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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ODYSSEY REINSURANCE
COMPANY, a Connecticut
corporation,

Plaintiff,

v.

RICHARD KEITH NAGBY, DIANE
NAGBY a.k.a. DIANE DOSTALIK;
PACIFIC BROKERS INSURANCE
SERVICES, a Nevada
Corporation; CAL-REGENT
INSURANCE SERVICES
CORPORATION, a California
corporation,

Defendants.

Case No.: 16-cv-03038-BTM-
WVG

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT AND
MOTION FOR PRELIMINARY
INJUNCTION [ECF No. 41]**

Plaintiff Odyssey Reinsurance Company has filed a Motion for Default Judgment against Defendants Pacific Brokers Insurance Services (“PBIS”) and Cal-Regent Insurance Services Corporation (“Cal-Regent”) pursuant to Federal Rule of Civil Procedure 55(b)(2). Plaintiff also seeks a preliminary injunction against Defendants Richard and Diane Nagby (collectively the “Nagbys”), Cal-Regent’s and PBIS’ officers and sole shareholders. The Court addresses each

1 motion below.

2 **I. FACTUAL BACKGROUND**

3 This action arises out of the judgment entered by the United States
4 District Court for the District of Connecticut in favor of Odyssey and against Cal-
5 Regent in the amount of \$3,200,000.00 (“Odyssey Judgment”) ¹. (Second Am.
6 Compl. (“SAC”) ¶¶ 15–17.) Cal-Regent was an insurance agency that
7 underwrote certain insurance risks on behalf of State National Insurance
8 Company (“State National”). (SAC ¶ 18.) Plaintiff in turn reinsured State
9 National for a certain percentage of those risks, ranging from 90%–100%. (Id.)
10 In accordance with a series of reinsurance agreements between the parties, Cal-
11 Regent received a provisional commission—paid in part by Plaintiff—on all
12 policies that it underwrote for State National. (SAC ¶ 19.) At the end of each
13 year, the provisional commissions were adjusted depending on the profitability of
14 the business underwritten by Cal-Regent. (SAC ¶ 20.) Where the provisional
15 commission paid by Plaintiff exceeded the amount to which Cal-Regent was
16 entitled to after the yearly adjustment, Cal-Regent was obligated to pay the
17 difference to Plaintiff. (Id.) By 2013, Cal-Regent owed Plaintiff \$2,740,802.61 in
18 return commissions, in part due to a lawsuit against State National that settled in
19 February 2013. (SAC ¶¶ 21–23, 25.)

20 Plaintiff alleges that by early 2013, the Nagbys “understood that the amount
21 of return commissions owing to [Plaintiff] would substantially increase” as a result
22 of the lawsuit. (SAC ¶ 29.) Plaintiff claims that “[a]s the potential effect of the
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25 ¹ The parties request that this Court take judicial notice of prior court judgments and documents filed in previous
26 court actions, documents found on Nevada’s Secretary of State’s website, and documents filed with California’s
27 Secretary of State. See (Pl.’s Req. for Judicial Notice (“RJN”), ECF No. 41–6.); (Def. Richard Nagby’s Opp’n to
28 Pl.’s Mot. for Preliminary Injunction, ECF No. 43-3.); (Def. Diane Nagby’s Opp’n to Pl.’s Mot. for Preliminary
Injunction, ECF No. 42–2.) The Court **GRANTS** the parties’ requests and takes judicial notice of these exhibits.
See Fed. R. Evid. 201(b)–(c); see also *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) (“It is well
established that we may take judicial notice of judicial proceedings in other courts.”); *Gerritsen v. Warner Bros.
Entm’t Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (taking judicial notice of business entity profiles on the
California Secretary State’s websites).

1 [lawsuit] on Cal-Regent’s obligation to pay return commission became clear to
2 the Nagbys, they embarked on a plan to strip Cal-Regent of assets.” (SAC ¶ 30.)

3 Plaintiff alleges that Mr. Nagby, with the help of Defendants Claim
4 Technology Services Corporation (“CTS”) and its Chief Executive Officer (“CEO”)
5 David Dostalík, “caused funds otherwise owing to Cal-Regent and/or to its
6 successor PBIS to be transferred to one or more account(s) held in the name of
7 CTS” to conceal funds from creditors including Plaintiff. (SAC ¶¶ 32, 40.7.)
8 Defendant Dostalík allegedly released to the Nagbys or for their benefit, “portions
9 of the funds held by CTS on behalf of Cal-Regent.” (SAC ¶ 33.) Some of the
10 funds were also deposited into the Cal-Regent and PBIS operating accounts to
11 pay creditors, “in order to deceive them as to the true status of Cal-Regent and
12 CTS.” (Id.) “Other funds deposited into the Cal-Regent or PBIS operating
13 accounts were characterized by the Nagbys as loans to those entities, so that
14 payments back to the Nagbys could be characterized as tax-free loan
15 repayments.” (Id.)

16 Plaintiff also claims that in April 2013, while Cal-Regent’s debts remained
17 outstanding, the Nagbys formed PBIS and subsequently “caused Cal-Regent to
18 transfer substantially all of its assets to PBIS,” including its goodwill and “book of
19 business,” without receiving reasonably equivalent value in exchange for these
20 assets. (SAC ¶¶ 35–36, 45.) The Nagbys are both Cal-Regent’s and PBIS’s
21 officers, directors, managers and shareholders. (SAC ¶ 46.) Plaintiff alleges that
22 “PBIS was formed by the Nagbys for the specific purpose of continuing the
23 business operations of Cal-Regent under a different name in order to hinder,
24 delay or defraud the creditors of Cal-Regent.” (SAC ¶ 49.)

25 In April 2014, Plaintiff filed an action in the District of Connecticut against
26 Cal-Regent to recover the amount owed to Plaintiff in return commissions. (SAC
27 ¶ 12.) In October 2015, the court rendered a judgment in Plaintiff’s favor and
28 against Cal-Regent in amount of \$2,740,802.61. (SAC ¶ 14.) In November

1 2015, the court awarded Plaintiff a supplement judgment. (SAC ¶¶ 15–17.) In
2 addition to the October 2015 judgment the court also awarded Plaintiff
3 \$459,197.39, bringing the judgment to a total sum of \$3,200,000.00 plus interest.
4 (Id.) Plaintiff alleges that “three months after oral argument on [Plaintiff’s] motion
5 for summary judgment in the Connecticut action and three months before the
6 Judgment was entered, the Nagbys caused PBIS to sell substantially all of its
7 assets to AmTrust for \$5 million.” (SAC ¶ 37.) AmTrust made an initial payment
8 of \$3 million which was distributed to the Nagbys. (SAC ¶ 37.)

9 Plaintiff now brings this action against several defendants including PBIS,
10 Cal-Regent and the Nagbys under several theories of liability including the
11 Uniform Voidable Transactions Act (“UVTA) and California’s alter ego and
12 successor liability law.

13 **II. PROCEDURAL BACKGROUND**

14 Plaintiff filed the SAC on March 21, 2017. Cal-Regent and PBIS were
15 served on March 21, 2017, in accordance with Federal Rule of Civil Procedure
16 4(e)(2)(A). (ECF Nos. 25–26.) Cal-Regent and PBIS have failed to appear or
17 respond to the SAC. On May 31, 2017, default was entered against Cal-Regent
18 and PBIS by the Clerk. (ECF No. 38.) On July 7, 2017, Plaintiff filed the motions
19 at issue, seeking a default judgment and permanent injunction against PBIS and
20 Cal-Regent, and a preliminary injunction against the Nagbys to prevent the
21 proceeds of the AmTrust sale from being dissipated. (ECF No. 41.)

22 **III. JURISDICTION**

23 When considering whether to enter a default judgment a court has “an
24 affirmative duty to look into its jurisdiction over both the subject matter and the
25 parties.” *In Re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). Plaintiff brought this
26 action under diversity jurisdiction, permitting the Court to exercise subject matter
27 jurisdiction over this case. Additionally, Plaintiff alleges that Cal-Regent is a
28 California corporation with its principal place of business within the Southern

1 District of California and that PBIS is a Nevada corporation with its principal place
2 of business within the Southern District of California. (SAC ¶ 5.) The Court relies
3 on the pleadings to find that it has personal matter jurisdiction over Cal-Regent
4 and PBIS. See *BNSD Ry. Tyrrell*, ___ U.S. ___, 137 S.Ct. 1549, 1558 (2017) (“[A]
5 court may assert general jurisdiction over foreign (sister-state or foreign-country)
6 corporations to hear any and all claims against them when their affiliations with
7 the State are so ‘continuous and systematic’ as to render them essentially at
8 home.”) (internal citations omitted).

9 IV. STANDARD

10 **A. Default Judgment**

11 Entry of default judgment is governed by Federal Rule of Civil Procedure
12 55(b) and is left to the trial court’s sound discretion. *Aldabe v. Aldabe*, 616 F.2d
13 1089, 1092 (9th Cir. 1980). After default has been entered, the well-pleaded
14 factual allegations of the complaint, except those relating to the amount of
15 damages, shall be taken as true. *Geddes v. United Fin. Group*, 559 F.2d 557,
16 560 (9th Cir. 1977). In determining damages, the court can rely on evidence
17 submitted by the plaintiff or may conduct a full evidentiary hearing. Fed. R. Civ.
18 P. 55(b)(2). A judgment by default shall not award damages that are different
19 from or exceed the amount requested in the plaintiff’s complaint. Fed. R. Civ. P.
20 54(c).

21 Factors which may be considered by courts in exercising their discretion as
22 to whether to enter default judgment include: (1) the possibility of prejudice to
23 plaintiff; (2) the merits of plaintiff’s substantive claims; (3) the sufficiency of the
24 complaint; (4) the sum of money at stake in the action; (5) the possibility of a
25 dispute concerning material facts; (6) whether the default was due to excusable
26 neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure
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1 favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir.
2 1986).

3 **B. Preliminary Injunction**

4 “A preliminary injunction is an extraordinary and drastic remedy.” *Pom*
5 *Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014) (citing *Munaf v.*
6 *Geren*, 553 U.S. 674, 689 (2008)). A plaintiff seeking a preliminary injunction or a
7 temporary restraining order must establish that (1) it is likely to succeed on the
8 merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief;
9 (3) the balance of equities tips in its favor; and (4) where applicable, an injunction
10 is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S.
11 7, 20 (2008). Alternatively, “serious questions going to the merits and a balance
12 of hardships can support issuance of a preliminary junction, so long as the plaintiff
13 also shows that there is a likelihood of irreparable injury and that the injunction is
14 in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
15 1135 (9th Cir. 2011) (internal quotation marks omitted). Due to the exigent nature
16 of a preliminary injunction, a court may consider hearsay and other evidence that
17 would otherwise be inadmissible at trial. See *Johnson v. Couturier*, 572 F.3d 1067,
18 1083 (9th Cir. 2009).

19 **V. DISCUSSION**

20 **A. Default Judgment**

21 **1. Eitel Factors**

22 The *Eitel* factors weigh in favor of granting default judgment. Cal-Regent
23 and PBIS were properly served but have failed to respond to the SAC. Plaintiff
24 has yet to recover the final judgment from Cal-Regent and it appears to have no
25 other recourse but this Court’s relief given that now both Cal-Regent and PBIS
26 are left with no assets or income. There is no evidence that the default was due
27 to excusable neglect since Plaintiff has stated facts showing that Mr. Nagby, Cal-
28 Regent’s and PBIS’ CEO, has made an appearance in this action but has not

1 directed Cal-Regent or PBIS to appear. Therefore, whether default judgment is
2 appropriate turns on the merits and sufficiency of Plaintiff's claims.

3 **2. Sufficiency and Merits of Claims**

4 "Upon entry of a default judgment, facts alleged to establish liability are
5 binding upon the defaulting part" *Danning v. Lavine*, 572 F.2d 1386, 1388
6 (9th Cir. 1978). The second and third *Eitel* factors require a court to assess the
7 substantive merits of a plaintiff's claims and the sufficiency of its pleadings. *Eitel*,
8 782 F.2d at 1472. The Ninth Circuit has suggested that these factors require a
9 plaintiff's allegations to "state a claim on which the [plaintiff] may recover."
10 *Danning*, 572 F.2d at 1388. Here, Plaintiff seeks default judgment on its claim
11 under the UVTA, California Civil Code sections 3439.04 and 3439.05, as well as
12 under the law of successor liability. After reviewing the Complaint, the Court
13 finds that Plaintiff has pled sufficient facts to support each cause of action.

14 ***i. Fraudulent Transfer***

15 "A fraudulent conveyance under the [UVTA] involves 'a transfer by the
16 debtor of property to a third person undertaken with the intent to prevent a
17 creditor from reaching that interest to satisfy its claim.'" *Filip v. Bucurenciu*, 129
18 Cal. App. 4th 825, 829 (2005) (citing *Kirkeby v. Super. Ct.*, 33 Cal. 4th 642, 648
19 (2004)). Under section 3439.04(a)(1) of the UVTA a transfer is fraudulent and
20 therefore voidable if the debtor made the transfer or incurred the obligation with
21 "the actual intent to hinder, delay, or defraud any creditor of the debtor." Cal. Civ.
22 Code. § 3439.04(a)(1). Because direct evidence of intent is uncommon, courts
23 may consider the following factors to determine an actual intent to defraud a
24 creditor:

- 25 (1) Whether the transfer or obligation was to an insider; (2) whether the
26 debtor retained possession or control of the property transferred after the
27 transfer; (3) whether the transfer or obligation was disclosed or concealed;
28 (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

1 of substantially all the debtor's assets; (6) whether the debtor absconded;
2 (7) whether the debtor removed or concealed assets; (8) whether the value
3 of the consideration received by the debtor was reasonably equivalent to
4 the value of the asset transferred or the amount of the obligation incurred;
5 (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.

6 Cal. Civ. Code § 3439.04(b)². A transfer is also voidable as to a creditor "if the
7 debtor made the transfer . . . without receiving a reasonably equivalent value in
8 exchange for the transfer or obligation and the debtor was insolvent at that time
9 or the debtor became insolvent as a result of the transfer or obligation." Cal. Civ.
10 Code § 3439.05.

11 Plaintiff alleges that nearly all of the enumerated factors are present here.
12 For instance, the transfer of the business was made from one corporation owned
13 by the Nagbys to another. (SAC ¶¶ 40.1, 50.1.) Though no physical assets may
14 have been transferred, Plaintiff alleges that Cal-Regent transferred its "book of
15 business" and goodwill to PBIS, which supports a claim of fraudulent transfer.
16 *See Hyosung (America), Inc. v. Hantle USA, Inc.*, No. 10-02160 SBA, 2011 WL
17 835781, at * 5 (N.D. Cal. March 4, 2011) (finding that the plaintiff had sufficiently
18 alleged a fraudulent transfer claim where the property allegedly transferred was
19 the debtor's business of selling and marketing ATM machines); *see also*
20 *Stoumbus v. Kilimnik*, 988 F.2d 949, 963–64 (9th Cir. 1993) (interpreting an
21 analogous provision of the Washington Bankruptcy Code and holding that the
22 transfer of a company's goodwill or "going concern value" could support a
23 fraudulent transfer claim). Because both companies were managed and
24 controlled by the same actors, the Nagbys also retained possession or control of
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28 ² The UVTA was amended by Stats. 2015, Ch. 44 which took effect on January 1, 2016. Because the transfers
occurred before January 1, 2016 and the merits of this motion do not depend on the amendments, the Court
relies on the language of the statute in effect during the period from 2013 to 2015.

1 the business before and after Cal-Regent's assets were transferred to PBIS.
2 Cal-Regent allegedly concealed the transfer by "purporting to operate and
3 conduct business as Cal-Regent even though it had been stripped of its assets."
4 (Compl. ¶ 54.3.) Event though Plaintiff had not initiated the Connecticut lawsuit
5 before PBIS was formed, the transfer of Cal-Regent's assets to PBIS occurred
6 shortly after the Nagbys became aware of the substantial debt Cal-Regent would
7 owe Plaintiff in return commissions. (SAC ¶ 54.1.) Plaintiff also claims that Cal-
8 Regent transferred all of its assets, including its "book of business" and the
9 goodwill it built up over 25 years of business, and left the business without the
10 ability to satisfy its debt to Plaintiff. (SAC ¶ 54.2.) Additionally, based on
11 Plaintiff's claim that Cal-Regent became insolvent after transferring its business
12 to PBIS, one can reasonably infer that it did not receive "reasonably equivalent
13 value" of the asset transferred. (SAC ¶¶ 55, 59.) These allegations are sufficient
14 to state a claim under Cal. Civ. Code sections 3439.04(a)(1) and 3439.05.

15 ***ii. Successor Liability***

16 Under California law, a corporation that purchases all of the assets of
17 another corporation is not liable for the former corporation's liabilities unless, "(1)
18 there is an express or implied agreement of assumption, (2) the transaction
19 amounts to a consolidation or merger of the two corporations, (3) the purchasing
20 corporation is a mere continuation of the seller, or (4) the transfer of assets to the
21 purchaser is for the fraudulent purpose of escaping liability for the seller's debts."
22 *Ray v. Alad Corp.*, 19 Cal.3d 22, 28 (1977). Although successor liability often
23 refers to formal purchases, courts have extended liability to transfers of assets as
24 well. See *Stoumbus*, 988 F.2d at 961 (interpreting Washington law and stating
25 that successor liability can extend to "transfers other than straightforward
26 purchases); see also *Cleveland v. Johnson*, 209 Cal. App. 4th 1315, 1327 (2012)
27 (sustaining a jury's finding of successor liability where there was no formal
28 purchase of assets of another corporation, but instead where a corporation which

1 established a separate line of business assigned leases for that businesses'
2 equipment to another corporation). To prevail on a theory of "mere continuation,"
3 a plaintiff must show one or both of the following factual elements: "(1) no
4 adequate consideration was given for the predecessor corporation's assets and
5 made available for meeting the claims of its unsecured creditors; (2) one or more
6 persons were officers, directors, or stockholders of both corporations." *Ray*, 19
7 Cal. 3d at 29.

8 "As with other equitable doctrines, it is appropriate to examine successor
9 liability issues on their own unique facts and considerations of fairness and equity
10 apply." *Cleveland*, 209 Cal. App. 4th at 1330 (internal citations omitted). Thus,
11 the significant principle remains that "if a corporation organizes another
12 corporation with practically the same shareholders and directors, transfers all of
13 the assets but does not pay all the first corporation's debts, the separate entities
14 may be disregarded and the new corporation held liable for the obligations of the
15 old.'" *Id.* at 1334 (quoting *McClellan v. Northridge Park Townhouse Owners*
16 *Ass'n*, 89 Cal. App. 4th 746, 753 (2001)).

17 Here, Plaintiff does not allege that PBIS formally purchased Cal-Regent's
18 assets. Instead, Plaintiff alleges that because Cal-Regent transferred its "book of
19 business" and goodwill to PBIS, it is a "mere continuation" of Cal-Regent and
20 should therefore assume its liabilities. The Court finds that taking the allegations
21 as true, Plaintiff has sufficiently established this claim. As already discussed
22 above, Plaintiff has pled that PBIS did not pay adequate consideration for the
23 transfer of assets and that both corporations were operated and managed by the
24 Nagbys. Moreover, having found that Plaintiff has adequately pled actual and
25 constructive fraud under Cal. Civ. Code sections 3439.04(a)(1) and 3439.05, its
26 successor liability claim survives under the "fraudulent purpose" theory as well.

27 Accordingly, Plaintiff has established a case on the merits for its claims
28 against PBIS and is entitled to a default judgment under both the UVTA and

1 successor liability.

2 **3. Damages**

3 Plaintiff requests that the Court award the full amount it is owed under the
4 Odyssey Judgment, \$3,200,000.00 plus post-judgment interest at a legal rate
5 from November 9, 2015 pursuant to 28 U.S.C. § 1961, as well as injunctive relief
6 against dissipation of the Amtrust sale proceeds.

7 Under the UVTA, a creditor may bring an action to void a fraudulent
8 transaction to the extent necessary to satisfy its claim. Cal Civ. Code §
9 3439.07(a)(1). To the extent a transfer is voidable, a “creditor may recover
10 judgment for the value of the asset transferred . . . or the amount necessary to
11 satisfy the creditor’s claim, whichever is less.” Cal Civ. Code § 3439.08(b)(1). A
12 judgment may be entered against “[t]he first transferee of the asset or the person
13 for whose benefit the transfer was made,” as well as “[a]n immediate or mediate
14 transferee of the first transferee.” § 3439.08(b)(1)(A)-(B). A creditor may also
15 bring an action for injunctive relief “against further disposition by the debtor or a
16 transferee, or both, of the asset transferred or other property of the transferee.” §
17 3439.07(a)(3)(A).

18 Here, Plaintiff is entitled to recover the Odyssey Judgment from PBIS in the
19 amount of \$3,200,000.00 plus post-judgment interest at a legal rate from
20 November 9, 2015 pursuant to 28 U.S.C. § 1961. Additionally, because justice
21 so requires, a permanent injunction is warranted so as to prevent disposition of
22 the remaining assets. The injunction shall prohibit PBIS and Cal-Regent from
23 distributing any remaining proceeds from its sale to Amtrust.

24 **B. Preliminary Injunction**

25 Plaintiff seeks a preliminary injunction against the Nagbys to prevent them
26 from disposing of any funds or property in their possession which are proceeds of
27 the AmTrust sale. The Court addresses the merits of Plaintiff’s request below.

28 //

1 **1. Likelihood of Success of the Merits**

2 First, Plaintiff must establish a likelihood of success on the merits of its
3 fraudulent conveyance claim under the UVTA. *See Winter*, 555 U.S. at 20.

4 As already discussed above, Section 3439.04 of the UVTA enumerates
5 factors that are “regarded as circumstantial ‘badges of fraud’ that are probative of
6 intent.” *In re Beverly*, 374 B.R. 221, 235 (B.A.P. 9th Cir. 2007). Plaintiff argues
7 that these factors demonstrate that the Nagbys personally acted with the “intent
8 to prevent a creditor from reaching that interest to satisfy its claim.” *Filip*, 129
9 Cal. App. 4th at 829 (internal citations omitted).

10 First, from the evidence, Plaintiff has established a substantial likelihood
11 that Cal-Regent fraudulently transferred its assets to PBIS under both sections
12 3439.04 and 3439.05 of the UVTA. As to the Nagbys’ personal liability, under
13 the UVTA a judgment may be entered against transferees or against “the person
14 for whose benefit the transfer was made.” Cal. Civ. Code. § 3439.08(b)(1).
15 Here, Plaintiff moves against the Nagbys as persons for whose benefit the
16 transfer was made. Plaintiff alleges and submits evidence that they have
17 received proceeds of the sale to AmTrust—a sale of fraudulently transferred
18 assets from Cal-Regent to PBIS. While in most cases the only beneficiaries of a
19 fraudulent transfer are debtors who avoid their creditors, in the case of a closely
20 held corporation, it is reasonable to infer that the sole shareholders and officers
21 of the corporation stood to benefit from the fraudulent transfer. *See Qwest*
22 *Commc’ns Corp. v. Weisz*, 278 F. Supp. 2d 1188, 1191 (S.D. Cal. 2003) (holding
23 that a creditor could obtain a judgment under the UFTA against the majority
24 shareholder of a debtor corporation that had fraudulently transferred corporate
25 assets to the shareholder’s father); *see also Oracle Am., Inc. v. Appleby*, No. 16-
26 cv-2090-JST, 2016 WL 5339799, at *9 (N.D. Cal. Sept. 22, 2016) (holding that
27 the co-owners of the “selling” and “buying” corporations, who forced the alleged
28 fraudulent transfer, could be held liable under the UVTA as persons for whose

1 benefit such transfer was made).

2 Second, Plaintiff has submitted an email exchange between Mr. Nagby and
3 Mr. Dostalík which Plaintiff argues is direct evidence of an intent to hinder, delay,
4 and defraud it so that it could not collect its debt from Cal-Regent. The emails of
5 May 19, 2014 include in relevant part:

6 Richard Nagby @ Pacific Brokers [9:55 a.m.]:

7 that's [their] stupid threat to make a motion to the court means written
8 declarations of what the money is where it comes from and [make] a
9 permanent public record that will tell Odyssey re and State national that we
10 have another source of [income] to pay them off . . . the money should get
[distributed] quietly through CTS . . .

11 Richard Nagby @ Pacific Brokers [11:35 a.m.]:

12 do you really want state national/odyssey Re/Knight/Corpeointe knowing
13 about this source of income? Do you see why this should be a private
14 matter not a public one in the court house? And why you [don't] want
15 anyone tracing funds from CTS to cal regent? without proper
documentation?

16 (Decl. of James J. Reardon in Supp. of Pl.'s Mot. for Prelim. Inj. ("Reardon's
17 Decl."), Ex. 14, ECF No. 41–4.)

18 These emails raise the likelihood that the Nagbys acted with the intent to
19 hinder or delay Plaintiff from recovering from Cal-Regent. Finally, Plaintiff has
20 demonstrated that instead of directing Cal-Regent to pay Plaintiff, the Nagbys
21 began taking money from the business, transferring it to CTS, and then
22 transferring it to themselves. This too raises the likelihood that Plaintiff would
23 succeed on the merits under the UVTA.

24 In response to Plaintiff's motion, Mrs. Nagby argues that there is no
25 evidence she did anything to assist in hindering, delaying or defrauding Plaintiff
26 in its efforts to collect its debt from Cal-Regent. In fact she argues that Mr.
27 Nagby unilaterally and without her knowledge or consent opened PBIS. Mr.
28

1 Nagby disputes Mrs. Nagby's alleged passive participation, arguing that she
2 managed Cal-Regent's finances. Mr. Nagby also argues that he started PBIS for
3 legitimate purposes, namely his desire to begin a new, virtual online company
4 that contracted with Corepointe instead of State National. Notwithstanding these
5 disputes, the Court finds that Plaintiff has established a likelihood of success on
6 the merits or at a minimum, has raised serious questions on the merits. See
7 *Alliance*, 632 F.3d at 1131.

8 **2. Likelihood of Irreparable Harm**

9 Second, Plaintiff must show that it is likely to suffer irreparable harm in the
10 absence of the order. "A party seeking an asset freeze must show a likelihood of
11 dissipation of the claimed assets, or other inability to recover monetary damages,
12 if relief is not granted." *Johnson v. Courturier*, 572 F.3d at 1085 (citing *Conn.*
13 *Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 1067, 1085 (9th Cir.
14 2009)). A court may also issue an injunction freezing assets where a plaintiff
15 demonstrates that a "defendant has engaged in a pattern of secreting or
16 dissipating assets to avoid judgment." *In re Estate of Marcos*, 25 F.3d 1467,
17 1480 (9th Cir. 1994). Although generally a preliminary injunction may not be
18 issued to preserve assets to which a party does not yet have a legal claim, the
19 Supreme Court and Ninth Circuit have specifically exempted instances of
20 fraudulent conveyances and bankruptcy from this rule. See *In re Focus Media*
21 *Inc.*, 387 F.3d 1077, 1085 (9th Cir. 2004) (citing *Grupo Mexicano de Desarrollo*
22 *S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 312 (1999)); see also *Wimbledon*
23 *Fund, SPC Class TT v. Graybox, LLC*, 648 Fed. Appx. 701, 702 (9th Cir. 2016)
24 (upholding a preliminary injunction in a fraudulent conveyance case and one in
25 which the plaintiff sought equitable relief).

26 PBIS has sold all of its assets to AmTrust, which has already paid PBIS \$3
27 million in cash. (Decl. of Dean Kirby in Supp. of Pl.s' Mot. for Prelim. Inj.
28 ("Kirby's Decl."), Ex. 38, 18, ECF No. 41-5.) In accordance with a stipulated

1 agreement in the Nagby's divorce action, these proceeds were immediately
2 distributed to them individually. (Pl.'s RJN, Ex. 22, 2, ECF No. 41–6.) Mrs.
3 Nagby received \$2.5 million and Mr. Nagby received \$500,000. (Id.) The
4 remaining earn out payments are being paid to Mr. Nagby. (Kirby Decl., Ex. 38,
5 18) Plaintiff argues that these proceedings, both the lump sum and remaining
6 earn out payments, are proceeds of the fraudulently transferred Cal-Regent
7 assets and that without an injunction, it will be unable to recover its judgment
8 against Cal-Regent and now, PBIS. The Court finds that there is a substantial
9 danger that Defendants may continue to transfer or dissipate the funds they have
10 received from the sale if the injunction were denied, resulting in denying recovery
11 to Plaintiff. Thus, this factor tips strongly in favor of Plaintiff.

12 **3. Balance of the Equities**

13 Plaintiff argues that the balance of equities tips in favor of granting it a
14 preliminary injunction because if the Court does not, there may not be any assets
15 from which it could collect its judgments against Cal-Regent and PBIS. In
16 response, Mr. Nagby argues that to go “after the divorced Nagbys at this point is
17 not an equitable result when the plaintiff knew all along the minimal financial
18 strength of Cal-Regent.” (Def. Richard Nagby's Opp'n to Pl.'s Mot. for
19 Preliminary Injunction, ECF No. 43, 12.) He argues that Plaintiff knew that it was
20 working with a small family business and that it could have “demanded personal
21 guarantees from the Nagbys or, at any time could have cancelled their contract
22 with Cal-Regent unless the contingent commissions were held in trust or
23 segregated from Cal-Regent's operating income” (Id.) The Court, however,
24 is not persuaded by Mr. Nagby's assumption of risk argument and finds that the
25 balance tips in Plaintiff's favor.

26 Plaintiff is a judgment creditor that seeks equitable relief to preserve its
27 right to recover what it is owed. It was unable to recover from Cal-Regent and is
28 now unable to recover all of its claim from PBIS, since PBIS has already

1 distributed the majority of the proceeds from the Am-Trust sale to the Nagbys
2 and no longer has any income. In contrast, the Nagbys will suffer minimal harm
3 by not immediately reaping the benefits of the sale. In fact, given their
4 stipulation, if the earn out payments to Mr. Nagby fall short of the projected
5 amount in any year then Mrs. Nagby will have to make up one half of the short
6 fall for that year. As Plaintiff points out, the payouts the Nagbys received remain
7 contingent on what AmTrust ultimately pays PBIS. Thus, they are nevertheless
8 prevented from dissipating those proceeds until the payments are completed.

9 Therefore, the balance of equities tips in Plaintiff's favor.

10 **4. Public Interest**

11 Finally, the Court finds that the public interest factor is neutral to both
12 parties. "When the reach of an injunction is narrow, limited only to the parties,
13 and has no impact on non-parties, the public interest will be 'at most a neutral
14 factor in the analysis rather than one that favor[s] [granting or] denying the
15 preliminary injunction.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138–39 (9th
16 Cir. 2009) (quoting *Bernhardt v. L.A. County*, 339 F.3d 920, 921 (9th Cir. 2003)).
17 "If, however, the impact of an injunction reaches beyond the parties, carrying with
18 it a potential for public consequences, the public interest will be relevant to
19 whether the district court grants the preliminary injunction." *Stormans*, 586 F.3d
20 at 1139. Here, the injunction would not implicate the public's interest, as it is
21 aimed at the Nagbys and the proceeds of the AmTrust sale.

22 Mrs. Nagby argues that if the Court were to grant Plaintiff an injunction it
23 will effectively divest Judge Murphy, the state court judge presiding over the
24 Nagbys' divorce proceedings, of his power to manage the community property
25 funds. She argues that Judge Murphy has already appointed a financial receiver
26 that is responsible for distributing the sale proceeds from PBIS to the Nagbys,
27 rendering an injunction unnecessary. However, the financial receiver is merely
28 responsible for ensuring that PBIS distributes the proceeds in accordance with

1 the stipulation the Nagbys entered into, not to ensure that fraudulently transferred
2 assets are not further dissipated. The issue of fraudulent transfers was never
3 before Judge Murphy. Therefore, the Court is not persuaded by Mrs. Nagby's
4 argument.

5 Accordingly, the public interest is not a significant factor in this case and
6 the *Winter* factors weigh in favor of granting Plaintiff's motion for a preliminary
7 injunction.

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1 **VI. CONCLUSION**

2 For the reasons discussed above, Plaintiff's motion for default judgment
3 against PBIS (ECF No. 41) is **GRANTED** in the amount of \$3,200,000.00 plus
4 post-judgment interest at a legal rate from November 9, 2015 pursuant to 28
5 U.S.C. § 1961. A permanent injunction is also issued against PBIS and Cal-
6 Regent prohibiting them from disposing of or commingling any funds or property
7 representing the proceeds of the sale of PBIS to AmTrust including but not
8 limited to all "earn out" distributions collected or to be collected from AmTrust,
9 and further ordering PBIS to deposit those funds into the registry of this Court.

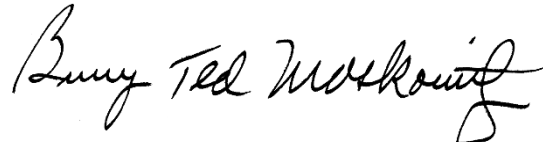
10 The Court also **GRANTS** Plaintiff's motion for preliminary injunction against
11 the Nagbys (ECF No. 41). They will be enjoined from transferring, disposing of
12 or commingling any funds or property representing the proceeds of the sale of
13 the property of PBIS to AmTrust, including but not limited to any initial payments
14 distributed by PBIS from the sale, as well as all "earn-out" distributions collected
15 or to be collected from AmTrust, and it will be ordered that each of the Nagbys
16 deposit those funds into the registry of this Court.

17 Because this Order addresses the same issues raised in Plaintiff's
18 emergency motion for temporary restraining order, that motion is **DENIED** as
19 moot (ECF No. 66).

20 Lastly, Plaintiff is ordered to file a request for post-judgment interest by
21 October 10, 2017 to supplement the declaration submitted by Dean Kirby. See
22 (Kirby's Decl. ¶ 5). Any objections should be filed by noon on October 13, 2017.

23 **IT IS SO ORDERED.**

24 Dated: October 4, 2017



25
26 Barry Ted Moskowitz, Chief Judge
27 United States District Court
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