).

The chancellor erred in dismissing the fraudulent conveyance claim under Rule 9(b). If the claim was required to comply with Rule 9(b) and failed to do so, the proper remedy would be a

dismissal with leave to file an amended complaint to set forth the circumstances giving rise to the claim with greater particularity. 2A *Moore's Federal Practice* ¶903[5], p. 9-58. Courts have consistently held that the failure to permit amendment of a complaint under similar circumstances to be an abuse of discretion. *Schreiber Dist.* v. *Serv-Well Furniture Co.,* 806 F.2d 1393 (9th Cir. 1986); *Bank v. Pitt,* 928 F.2d 1108 (11th Cir. 1991). If the chancellor concluded more specificity was required, he should have granted Debbie leave to file a second amended complaint to assert the fraudulent conveyance claim with greater specificity.

Further, Debbie submits her fraudulent conveyance allegations met the requirements of Rule 9(b). The purpose of Rule 9(b) is to ensure that a complaint contains enough information to allow a defendant to prepare an adequate response. *Shusany* v. *Allwaste, Inc.,* 992 F.2d 517,521 (5th Cir. 1993); 2A *Moore's Federal Practice,* ¶903[1], p.9-32 to 9-34. Where the facts relating to the alleged fraud are within the knowledge of the defendant, as is the case here, the particularity requirement under Rule 9(b) is relaxed. The essence of Rule (9) has been referred to as the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

The amended complaint met the "who" requirement by alleging the West Entities made transfers to Tim consisting of "account receivables" and loans; it met the "what" requirement by alleging that the Coastal loans, the 113 account receivables and security agreement were transfers intended to deprive Debbie of her interest in those payments to Tim; it met the "when" requirement by alleging the 113 transfers began in 1999 and continued through the date of the amended complaint; and it met the "how" requirement by alleging the method of transferring funds for Tim's benefit was through "loans" and "account receivables." (R.E. 114-23).

Rule 12(b)(6) required that the chancellor to take as true the allegations that the Coastal loans and 113 account receivables were transfers intended to deprive Debbie of the income generated by her equitable ownership interest, and her allegations that the "security agreement" (T2.Ex. 71) was a fraudulent conveyance intended to prevent Debbie from receiving the benefit of her equitable interest by placing Tim's legal interest in the West Entities beyond her reach. (R.E.116-120). Rather than accepting the allegations as true for purposes of considering the motion to dismiss, the chancellor concluded that Debbie's claim failed as a matter of law, finding that a loan from a corporation to a shareholder can never arise to the level of fraudulent conveyance. (T2.2 191).

The chancellor's legal conclusion is contrary to *West I,* which held *the very loans under consideration* may be fraudulent transfers. In *A & L, Inc., et al v. Grantham,* 747 So.2d 832, ¶47-50 (Miss. 1999), this Court considered a similar case. In *Grantham,* payments from family-owned, closely held corporations to a shareholder were used to pay various personal expenses of the shareholder. The corporations and shareholders characterized the transfers as "loans." A note was signed regarding the purported loans. *Grantham,* ¶7. The husband in *Grantham* also conveyed his stock in the closely held corporations to his siblings, which this Court concluded was a fraudulent conveyance, intended to deprive a former spouse of her interest in the stock. *Grantham,* ¶50.

A transfer intended to deprive a former spouse of monies she would is entitled to receive under a PSA is a fraudulent transfer under Miss. Code Ann. §15-3-3[20]; *West I, supra; Blount v. Blount,* 231 Miss. 398, 95 So.2d 545, (Miss. 1957); *Morreale v. Morreale,* 646 So.2d 1264 (Miss. 1994); *Grantham, supra* at ¶47-50. The chancellor erred in dismissing the fraudulent conveyance claim without considering the merits.

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[20]On July 1, 2006 Miss. Code Ann. §15-3-3 was repealed and replaced by the Mississippi Uniform Fraudulent Transfer Act, Miss. Code Ann. §§15-3-101 *et seq.*

This Court in *West I* recognized the Coastal loans may constitute fraudulent conveyances. The chancellor's holding that the transfers could not be fraudulent conveyances since they were non-proportionate is contrary to the many courts holding that proportionate payments are not required to establish that a payment is a constructive distribution and not a loan. *Lenzen, supra; Nix, supra*; *Boecking, supra; Roschuni, supra.* The chancellor's decision on this issue was clearly erroneous and the result of manifest error. The Court should reverse the dismissal of Debbie's fraudulent conveyance claim against the West Entities and remand the claim for a full hearing on the merits.

R. The chancellor erred in granting the West Entities' motion for attorneys fees.

The chancellor also awarded the West Entities attorneys fees. The West Entities motion for attorneys fees and expenses claims that Debbie joined the West Entities as party defendants "to exercise undue influence over the West Entities" and that joining the West Entities was "a blatant abuse of the legal process." (A.R.E. 40-45). The motion does not allege a violation of the Litigation Accountability Act ("LLA"), Miss. Code Ann. §11-55-5, *et seq.* (2002) or M.R.Civ.P. 11.

The chancellor found that Debbie should have considered filing a fraudulent conveyance against the West Entities based on this Court's decision in *West I*, but should have also determined that there was no basis for fraudulent conveyance claim. (R.E. 86). The chancellor also held the transfers may be fraudulent conveyances to Tim, but could not be fraudulent conveyances as a matter of law to the West Entities. (T2.191).

While not pled by Tim or cited by the chancellor, Mississippi law provides that attorneys fees and costs may be assessed if a claim is brought without substantial justification under the LLA or Rule 11. The standard for review of an award of attorneys fees is an abuse of discretion. *Choctaw, Inc. v. Campbell-Cherry-Harrison -Davis & Dove*, 965 So.2d 1041 ¶9 (Miss. 1997). Miss. Code Ann. § 11-55-3(a) defines the phrase "without substantial justification" as "frivolous,

groundless in fact or in law, or vexatious," as determined by the court. In *Scruggs v. Saterfiel,* 693 So.2d 924, 927 (Miss. 1997), this Court held that a "frivolous claim" occurs "only when, objectively speaking, the pleader or movant has no hope of success" *citing Stevens v. Lake,* 615 So.2d 1177, 1184 (Miss.1993). Further, while "a case may be weak or 'light-headed,'that is not sufficient to label it frivolous." *Nichols v. Munn,* 565 So.2d 1132, 1137 (Miss.1990).

This Court held the payments to Tim from the West Entities may constitute a fraudulent conveyance. *West I* at ¶44. Following the publication of *West I,* Justice Waller noted *West I* was a case of first impression, in recognizing that a payment to an individual from a closely held corporation could constitute a fraudulent conveyance. Waller, Mississippi Lawyer, *Modifications or Avoidance of Child Support and Alimony Commitments based on Questionable Distributions after Equitable Division of Assets.* (June 2005). Counsel for the West Entities acknowledged that this Court recognized the transactions at issue may be fraudulent transfers, informing the chancellor, "Your Honor, the Supreme Court did say this may be a fraudulent conveyance." (T2.1695).

Debbie submits that, "objectively speaking", she had "some hope of success" in asserting a fraudulent conveyance claim against the West Entities and the chancellor abused his discretion and committed manifest error in awarding attorneys fees to the West Entities. The chancellor's holding on this issue should be reversed and rendered by this Court.

S. Debbie is entitled to attorneys fees on this appeal

Debbie is entitled to an award of reasonable attorney fees incurred on this appeal. Debbie has no assets to pay her attorney the substantial amounts owed, except from the unpaid sums which Tim owes to her. Further, as discussed above, there is considerable disparity in the relative financial positions of the parties. While this Court has generally awarded attorney fees on appeal in the amount of one-half of what was awarded in the lower court, *Grant, supra,* ¶19, an award of fees on

appeal is discretionary and is intended to compensate for services actually rendered after it has been determined that the legal work reasonable and necessary. *Howard v. Howard*, 968 So.2d 961, ¶53-54 (Miss. App. 2007). Debbie requests that she be granted leave to file a motion for attorneys fees incurred on appeal with an itemized statement of the fees incurred for consideration by the Court.

VIII. CONCLUSION

This Court should affirm the chancellor's application of the law of the case doctrine as to Debbie's right to share in business distributions and in determining the parties agreement regarding their marital property. It should affirm the chancellor's holding that the West Quality shareholder agreement did not void the PSA, but reverse and render the characterization of Debbie's interest as a "contingent" interest, finding that Debbie has an equitable interest in the West Entities, with an equitable lien on Tim's interest in the West Entities as provided by the PSA.

This Court should affirm the chancellor's finding of contempt against Tim, since he failed to prove an inability to pay. This Court should also affirm the chancellor's finding that Tim was not entitled to a modification since he lacked clean hands and failed to prove a material change in circumstances not reasonably anticipated when the PSA was entered. This Court should also affirm the chancellor's finding that Tim breached his obligation to provide Debbie with financial information required by the PSA and the chancellor's finding that Tim breached his obligation to provide Debbie with life insurance. Both of those findings were supported by substantial evidence.

This Court should affirm the award of attorneys fees to Debbie, but should reverse and render the failure to award post-judgment interest on the fees. The Court should also affirm the judgment of past due alimony, and the award of interest on the past due alimony awarded, but the Court should reverse and render the chancellor's calculation of the amount of past due alimony. The past due alimony awarded through December 31, 2005 should be increased from $558,808 to

$856,052 and the past due alimony award from January 1, 2006 to June 30, 2008 should be increased from $11,984 to $327,253, plus interest from the date the payments were due.

This Court should reverse and render the chancellor's failure to find that Tim owed a fiduciary duty to Debbie, and breached his fiduciary duty to her. This Court should also reverse and render the chancellor's failure to impose a constructive trust on the stock and partnership interest in which Tim holds legal title, but which are equitably owned by Debbie.

This Court should also reverse and render the chancellor's failure to find that the Coastal loans and Tim's 113 account receivables were constructive distributions in which Debbie was entitled to share under the PSA.

While the Court should affirm the chancellor's finding that Tim breached the DBA by removing Debbie as the sole beneficiary, it should reverse and render the chancellor's holding that Tim's breach of the DBA was moot.

While Debbie has not appealed the chancellor's decision to award child support payments to Tim, the chancellor erred in making those payments retroactive to July 1, 2001, since Tim failed to prove a change in circumstance as of July 2001. This Court should reverse and render, finding that support payments are only due from the date of the chancellor's opinion on April 10, 2008.

This Court should reverse and render the chancellor's dismissal of the West Entities' and the chancellor's award of attorneys fees and expenses to the West Entities. In *West I,* held the very transfers at issue may be considered fraudulent conveyances. Debbie clearly stated a claim against the West Entities upon which relief could be granted as a matter of law. Even if the chancellor was correct in granting the West Entities' motion to dismiss, Debbie had some hope of success in asserting a fraudulent conveyance claim against the West Entities based upon *West I.* Attorney fees should not have been imposed against Debbie under either Rule 11 or the LAA.

Finally, this Court should award Debbie reasonable fees incurred on this appeal. Debbie requests that she be granted leave to file a motion for attorneys fees incurred on appeal with an itemized statement of the fees incurred for consideration by the Court

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IX. CERTIFICATE OF SERVICE

I, Patrick F. McAllister, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief by U.S. mail, postage prepaid, upon:

Hon. Franklin C. McKenzie, Jr.
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DATED: this the 25 day of June, 2009.

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