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THE DISTRICT COURT OF GUAM

In Re:

MYRNA CASTRO EVANS,

Debtor.

BANKRUPTCY CASE NO. 15-00090
(Chapter 7)

ADVERSARY CASE NO. 16-00002

**DECISION AND ORDER RE
DEFENDANT’S MOTION TO DISMISS
AND PLAINTIFF’S MOTION TO STRIKE**

MARK HEATH, CHAPTER 7
BANKRUPTCY TRUSTEE,

Plaintiff,

vs.

ROY KENNETH EVANS,

Defendant.

Before the court are Defendant Roy Kenneth Evans’ (“Evans”) Motion to Dismiss, and Plaintiff Mark Heath, Chapter 7 Bankruptcy Trustee’s (“Trustee”) Motion to Strike. *See* Mot. Dismiss, ECF No. 7; Mot. Strike, ECF No. 14. On November 4, 2016, the parties appeared before the court for a hearing. After reviewing the parties’ submissions, and relevant caselaw and authority, and having heard argument from counsel on the matter, the court hereby **GRANTS** Evans' Motion to Dismiss, but permits Trustee leave to amend within twenty-one days of the date of this Order. Furthermore, the court **DENIES** Trustee’s Motion to Strike, but **GRANTS** Trustee’s oral request that the expunged criminal records be sealed.

1 Guam Code Annotated §§ 6101² & 6103;³ (4) Recovery of Transfer per 11 U.S.C. § 550,⁴ and
2 (5) for Declaratory relief. *Id.* The Complaint avers that Debtor’s intent to “delay or defraud” her
3 creditors can be inferred. *Id.* at ¶¶ 22-26, 40-44.

4 **C. The Motion to Dismiss.**

5 On July 22, 2016, Evans filed a Motion to Dismiss pursuant to Federal Rule of

6 (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation;
7 and

8 (ii)(I) was insolvent on the date that such transfer was made or such obligation was
incurred, or became insolvent as a result of such transfer or obligation;

9 (II) was engaged in business or a transaction, or was about to engage in business or a
10 transaction, for which any property remaining with the debtor was an unreasonably small
capital;

11 (III) intended to incur, or believed that the debtor would incur, debts that would be
beyond the debtor's ability to pay as such debts matured; or

12 (IV) made such transfer to or for the benefit of an insider

13 11 U.S.C. § 548(a) (emphasis added).

14 ² Guam’s statute related to transfers to defraud creditors states:

15 Every transfer of property or charge thereon made, every obligation incurred, and every judicial
16 proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is
void against all creditors of the debtor, and their successors in interest, and against any person
upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

17 20 G.C.A. § 6101.

18 ³ Under Guam law, questions of fraudulent transfers are determined in the following manner:

19 In all cases arising under . . . the provisions of this Chapter, except as otherwise provided in 7
20 GCA § 50500 [*Transfers, Etc., Defraud Creditors*], the question of fraudulent intent is one of fact
and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it
21 was not made for a valuable consideration; provided, however, that any transfer or encumbrance
of property made or given voluntarily, or without a valuable consideration, by a party while
insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.

22 20 G.C.A. § 6103.

23 ⁴ A Trustee may recover a fraudulent transfer under 11 USC § 548 “for the benefit of the estate, the
property transferred, or, if the court so orders, the value of such property” if the following conditions are met: “(1)
the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or
24 mediate transferee of such initial transferee.” 11 U.S.C.A. § 550(a). However, “[t]he trustee may not recover . . .
under subsection (a) from a transferee that is not an insider.” 11 U.S.C. § 550(b).

1 Bankruptcy Procedure 7012, and Federal Rules of Civil Procedure (“FRCP”) 12(b)(6) and 9(b).
2 Mot. Dismiss at 1, ECF No. 7. The Motion to Dismiss alleges that the Complaint failed to
3 sufficiently state claims that were plausible, and also that the fraud claims were not pleaded with
4 particularity. *Id.*

5 Trustee opposed the Motion on August 1, 2016, asserting that the Complaint satisfied the
6 applicable pleading requirements of the FRCP. Opp’n at 5, ECF No. 9. The Opposition
7 introduces facts not alleged within the Complaint. *Id.* at 5. Trustee’s Opposition requests leave
8 to amend his Complaint should this court grant Evans’ Motion to Dismiss. *Id.* at 13.

9 Evans filed a Reply Brief on August 8, 2016. Reply in Supp. Mot. Dismiss 1, ECF No.
10 11. The Reply noted that the Opposition asserted and relied on facts that were not pleaded in the
11 Complaint, and also contends that amendment would be futile. *Id.* at 1, 11.

12 **D. The Motion to Strike.**

13 Criminal charges were filed against Debtor for Solicitation to Commit Aggravated
14 Assault and Murder of Evans. *See* Reply In Supp. Mot. Dismiss at Ex. A, ECF No. 11. Evans
15 attached Debtor’s “Deferred Plea Agreement” and “Order After Hearing Re: Deferred Plea” to
16 his Reply Brief. *Id.* at Ex. A-B. The inclusion of these Exhibits in Evans’ Reply prompted
17 Trustee to file a Motion to Strike the Exhibits on the grounds that Guam law prohibits one to
18 make an expunged record public. *See* Mot. Strike at 2, ECF No. 14. Evans Opposed the Motion
19 to Strike on September 1, 2016. Opp’n Mot. Strike, ECF No. 20.

20 **II. APPLICABLE LEGAL STANDARDS**

21 **A. FRCP 12(b)(6).**

22 FRCP 12(b)(6) provides that, in response to a claim for relief, a party may move the court
23 to dismiss that claim for “failure to state a claim upon which relief can be granted.” FRCP
24 12(b)(6).

1 Whether a party has sufficiently stated a claim for relief is viewed in light of FRCP 8.
2 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Under Rule 8, a claim for relief must
3 include “a short and plain statement of the claim showing that the pleader is entitled to relief.”
4 FRCP 8(a)(2). The pleading standard under Rule 8 “does not require detailed factual allegations,
5 but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”
6 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

7 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
8 accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (citing *Twombly*, 550
9 U.S. at 570) (internal quotation marks omitted). The court must engage in a two-step procedure
10 to determine the plausibility of a claim. *Id.* at 678–79. First, the court must weed out the legal
11 conclusions—that is “threadbare recitals of the elements of a cause of action, supported by mere
12 conclusory statements”—in the pleading that are not entitled to a presumption of truth. *Id.* at
13 678. Second, the court should presume the remaining factual allegations are true and determine
14 whether the claim is plausible. *Id.* at 679.

15 A claim is facially plausible if “the plaintiff pleads factual content that allows the court to
16 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678
17 (citing *Twombly*, 550 U.S. at 556). The court must then “draw on its judicial experience and
18 common sense” to determine the plausibility of a claim given the specific context of each case.
19 *Id.* at 679.

20 **B. FRCP 9.**

21 FRCP 9(b) requires that “[i]n alleging fraud or mistake, a party must state with
22 particularity the circumstances constituting fraud or mistake.” FRCP 9(b). Under Ninth Circuit
23 law, “Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud.” *In re*
24 *GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547–48 (9th Cir. 1994) (en banc) (emphasis added),

1 *superseded on other grounds by* 15 U.S.C. § 78u-4.

2 A plaintiff's pleadings must include the time, place, and nature of the alleged fraud;
3 "mere conclusory allegations of fraud are insufficient" to satisfy this requirement. *Id.* at 1548
4 (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)). "[T]he
5 circumstances constituting the alleged fraud [must] 'be specific enough to give defendants notice
6 of the particular misconduct . . . so that they can defend against the charge and not just deny that
7 they have done anything wrong.'" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.
8 2009) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)); *see also Moore*,
9 885 F.2d at 540 (finding that Rule 9(b) requires a plaintiff to attribute particular fraudulent
10 statements or acts to individual defendants). However, "[m]alice, intent, knowledge, and other
11 conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see also In re*
12 *GlenFed, Inc. Sec. Litig.*, 42 F.3d at 1547 ("We conclude that plaintiffs may aver scienter . . .
13 simply by saying that scienter existed."); *Walling v. Beverly Enter.*, 476 F.2d 393, 397 (9th Cir.
14 1973) (finding that Rule 9(b) "only requires the identification of the circumstances constituting
15 fraud so that the defendant can prepare an adequate answer from the allegations" (citations
16 omitted)).

17 A motion to dismiss for failure to plead a claim with particularity is functionally
18 equivalent of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Vess v. Ciba-*
19 *Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003).⁵ In considering a motion to dismiss, the

21 ⁵ Rule 9(b) requires allegations of fraud to:

22 "[B]e 'specific enough to give defendants notice of the particular misconduct . . . so that they can
23 defend against the charge and not just deny that they have done anything wrong.'" *Bly-Magee*,
24 236 F.3d at 1019 (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)). Averments of
fraud must be accompanied by "the who, what, when, where, and how" of the misconduct
charged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) (internal quotation marks omitted).
"[A] plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The
plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re*
GlenFed, Inc. Sec. Litig., 42 F.3d at 1548.

1 court is not deciding the issue of “whether a plaintiff will ultimately prevail but whether the
2 claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232,
3 236 (1974) *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984).

4 **C. FRCP 15.**

5 FRCP 15(a)(2) provides that “[t]he court should freely give leave [to amend] when
6 justice so requires.” FRCP 15(a)(2). In deciding whether justice requires granting leave to
7 amend, factors to be considered include “the presence or absence of undue delay, bad faith,
8 dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice
9 to the opposing party, and futility of the proposed amendment.” *Moore*, 885 F.2d at 538 (citing
10 *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

11 **B. DISCUSSION**

12 Evans moves to dismiss Trustee’s Complaint, arguing that Trustee fails to state a
13 plausible claim for relief and inadequately pleads facts sufficient to satisfy the elements of causes
14 of action related to purported fraudulent transfers of real property. Mot. Dismiss at 2, 5-7, ECF
15 No. 7. Trustee contends that the Complaint meets the pleading requirements of the FRCP, but
16 requests leave to amend his Complaint if the Motion to Dismiss is granted. Opp’n 12-13, ECF
17 No. 9.

18 Trustee also moves to strike Exhibits as attachments to Evans’ Reply Brief for including
19 criminal records of Debtor, which Trustee claims are expunged. Mot. Strike 1-5, ECF No. 14.

20 **A. Whether Evans’ Motion to Dismiss Should be Granted.**

21 Evans’ Motion to Dismiss maintains that the Complaint failed to allege sufficient facts to
22 state claims that were plausible, and also that the fraud claims were not pleaded with
23 particularity. Mot. Dismiss 1-2, 5-7, ECF No. 7. In response, the Trustee’s Opposition

24 *Vess*, 317 F.3d at 1106 (second and third alterations in original).

1 introduces facts not alleged within the Complaint to argue that the elements of his causes of
2 action were satisfied. Opp'n, ECF No. 9.

3 “[W]hen the legal sufficiency of a complaint's allegations is tested by a motion under
4 Rule 12(b)(6), ‘[r]eview is limited to the complaint,’” and allegations made outside of the
5 complaint are not properly before the court. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688
6 (9th Cir. 2001) (alteration in original) (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273,
7 1274 (9th Cir.1993)); *see also In re Am. Apparel, Inc. S'holder Litig.*, 855 F. Supp. 2d 1043,
8 1060 (C.D. Cal. 2012) (“Because Rule 12(b)(6) review is confined to the complaint, the court
9 typically does not consider material outside the pleading (e.g., facts presented in briefs,
10 affidavits, or discovery materials) (citation omitted)); *In re Colonial Ltd. P'ship Litig.*, 854 F.
11 Supp. 64, 79 (D. Conn. 1994) (citing *Morgan Distributing Co., Inc. v. Unidynamic Corp.*, 868
12 F.2d 992, 995 (8th Cir. 1989) (“[I]t is axiomatic that a complaint may not be amended by the
13 briefs in opposition to a motion to dismiss.”)). If a party could reference matters outside of the
14 Complaint in opposition to a motion to dismiss, it would essentially “mean that a party could
15 unilaterally amend a complaint at will, . . . even without filing an amendment, and simply by
16 raising a point in a brief.” *Morgan Distributing Co., Inc.*, 868 F.2d at 995 (citing *Friedman v.*
17 *Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985)).

18 Regarding Trustee’s claim for transfer made with “actual fraud” under 11 U.S.C. §
19 548(a), Evans argues that Trustee fails to allege specific facts to state a plausible claim because
20 the Complaint does not set forth the value of the properties at issue, that Debtor and/or
21 Defendant knew that the value of the consideration exchanged was insufficient, and that the
22 Complaint failed to allege facts that Debtor was insolvent at the time of the fraudulent transfer,
23 or became insolvent as a result of the transfer. Mot. Dismiss at 6, ECF No. 7.

24 Concerning Trustee’s second claim for relief for constructive fraud under 11 U.S.C. §

1 548(a)(1)(B), Evans asserts that the Complaint does not contain sufficient facts to plausibly show
2 that Debtor was actually insolvent or received less than what was given to Evans on the date of
3 the transfer. Mot. Dismiss 7, ECF No. 7. This claim references “duress,” but the circumstances
4 of this supposed duress are not described within the Complaint, but are rather impermissibly
5 elucidated upon in Trustee’s Opposition to the Motion to Dismiss. Opp’n at 5, ECF No. 9; *see*
6 *also* Compl. at ¶ 30, ECF No. 2.

7 As to Trustee’s third claim for relief that a transfer was made with actual intent to delay
8 or defraud a creditor under 20 G.C.A. § 6101, Evans contends that the Complaint “conclusively
9 alleges that the transfers were with the actual intent to delay or defraud Debtor’s creditors,” but
10 that it does not “sufficiently allege facts that would form the basis for finding that the transfers
11 themselves hindered, delayed or defrauded a creditor of the Debtors or that the Debtor intended
12 the Divorce and Property Settlement Agreement to do so on the date of the transfer.” Mot.
13 Dismiss at 5, ECF No. 7. The Ninth Circuit has held that:

14 In some cases, the plaintiff may allege a unified course of fraudulent conduct and
15 rely entirely on that course of conduct as the basis of a claim. In that event, the
16 claim is said to be “grounded in fraud” or to “sound in fraud,” and the pleading of
17 that claim as a whole must satisfy the particularity requirement of Rule 9(b).

18 *Vess*, 317 F.3d at 1103–04 (9th Cir. 2003). Thus, Evans contends that Trustee has not pleaded a
19 plausible 20 G.C.A. § 6101 claim because the facts alleged regarding the requisite actual intent
20 fail to satisfy FRCP 9’s particularity requirements. Mot. Dismiss at 5, 7, ECF No. 7.

21 The Complaint in this case conclusively avers facts that Debtor’s intent to “delay or
22 defraud” her creditors can be inferred from the fact that (1) the value of the consideration that
23 Debtor received for the transfers was insufficient; (2) Debtor became insolvent shortly after the
24 transfers were made; (3) “the transfers were substantially all of debtor’s assets;” (4) Debtor’s
obligations exceeded her ability to pay her debts at the time of the transfers; and (5) “the
[t]ransfers were made to an insider of the Debtor[, h]er husband.” Compl. at ¶¶ 22-26, 40-44,

1 ECF No. 2. The Complaint generally references that the properties at issue were quitclaimed to
2 her husband under duress, under either absent or inadequate consideration within one year of the
3 date she filed for bankruptcy. *Id.* ¶¶ 10-12. Evans is correct that Trustee fails to plead “facts
4 forming the basis for the assertion that Debtor or [Evans] knew that the value of the
5 consideration received by Debtor in exchange for the properties was not of reasonably equivalent
6 value.” *See* Mot. Dismiss at 6, ECF No. 7. The “threadbare recitals of the elements of a cause of
7 action, supported by mere conclusory statements”—within Trustee’s Complaint, particularly
8 related to the claim that the transfers were made “under duress” without clarifying those
9 circumstances, are not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 678.⁶

10 Facts raised in the Opposition that were not within the Complaint include that Evans
11 misrepresented to Debtor that she would be criminally prosecuted unless “Defendant [Evans]
12 agreed to dismiss the Complaint, that the terms of the Divorce and Property Settlement . . . were
13 ‘fair and equitable,’ [and] that [Evans] was an insider.” *Opp’n* at 5, ECF No. 9. Additionally, the
14 Opposition states that Evans failed to disclose that the property at issue was joint at the time of
15 the transfer, that Evans fraudulently stated that the Office of the Attorney General of Guam’s
16 dismissal of the Complaint against Evans was *not* dependent on Evans written waiver agreement,
17 by fraudulently stating that Debtor’s property interests were community rather than separate
18 property, that Debtor had not community property right to Evans’ National Guard Retirement,
19 and by fraudulently stating the terms of the Divorce and Property Settlement Agreement were
20 “fair and equitable.” *Id.* at 5.

21 The facts not raised within the Complaint that clarify the circumstances of the supposed
22 “duress” under which the transfers were made should not be considered when considering
23

24 ⁶ At the hearing, Trustee stated that his Complaint is sufficient because it was modeled after another
Complaint that survived beyond the pleading stage. Trustee conceding, however, that there was no motion to
dismiss challenging the sufficiency of the pleadings in that case.

1 whether Trustee's claims survive. *See Morgan Distributing Co., Inc.*, 868 F.2d at 995; *see*
2 Compl. ¶¶ 11-12, ECF No. 2. Pursuant to FRCP 9(b), the claim that the real property transfers
3 were made "under duress" without clarifying the circumstances of the purported fraud and duress
4 are not "specific enough to give defendants notice of the particular misconduct . . . so that they
5 can defend against the charge and not just deny that they have done anything wrong." *See*
6 *Kearns*, 567 F.3d at 1124 (citations omitted); *see also* Compl. ¶¶ 10-12, ECF No. 2. Moreover,
7 the Trustee "must set forth *more* than neutral facts necessary to identify the transaction . . . [and]
8 must set forth what is false or misleading about [Evans' actions], and why it is false." *See Vess*,
9 317 F.3d at 1106 (citing *Decker*, 42 F.3d at 1548).

10 Because the circumstances of fraud are insufficiently pleaded, and also because Trustee's
11 Opposition relies on factual assertions extrinsic to the Complaint to support his claims, the
12 Motion to Dismiss is **GRANTED**. The facts references within the Opposition should be
13 incorporated into Trustee's Amended Complaint.

14 **B. Whether Trustee's Motion to Strike Should be Granted.**

15 Trustee moves to strike the exhibits attached to Evans' Reply Brief that include criminal
16 records of Debtor, which Trustee claims are expunged. Mot. Strike at 1, ECF No. 14.

17 Criminal charges were filed against Debtor for Solicitation to Commit Aggravated
18 Assault and Murder. *See Reply In Supp. Mot. Dismiss, Ex. A, ECF No. 11.* Evans attached
19 Debtor's "Deferred Plea Agreement" and "Order After Hearing Re: Deferred Plea" to his Reply
20 Brief. *Id.* Ex. A-B. The purpose of the inclusion was to argue that Evans could not "collude[]
21 with Debtor to delay, hinder or defraud Debtor's creditor's" because the plea agreement prohibits
22 contact between Debtor and Evans. *Id.* at 4, Ex. A at 3 ([Debtor] shall stay away, directly and
23 indirectly, from . . . Evans . . .") (emphasis omitted).

24 The inclusion of these Exhibits in Evans' Reply prompted Trustee to move to strike the

1 exhibits because Guam law, specifically 8 GCA §§ 11.10 & 11.11, and 9 GCA § 70.44,⁷
2 prohibits one to make public an expunged record. *See* Mot. Strike at 2-4, ECF No. 14.

3 In response, Evans first argues that Debtor effectively “unexpunge[d]” her records by
4 putting them at issue in this separate proceeding. *See In re State Bar of Texas*, 440 S.W.3d 621,
5 625 (Tex. 2014) (citing *W.V. v. State*, 669 S.W.2d 376, 378–79 (Tex. App.-Dallas 1984, writ
6 ref’d n.r.e.) (“holding that retention of files was not necessary to afford protection from potential
7 civil action because expunged records would be held by district clerk and could be retrieved if
8 needed for subsequent proceedings”); *see also Thomas v. City of Selma*, 2006 WL 2854405, *3
9 (W.D.Tex. Oct. 4, 2006) (“holding that district clerk must produce arrest records for use in suit
10 based on arrest”); Opp’n Mot. Strike, at 3, ECF No. 20. Hence, the court agrees that Debtor put
11 the records at issue during the 341(a) meeting, on September 30, 2015, when she testified that
12 she quitclaimed the two parcels at issue under duress. *See* Compl. at ¶¶ 10-12, ECF No. 2.

13 Second, Evans maintains that 9 G.C.A. § 70.44 only prohibits disclosure of criminal
14 records from criminal justice agencies as opposed to private conduct. Opp’n Mot. Strike, at 3,
15 ECF No. 20 (citing *Taha v. Bucks Cty.*, 9 F. Supp. 3d 490, 492 (E.D. Pa. 2014)). Here, Evans
16 and his counsel are private parties, and Evans’ counsel permissively obtained the documents
17 from the privately owned database www.JurisPacific.com. *Id.*

18 Third, Evans includes three media articles reporting that Debtor was charged with
19 soliciting to murder Evans. Opp’n Mot. Strike, at Ex. A-D, ECF No. 20. The fact that

20 ⁷ The situations that permit expungement of criminal records are found within 8 GCA § 11.10, and the term
21 “expungement” is defined within 8 GCA § 11.11. Under Guam law, it is a criminal misdemeanor for expunged
records to be made public:

22 A person is guilty of a misdemeanor if he permits to be made public or reveals to any person not
23 entitled to review it any official record of the court, Attorney General or any other entity of the
government of Guam which has been expunged in accordance with § 271 of the Code of Civil
Procedure or Chapter 11 of Title 8 GCA.

24 9 G.C.A. § 70.44.

1 information regarding Debtor's charges is publicly available on the internet supports Evans' use
2 of this information in his defense. *In re State Bar of Texas*, 440 S.W.3d at 626 (propriety of use
3 of expunged records in disciplinary case supported by the fact that the transcript of trial was
4 publicly available on the internet.). This case is unlike *In re State Bar Texas*, however, because
5 the expunged records themselves are not publicly available online. Thus, the court is persuaded
6 that Evans is permitted to use the information in his defense, but that the court documents
7 themselves should be sealed because they are not publicly available online.

8 Fourth, Evans cogently asserts that it would be inequitable to restrict him from
9 referencing these records "to defend himself against the allegations of wrongdoing, while
10 allowing [Trustee] to use those same facts as a sword." Opp'n Mot. Strike, at 4, ECF No. 20
11 (citing *State v. J.R.S.*, 939 A.2d 226, 229 (App. Div. 2008) (holding it would be inequitable to
12 bar Defendant from using expunged records in plaintiff's tort claim for an alleged false arrest
13 and malicious prosecution)). The court agrees that it would be unjust to permit Trustee to
14 reference the criminal proceeding while prohibiting Evans from doing the same.

15 Finally, Evans convincingly contends that expungement of Debtor's records is not
16 constitutionally protected because Debtor has no privacy interest due to the fact that references to
17 criminal conduct lingered in public media after expungement. *See* Opp'n Mot. Strike at 4, ECF
18 No. 20 (citing *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (holding the details of
19 plaintiff's prior guilty plea were not inherently private and that plaintiff had no legitimate
20 expectation of privacy in these details because the nature of the matters were within the public
21 domain.) (citations omitted)); *see also Nunez v. Pachman*, 578 F.3d 228, 229, 231 (3d Cir. 2009)
22 (there is no cognizable privacy interest in expunged criminal records under the federal
23 constitution because "the information expunged is never truly 'private'" and "may persist in
24 public news sources after expungement." (footnote omitted)).

1 The court is persuaded that Evans should be permitted to reference Debtor's expunged
2 conviction so that he has the opportunity to fully defend himself in this action. To the extent that
3 Trustee's Motion sought to strike the records from being used in this proceeding, the motion is
4 **DENIED**. Trustee's request to file the documents under seal, however is **GRANTED**. Even
5 though information regarding Debtor's criminal history is accessible online, the expunged
6 records themselves are not publicly available.

7 **C. Whether Trustee's Request for Leave to Amend His Complaint Should Be**
8 **Granted.**

9 Trustee's Opposition requests leave to amend his Complaint should this court grant
10 Evans' Motion to Dismiss. Opp'n at 13, ECF No. 9. Leave to amend should be granted
11 liberally, unless such amendment would be futile. *See Ascon Props., Inc.*, 866 F.2d at 1160
12 (citation omitted).

13 Evans' Reply first maintains that leave to amend would be futile because Trustee cannot
14 allege any facts that would make him an "insider" of the Debtor because divorcing spouses are
15 not spouses. Reply in Supp. Mot. Dismiss, 4, ECF No. 11 (citing *In re Carbaat*, 357 B.R. 553,
16 558 (Bankr. N.N. Cal. 2006). A "trustee may not recover . . . under subsection (a) [of 11 U.S.C.
17 § 548] from a transferee that is not an insider." 11 U.S.C. § 550(b). *In re Carbaat*, however,
18 does not appear to establish a *per se* rule that spouses cannot be insiders. 357 B.R. at 558.
19 Rather, it states that "[a]ssuming a divorce *is not collusive*, the Court does not consider a spouse
20 an insider of the divorcing spouse." *Id.* (emphasis added). Perhaps the parties can address the
21 issue of collusion more thoroughly within the Amended Complaint and/or by future motion.

22 As to the claim that the Divorce and Property Settlement was executed under duress of
23 Evans conditioning its execution on the dismissal of the Criminal Complaint, Evans argues that
24 her (expunged) criminal plea was entered before the Settlement was signed. Reply in Supp. Mot.
Dismiss, 4, ECF No. 11. This is a fact outside the pleadings, and the court declines to exercise

1 its discretion to consider matters outside the pleadings for motion to dismiss purposes. *See In re*
2 *Colonial Ltd. P'ship Litig.*, 854 F. Supp. at 79; *see also Shugart v. GYPSY Official No. 251715,*
3 *its Engines, Mach., Appurtenances*, No. 2:14-CV-1923RSM, 2015 WL 1965375, at *2 (W.D.
4 Wash. May 1, 2015) (citation omitted).

5 Evans next contends that a plausible claim for a transfer less than reasonably equivalent
6 value cannot be sustained because the Ninth Circuit has held that “a state court’s dissolution
7 judgment, following a regularly conducted contested proceeding, conclusively establishes
8 ‘reasonably equivalent value’ for the purpose of § 548, in the absence of actual fraud.” *In re*
9 *Blesdoe*, 569 F.3d 1106, 1112 (9th Cir. 2009); *see also* Reply in Supp. Mot. Dismiss at 5, ECF
10 No. 11. Evans’ Reply fails to acknowledge, however, that this presumption is not present in
11 cases of “actual fraud.” *See In re Blesdoe*, 569 F.3d at 1112. Trustee’s Complaint alleges that
12 “actual fraud” occurred, thus the presumption may not apply if this fraud is sufficiently pleaded
13 and subsequently proven.

14 In his Opposition to the Motion to Strike, Evans argues that the Motion to Strike weighs
15 against leave to amend because it amounts to a dilatory practice. Opp’n Mot. Strike at 5-6, ECF
16 No. 20. Evans also argues that Trustee failed to satisfy Civil Local Rules 7 and FRCP 15 by
17 failing to request leave to amend through a separate motion with a copy of the proposed amended
18 complaint. *Id.* at 6. Trustee does not respond to these argument.

19 Although Evans is correct that Trustee failed to satisfy the requirements of Civil Local
20 Rules 7 and FRCP 15 with respect to the appropriate procedure for requesting leave to amend his
21 complaint, the court nonetheless will grant leave to amend. *See Foman*, 371 U.S. at 182 (“the
22 grant or denial of an opportunity to amend is within the discretion of the District Court”).
23 Therefore, due to the liberal policies permitting amendments of pleadings, and both parties’
24 extensive reference to matters outside the pleadings, Trustee’s request for leave to amend is

1 **GRANTED.**

2 **C. CONCLUSION**

3 Evans' Motion to Dismiss is **GRANTED** because the Trustee's fraud claims are not
4 pleaded with particularity, and Opposition references facts outside of the Complaint in support of
5 Trustee's claim. However, Trustee is granted leave to amend because Evans' Reply has not
6 proven futility of amendment at this time, and because leave to amend should be given freely.

7 The court is persuaded that Evans should be permitted to reference Debtor's expunged
8 conviction so that he has the opportunity to fully defend himself in this action. To the extent that
9 Trustee's Motion sought to strike the records from being used in this proceeding, the motion is
10 **DENIED**. Trustee's request to seal the expunged records themselves, however is **GRANTED**.
11 The Clerk of Court is hereby ordered to seal Exhibits A and B in ECF No. 11.

12 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Nov 10, 2016