SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

ORTHOTEC, LLC

-v-

HEALTHPOINT CAPITAL, LLC et al

INDEX NO. 601377/08

MOTION DATE

MOTION SEQ. NO. 005

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ☒ by defendants pursuant to CPLR 3212 to dismiss the complaint is GRANTED to the extent of dismissing the second cause of action and is otherwise DENIED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: May 30, 2013

Melvin L. Schweitzer J.S.C.
MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

ORTHOTEC, LLC, Plaintiff, -against- HEALTHPOINT CAPITAL, LLC, JOHN FOSTER, MORTIMER BERKOWITZ, III, HEALTHPOINT CAPITAL PARTNERS, LP, HEALTHPOINT CAPITAL PARTNERS II, LP, and SCIENT'X, S.A., Defendants.	Index No. 601377/08 DECISION AND ORDER Motion Sequence No. 005

MELVIN L. SCHWEITZER, J.:

Defendants Healthpoint Capital, LLC (HPC), John Foster, Mortimer Berkowitz, III, Healthpoint Capital Partners, LP (HPC I), and Healthpoint Capital Partners II, LP (HPC II) move for an order, pursuant to CPLR 3212, dismissing the complaint.

Plaintiff OrthoTec, LLC (OrthoTec) brought this action alleging that the defendants should be held liable for the payment of two judgments which it obtained against a French company, Eurosurgical, S.A. (Eurosurgical), in California state and federal courts in 2004 and 2007, based on breaches of an agreement in which Eurosurgical had assigned to OrthoTec the right to produce and distribute certain of its spinal surgical devices in the United States, and on copyright and trademark infringement. The judgments, with interest, currently total in excess of $56 million. OrthoTec claims that, facing these large judgments, Eurosurgical conspired with the defendants to fraudulently transfer all of Eurosurgical's assets, which it asserts were worth in excess of $47 million at the time of transfer, away from the company, and leaving it an empty, insolvent shell. OrthoTec also asserts that under the judgments, Eurosurgical was required to

turn over manufacturing plans for certain surgical products, and that upon the fraudulent transfer defendants came into possession of these plans, and have refused to turn them over. It further asserts that it entered into a contract to sell all its product rights to a third party, but that when it was unable to deliver the plans the purchase price was reduced by $11 million.

Defendants now move for summary judgment, urging that OrthoTec cannot recover from them because the challenged transfers were between Eurosurgical and another French company Surgiview, S.A.S., and defendants were not transferors, transferees or beneficiaries of the transfer. They contend that New York's fraudulent conveyance law does not permit recovery against them based on their ownership of stock in an entity affiliated with the transferee, nor does it permit recovery of the damages, that is, the amount of the judgments, OrthoTec is seeking. They also urge that OrthoTec is asking the court to disregard the fact that the challenged transfers were approved by the Commercial Court of Arras, in France, the process was overseen by a pre-insolvency agent, fair value was derived by a valuation expert, and the transfer was confirmed by an independent legal expert. Further, defendants urge that based on undisputed facts, OrthoTec cannot demonstrate by clear and convincing evidence that defendants acted with an intent to defraud.

OrthoTec counters that its claims are governed by California law, which permits recovery on a conspiracy theory against parties such as these defendants based on their actions and connection to the transferee, and as parties interfering with its ability to collect on its judgments. It argues that even if New York law applied, its damages are recoverable for tortious interference with the collection of a judgment. It asserts that comity does not prevent it from challenging the fraudulent transfers, because the French court approval does not curtail its right to sue for

fraudulent transfer. Finally, it asserts that California law does not require proof by clear and convincing evidence, and, even if it did, it can prove such intent.

Background

OrthoTec is a Delaware company with its principal place of business in California (first amended complaint, ¶ 1). HPC, a Delaware company with its principal place of business in New York, is a private equity firm that acquires and manages investments in the medical industry. HPC I and HPC II are the investment funds managed by HPC, and the individual defendants, John Foster and Mortimer Berkowitz, III are residents of New York and are principals of HPC (*id.*, ¶¶ 2, 4, 5). Defendant Scient'x, S.A. (Scient'x) is a French company that manufactures spinal surgical implants. HPC owns a one-third interest in Scient'x, and Foster and Berkowitz were directors on Scient'x's board (*id.*, ¶ 2-3, 14).

In 1998, OrthoTec and nonparty Eurosurgical, a French company, entered into an assignment agreement (the Assignment Agreement) in which OrthoTec purchased all rights in the U.S. to certain Eurosurgical surgical devices, acquired the right to market any new products created by or for Eurosurgical, and gave OrthoTec certain intellectual property rights in certain geographical areas (*id.*, ¶ 6-7; *see also* exhibit 2 to affirmation of Colleen M. Carey, dated December 12, 2012 [Carey affirm], at 1-2). Several years into the agreement, Eurosurgical falsely asserted that OrthoTec owed certain amounts for product purchases, and OrthoTec filed suit in California state court for breach of the assignment agreement. On August 27, 2004, that action resulted in a jury award in OrthoTec's favor of $8.93 million, with an additional $596,696.17 in fees and costs (first amended complaint, ¶ 9; exhibit 5 to Carey affirm). This judgment was affirmed in June 2007 (first amended complaint, ¶ 9). While that action was

pending, OrthoTec brought another action against Eurosurgical in California federal district court for infringement of its trademarks and copyrights. That federal action resulted in a judgment, entered on January 11, 2007, in OrthoTec's favor for $30 million, and Eurosurgical's subsequent appeal was dismissed (*id.*, ¶ 10; *see also* exhibit 6 to Carey affirm) (collectively, the California Judgments). OrthoTec has been unable to collect upon these California Judgments.

On September 28, 2004, after the California state court judgment but before the federal court judgment, Eurosurgical entered into a Business Lease Contract (the Business Lease) with a French company called Surgiview, which gave Surgiview the right to occupy the premises Eurosurgical used, to take possession of the business and operate it, and to continue to employ its employees, fulfilling existing contracts with clients, assuming liability for current purchase orders, assuming all contracts with surgeons, and assuming the equipment used by the business, among other things (exhibit 7 to Carey affirm). Surgiview also purchased all of Eurosurgical's inventory. The Business Lease was for an identified territory which did not include the areas in which OrthoTec was assigned in the Assignment Agreement (e.g., North America, Central America, India, Australia and New Zealand (*id.* at 2). Eurosurgical could have sold its products in these territories, it just had to do so through OrthoTec under its Assignment Agreement (*see* affidavit of Patrick Bertranou, dated January 31, 2013 [Bertranou aff], ¶ 8). In the preamble to the Business Lease, Eurosurgical specifically acknowledged that it was encountering difficulties from its litigation with OrthoTec, and obtained a pre-insolvency agent, Robert Meynet, to assist in managing the company and preserving the employees, while the OrthoTec litigation was ongoing (exhibit 7 to Carey affirm, at 1). Upon termination of the Business Lease, Eurosurgical was required to repurchase the inventory (*id.* at 7-8, article 6). On September 29, 2004, Mr.

Meynet presented to the Commercial Court of Arras, France, the Business Lease, requesting that the court ratify it, which the court did (exhibit 12 to Carey affirm, declaration of Robert Meynet filed in California state court action, dated September 11, 2008 [Meynet Declaration] at ¶¶ 5-8). OrthoTec was not aware of, nor was it a party to the proceedings before the Commercial Court of Arras, and it did not receive notice of any request that the Arras court approve the transaction (Bertranou aff, ¶ 9).

Several months before, in June 2004, HPC I, through a Luxembourg affiliate, Healthpoint Capital (Luxembourg) I S.a.r.l., acquired a 33.1 percent interest in Scient'x (exhibit 24 to Carey affirm, affidavit of Mortimer Berkowitz, III, dated December 12, 2012 [Berkowitz aff], ¶ 7). One year after Eurosurgical and Surgiview entered into the Business Lease, in July 2005, Scient'x acquired a 73 percent interest in Surgiview (*id.*, ¶ 9).

On April 25, 2006, OrthoTec entered into an asset purchase agreement with Choice Spine in which it sold its product rights to the Eurosurgical products in the United States to Choice Spine at an original purchase price of $16 million (Bertranou aff, ¶ 13 and exhibit 139 annexed thereto). In order to effect this sale, OrthoTec made repeated demands on Eurosurgical to turn over plans and specifications for the products to which the California state court adjudged OrthoTec to own the rights, and Eurosurgical never complied (Bertranou aff, ¶¶ 14-16). Because of OrthoTec's inability to obtain these plans and specifications, by a third amendment to the parties' asset purchase agreement, dated April 24, 2008, OrthoTec claims it reduced its purchase price to Choice Spine to $5.225 million (*id.*, and exhibit 152 annexed thereto).

On May 17, 2006, Eurosurgical then entered into a Partial Sale of Industrial and Commercial Business (the PSA) with Surgiview, in which it sold the business, the commercial

name "Eurosurgical," the clientele and all related assets, the industrial property rights, the right to lease the premises, the inventory, the benefit of the lease agreement and real estate loans described therein, and the benefit of contracts for the distribution of the products listed in an appendix (exhibit 8 to Carey affirm, at 1-2). Basically, Eurosurgical sold everything which represented the business in all territories except for the territories or zones which OrthoTec had been assigned – North America (USA and Canada), Central America, India, Australia and New Zealand (*id.* at 2). Eurosurgical also agreed to, within three months following its entry into the PSA, remove all liens on the business (*id.* at 3; exhibit 39 to Bertranou aff, at 3). Together these liens amounted to just over 2 million euros (*id.*). The PSA purchase price was 1.6 million euros (*id.* at 8; *see* exhibit 12 to Carey affirm., Meynet declaration ¶13). Scient'x allegedly loaned Surgiview the $2 million it needed to put into escrow under the PSA (exhibit 3 to Carey affirm, first amended complaint, ¶ 20). Again, OrthoTec did not receive notice of this transaction (Bertranou aff, ¶ 9).

On July 14, 2006, public notice regarding Eurosurgical's sale to Surgiview was published in the French newspaper called "BODACC," and in the local Arras paper, but OrthoTec did not see such notice (*id.*). On October 20, 2006, the commercial court of Arras approved the sale of the good will and the physical plant of Eurosurgical to Surgiview (exhibit 12 to Carey affirm, Meynet declaration, ¶¶ 14, 16, 17).

On July 6, 2007, Eurosurgical filed to liquidate in bankruptcy in France (affidavit of Arlette Bardon, dated January 30, 2013 [Bardon aff], ¶ 5, and exhibit A annexed thereto).

On November 21, 2007, HPC II acquired majority ownership of Scient'x, and acquired a 4.9 percent interest in Surgiview (exhibit 24 to Carey affirm, Berkowitz aff, ¶ 12).

On May 7, 2008, OrthoTec commenced this action asserting three causes of action: fraudulent transfer, fraudulent conveyance under New York Debtor and Creditor Law (DCL) §§ 273 et seq., and intentional interference with prospective economic advantage (exhibit 3 to Carey affirm).

Defendants now move for summary judgment seeking dismissal of all of OrthoTec's claims. First, they argue that there is no third-party liability for fraudulent transfer and fraudulent conveyance claims under New York common law and the DCL. They contend that it is undisputed that the challenged transfers took place between Eurosurgical and Surgiview – not the defendants, and that they have submitted undisputed proof that they had no involvement with those parties at the time of the relevant events. They contend that an action for fraudulent transfer in New York does not create a remedy for money damages against third parties who assist or conspire with the debtor. They assert that under the DCL only transferees of the assets or beneficiaries of the conveyance may be held liable, and that non-transferees or non-beneficiaries are not liable solely for assisting the transfer. They urge that holding stock ownership in a company that owned an interest in the transferee is too attenuated a relationship to be a transferee or beneficiary of a conveyance. They assert that the PSA was between Eurosurgical and Surgiview, with Surgiview being the transferee, and that none of the defendants were a party to that transfer, received any funds individually, and they only held a minority interest in an affiliated company of the transferee, which is insufficient as a matter of law.

Second, defendants urge that OrthoTec cannot obtain the remedy it seeks as a matter of law. Rather, the remedy in such an action is limited to reaching the property which would have

been available to satisfy the judgment had there been no conveyance– not for damages against parties who caused the transfer in the amount of unpaid court judgments for the creditor's loss.

Next, defendants assert that the challenged transfer was conducted in accordance with French law, by obtaining the approval of the Business Lease and the PSA from the Commercial Court of Arras, which approval is entitled to comity. Defendants submit the report of their French legal expert, Professor Alain Pietrancosta, who opined that the transactions and procedures by Eurosurgical were not inherently abnormal or suspicious, and that they went beyond the minimal legal requirements in France (exhibit 14 to Carey affirm at 3–14). They point to the fact that the transfer was publically disclosed as required by French law – once in the Gazette Nord-Pas Calais (exhibit 9 to Carey affirm at 128-130; *see also* exhibit 58 to Carey affirm, declaration of Saverio Cuiaba, dated March 9, 2007, ¶ 4), and twice in the BODACC in July and August 2006 (exhibit 12 to Carey affirm, Meynet declaration ¶ 16, and exhibit 6 annexed thereto; exhibit 9 to Carey affirm at 128-130; exhibit 10 to Carey affirm, deposition of Alain Pietrancosta at 69-70).

Finally, defendants urge that plaintiff cannot show clear and convincing evidence of an intent to hinder, delay or defraud, requiring dismissal of their claims. They point to evidence that they had no role in the Business Lease or its negotiation, and had no ownership interest in either Eurosurgical or Surgiview at that time (exhibit 24 to Carey affirm, Berkowitz aff, ¶ 8). Defendants further submit that HPC and HPC II had no role in the negotiation of the PSA, and were not parties to it (*id.*, ¶ 10). Defendants urge that plaintiff's conspiracy theory defies logic, considering that, voluntarily, Eurosurgical contacted OrthoTec before entering into the Business Lease, subjected itself to the French court scrutiny, engaged an independent pre-insolvency agent,

Mr. Meynet, hired and independent valuation expert, Mr. Preud'homme, who opined that fair consideration was paid, obtained an independent French law expert opinion, and placed appropriate legal notices in French papers (*id.*, ¶¶ 2-10).

With respect to plaintiff's intentional interference claim, defendants urge that plaintiff cannot establish a prima facie claim because it cannot show the existence of a prospective relationship– the Eurosurgical judgments are not such a relationship. The Assignment Agreement and the agreement plaintiff entered into with Choice Spine could not qualify as the Assignment Agreement was already breached in 2002, and the Choice Spine agreement was already entered into and was not a prospective relationship. Further, even if the Choice Spine agreement could form the basis of the claim, defendants assert that the claim fails because the undisputed facts show that defendants did not interfere with that relationship directly, nor did they convince Choice Spine not to enter into a contractual relationship with plaintiff or act with the requisite malice. They point to the testimony of Richard Henson from Choice Spine who testified that he never spoke to Foster, Berkowitz or anyone at the HPC entities, regarding Choice Spine's agreement with OrthoTec; and no one from the HPC entities tried to dissuade him from entering into the agreement or threatened him physically or otherwise in connection therewith (exhibit 46 to Carey affirm, deposition of Richard Henson at 31-32). Mr. Bertranou never told defendants he had a business deal contingent upon defendants' actions, but instead sought to sell OrthoTec's rights to the HPC entities (exhibit 20 to Carey affirm at response 9, and exhibit 61 to Carey affirm). Finally, defendants argue that, at the least, the claims against the individual defendants Foster and Berkowitz must be dismissed because there is no personal liability, under French law, for their actions taken as directors of Scient'x.

In opposition, plaintiff first contends that defendants fail to support their motion with admissible evidence, relying on unauthenticated documents, and witnesses attesting to facts without personal knowledge. Plaintiff also contends that its allegations, not the titles of its claims govern. Thus, plaintiff asserts that the substance of its claims state cognizable claims under California and New York law, and the evidence supports such claims. Plaintiff urges that under New York's choice of law rules, California law applies, because that is where the injury occurred, where plaintiff is located. It contends that, under California law, parties who aid a fraudulent transfer and who conspire with a debtor to conceal assets for the purpose of defrauding creditors are guilty on a claim for fraudulent conveyance. Plaintiff asserts that defendants, as beneficial owners of Surgiview (Ross affidavit, exhibit F, deposition of John Foster at 10, 88-89), each benefitted, at least indirectly from the fraudulent conveyance, and that defendants Berkowitz and Foster personally directed the transaction, so they conspired to violate California's fraudulent conveyance law, and are personally liable. Plaintiff also asserts that in California a creditor can recover its damages, not just the fraudulently transferred assets, as well as punitive damages.

Alternatively, plaintiff urges that it may proceed, in its first cause of action, under New York common law for defendants's unlawful interference with plaintiff's collection of its judgments. This claim, plaintiff urges, may be asserted against one who is neither a transferor nor a beneficiary of the transfer.

Plaintiff next challenges defendants's contention that the French "Commercial Court of Arras" which purportedly approved the transaction is entitled to any comity, because its approval does not bar the rights of a non-signatory, such as plaintiff, from challenging the agreement or

suing for fraudulent transfer of assets. It submits the affidavit of its French legal expert, Arlette Bardon, who opines that such agreements are enforceable between the parties thereto, but do not bar non-signatories from challenging them (Bardon aff, ¶ 4), and defendants's expert, Professor Pietrancosta agrees (exhibit 14 to Carey affirm at 8). Since plaintiff did not participate and was not a signatory, it is not bound by, or restricted in its rights as creditor of Eurosurgical, by the French court proceeding. In any event, plaintiff contends there is a sharp dispute of fact as to the legitimacy of the French proceeding.

On the issue of intent, plaintiff maintains that under California law it has asserted a claim for constructive fraudulent transfer– that is, a transfer made without reasonably equivalent value by one who is insolvent or rendered insolvent, which does not require proof of actual fraudulent intent (*see* Cal Civ Code § 3439.05; *Mejia v Reed*, 31 Cal 4th 657, 664 [2003]). Plaintiff urges that there is sufficient evidence here that Eurosurgical sold its business without receiving reasonably equivalent value, selling it for 1.6 million euros (exhibit 8 to Carey affirm, PSA at 8), and plaintiff's expert economist, Robert Wunderlich opines that it was actually worth over 36 million euros (affidavit of Robert Wunderlich, dated January 30, 2013 [Wunderlich aff], and exhibit A annexed thereto at 2, 6-12). The sale left Eurosurgical insolvent in that the purchase price was insufficient even for it to pay off Eurosurgical's other creditors (besides plaintiff). Plaintiff further argues that, under California law, it is enough if the plaintiff proves that the conspirators knew that the transferor sought to defraud or hinder creditors, and proof need only be by a preponderance of the evidence. In any event, plaintiff asserts that whether a conveyance was made with fraudulent intent is a question of fact as it is here.

On the intentional interference claim, plaintiff asserts that, under either New York or California law, the California Judgments qualify as prospective economic advantage. Plaintiff contends that, in California, a judgment is a contract, and thus interference with a judgment is interference with a contract. In New York, at common law, a claim for tortious interference with the collection of a judgment is recognized, and liability may be extended beyond transferees and beneficiaries. It contends that it is entitled to pursue its claim whether it is for tortious interference with contract or with prospective economic advantage. In addition, plaintiff maintains that by preventing it from obtaining the manufacturing plans, defendants used wrongful means and interfered with plaintiff's ability to sell its product rights to Choice Spine. It points to the Assignment Agreement provision requiring Eurosurgical to turn over the plans (Betranou aff, exhibit 119, § 4), plaintiff's California state court judgment requiring Eurosurgical to turn over the plans (Bertranou aff ¶ 14, and exhibit 81 annexed thereto, at 7, ¶ 5), Surgiview's possession of all Eurosurgical's assets, defendants' indirect ownership or control of Surgiview (affidavit of Peter W. Ross in opposition, dated January 31, 2013 [Ross aff], exhibit B, deposition of John Foster at 99), defendants' knowledge of the state court judgment but failure to act to ensure plans were turned over (Ross aff, exhibit E, deposition of Mortimer Berkowitz III, at 94-95, and exhibit B, Foster dep at 39-41, 44-45, 59-60, 62, 66), and the fact that plaintiff never received the manufacturing plans and had to reduce the purchase price in its agreement with Choice Spine (Bertranou aff ¶¶ 14, 16-17). By these actions, plaintiff contends, defendants interfered with plaintiff's enforcement of the California Judgments and with its sale agreement with Choice Spine.

On the issue of the liability of defendants Berkowitz and Foster, plaintiff asserts that French law does not apply– either California or New York law applies which do not conflict. Thus, under either of those state's law, directors and officers may be held liable on a fraud claim if they participated in, directly ordered, or authorized the fraud, even if they did not stand to gain personally. Plaintiff contends that the evidence establishes that Foster and Berkowitz were directly involved in the fraudulent transfer.

In reply, defendants assert that plaintiff cannot now, after discovery is complete and the note of issue was filed on October 12, 2012, amend its complaint to change the theory of its claim to one for intentional interference with the collection of a judgment. They then argue that even if the claim could be construed as plaintiff urges, it cannot demonstrate the elements of such a claim because it cannot show that defendants made the purported transfers with the intent and objective of depriving plaintiff of the opportunity to collect on its judgment. At most, plaintiff could demonstrate that defendants were aware of the California state court judgment in 2004, and had considered and had rejected an investment in Eurosurgical in 2004. There is no evidence of any illegal conduct by defendants, just evidence that they acted in their own economic interest, which is not enough to establish malice. They also urge that French law applies under New York's choice of law principles, and French law does not permit recovery against defendants who were not transferees. Even if California law applies, defendants assert that plaintiff cannot demonstrate sufficient "badges of fraud" so that the facts add up to an actual fraudulent transfer. They urge that plaintiff fails to demonstrate that they are transferees or that they had dominion and control over the transferee or over the assets. They point to the lack of connection between Eurosurgical and Surgiview, as debtor and transferee on the one hand, and defendants on the

other. Only HPC held a minority interest, through a Luxembourg subsidiary, in Scient'x, Surgiview's parent company (exhibit 24 to Carey affirm, Berkowitz aff, ¶¶ 7, 9; and exhibit 25, affidavit of John Foster, ¶ 3). This is not sufficient. Plaintiff's conspiracy theory fails because it fails to demonstrate an underlying fraudulent transfer by a primary tortfeasor which defendants joined as conspirators. Defendants assert that they were not the transferee, they were not parties to the transfer agreement, they did not benefit from the transfer, and they did not create the transferee for the purpose of completing a fraudulent transfer. Additionally, they contend that there is no intent to defraud based on evidence that Eurisurgical contacted plaintiff before executing the Business Lease, voluntarily subjected itself to French court scrutiny, voluntarily engaged Mr. Meyner as its independent pre-insolvency agent, hired Mr. Preud'homme as an independent valuation expert who opined that the consideration paid was fair, obtained an expert legal opinion, and publicized the PSA in the appropriate French paper for legal notices (exhibit 24 to Carey affirm, Berkowitz aff, ¶¶ 2-10).

Defendants contend that the tortious interference claim cannot be based on the Judgments because the California courts have distinguished between a judgment entered after litigation and contracts derived through the parties's mutual agreement. They assert that plaintiff has not and cannot cite a California case in which such a claim is based on a judgment because there are none. Judgments may be like a contract because they are enforceable between the parties but they are not construed as a contract for purposes of a third party. The intentional interference claim is not maintainable with regard to the Choice Spine agreement, because defendants had no obligation regarding the manufacturing plans and so the failure to deliver them was not wrongful and their inaction was not designed to interfere with the agreement. Finally, with respect to

Foster and Berkowitz, defendants maintain that French law applies to their personal liability for actions taken as directors of Scient'x, a French corporation, and under such law the claim must be dismissed (*see* Pietrancosta aff).

Discussion

The defendants' motion for summary judgment is granted only to the extent that the second cause of action for violation of DCL§§ 273 et seq., is dismissed, and is otherwise denied.

The first issue to be resolved on this motion is which law is to be applied to plaintiff's fraudulent conveyance and tortious interference claims – New York law or California law. In determining which law is to be applied, the first issue to be determined is whether there is an actual conflict between the laws of the jurisdictions involved (*Matter of Allstate Ins. Co. [Solarz] v New Jersey Mfrs. Ins. Co.*, 81 NY2d 219, 223 [1993]; *Elson v Defren*, 283 AD2d 109, 114 [1st Dept 2001]). California follows the Uniform Fraudulent Transfer Act (UFTA) (Cal Civ Code § 3439 et seq.), but New York has adopted the Uniform Fraudulent Conveyance Act (UFCA) (NY DCL ch 12, article 10). While these two statutes are substantially similar, they also differ in several respects (*see Allstate Ins. Co. v Countrywide Fin. Corp.*, 842 F Supp 2d 1216, 1224 [CD Cal 2012]; *Drenis v Haligiannis*, 452 F Supp 2d 418, 426-427 [SD NY 2006]). The UFTA, which California follows, specifically sets forth "badges of fraud" from which an inference of fraudulent intent may be drawn for actual fraud (Calif Civ Code § 3439.04 [b]), whereas New York looks to the common law (*see Allstate Ins. Co. v Countrywide Fin. Corp.*, 842 F Supp 2d at 1222-1223 [analyzing choice of law for fraudulent transfer claim between Illinois, an UFTA state, and New York, an UFCA state]; *MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 [SD NY 1995]; *Marine Midland Bank v*

Murkoff, 120 AD2d 122, 128 [2d Dept 1986], *appeal dismissed* 69 NY2d 875 [1987]). Under California's UFTA, an actual fraudulent transfer is one which was made with "actual intent to hinder, delay, or defraud any creditor of the debtor" (Calif Civ Code § 3439.04 [a] [1]). For constructive fraud, a transfer is fraudulent if the debtor did not receive a "reasonably equivalent value in exchange for the transfer" and the debtor is or is about to become insolvent (*id.* § 3439.04 [a] [2]). A transferee's good faith is irrelevant to determination of the adequacy of consideration.

In New York, every transfer made with actual intent to defraud existing or future creditors is fraudulent irrespective of good faith or exchange of fair consideration (NY DCL§ 276). With respect to constructive fraudulent transfers, however, there must be an absence of "fair consideration" (NY DCL§ 272 [a]). "Fair consideration" is defined as requiring both "fair equivalent" value, and "good faith" (*id.*). Therefore, unlike in California, in New York, the transferee's good faith is relevant. In addition, under California law, a creditor may pursue conspirators with the debtor or transferee (*Qwest Communications Corp. v Weisz*, 278 F Supp 2d 1188, 1192-1193 [SD Cal 2003] [California law]), whereas, under New York law, a claim is actionable only against the transferee and those who benefitted from the transfer, and not those who conspired or aided and abetted the transferee (*see Paradigm BioDevices, Inc. v Viscogliosi Bros., LLC*, 842 F Supp 2d 661, 667 [SD NY 2012] [New York law]). Because there is a conflict between New York and California law (*see Allstate Ins. Co. v Countrywide Fin. Corp.*, 842 F Supp 2d at 1224 [conflict exists between UFTA and UFCA]; *Drenis v Haligiannis*, 452 F Supp 2d at 426-427 [same]), New York conflict of law principles will be applied to determine which law applies to these claims.

With respect to tort claims, New York employs the "interest analysis," applying the law of the jurisdiction with the greatest interest in the action. That approach mandates application of California law here. Where the laws alleged to be in conflict are conduct-regulating, such as fraudulent conveyance statutes (*Drenis v Haligiannis*, 452 F Supp 2d at 427), "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders" (*Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Secs., LLC*, 446 F Supp 2d 163, 192 [SD NY 2006] [internal quotation marks and citation omitted]; *see also Paradigm BioDevices, Inc. v Viscogliosi Bros., LLC*, 842 F Supp 2d at 665). As a general matter, a tort occurs where the injury was inflicted which is usually where the plaintiff is located (*Drenis v Haligiannis*, 452 F Supp 2d at 427). In fraud claims, the paramount concern of a court is the locus of the fraud which again is where the injury is inflicted, not where the fraudulent act originated (*Allstate Ins. Co. v Countrywide Fin. Corp.*, 842 F Supp 2d at 1223). In the instant case, the place of injury is California because that is where the plaintiff, a Delaware company with its principal place of business in California, felt the economic injury of defendants' alleged tortious behavior (*see Schultz v Boy Scouts of Am.*, 65 NY2d 189, 195 [1985]). This is also true for plaintiff's third cause of action for interference with prospective economic advantage, and, to the extent that there are any differences in California and New York law regarding that claim, California law will be applied, as that is where the tort occurred. Defendants' reliance on *Atsco Ltd. v Swanson* (29 AD3d 465 [1st Dept 2006]) and *James v Powell* (19 NY2d 249, 256 [1967]) is misplaced as both are factually distinguishable. In *James v Powell*, the court applied the laws of Puerto Rico because the case involved the transfer of land located in Puerto Rico. In *Atsco Ltd. v Swanson*, the underlying judgment was from a

Malaysian proceeding, and it involved a Malaysian citizen conveying property out of Malaysia, and therefore, the court applied that law rather than the law of the Cayman Islands, where the plaintiff was incorporated, or Japan, where it was a citizen. Here, since the plaintiff's injuries occurred in California as that is where it is located, and the California Judgments arose out of lawsuits in California, California law will, therefore, apply to the tort claims (*see Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993]).

A fraudulent conveyance under California's Uniform Fraudulent Transfer Act (CUFTA) involves a "transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim" (*Filip v Bucurenciu*, 129 Cal App 4th 825, 829 [Cal App 2005] [internal quotation marks and citation omitted]). A transfer is fraudulent if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor . . . ." (Cal Civ Code § 3439.04 [a] [1]). The courts consider any and all "badges of fraud" set forth in the statute to determine actual intent, including:

> "(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.
>
> (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 lienholder who transferred the assets to an insider of the debtor"

(Cal Civ Code § 3439.04 [b]). The presence of several of these badges of fraud does not automatically lead to the conclusion that there was an actual intent to defraud. Instead, the badges must be viewed as a whole, and examined for the strength of the inference of actual intent to defraud that those indicia permit (*see Allstate Ins. Co. v Countrywide Fin. Corp.*, 842 F Supp 2d at 1228-1230 [applying Illinois law which also adopted UFTA]). A person who "took in good faith and for reasonably equivalent value" has a complete defense to the claim (Cal Civ Code § 3439.08 [a]). Damages are "the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim, whichever is less," and that value is assessed at the time of the transfer (*id.*, § 3439.08 [b] and [c]).

The creditor's judgment may be entered against "(1) the first transferee of the asset; (2) a subsequent transferee who did not take for value in good faith; or (3) the person for *whose benefit* the transfer was made" (*Qwest Communications Corp. v Weisz*, 278 F Supp 2d at 1190, citing Cal Civ Code § 3439.08 [b]). "A transfer is not voidable against a person 'who took in good faith

and for a reasonably equivalent value or against any subsequent transferee . . . .'" (*Filip v Bucurenciu*, 129 Cal App 4th at 830, quoting Cal Civ Code § 3439.08 [a]). Generally, the beneficiaries of a fraudulent transfer are the transferee who obtains the assets, or the debtor who avoids a creditor (*Qwest Communications Corp. v Weisz*, 278 F Supp 2d at 1191). The California courts, however, have extended liability, for example, to a parent entity that created a wholly-owned subsidiary to receive the transfer, and was the party to the transfer agreement, and to the newly-created subsidiary (*Monastra v Konica Bus. Mach., U.S.A., Inc.*, 43 Cal App 4th 1628, 1633-34 [Cal App 1996]); to the majority shareholder and president of the debtor corporation as a beneficiary where the assets of the failing debtor were transferred to that shareholder's father (*Qwest Communications Corp. v Weisz*, 278 F Supp 2d at 1191); and to the former wife and daughter of the debtor who were the sole shareholders of the transferee corporation (*Filip v Bucurenciu*, 129 Cal App 4th at 829-830) Liability has also been extended based on a conspiracy theory beyond transferees (*see Qwest Communications Corp. v Weisz*, 278 F Supp 2d at 1192 [conspiracy theory may be used to extend liability to person as co-conspirator]; *Fidelity Natl. Fin., Inc. v Friedman*, 2009 WL 1160234, 2009 US Dist LEXIS 40732 [CD Cal Apr. 27, 2009, No. CV 06-4271 CAS (JWJx)] [federal district court finds issues of fact as to whether defendant participated in violation of CUFTA, and also conspired with debtors to fraudulently transfer assets]); *see also Forum Ins. Co. v Comparet*, 62 Fed Appx 151, 153 [9th Cir 2003] [California recognizes claim for conspiracy to commit fraudulent transfer allowing a plaintiff to recover legal damages to the amount of property fraudulently transferred or amount of the debt, whichever is less]). Conspiracy is a legal theory used to impose liability on a person, who did not actually commit the tort itself, but who shared a common plan with the

tortfeasors to perpetrate the fraud (*Applied Equip. Corp. v Litton Saudi Arabia Ltd.*, 7 Cal 4th 503, 510-511, 869 P2d 454, 457 [Cal 1994]). It is well settled in California, that conspiracy liability cannot arise vicariously out of participation in the conspiracy itself. Instead, the conspirator must already owe an independent legal duty to the plaintiff, the breach of which will support an action against members of the conspiracy individually (*see Applied Equip. Corp. v Litton Saudi Arabia Ltd.*, 7 Cal 4th at 510-11; *Doctors' Co. v Superior Court*, 49 Cal 3d 39, 775 P2d 508 [1989]; *Gruenberg v Aetna Ins. Co.*, 9 Cal 3d 566 [1973]; *Chavers v Gatke Corp.*, 107 Cal App 4th 606, 611-614 [Cal App 2003]; *Ferris v Gatke Corp.*, 107 Cal App 4th 1211, 1225 [Cal App 2003]). The conspirator must be legally capable of committing the tort, that is, the conspirator must owe a duty to plaintiff recognized by the law, and be potentially subject to liability for breach thereof (*Applied Equip. Corp. v Litton Saudi Arabia Ltd.*, 7 Cal 4th at 511). "[A] debtor and those who conspire with him to conceal his assets for the purpose of defrauding creditors are guilty of committing a tort and each is liable for damages" (*Taylor v S & M Lamp Co.*, 190 Cal App 2d 700, 706 [Cal App 1961]). In *Qwest Comm. Corp.*, the court found that the alleged conspirator had a duty not to commit a fraud upon the creditor, noting that "[i]ndeed, *everyone* owes a duty not to commit an intentional tort against *anyone*" (278 F Supp 2d at 1192-1193 & n 4 [emphasis in original]; *Filip v Bucurenciu*, 129 Cal App 4th at 837 [claim under UFTA involves tortious conduct of fraudulently transferring property which may form basis for conspiracy claim]).

Defendants challenge plaintiff's fraudulent transfer claim on the ground that there is no third-party liability for such a claim. They contend that any possible connection between them and Surgiview came after the Business Lease and PSA, and is too far attenuated to hold them

liable even under the California fraudulent transfer law. They point to the fact that the PSA was entered into between Eurosurgical, the debtor, and Surgiview, the transferee, and not the defendants, which had no involvement with either of those parties at that time. They submit that HPC is a holding company which does not make direct investments in companies, and that it never invested in Eurosurgical, Surgiview, or Scient'x (exhibit 24 to Carey affirm, Berkowitz aff, ¶ 2). They further submit that HPC I and HPC II never invested in Eurosurgical, and that, in May 2006 (when the PSA was executed), the only interest held by the defendants was HPC I's previous acquisition (in June 2004) of a 33.1 % interest in Scient'x (*id.*, ¶¶ 4-7). At that time, Scient'x did not own any stock in Eurosurgical or Surgiview (*id.*, ¶ 7). After that acquisition, defendants Berkowitz and Foster, both of whom were directors and officers of HPC, served on the board of Scient'x (*id.*; exhibit 25 to Carey affirm, affidavit of John H. Foster, dated December 12, 2012 [Foster aff], ¶ 3). Defendants Berkowitz and Foster both aver that they never personally owned stock in Eurosurgical or Surgiview (Berkowitz aff, ¶ 6; Foster aff, ¶ 2). Then, in July 2005, Scient'x purchased a 73% interest in Surgiview (exhibit 24 to Carey affirm, Berkowitz aff, ¶¶ 7, 9). Thus, at the time of the PSA (in May 2006), HPC I owned a one-third interest in Scient'x, a company that owned a majority interest in the transferee, Surgiview. Almost one and a half years after the PSA, HPC II acquired majority ownership of Scient'x, and HPC II, through a Luxembourg affiliate, acquired a minority (4.9 %) interest in Surgiview (*id.*, ¶ 12). Defendant Berkowitz though admits that he did participate in a Scient'x board meeting on March 6, 2006, in which the board authorized Mr. Oliver Carli, majority owner and president of Scient'x, to explore the idea of Surgiview entering into a purchase agreement with Eurosurgical (*id.*, ¶ 11). Defendants urge that plaintiff fails to present any case law to support its assertion of defendants'

liability. They further urge that while California courts have recognized a conspiracy theory in connection with a fraudulent transfer claim, plaintiff fails to demonstrate that defendants were beneficiaries of the transfer, family or related members of the debtor, were parties to the transfer agreement, or created the transferee in order to complete a fraudulent transfer (*cf. Qwest Communications Corp. v Weisz*, 278 F Supp 2d at 1192; *Filip v Bucurenciu*, 129 Cal App 4th at 830; *Monastra v Konica Bus. Mach., U.S.A., Inc.*, 43 Cal App 4th at 1633-34).

Plaintiff, however, has submitted evidence raising a triable issue as to whether defendants conspired with Eurosurgical, the debtor, and Surgiview, the transferee, to fraudulently transfer Eurosurgical's assets, knowing of, and in order to avoid, plaintiff's California Judgments. It submits proof, in the form of Berkowitz's deposition testimony, that the HPC defendants were interested in acquiring Eurosurgical since 2004, two years before the PSA took place (exhibit E to Ross aff, Berkowitz December 16, 2008 deposition [Berkowitz dep I] at 59-60, 86-87, 103-04). In this testimony, Berkowitz admitted that as early as May 2004, the HPC defendants were evaluating a potential acquisition of Eurosurgical (*id.*). The HPC defendants's emails also indicated that they brought Mr. Carli into the deal to act as their agent and bid for Eurosurgical while they provided the financing (*id.* at 86-87). Berkowitz also attested that they were aware of plaintiff's California state court judgment by July 14, 2004, nearly two years before the PSA (*id.* at 94-95; *see* also exhibit A.1 to supplemental affirmation of Peter W. Ross [Ross supplemental affirm], Berkowitz March 7, 2012 Deposition [Berkowitz dep II], at 71-72; and exhibit E.1, Berkowitz dep I at 51), and that they knew that Eurosurgical could not go into bankruptcy because plaintiff would be the largest creditor and would, in effect take all the equity in Eurosurgical to pay the California Judgments (exhibit E to Ross aff, Berkowitz Dep I at 95-

96). Berkowitz further testified that in the fall of 2004, he personally visited Eurosurgical "[t]o understand the business of Eurosurgical and [sic] opportunity to — to combine activities with them and Scient'x, and the growth potential of the business," and arranged for defendant Foster to meet with Eurosurgical's president Guy Viart (*id.* at 102-105). He also testified regarding the minutes of a Scient'x board meeting, at which he and Foster attended as members, which indicated that plaintiff had obtained a judgment against Eurosurgical for $9 million, and that "Scient'x has been approached by Eurosurgical in an attempt to protect its assets," responding that he could not recall what that meant (exhibit A.1 to Ross supplemental aff, Berkowitz dep II at 71-72 and exhibit 131 annexed thereto at HPC00007345). He testified that Eurosurgical entered into the Business Lease with Surgiview, essentially leasing its entire business, as a way for it to continue without paying the debt to plaintiff (exhibit E to Ross aff, Berkowitz dep I at 111-113). Plaintiff submits an October 18, 2004 email between Foster and Tim Berkowitz, also of HPC, in which Berkowitz cautions "we can't [tell] anyone what the end game is with Eurosurgical" (exhibit 24 to Ross aff; *see also* exhibit E to Ross aff, Berkowitz dep I at 119-120). Plaintiff points to the fact that almost a year before the PSA, Scient'x obtained a 73% majority interest controlling Surgiview, that the HPC defendants owned a 33% interest at the time of transfer, and then later a majority interest in Scient'x, Surgiview's parent entity. Berkowitz himself admitted that HPC's investment committee, which included himself and Foster, unanimously approved the purchase by Surgiview of the assets of Eurosurgical in May 2006, which approval was necessary because HPC owned a third of the business, and without their approval no deal would have taken place (exhibit E to Ross aff, Berkowitz dep I at 10-11). This evidence submitted by plaintiff is sufficient to raise a triable issue of fact as to whether these

defendants conspired with Eurosurgical to conceal its assets for the purpose of defrauding plaintiff, and as to whether they intended to hinder or delay plaintiff's collection of its judgments (*see Monastra v Konica Bus. Mach., U.S.A., Inc.*, 43 Cal App 4th at 1633-34; *see also Qwest Communications Corp. v Weisz*, 278 F Supp 2d at 1192; *Filip v Bucurenciu*, 129 Cal App 4th at 830; *Gutierrez v Givens*, 1 F Supp 2d 1077, 1087 [SD Cal 1998]; *see also Cardinale v Miller*, 2010 WL 1952423, *3-4, 2010 Cal App Unpub LEXIS 3600, * 8-11 [Cal App May 17, 2010, No. A125546]). The court notes that, contrary to defendants's contention, California does not require clear and convincing proof of fraud, but, rather, a preponderance of the evidence (*Gagan v Gouyd*, 73 Cal App 4th 835, 839 [Cal App 1999], *disapproved on other grounds Mejia v Reed*, 31 Cal 4th 657, n2 [2003]; *Whitehouse v Six Corp.*, 40 Cal App 4th 527, 534, 538 [Cal App 1995]; *In re Stern*, 345 F3d 1036, 1043 [9th Cir 2003], *cert denied* 541 US 936 [2004]).

To the extent that plaintiff is asserting an actual fraudulent transfer, "[w]hether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer" (*Filip v Bucurenciu*, 129 Cal App 4th at 834; *see Bulmash v Davis*, 24 Cal 3d 691, 699 [1979]). There are several of the badges of fraud present here, including that before the transfer was made, in May 2006, Eurosurgical had been sued by plaintiff, defendants were aware of the California actions, the transfer was of substantially all of Eurosurgical's assets, Eurosurgical was insolvent or became insolvent shortly after the PSA (*see* Bardon aff, ¶ 5, and exhibits A and B annexed thereto), and the PSA occurred shortly after a substantial debt was owed by the California state court judgment and after the California federal court judgment (Cal Civ Code §§ 3439.04 [a] [4], [5], [9], and [10]). In addition, whether Eurosurgical received a reasonably equivalent value is a genuine material

disputed fact. Defendants submit proof that it was independently valued by Mr. Preud'homme in the French Commercial Court of Arras proceeding (exhibit 28 to Carey affirm, at OT01628-30, OT01637- OT01648) who opined that a valuation range from 1 to 1.5 million euros based on the then-present value of Eurosurgical's future profit was fair (*id.* at OT01648). They also submit an expert report from Mark S. Brown of PriceWaterhouseCoopers (exhibit 31 to Carey affirm), who opined that the fair market value of the assets that Eurosurgical transferred as of May 17, 2006 was between 1.26 million euros and 1.55 million euros (*id.* at 4). Mr. Brown challenges the valuation method used by plaintiff's expert, asserting that plaintiff's expert used only the market approach, and failed to consider the income or asset-based approaches (*id.*). In opposition, plaintiff submits the report of its expert, Robert Wunderlich, who opines that the value of companies such as Eurosurgical usually are based on a multiple of sales (Wunderlich aff and exhibits A and B annexed thereto; *see also* exhibit F to Ross aff, deposition of John Foster, dated December 15, 2008, at 49). In 2005, the year before Eurosurgical's entry into the PSA, its sales were 6,205,820 euros, which means that the price Surgiview paid for Eurosurgical was only .26 of its 2005 sales (exhibits A and B to Wunderlich aff). He asserts that in May 2006, the market value of Eurosurgical was 37.2 million euros (*id.* at 2; *see also* Schedules A1-A4 of exhibit A to Wunderlich aff), and, in his rebuttal report, disputes the asset-based approach used by defendants for failing to consider Eurosurgical's good will and/or intangible assets as an ongoing business, and the income approach as based on inappropriate assumptions which lead to an understatement of value (exhibit B to Wunderlich aff). Plaintiff further submits Berkowitz's deposition testimony in which he states that two weeks after acquiring Eurosurgical's assets, defendants filed a registration statement with the French Securities and Exchange Commission with regard

to Scient'x in order to offer those assets for sale to the public, and the valuation multiplier used was 6.6, not .26 (*see* exhibit E to Ross aff, Berkowitz dep I at 158-163, and exhibit 55 to Ross aff). Taken together, this proof supports the conclusion that whether Eurosurgical received a reasonably equivalent value is a triable issue of material fact.

Further, with regard to the issue of actual intent, defendants assert that based on Eurosurgical's actions in engaging Mr. Meynet as its independent pre-insolvency agrent, and Mr. Preud'homme as an independent valuation expert, voluntarily subjecting itself to French court scrutiny, obtaining a legal opinion on French law, and in advertising the PSA in the French BODACC and the local newspaper, there is no basis for finding an actual intent to defraud. Plaintiff, however, sharply disputes the legitimacy of the French court proceeding, and asserts that the proceeding was not binding on it since it was not a party, was not notified of the proceeding, and was not a party to the PSA which the French court supposedly approved. Arlette Bardon, plaintiff's French legal expert, affirms that, under French law, court approval of such voluntary agreements renders them enforceable between the signatories, but does not compromise the rights of non-signatories, such as plaintiff here, to challenge the agreement and the transfer of assets (Bardon aff, ¶ 4). Further, plaintiff urges that, at the least, this transaction constituted a constructive fraudulent transfer, because it was made without reasonably equivalent value by a debtor who was insolvent or was rendered insolvent by the transaction (*see* Cal Civ Code § 3439.05). This court finds that the circumstances surrounding this transaction give rise to a question of fact as to whether reasonably equivalent value was exchanged, and whether defendants acted with the relevant fraudulent intent (*see Monastra v Konica Bus. Mach., U.S.A., Inc.*, 43 Cal App 4th at 1633-34).

As to the individual defendants Berkowitz's and Foster's liability on these claims, contrary to defendants' contention, French law will not be applied. The issue does not involve the internal affairs of the corporation Scient'x, on whose board they served. Rather, it involves allegations of their actions in conspiring and participating in fraudulent transfers. As determined above, California law applies to these fraud claims. Under California law, corporate officers may be held individually liable if they participate in, or have knowledge of, a fraud (*Wyatt v Union Mortgage Co.*, 24 Cal 3d 773, 785 [1979]). While they are not liable simply because of their positions as officers or directors of a corporation, they may be held liable if they "directly ordered, authorized or participated" in the fraudulent conduct (*id.*). Such liability may rest upon an officer or director's conspiracy to injure third parties through the corporation (*id.*; *see also Thomas v Global Vision Prods., Inc.*, 2008 WL 7184817 [Cal Super, May 14, 2008, No. RG 03091195]; *Schwartz v Pillsbury, Inc.*, 969 F2d 840, 844 [9th Cir 1992]). Berkowitz and Foster were significantly involved in the allegedly fraudulent conveyance as indicated above. There is a triable issue as to whether they were engaged in, and the extent of their knowledge and participation in, a conspiracy to hinder collection of the California Judgments through the PSA as a fraudulent transfer. Accordingly, summary judgment is denied as to the first cause of action for fraudulent transfer as against all the defendants.

Summary judgment, however, is granted as to the second cause of action. That claim specifically pleads fraudulent conveyance under DCL §§ 273 et seq. Plaintiff now contends, and this court agrees, as determined above, that California law applies to its fraudulent conveyance claim. Therefore, this claim is dismissed.

Finally, summary judgment is denied with respect to the third cause of action. In the complaint, plaintiff seeks recovery for intentional interference with prospective economic advantage. Specifically, as pleaded in its first amended complaint, plaintiff alleges that it had the right to payment from Eurosurgical of the amount of the California Judgments, which right would have resulted in an economic benefit to plaintiff in that it would have been able to collect all or part of this amount from Eurosurgical, and that defendants each engaged in wrongful conduct by participating, conspiring, and aiding and abetting Eurosurgical's fraudulent transfer of substantially all of its assets for less than fair value, and interfering with plaintiff's right to collect on its judgments, resulting in plaintiff's inability to so collect to its damage (first amended complaint, ¶¶ 43-50). In California, to recover in tort for intentional interference with the performance of a contract, a plaintiff must assert and prove: (1) an economic relationship between plaintiff and a third party with a probable future economic benefit to plaintiff; (2) defendant's knowledge of the relationship; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage proximately caused by defendant's actions (*Korea Supply Co. v Lockheed Martin* Corp., 29 Cal 4th 1134, 1153 [2003]; *Pacific Gas & Electric Co. v Bear Stearns & Co.*, 50 Cal 3d 1118, 1126-1129 [1990]). The defendant's acts must be wrongful apart from the interference itself (*Korea Supply Co. v Lockheed Martin* Corp., 29 Cal 4th at 1153). Thus, it must be proscribed by constitutional, regulatory, statutory or common law or other determinable legal standard (*id.* at 1159). "[A]n essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual

relationship, an existing relationship is required" (*Roth v Rhodes*, 25 Cal App 4th 530, 546 [Cal App 1994] [citations omitted]; *see also North Am. Chem. Co. v Superior Court of Los Angeles County*, 59 Cal App 4th 764, 786 [Cal App 1997] [to establish tort of interference with prospective business advantage, plaintiff must show "an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff"]).

Plaintiff's claim, as plead in its first amended complaint, based on the California Judgments, fails because it has not demonstrated the required elements. Contrary to its contentions, a judgment is a final determination of the parties' rights and obligations by a court, which does not constitute an "economic" relationship. Instead, an economic or business relationship involves providing or consuming goods or services. Plaintiff claims that this cause of action does not require an economic relationship, but fails to cite to a California case, and this court has found none, holding that a judgment can form the requisite relationship for a tortious interference claim. The goal of tortious interference claims is to protect competition, and to prevent parties from acting wrongfully to gain advantage in an underlying business relationship. The only case upon which plaintiff relies in asserting that the judgments can form the basis for the tortious interference claim is *Gold v Los Angeles Democratic League* (49 Cal App 3d 365 [1975]). That case, however, is factually distinguishable. It involved a claim by an unsuccessful candidate for public office asserting that the defendants interfered with the election at issue, and has been viewed by California's highest court as a lone case which would not be extended in *Youst v Longfo*, (43 Cal 3d 64, 72-74 [1987]). Thus, this court holds that, as plead in the first amended complaint, plaintiff fails to state a claim for tortious interference with prospective

economic relationship under California law based on defendants' interference with the California Judgments.

However, plaintiff, in its affidavit in opposition to this motion, which can be read along with the complaint, and the exhibits submitted in opposition, asserts that the tortious interference claim is also based on the defendants' purported interference with plaintiff's contract with Choice Spine. Defendants have addressed the claim as plead based on the Choice Spine agreement in their opposition and reply briefs. Thus, plaintiff contends that, on April 25, 2006, it entered into an asset purchase agreement with Choice Spine in which it sold its product rights to the Eurosurgical products, among other things, to Choice Spine for an original purchase price of $16 million (Bertranou aff, ¶ 13 and exhibit 139 annexed thereto, ¶ 1.3). In the California state court judgment, Eurosurgical was required to turn over the product plans and specifications for the products to plaintiff (exhibit 81 to Bertranou aff, at 5, ¶ 7). Mr. Bertranou, plaintiff's principal and managing member, states in his affidavit in opposition that he made repeated demands on Eurosurgical to turn over those plans and specifications, but it never complied (Bertranou aff, ¶ 14). He further attests that he contacted defendant Foster, by letter, on November 1, 2006, as Chairman of Alphatec Holdings, Inc., demanding that the plans and specifications be turned over enclosing a copy of the California state court judgment, but he received no response (*id.*, ¶ 15 and exhibit 143 annexed thereto). Mr. Bertranou further states that, in early 2007, he personally advised defendant Berkowitz that he needed to obtain the plans and specifications so that plaintiff could comply with its contract with Choice Spine (Bertranou aff, ¶ 16). He then states that because Eurosurgical and defendants refused to turn over those plans and specifications, plaintiff was unable to provide them to Choice Spine, and, at Choice Spine's request, had to agree

to reduce the purchase price to be paid by Choice Spine to $5.225 million. He avers that without the plans, Choice Spine was delayed in manufacturing the products and lost its market share, so the deal had become less valuable, which required a third amendment to that agreement, reducing the price, which occurred on April 24, 2008 (*id.*, ¶ 14 and exhibit 152).

The court finds this claim is not only sufficiently plead as a tortious interference claim, but that there are triable issues of fact. Plaintiff has clearly presented an existing contractual relationship, with the first agreement being entered into by plaintiff and Choice Spine in April 2006, with a probable future economic benefit to plaintiff. Plaintiff has also presented proof that defendants were aware that plaintiff needed the plans and specifications so that it could comply with its contract with Choice Spine (Bertranou aff, ¶16). Whether plaintiff actually told them it had an agreement with Choice Spine or not, and whether the lack of plans caused the price reductions (*see* exhibit D to Ross aff, deposition of Richard Henson, at 122-127) may not be resolved on these papers. In addition, whether these defendants used wrongful means in interfering with the Choice Spine agreement is a genuine triable issue. As discussed above, plaintiff presents proof that, one month after the California state court judgment was entered, Surgiview took possession of all of Eurosurgical's assets, including the manufacturing plans, through the Business Lease; defendants owned and controlled Surgiview through their ownership in Scient'x; defendants were financing Surgiview's purchase of Eurosurgical's business; defendants knew of the state court judgment as soon as it was entered (exhibit E to Ross aff, Berkowitz Dep at 94-95, and exhibit B, Foster Dep at 44-45), and that while they were aware of the requirement in the judgment that Eurosurgical turn over the plans to plaintiff, and received the letter directly from plaintiff requesting the plans, they took no steps to ensure that the plans

were turned over (exhibit B to Ross aff, Foster dep at 39-41, 59-60, 62). Whether defendants had intentionally and wrongfully acted to disrupt the plaintiff's contractual relationship by conspiring to fraudulently transfer Eurosurgical's assets, including the manufacturing plans, to avoid the California Judgments owed to plaintiff, and then by refusing to acknowledge the California Judgments, and the obligation to turn over the plans of which they were aware, and whether they knew that such refusal was harming plaintiff, are issues to be resolved upon the trial of this action. Therefore, summary judgment is denied on this claim to the extent that it is based on tortious interference with plaintiff's contractual relationship with Choice Spine.

Finally, the court notes that, in an appendix annexed to its opposition papers, plaintiff objects to the admissibility of defendants' exhibits as not properly authenticated, and as not based on personal knowledge. Plaintiff claims that much of the evidence submitted is inadmissible because the exhibits relied upon by defendants are attached to the affidavit of their attorney who does not have personal knowledge of the documents. However, many of the documents appear to be self-authenticating under CPLR article 45 (for example, CPLR 4540 for domestic public documents, CPLR 4542 for foreign public documents, CPLR 4532 for newspapers, and CPLR 4538 for acknowledged documents), or may be considered on this summary judgment motion as business records (CPLR 4518). Plaintiff has even objected to documents which it produced in discovery and upon which it also relied in its opposition, such as the assignment agreement between itself and Eurosurgical, the breach of which formed the basis of the California Judgments, the Business Lease, the PSA, and facsimiles and emails (*compare* Appendix to Plaintiff's Memorandum Opposition to Summary Judgment *with* Defendants's Appendix A - Response to OrthoTec's Evidentiary Objections). In addition, it objects that some of the

affidavits, such as Berkowitz's affidavit, are not based on personal knowledge, when the affiants do state they have such knowledge. In any event, as discussed above, the court finds that there are triable issues of fact on plaintiff's first and third claims, the claims to which most of these exhibits apply, and the dismissed second cause of action is based on the law, not on these exhibits. Thus, plaintiff's objections fail to warrant a different conclusion with regard to the second claim.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted only to the extent that the second cause of action is dismissed, and is otherwise denied.

Dated: May 30, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER