

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 16

**Honorable Carrie Zepeda is hearing these matter for
Honorable Amber Rosen, Presiding**

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 11-07-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling (California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.

https://www.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: **408-882-2430** When you can call: **Monday to Friday, 8:30 am to 12:30 pm**

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV341509 Hearing: Claim of Exemption	Unifund CCR, LLC vs Mindy Diep	The parties are ordered to appear. If there is no appearance by the moving party, the matter will be ordered OFF CALENDAR.
LINE 2	17CV311664 Motion: Strike	Thuy Pham vs An Nguyen, et al	See Tentative Ruling below. Plaintiff shall submit the final order.
LINE 3	23CV416274 Hearing: Demurrer	Davis Lewis vs S.B.S. Trust Deed Network, et al	Notice appearing proper, the unopposed Demurrer is GRANTED on the grounds that each cause of action lacks specificity and is uncertain. Plaintiff shall have 15 days from service of this order to file an amended complaint. Defendant shall submit an order.

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LINE 4	23CV419320 Hearing: Motion to Quash	Delia Mao vs Montaseri Medi, et al	No Proof of Service for the motion. The matter will go OFF CALENDAR.
LINE 5	20CV373145 Hearing: Motion to Compel	Magnoliadrhomes LLC, et al vs Guidance Law, APC, et al	Defendant Richard Kahn filed a motion to compel access to the docket. The clerk's office has made the documents Mr. Khan requested available on the public portal. The motion is moot and will go OFF CALENDAR.
LINE 6	22CV404685 Hearing: Motion to Compel (Interrogatories)	Yudhveer Singh vs General Motors, LLC	See Tentative Ruling below. Plaintiff shall submit the final order.
LINE 7	22CV404685 Hearing: Motion to Compel	Yudhveer Singh vs General Motors, LLC	See Tentative Ruling below. Plaintiff shall submit the final order.
LINE 8	19CV353997 Hearing: Unidentified Motion	Cavalry SPV I, LLC vs Maria Hernandez	Plaintiff's Notice of Continued Motion does not comply with CCP §1010 (it does not state what relief is being sought or the grounds). The matter will go OFF CALENDAR.
LINE 9	19CV358724 Motion to Withdraw as Attorney	Angela Duran, et al vs Rajan Khanna, et al	Notice appearing proper, the unopposed Motion to be Relieved as Counsel is GRANTED. Mr. Roberts shall submit the final order.
LINE 10	19CV358724 Motion to Withdraw as Attorney	Angela Duran, et al vs Rajan Khanna, et al	Notice appearing proper, the unopposed Motion to be Relieved as Counsel is GRANTED. Mr. Roberts shall submit the final order.

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**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court
3.1312.)**

<u>LINE 11</u>	22CV401826 Motion to Seal Records	Stuart Kirchick vs Allied Telesis, INC., et al	Notice appearing proper, and good cause appearing, the unopposed motion to seal is GRANTED. The request is consistent with prior orders of this court which protect the confidential financial terms of the relevant third party confidential settlement agreement. Plaintiff shall submit the final order.
<u>LINE 12</u>	19CV342665 Petition for Approval of Compromise of Minor's Claim	Jesus Siller, et al vs Andrei Stasevici	The petition is granted. The court adopts the proposed disposition and orders the minor's funds to be placed in a blocked account.

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Calendar Line 1

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Calendar Line 2

Case Name: *Thuy Pham v. An Nguyen, et al.*

Case No.: 17CV311664

(1) Defendant Olivia Nguyen's Special Motion to Strike

Factual and Procedural Background

Defendants Olivia Nguyen (“Olivia”)¹ and An Nguyen (“An”) were previously married, but Olivia filed for divorce against An on October 29, 2001 in Orange County Superior Court. (First Amended Complaint (“FAC”), p. 3, ¶1.) On June 25, 2004, the court entered a judgment of dissolution as to Olivia and An but reserved jurisdiction on the issue of division of assets and liabilities. (*Id.*) On July 18, 2007, pursuant to a judgment of dissolution for division of assets and liabilities, Olivia and An agreed to sell a jointly-owned vacation home located at 39045 N. Shore Drive in Fawnskin, CA (“Fawnskin Home”) and divide the proceeds after sale. (*Id.*) However, Olivia and An never sold the Fawnskin Home after their divorce but continued to jointly own and use the property thereafter. (*Id.*) The Fawnskin Home has an estimated value of approximately \$3,666,536.00. (*Id.*)

Defendant An later remarried plaintiff Thuy Pham (“Pham”), but An filed for divorce against plaintiff Pham in or around September 2007 in Orange County Superior Court. (FAC, ¶2.) A judgment of dissolution between An and plaintiff Pham was filed on November 20, 2007, but subsequently set aside pursuant to a stipulation and order filed on August 26, 2009. (*Id.*) The only issue not set aside was the termination of status so An and plaintiff Pham remain divorced. (*Id.*) Property division issues remained but the court dismissed the case. (*Id.*) Thereafter, defendant An commenced a division of asset proceeding in Vietnam (“Vietnam Action”) sometime in April 2010 which is currently pending adjudication. (*Id.*)

On July 6, 2010, plaintiff Pham filed a divorce action against defendant An in Santa Clara County Superior Court, case number 110-FL-155416. (FAC, ¶3.) Defendant An agreed to personal jurisdiction. (*Id.*) During a December 7, 2011 trial date, defendant An and plaintiff Pham agreed to a global settlement of all remaining issues of support, division of assets, and division of liabilities, relating to all properties located in California and Vietnam. (*Id.*) The parties executed a “Stipulation and Order Regarding Global Settlement of All Issues” in court pursuant to which plaintiff Pham accepted five apartments located in Ho Chi Minh City, Vietnam as future child support payments and almost all of the real property located in Vietnam would be placed in a trust for the benefit of the two children. (*Id.*) Both parties agreed to obtain a court order in Vietnam consistent with the December 7, 2011 stipulation and order. (*Id.*)

Defendant An never intended to comply with the December 7, 2011 stipulation and order. (FAC, ¶4.) Defendant An refused to comply and continued to maintain the Vietnam Action in order to obtain full ownership of all remaining real properties in Vietnam. (*Id.*)

¹ “For the sake of clarity, we refer to the [parties] by their first names. We mean no disrespect in doing so.” (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 551, fn. 2.)

In an effort to enforce the December 7, 2011 stipulation and order, plaintiff Pham's counsel filed a motion to, among other things, enforce the December 7, 2011 stipulation and order. (FAC, ¶5.) The motion was heard on March 26, 2014 and the court issued several orders including, among other things, reinstatement of the Automatic Temporary Restraining Order ("ATRO") against defendant An; issuance of a temporary restraining order ("TRO") prohibiting defendant An from transferring, encumbering, hypothecating, concealing, or in any way disposing any legal or equitable interest in: (i) 10 Shadow Cast, Newport Coast, CA 92657 ("Newport Home"), (ii) Fawnskin Home, and (iii) 16872 Coray Cay Lane, Huntington Beach, CA 92649 ("Huntington Home"). (*Id.*; see also FAC, Exh. 1.)

In violation of the ATRO and TRO in the March 26, 2014 order, defendant An subsequently transferred half of his interest in the Fawnskin Home to defendant Olivia and also attempted to sell his interest in both the Newport Home and Huntington Home with the assistance of defendant An's sister, Thi Do Nguyen, and brother, De Nguyen. (FAC, ¶7.)

After receiving notice of the March 26, 2014 order, defendant An subsequently devised a scheme to fraudulently transfer his remaining interest in the real properties he owned in California in order to hinder, delay, and defraud plaintiff Pham. (FAC, ¶8.) Defendants An and Olivia subsequently entered into an agreement to transfer half of his interest in the Fawnskin Home in exchange for Olivia's release of her interest in personal property and furniture at a property located at 42 Pelican Point Drive. (*Id.*) On June 13, 2014, defendant An transferred half of his interest in the Fawnskin Home to defendant Olivia by interspousal deed transfer. (*Id.*)

Defendant An conspired with plaintiff Pham's mother to fraudulently transfer five Sea Link Golf and Country Club villas located in Vietnam and worth more than \$1 million to third parties in violation of the December 7, 2011 stipulation and order. (FAC, ¶9.)

On May 12, 2014, the Santa Clara County Superior Court issued an order which, among other things: (i) excused plaintiff's compliance with the terms in the December 7, 2011 stipulation and order, and (ii) ordered defendant An to pay plaintiff Pham \$60,000 in attorney's fees as sanctions, and (iii) continued to assert personal jurisdiction over defendant An. (FAC, ¶10.) Between July 3, 2018 and August 29, 2019, the Santa Clara County Superior Court imposed monetary sanctions against defendant An; and ordered him to pay child support arrearages; and issued a bench warrant for defendant An's arrest. (FAC, ¶11.) Defendant An has not made any payment to plaintiff Pham pursuant to the orders/ judgments discussed above. (FAC, ¶12.)

On June 12, 2017, plaintiff Pham commenced this action by filing a complaint. On January 23, 2019, plaintiff Pham filed the operative FAC which asserts the following causes of action:

- (1) Breach of Fiduciary Duty [versus defendant An]
- (2) Violation of Family Code § 2040 & et seq.
- (3) Violation of Court Orders
- (4) Actual Fraudulent Transfer
- (5) Constructive Fraudulent Transfer
- (6) Conspiracy

- (7) Aiding and Abetting
- (8) Action on Judgment [versus defendant An]
- (9) Creditor Suit
- (10) Constructive Trust

On July 10, 2019, defendant Olivia filed (1) a special motion to strike; and (2) a demurrer to plaintiff Pham's FAC.

On September 13, 2019, plaintiff made an ex-parte application for an order, among other things, lifting the stay on discovery pursuant to Code of Civil Procedure section 425.16. The court denied plaintiff Pham's ex-parte application but did allow plaintiff Pham to file a motion to reopen discovery to be heard in conjunction with defendant Olivia's two motions. On September 13, 2019, plaintiff Pham filed a motion to reopen discovery pursuant to Code of Civil Procedure section 425.16, subdivision (g).

On October 1, 2019, the court (Hon. Kirwan) issued an order denying defendant Olivia's special motion to strike. The court sustained without leave to amend defendant Olivia's demurrer to the second and third causes of action, and it sustained defendant Olivia's demurrer to the tenth cause of action with leave to amend. The court denied plaintiff Pham's motion to reopen discovery as moot.

On October 17, 2019, defendant Olivia filed a notice of appeal of the court's October 1, 2019 order.

On June 15, 2022, the Sixth District Court of Appeal filed a remittitur. In its opinion, the Sixth District Court of Appeal issued the following disposition:

The order denying appellant Olivia Nguyen's special motion to strike respondent Thuy Pham's first amended complaint pursuant to special motion to strike under section 425.16 is reversed. The case is remanded to the trial court for further consideration of the second prong of the motion to strike. The court shall, in conjunction with the motion to strike, first consider the merits of respondent's motion to lift the discovery stay. In addressing the second prong of the motion to strike, the court shall consider the evidence presented to determine whether [plaintiff] Pham's claims have minimal merit, and it shall consider [defendant] Olivia's collateral attack argument. In the event the court determines that [plaintiff] Pham's claims based upon fraudulent conveyance of property have minimal merit and that the claims are not barred as an improper collateral attack on a judgment, then the litigation privilege defense asserted by [defendant] Olivia will not act as a bar to Pham's claims under the second step of the analysis of the special motion to strike.

On April 14, 2023, the court (Hon. Rosen) issued an order setting the hearing on plaintiff Pham's motion to reopen discovery pursuant to Code of Civil Procedure section 425.16, subdivision (g), for May 25, 2023.

A minute order dated May 25, 2023 states, in relevant part, "The Defendant's Anti SLAPP motion is to be on 11-7-23 at 9am in dept. 16." The minute order further reflects the court issued and adopted its tentative ruling wherein the court granted plaintiff Pham's motion

to reopen discovery “for the limited purpose of obtaining evidence to show that she has a reasonable probability of prevailing on claims 2, 4, 5, 9 and 10 of the First Amended Complaint. The Court does not find good cause to conduct additional discovery related to claims 6 and 7, based on the facts provided by Plaintiff.” On July 14, 2023, the court issued a formal order after hearing in conformity with the May 25, 2023 minute order.

Based on a hearing date of November 7, 2023, any [supplemental] opposition to defendant Olivia’s special motion to strike should have been filed by plaintiff Pham no later than October 25, 2023. Plaintiff Pham did not file supplemental opposition or evidence by that date.² On November 1, 2023, plaintiff Pham filed a late supplemental opposition.³

On November 3, 2023, defendant Olivia filed an objection to plaintiff Pham’s untimely supplemental opposition. The court has discretion to consider a late filed paper. To avoid the expenditure of any additional resources by the parties and the expenditure of any further judicial resources, the court will look past this procedural violation and consider the supplemental opposition on its merits. The court finds no prejudice to defendant Olivia as the court’s intended ruling did not change as a result of any argument or evidence presented in plaintiff Pham’s supplemental opposition. Nevertheless, plaintiff Pham and plaintiff Pham’s counsel are hereby admonished for the procedural violation. Any future violation may result in the court’s refusal to consider untimely filed papers.

I. Defendant Olivia’s special motion to strike is GRANTED, in part, and DENIED, in part.

A. The two-step procedure for anti-SLAPP motions.

Code of Civil Procedure section 425.16 requires a court to engage in a two-step process when determining whether a defendant’s anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one “arising from” protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the defendant’s right of petition or free speech under the United States or California Constitution in connection with a public issue. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. In making these determinations, the trial court considers the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

² The Sixth District Court of Appeal instructed, in relevant part: “We will direct that the trial court, on remand in addressing the anti-SLAPP motion, first consider Pham’s motion to lift the discovery stay. Then, after receiving and considering further briefing, evidence, and argument as it deems appropriate, the court shall decide whether Pham has established, under the second step, a probability of prevailing on her claims.”

³ Code of Civil Procedure section 1005, subdivision (b) states, “All papers opposing a motion ... shall be filed with the court and a copy served on each party at least nine court days ... before the hearing.” Based on a hearing date of November 7, 2023, plaintiff Pham’s supplemental opposition had to be filed and served no later than October 25, 2023. Plaintiff Pham did not file or serve her supplemental opposition until November 1, 2023, five court days late. California Rules of Court, rule 3.1300, subdivision (d) states, “No paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate.”

B. Step two – Probability of prevailing.

The Sixth District Court of Appeal opined defendant Olivia has made a threshold showing that the claims asserted against her in plaintiff Pham’s FAC arise from protected activity. As instructed, this court will move directly to the second step and consider whether the plaintiff Pham has demonstrated a probability of prevailing on her claims.

“[I]f a court ruling on an anti-SLAPP motion concludes the challenged cause of action arises from protected petitioning, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. To satisfy this prong, the plaintiff must state and substantiate a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741; internal citations and punctuation omitted.) “The court does not weigh credibility or comparative strength of the evidence. The court considers defendant’s evidence only to determine if it defeats plaintiff’s showing as a matter of law.” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).)

A. Second and Third Causes of Action.

As the Sixth District Court of Appeal recognized in its opinion:

The first and eighth causes of action were directed against An, only. The court below sustained without leave to amend Olivia’s demurrer to the second and third causes of action, and it sustained her demurrer to the tenth cause of action with leave to amend. Olivia has represented to this court that Pham never filed an amended complaint, and Pham does not challenge this statement. Although Olivia demurred to the ninth cause of action, and Pham opposed that demurrer, the court did not rule on the demurrer to the ninth cause of action. Accordingly, we address here only the fourth through seventh and ninth causes of action of the Complaint.

Thus, it would appear the Sixth District Court of Appeal has given effect to this court’s earlier ruling on defendant Olivia’s demurrer. In particular, the second and third causes of action were involuntarily dismissed. To be consistent, this court will also treat the second and third causes of action as effectively dismissed in advance of the hearing on the special motion to strike. (*Cf. Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 881—“dismissal filed by plaintiff was effective upon filing, and the trial court lacked the jurisdiction to rule on defendants’ anti-SLAPP motion.” But see Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶7:1124, p. 7(II)-80 citing *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220—“the court may award fees to a prevailing defendant whose anti-SLAPP motion was not heard because the complaint was dismissed on other grounds before the hearing on the motion.”)

B. Fourth and Fifth Causes of Action.

Claims for fraudulent transfer are governed by the UVTA [Uniform Voidable Transactions Act (UVTA), Civil Code section 3439 et seq., formerly known as the Uniform Fraudulent Transfer Act]. The purpose of the UVTA is to prevent

debtors from placing, beyond the reach of creditors, property that should be made available to satisfy a debt. (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071, 234 Cal.Rptr.3d 824.) A creditor may set aside a transfer as fraudulent under Civil Code section 3439.04 by showing actual fraud as defined in subdivision (a)(1) or by showing constructive fraud as defined in subdivision (a)(2). [Footnote.] (See *Lo v. Lee, supra*, 24 Cal.App.5th at p. 1071, 234 Cal.Rptr.3d 824; *Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1401-1402, 166 Cal.Rptr.3d 705.) As a remedy, the creditor may obtain avoidance of the transfer, an attachment or other provisional remedy, and, subject to applicable principles and rules, an injunction or a receiver. (Civ. Code, § 3439.07, subd. (a).)

(*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817.)

1. Actual fraud.

A claim for fraudulent transfer based upon actual fraud requires a plaintiff to establish all of the following:

1. That [name of plaintiff] has a right to payment from [name of debtor] for [insert amount of claim];
2. That [name of debtor] [transferred property/incurred an obligation] to [name of defendant];
3. That [name of debtor] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/nonbinary pronoun/its] creditors;
4. That [name of plaintiff] was harmed; and
5. That [name of debtor]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

(CACI, No. 4200.)

a. Plaintiff Pham has a right to payment from defendant An.

In her opposition, plaintiff Pham requests judicial notice of a “First Amended – Order After Hearing – May 12, 2014” in *Thuy Ngoc Thi Pham v. An Duc Nguyen*, Santa Clara County Superior Court, case number 110-FL-155416 wherein it states, in relevant part, “Respondent, AN DUC NGUYEN, is ordered to pay Petitioner, THUY PHAM, \$60,000 in attorney fees as sanctions by the Court by August 1, 2014.”

Plaintiff, Thuy Pham’s request for judicial notice in support of opposition to defendant’s special motion to strike, etc., exhibit 4, is GRANTED. (Evid. Code, §452, subd. (d); see also *People v. Woodell* (1998) 17 Cal.4th 448, 455—Evidence Code section 452 and 453 permit the trial court to “take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.”)

The above-referenced order establishes plaintiff Pham has a right to payment from defendant An.

b. Defendant An transferred property to defendant Olivia.

In her opposition, plaintiff Pham requests judicial notice of an “Inter-Spousal Transfer Deed – June 13, 2014 between [defendants] An and Olivia – Fawnskin Property.”

Plaintiff, Thuy Pham’s request for judicial notice in support of opposition to defendant’s special motion to strike, etc., exhibit 9, is GRANTED. “[A] court may take judicial notice of the fact of a document’s recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document’s legally operative language, assuming there is no genuine dispute regarding the document’s authenticity.⁴ From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face.” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.)

The above-referenced transfer deed establishes defendant An transferred property [the Fawnskin Home] to defendant Olivia on June 13, 2014.

c. Defendant An transferred property with the intent to hinder, delay, or defraud one or more creditors.

“A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: With *actual intent* to hinder, delay, or defraud any creditor of the debtor.” (Civ. Code, §3439.04, subd. (a)(1); emphasis added.)

In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor’s assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

⁴ As a recorded document, the deed is self-authenticating under Evidence Code section 1600—“The record of an instrument or other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if: (1) The record is in fact a record of an office of a public entity; and (2) A statute authorized such a document to be recorded in that office.

- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
- (11) Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

(Civ. Code, §3439.04, subd. (b); see also CACI, No. 4201.)

Significantly, “whether a conveyance is made with fraudulent intent is a question of fact.” (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1294 (*Annod*); see also *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 (*Filip*)—“proof often consists of inferences from the circumstances surrounding the transfer.”) “There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other.” (*Filip, supra*, 129 Cal.App.4th at p. 834.)

In her moving papers, defendant Olivia focuses principally upon Civil Code section 3439.04, subdivision (b)(8), i.e., whether the value of the consideration received by defendant An was reasonably equivalent to the value of the asset transferred [defendant An’s one-half interest in the Fawnskin Home]. Defendant Olivia argues and proffers evidence that defendant An did receive reasonably equivalent value. Even if the court credits defendant Olivia’s evidence, as explained by the authorities *Annod* and *Filip*, no one factor is determinative.⁵ Indeed, in opposition, plaintiff Pham proffers evidence to support the existence of other badges of fraud.

Plaintiff Pham begins by pointing out defendant An’s transfer of the Fawnskin Home was to an insider. (Civ. Code, §3439.04, subd. (b)(1).) “ ‘[A] special relationship between the debtor and the transferee’ is one of the ‘more common circumstantial indicia of fraudulent intent.’ [Citations omitted.] This can include a ‘family, friendship, or close associate relationship.’ [Citation omitted.]” (*Kaisha v. Dodson* (N.D.Cal. 2010) 423 B.R. 888, 901.) The same transfer deed proffered above establishes defendant An’s transfer of the Fawnskin Home to defendant Olivia, a “former spouse.”

Plaintiff Pham also proffers evidence that before the transfer was made, the debtor (defendant An) had been sued. Again, the “First Amended – Order After Hearing – May 12, 2014” in *Thuy Ngoc Thi Pham v. An Duc Nguyen*, Santa Clara County Superior Court, case number 110-FL-155416, together with the Inter-Spousal Transfer Deed establishes the existence of a pending action against defendant An before the June 12, 2014 transfer.

d. Defendant An’s conduct was a substantial factor in causing plaintiff Pham’s harm.

⁵ Also, as noted earlier, “The court considers defendant’s evidence only to determine if it defeats plaintiff’s showing as a matter of law.” (*Soukup, supra*, 39 Cal.4th at p. 291.) Since fraudulent intent is a question of fact, defendant Olivia’s argument and evidence concerning one of the several badges of fraud does not establish the issue of fraudulent intent in her favor, as a matter of law. Since defendant Olivia’s evidence does not defeat plaintiff’s showing as a matter of law, the court finds it unnecessary to rule on the objections to defendant Olivia’s evidence filed by plaintiff Pham in opposition.

A well-established principle of the law of fraudulent transfers is, "A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt." [Citations omitted.]

(*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80.)

In reviewing plaintiff Pham's opposition and supplemental opposition papers, the court was unable to locate any particular evidence to support a prima facie showing that plaintiff Pham suffered some harm as a result of defendant An's transfer of his one-half interest in the Fawnskin Home to defendant Olivia.

In her opposition and supplemental opposition points and authorities, plaintiff Pham contends that since defendant An has defaulted in this case, he is " 'deemed to admit the material allegations of the complaint for purposes of the action.' " *Vasey v. California Dance Co., Inc.* (1977) 70 CA3d 742, 749. See Plaintiff's RJN 'Exhibit 7.' " Indeed, the court in *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749, wrote, "Although by a default a defendant admits the allegations in the complaint, the defendant who fails to answer admits only facts which are well pleaded. (4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings Without Trial, § 155, p. 2812.)"

In her FAC, plaintiff Pham alleges, in relevant part, "As a direct and legal result of the Defendants' intentional acts, misrepresentations, omissions, breach of fiduciary duty, and violation of law, Plaintiff [Pham] has been damaged." (FAC, ¶38.)

However, plaintiff Pham has not established defendant An's default in this action. Plaintiff Pham's reference to her request for judicial notice, exhibit 7, is to a request for entry of default filed by plaintiff Pham on September 13, 2019. The document does not show that the court clerk entered default. [The Sixth District Court of Appeal made this same observation. At footnote 8 of the opinion, the Sixth District Court of Appeal wrote, "It is apparent that An did not respond to the Complaint. The record reflects that, on September 13, 2019, Pham filed a request for entry of default against An on the Complaint. The record, however, does not reflect that the court thereafter formally entered a default against him.] The court's own review of the records from this action reveals plaintiff Pham filed a subsequent request for entry of default more recently on September 28, 2023, but similarly, the court clerk has not yet entered default against defendant An.

Moreover, the court expresses some doubt as to whether plaintiff Pham can apply defendant An's admission against defendant Olivia. (*Cf.* Code Civ. Proc., §2033.410—" (a) Any matter admitted in response to a request for admission is conclusively established **against the party making the admission** in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300.

(b) Notwithstanding subdivision (a), any admission made by a party under this section is **binding only on that party** and is made for the purpose of the pending action only. It is not an admission by that party for any other purpose, and it shall not be used in any manner against that party in any other proceeding." (Emphasis added.)) Plaintiff Pham has not provided this

court with any legal authority to suggest that one defendant should be made to suffer an admission based upon the default of another co-defendant.

Consequently, plaintiff Pham cannot rely upon defendant An's default to establish (by deemed admission of the FAC's allegations) that defendant An's conduct was a substantial factor in causing plaintiff Pham's harm. Absent any admissible evidence concerning the element of harm and causation, plaintiff Pham has not met her burden of demonstrating a probability of prevailing on her second cause of action for actual fraudulent transfer.

2. Constructive fraud.

There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04, subdivision (b) provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either "(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or [¶] (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and "was insolvent at that time or ... became insolvent as a result of the transfer"

(*Mejia v. Reed* (2003) 31 Cal.4th 657, 669-670; see also CACI, Nos. 4202 – 4203.)

Of the various forms of constructive fraud under Civil Code sections 3439.04 and 3439.05, it is unclear from the FAC which form plaintiff Pham is alleging. In her opposition, plaintiff Pham appears to be relying upon Civil Code section 3439.05. Even so, under each of the various forms of constructive fraudulent transfer, just as with actual fraudulent transfer, plaintiff Pham must demonstrate defendant An's conduct was a substantial factor in causing plaintiff Pham harm. (See CACI, Nos. 4202 – 4203.)

For the same reasons discussed above in connection with plaintiff Pham's second cause of action for actual fraudulent transfer, plaintiff Pham has not met her burden of demonstrating a probability of prevailing on her third cause of action for constructive fraudulent transfer as she has not presented any admissible evidence concerning the element of harm and causation.

Accordingly, defendant Olivia's special motion to strike the fourth and fifth causes of action of plaintiff Pham's FAC pursuant to Code of Civil Procedure section 425.16 is GRANTED.

C. Sixth and Seventh Causes of Action.

"The elements of a civil conspiracy are (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting." (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1048; see also CACI, No. 3600.) "The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective." (*Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1328.)

“Liability may ... be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person’s own conduct, separately considered, constitutes a breach of duty to the third person.’ [Citation.]” (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654; see also CACI, No. 3610.) “Because transferring funds in order to evade creditors constitutes an intentional tort, it logically follows that California common law should recognize liability for aiding and abetting a fraudulent transfer.” (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1025.)

However,

there is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 44, 45, pp. 107-108, italics omitted.) Because the trial court correctly granted judgment for defendants on the main cause of action, the conspiracy allegation is moot.

(*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 82.)

Similarly, without the underlying tort, there can be no liability as an aider and abettor. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574 – 575.)

Thus, plaintiff Pham’s sixth cause of action for conspiracy and seventh cause of action for aiding and abetting necessarily depend upon plaintiff Pham establishing a probability of prevailing on the fourth and fifth causes of action for fraudulent transfer. Since plaintiff Pham has not established a probability of prevailing on the fourth and fifth causes of action, plaintiff Pham cannot independently maintain claims for conspiracy or aiding and abetting.

Accordingly, defendant Olivia’s special motion to strike the sixth and seventh causes of action of plaintiff Pham’s FAC pursuant to Code of Civil Procedure section 425.16 is GRANTED.

D. Ninth Cause of Action.

Plaintiff Pham’s ninth cause of action is entitled, “Creditor’[s] Suit.” The court understands plaintiff Pham’s ninth cause of action to be premised upon Code of Civil Procedure sections 708.210 through 708.290.

“If a third person [here, defendant Olivia] has possession or control of property in which the judgment debtor [here, defendant An] has an interest or is indebted to the judgment debtor, the judgment creditor [here, plaintiff Pham] may bring an action against the third person [defendant Olivia] to have the interest or debt applied to the satisfaction of the money judgment.” (Code Civ. Proc., §708.210.) “This action commonly is referred to as a creditor's suit.” (*Evans v. Paye* (1995) 32 Cal.App.4th 265, 276.)

As summarized by the Sixth District Court of Appeal, “Pham alleged that she had several monetary ‘judgments ‘ (i.e., orders) against An that remain unpaid. Olivia held property in which An had an interest, including the Fawnskin Property, and personal property and furniture owned by An and Olivia while they lived at the Pelican Drive Property. Olivia owed An \$2 million or more.”

Actually, the FAC alleges “Olivia has possession or control of properties in which An has an interest as follows: (1) The Fawnskin Home ..., (2) personal properties and furniture owned by [Olivia and An] during their residence at ... 42 Pelican Point Drive, Newport Coast ..., (3) proceeds from the sale of real property located at: 42 Pelican Point Drive, Newport Coast ..., (4) real property located at: 18 Tasman Sea, Newport Coast ..., (4) [mis-numbered] **An’s shares and/or ownership interest in the Paddy Murphy, Inc.** ...; and (5) any and all personal and real properties held in An’s Trust or in An’s or Olivia’s Joint Trust.” (FAC, ¶75; emphasis added.)

Furthermore, plaintiff Pham’s FAC alleges defendant “**Olivia is indebted to An for approximately \$2,000,000.00 or more.**” (FAC, ¶76; emphasis added.)

To prevail on a “creditor’s suit,” plaintiff Pham must establish one of two alternatives: either (1) defendant Olivia has possession or control of property in which the defendant An has an interest; or (2) defendant Olivia is indebted to defendant An.

Plaintiff Pham directs the court’s attention to defendant Olivia’s declaration filed in support of the special motion to strike wherein defendant Olivia states, “As to Paddy Murphy, Inc., a California corporation, I have been the sole owner of that corporation since 2010, after I purchased An Nguyen’s shares of stock in that corporation for the agreed-upon price of \$1,000,000.00.” (See ¶7 to the Declaration of Defendant Olivia Nguyen in Support of Special Motion to Strike.) This averment disclaims any interest in Paddy Murphy, Inc. by defendant An so plaintiff Pham is unable to establish, from this evidence, that defendant Olivia has possession or control of property in which defendant An has an interest. However, this statement is also relevant to establish that defendant Olivia was indebted to defendant An.

Plaintiff Pham then directs the court’s attention to a portion of defendant Olivia’s deposition testimony which plaintiff Pham contends refers to defendant Olivia’s payment to defendant An for acquisition of defendant An’s shares of stock in Paddy Murphy, Inc.⁶ In relevant part, the cited portion of defendant Olivia’s deposition testimony states:

Q: So I’m looking at a document that your attorney has produced and it seems to be checks, deposited checks; is that correct?

A: Yeah. I made payment to him for the sale of the business.

Q: Uh-huh. Have you made all the payments to him?

A: Yes.

Q: When was the last payment made?

A: Just for this month, for September, so a couple...

⁶ See ¶3 and Exh. 1 (page 20, lines 17 - 25) to the Declaration of James T. Kim, Esq. in Support of Plaintiff’s Opposition to Defendant’s Special Motion to Strike, etc.

Defendant Olivia's deposition testimony is dated August 30, 2019. From this, plaintiff Pham asks the court to deduce that defendant Olivia was still indebted to defendant An until September 2019. Although underdeveloped, the court understands plaintiff Pham to rely on Code of Civil Procedure section 708.250 which states, "Service of summons on the third person creates a lien on the interest of the judgment debtor in the property or on the debt owed to the judgment debtor that is the subject of an action under this article." Plaintiff Pham does not establish when service of summons was made upon defendant Olivia. A review of court records reflects a proof of service of First Amended Summons and the FAC (which includes this creditor's suit cause of action) upon defendant Olivia by substituted service on April 15, 2019 while defendant Olivia remained indebted to defendant An for the purchase of defendant An's shares in Paddy Murphy, Inc. since the debt was, by defendant Olivia's own testimony, not completely paid until September 2019. Thus, service of the summons created a lien against the outstanding debt owed by defendant Olivia to defendant An.

If the court determines that the third person has transferred property that was subject to a lien in favor of the judgment creditor or, contrary to court order of which the third person has notice, has paid the debt to the judgment debtor or has transferred the property, the court shall render judgment against the third person in an amount equal to the lesser of the following:

- (1) The value of the judgment debtor's interest in the property or the amount of the debt.
- (2) The amount of the judgment creditor's judgment against the judgment debtor remaining unsatisfied.

(Code Civ. Proc., §708.280, subd. (d).)

This statute, together with defendant Olivia's deposition testimony, is sufficient for plaintiff Pham to establish a prima facie claim for creditor's suit on the basis that defendant Olivia was indebted to defendant An.

Defendant Olivia's reply claims there is no authority for a lien against her indebtedness to defendant An but Code of Civil Procedure section 708.250 specifically provides such authority. Defendant Olivia's reply also mistakenly focuses on the first available method for a creditor's suit, ignoring the second method for establishing liability.

Accordingly, defendant Olivia's special motion to strike the ninth cause of action of plaintiff Pham's FAC pursuant to Code of Civil Procedure section 425.16 is DENIED.

E. Tenth Cause of Action.

In her opposition to defendant Olivia's earlier demurrer to the FAC, plaintiff Pham states, "Plaintiff is not contesting Olivia's argument that a Constructive Trust [tenth cause of action] is not a valid cause of action."

As with the second and third causes of action, *supra*, this court will treat the tenth cause of action as effectively abandoned/ voluntarily dismissed in advance of the hearing on the special motion to strike.

F. Collateral Attack on Judgment.

In its disposition, the Sixth District Court of Appeal directed this court to consider defendant Olivia's argument that plaintiff Pham's FAC constitutes a collateral attack on the May 15, 2014 Stipulation and Order re Amendment to Judgment filed July 18, 2007 ("2014 Stipulated Order") which is how defendants Olivia and An effectuated the transfer of defendant An's one-half interest in the Fawnskin Home to defendant Olivia.⁷

Among other decisions, defendant Olivia cites *Burrows v. Burrows* (1935) 10 Cal.App.2d 749, 751, for the statement that, "It is a well-established rule that a judgment of a court of record cannot be collaterally assailed unless it is void upon its face." Instead, according to defendant Olivia, a judgment valid on its face must be challenged by direct attack.

However, as the Sixth District Court of Appeal recognized, the following passage from *Mejia v. Reed* (2003) 31 Cal.4th 657, 668, suggests such an argument would not be persuasive:

The California Legislature has a general policy of protecting creditors from fraudulent transfers, including transfers between spouses. CA(4) (4) A transfer before dissolution can be set aside as a fraudulent conveyance. (See Fam. Code, § 851 [transmutation of marital property subject to UFTA]; *Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 122–123 [10 Cal. Rptr. 2d 55, 10 Cal. Rptr. 2d 58].) A transfer after dissolution can be set aside under the clear terms of the UFTA. When the court divides the marital property in the absence of an agreement by the parties, it must divide the property equally (Fam. Code, § 2550), which provides some protection for a creditor of one spouse only. In view of this overall policy of protecting creditors, it is unlikely that the Legislature intended to grant married couples a one-time-only opportunity to defraud creditors by including the fraudulent transfer in [a marital settlement agreement].

Like the Sixth District Court of Appeal, this court is of the opinion that plaintiff Pham's assertion/ claims of fraudulent transfer are not improper collateral attacks.

In any case, the only cause of action surviving from the special motion to strike is plaintiff Pham's ninth cause of action, creditor's suit, and it survived for reasons unrelated to the allegation concerning defendant An's ownership interest in the Fawnskin Home. Even if credited, defendant Olivia's improper collateral attack argument would only subject a portion of the ninth cause of action to being stricken. It would not be a basis for striking the entire ninth cause of action which is what defendant Olivia has requested. (See page 1, lines 3 – 17 of Defendant Olivia Nguyen's Notice of Motion and Special Motion to Strike.)

In summary, defendant Olivia's special motion to strike the ninth cause of action of plaintiff Pham's FAC pursuant to Code of Civil Procedure section 425.16 is DENIED.

⁷ See Exh. B to Defendant Olivia Nguyen's Request for Judicial Notice in Support of her Special Motion to Strike, etc. The request for judicial notice of this document is GRANTED. (Evid. Code, §452, subd. (d); see also *People v. Woodell* (1998) 17 Cal.4th 448, 455—Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.")

Defendant Olivia's special motion to strike the fourth, fifth, sixth, and seventh causes of action of plaintiff Pham's FAC pursuant to Code of Civil Procedure section 425.16 is GRANTED. The court deems the second, third, and tenth causes of action abandoned/ dismissed in advance of the hearing on the special motion to strike.

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Case Name: Yudhveer Singh v. General Motors LLC

Case No.: 22CV404685

Plaintiff moves to compel further responses to Special Interrogatories, Set One, Nos. 2, 3, 17-19, 21-23, 30 and 34. After reviewing the moving papers, the opposition and all supporting documents, the court finds that Plaintiff's interrogatories seek information that is relevant to the litigation and/or will lead to the discovery of admissible evidence. Plaintiff has

adequately met and conferred with Defendant, and the discovery is not outrageously demanding, abusive or overbroad. Furthermore, the interrogatories do not seek privileged, confidential, proprietary or trade secret information, the do not seek “discovery about discovery” and the terms used are not vague or ambiguous. The court finds no merit to any of Defendant’s objections. Accordingly, Plaintiff’s motion is GRANTED. Defendant shall respond to Plaintiff’s Special Interrogatories, Set One, Nos. 2, 3, 17-19, 21-23, 30 and 34, without objection, within 10 days of the final order. Plaintiff shall submit a written order to the court for signature.

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Calendar Line 7

Case Name: Yudhveer Singh v. General Motors LLC

Case No.: 22CV404685

Plaintiff moves to compel further responses to Plaintiff’s Requests for Production of Documents, Set One, Nos. 10-14, 17-21, and 37-42, however, Plaintiff has never filed the Stipulation and Protective Order—Confidential Designation Only signed by the parties in March 2023. Plaintiff is ordered to file the stipulation within 24 hours of the hearing date. This motion to compel is continued to December 19, 2023, at 9:00 a.m. in D-16.

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