**No.**

# In the Supreme Court of the United States

CHARLES M. IVEY, III, TRUSTEE, PETITIONER

*v.*

FIRST CITIZENS BANK & TRUST COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**PETITION FOR A WRIT OF CERTIORARI**


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## QUESTION PRESENTED

This case presents a clear and acknowledged circuit conflict about the meaning of a key statutory definition in the Bankruptcy Code.

The Code defines a "transfer" to include "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property." 11 U.S.C. 101(54)(D). That definition is central to multiple Code provisions that circumscribe transactions involving a debtor's property. And those provisions matter critically to bankruptcy's core functions of asserting "exclusive jurisdiction over all of the debtor's property" and achieving "the equitable distribution of that property among the debtor's creditors." *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006). Yet the courts are openly divided over whether the common occurrence of a debtor's bank deposit constitutes a "transfer." See App., *infra*, 6a ("Courts are thus divided on whether § 101(54)'s definition of transfer * * * includes a debtor's deposits in his own unrestricted bank account in the regular course of business."); *Schoenmann* v. *Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231, 1246 & n.1 (9th Cir. 2017) (Korman, D.J., concurring) ("The circuits are divided on this question").

Despite the broad language of Section 101(54) and a widely cited Senate Report confirming that a "deposit in a bank account or similar account is a transfer," S. Rep. No. 95-989, 95th Cong., 2d Sess. 27 (1978), the Fourth Circuit here, in conflict with the Ninth and Tenth Circuits, held that a debtor's deposit into his own bank account is not a "transfer." The question presented is:

Whether the definition of "transfer" under 11 U.S.C. 101(54) includes a debtor's deposit into his own bank account.

## PARTIES TO THE PROCEEDING BELOW

Petitioner is Charles M. Ivey, III, the plaintiff-appellant below and the trustee for the estate of debtor James Edwards Whitley.

Respondent is First Citizens Bank & Trust Company, the defendant-appellee below.

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## PETITION FOR A WRIT OF CERTIORARI

Charles M. Ivey, III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 848 F.3d 205. The opinion of the district court (App., *infra*, 12a-31a) is reported at 539 B.R. 77. The opinion of the bankruptcy court (App., *infra*, 32a-36a) is unreported but available at 2014 WL 6910837.

## JURISDICTION

The judgment of the court of appeals was entered on January 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 101(54) of Title 11 of the United States Code provides, in pertinent part:

The term "transfer" means—

* * *

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—

(i) property; or

(ii) an interest in property.

## INTRODUCTION

This case presents a clear and intractable circuit conflict on how to interpret a critical statutory definition in the Bankruptcy Code. According to the court of appeals, the Code's definition of "transfer" (11 U.S.C. 101(54)(D)) does not include a debtor's deposits into his own bank account. The Fourth Circuit reached that holding by expressly rejecting a decision of the Tenth Circuit, and the Ninth Circuit has since rejected the Fourth Circuit's decision on the same question. The same confusion is pervasive in the lower courts: As the panel observed at oral argument, the law is "all over the place" on the issue. Fourth Cir. Oral Arg. Recording 2:30-2:39.[1]

The resolution of this important question is outcome-determinative in a wide range of cases. Indeed, multiple Code sections turn directly on that definition. And this case is the ideal vehicle for resolving the question: This "significant threshold" issue was the single basis for the

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[1] See http://coop.ca4.uscourts.gov/OAarchive/mp3/15-2209-2016 1026.mp3.

disposition below, and it is squarely presented for the Court's review. App., *infra*, 5a.

Moreover, the analysis on the merits of the question presented is not demanding. The Fourth Circuit incorrectly followed decisions construing the *narrower* statutory language in the old Bankruptcy Act. But Congress later replaced that Act with a new Bankruptcy Code, and it wrote the modern definition of "transfer" to be "as broad as possible." S. Rep. No. 95-989, 95th Cong., 2d Sess. 27 (1978). That new definition covers "parting with" any "interest in property," and a bank deposit easily meets that definition. And lest there were any doubt that Congress meant what it said, Congress also confirmed that *it meant what it said*: according to the definitive Senate Report on the Code, "[a] deposit in a bank account or similar account is a transfer." *Ibid.*

This case presents an important question of statutory construction, and this case is the ideal vehicle for deciding that question. There is an obvious 2-1 split that the courts of appeals have expressly acknowledged. The petition readily satisfies all the traditional criteria for Supreme Court review. The petition for a writ of certiorari should be granted.

## STATEMENT

1. a. "Critical features of every bankruptcy proceeding" include "the exercise of exclusive jurisdiction over all of the debtor's property" and "the equitable distribution of that property among the debtor's creditors." *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006). It is thus essential to determine what property belongs to the estate and how to treat transactions involving the debtor's property. These issues are bound up with the Code's definition of "transfer," which is often critical to the proper administration of a bankruptcy case. Whether a particular

act qualifies as a "transfer" can affect the estate's holdings and the assets available to satisfy creditors' claims.

Accordingly, the Code has multiple provisions that turn directly on whether a particular transaction constitutes a "transfer." For instance, Section 548 allows a trustee to "avoid any transfer" made "with actual intent to hinder, delay, or defraud" a creditor. 11 U.S.C. 548(a)(1)(A); see also 11 U.S.C. 547(b) (authorizing a trustee to "avoid any transfer" that prefers one creditor at the expense of other creditors); 11 U.S.C. 549 (authorizing a trustee to avoid post-petition transfers of property). In turn, "to the extent that a transfer is avoided" under those provisions, "the trustee may recover, for the benefit of the estate, the property transferred" or "the value of such property." 11 U.S.C. 550(a). These avoidable-transfer provisions naturally hinge on whether a transaction (*e.g.*, a deposit) constitutes a "transfer" at all. If it does not, the transaction cannot be avoided and the trustee cannot recover the property (or its value) for the estate.

The issue of an avoidable transfer also affects a debtor's ability to exempt property from the estate. Once a debtor files for bankruptcy, the estate generally sweeps in all the debtor's interests, see 11 U.S.C. 541, but the Code allows the debtor to exempt certain property, see 11 U.S.C. 522(b)(1). The Code generally precludes an exemption, however, for property that the debtor fraudulently transferred but the trustee later recovered for the estate. See 11 U.S.C. 522(g). Therefore, if a transaction is not a "transfer," the debtor need satisfy only the basic requirements of Section 522(b)(1) to establish an exemption.

As a final example, a successful bankruptcy typically ends with the debtor's discharge. *E.g.*, 11 U.S.C. 727(a). But a debtor may be denied a discharge if he "transfer[s]" property out of the estate "with intent to hinder, delay, or defraud a creditor or an officer of the estate." 11 U.S.C.

727(a)(2). Without a "transfer" in the first instance, a challenge to the discharge automatically fails.

b. The Bankruptcy Act of 1898 defined "transfer" to "include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Bankruptcy Act of 1898, Ch. 541, § 1, Pub. L. No. 55-541, 30 Stat. 544, 545. In 1978, however, "Congress fundamentally restructured bankruptcy law," *Begier* v. *IRS*, 496 U.S. 53, 63 (1990), including amending the definition of "transfer." Congress "deleted" "potentially limiting words" in the former definition, to make it "as broad as possible." S. Rep. No. 95-989, 95th Cong., 2d Sess. 27 (1978). The modern Code now defines "transfer" to include "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with" "property" *or* "an interest in property." 11 U.S.C. 101(54)(D). This definition encompasses "a transfer of possession, custody, or control even if there is no transfer of title." S. Rep. No. 95-989, at 27. The Senate Report expressly declared that a "deposit in a bank account or similar account is a transfer." *Ibid.*

2. This case arises from the bankruptcy of James Edwards Whitley. Whitley was forced into bankruptcy after his multi-year Ponzi scheme collapsed. App., *infra*, 2a-3a. An integral part of his scheme was his use of a checking account at respondent's bank. *Id.* at 3a. Whitley "used this account to deposit funds, receive wire transfers, and write checks as part of his fraudulent scheme." *Ibid.*

Petitioner, the trustee for the estate, initiated an adversary proceeding against respondent. He claimed that Whitley's deposits were avoidable fraudulent transfers under 11 U.S.C. 548(a), entitling the estate to damages under 11 U.S.C. 550(a)(1). App., *infra*, 3a. The complaint

alleged that respondent was aware of Whitley's illegal activities, yet permitted him to use the account to give his scheme an air of legitimacy and to disburse funds to his "investors." Every time Whitley found a new "investor," the estate suffered by incurring another claim that reduced the shares of other creditors.

Respondent moved for summary judgment, which the bankruptcy court granted, and the district court affirmed. App., *infra*, 3a, 31a, 36a. Both courts found that Whitley had the '"actual intent to hinder, delay, or defraud creditors"' under Section 548(a)(1)(A). *Id.* at 17a (quoting bankruptcy court's decision denying respondent's motion to dismiss). Each court held, however, that "although the transactions [*i.e.*, the deposits] were transfers from Whitley to [respondent], those transfers neither diminished the bankruptcy estate nor placed the funds beyond the creditors' reach, and they were therefore not avoidable as fraudulent transfers." *Id.* at 3a.

3. The Fourth Circuit affirmed on other grounds. App, *infra*, 10a-11a. It explained that the "threshold question" is "whether the transactions at issue are transfers within the meaning of § 101(54)." *Id.* at 5a. The court expressly noted the existing conflict regarding whether a debtor's deposits into his own bank account satisfied Section 101(54), calling it a "significant" issue that has "divided" the courts. *Id.* at 5a, 6a. On one side of the conflict, "[s]ome courts have found that these types of transactions do constitute 'transfers.'" *Id.* at 6a-7a (discussing, *e.g.*, *Redmond* v. *Tuttle*, 698 F.2d 414, 417-418 & n.8 (10th Cir. 1983); *In re Schafer*, 294 B.R. 126, 132 (N.D. Cal. 2003)). Those decisions were guided by "the Senate Report's statement that the definition of 'transfer' should be read as broadly as possible, as well as the broad language of § 101(54) itself." *Id.* at 7a.

On the other side, the Fourth Circuit explained, some "courts have just as strongly concluded the deposits by a debtor into his own unrestricted checking account" are not "transfers." App., *infra*, 7a. These decisions—including earlier Fourth Circuit decisions predating the Code—relied primarily on a 1904 opinion from this Court construing the old Bankruptcy Act. *Id.* at 7a-9a (discussing *N.Y. Cty. Nat'l Bank* v. *Massey*, 192 U.S. 138, 145 (1904); *Bank of Commerce & Trs.* v. *Hatcher*, 50 F.2d 719, 720 (4th Cir. 1931); and *Citizens' Nat'l Bank of Gastonia, N.C.* v. *Lineberger*, 45 F.2d 522, 527-528 (4th Cir. 1930)). As the Fourth Circuit observed, *Massey* characterized a deposit as "creat[ing] an ordinary debt, not a privilege or right of a fiduciary character," but "'with the superadded obligation that the money is to be paid, when demanded, by a check.'" *Massey*, 192 U.S. at 145; App., *infra*, 7a-8a. Despite the Code's new definition of "transfer," these courts, "before and after the enactment of the current Bankruptcy Code," continued to follow *Massey* in holding that a deposit does not constitute a "transfer." App., *infra*, 9a.

After analyzing the conflict, the Fourth Circuit aligned itself with the latter side of the split: "While recognizing that some courts read § 101(54) more broadly, we are persuaded by the precedent in this Circuit and our sister circuits that the better interpretation of 'transfer' does not include a debtor's regular deposits into his own unrestricted checking account—a specific circumstance not explicitly contemplated by the Senate Report [*i.e.*, S. Rep. No. 95-989]." App., *infra*, 10a. The court accordingly affirmed the district court on this "narrower ground" without addressing the lower courts' other holdings or the parties' other arguments. *Id.* at 10a-11a; see also *id.* at 5a.

## REASONS FOR GRANTING THE PETITION

### A. As The Decision Below Expressly Acknowledged, There Is A Square Circuit Conflict Over The Meaning Of "Transfer" Under The Code

The Fourth Circuit explicitly recognized that the lower courts are "divided on whether § 101(54)'s definition of 'transfer' * * * includes a debtor's deposits in his own unrestricted bank account in the regular course of business." App., *infra*, 6a. This disarray was likewise recognized at oral argument, with one panel member explaining that "[t]he law is all over the place." Fourth Cir. Oral Arg. Recording 2:30-2:39. The court openly created a circuit conflict by expressly rejecting a decision from the Tenth Circuit. And the Ninth Circuit deepened that conflict only months later, when it reached the opposite conclusion in rejecting the decision below. This split is now entrenched and will not be resolved on its own. Further review is plainly warranted.

1. a. In direct conflict with the Fourth Circuit, the Ninth Circuit has squarely held that a debtor's deposit into his own bank account is a "transfer" under Section 101(54). *Schoenmann* v. *Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231, 1243-1244 (9th Cir. 2017) ("'depositing money into a bank account is a transfer'") (quoting *Bernard* v. *Sheaffer (In re Bernard)*, 96 F.3d 1279, 1282 (9th Cir. 1996)). It reached this conclusion after the Fourth Circuit's decision, and recognized the obvious division among the circuits. *Id.* at 1246 & n.1 (Korman, D.J., concurring in part and concurring in the judgment) ("The majority is correct that *Bernard*[] binds us to begin with the premise that a bank deposit is a 'transfer' under the modern Bankruptcy Code. * * * The circuits are divided on this question.") (citing the Fourth Circuit). But it adhered to its earlier precedent, which compelled the opposite result.

As the panel explained, the Ninth Circuit initially confronted this issue in the analogous context of a debtor's withdrawal from a checking account. *Tenderloin*, 849 F.3d at 1243 (discussing *Bernard*, 96 F.3d at 1282-1283). In *Bernard*, the debtors withdrew funds to "fend off the [creditors'] attempts to reach [their] assets." 96 F.3d at 1282. The creditors accordingly argued that the debtors should be denied a discharge under 11 U.S.C. 727(a)(2)(A), because they "transferred" property "with intent to hinder, delay, or defraud a creditor." *Id.* at 1281. The debtors disagreed, asserting that the withdrawals "were not transfers in any meaningful sense"—"they merely moved their assets from one of *their own* pockets to another." *Id.* at 1282.

Although the court found that the debtors' "argument has force and arguably finds some support in out-of-circuit law," it could not overcome the Code's "*extremely* broad" definition of "transfer." *Bernard*, 96 F.3d at 1282. The court examined the Code's plain text and legislative history, including the Senate Report's declaration that "*[a] deposit in a bank account or similar account is a transfer*." *Ibid.* (emphasis in original). It thus concluded that, "[i]f, as the legislative history indicates, depositing money into a bank account is a transfer, then later withdrawing money from that account should be a transfer, too—it ought to be a two-way street." *Ibid.* Moreover, the court continued, a deposit does not merely shift money between a debtor's pockets; it exchanges money for a "claim[] against the[] bank," creating a debtor-creditor relationship between bank and depositor. *Id.* at 1282-1283. Following the same logic, "[w]hen [the debtors] withdrew

from their accounts, they exchanged debt for money, * * * satisfying the Code's definition of transfer." *Id.* at 1283.[2]

In its latest decision, the Ninth Circuit found *Bernard* controlling: "'Under the holding in *Bernard*, there is no ambiguity around the definition of a transfer; withdrawals and deposits into bank accounts clearly qualify.'" *Tenderloin*, 849 F.3d at 1243-1244. The court accordingly rejected the defendant-bank's contention that the debtor's deposit into its account "would not constitute a 'transfer.'" *Id.* at 1242. Like the Fourth Circuit, the defendant relied heavily on this Court's decision in *Massey*. *Id.* at 1243. But, the Ninth Circuit responded, the modern Bankruptcy Code "'fundamentally restructured bankruptcy law,'" and the legislative history "state[s] squarely that '[a] deposit in a bank account or similar account is a transfer.'" *Ibid.* (quoting *Begier*, 496 U.S. at 63, and S. Rep. 95-989 at 27) (second alteration in original). The court accordingly held that the debtor's deposit was a transfer within Section 101(54): A "deposit 'exchange[s] money for debt * * * result[ing] in a "parting with" property under the holding in *Bernard* as a matter of law.'" *Tenderloin*, 849 F.3d at 1243-1244 (citation omitted). The concurrence agreed with this aspect of the court's analysis. It stated that "a bank deposit is a 'transfer' under the modern Bankruptcy Code," and, citing the Fourth Circuit decision below, recognized that "[t]he circuits are divided on this question." 849 F.3d at 1246 & n.1 (Korman, D.J., concurring in part and concurring in the judgment).

The Ninth Circuit's holding is both decisive and unsurprising. Indeed, over the past two decades, courts within the Ninth Circuit have consistently followed *Bernard* in

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[2] Judge O'Scannlain dissented, declaring that the debtors "merely changed the location of identifiable cash." *Ibid.* (O'Scannlain, J., dissenting).

holding that a deposit into the debtor's own bank account constitutes a "transfer." See, *e.g.*, *A&H Ins., Inc.* v. *Huff (In re Huff)*, BAP No. NV-13-1263, 2014 WL 904537, at *5-*6 (B.A.P. 9th Cir. Mar. 10, 2014) (rejecting bankruptcy court's holding that the debtor "had possession and control at all times over the funds after they were deposited," and explaining that, under *Bernard*, "there is no ambiguity around the definition of a transfer; withdrawals and deposits into bank accounts clearly qualify"); *In re Schafer*, 294 B.R. 126, 131-132 (N.D. Cal. 2003) (citing *Bernard* to reject debtor's argument that depositing funds "was not a prohibited transfer because the funds remained in his possession," and holding that "[t]here is no ambiguity around the definition of transfer, deposits in bank accounts clearly qualify"). In fact, the Fourth Circuit below discussed one of those decisions (*Schafer*) as a representative example of courts holding that deposits "constitute 'transfers' within the meaning of § 101(54)." App., *infra*, 6a.

The Ninth Circuit's interpretation of the Code is thus directly at odds with the Fourth Circuit's decision below; had this case arisen in California instead of North Carolina, the decision would have come out the opposite way.

b. As the Fourth Circuit acknowledged, its decision also directly conflicts with the Tenth Circuit's decision in *Redmond* v. *Tuttle*, 698 F.2d 414 (10th Cir. 1983). See App., *infra*, 6a-7a. That case involved a debtors' omission of a checking account from their schedule of assets. 698 F.2d at 415. After the trustee discovered the account and recovered its contents for the estate, the debtors attempted to exempt the money under 11 U.S.C. 522(g). *Id.* at 415-416; see 11 U.S.C. 522(g) (allowing a debtor to exempt property recovered by the trustee "to the extent that the debtor could have exempted such property * * *

if such property had not been transferred," if the "transfer was not a voluntary transfer" and "the debtor did not conceal such property"). The court explained that "the transfer[] need only be voluntary, not just fraudulent, to preclude exemption." *Id.* at 417. The court had little trouble concluding that the deposit was a "transfer": "'Transfer' is broadly defined in 11 U.S.C. § 101([54]) to include every means of parting with property or an interest in property, even by deposits in a bank account." *Id.* at 417 & n.8 (citing S. Rep. No. 95-989 at 27). Because the deposits were "transfers" and voluntary, the Tenth Circuit denied the exemption. *Id.* at 417-418.[3]

2. The Fourth Circuit correctly explained that the division here extends beyond the circuit courts to include confusion among the district and bankruptcy courts (including conflicting decisions in the same district). Compare, *e.g.*, *Schafer*, 294 B.R. at 131-132 (deposits are transfers); and *In re Wilbur*, 211 B.R. 98, 104 (Bankr. M.D. Fla. 1997) (same) (agreeing with *Bernard*, 96 F.3d at 1282), with, *e.g.*, *Rosen* v. *Kore Holdings, Inc. (In re Rood)*, 459

[3] According to the Fourth Circuit, despite creating a conflict with the Tenth Circuit, its holding is consistent with the Seventh Circuit's decision in *In re Prescott*, 805 F.2d 719 (7th Cir. 1986). See App., *infra*, 9a. This is not entirely correct. The Seventh Circuit adopted the same reading of the Code as the Ninth and Tenth Circuits: "Deposits into bank accounts clearly can be transfers under the new Bankruptcy Code." 805 F.2d at 729 ("As the Senate Report stated, 'The definition of transfer is as broad as possible. * * * A deposit in a bank account or similar account is a transfer.'"). The court, however, ultimately relied on "established" pre-Code authority to find the deposit was not a transfer, repeating the Fourth Circuit's error below. *Id.* at 729 (citing "established caselaw"). In any event, the Seventh Circuit's commentary was dicta, because the court also found that the deposit was not unrestricted at all, but was a "payment for an antecedent debt." *Ibid.*

B.R. 581, 606 (Bankr. D. Md. 2011) (deposits are not transfers); *Kiester* v. *Handy (In re Handy)*, 164 B.R. 355, 357-358 (Bankr. M.D. Fla. 1994) (same); and *Tonyan Constr. Co., Inc.* v. *McHenry State Bank (In re Tonyan Constr. Co., Inc.)*, 28 B.R. 714, 728-729 (Bankr. N.D. Ill. 1983) (same); cf. also *Feltman* v. *City Nat'l Bank Corp. (In re Sophisticated Commc'ns, Inc.)*, Adversary No. 02-1526-BKC-RAM-A, 2007 WL 2257604, at *1 (Bankr. S.D. Fla. Aug. 1, 2007) (concluding that a deposit of funds into the debtor's account from the debtor's other account at the same bank was not a transfer, but a deposit of funds from the debtor's account at a different bank was a transfer). In short, as one of the judges below declared during oral argument, "the law is all over the place" on this issue. Fourth Cir. Oral Arg. Recording 2:30-2:39.

3. Confronting this extensive disarray, the Fourth Circuit examined both sides of the issue and rejected the Tenth Circuit's decision. The Ninth Circuit then reaffirmed its earlier precedent and rejected the Fourth Circuit's reasoning. Each side of the conflict acted against a well-developed body of law on this important issue. The existence of a clear and now-intractable split is undeniable. This Court's intervention is urgently needed.

### B. Review Is Warranted Because The Fourth Circuit Misinterpreted The Code

While the conflict over this issue is substantial, the analysis on the merits is straightforward. The plain text of Section 101(54) covers a "parting with" "property" *or* "an interest in property," and exchanging money for a claim against a bank is clearly parting with an "interest" in property. That is a basic question of statutory construction, and petitioner plainly has the better side. But even if the text had any ambiguity, the legislative history is dispositive, and it says petitioner wins. The Senate Report

specifically declares that "possession, custody, and control are interests in property," and thus a "deposit in a bank account or similar account is a transfer." S. Rep. 95-989 at 27. The Fourth Circuit's contrary holding is directly at odds with the Code's unambiguous text and legislative history; it relies instead on cases decided under an earlier, and conspicuously narrower, definition of "transfer." Further review is warranted.

1. a. Section 101(54)(D) defines "transfer" to include "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property." By depositing funds, Whitley turned his property over to the bank. That deposit "create[d] the relation of debtor and creditor." *Massey*, 192 U.S. at 145; see also, *e.g.*, *Barnhill* v. *Johnson*, 503 U.S. 393, 398 (1992) ("A person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance."); *Holloway* v. *Wachovia Bank & Trust Co., N.A.*, 423 S.E.2d 752, 757 (N.C. 1992) ("When Crisp deposited the $20,000.00 with Wachovia, a debtor-creditor relationship was established in which Wachovia became the owner of the money and the debtor of Crisp.").[4] "Instead of owning money sitting in [his] account[], [Whitley] owned claims against [respondent]." *Bernard*, 96 F.3d at 1283. He therefore "part[ed]

[4] "This position is the majority position in the United States." *Huff*, 2014 WL 904537, at *6 n.8 (citing *Massey*, 192 U.S. at 147-149; *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1158 (2d Cir. 1986); and Restatement (Second) of Trusts § 12, cmt. 1 (1959)). Federal law defines the meaning of "transfer," but its reference to "property" is controlled by state law. *Barnhill*, 503 U.S. at 397-398.

with" his property or, at a minimum, an interest in property. 11 U.S.C. 101(54)(D).[5]

The Fourth Circuit misconstrued the Code's plain text. Although the court recognized that a deposit results in "a substitution of the property for a corresponding credit," it nonetheless found no "transfer" because the depositor "is still free to access those funds at will." App., *infra*, 9a, 10a. "Access," however, is not the statutory test; a "transfer" hinges on a parting with *any* "interest" in property. 11 U.S.C. 101(54)(D)(ii). The court did not explain how a "substitution" of actual money for a mere credit maintains the depositor's identical interests in property. Indeed, the deposits plainly came into the bank's possession (and thus left Whitley's): "The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits." *Massey*, 192 U.S. at 145.

b. The legislative history eliminates any doubt on this score. "Possession, custody, and control are interests in property," and accordingly "*[a] deposit in a bank account or similar account is a transfer*." S. Rep. No. 95-989 at 27 (emphasis added). The Fourth Circuit had no answer for how "access" equates to possession, custody, *and* control. (It does not.) As to the Senate Report's unambiguous declaration that deposits are indeed transfers, the court opined that "a debtor's regular deposits into his own un-

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[5] While *Massey* interpreted a now-outdated definition of "transfer," its discussion of the practical effects of a deposit—*i.e.*, creating a debtor-creditor relationship—is still good law. See, *e.g.*, *Huff*, 2014 WL 904537, at *6 & n.8.

restricted checking account" presents "a specific circumstance not explicitly contemplated by the Senate Report." App., *infra*, 10a. That is a curious rationalization. The report speaks categorically and does not admit of distinctions. Moreover, a depositor relinquishes "possession" (at the very least) to her bank regardless of the nature of the account.

2. The 1978 enactment of the new Bankruptcy Code also undermines the Fourth Circuit's heavy reliance on pre-Code authority. See App., *infra*, 7a-9a. According to the Fourth Circuit, that case law, including two circuit decisions from the 1930s, "interpreted *Massey* to say that this type of transaction" is not a transfer, and more recent decisions continue to use the same reasoning. *Id.* at 8a-9a.

But those decisions cannot be squared with the fact that the new definition of "transfer" differs markedly from that of *Massey*'s time: "Today, the parting may be with a mere 'interest in property' and need not be done 'as a payment, pledge, mortgage, gift, or security.'" *Tenderloin*, 849 F.3d at 1243 n.12 (quoting 11 U.S.C. § 101(54)). As the Senate Report explained, the 1978 amendment "deleted" "many of the potentially limiting words in current law" to make the new definition "as broad as possible." S. Rep. No. 95-989 at 27. "The *Massey* court had no occasion to contemplate these amendments; it considered only the Bankruptcy Code's former and narrower definition of 'transfer.'" *Tenderloin*, 849 F.3d at 1243. The Fourth Circuit erroneously brushed aside these significant statutory changes. Cf. *Husky Int'l Electronics, Inc.* v. *Ritz*, 136 S. Ct. 1581, 1586 (2016) ("When 'Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'").

3. Finally, as a practical matter, it makes sense to treat deposits as transfers, because placing money in a bank account carries real consequences. For example, in this

case, transferring funds to respondent facilitated Whitley's Ponzi scheme by enabling him to move around his funds quickly and easily. Likewise, in denial-of-discharge cases, a debtor can escape creditors by opening and funding a new account that creditors (and perhaps the trustee) are unaware of. This issue arises as a "significant threshold question" (App., *infra*, 5a) in many parts of the Code. If deposits do not constitute "transfers," then tests for avoidable transfers and discharge denials are short-circuited, even if the debtor "inten[ded] to hinder, delay, or defraud" a creditor. 11 U.S.C. 548(a)(1)(A); see, *e.g.*, 11 U.S.C. 727(a)(2).

Congress intentionally wrote Section 101(54) "broad[ly]" (S. Rep. No. 95-989 at 27), precisely to encompass as many transactions as possible. Congress presumably meant what it said. Further review is warranted to correct the court of appeals' unduly narrow construction of this important provision of bankruptcy law.

### C. The Meaning Of This Definitional Section In The Code Is A Significant And Recurring Question That Requires Uniformity

The Fourth Circuit correctly recognized that the question presented is "significant." App., *infra*, 5a; see Fourth Cir. Oral Arg. Recording 2:46-2:48 (Court: "it is an important issue"). The factual scenario—a simple bank deposit—is routine, and the definitional issue presents a "threshold question" (App., *infra*, 5a) for multiple Code provisions that are fundamental to the purpose and administration of bankruptcy cases.

As discussed above, however, the circuit conflict on this basic issue is clear and entrenched. The Fourth and Ninth Circuits confronted the competing viewpoints and chose opposite sides. That division is particularly troubling for national banks operating within States on both sides of the split. Those banks will be subject to different

rules depending entirely on the happenstance of where a deposit might occur. And there is no reason to think these courts will revisit the question on their own. The Fourth Circuit already considered the split before reaching its disposition, and the Ninth Circuit did the same in adhering to circuit law that had been on the books for decades. The issue has been exhausted and further percolation is pointless. This Court alone can provide the necessary uniformity.

And achieving "uniform[ity]" is particularly important in the bankruptcy context. U.S. Const. Art. I, § 8, cl. 4. This Court thus regularly grants review to resolve even shallow conflicts over the proper construction or administration of the Bankruptcy Code. See, *e.g.*, *Husky Int'l Electronics, Inc.* v. *Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015) (1-1 split); *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (1-1 split); *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014) (1-1 split). Given the constitutional and practical interests in clarity and uniformity, the existing conflict is particularly intolerable. Further review is plainly warranted.

### D. This Case Is An Ideal Vehicle For Deciding The Question Presented

This case is an excellent vehicle for resolving the meaning of "transfer" under the Code. The material facts are simple and undisputed: the debtor deposited money into his own bank account. That is the representative fact-pattern at the heart of the conflict. There are no other obstacles to review. This issue was outcome-determinative below. The Fourth Circuit's decision rested solely on whether this common transaction constituted a "transfer" under Section 101(54). While the parties joined issue on other arguments, the court of appeals did not address

them. Cf., *e.g.*, *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("'[W]e are a court of review, not of first view.'") (alteration in original).

Because the definition of "transfer" is a "threshold question" (App., *infra*, 5a), other cases may arrive with alternative grounds for affirmance—assuming they arrive at all. See, *e.g.*, Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010) ("The nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation."). The question here is presented cleanly and squarely. The Court should seize the opportunity to resolve this acknowledged and significant circuit conflict.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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# APPENDIX

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 15-2209

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In Re: JAMES EDWARDS WHITLEY,
Debtor.

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CHARLES M. IVEY, III, Chapter 7 Trustee for the Estate of James Edwards Whitley,
Plaintiff-Appellant,

v.

FIRST CITIZENS BANK & TRUST COMPANY,
Defendant-Appellee.

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Filed: January 31, 2017

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Before: GREGORY, Chief Judge, WYNN, Circuit Judge, and DAVIS, Senior Circuit Judge.

**OPINION**

GREGORY, Chief Judge:

This appeal is from an adversary proceeding in the bankruptcy of debtor James Edwards Whitley. Charles M. Ivey III, the Chapter 7 trustee for Whitley's estate, appeals the district court judgment affirming the bank-

ruptcy court's award of summary judgment for First Citizens Bank and Trust Company ("First Citizens Bank" or "the Bank") on the trustee's claim that certain deposits and wire transfers to Whitley's personal checking account at First Citizens Bank are avoidable as fraudulent transfers. We find that the transactions at issue do not constitute transfers within the meaning of the Bankruptcy Code, and we therefore affirm.

I.

This case arises out of Whitley's bankruptcy, which in turn stems from Whitley's Ponzi scheme wherein he defrauded his friends, family, and acquaintances out of millions of dollars under the guise of investing their money in a purchase order factoring contract business.[1] This scheme unraveled in late 2009 when Whitley was unable to secure additional funds to continue his fraudulent operations.

In early 2010, a group of eight individual creditors filed with the bankruptcy court an involuntary petition against Whitley for relief pursuant to 11 U.S.C. § 303.

[1] The details of Whitley's fraudulent scheme are recounted in our earlier opinion affirming his criminal sentence for wire fraud and money laundering. *See United States v. Whitley*, 544 F. App'x 154 (4th Cir. 2013). As we explained there,

> A "purchase order factoring contract" is needed when a supplier requires that a buyer pay for goods by cash on delivery, but the buyer wants to purchase the goods on 30 to 60 day terms. The purchase order contractor agrees to pay the supplier upon delivery of the goods, which enables the buyer to delay payment for a specified period of time.

*Id.* at 155 n.1. Whitley did not invest any of his victims' funds in such a business; he instead spent their funds both to further his Ponzi scheme and for his own personal use. *Id.* at 156.

The petition was granted on March 30, 2010. In 2012, after more than two years of bankruptcy proceedings and Whitley's conviction for wire fraud and money laundering, the trustee filed a complaint on behalf of the bankruptcy estate against First Citizens Bank, where Whitley had a personal checking account in his name. Whitley had used this account to deposit funds, receive wire transfers, and write checks as part of his fraudulent scheme in the two years preceding the filing of the involuntary bankruptcy petition. Administrative Record ("A.R.") 482. In the complaint, the trustee alleged, among other things,[2] that certain deposits and wire transfers to Whitley's account, including personal and cashier's checks and wire transfers from Whitley's "investors," constituted transfers from Whitley to the Bank that were made with the actual intent to hinder, delay, or defraud creditors, and that they were therefore avoidable as fraudulent transfers under 11 U.S.C. § 548(a)(1)(A). *Id.*

The bankruptcy court granted summary judgment for First Citizens Bank on the grounds that although the transactions were transfers from Whitley to the Bank, those transfers neither diminished the bankruptcy estate nor placed the funds beyond the creditors' reach, and they were therefore not avoidable as fraudulent transfers. The district court affirmed on the same grounds. The trustee timely appealed to this Court.

## II.

We review de novo the bankruptcy court's and the district court's legal conclusions and review for clear error the bankruptcy court's factual findings. *In re Taneja*, 743

[2] The bankruptcy court granted the Bank's motion to dismiss the trustee's other claims, and the trustee did not appeal the dismissal of those claims.

F.3d 423, 429 (4th Cir. 2014). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). And "[i]n reviewing the grant of summary judgment, we can affirm on any legal ground supported by the record and are not limited to the grounds relied on by the district court." *Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993).

A.

The trustee alleges that the transactions at issue should be avoided as fraudulent transfers made from Whitley to the Bank with the actual intent to hinder, delay, or defraud Whitley's creditors. The trustee argues that the bankruptcy and district courts erred by requiring that the transactions diminish the bankruptcy estate in order to qualify as fraudulent transfers under § 548(a)(1)(A). Where actual fraudulent intent is present, the trustee contends, there is no requirement that the transactions diminish or otherwise move property away from the bankruptcy estate.

First Citizens Bank counters that the bankruptcy and district courts properly required that the transactions diminish the bankruptcy estate. The Bank points out that § 548(a)(1)(A) requires that an avoidable transfer be one "of an interest of the debtor in property," which, the Bank maintains, federal courts have interpreted to mean that the property would have been in the estate if not for the transfer. The Bank also emphasizes the underlying policy of fraudulent transfer law, which is to prevent depletion of the estate. Here, where Whitley deposited checks and received wire transfers in his personal checking account, the Bank argues that he neither transferred his interest in the funds to the Bank nor diminished the bankruptcy

estate, since Whitley at all times had access to and control of the funds.

We asked the parties to address at oral argument the significant threshold question of whether the transactions at issue are even transfers within the meaning of § 101(54) of the Bankruptcy Code, such that we might proceed to consider whether the transactions are *avoidable* transfers under § 548(a)(1)(A). The trustee argued that the transactions did constitute transfers under § 101(54)'s broad definition, which includes any "dispos[al] of or parting with [] property." The trustee contended that depositing and accepting funds into a bank account as Whitley did here constitutes parting with property under § 101(54) because of the Bank's access to and interest in the funds. First Citizens Bank responded that no such parting with property occurred. It argued that there was no change to Whitley's rights and interests in the property after the deposits and wire transfers because Whitley still had access to his account, he could withdraw the funds at will, and any funds in the account were available to the bankruptcy estate.

We now find that the transactions at issue do not constitute transfers within the meaning of the Bankruptcy Code. Because our resolution of this threshold question disposes of the appeal, we need not reach the parties' other arguments.

B.

Under 11 U.S.C. § 548(a)(1)(A), a "trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily [] made such transfer . . . with actual intent to hinder, delay, or defraud any" creditor. The

Bankruptcy Code defines "transfer," in pertinent part, as any "mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with[] (i) property; or (ii) an interest in property." *Id.* § 101(54)(D). The threshold question here is whether the transactions at issue are transfers within the meaning of § 101(54), such that they might be considered under § 548.

Congress sought to make "[t]he definition of transfer" in the Bankruptcy Code "as broad as possible," drafting it to include "any transfer of an interest in property," including "[a] deposit in a bank account or similar account." S. Rep. No. 95-989, at 27 (1978) (stating also that "any transfer of an interest in property is a transfer, including a transfer of possession, custody, or control even if there is no transfer of title, because possession, custody, and control are interests in property"). The Senate Report did not, however, distinguish between different types of deposits; it merely articulated the general principle that "transfer" is meant to encompass an array of transactions. Courts are thus divided on whether § 101(54)'s definition of "transfer," even interpreted as broadly as Congress intended, includes a debtor's deposits in his own unrestricted bank account in the regular course of business.

Some courts have found that these types of transactions do constitute "transfers" within the meaning of § 101(54). For instance, in *In re Schafer*, 294 B.R. 126 (N.D. Cal. 2003), where the debtor opened a new account and deposited his funds there because a creditor had attached his old account, the court found that "[t]here is no ambiguity around the definition of transfer, deposits in bank accounts clearly qualify." *Id.* at 132. And in *Meoli v. Huntington Nat'l Bank*, No. 1:12-CV-1113, 2015 WL 5690953, at *9-10 (W.D. Mich. Sept. 28, 2015), the court found that a customer's deposits in his bank account were

transfers and that the bank was the immediate transferee as a result of the deposits. *See also Redmond v. Tuttle*, 698 F.2d 414, 417-18, 417 n.8 (10th Cir. 1983) (finding that deposits in debtors' checking account were transfers within the meaning of § 101(54)). These courts looked to the Senate Report's statement that the definition of "transfer" should be read as broadly as possible, as well as the broad language of § 101(54) itself.

But courts have just as strongly concluded that deposits by a debtor into his own unrestricted checking account in the regular course of business do *not* constitute "transfers" within the meaning of § 101(54). The Fourth Circuit said precisely that almost ninety years ago:

> An ordinary deposit in a bank, however, is not a "transfer" . . . . It . . . results in substituting for currency, bank notes, checks, drafts, and other bankable items a corresponding credit with the bank, which may be checked against, and which provides the depositor with the medium of exchange in universal use in the transaction of business. . . . [I]f the deposit is in reality a deposit, made in good faith as such, subject to the withdrawal of the depositor, and not made as a cloak for a payment or other forbidden transaction, it is not a transfer within the meaning of the Bankruptcy Act . . . .

*Citizens' Nat. Bank of Gastonia, N.C. v. Lineberger*, 45 F.2d 522, 527-28 (4th Cir. 1930); *see also Bank of Commerce & Trs. v. Hatcher*, 50 F.2d 719, 720 (4th Cir. 1931) (same) (citing *Lineberger*, 45 F.2d at 527). The *Lineberger* and *Hatcher* courts relied heavily on language from the Supreme Court, which had previously stated that "[i]t cannot be doubted that, except under special circumstances, . . . a deposit of money upon general account with a bank creates the relation of debtor and creditor.

. . . It creates an ordinary debt, not a privilege or right of a fiduciary character." *N.Y. Cty. Nat'l Bank v. Massey*, 192 U.S. 138, 145 (1904). And this "ordinary debt," with the Bank's corresponding obligation to make the funds available at the depositor's will, does not change the debtor's interest in the funds. *See id.* Courts have interpreted *Massey* to say that this type of transaction therefore does not constitute a transfer within the meaning of the Bankruptcy Code. *See, e.g.*, *In re Consol. Pioneer Mortg. Entities*, 211 B.R. 704, 714-15 (S.D. Cal. 1997), *aff'd in part, rev'd in part on other grounds*, 166 F.3d 342 (9th Cir. 1999).

Though *Lineberger*, *Hatcher*, and *Massey* all predate the current Bankruptcy Code, courts continue to rely on these cases in similarly finding that certain deposits do not constitute transfers under § 101(54). In *Consolidated Pioneer Mortgage*, the court found that "[n]otwithstanding [§ 101(54)'s] broad definition [of 'transfer'], it is well settled that a customer's bank deposits into its own unrestricted checking account are not transfers within the meaning of the Bankruptcy Code." *Id.* at 714 (citing *Massey*, 192 U.S. at 145). And relying on the passage from *Lineberger* quoted above, the court added, "Although the customer 'disposes of' or 'parts with' the deposited items in exchange for the credit, this 'parting' is not a transfer for bankruptcy purposes because, in effect, the assets available to the customer have not changed." *Id.* at 714-15. And at least one bankruptcy court in this Circuit has similarly applied *Lineberger* to determine that these types of transactions are not transfers under § 101(54). *See In re Rood*, 459 B.R. 581, 606 (Bankr. D. Md. 2011), *aff'd*, 482 B.R. 132 (D. Md. 2012), *aff'd sub nom. S. Mgmt. Corp. Ret. Trust v. Rood*, 532 F. App'x 370 (4th Cir. 2013), and *aff'd sub nom. S. Mgmt. Corp. Ret. Trust v. Jewell*, 533 F. App'x 228 (4th Cir. 2013) ("[W]ith respect to those

'transfers' that were actually deposits of funds into accounts controlled by [the debtor], the court observes that 'an ordinary deposit in a bank . . . is not a "transfer."'" (quoting *Lineberger*, 45 F.2d at 527)). According to these courts, such transactions do not change the debtor's possession, custody, or control of the property because the transactions result in only a substitution of the property for a corresponding credit—a credit that may be redeemed by the debtor at any time.

Other bankruptcy and circuit courts, considering the issue both before and after the enactment of the current Bankruptcy Code, agree. *See In re Prescott*, 805 F.2d 719, 729 (7th Cir. 1986) ("Deposits into bank accounts clearly can be transfers under the new Bankruptcy Code. . . . However, . . . to the extent a deposit is made into an unrestricted checking account, in the regular course of business and withdrawable at the depositor's will, it is not avoidable by the trustee . . . .") (citing *Katz v. First Nat'l Bank of Glen Head*, 568 F.2d 964, 969 (2d Cir. 1977)); *Katz*, 568 F.2d at 969 ("It is well settled that deposits in an unrestricted checking account, made in the regular course of business, do not constitute transfers within the meaning of the Bankruptcy Act."); *In re Tonyan Const. Co., Inc.*, 28 B.R. 714, 728-29 (Bankr. N.D. Ill. 1983) (stating that "[o]rdinarily, a deposit in an unrestricted checking account does not constitute a parting with property, because it '[] results in substituting for currency, bank notes, checks, drafts, and other bankable items a corresponding credit with the bank, which may be checked against'" (quoting *Lineberger*, 45 F.2d at 527)); *In re Perry*, 336 F. Supp. 420, 425 (D.S.C. 1972) (finding that "deposits and subsequent set-offs are not transfers" because they "result in a substitution of credit for various forms of commercial paper or currency" and "are withdrawable at the will of the depositor").

While recognizing that some courts read § 101(54) more broadly, we are persuaded by the precedent in this Circuit and our sister circuits that the better interpretation of "transfer" does not include a debtor's regular deposits into his own unrestricted checking account—a specific circumstance not explicitly contemplated by the Senate Report. When Whitley made deposits and accepted wire transfers into his checking account at First Citizens Bank, he continued to possess, control, and have custody over those funds, which were freely withdrawable at his will. Indeed, any funds in the account were at all times part of the bankruptcy estate. The Bank's mere maintenance of Whitley's checking account does not suffice to make deposits and wire transfers in that account "transfers" from Whitley to the Bank, and we decline to read § 101(54) to say otherwise.

We express no opinion on whether other types of deposits, such as those made to restricted checking accounts, would constitute transfers under § 101(54). Our holding is limited to the narrow circumstances presented here: when a debtor deposits or receives a wire transfer of funds into his own unrestricted checking account in the regular course of business, he has not transferred those funds to the bank that operates the account. When the debtor is still free to access those funds at will, the requisite "disposing of" or "parting with" property has not occurred; there has not been a "transfer" within the meaning of § 101(54).

Contrary to the bankruptcy and district courts, we find that the deposits and wire transfers at issue here are not § 101(54) "transfers" from Whitley to First Citizens Bank. The transactions therefore cannot be avoidable

transfers under § 548(a). Accordingly, summary judgment for First Citizens Bank is proper on this narrower ground.

III.

For all of these reasons, the district court's judgment is

*AFFIRMED.*

## APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

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No. 1:14CV1067

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CHARLES M. IVEY, III,
as Chapter 7 Trustee for the
Estate of JAMES EDWARDS WHITLEY,
Plaintiff-Appellant,

v.

FIRST CITIZENS BANK AND TRUST COMPANY,
Defendant-Appellee.

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Signed: October 1, 2015

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### AMENDED MEMORANDUM OPINION AND ORDER[1]

OSTEEN, JR., District Judge.

This appeal is from a judgment of the United States Bankruptcy Court for the Middle District of North Carolina. Plaintiff Charles M. Ivey, III ("Plaintiff") is appealing the Bankruptcy Court's December 8, 2014 Order in which the Bankruptcy Court granted Defendant First

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[1] The Memorandum Opinion and Order is amended to correct a typographical error.

Citizens Bank and Trust Company's ("Defendant") summary judgment motion. For the reasons set forth below, the Bankruptcy Court's grant of summary judgment will be affirmed.

## I. INTRODUCTION

This case arises out of the bankruptcy of James Edward Whitley ("Debtor"), who was engaged in a Ponzi scheme[2] disguised as a factoring business.[3] (Notice of Appeal, Memorandum Opinion ("Mem. Op.") (Doc. 1) at 5.)[4] Plaintiff, as the Chapter 7 Trustee for the Bankruptcy Estate of Debtor, filed the action underlying the present appeal against Defendant. In an Adversary Proceeding, Plaintiff filed a Complaint against Defendant on April 27, 2012, asserting three claims: (1) civil conspiracy, (2) fraudulent transfer, and (3) unfair and deceptive trade

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[2] "The term Ponzi scheme is the namesake of Charles Ponzi, a renowned Boston swindler, and refers to a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors." United States v. Godwin, 272 F.3d 659, 665 n.3 (4th Cir. 2001).

[3] As set out in United States v. Wachovia Corp.:

> Factoring is a process by which business enterprises acquire more capital and keep their own capital turning over faster. A factor purchases the accounts receivable without recourse but at a discount, and then collects the accounts. This enables the factor's customer to get his money out of his accounts receivable without delay. Although not strictly a lending business, it serves a credit-related purpose by putting the factor's assets to work instead of requiring borrowing from other sources by the factor's customers.

313 F. Supp. 632, 636 (W.D.N.C. 1970).

[4] All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

practices. (Complaint ("Compl.") (Doc. 5).) On June 27, 2012, Defendant filed a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6). (Id., Attach. (Doc. 5-8).) On February 7, 2013, the Bankruptcy Court granted Defendant's motion to dismiss as to the two state law claims of (1) civil conspiracy and (2) unfair and deceptive trade practices. (Doc. 3-7.) Defendant subsequently filed a motion for summary judgment on the remaining claim on May 6, 2014. (Doc. 5-18.) In a Memorandum Opinion dated December 8, 2014, the Bankruptcy Court granted Defendant's motion for summary judgment as to the remaining claim of fraudulent transfer. (Mem. Op. (Doc. 1) at 5-10.)

Plaintiff timely appealed the Bankruptcy Court's grant of summary judgment to this court on December 18, 2014. (Notice of Appeal (Doc. 1).) Plaintiff filed a Brief in support of his appeal on March 11, 2015. (Doc. 16.) Defendant filed a Brief (Doc. 18) on April 10, 2015, and Plaintiff filed a Reply (Doc. 19) on April 27, 2015. This action is thus ripe for review.

## II. LEGAL STANDARD

This appeal is brought pursuant to 28 U.S.C. § 158(a) and Rule 8001 of the Federal Rules of Bankruptcy Procedure. On appeal from the Bankruptcy Court, this court functions as an appellate court and reviews the Bankruptcy Court's findings of fact for clear error and conclusions of law de novo. In re Merry–Go–Round Enters., Inc., 400 F.3d 219, 224 (4th Cir. 2005). This court reviews the grant of summary judgment de novo. See Hager v. Gibson, 109 F.3d 201, 207 (4th Cir. 1997). The district court may affirm, modify, or reverse a Bankruptcy Judge's order, or remand with instructions for further proceedings. See 28 U.S.C. § 158(a) (2012); Fed. R. Bankr. P. 8001, 9002(2).

## III. FACTUAL BACKGROUND

As part of a Ponzi scheme, Debtor utilized a personal bank account in his own name at one of Defendant's branch banks to deposit funds. (Notice of Appeal (Doc. 1) at 5-6.) During the two years preceding the filing of involuntary Chapter 7 bankruptcy proceedings against Debtor, Debtor's account at Defendant bank received eleven deposits at issue, six checks and five credits, via wire or telephone transfer, all of which allegedly relate to Debtor's Ponzi scheme activity.[5] (Id. at 6.) Plaintiff asserts that these deposits, as transfers, can be avoided pursuant to 11 U.S.C. § 548(a)(1)(A) or, alternatively, pursuant to 11 U.S.C. § 544 and the North Carolina fraudulent transfer statutes. (Id.) Defendant argues summary judgment in its favor is appropriate based on two theories: (1) the transfers into the bank account were made by third parties into Debtor's account and therefore are not transfers made by the Debtor, and (2) the transfers did not diminish the bankruptcy estate. (Def.'s Mot. for Summ. J. (Doc. 5–18) at 3.) In granting the motion for summary judgment, the Bankruptcy Court

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[5] Defendant notes a discrepancy in the number of deposits at issue on this appeal. (Br. of Appellee (Doc. 18) at 12 n. 1.)

> The Bankruptcy Court ruled on the eleven deposits identified in FCB's [First Citizens Bank and Trust] summary judgment brief. Appellant's Brief identifies a twelfth deposit, a cash deposit for $2000 made on 21 January 2009. Because this deposit was not identified or included in the Bankruptcy Court's decision, it should not be considered on appeal.

(Id. (citations omitted).) Because this court's decision does not depend on specific deposits, this court finds no need to resolve this discrepancy.

> [r]eject[ed] the proposition that the deposit of the checks by or on behalf of the Debtor and the subsequent processing of the checks and wire transfers did not result in transfers of property of the Debtor to the [Defendant], [but] the court agree[d] that the transfers to the [Defendant] that did occur involving the checks and money orders did not diminish the bankruptcy estate.

(Mem. Op. (Doc. 1) at 7.) For this reason, the Bankruptcy Court granted summary judgment in favor of Defendant.

Plaintiff filed the present appeal and submitted a single issue for this court to consider:

> Whether, in order to survive summary judgment on his fraudulent transfer claims, the appellant-trustee must prove that the transfers of checks or wire transfers that were made to First Citizens diminished the assets of the bankruptcy estate?

(Br. of Appellant (Doc. 16) at 14.) Plaintiff goes on to argue that:

> In requiring a diminution of estate assets, the Bankruptcy Court fashioned a new implied element, which is totally unsupported by the statutory text, and contrary to established Fourth Circuit precedent.

(Id. at 20.)

## IV. ANALYSIS

This court concludes that the Bankruptcy Court did not err in citing the lack of diminution of the estate to support the grant of summary judgment.

In outlining what constitutes an avoidable transfer, Bankruptcy Code § 548(a)(1)(A), Fraudulent transfers and obligations, provides:

> The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> > (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; . . . .

11 U.S.C. § 548(a)(1)(A) (2012). The parties do not dispute that the transfers in question fall under § 548(a)(1)(A) or that Debtor was involved in a Ponzi scheme. "A majority of federal courts have held that proof of operation of a Ponzi scheme is sufficient to establish actual intent to hinder, delay, or defraud creditors so as to permit avoidance as a fraudulent transfer under section 548(a)(1)(A)." In re Whitley, 463 B.R. 775, 781 (Bankr. M.D.N.C. 2012). That Debtor here was effectuating a Ponzi scheme satisfies the actual intent prong of § 548(a)(1)(A).

Given this analysis of § 548(a)(1)(A), the Bankruptcy Court discussed why these transfers nonetheless do not qualify as fraudulent transfers under § 548(a)(1)(A). In explaining its grant of summary judgment, the Bankruptcy Court found that

> [T]he transfers to the Bank in this case resulting from the deposits of the checks and wire transfers were not fraudulent transfers because . . . they did not diminish the Debtor's estate nor place the funds involved in the transfers beyond the reach of creditors. The critical facts underlying this result are that (1) the transfers to the Bank made or caused to be made by the Debtor were to a bank account belonging to the Debtor and (2) such account was an ordinary checking account in which the funds in the account were readily available to the Debtor.

(Mem. Op. (Doc. 1) at 8.) The transfers that Plaintiff wants avoided pursuant to § 548 are listed in Defendant's summary judgment brief, (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. (Doc. 6) at 2), and as found by the Bankruptcy Court, are all credits to Debtor's checking account at Defendant's bank. (Mem. Op. (Doc. 1) at 6.) The transfers in question do not cause any diminution of the estate and would otherwise be available for administration.[6]

Section 101 of the Bankruptcy Code defines the term "transfer" to include "an interest of the debtor in property." 11 U.S.C. § 101(54)(D)(ii).[7] Section 548 also defines

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[6] Plaintiff does argue that the transfers diminished the estate. This court disagrees for reasons explained hereafter.

[7] In full, § 101(54) provides:

> The term "transfer" means—
>
> (A) the creation of a lien;
>
> (B) the retention of title as a security interest;
>
> (C) the foreclosure of a debtor's equity of redemption; or
>
> (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—

a fraudulent transfer as a "transfer . . . of an interest of the debtor in property." 11 U.S.C. § 548(a)(1)(A). In keeping with established principles of statutory construction "requir[ing] a court to construe all parts to have meaning and to reject constructions that render a term redundant," PSINet, Inc. v. Chapman, 362 F.3d 227, 232 (4th Cir. 2004),[8] this court does not read the inclusion of "an interest of the debtor in property" in both § 101 and § 548 to be redundant or without meaning.

In reworking the Bankruptcy Code, Congress sought to make "[t]he definition of transfer [] as broad as possible," drafting it to include "any transfer of an interest in

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(i) property; or

(ii) an interest in property.

11 U.S.C. § 101(54)(A)-(D) (2012).

[8] The Fourth Circuit provided extensive citations in support. PSINet, 362 F.3d at 232 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (where the Supreme Court explained that a court is "obliged to give effect, if possible, to every word"); Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58-59 (1878) (if a construction renders a term redundant, that is a reason for rejecting that construction); Virginia v. Browner, 80 F.3d 869, 877 (4th Cir. 1996) (a court should not "construe a statute in a manner that reduces some of its terms to mere surplusage"); United States v. Snider, 502 F.2d 645, 652 (4th Cir. 1974) (all parts of a statute must be construed so that each part has meaning)). Other circuits have similar interpretations of the requirements of statutory construction. See, e.g., Scherr v. Marriott Int'l, Inc., 703 F.3d 1069, 1077 (7th Cir. 2013) ("When we do not have statutory definitions available, 'we . . . view words not in isolation but in the context of the terms that surround them; we likewise construe statutes in the context of the entire statutory scheme and avoid rendering statutory provisions ambiguous, extraneous, or redundant; we favor the more reasonable result; and we avoid construing statutes contrary to the clear intent of the statutory scheme.'" (quoting In re Merchants Grain, Inc., 93 F.3d 1347, 1353-54 (7th Cir. 1996))).

property," including "[a] deposit in a bank account or similar account." S. Rep. No. 95-989, at 27 (1978); see also § 101(54). Thus, Debtor here, who deposited into his own account, did effectuate a transfer under § 101 and, due to the Ponzi presumption, is deemed to have the requisite fraudulent intent under § 548. However, § 548 appears to require more, as Congress drafted § 548 to also require a fraudulently intended transfer "of an interest of the debtor in property." § 548. While the Code itself does not define the phrase "interest of the debtor in property," the courts have. "The phrase 'interest of the debtor in property' 'is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.'" In re BeaconVision, Inc., 340 B.R. 674, 677 & n.2 (Bankr. D.N.H. 2006) (quoting Begier v. IRS, 496 U.S. 53, 58 (1990)) (noting in footnote 2: "The Supreme Court read the phrases 'property of the debtor' and 'an interest of the debtor in property' 'coextensive[ly]' and '[f]or guidance' looked 'to § 541, which delineates the scope of 'property of the estate'" (quoting Begier, 496 U.S. at 58-59 & n.3)).[9]

[9] Although Begier v. Internal Revenue Service analyzed § 547(b), the terminology in § 548 is the same and thus the Court's holdings regarding "an interest of the debtor in property" apply to both sections equally. See Bear, Stearns Sec. Corp. v. Gredd, 275 B.R. 190, 193-94 (S.D.N.Y. 2002) ("[T]he Supreme Court . . . ha[s] interpreted the identical statutory language—'an interest of the debtor in property'—in the manner advocated . . . . In Begier, the Supreme Court stated that 'property of the debtor' . . . is 'that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.' While Begier and its progeny were concerned with § 547 . . . , the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning,' counsels us to construe this language to have the same meaning when it is used in § 548(a)(1)(A)." (citations omitted)).

This definition of "interest of the debtor in property" under § 548 means:

> A bankruptcy trustee can recover for the bankruptcy estate transfers made by a debtor by demonstrating the transferred property was "of an interest of the debtor in property." "[A]ny funds under the control of the debtor, regardless of the source, are properly deemed to be the debtor's property, and any transfers that diminish that property are subject to avoidance." A debtor must have exercised "sufficient control over the funds to warrant a finding that the funds were the debtor's property." . . . The purpose of avoiding fraudulent transfer actions is to prevent a debtor from diminishing property that properly belongs to all creditors.

In re Pearlman, 472 B.R. 115, 125–26 (Bankr. M.D. Fl. 2012) (alteration in original) (footnotes and citations omitted).

Consequently, the parties and this court have addressed this issue primarily as an issue of diminution of

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Notably, in In re French, the Fourth Circuit also applies Begier's interpretation of "interest of the debtor in property" in § 547 to § 548, but In re French is distinguishable from the matter at hand as it addressed foreign real property in the context of § 548(a)(1)(B). In re French, 440 F.3d 145, 151-52 (4th Cir. 2006) ("Section 541 defines 'property of the estate' as, inter alia, all 'interests of the debtor in property.' In turn, § 548 allows avoidance of certain transfers of such 'interest[s] of the debtor in property.' By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that would have been 'property of the estate' prior to the transfer in question—as defined by § 541—even if that property is not 'property of the estate' now." (other citations omitted) (citing Begier v. IRS, 496 U.S. 53, 58, 59 n.3 (1990))).

the estate, and this court is of the opinion that such a purpose is reflected in the statutory construction of § 548. Because the statute requires not just a "transfer," § 101, (i.e., a transfer by a debtor of currency from a safe in his home to a deposit bank account would be a transfer, § 101; S. Rep. No. 95-989, at 27 (1978)), but a "transfer of an interest of the debtor in property," § 548, a transfer would not necessarily be a fraudulent conveyance under § 548. This construction simply recognizes that a transfer is not subject to avoidance if it did not or could not diminish the estate, reflecting that the interest of the debtor in such property did not change. Thus, because the Debtor here merely effectuated transfers to himself within the estate, the § 548 phrase "interest of the debtor in property" eliminates his actions from its scope, since his actions had no actual or potential diminutive effect on the bankruptcy estate. See In re BeaconVision, 340 B.R. at 677. As a result, this court does not find that the Bankruptcy Court added an element to the fraudulent transfer claim, expressly or impliedly.

In addition to the statutory basis, the Bankruptcy Court's grant of summary judgment based on a finding that there was no diminution of the estate also recognizes past bankruptcy practice as stated in New York Cty. Nat'l Bank v. Massey, 192 U.S. 138, 147 (1904) ("These transfers of property, amounting to preferences, contemplate . . . the consequent diminution of the bankrupt's estate. . . . [A] deposit of money to one's credit in a bank does not operate to diminish the estate . . . ."), and presently recognized in In re Derivium Capital LLC, 716 F.3d 355, 361 (4th Cir. 2013) ("The purpose of the Bankruptcy Code's avoidance provisions is to prevent a debtor from making transfers that diminish the bankruptcy estate to the detriment of creditors."). The Bankruptcy Court's

holding is in keeping with the Supreme Court's reluctance to "interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." Dewsnup v. Timm, 502 U.S. 410, 419 (1992).

Consideration of actual or potential diminution of the estate recognizes that "[w]hether the goal is to protect some creditors, as in the case of § 547, or all creditors, as in the case of § 548, only asset transfers that may have actually harmed creditors may be avoided." Bear, Stearns Sec. Corp., 275 B.R. at 194. The Fourth Circuit has not explicitly addressed this diminution issue, but "[t]he purpose of the Bankruptcy Code's avoidance provisions is to prevent a debtor from making transfers that diminish the bankruptcy estate to the detriment of creditors." Derivium, 716 F.3d at 361.

Although the Fourth Circuit has not explicitly addressed this diminution issue,[10] other courts have. "A diminution of estate issue rarely arises in the context of fraudulent transfers because there is usually no question that the fraudulent transfer depleted the estate of the debtor in the amount of the transfer." In re Consol. Pioneer Mortg. Entities, 211 B.R. 704, 717 (S.D. Cal. 1997). The Pioneer court went on to state:

> [Plaintiff] argues that "depletion of the estate" is not an element of proof in the fraudulent transfer statute. Although there is no formal "diminution of estate" requirement in the statutory language, the purpose of fraudulent transfer recovery is to prevent a debtor from putting assets otherwise available to its

[10] However, the Fourth Circuit addresses the general issue of what an interest of the debtor in property entails under § 548(a)(1)(B) in In re French, as discussed in supra note 9.

> creditors out of their reach: "In our quest to understand fraudulent transfer liability, we often overlook first principles. At its core, fraudulent transfer law is a debt-collection device and not a revenue generating tool; its mission is to prevent the unjust diminution of the debtor's estate."
>
> The "diminution of estate" or "depletion of the estate" concept usually arises in connection with preferences. . . . The purpose of fraudulent transfer law is to protect creditors from last-minute diminutions of the pool of assets in which they have interests.

Id. at 717 (citations omitted).

Plaintiff relies on several decisions to support his contention that "diminution of the estate is not an element of a fraudulent transfer claim, and was therefore irrelevant to the Bankruptcy Court's analysis." (Br. of Appellant (Doc. 16) at 24.) This court is not persuaded by Plaintiff's reliance on these cases in support of a proposition that a transfer that does not diminish the estate, as on these present facts, is nonetheless a fraudulent transfer under § 548.

Plaintiff cites In re Model Imperial, Inc., 250 B.R. 776 (Bankr. S.D. Fla. 2000). (Br. of Appellant (Doc. 16) at 24-25.) The Model court does state that "if diminution of the estate were an essential element of a § 548(a)(1) claim, then § 548(a)(2) would be redundant." In re Model Imperial, Inc., 250 B.R. at 793-94. However, in finding the transfers in question not avoidable, the Model court goes on to state that, with regard to some of the transfers that did not negatively affect the estate, the "alleged fraudulent transfers are not avoidable because in economic reality, they were a nullity." Id. at 797. The "economic nullity" in Model is strikingly similar to Debtor's bank deposits

into his own checking account in the present action. Debtor transferred money or credit into his own bank account with no discernable impact on the estate. "[B]ankruptcy courts are courts of equity, and as such, 'they possess the power to delve behind the form of the transactions and the relationships to determine the substance.'" Id. at 796 (citations omitted). The substance of the present transfers at issue seems to be, like those in Model, an "economic nullity" not eligible for avoidance.

Plaintiff also cites two Fourth Circuit cases for "reject[ing]" the diminution of estate prong of fraudulent transfer: Tavenner v. Smoot and In re Mahaffey. (Br. of Appellant (Doc. 16) at 27-29.) This court does not agree with Plaintiff's contention that these cases do not take into account the effect on the estate when considering fraudulent transfer claims.

Tavenner v. Smoot, 257 F.3d 401 (4th Cir. 2001), is distinguishable because the transfers at issue, even though they involved otherwise-exempt property, were made in such a manner (largely to third parties) as to remove the assets from the estate. In contrast, Debtor here transferred funds into the estate and the transfers at issue did nothing to actually or potentially diminish the estate.

Further, the transfers at issue in Tavenner involved exemptible property under Virginia law. The defendant argued those transfers could not qualify under § 548 because "it is impossible to hinder, delay or defraud creditors by transferring property to which the creditors were not entitled in the first place." Id. at 407. The Fourth Circuit agreed with the majority position that transfers of exempt property are amenable to avoidance actions, stating that "[n]othing in § 548 indicates that a trustee must establish that a fraudulent conveyance actually harmed a creditor," id., and recognizing that "if a debtor enters into

a transaction with the express purpose of defrauding his creditors, his behavior should not be excused simply because, despite the debtor's best efforts, the transaction failed to harm any creditor." Id. (citations omitted).

However, more pointedly to this case, in Tavenner's rejection of the "no harm, no foul" approach, the Fourth Circuit focused on the fact that:

> Under a statutory scheme in which all property is presumed to be part of the bankruptcy estate, and no property is exempt until such time as the debtor claims an exemption for it, creditors can be harmed by transfers of potentially exempt property because it is not a foregone conclusion that such property will be exempt from the estate.

Id.

Section 548, as analyzed by the Fourth Circuit in Tavenner, does not require actual harm to establish a fraudulent transfer.[11] Nevertheless, Tavenner is consistent with both § 548 and past bankruptcy practice because there is no indication from Tavenner that the type of transfer or effect on the estate is irrelevant to the Fourth Circuit's analysis. Contrary to Plaintiff's argument, Tavenner discusses the potential or actual effect on the estate. Under this analytical structure, while actual harm is not required to establish a § 548 fraudulent transfer, the actual or potential effect of a transfer is relevant. Notably, the potential effect on the estate described in Tavenner is a potential diminution in value, should the

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[11] In Tavenner, the Fourth Circuit first discusses its rejection of the "no harm, no foul" approach and then discusses specific intent and harm under § 548 in the immediately following section. See Tavenner, 257 F.3d at 406-07. The Circuit's reasoning in both analyses supports this opinion.

debtor not have exempted the property from the estate. See id. at 406-07.[12] By focusing on a transfer's potential to harm the estate as a basis for its inclusion under the purview of § 548, see id., the Fourth Circuit illustrates that reasoning and the statutory text do not support a fraudulent transfer analysis completely divorced from the actual or potential diminution of the estate. As such, this court does not agree with Plaintiff's contention that the Bankruptcy Court's discussion of diminution of the estate is inconsistent with Tavenner.

Similarly, in rejecting the "no harm, no foul" rule in In re Mahaffey, the Fourth Circuit stated that:

> [T]he "no harm, no foul" approach seemed more appropriate under the old Bankruptcy Act, in which exempt property was not part of the bankruptcy estate. Under the new Bankruptcy code, in contrast, all property, including potentially exempt property, is part of the estate until the debtor claims an exemption. Consequently, a transfer of potentially exempt property could harm creditors.

In re Mahaffey, No. 95-2411, 1996 WL 383922, at *2 (4th Cir. 1996) (citations omitted). Again, this court does not find any indication in Mahaffey that the Fourth Circuit did not consider the actual or potential effect of a transfer on the estate in addressing the fraudulent transfer claim. To the contrary, the Fourth Circuit emphasizes that the property was part of the estate unless or until an exemption was claimed and thus the transfer was significant. In

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[12] Notably, Tavenner also analyzes how the transfer of this property is a removal of property from the estate, notwithstanding its exemptible status, because, as quoted supra, all property remains part of the estate until the debtor actually claims an exemption. See Tavenner, 257 F.3d at 406.

focusing on the changed Bankruptcy Code, the Fourth Circuit's analysis illustrates the principle articulated in Tavenner—that the transfer could result in diminution to the estate and thus could be avoidable under § 548.

Thus, given the text of § 548, prior bankruptcy practice, and corresponding Fourth Circuit precedent, Plaintiff has not persuaded this court that the Bankruptcy Court's consideration of no actual or potential diminution of the estate was improper.

In the alternative, Plaintiff asserts that the bankruptcy estate was in fact diminished by the transfers at issue. (Br. of Appellant (Doc. 16) at 29-30.) This court does not find this argument persuasive on the facts present.

In a case still cited by courts and referenced by the Bankruptcy Court here, the United States Supreme Court addresses the impact of a bank deposit on an estate in the bankruptcy context.

> As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security.

New York Cty. Nat'l Bank v. Massey, 192 U.S. at 147. Plaintiff contends that "[t]he Bankruptcy Court's reliance upon Massey was entirely misplaced. Massey addressed a preference claim under the former Bankruptcy Act of 1898." (Br. of Appellant (Doc. 16) at 21.) Plaintiff relies on Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 469 B.R. 713 (Bankr. W.D. Mich. 2012),

for the proposition that Massey is not currently viable. (Br. of Appellant (Doc. 16) at 21-23.)

> Teleservices Group makes clear . . . why Massey dealt only with a preference under the old Act, back when diminution was still a recognized element. The Massey decision is simply not applicable anymore when addressing issues under the current Bankruptcy Code's fraudulent transfer provisions.

(Id. at 23.) Defendant counters that:

> The Teleservices court ultimately concluded that Massey's analysis of preferential set-offs had become "an anachronism" because the Bankruptcy Code addressed such setoffs by adding 11 U.S.C. § 553(b). Notably, however, it did not, as the Trustee suggests, reject as improper or no longer valid Massey's determination that a bank account deposit does not diminish the bankruptcy estate.

(Br. of Appellee (Doc. 18) at 29-30.) This court is not persuaded that Plaintiff's argument regarding Massey's inapplicability makes Massey invalid for the proposition upon which the Bankruptcy Court relied.[13] Of note are the distinguishable facts and findings of Teleservices.

In Teleservices, the transfer in question placed funds in the benefit of the depositor and the defendant bank because an agreement allowed the bank to use the funds to offset debt at the bank. Teleservices, 469 B.R. at 719. Alt-

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[13] Albeit in a different context, the Supreme Court noted the relevance of prior bankruptcy to current bankruptcy code. "When Congress amends the bankruptcy laws, it does not write 'on a clean slate'". Hall v. United States, 566 U.S. ____, ____, 132 S. Ct. 1882, 1893 (2012) (quoting Dewsnup, 502 U.S. at 419).

hough ultimately the court found the defendant bank liable on the basis of transferee liability, id. at 747, 767, Teleservices explicitly addresses the estate diminution issue:

> Indeed, diminution of the estate is not even an issue when the liability of a transferee under Section 550 is being assessed. But then, this court sees no reason why it should be a factor given that diminution of the estate is relevant only with respect to the initial transfer and then only as to its avoidability.

Teleservices, 469 B.R. at 742. Absent evidence to the contrary, and on the present facts, Plaintiff has neither persuaded this court that Massey's holding that a deposit by a debtor into the debtor's own checking account does not serve to diminish the debtor's estate is an incorrect interpretation nor convinced this court that Teleservices supports such a finding.[14] Further, nothing in the record here indicates the estate was negatively impacted when these deposits were made into Debtor's own checking account at Defendant's branch bank.

In the present action, the Ponzi presumption allows a court to infer actual intent of fraud, but it does not negate the relevance of actual or potential diminution of the estate to § 548 analysis. Further, this court finds that Debtor's deposit of funds into an unrestricted demand checking account neither actually diminished nor had the

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[14] Notably, in Teleservices, a part of the transfers were deposits into bank accounts that themselves served as security for the line of credit that the defendant bank extended to debtor. See Teleservices, 469 B.R. at 719. Therefore, whether or not the bank actually exercised its rights against the accounts, the deposits themselves created an actual or potential diminution of the estate by subjecting the funds to the bank's power under this credit agreement.

potential to diminish the estate. Accordingly, the Bankruptcy Court's grant of summary judgment on the fraudulent transfer claims will be affirmed.

## V. CONCLUSION

For the reasons set forth herein, **IT IS HEREBY ORDERED** that the Bankruptcy Court's grant of summary judgment (Doc. 1) is **AFFIRMED.**

This the 1 day of October, 2015.

/s/ William L. Osteen, Jr.
United States District Judge

## APPENDIX C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

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Case No. 10-10426
Adversary No. 12-02028

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IN RE:
JAMES EDWARD WHITLEY, a/k/a
Ed Whitley,
Debtor.

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CHARLES M. IVEY, III,
Chapter 7 Trustee for the Estate of James Edward
Whitley,
Plaintiff,

v.

FIRST-CITIZENS BANK AND TRUST COMPANY,
Defendant.

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Signed: December 8, 2014

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### MEMORANDUM OPINION

STOCKS, United States Bankruptcy Judge.

This adversary proceeding came before the court on October 8, 2014, for hearing on the Defendant's motion for summary judgment. Edwin R. Gatton and Charles M. Ivey, III appeared on behalf of the Plaintiff and Michael

P. Flanagan and Gary J. Rickner appeared on behalf of the Defendant.

FACTUAL BACKGROUND

The Debtor, James Edward Whitley, purportedly was engaged in the factoring business. In reality, the Debtor was engaged in a Ponzi scheme. The Debtor utilized a checking account located at First-Citizens Bank and Trust Company ("Defendant" or "Bank") to make deposits and write checks in the course of the Ponzi scheme. The checking account at the Bank utilized by the Debtor has been identified as account number 8643. Two of the methods utilized by the Debtor in obtaining funds from his victims were to obtain checks from the victims made out to him or to have the victims wire funds to him for deposit in account number 8643.

During the two years preceding the filing of the involuntary chapter 7 petition against the Debtor, five such checks, including one cashier's check, were deposited by the Debtor in the following amounts: $293,708, $100,000, $75,000, $20,000 and $15,000 (the cashier's check). There were five other credits to account 8643 as a result of wire or telephone transfers originated by other victims. These credits were in the amounts of $100,000, $297,478, $80,000, $148,000 and $180,000. A $293,708 credit to account number 8643 resulted from the deposit of a check payable to the Debtor and his wife which was drawn on an attorney's trust account. A $300,000 credit to account number 8643 was the result of a transfer from by the Bank from the Debtor's construction loan account.

The Plaintiff asserts that all of these deposits involved transfers of property of the Debtor that were made with actual intent to hinder, delay or defraud creditors which

can be avoided under section 548(a)(1)(A) or, alternatively, pursuant to section 544 and the North Carolina fraudulent transfer statutes. The Bank assets that it is entitled to summary judgment because "none of these credits or deposits for Account No. 8643 constitutes a fraudulent transfer under 11 U.S.C. § 548 [because] (1) the eight transfers made by the investors were not transfers by the debtor, Whitley, of his property; and (2) the remaining three transfers were deposits into Whitley's checking account which did not diminish the bankruptcy estate." While the court rejects the proposition that the deposit of the checks by or on behalf of the Debtor and the subsequent processing of the checks and wire transfers did not result in transfers of property of the Debtor to the Bank, the court agrees that the transfers to the Bank that did occur involving the checks and money orders did not diminish the bankruptcy estate, and for that reason will grant the motion for summary judgment.

## ANALYSIS

As the court pointed out in Grayson Consulting, Inc. v. Wachovia Securities, LLC (In re Derivium Capital, LLC), 716 F.3d 355, 361 (4th Cir. 2013), "[t]he purpose of the Bankruptcy Code's avoidance provisions is to prevent a debtor from making transfers that diminish the bankruptcy estate to the detriment of creditors." As expressed in Collier, "fraudulent transfer law allows creditors to avoid transfers which unfairly or improperly deplete a debtor's assets. . . ." 5 Collier on Bankruptcy ¶ 548.01 (6th Ed. 2014). Because the transfers at issue in Dividium did not diminish the debtor's estate, they were not fraudulent transfers under section 548 of the Bankruptcy Code. 716 F.3d at 361. The same is true in this proceeding—the transfers to the Bank in this case resulting from the de-

posits of the checks and wire transfers were not fraudulent transfers because, although different from the type of transfers involved in Dividium, they did not diminish the Debtor's estate nor place the funds involved in the transfers beyond the reach of creditors. The critical facts underlying this result are that (1) the transfers to the Bank made or caused to be made by the Debtor were to a bank account belonging to the Debtor and (2) such account was an ordinary checking account in which the funds in the account were readily available to the Debtor.

The legal effect of a debtor making a deposit into its own checking account is succinctly stated in New York County Nat. Bank v. Massey, 192 U.S. 138, 147, 24 S.Ct. 199, 201 (1904):

> As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit.

The foregoing scenario is exactly what occurred when the Bank received the funds resulting from the deposit of the checks belonging to the Debtor and the receipt of the wire transfers. In each instance, the Debtor received credit and became a creditor of First Citizens in an amount equal to the amount of the check or wire transfer. The funds then remained subject to the control of the Debtor and were available to him at any time he wished to write a check on his checking account or otherwise make a withdrawal from the account. The funds that went into the Debtor's checking account were not placed beyond the reach of creditors. To the contrary, had a bankruptcy filing occurred immediately after the funds were credited to the checking account, the checking account would have been property of the bankruptcy estate and

the funds then attributable to the account would have been available to the bankruptcy trustee.

Based upon the foregoing, the court concludes that the Bank's motion for summary judgment should be granted. An order so providing is being entered contemporaneously with the filing of this memorandum opinion.

This 8th day of December, 2014.

/s/ William L. Stocks
WILLIAM L. STOCKS
United States Bankruptcy Judge