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K. TORRE, CLERK OF THE SUPERIOR COURT
COUNTY OF CONTRA COSTA, CALIF.

4 **In The Superior Court of California**
5 **In and For Contra Costa County**

L. Bandura, Deputy Clerk.

7	John Hutchens et. Al.)	Case No.: C 07-00955
)	
8	Plaintiffs,)	Plaintiff's Memorandum of Points and
)	Authorities in Opposition to
9	vs.)	Defendant 4629 MLK Lilac's Motion to
)	Expunge Lis Pendens
10	Lighthorse Ventures LLC, et. Al.)	
)	Date : 11-19-08
11	Defendants)	Time: 9:00 A.M.
)	Department : 2

12
13 **Introductory Statement**

14 The Case at bar involves the efforts of the Plaintiff's to recover over
15 \$103,000. In money which Defendants "borrowed" by way of fraudulent inducement
16 and an additional amount for services rendered as a result of false
17 promises made by said Defendants .

18 Said Defendants are presumed to be insolvent in that they are not
19 able to and have not paid their obligations to creditors as those
20 obligations have become due .

21 During the calendar year of 2005, Said Defendants and each of them became
22 indebted to Plaintiff Jeffrey Heaton in the sum of \$103,000. Principal plus
23 interest. During that same time period , said Defendants became indebted to
24 Plaintiff John Hutchens for services rendered by Mr. Hutchens at the request
25 of said Defendants.

26 Defendants failed and refused to pay the Plaintiff's and the present
27 lawsuit was filed . Plaintiff's Second Amended Complaint contains a Cause
28 of Action to Set aside a Fraudulent Conveyance .

1 At a point in time after Defendants Lighthouse Ventures, LLC , Paul
2 Hoffman and Stephan Lopez were served with process in the instant action,
3 they sold the property which is the subject of Plaintiff's Cause of Action
4 to set aside a Fraudulent Conveyance. This property was sold after
5 Plaintiff's were fully aware of the debt they owed to Plaintiff Jeffrey
6 Heaton and the Claims of John Hutchens . At the time said Defendants sold
7 this property, it was the only asset held by them. They did not apply any
8 of the proceeds of this sale to payment of their debt to Plaintiff Jeffrey
9 Heaton or to payment of the Claims of John Hutchens .

10 The price that was paid for the subject property was well below it's
11 fair market value . This becomes clear when one considers the statement made
12 By opposing counsel in his moving papers when he states that the purchase
13 price paid for the property was 1.35 Million in 2007, before the economic
14 Crises and fall in real estate prices and that now , in 2008, after
15 the collapse in the price of real estate , the purchaser has been
16 approved for a 2.45 million dollar loan on the property . The moving party
17 claims to have invested 1 Million Dollars in improvements into the property
18 but offers no evidence of the same.

19 Plaintiffs have complied with all procedural requirements for
20 perfecting the subject Lis Pendens. A copy of said Lis Pendens was filed with
21 the Court on the same date as this Opposition was prepared . Plaintiffs
22 had not received a copy of the Recorded Lis Pendens from the Alameda
23 County Records Office at an earlier date so as to allow an earlier
24 filing of the same with the court .

25 **Authority Allowing The**

26 **Recordation of a Lis Pendens**

27 **On The Facts of This Case**

28 The California Supreme Court, in the Case of Kirkeby v Superior Court of

1 Orange County (2004) 33 Cal. 4th 642; 15 Cal. Rptr. 3d 805, dealt with the question
2 of whether or not a Fraudulent Conveyance Cause of action was one which
3 affects title to or the right to possession of real property and will
4 support the recordation of a Lis Pendens . The court, in it's well reasoned
5 opinion , held that because a fraudulent conveyance claim requesting relief
6 , if successful , may result in the voiding of a transfer of title of specific
7 property , and since the voiding of a transfer of real property will affect
8 title to or possession of real property , a fraudulent conveyance action
9 seeking avoidance of a transfer clearly affects title to , or the right
10 to possession of real property and is therefore a real property claim
11 for the purposes of the Lis Pendens Statutes . (Kirkeby (Supra))

12 The court in Kirkeby (supra) discussed at length , what the Lis Pendens
13 remedy is and how the courts should approach the task of determining
14 whether said remedy is available ion the facts of a particular case .

15 Thus, the Court Stated :

16 "

17 "A lis pendens is a recorded document giving constructive notice that an action has been
18 filed affecting title or right to possession of the real property described in the notice." (Urez
19 Corp. v. Superior Court (1987) 190 Cal. App. 3d 1141, 1144 [235 Cal. Rptr. 837].) A lis
20 pendens may be filed by any party in an action who asserts a "real property claim." (Code
21 Civ. Proc., § 405.20.) ¹ Section 405.4 defines a " 'Real property claim' " as "the cause or
22 causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to
23 possession of, specific real property" "If the pleading filed by the claimant does not
24 properly plead a real property claim, the lis pendens must be expunged upon motion under
25 CCP 405.31." (Code com., 14A West's Ann. Code Civ. Proc. (2004ed.) foll. Sec 405.4, p.
26 315) Section 405.30 allows the property owner to remove an improperly recorded lis
27 pendens by bringing a motion to expunge. There are several statutory bases for
28 expungement of a lis pendens, including the claim at issue here: claimant's pleadings, on
which the lis pendens is based, do not contain a real property claim. (See § 405.31.) ²

1 Unlike most other motions, when a motion to expunge is brought, the burden is on the
2 party opposing the motion to show the existence of a real property claim. (See § 405.30.)
3 A fraudulent conveyance claim is set forth in the Uniform Fraudulent Transfer Act (UFTA),
4 which is codified in Civil Code section 3439 et seq. "A fraudulent conveyance is a transfer by
5 the debtor of property to a third person undertaken with the intent to prevent a creditor
6 from reaching that interest to satisfy its claim." (*Yaesu Electronics Corp. v. Tamura* (1994)
7 28 Cal.App.4th 8, 13 [33 Cal. Rptr. 2d 283].) A transfer under the UFTA is defined as "every
8 mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or
9 parting with an asset ... , and includes payment of money, release, lease, and creation of a
10 lien or other encumbrance." (Civ. Code, § 3439.01, subd. (i).) "A transfer of assets made by
11 a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the
12 transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay, or
13 defraud any creditor, or (2) without receiving reasonably equivalent value in return, and
14 either (a) was engaged in or about to engage in a business or transaction for which the
15 debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or
16 reasonably should have believed, that he or she would incur debts beyond his or her ability
17 to pay as they became due. [Citations.]" (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 928
18 [60 Cal. Rptr. 2d 841], fns. omitted; see also Civ. Code, § 3439.04.) ⁴

19
20 **FOOTNOTES**

21
22 ⁴ Civil Code section 3439.04 provides: "A transfer made or obligation incurred by a debtor
23 is fraudulent as to a creditor, whether the creditor's claim arose before or after the
24 transfer was made or the obligation was incurred, if the debtor made the transfer or
25 incurred the obligation as follows: [¶] (a) With actual intent to hinder, delay, or defraud
26 any creditor of the debtor. [¶] (b) Without receiving a reasonably equivalent value in
27 exchange for the transfer or obligation, and the debtor: [¶] (1) Was engaged or was about
28 to engage in a business or a transaction for which the remaining assets of the debtor were

1 unreasonably small in relation to the business or transaction; or [¶] (2) Intended to incur,
2 or believed or reasonably should have believed that he or she would incur, debts beyond
3 his or her ability to pay as they become due.”
4

5 Civil Code section 3439.07⁵ sets forth the remedies in a fraudulent conveyance action.
6 Under subdivision (a)(1) of that section, a creditor who makes a successful fraudulent
7 conveyance claim may obtain “[a]voidance of the transfer or obligation to the extent
8 necessary to satisfy the creditor's claim.” Therefore, a fraudulent conveyance claim
9 requesting relief pursuant to Civil Code section 3439.07, subdivision (a)(1), if
10 successful, may result in the voiding of a transfer of title of specific real
11 property. By definition, the voiding of a transfer of real property will affect title
12 to or possession of real property. Therefore, a fraudulent conveyance action seeking
13 avoidance of a transfer under subdivision (a)(1) of Civil Code section 3439.07 clearly
14 “affects title to, or the right to possession of” (Code Civ. Proc., § 405.4) real
15 property and is therefore a real property claim for the purposes of the lis pendens
16 statutes.
17

18 **FOOTNOTES** Civil Code section 3439.07 provides in relevant part: “(a) In an action for
19 relief against a transfer or obligation ... a creditor ... may obtain: [¶] (1) Avoidance
20 of the transfer or obligation to the extent necessary to satisfy the creditor's
21 claim. [¶] (2) An attachment or other provisional remedy against the asset
22 transferred or its proceeds [¶] (3) Subject to applicable principles of equity
23 and in accordance with applicable rules of civil procedure, the following: [¶] (A) An
24 injunction against further disposition by the debtor ... of the asset transferred or
25 its proceeds. [¶] (B) Appointment of a receiver [¶] (C) Any other relief the
26 circumstances may require. [¶] (b) If a creditor has commenced an action on a claim
27 against the debtor, the creditor may attach the asset transferred or its proceeds
28

1 [¶] (c) If a creditor has obtained a judgment on a claim against the debtor, the
2 creditor may levy execution on the asset transferred or its proceeds.”

3
4 Hunting World, Inc. v. Superior Court (1994) 22 Cal.App.4th 67 [26 Cal. Rptr. 2d 923]

5 (*Hunting World*), offers additional support for this conclusion. In *Hunting World*, the plaintiff
6 filed a federal court action for trademark infringement seeking money damages and the
7 imposition of a constructive trust on profits obtained as a result of the infringement. After
8 being served with the lawsuit, the defendant quitclaimed his interest in his family's
9 residence to his wife. The plaintiff then brought a fraudulent conveyance action in state
10 court to set aside the conveyance and recorded a lis pendens against the property. On
11 appeal, the Court of Appeal reversed the trial court's order granting the defendant's motion
12 to expunge the lis pendens. Using the same reasoning we use here, the Court of Appeal
13 held that an action to set aside a fraudulent conveyance fell within the “clear wording of the
14 ‘real property claim’ prong of lis pendens law.” (*Id. at p. 73.*)

15 . . . a court “must look through the pleadings to ascertain the purpose of the party
16 seeking to maintain notice of lis pendens.” (*Hunting World, supra, 22 Cal.App.4th at p. 73.*)
17 In support, the Fascenellis cite *Urez Corp v. Superior Court, supra, 190 Cal. App. 3d 1141,*
18 and several other cases. § The Fascenellis' argument fails based on the plain language of the
19 applicable statute. Nowhere in the language of section 405.31, or in its legislative history, is
20 the court directed to conduct such an examination during its demurrer-like analysis. Indeed,
21 the legislative history expressly requires courts to consider only the specific claim as pled
22 and to determine whether that claim is a real property claim: “This section concerns
23 pleading. Prior law became confused because of failure of the courts to distinguish between
24 allegations (pleadings) and evidence. This section concerns judicial examination of
25 allegations only. Judicial examination of factual evidence is separately governed by CCP
26 405.32. [¶] ... This section ... mandates expungement if the pleading does not contain a real
27 property claim. The analysis required by this section is analogous to, but more limited than,
28 the analysis undertaken by a court on a demurrer. ... [T]he court must undertake the more
limited analysis of whether the pleading states a real property claim.” (Code coms., Assem.

2
3 **FOOTNOTES**

4
5 ¶ The other cases cited are: BGJ Associates, LLC v. Superior Court (1999) 75 Cal.App.4th
6 952 [89 Cal. Rptr. 2d 693]; Lewis v. Superior Court (1994) 30 Cal.App.4th 1850 [37 Cal.
7 Rptr. 2d 63]; La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322 [264 Cal. Rptr.
8 63]; Wardley Development Inc. v. Superior Court (1989) 213 Cal. App. 3d 391 [262 Cal.
9 Rptr. 87]; Moseley v. Superior Court (1986) 177 Cal. App. 3d 672 [223 Cal. Rptr. 116];
10 Deane v. Superior Court (1985) 164 Cal. App. 3d 292 [210 Cal. Rptr. 406]; Burger v.
11 Superior Court (1984) 151 Cal. App. 3d 1013 [199 Cal. Rptr. 227].

12
13
14 Lewis v. Superior Court, supra, 30 Cal.App.4th 1850, is inapposite and actually supports our
15 conclusion. In *Lewis*, the real party in interest “merely allege[d] that [seller] wrongfully took
16 [real party in interest's] money and used the money to buy—not convey—the property.”
17 (*Id.* at p. 1865.) The Court of Appeal concluded that the real party in interest had simply
18 realleged its constructive trust claim, which could not support a lis pendens. (*Ibid.*) The
19 court therefore held that although a fraudulent conveyance claim may support a lis
20 pendens, the complaint in that case did not allege a conveyance of real property. (*Ibid.*)^z

21
22 **FOOTNOTES**

23
24 ^z Because it is not presented in this case, we do not address the question of whether a
25 claim that seeks to impose a constructive trust or equitable lien may be a basis for a lis
26 pendens.

27
28 By contrast, Kirkeby adequately pled a fraudulent conveyance claim by alleging that the

1 Fascenellis transferred title of the subject properties with the intent to defraud. Specifically,
2 she alleged "that Defendants made these transfers with the actual intent to hinder, delay,
3 and/or defraud all of their creditors in the collection of their claims. ..." Kirkeby also asked
4 the court to void the transfers of both properties to the extent necessary to satisfy the
5 claims in her complaint. As such, her fraudulent conveyance claim, if successful, will affect
6 title to specific real property. Accordingly, her lis pendens was improperly expunged based
7 on section 405.31.

8 **Plaintiff's Have Stated**
9 **A Cause of Action To Set**
10 **Aside A Fraudulent**
11 **Conveyance**

12 Plaintiff's have properly stated a cause of Action for Fraudulent Conveyance .
13 Thus , the demurrer type analysis of this matter is one which the Court may find
14 in favor of Plaintiff's recordation of the subject Lis Pendens.

15 **The Evidence Shows That**
16 **Plaintiff's Have a Likelihood**
17 **Of Prevailing On The**
18 **Cause of Action to Set Aside**
19 **A Fraudulent Conveyance**

20 Plaintiff's refer to their Verified Second Amended Complaint on file with the Court
21 And incorporate it by reference as though fully set forth . Said Verified Second
22 Amended Complaint contains a complete statement of facts , sworn to be true
23 under declaration of perjury , to support the statements made regarding the
24 evidence showing a likelihood of Plaintiff's success on the Fraudulent Conveyance
25 Claim .

26 Here, Defendants Lighthouse Ventures LLC, Paul Hoffman and Stephan Lopez have
27 fraudulently victimized the Plaintiffs . The evidence in
28 the transaction which Plaintiffs seek to set aside
shows a continuation of that fraud. The property was

1 Defendants only asset at the time it was sold.
2 Defendants knew of the debts they owed to the
3 Plaintiff's at the time the property was sold .
4 Defendants were insolvent at the time the property was
5 sold . Defendants did not use any of the proceeds of
6 the sale to pay or reduce their indebtedness to the
7 Plaintiffs. The price paid for the subject property was
8 not a fair market value of said property . (Sold for
9 1.35 Million prior to the collapse of real estate market,
10 qualified for a loan of 2.45 million after said
11 collapse) It is submitted that these facts should
12 sustain a finding in favor of Plaintiffs on the instant
13 Motion to Expunge .

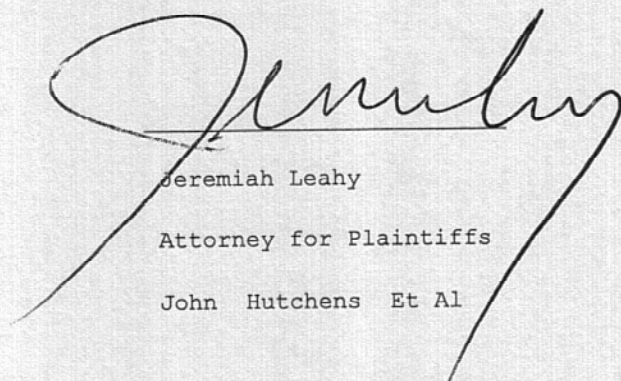
14 **Request for Attorney Fees**

15 Plaintiffs hereby request reasonable Attorney Fees
16 incurred in opposing this motion.

17 **Conclusion**

18 For the reasons set forth hereinabove ,m it is
19 respectfully that this Court should deny Defendants Motion
20 to Expunge the Lis Pendens and should Award reasonable
21 Attorney fees to the Plaintiffs incurred in the
22 opposition of the Motion to Expunge

23
24
25 Date November13, 2008


26 Jeremiah Leahy

27 Attorney for Plaintiffs

28 John Hutchens Et Al

1 Declaration Regarding Service by United States Mail

2 I , Jeremiah Leahy declare that I am above the age of eighteen years
3 And that I am not a party to the herein action. My business address is
4 1740 University Avenue , No. 64, Berkeley, California, 94702.

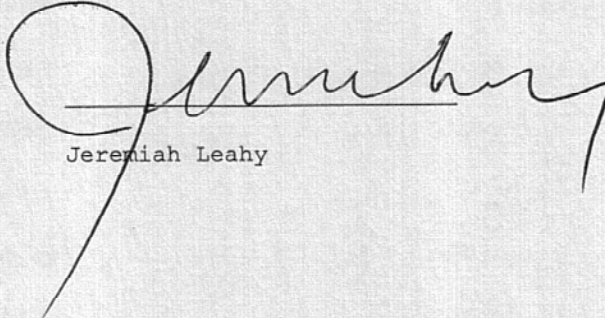
5 On the date entered below I caused to be served , Plaintiff's
6 Opposition to Defendants Motion To Expunge Lis Pendens , on the interested
7 parties by true and correct copies of the same in sealed envelopes with
8 proper postage affixed thereto , addressed as follows :

9
10 Donald Tenconi Paul Hoffman
11 Law Office of Donald Tenconi 1600 South Main Plaza, Suite 325
12 1600 South Main Plaza, Suite 325 Walnut Creek, California , 94596-8812
13 Walnut Creek California , 94596

14
15 H. Paul Bryant
16 Law Office of H. Paul Bryant
17 901 Clay Street
18 Oakland, CA. 94607

19
20 And depositing the same in the United States Mail on November 13, 2008.

21
22 I declare under penalty of perjury under the laws of the State of
23 California that the foregoing statements are true and correct and that this
24 declaration was executed on this 13th day of November , 2008 at Martinez
25 California.

26
27 
Jeremiah Leahy