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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAJOSEPH LACHAPELLE, et al.,  
Plaintiffs,  
v.  
DONG KWAN KIM, et al.,  
Defendants.Case No. [15-cv-02195-JSC](#)**ORDER GRANTING MOTION TO  
DISMISS**

Re: Dkt. No. 17

Plaintiffs Joseph Lachapelle and James Field (“Plaintiffs”) bring this action against Defendants Dong Kwan Kim (“Kim”), Young Song (“Song”), ZeroDesktop, Inc. (“ZeroDesktop”), Klaus Maier (“Maier”), nComputing, Inc. (“nComputing”), Daehong Technew Corp. (“DTC”), and a number of Doe Defendants (collectively, “Defendants”) to recover allegedly fraudulent transfers and for damages. The complaint alleges that Defendants engaged in a scheme to transfer assets from nComputing to ZeroDesktop to prevent Plaintiffs from satisfying an outstanding judgment against Kim. Defendants Song and ZeroDesktop have moved to dismiss the complaint. (Dkt. No. 17.) The Court concludes that oral argument is unnecessary. See Civ. L.R. 7-1(b). Having considered the parties’ submissions and the relevant authority, the Court GRANTS the motion with leave to amend.

**BACKGROUND**

The following facts are based on the allegations in the complaint and documents of which the Court takes judicial notice.

Following a jury trial in state court in Oregon, Plaintiffs, pursuing shareholder derivative claims on behalf of Deep Photonics, Inc., obtained a judgment (“Judgment”) against Kim, among others, in the amount of \$10,000,000.00. (Dkt. No. 1 ¶ 7; Dkt. No. 18-1 at 2-3.) As of the filing

1 of the complaint, only \$300,000.00 of the Judgment has been paid. (Dkt. No. 1 ¶ 7.) The  
2 complaint relates Plaintiffs’ attempts to satisfy the remainder of the judgment against Kim. These  
3 efforts have involved legal action in Oregon, Delaware, and California state courts, as set forth  
4 below.

5 Kim is an individual who owns or controls DTC. (Dkt. No. 1 ¶¶ 2, 8.) Kim and/or DTC,  
6 in turn, own and control nComputing, a Delaware corporation. (Id. ¶¶ 4, 8.) In response to  
7 interrogatories that Plaintiffs propounded against Kim in post-judgment debt collection  
8 proceedings in the original Oregon case, Kim disclosed that he owned shares of stock in both  
9 nComputing and ZeroDesktop, a California corporation. (Dkt. No. 1) Defendants Song and  
10 Maier are officers or employees of nComputing, and longtime business associates of Kim. (Id.  
11 ¶ 4.) On January 20, 2015, Plaintiffs’ counsel advised nComputing in writing of the Judgment and  
12 notified nComputing that any asset transfer by nComputing would be viewed as a fraudulent  
13 transfer. (Id. ¶ 8.)

14 Despite the written warning, less than a week later, on January 26, 2015, nComputing  
15 made an assignment for the benefit of creditors. (Dkt. No. 1 ¶ 8; see also Dkt. No. 17-1 at 26.) At  
16 some point thereafter, the assignee transferred virtually all assets of nComputing to ZeroDesktop.  
17 (Dkt. No. 1 ¶¶ 5, 8.) Song and Maier, Kim’s business associates who previously worked at  
18 nComputing, now work for ZeroDesktop. (Id.)

19 In the meantime, on January 23, 2015, Plaintiffs registered in Delaware the Judgment  
20 against Kim. (Id. ¶ 4, 8; Dkt. No. 18-8 at 14 ¶ 1.) One week later, Plaintiffs issued a citation to  
21 nComputing to attach Kim’s shares in the company to satisfy the judgment. (Dkt. No. 1 ¶ 8; Dkt.  
22 No. 18-8 at 14.) After nComputing failed to respond to the citation, on March 20, 2015 judgment  
23 (“the Delaware Judgment”) was entered against nComputing in favor of Plaintiffs in the amount of  
24 \$10,000,000.00. (Dkt. No. 1 ¶ 8.) On February 26, 2015, Plaintiffs filed an action against Kim  
25 (and the two other defendants in the initial Oregon case) in San Mateo County Superior Court to  
26 collect on the Judgment. (Dkt. No. 18-1 at 38.) In that case, Plaintiffs sought an order charging  
27 Kim’s interest in ZeroDesktop, but the motion was denied on procedural grounds. (Dkt. Nos. 18-  
28 3—18-7, 18-8 at 2.)

1 On May 15, 2015, Plaintiffs filed the instant complaint alleging that all defendants are  
2 liable for fraudulent transfers and conspiracy to defraud in connection with nComputing’s transfer  
3 of assets to ZeroDesktop. Plaintiffs seek a declaration that the transfers were fraudulent and  
4 voidable and that the property transferred be awarded to Plaintiffs, as well as at least  
5 \$10,000,000.00 in compensatory damages and \$5,000,00.00 in punitive damages. (Dkt. No. 1 at  
6 4.) Defendants Kim, Song, ZeroDesktop, and DTC appeared and consented to magistrate judge  
7 jurisdiction. (Dkt. Nos. 9, 16, 28.) Defendants Klaus Maier and nComputing, Inc., failed to  
8 appear, and the Clerk of Court entered their default. (Dkt. No. 13, 34.) Song and ZeroDesktop  
9 filed the instant motion to dismiss, contending that the complaint must be dismissed for failure to  
10 state a claim for fraudulent transfer and conspiracy and also failure to comply with the heightened  
11 pleading standard for fraud claims. (Dkt. No. 17.) By stipulation of the parties, the Court now  
12 severs Plaintiffs’ claims against the defaulting defendants and will proceed to decision on the  
13 motion to dismiss. (Dkt. No. 35, 36.)

#### 14 LEGAL STANDARD

15 A Rule 12(b)(6) motion challenges the sufficiency of a complaint as failing to allege  
16 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*  
17 *Twombly*, 550 U.S. 544, 570 (2007). A facial plausibility standard is not a “probability  
18 requirement” but mandates “more than a sheer possibility that a defendant has acted  
19 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citations  
20 omitted). For purposes of ruling on a Rule 12(b)(6) motion, the court “accept[s] factual  
21 allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the  
22 non-moving party.” *Manzarek v. St. Paul Fire & Mar. Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.  
23 2008). “[D]ismissal may be based on either a lack of a cognizable legal theory or the absence of  
24 sufficient facts alleged under a cognizable legal theory.” *Johnson v. Riverside Healthcare*  
25 *Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotations and citations omitted); see  
26 also *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a  
27 claim on the basis of a dispositive issue of law”).

28 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), under

1 which a party is only required to make “a short and plain statement of the claim showing that the  
2 pleader is entitled to relief,” a “pleading that offers ‘labels and conclusions’ or ‘a formulaic  
3 recitation of the elements of a cause of action will not do.” Iqbal, 556 U.S. at 678  
4 (quoting Twombly, 550 U.S. at 555). “[C]onclusory allegations of law and unwarranted inferences  
5 are insufficient to defeat a motion to dismiss.” Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir.  
6 2004); see also Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (“[A]llegations in a complaint  
7 or counterclaim may not simply recite the elements of a cause of action, but must contain  
8 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to  
9 defend itself effectively.”). The court must be able to “draw the reasonable inference that the  
10 defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 663. “Determining whether a  
11 complaint states a plausible claim for relief . . . [is] a context-specific task that requires the  
12 reviewing court to draw on its judicial experience and common sense.” Id. at 663-64.

13 If a Rule 12(b)(6) motion is granted, the “court should grant leave to amend even if no  
14 request to amend the pleading was made, unless it determines that the pleading could not possibly  
15 be cured by the allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en  
16 banc) (internal quotation marks and citations omitted).

### 17 DISCUSSION

18 Defendants argue that the complaint must be dismissed because it does not adequately  
19 plead fraudulent transfer or conspiracy.<sup>1</sup> The parties dispute whether the Court can consider the  
20 additional materials that Defendants submitted in connection with their motion to dismiss. They  
21 also dispute whether Rule 9(b)’s heightened pleading requirement applies to Plaintiffs’ claims.  
22 The Court will address these questions before turning to the substance of each cause of action  
23 alleged.

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26 <sup>1</sup> In the caption of their motion, Defendants also move for dismissal for lack of ripeness under  
27 Federal Rule of Civil Procedure 12(b)(1). But they mention ripeness in the substance of the  
28 motion only in passing, even then framing the lack of ripeness as inadequately pleaded damages.  
Their motion includes the legal standard only for a 12(b)(6) motion and almost entirely focuses on  
the insufficiency of the allegations in that context. The Court therefore concludes that Defendants  
are moving solely under Rule 12(b)(6).

1     **I.     Extra-Pleading Materials**

2             When adjudicating a motion to dismiss brought pursuant to Rule 12(b)(6), the Court’s  
3     consideration of extra-pleading materials is limited. Normally, the Court cannot consider matters  
4     outside of the pleading without converting the motion into one for summary judgment. See Fed.  
5     R. Civ. P. 12(b)(6); see also *Ramirez v. United Airlines, Inc.*, 416 F. Supp. 2d 792, 795 (N.D. Cal.  
6     2005) (“[M]aterials outside the pleadings ordinarily are not considered on a motion to dismiss[.]”).  
7     However, courts may consider documents alleged in a complaint and essential to a plaintiff’s  
8     claims. See *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *Steckman v. Hart Brewing, Inc.*,  
9     143 F.3d 1293, 1295 (9th Cir. 1998). A court may also “take judicial notice of documents on  
10    which allegations in the complaint necessarily rely, even if not expressly referenced in the  
11    complaint, provided that the authenticity of those documents is not in dispute[.]” *Tercica, Inc. v.*  
12    *Insmed Inc.*, No. C 05-5027 SBA, 2006 WL 1626930, at \*8 (N.D. Cal. June 9, 2006) (emphasis in  
13    original) (citing *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d 833, 837-38 (N.D. Cal. 2000)),  
14    and may take judicial notice of matters of public record, *Coto Settlement v. Eisenberg*, 593 F.3d  
15    1031, 1038 (9th Cir. 2010), including court filings, *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442  
16    F.3d 741, 746 n.6 (9th Cir. 2006).

17             Here, Defendants request that the Court take judicial notice of 11 documents in connection  
18    with the motion to dismiss. (Dkt. No. 18.) Exhibits A through K to Defendants’ Request for  
19    Judicial Notice are all documents filed on the public docket in Washington County Circuit Court  
20    in Oregon, San Mateo County Superior Court in California, and New Castle County Superior  
21    Court in Delaware pertaining to Plaintiffs’ various collection actions against Kim. (Dkt. Nos. 18-  
22    1—18-8.) Plaintiffs object to the Court’s consideration of these documents on the grounds that the  
23    documents are not certified copies. (Dkt. No. 23-1.) The relevant Ninth Circuit case law does not  
24    require that court filings to be certified copies in order to take judicial notice, see *Reyn’s Pasta*  
25    *Bella*, 442 F.3d at 746 n.6, and Plaintiffs have not cited any case law that requires as much. Thus,  
26    the Court takes judicial notice of these documents over Defendants’ objection. However, the  
27    documents are for the most part irrelevant to the Court’s decision on the motion to dismiss as  
28    whether Plaintiffs have previously sought to enforce the judgment via other means has no bearing

1 on whether the complaint states a claim.

2 Defendants also submitted two documents attached to the declaration of Defendant Young  
3 Song in support of the motion to dismiss. (Dkt. Nos. 17-1.) Exhibit A is a letter from Plaintiffs’  
4 counsel to Song referenced in the complaint at paragraph 8, in which Plaintiffs allege that “[o]n or  
5 about January 20, 2015, Oregon counsel for Creditors advised nComputing in writing of the  
6 [Judgment] and further advised nComputing that any asset transfer by nComputing would be  
7 viewed as a fraudulent transfer.” (Dkt. No. 1 ¶ 8.) Exhibit B is a Notice of Assignment for the  
8 Benefit of Creditors, referenced in the same paragraph. (Id. (“Less than a week after receiving  
9 such notice, nComputing made an assignment for the benefit or creditors, and that assignee  
10 immediately transferred virtually all assets of nComputing to ZeroDesktop.”). Plaintiffs object to  
11 the Court’s consideration of these documents at this stage of the litigation, urging that a 12(b)(6)  
12 motion is limited to the four corners of the complaint, but do not contest the documents’  
13 authenticity. (Dkt. No. 23-1.) The documents are referenced in the complaint and central to the  
14 claims: the letter highlights that nComputing had notice of Plaintiffs’ claims as creditors, while the  
15 Assignment for the Benefit of Creditors is one of the fraudulent transfers alleged. The Court  
16 therefore considers Exhibits A and B to the Song Declaration as they were referenced in the  
17 complaint, essential to the claims, and their authenticity has not been challenged.

18 The Court will judicially notice or consider the documents solely for the purpose of noting  
19 that the documents were filed, not for the truth of the matters asserted therein. See, e.g.,  
20 McMunigal v. Bloch, No. C 1002765 SI, 2010 WL 5399219, at \*2 (N.D. Cal. Dec. 23, 2010)  
21 (judicially noticing records of other proceeding “only for the purposes of noticing the existence of  
22 the [prior] lawsuit, and the fact that various documents were filed therein”) (citation omitted).

23 **II. Sufficiency of the Complaint**

24 A. The Heightened Pleading Standard of Rule 9(b) Applies

25 The main claim underlying both causes of action in the complaint is fraudulent transfer;  
26 the second cause of action for conspiracy to defraud is based on a conspiracy to effect the  
27 fraudulent transfers alleged in the first cause of action. The gravamen of the claims is that Kim, as  
28 debtor, arranged with the help of all Defendants for nComputing to transfer its assets to

1 ZeroDesktop to prevent Plaintiffs from satisfying their debt against Kim through his shares of  
2 nComputing. The parties dispute whether the heightened pleading standard of Federal Rule of  
3 Civil Procedure 9(b) applies to these claims.

4 In cases where fraud is not a necessary element of a claim, but a plaintiff nonetheless  
5 frames the claims as a course of fraudulent conduct, “the claim is said to be ‘grounded in fraud’ or  
6 to ‘sound in fraud’ and the pleading of that claim as a whole must satisfy the particularity  
7 requirement of Rule 9(b).” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir.  
8 2003) (citation omitted). So it is here. The complaint urges that Defendants engaged in the  
9 fraudulent transfers “with intent to hinder, delay, or defraud creditors” such as Plaintiffs and  
10 “conspired to effectuate the Transfers to ZeroDesktop as part and parcel of a conspiracy to  
11 defraud” Plaintiffs. (Dkt. No. 1 ¶¶ 11, 17.) These allegations leave no doubt that the claims  
12 “sound in fraud” such that the heightened pleading standard applies. Indeed, courts in this District  
13 regularly hold that Rule 9(b) applies to a fraudulent conveyance claim alleging intent to hinder,  
14 delay, or defraud.<sup>2</sup> See, e.g., *Opperman v. Path, Inc.*, --- F. Supp. 3d ----, No. 13-cv-00453--JST,  
15 2014 WL 1973378, at \*31 (N.D. Cal. May 14, 2014); *Kelleher v. Kelleher*, No. 13-cv-05450-MEJ,  
16 2014 WL 94197, at \*5 (N.D. Cal. Jan. 9, 2014) (“Because a claim for actual fraudulent transfer  
17 involves an allegation of fraud or mistake, it is subject to [Rule] 9(b), which requires a party to  
18 ‘state with particularity the circumstances constituting fraud or mistake’ and is applied by a federal  
19 court to both federal law and state law claims.”) (citation omitted); *Hyosung (Am.), Inc. v. Hantle*  
20 *USA, Inc.*, No. C 10-02160 SBA, 2011 WL 835781, at \*4 (N.D. Cal. Mar. 4, 2011) (Rule 9(b)  
21 applies to fraudulent transfers alleged to have occurred with “actual intent to hinder, delay, or  
22 defraud” a creditor) (citation omitted); *Kennedy Funding, Inc. v. Chapman*, No. C 09-01957 RS,

23 \_\_\_\_\_  
24 <sup>2</sup> In contrast, a cause of action for constructive fraudulent conveyance under California Civil Code  
25 § 3439.05 “focuses entirely on the transaction at issue and does not include elements of  
26 knowledge, intent, or purpose” and thus does not sound in fraud and may not be subject to Rule  
27 9(b)’s heightened pleading requirements. See *Sunnyside Dev. Co. LLC v. Cambridge Display*  
28 *Tech. Ltd.*, No. C 08-01780 MHP, 2008 WL 4450328, at \*9 (N.D. Cal. Sept. 29, 2008). Although  
the complaint does not list a particular statutory section, it alleges that the transfer occurred with  
intent to hinder, delay, or defraud, which is actual—not constructive—conveyance. See *Wolkowitz*  
*v. Beverly (In re Beverly)*, 374 B.R. 221, 235 (9th Cir. BAP 2007) (“A transfer is said to be  
‘actually fraudulent’ as to a creditor if the debtor made the transfer ‘with actual intent to hinder,  
delay, or defraud any creditor of the debtor.’”) (quoting Cal. Civ. Code § 3439.04(a)(1)).

1 2010 WL 2528729, at \*9 (N.D. Cal. June 18, 2010) (same). Likewise, courts have held that the  
2 heightened pleading standard also applies to claims of conspiracy to defraud. See, e.g.,  
3 *Ajetunmobi v. Clarion Mortg. Capital, Inc.*, No. SACV 12-0568 DOC (JPRx), 2012 WL 2945051,  
4 at \*7 (C.D. Cal. July 17, 2012) (claims for conspiracy to defraud are subject to Rule 9(b)'s  
5 heightened pleading standard) (citation omitted); *Solano v. Am.'s Servicing Co.*, No. 2:10-cv-  
6 02426-GEB-GGH, 2011 WL 1669735, at \*10 (E.D. Cal. May 3, 2011) (same) (citations omitted).  
7 Plaintiffs' argument that Rule 9(b) does not apply because their claims "have nothing to do with  
8 common law fraud" is therefore unavailing, since the rule applies broadly to any claim that sounds  
9 in fraud. As currently alleged, Plaintiffs' claims do so here.

10 Thus, Plaintiffs' complaint must plead with particularity the circumstances surrounding the  
11 fraudulent transfer and conspiracy to defraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124  
12 (9th Cir. 2009). To satisfy the heightened standard, allegations must be "specific enough to give  
13 defendants notice of the particular misconduct which is alleged to constitute the fraud charged so  
14 that they can defend against the charge and not just deny that they have done anything  
15 wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). This includes "the who, what,  
16 when, where, and how of the misconduct charged." *Vess*, 317 F.3d at 1106. Conclusory  
17 allegations that a defendant's conduct was fraudulent are insufficient. *Facebook, Inc. v.*  
18 *MaxBounty, Inc.*, 274 F.R.D. 279, 285 (N.D. Cal. 2011). While, "[w]hen alleging fraud, a party  
19 must plead with particularity the circumstances constituting fraud, [ ] conditions of the mind, such  
20 as knowledge and intent, may be alleged generally." *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d  
21 915, 935 (N.D. Cal. 2013) (internal quotation marks and citation omitted) (emphasis omitted).

22 B. The Complaint Fails to Allege Fraudulent Transfer

23 The first cause of action is for fraudulent transfer, also known as fraudulent conveyance.  
24 A fraudulent conveyance is "a transfer by the debtor of property to a third person undertaken with  
25 the intent to prevent a creditor from reaching that interest to satisfy its claim." *Yaesu Elecs. Corp.*  
26 *v. Tamura*, 28 Cal. App. 4th 8, 13 (1994). To protect creditors from unseemly debtors,  
27 California's Uniform Fraudulent Transfer Act ("UFTA") provides that a transfer may be deemed  
28 invalid if a debtor transfers property with the "actual intent to hinder, delay, or defraud any



1 creditor of the debtor.” Cal. Civ. Code § 3439.04(a)(1). To state a claim for fraudulent transfer,  
2 “there must be a transfer of an asset as defined in the UFTA.” *Fid. Nat’l Title Ins. Co. v.*  
3 *Schroeder*, 179 Cal. App. 4th 834, 840-41 (2009) (citation omitted) (emphasis in original). Under  
4 the Act, “transfer” is defined as “every mode, direct or indirect, absolute or conditional, voluntary  
5 or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes  
6 payment of money, release, lease, and creation of a lien or other encumbrance.” Cal. Civ. Code  
7 § 3439.01(i). An “asset,” in turn, is defined by the term “property,” which includes “anything that  
8 may be the subject of ownership.” Cal. Civ. Cod § 3439.01(a), (h). A creditor cannot premise a  
9 UFTA claim on a transfer unless it “puts beyond [the creditor’s] reach property [the creditor]  
10 otherwise would be able to subject to the payment of [ ] debt.” *Mehrtash v. Mehrtash*, 93 Cal.  
11 App. 4th 75, 80 (2001) (internal quotation marks and citation omitted); see also *id.* at 81.  
12 Plaintiffs must also plead facts sufficient to plausibly establish that the transfer was made with  
13 “actual intent to hinder, delay, or defraud any creditor of the debtor.” Cal. Civ. Code  
14 § 3439.04(a)(1). A transfer may be fraudulent in violation of the UFTA “whether the creditor’s  
15 claim arose before or after the transfer” so long as that intent is alleged and the debtor “either (a)  
16 was engaged in or about to engage in a business or transaction for which the debtor’s assets were  
17 unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have  
18 believed, that he or she would incur debts beyond his or her ability to pay as they became due.”  
19 *Cortez v. Vogt*, 52 Cal. App. 4th 917, 928 (1997) (citations omitted); see also Cal. Civ. Code  
20 § 3439.04; *Kelleher*, 2014 WL 94197, at \*5.

21 Plaintiffs’ claim of fraudulent transfer is not plausibly alleged nor pleaded with the  
22 requisite particularity. First, the complaint does not identify the particular defendants against  
23 whom the fraudulent transfer claim is brought. (See Dkt. No. 1 ¶¶ 10-15.) The body of the claim  
24 references only nComputing and ZeroDesktop, not the other defendants, but does not clarify that  
25 the other defendants are not sued under that claim.

26 Turning to the substance of the claim itself, Plaintiffs allege that the assignment for the  
27 benefit of creditors and subsequent transfer to ZeroDesktop is the relevant transfer of assets by a  
28 debtor. An assignment for the benefit of creditors “is an alternative to a Chapter 7 liquidation,

1 whereby the debtor assigns substantially all of its assets to the assignee (instead of a bankruptcy  
2 trustee) for the benefit of the debtor’s creditors.” *Tatung Co. v. Shu Tze Hsu*, 43 F. Supp. 3d 1036,  
3 1066 (C.D. Cal. Sept. 2, 2014). The role of the assignee “is akin to that of a trustee or  
4 administrator of an estate who owes fiduciary duties to the estate’s beneficiaries.” *Berg & Berg*  
5 *Enters., LLC v. Sherwood Partners, Inc.*, 131 Cal. App. 4th 802, 825 (2005). While Defendants  
6 insist that an assignment for the benefit of creditors cannot serve as the “transfer of assets” for the  
7 purposes of a fraudulent transfer claim, they do not cite any authority in support of that  
8 proposition. At least one district court has found that a plaintiff can state a claim for fraudulent  
9 transfer premised on an assignment for the benefit of creditors, having found “no other authority  
10 or basis in the statutory text to hold that the Uniform Fraudulent Transfer Act is inapplicable to  
11 assignments for the benefit of creditors.” *Tatung Co.*, 43 F. Supp. 3d at 1069. Nor has this Court.  
12 Thus, Plaintiffs have alleged the “what” and “when” of the fraudulent transfer—i.e., a transfer  
13 based on the assignment of “virtually all assets” of nComputing valued at “millions of dollars” to  
14 an assignee within a week of January 20, 2015, followed by the assignee’s transfer to  
15 ZeroDesktop. (Dk.t No. 1 ¶¶ 8, 11; see also Dkt. No. 17-1 at 26.)

16 Plaintiffs must also allege that a debtor completed the asset transfer. According to the  
17 complaint, Kim is the debtor of the \$10,000,000.00 judgment. (Dkt. No. 1 ¶ 7.) While  
18 nComputing—not Kim—is alleged to have made the transfers at issue, the complaint also alleges  
19 that Kim controlled nComputing through his company DTC. (*Id.* ¶¶ 6, 8.) Thus, Plaintiffs have  
20 connected Kim and nComputing as the debtor conducting the transfer; they have not, however, so  
21 connected ZeroDesktop. While “the fraudulent conveyance statute provides for liability if the  
22 transferee colluded with the debtor or otherwise actively participate[d] in the fraudulent scheme of  
23 the debtor[.]” *Kelleher*, 2014 WL 94197 (citing *Lewis v. Super. Ct.*, 30 Cal. App. 4th 1850, 1858  
24 (1994)), the complaint does not allege any facts from which the Court can reasonably infer that  
25 ZeroDesktop colluded with nComputing, Kim, or otherwise knew about and actively participated  
26 in an attempt to defraud Plaintiffs. Similarly, aside from the allegation that Song used to work for  
27 nComputing and now works for ZeroDesktop, the complaint fails to allege any facts whatsoever  
28 pertaining to his role from which the Court can reasonably infer his participation. Thus, Plaintiffs

1 have identified an asset transfer by nComputing and Kim, but no other defendant, that could  
2 conceivably give rise to liability under the UFTA.

3 But even so, Plaintiffs’ allegations do not establish that the assignment and transfer put  
4 beyond Plaintiffs’ reach the property they would otherwise be able to subject to the payment of  
5 debt, as required to show that a plaintiff has been damaged by the fraudulent transfer. See  
6 *Mehrtash v. Mehrtash*, 93 Cal. App. 4th 75, 81 (2001); *Opperman*, 2014 WL 1973378, at \*31. Put  
7 another way, the complaint does not explain how nComputing’s assignment for the benefit of  
8 creditors, and that assignee’s transfer of assets to ZeroDesktop, will affect Kim’s shares in the  
9 company and thus Plaintiffs’ ability to collect their judgment against him. Absent such  
10 allegations, Plaintiffs cannot state a claim for fraudulent transfer. For this reason, too, the  
11 fraudulent conveyance claim must be dismissed.

12 Defendants’ insistence that Plaintiffs will never be able to show that absent the transfer  
13 they could have satisfied Kim’s debt through nComputing because the assignee—not  
14 nComputing—would retain the funds transferred to ZeroDesktop, ignores what Plaintiffs have  
15 actually pleaded: that the assignment for the benefit of creditors and the subsequent transfer to  
16 ZeroDesktop were part of the fraudulent transfer scheme; had neither occurred, nComputing  
17 would still have the assets. Thus, Defendants’ argument that fraudulent transfer damages are  
18 unavailable as a matter of law is unpersuasive.

19 Lastly, while intent can be pleaded generally, here Plaintiffs allege only that nComputing  
20 had the intent to hinder, delay, or defraud Plaintiffs. (Dkt. No. 1 ¶ 11.) There are not even general  
21 allegations that the other defendants shared in this intent. Of course, other factual allegations  
22 besides alleging intent itself might be relevant. For example, in determining whether a debtor  
23 transferred assets with fraudulent intent, a court considers, among other factors, whether the debtor  
24 retained possession or control of the property after the transfer, whether the debtor was threatened  
25 with suit before the transfer, whether the transfer rendered the debtor insolvent or was of  
26 substantially all of the debtor’s assets. See Cal. Civ. Code § 3439.04(b); see also *Filip v.*  
27 *Bucurenciu*, 129 Cal. App. 4th 825, 834 (2005) (citation omitted). But besides the conclusory  
28 allegation that “[t]he transfers were made for less than reasonably equivalent value at a time when

1 nComputing knew or should have known that it had unreasonably small capital remaining to pay  
2 its debts as they became due[.]” (Dkt. No. 1 ¶ 13), the complaint offers no facts to support this  
3 conclusory allegation or any of the other hallmarks of fraudulent intent listed in the statute. Thus,  
4 intent is not adequately pleaded.

5 In short, Plaintiffs have identified a transfer of assets—nComputing-to-assignee-to-  
6 ZeroDesktop—but have not adequately alleged why that transfer constitutes a fraudulent  
7 conveyance or how each of the defendants was involved in the purported scheme. The complaint  
8 therefore fails to state a claim for fraudulent conveyance. The Court will grant Plaintiffs leave to  
9 amend to cure the defects identified above.

10 C. The Complaint Fails to Allege Conspiracy to Defraud

11 To state a cause of action for civil conspiracy, the complaint must allege (1) the formation  
12 and operation of a conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the  
13 damage resulting from such act or acts. *Yunan v. Equifax, Inc.*, 111 Cal. App. 3d 498, 511 n.9  
14 (1980). Thus, a civil conspiracy “must be activated by the commission of an actual tort[.]”  
15 *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511 (1994), or other wrong,  
16 *Yunan*, 111 Cal. App. 3d at 511 n.9. For each element of conspiracy, “[b]are allegations and rank  
17 conjecture do not suffice[.]” *Choate v. Cnty. of Orange*, 86 Cal. App. 4th 312, 333 (2000)  
18 (internal quotation marks omitted).

19 The instant complaint fails to allege facts to plausibly establish any of the elements. First,  
20 with respect to the formation and operation of a conspiracy, a plaintiff must allege knowledge of  
21 the wrongful activity, agreement to join in the wrongful activity, and intent to aid in the wrongful  
22 activity. *Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571, 1583 (1995); see also *Wasco*  
23 *Prods., Inc. v. Southwall Tech., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). The plaintiff must show  
24 that each member of the conspiracy came to the agreement. See *Arei II Cases*, 216 Cal. App. 4th  
25 1004, 1022 (2013) (citation omitted). The conspiracy “may be inferred from the nature of the acts  
26 done, the relations of the parties, the interests of the alleged conspirators, and other  
27 circumstances.” *117 Sales Corp. v. Olsen*, 80 Cal. App. 3d 645, 649 (1978). But when a plaintiff  
28 alleges that a defendant is liable for a fraud-based claim under a conspiracy theory, Rule 9(b)

1 requires the plaintiff to allege with particularity facts that support the existence of the conspiracy.  
2 See, e.g., *Cisco Sys., Inc. v. STMicroelecs., Inc.*, 77 F. Supp. 3d 887, 894 (N.D. Cal. 2014)  
3 (citation omitted).

4 There are no facts in the complaint from which the Court can draw a reasonable inference  
5 that all defendants had knowledge of and agreed to the alleged fraud. First, the claim refers only  
6 generally to “defendants” without attributing particular conduct to any single defendant, which is  
7 insufficient to plead a conspiracy with a fraudulent end. See *Swartz v. KPMG LLP*, 476 F.3d 756,  
8 764-65 (9th Cir. 2007) (noting that allegations that “merely lump multiple defendants together”  
9 are not enough to state a claim for conspiracy). The complaint does not provide a time-frame for  
10 when defendants entered the agreement, describe how defendants came to reach such agreement,  
11 or indicate that each defendant had knowledge of the wrongful act and intent to aid in it, so the  
12 elements of the formation and operation of a conspiracy are lacking. See *Kidron*, 40 Cal. App. 4th  
13 at 1583. The allegation that “[a]t or prior to the time of the Transfers, defendants, and each of  
14 them, entered into a conspiracy to defraud creditors” by “effectuat[ing] the Transfers to  
15 ZeroDesktop[.]” (Dkt. No. 1 ¶ 17), is conclusory and therefore insufficient to support a pleading of  
16 conspiracy under *Iqbal* and *Twombly*. See *Cisco Sys., Inc.*, 77 F. Supp. 3d at 894.

17 Nor have Plaintiffs adequately alleged the second element: an underlying “wrongful act,”  
18 which requires a plaintiff to adequately plead a cause of action for a separate tort or other wrong.  
19 See *Applied Equip. Corp.*, 7 Cal. 4th at 511. In this case, the underlying wrongful conduct alleged  
20 is the fraudulent transfer. While a fraudulent transfer can serve as the underlying wrongful  
21 conduct giving rise to conspiracy liability, see *Filip*, 129 Cal. App. 4th at 837, for the reasons  
22 described above, the complaint does not adequately allege fraudulent transfer. Thus, the predicate  
23 “wrong” for a conspiracy claim is absent, and the claim fails. See *Applied Equip. Corp.*, 7 Cal. 4th  
24 at 511.

25 Finally, “[d]amages are an essential element of a cause of action for conspiracy.” *Filip*,  
26 129 Cal. App. 4th at 837 (citation omitted). Plaintiffs allege that, as a result of the conspiracy,  
27 they have been damaged in an amount “not less than \$10,000,000.00 plus interest thereon[.]”  
28 (Dkt. No. 1 ¶ 18.) But Plaintiffs have not alleged that nComputing fraudulently transferred 10

1 million dollars. Nor have they explained why they would be entitled to collect that amount from  
2 Kim when \$300,000.00 of the 10 million dollar judgment has already been paid. Ultimately,  
3 Plaintiffs have not connected the damages sought to any alleged conspiracy. Normally, the  
4 measure of compensatory damages for a conspiracy are the same as those for the underlying tort,  
5 only the conspiracy claim allows liability to reach co-conspirators. See *Applied Equip. Corp.*, 7  
6 Cal. 4th at 511; see *Riley v. Modesto Irrigation Dist.*, No. CV F 10-2281 AWIGSA, 2011 WL  
7 31001796, at \*7 (E.D. Cal. July 25, 2011) (“The damages result from the tort underlying the  
8 conspiracy.”) (citation omitted). As explained above, Plaintiffs’ fraudulent transfer claim fails to  
9 plead cognizable damages, see *Mehrtash*, 93 Cal. App. 4th at 81; *Opperman*, 2014 WL 1973378,  
10 at \*31, Plaintiffs likewise fail to plead damages for the purposes of their conspiracy claim.

11 **CONCLUSION**

12 The complaint fails to adequately allege fraudulent transfer and conspiracy to defraud. The  
13 Court therefore GRANTS motion to dismiss filed by Defendants Song and ZeroDesktop.  
14 Plaintiffs are given leave to amend by October 1, 2015. As the discussion above indicates,  
15 Plaintiffs’ claims in the amended complaint must be pleaded with particularity consistent with  
16 Rule 9(b).

17 The case management conference currently scheduled for September 17, 2015, is  
18 continued to November 19, 2015 at 1:30 p.m., and a joint case management statement shall be  
19 filed seven days prior to the conference.

20 Pursuant to the parties’ consent to severance (Dkt. No. 35), the Court has severed the  
21 claims against defaulting defendants nComputing and Maier. The Court directs the Clerk of Court  
22 to terminate nComputing and Maier as defendants from this action and to assign a new case  
23 number to the complaint against them and assign the new action to the undersigned magistrate  
24 judge.

25 This Order disposes of Docket No. 17.

26 **IT IS SO ORDERED.**

27 Dated: September 16, 2015

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JACQUELINE SCOTT CORLEY  
United States Magistrate Judge