**IT IS ORDERED as set forth below:**

**Date: August 7, 2013**

Mary Grace Diehl

**Mary Grace Diehl**
**U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| In re: | : | Case No. 09-61108-MGD |
| **RANDY A. PULLEN**, | : | Chapter 7 |
| Debtor. | : | Judge Mary Grace Diehl |
| **NEIL C. GORDON, Chapter 7 Trustee for the Estate of Randy A. Pullen,** | : | |
| Plaintiff, | : | |
| v. | : | Adversary Proceeding No. 11-05620 |
| **LISA LOVE,** | : | |
| Defendant. | : | |

**ORDER GRANTING THE CHAPTER 7 TRUSTEE'S**
**MOTION FOR PARTIAL SUMMARY JUDGMENT**

This action involves the Chapter 7 Trustee's claims against Debtor's ex wife. Within two-years of Debtor's Chapter 7 filing, Debtor transferred his half interest in real property to Defendant through a divorce settlement. The Trustee seeks to avoid and recover the half-interest

in real property as an actual fraudulent transfer, obtain authority to sell the property, and to disallow Defendants' proof of claims. The facts relied upon by the Trustee to support his motion for Summary Judgment primarily consist of Debtor's testimony under oath in an evidentiary hearing on Defendant's motion for contempt in the divorce proceeding. Defendant contests the validity of Debtor's sworn testimony in the contempt proceeding and the facts relied up for the Superior Court's ruling.

The above-styled adversary proceeding is before the Court on cross motions for summary judgment.[1] (Docket Nos. 29 and 37). The Chapter 7 Trustee, Neil C. Gordon ("Trustee") moves for partial summary judgment as to four counts of the Complaint (Docket No. 29):

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| Count One: | Avoidance of Quitclaim Deed as a fraudulent transfer of the Debtor's One-Half Interest in the North Decatur Property under 11 U.S.C. § 548(a)(1)(A); |
| Count Two: | Recovery and Preservation of the One-Half Interest in the North Decatur Property pursuant to §§ 550 and 551; |
| Count Three: | Sale of Debtor and Defendant's interest in the North Decatur Property under § 363(h); |
| Count Four: | Disallowance of Claims for Alleged Unpaid Alimony and Property Obligations. |

Defendant filed a response and moved for summary judgment as to the same counts and Trustee filed a Reply. (Docket Nos. 34 & 43). Trustee relies on his Statement of Material Facts, the Declaration of Angela G. Ford, the Declaration of Neil C. Gordon; the transcript of the July 2011 contempt proceeding, the Deposition of Debtor Randy A. Pullen, and the case record. (Docket No. 29). Defendant submits documents in support of her motion, including email and text message exchanges and excerpts, charts regarding income and expenses for the parties, bank

[1] Defendant has also filed a Motion to Permit Late Filing of Response (Docket No. 33). The Court used its discretion to consider all the Defendant's pleadings in this matter. Therefore, Defendant's Motion is granted.

statements, county tax assessment records relating to the properties at issue, and confidential mental health records. (Docket No. 37). For the reasons set forth below, Trustee's Motion for Partial Summary Judgment is granted and Defendant's Motion is denied.

This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (H) and jurisdiction over this action is set forth in 28 U.S.C. §§ 157(b) and 1334(b).

## I. Facts

The following are the undisputed facts presented by the pleadings, discovery, depositions, and other materials on file. Mr. Pullen ("Debtor") purchased a house and surrounding property located at 2320 North Decatur Road in Atlanta, Georgia (the "North Decatur Property") in the late 1980s. (Docket No. 29, *Plaintiff's Statement of Material Facts (PSOF)*, ¶ 2). In 1995, the Debtor and Ms. Love ("Defendant") married. *PSOF* at ¶ 1. The North Decatur Property remained titled in Debtor's sole name until 2005. *Id.* at ¶ 5.

Also in 2005, the parties moved into and purchased another property, 14260 Freemanville Road in Alpharetta, Georgia ("Freemanville"). *Id.* at ¶ 4. The parties planned to rent the North Decatur Property. *Id.* To finance the renovations at Freemanville, the parties executed a deed for the North Decatur Property to be owned jointly. Defendant now owned an undivided half interest in the North Decatur Property. *Id.* at ¶ 5.

For the three-year period ending in December 2006, Debtor was the president, managing partner, and 25% owner of Auto Sports of Atlanta ("ASA"), a dealer of high-end luxury cars. *Id.* at ¶ 3. Debtor had personally guaranteed certain ASA's debts, including the lease of its facility. *Id.* ASA later defaulted on the lease and closed in December of 2006. *Id.* at ¶¶ 6-7. Debtor engaged in some work after the closing of ASA to wind down the partnership and liquidate the assets. *Id.*; Exhibit A ("Contempt Hearing Transcript").

Debtor and Defendant divorced in April of 2007. *PSOF*, ¶ 15. Defendant filed for divorce and retained counsel who drafted a Marriage Dissolution Agreement. *Id*. at ¶ 9. Debtor did not retain counsel in the divorce proceeding. (Randy Pullen November 7, 2013 Deposition ("*Pullen Depo*"); p. 21). Numerous factors lead to divorce, including infidelity and financial strain. *Id.* at p. 34-35; Defendant's Statement of Undisputed Facts ("*DSOF*"), ¶¶ 2, 5-6. The Divorce Decree, which incorporated the Marriage Dissolution Agreement that was agreed to by Debtor and Defendant, was entered April 19, 2013. *DSOF*, ¶ 7.

The Marriage Dissolution Agreement ("Agreement") required Debtor to make certain alimony and property settlement payments to Defendant and to convey his remaining one-half interest in the North Decatur Property to Defendant. *Pullen Depo, Agreement*. Debtor was to make monthly alimony payments in the amount of $4,500 to Defendant for a 48-month period from the date of the divorce. *Id.* The property division included, in relevant part, that Defendant would obtain exclusive use and possession of the North Decatur Property, and Debtor would quitclaim his interest in the North Decatur Property within 30-days of execution of the Agreement. *Id.* Defendant was to cover maintenance and fees on the property, including the mortgage payment. *Id.* In addition, Debtor was to pay Defendant $45,000, which was the outstanding mortgage balance on the property, within 6-months of "finalization of the parties' divorce." *Id.* On April 30, 2007, Debtor executed a Quitclaim Deed conveying his one-half interest in the North Decatur Property (the "Quitclaim Deed"). *PSOF* at ¶ 10. Defendant now had sole ownership of the North Decatur Property. *Id*. at ¶ 13. The approximate value of the property is $261,700. *Complaint*, ¶ 33; *DSOF*, Exhibit 9, p. 2.

Debtor did not make the payments as provided in the Agreement. *Pullen Depo, Contempt Order*; *DSOF*, ¶ 34. Instead, in the three years following the divorce (until August of

2010), Debtor and the Defendant lived together, ate meals together, went shopping together, took vacations together. *PSOF*, ¶ 15. Defendant disputes that they continued to engage in sexual relations with one another. *Id*. at ¶ 16; *DSOF*, ¶ 16(e). Defendant states the reasons they lived together was not based on fraud. *DSOF*, ¶ 27. Debtor engaged in sexual relations with women other than Defendant during this period. *Id.* at ¶¶ 16(d) & 31.

During this time, Debtor remained obligated on the mortgage for the North Decatur Property and made the mortgage payments and financed repairs on the North Decatur Property. *PSOF*, ¶ 18. Debtor also collected rental income, totaling $7,000. *Id.* Although Debtor and Defendant disagree as to the effect of Debtor's payments of the mortgage, repairs, and receipt of rents, they agree that Debtor did not make a payment to Defendant within 6-month of the divorce decree in the amount of $45,000. *DSOF*, ¶ 28.

With respect to the alimony obligation, Debtor and Defendant again disagree as to the effect of Debtor's actions, but they agree that Debtor did not formally make monthly $4,500 payments to Defendant until September of 2010. *Id.* at ¶ 34; *DSOF* ¶ 19. Around June of 2008, Accelerated Investments, a creditor of ASA, secured a garnishment on Debtor's personal bank account. *PSOF* at ¶ 20. To avoid the garnishment, Debtor began depositing paychecks from his new job into the Defendant's account. *Id*. at ¶¶ 19-20. Defendant then used funds deposited in her account to pay Debtor's expenses. *Id*. at ¶ 20; *DSOF*, ¶ R20 . This arrangement continued until August of 2010. *Id*. Defendant also had some income during this time from freelance work and inheritance. *PSOF*; *Contempt Hearing Transcript.*

On January 14, 2009, Debtor filed Chapter 7 bankruptcy. *PSOF* at ¶ 21. Debtor's testimony at the meeting of creditors revealed that he had quitclaimed the North Decatur Property to Defendant within two years of his Chapter 7 filing. Debtor's sworn testimony is

conflicting regarding where and with whom he lived following the divorce. At the meeting of creditors, Debtor testified under oath that he lived alone at the Freemanville Property. *Id*. at ¶ 23. Later, as part of a contempt proceeding brought by Defendant with respect to the divorce decree and Agreement, Debtor testified that he and Defendant lived together in the Freemanville Property before jointly relocating to another rental property. *Contempt Hearing Transcript*. After the contempt proceeding, Debtor testified as to the same facts regarding Debtor and Defendant living together at the respective properties, yet his testimony included that they lived together on and off and relocated to the rental property separately. *Pullen Depo*, pp. 22, 47 & 52. Debtor and Defendant lived together, in some form, until August of 2010. *PSOF*, ¶ 24.

On October 22, 2009, Defendant timely filed two claims in the bankruptcy case. *Id*. at ¶ 25. The first claim is for $45,000.00 and is based upon the division of property under the divorce decree ("Claim 14"). *Id*. at ¶ 25. The second claim is for unpaid alimony, also in the amount of $45,000.00 ("Claim 15"). *Id*. Defendant's claims predate the Contempt Hearing and Contempt Order.

About 4 years after the divorce and more than two and one-half years after Debtor's Chapter 7 filing, Defendant filed a motion for contempt in the Superior Court of Fulton County. *Id.* at ¶ 26. A two-day evidentiary hearing was held in which both the Debtor and Defendant testified and were cross-examined. *Contempt Hearing Transcript.* Part of Debtor's legal theory to defend the contempt action was to assert that the North Decatur Property was held by Defendant in a constructive trust and remained property of Debtor. *Id.*

The Superior Court ruled on the contempt motion on August 23, 2011, finding that the parties conduct warranted a determination under the equitable exception, not merely according to the Agreement adopted through the Divorce Decree. *Contempt Order*. Debtor had satisfied his

alimony obligation to the Defendant based on his financial support of Defendant in the 42-months following the divorce. *Id.* The Superior Court found that between July of 2008 and August of 2010, Debtor direct deposited his paychecks, totaling $278,641.39, into Defendant's individual bank account. *Id.* The Superior Court also found that after the parties separated in August 2010, Debtor made a lump sum payment of $27,000, described as representing the remaining six months of owed alimony -- months forty-three through forty-eight. *PSOF*, ¶ 27; *Contempt Order*. The Superior Court also determined that, post-divorce, Debtor had made $17,467 in mortgage payments and expended $4,062 in repairs on the North Decatur Property. *Id.* The Superior Court ruled that Defendant was entitled to a final settlement payment from Debtor in the amount of $30,471.00 to satisfy the property division portion of the Agreement. *Id.*

The findings in the Contempt Order included several relevant findings to this action: "[T]he uncontroverted evidence establishes that he parties' divorce action was orchestrated and agreed to by [Debtor and Defendant] to shield the parties' assets from [Debtor's] creditors. *Contempt Order*, p. 3. "The parties' financial and personal relationship continued unchanged after the divorce." *Id.* at p. 2. The Contempt Order contemplated the effect of Debtor's bankruptcy. Based on testimony, the Superior Court assumed Defendant would be entitled to an approximate $12,500 distribution from the estate. The Contempt Order, however, directs Defendant to "forward such payment to [Debtor] upon receipt." *Id.*, p. 4. The Contempt Order has not been appealed by Debtor or Defendant. *PSOF*, ¶ 28.

Defendant has filed a motion to correct and an amended motion to correct in the Superior Court. *DSOF*, Exhibit 8, Superior Court Pleadings.[1] In the motion to correct, Defendant asserts that the Contempt Order contains a clerical mistake as to the number of months debtor financially supported the Defendant. *Id.* She contends that the calculation is off by two months. Defendant also refers to an Amended Motion to Correct the Order, which was purportedly filed in February 2012, that takes issue with the factual findings in the Contempt Order in addition to the credit given to Debtor based on the admitted exhibits. *Id.* The parties agree that there has been no ruling by the Superior Court.

Defendant emailed Trustee, through his paralegal, regarding her proof of claims in September 2011. *PSOF*, ¶ 29; Declaration of Angela Ford. Defendant stated that Debtor had made the property settlement payment as ordered in the Contempt Order. The e-mail stated, "Please cancel my claim for this or send me a form to fill out if necessary." *Id.* The preceding sentence closed the first paragraph of a section entitled, "Claim for Property Settlement 45K." *Id.* Defendant now asserts that based on the miscalculation in the Contempt Hearing, she now disputes disallowing the Property Settlement Claim. *DSOF*, ¶ R29. Defendant asserts that the Superior Court erroneously determined the North Decatur Property mortgage payments by Debtor – a $1883 overstatement – and Debtor's repair expenditures – a $2,978 overstatement. *DSOF*, ¶ R28. The parties agree that Debtor made the $30,471 payment to Debtor as ordered by the Superior Court's Contempt Order. *PSOF, Declaration Angela Ford.* Defendant also opposes disallowing the Alimony Claim. Her motion and amended motion to correct assert that the Superior Court's calculation of the 48-month alimony period is off by two months. *Id.*

[1] Defendant includes the motion and amended motion but the pleadings are not signed and do not include a file stamp from the Superior Court.

The parties agree that the North Decatur Property is a single family residence used as a rental property. *PSOF*, ¶ 30. The rent generated from the North Decatur Property, to date, does not cover the aggregated expenses of the mortgage payments, property taxes and insurance. *PSOF* at ¶ 30; *DSOF* at ¶ R30(a). The North Decatur Property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. *PSOF* at ¶ 30.

## II. Summary Judgment Standard

In accordance with Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982). Once this burden is met, the nonmoving party cannot rely merely on allegations or denials in its own pleadings. Fed. R. Civ. P. 56(e). Rather, the nonmoving party must present specific facts that demonstrate there is a genuine dispute over material facts. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). The "[o]ne who resists summary judgment must meet the movant's affidavits with opposing

affidavits setting forth specific facts to show why there is an issue for trial." *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000); FED R. CIV. P. 56(e).

Where the nonmoving party bears the burden of proof at trial, the burden can be satisfied if the moving party demonstrates the absence of evidence supporting the nonmoving party's case. *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1259 (11th Cir. 2004). In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548 (1986).

At the summary judgment stage, the Court may not make credibility determinations or weigh evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The Court's only task at this stage is to assess whether "a genuine issue of material fact" remains for resolution at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 322–23.

**III. Discussion**

The undisputed facts entitle Trustee to an award of summary judgment. Defendant's arguments do not defeat Trustee's claims and the materials facts have not been placed in dispute under the summary judgment standard. Debtor's transfer of the North Decatur Property was made with the intent to hinder, delay or defraud his creditors. Defendant's arguments about the existing marital problems and her emotions regarding the divorce are not relevant under the legal standard of § 548(a)(1)(A). Trustee also established that he is entitled to sell the North Decatur Property, including Defendant's half interest, because the undisputed facts demonstrate that the benefit to the estate outweighs the detriment to Defendant. Further, the undisputed facts

demonstrate that the underlying basis for Defendant's property settlement and alimony claims have been satisfied. Although Defendant seeks a recalculation of the determinations made by the Superior Court in the contempt proceeding, she does not present admissible evidence for the court to consider.

### A. The undisputed facts establish that Debtor's execution of the Quitclaim Deed and transfer of his one-half interest in the North Decatur Property constitutes a fraudulent transfer under § 548(a)(1)(A).

Trustee seeks to avoid the transfer of Debtor's half interest in the North Decatur Property under 548(a)(1)(A) as an actual fraudulent transfer. Trustee is entitled to judgment as to this claim based on the undisputed facts.

The trustee established each of the elements of Bankruptcy Code Section 548(a)(1)(A)[2]:

> [t]he trustee may avoid any transfer ... of an interest of the debtor in property ... incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition if the debtor voluntarily or involuntarily ... (A) made such transfer ... with actual intent to hinder, delay, or defraud any entity to which the debtor was or became ... indebted.

11 U.S.C. § 548(a)(1)(A).

#### 1. The Quitclaim Deed constitutes a transfer of property of the Debtor.

The undisputed facts support that the Quitclaim Deed represents a transfer of debtor's property. Debtor purchased the North Decatur Property in 1986 or 1987 before he was married. After Debtor and Defendant married, Debtor transferred a one-half interest in the North Decatur

[2] The parties' briefs include arguments regarding Defendant's insider status. There is a two-year reach back period under this statute that became effective October 17, 2006, which was 1-year after the October 17, 2005 enactment date of the Bankruptcy Abuse Protection and Consumer Protection Act. (Pub.L. No. 109–8, 119 Stat. 23 (April 20, 2005)). The facts and argument regarding Defendant's alleged insider status are not relevant to this claim.

Property to the Defendant. Debtor still owned the remaining one-half interest in the North Decatur Property until he transferred his interest to Defendant on April 30, 2007 by Quitclaim Deed, as provided by the Divorce Agreement.

The Quitclaim Deed constitutes a transfer of Debtor's interest in the North Decatur Property, as defined in 11 U.S.C. § 101(54). The effect of the Quitclaim Deed was that Debtor no longer held a one-half interest in the North Decatur Property. Defendant became the sole owner. Defendant asserts that the Quitclaim Deed is not an avoidable transfer because such transfer was made pursuant to the Dissolution Agreement. Yet, for the purposes of Code Section 548, "transfers" include the execution of a quitclaim deed as part of a divorce agreement. *E.g.*, *In re Knight,* 473 B.R. 847, 848 (Bankr. N.D. Ga. 2012) (assessing transfer pursuant to divorce decree under § 548(a)(1)(B) and whether there was reasonably equivalent value given in exchange). "Section 548 does *not* explicitly except from the Trustee's avoiding powers under it any transfer made pursuant to separation agreements, property settlements or divorce decrees." *In re Lange*, 35 B.R. 579, 583 (Bankr. E.D. Mo. 1983).

The Trustee has satisfied the first two elements of an actual fraudulent transfer claim: that a transfer occurred and that the transfer was property of the debtor.

**2. Debtor transferred his one-half interest in the North Decatur Property within two-years before the petition date.**

The Quitclaim Deed was executed within two-years before the petition date. Under Code Section 548, the trustee may avoid certain transfers made within two-years before the petition date. 11 U.S.C. §548(a)(1). Here, that Debtor filed the chapter 7 petition on January 14, 2009. The undisputed facts also show that on April 30, 2007, Debtor, by executing the Quitclaim Deed, transferred his one-half interest in the North Decatur Property to Defendant. Because the

execution of the Quitclaim Deed on April 30, 2007 is within two-years of the January 14, 2009 filing date, the Trustee has satisfied this temporal element of the actual fraudulent transfer claim.

**4. Debtor transferred the North Decatur Property with the intent to hinder, delay, or defraud creditors.**

The undisputed facts establish that Debtor's transfer of the North Decatur Property by Quitclaim Deed was made with the intent to hinder, delay, or defraud creditors. Although it is unusual to have actual admissions in the record, Debtor's sworn statements make out the required intent element under § 548(a)(1)(A). Intent is a question of fact that may be admitted. *In re Krepps*, 476 B.R. 646, 650 (Bankr. S.D. Ga. 2012) (citing s*ee In re Wines*, 997 F.2d 852, 856 (11th Cir. 1993) ("[W]hether the debtor had the requisite wrongful intent is a question of fact.").

The undisputed facts in the record include sworn statements from Debtor regarding his intent to protect the North Decatur Property from creditors. Debtor's testimony at the contempt proceeding included statements that the transfer of the property to Defendant would better protect the property for the long-term. Debtor explained that placing the North Decatur Property in Defendant's sole name "seemed to be the best way to protect the North Decatur Property." *Contempt Hearing*, p. 104; *Pullen Depo*, pp. 26-30. In fact, Debtor advanced a constructive trust theory in the contempt proceeding, asserting that Defendant held the property in trust for him. Debtor testified that "[t]he understanding between Ms. Love and myself was that North Decatur truly was my property . . . ." *Contempt Transcript*, p. 65, lines 16-17. The Superior Court ruled that, "[T]he uncontroverted evidence establishes that he parties' divorce action was orchestrated and agreed to by [Debtor and Defendant] to shield the parties' assets from [Debtor's] creditors.

*Contempt Order*, p. 3. Although it is unusual to have actual admissions in the record, Debtor's undisputed statements make out the required intent element under 548(a)(1)(A).

Defendant asserts that Debtor's sworn statements in the record create factual issues. She contends that since Debtor's testimony from the Contempt Hearing and the later deposition testimony are inconsistent, then there is a material dispute of fact. This is not the relevant standard for summary judgment. Defendant's burden as to her own motion on the fraudulent transfer claim is to show that Trustee failed to make out an element of the claim. Defendant may also defend Trustee's claim by putting material facts at issue by submitting admissible evidence. Although Debtor's deposition statements vary from his more precise statements at the Contempt Hearing, there is no material dispute as to his intent to transfer the North Decatur Property. There is no admissible evidence in the record to refute or dispute his statements he transferred his one-half interest in the North Decatur Property to Defendant through the divorce decree to protect the property from his creditors. Defendant cannot rely on the presumed or inferred motive of Debtor to defeat Trustee's motion for summary judgment.

Defendant also argues that there is no evidence that she sought to hinder, delay, or defraud creditors. She contends that she had no intent to defraud creditors. In a fraudulent transfer action, Defendant's intent is not relevant. "[F]or the purposes of avoidance pursuant to § 548 the transferee's good faith or lack of it does not matter." *Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406, 451 (S.D.N.Y. 2001). The inquiry as to intent rests solely with the debtor under the statutory language.

Defendant also seeks to contest Trustee's claim on the basis that the marriage and divorce were not a "sham." Although the Superior Court made certain finding regarding the divorce, this Court's inquiry is limited to the transfer and Debtor's intent. Defendant attempts to assert that

she had good cause to seek a divorce. Defendant's intent, actions, and emotions are simply not relevant. The divorce itself is not relevant to this Court. Rather, Debtor's intent in transfering his property is the sole inquiry. Debtor's sworn statements satisfy the intent element.

Alternately, because typically a debtor's actual intent to defraud creditors is not provided in direct evidence, courts look to a variety of factors, referred to as the "badges of fraud," to infer the intent of the debtor. *Kipperman v. Onex Corp.*, 411 B.R. 805, 853 (N.D. Ga. 2009) (citing *XYZ Options, Inc.*, 154 F.3d 1262 (11th Cir. 1998). When direct proof of debtor's fraudulent intent is unavailable, it may be inferred from the circumstances surrounding the transfer. *In re XYZ Options, Inc.*, 154 F.3d 1262, 1271 (11th Cir. 1998). "In determining whether the circumstantial evidence supports an inference of fraudulent intent, courts should look to the existence of certain badges of fraud." *Id*. These badges of fraud include: "[a] close relationship between the transferor debtor and the transferee, *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1499 (11th Cir. 1997); debtor's retention of possession and control of the transferred property, *In re XYZ Options, Inc.*, 154 F.3d at 1272; and debtor's exhibiting a pattern of avoiding creditors, *Soza v. Hill (In re Soza)*, 542 F.3d 1060, 1067 (2008). Additionally, "[a] badge of fraud may be defined to be any circumstance which tends to raise justifiable suspicion of fraud." *Kipperman*, 411 B.R. at 853. "While no one badge is sufficient to establish fraudulent intent, the confluence of several can constitute conclusive evidence of an actual intent to defraud." *Laddin v. Edwards*, 2006 WL 1097491 (N.D. Ga. Apr. 21, 2006)(internal quotation omitted).

The close relationship between Debtor and Defendant gives rise to a badge of fraud. A badge of fraud exists where there is a close relationship between the transferor debtor and the transferee. *Gen. Trading Inc.*, 119 F.3d at 1499; *see also Banner Const. Corp. v. Arnold*, 128 So.

2d 893, 896 (Fla. Dist. Ct. App. 1961) ("The recognized indicia or badges of fraud include the fact that the parties to the disputed transfer are related, one to the other, by blood or marriage."); *In re Ingersoll*, 124 B.R. 116, 122 (M.D. Fla. 1991)(transfer between a father and son amounts to a badge of fraud). In *Harper*, the court affirmed a finding that a badge of existed fraud where the transferee was debtor-transferor's ex-wife. *Harper v. United States*, 769 F. Supp. 362, 367 (M.D. Fla. 1991). Here, Debtor and Defendant had a close personal relationship because they continued to live together post-divorce. They agree that they ate meals together, went shopping together, and took vacations together. *PSOF* at ¶¶ 15-16. Further, like in *Harper*, Defendant is the ex-wife of Debtor.

Debtor's retention of control over the North Decatur Property following the transfer through the quitclaim deed also gives rise to a badge of fraud. *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 4, 709 S.E.2d 267, 270 (2011) (upholding a finding of a badge of fraud where the transferor "remained in possession or control of the transferred assets" following the transfer). Despite the terms of the Divorce Agreement, Debtor continued to pay the mortgage, retain the mortgage in his name, make repairs and collect rents on the property.

Debtor's pattern of creditor avoidance also gives rise to a badge of fraud. *In re Soza*, 542 F.3d at 1067 (2008) ("[T]he existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors" gives rise to a badge of fraud.); *In re Bayou Grp., LLC*, 439 B.R. 284, 308 (S.D.N.Y. 2010)(noting that a pattern of conduct "giv[es] rise to a further inference of fraudulent intent"). First, debtor admits that he transferred the North Decatur Property because "that seemed to be the best way to protect the North Decatur Property" from the reach of his

creditors. *PSOF,* ¶ 11. Second, debtor deposited his paychecks into the Defendant's individual account "to evade [a] creditor's garnishment." *Id.* at ¶ 20.

Defendant disputes Trustee's arguments regarding the badges of fraud based upon her own intent and the "sham" characterization of the divorce. As discussed above, these determinations are not legally relevant to Trustee's § 548(a)(1)(A) claim. Defendant also asserts that she contributed to maintenance and Debtor's expenses post-divorce. Again, those facts are not relevant to this determination. Defendant concedes the material facts – she and Debtor continued to have a close relationship post-divorce; Debtor continued to service the mortgage on the North Decatur Property, although he was not required under the Divorce Agreement; Debtor collected rents on the North Decatur Property after he had no ownership interest in the property; and Debtor's intent to deposit his funds into her account was to avoid the garnishment.

The undisputed facts entitle the Trustee to judgment as a matter of law as to the fraudulent transfer count. The Quitclaim Deed constituted a transfer of the Debtor's property within two years of the bankruptcy. Debtor's actual intent to hinder, delay, or defraud creditors requirement is met here because Debtor testified under oath to having this intent in executing the Quitclaim Deed. In the alternate, Debtor's conduct conforms to the badges of fraud which allow the Court to infer, as a matter of law, Debtor's actual intent to hinder, delay or defraud creditors.

**B. The Trustee may recover a one-half interest in the North Decatur Property.**

Under § 550, the Trustee may recover the one-half interest in the North Decatur Property that Debtor conveyed to the Defendant in the Quitclaim Deed. Section 550 provides that a trustee may recover the property transferred from the defendant if (1) the defendant was the initial transferee, and (2) the transfer is avoidable under Code Section 548. 11 U.S.C. §550. Both elements have been satisfied by the undisputed facts.

### C. Trustee may sell the North Decatur Property pursuant to Code Section 363(h).

Trustee seeks to sell the entirety of the North Decatur Property, notwithstanding the Defendant's one-half interest in the North Decatur Property. Under Code Section 363(h),

> "[t]he trustee may sell both the estate's interest . . . and the interest of any co-owner in property in which debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, a joint tenant, or tenant by the entirety, only if (1) partition in kind . . . is impracticable; (2) sale of the estate's undivided interest in such property would recognize significantly less value for the estate than sale of such property free of the interests of such co-owners; (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power."

11 U.S.C. §363(h). Trustee bears the burden of proof in establishing each element in § 363(h). *Accord In re McDow*, 248 B.R. 466, 469 (Bankr. M.D. Fla. 2000).

Section 363(h) was enacted by Congress to "facilitate the bankruptcy goal of effective distribution of the property of the bankruptcy estate by the trustee ." *In re Hatfield*, 2009 WL 7751435 (B.A.P. 9th Cir. Mar. 17, 2009) (quoting *Coan v. Bernier (In re Bernier)*, 176 B.R. 976, 985–86 (Bankr. D. Conn.1995)). It "makes significant changes in what constitutes property of the estate.... These changes will bring anything of value that the debtors have into the estate ... for a coherent valuation of its value and transferability, and then to dispose of it for the benefit of debtor's creditors." *Id.* (citing H.R.Rep. No. 595, 95th Cong.2d Sess. 175–75 (1977) reprinted in 1978 U.S.C.C.A.N. 5963, 6136–37 (1977)).

As a threshold matter, Trustee must establish that at the time of the commencement of the case, Debtor had an undivided interest in the North Decatur Property. Here, the avoidance and recovery action is the basis for establishing that Debtor had an undivided interest in the property at the time Debtor's bankruptcy case was filed. At the time of Debtor's chapter 7 filing,

Defendant held sole title to the North Decatur Property based on the Quitclaim Deed that was executed pursuant to the Divorce agreement.

The commencement of a bankruptcy case creates an estate, including all legal and equitable interests of the debtor in property as of the commencement of the case 11 U.S.C. § 541 (a)(1) and any interest in property that the trustee recovers for the benefit of creditors by avoiding a fraudulent transfer. 11 U.S.C. § 541(a)(3). "A trustee has the power to sell under § 363(h) property of the estate by reason of avoidance of a prepetition fraudulent transfer." *In re Addario*, 53 B.R. 335, 337 (Bankr. D. Mass. 1985) (citing *In re Brown*, 33 B.R. 219 (Bankr. N.D. Ohio 1983)). "Section 363(h) applies to property that a trustee recovers under the Bankruptcy Code's avoiding powers." *In re Phillips*, 379 B.R. 765, 795 (Bankr. N.D. Ill. 2007). Here, based on the successful avoidance of the Quitclaim Deed, the bankruptcy estate includes Debtor's undivided one-half interest in the North Decatur Property subject to sale under § 363(h).

**(1) Partition in kind is impracticable**

The first requirement of Code Section 363(h) is that partition in kind of the North Decatur Property is impracticable. 11 U.S.C. §363(h). "Where property is a single family residence, there is no practicable manner of partition other than a sale and division of the proceeds." *E.g.*, *In re Leonard*, 418 B.R. 477, 489 (Bankr. S.D. Fla. 2009) (quoting *In re Griffin*, 123 B.R. 933, 935 (Bankr. S.D. Fla. 1991)). There is no dispute that the North Decatur Property is a single family residence. There is no evidence or argument in the record that this property can be subdivided. Accordingly, Defendant does not deny that the North Decatur Property is a single family home or that partition in kind is not practicable. The first element of §363(h) is therefore satisfied.

**(2) Sale of the estate's one-half interest in the North Decatur Property would recognize significantly less value for the estate than sale of the property free of the interest of the Defendant.**

The second element the Trustee must prove under § 363(h) is that the sale of the estate's one-half interest in the North Decatur Property would recognize significantly less value for the estate than sale of the property free of the interest of the Defendant. 11 U.S.C. §363(h). It is widely accepted that a sale of a single family residence subject to a co-owners one-half interest in such property "chills any prospective purchase of the estate's one-half interest," and the estate would realize more value from the sale of [the co-owner's interest]" along with that of the estate. *In re Baldwin*, 2007 WL 4414870 (Bankr. S.D. Fla. Dec. 14, 2007); *accord In re Ziegler*, 396 B.R. 1, 4 (Bankr. N.D. Ohio 2008); *Maxwell v. Barounis (In re Swiontek)* 376 B.R. 851, 866 (Bankr. N.D. Ill.2007).

Trustee asserts that most or all of the benefit to the estate would be eliminated if the Trustee were unable to sell Defendant's one-half interest in the North Decatur Property along the estate's. Defendant does not deny that the sale of the estate's one-half interest in the North Decatur Property would recognize significantly less value for the estate than sale of the entire property, and, therefore, the second element of Code Section 363(h) is satisfied. *See id.*

**(3) Benefit to the estate of a sale of the North Decatur Property free of the interest of the Defendant outweighs the detriment to the Defendant.**

The third requirement of § 363(h) is that the benefit to the estate of a sale of the North Decatur Property free of the interest of the Defendant outweighs the detriment to the Defendant. 11 U.S.C. §363(h). This prong requires a balancing of the estate's benefit and the co-owner's

detriment, but does not require that the estate's benefit significantly exceed the co-owner's detriment. *In re Calumet Farm, Inc.*, 150 B.R. 664, 675 (Bankr. E.D. Ky. 1992).

The estate would benefit from the sale of the entire North Decatur Property free of the Defendant's interest. Defendant does not dispute that the North Decatur Property has value. Instead, Defendant alleges that the estate would not benefit from the sale of the entire North Decatur Property because the sale "would likely only pay the Trustee's administrative and legal fees, if that, instead of the estate's creditors." *DSOF*, ¶ R30(f). Defendant's assertion, however, is not supported by admissible evidence. The Court's duty is to weigh the benefit to the estate against the prejudice to Defendant in accordance with the summary judgment standard.

In considering the detriment to a co-owner of the sale of the property, the court must consider "not only economic hardship, but also any loss, harm, injury, or prejudice proximately following from an involuntary displacement." *In re Baldwin*, 2007 WL 4414870 (Bankr. S.D. Fla. Dec. 14, 2007); *In re Griffin*, 123 B.R. 933, 936-37 (Bankr. S.D. Fla. 1991) (holding that the benefit to the estate of a sale of property did not exceed the detriment to a co-owner in part because "the economic and emotional impact resulting from the co-owner's involuntary displacement from her residence of almost fourteen years would be severe"); *In re Persky*, 893 F.2d 15, 20-21 (2d Cir. 1989) ("[I]n valuing detriment to the co-owner, § 363(h)'s balancing test should include non-economic factors.").

Here, the detriment to Defendant is not the loss of her home, but the loss of a rental property that does not generate net positive income. Although the non-economic factors are considered, including Defendant's purported reliance on the North Decatur Property for her own financial stability, in cases involving property that is not the co-owner's homestead, however, pure economic considerations are more influential. *See In re Calumet Farm, Inc.*, 150 B.R. at

675 (holding that a co-owner's professed affectation for a stallion, property that is obviously not the co-owner's homestead, "is not at all persuasive" in considering whether the benefit to the estate of the sale of the stallion exceeds the detriment to the co-owner); *56 Assoc. v. Diorio*, 381 B.R. 431, 438 (D.R.I. 2008).

Under Defendant's own analysis there remains a substantial benefit to the estate. Defendant provides a 2012 tax assessment for the North Decatur Property, valuing it at $261,700. She asserts that comparable sales in the area would result in a maximum sale of $250,000. The outstanding mortgage balance is in the approximate amount of $28,000. Although Defendant asserts that she has obtained a line of credit secured by this property, she has not successfully demonstrated that such line of credit would substantially diminish the value realized from a sale for the benefit of the estate. Further, the arguments regarding the line of credit are not in the form of admissible evidence and there are no particulars regarding the line of credit in the record, such as the date it was obtained, the outstanding balance, the use of funds obtained. So, no legal determination can be made as to whether the estate has a legal obligation to satisfy the line of credit asserted by Defendant and whether the line of credit affects the benefit to the estate. Defendant also asserts that there is an existing $11,000 attorney lien on the property, again, without particulars or admissible evidence.

Trustee objects to Defendant's assertions under Rule 56(c)(2) and the objection is well taken. Further, Defendant's analysis regarding the lack of value for the estate also undercuts her own assertions that she relies upon the equity in the property for her financial stability. Trustee has established the relevant elements and Defendant's concerned regarding the purported liens on the property has not overcome the benefit to the estate outweighing the detriment to co-owner, Defendant.

Here, the North Decatur Property is a rental property, but is not a source of income for the Defendant because "the aggregate sum of the mortgage payments, property taxes and insurance costs . . . exceeds any income" received from renting out the property. *PSOF, Gordon Declaration*; *DSOF* ¶ R30(a). Defendant does not contest this fact, she merely explains that she could rent the North Decatur Property at a profit and the uncertainty of the status of the Property has contributed to the lack of income it has generated. *DSOF*, Exhibit 9, p. 6-7. If loss of a viable income stream was an insufficient detriment in *56 Assoc. v. Diorio*, then loss of a rental property that is not a source of income is certainly insufficient to outweigh the benefit to the estate of the sale of the North Decatur Property in its entirety. *56 Assoc. v. Diorio*, 381 B.R. at 437.

Finally, Defendant has the safeguard of being able to purchase the estate's one-half interest in the Property. Bankruptcy Code Section 363(i) protects co-owners by giving them a right of first refusal to purchase property sold under this section. 11 U.S.C. § 363(i) (**"**Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, . . . a co-owner of such property . . . may purchase such property at the price at which such sale is to be consummated."); *See In re Ivey*, 10 B.R. 230, 233 (Bankr. N.D. Ga. 1981) (holding that the benefit to the estate of a proposed sale "far outweighs" any detriment to the co-owner because the co-owner "would be entitled to purchase, the property at the proposed sale and, given the significant amount of equity in the property, new financing should be available for that purpose"); *In re Baldwin*, 2007 WL 4414870 (trustee's sale of property under Bankruptcy Code Section 363(h), after an additional 45 day waiting period for the co-owner to find a new home, was "the most equitable [outcome] to all parties" because co-owner will still have a right of first refusal to retain her home). The Defendant's right of first refusal to purchase the estate's interest

in the North Decatur Property further mitigates the detriment to the Defendant. The benefit to the estate of the sale of the North Decatur Property free of the Defendant's interest therefore outweighs the detriment to the Defendant.

On balance, the benefit to the estate of a sale of the North Decatur Property free of the interest of the Defendant outweighs the detriment to the Defendant because the North Decatur Property is not the Defendant's homestead and does not provide a source of income for the Defendant.

**(4) North Decatur Property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.**

The fourth requirement of Code Section 363(h) is that the property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. 11 U.S.C. §363(h). It is undisputed that the North Decatur Property meets this requirement. The fourth and final element of Code Section 363(h) is therefore satisfied. Trustee is awarded judgment to seek a sale free of Defendant's interest.

### D. Claims 14 and 15 are disallowed because their underlying obligations have been fully satisfied.

Trustee also moves for judgment regarding the disallowance of Defendant's claims 14 and 15. Claim 14 is a claim for an amount owed by Debtor to the Defendant as part of the property settlement portion of the Divorce Agreement. Claim 15 is a claim for Debtor's alimony obligation under the Divorce Agreement.

Defendant's claims were filed in this case based upon the Agreement. Defendant subsequently initiated contempt proceedings in the Superior Court and an Order was entered. The Order determined that the circumstances of Debtor's and Defendant's divorce and post-

divorce life required an analysis outside of the terms of the Agreement and, instead, based on equity. *Contempt Order*, p. 3.

Trustee concedes that he cannot assert claim or issue preclusion in this instance to preclude relitigation of these issues because he was not a party to the contempt proceeding and under applicable Georgia law there must be an identity of parties in the present and prior action. *Community State Bank v. Strong*, 651 F.3d 1241, 1263-64 (11th Cir. 2011). However, the facts and determinations in the Superior Court remain facts in this proceeding. Defendant can put the findings of the Superior Court in dispute based upon the summary judgment standard of presenting specific facts with the required support. FED. R. CIV. P. 56(c).

Bankruptcy courts are also directed to afford a great deal of deference to Superior Courts in matters of divorce. *Carver v. Carver*, 954 F.2d 1573, 1579 (11th Cir. 1992)(quoting *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985)) ("It is appropriate for bankruptcy courts to avoid incursions into family law matters 'out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.'").

**(1) Defendant's property settlement claim for $45,000 (Claim 14) is disallowed because Debtor's property settlement obligation under the Divorce Agreement has been fully satisfied.**

Defendant filed a timely $45,000 property settlement priority claim. The Superior Court determined in the Contempt Proceedings that the parties' conduct required an equitable determination as to the amounts owing or outstanding, instead of enforcing the Agreement as executed. The Superior Court considered two days of testimony and evidence to determine that Debtor had made $17,467 in mortgage payments and $4,062 in repairs on the North Decatur Property. The Superior Court ordered that Debtor make a $30,471 payment to Defendant to fully satisfy his property settlement obligation to Defendant.

Trustee asserts that Defendant consents to the disallowance of claim based on correspondence with Trustee's paralegal. Defendant, in an email to Angela G. Ford, paralegal for the Trustee's Counsel, dated September 29, 2011, stated that "[t]he proof of claim for the Lump Sum Payment of [$]45K Property settlement that I filed has been satisfied . . . Please cancel my claim for this or send me a form to fill out if necessary." *PSOF, Declaration of Angela G. Ford*, p. 1, 4. Defendant also admits that her property claim has been satisfied in her answer. The parties agree that Debtor made the $30,471 payment pursuant to the Contempt Order. In her Answer, Defendant admits that Claim 14 has been satisfied and that she requested that the proof of claim be cancelled. Docket No. 6, ¶ 39. Defendant has not moved to amend or withdraw her admission.

Defendant's opposition and motion is not based upon any denial of her stated consent – in her answer and through written correspondence – but based upon a purported miscalculation by the Superior Court, which totals $4861.[3] Defendant includes voluminous calculations and spreadsheets that are purported to show the allocation of expenses and payments made by herself and Debtor. Trustee objects to these statements, assertions, and exhibits as non-admissible evidence under Rule 56(c)(2). Defendant also includes in support of her motion for summary judgment a motion to correct and an amended motion to correct that were purported filed in the Superior Court under O.C.G.A. § 9-11-60(g). *DSOF*, Exhibit 9. Neither the motion nor the amended motion are signed or file stamped by the Superior Court. The parties agree, however, that no appeal of the Contempt Order was taken and no ruling has been made on Defendant's motion or amended motion.

[3] Defendant asserts that the Superior Court erred in determining the mortgage payments by $1883 and miscalculated the repairs by $2978. *DSOF*, Exhibit 8, p.30.

Trustee's objection to the admissibility of Defendant's calculations and self-made charts in support of the Superior Court purported miscalculations is well taken. Under Rule 56(e), the Court has discretion to consider the facts made by the Superior Court undisputed. FED. R. CIV. P. 56(e)(2). Trustee may disallow this claim because the undisputed facts demonstrate that the underlying property settlement obligation has been fully satisfied. Given the deference prescribed to the courts determining family law matters, the evidence taken, the detailed findings in the Contempt Order, the fact that no appeal was taken, and Defendant's existing admissions on the record, Trustee has satisfied his burden that there is no material dispute of fact. Defendant's ability to seek additional sums from Debtor should the Superior Court rule on her motion to correct is not affected by this Order.[4]

**(2) Defendant's $45,000 alimony claim (Claim 15) is disallowed because Debtor's alimony obligation has been fully satisfied.**

The Superior Court has already considered the issue of whether Debtor has satisfied his alimony obligations to Defendant under their Divorce Agreement. The Superior Court held:

> "[Debtor's financial support of [Defendant] satisfies the balance of his obligation to pay alimony during the forty-two (42) months that the parties continued to live together post-divorce. It would be inequitable to require [debtor] to pay for support he has already provided to [the Defendant]. [Debtor] has satisfied the remaining six (6) months of his obligation to pay alimony to petitioner by the payment of $27,000, representing months forty-three (43) through forty-eight (48) of the post-divorce alimony period at $4,500 per month."

*Contempt Order*, p. 3. Again, Defendant asserts that the Superior Court's determination as to the number of months the Debtor and Defendant lived together post-divorce is 40 instead of 42 and

[4] Under O.C.G.A. § 9-11-60, clerical mistakes in orders "may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." *See Brannon v. Trailer Craft Mfg. Co.*, 130 Ga. App. 766, 204 S.E.2d 477, 478 (1974)(holding a mathematical error on the face of the judgment "could be amended at any time so as to speak the truth").

she asserts this position in the motion and amended motion to correct, which are presented to this Court unsigned and without a file stamp. Again, the parties agree no appeal has been taken by either party in the Superior Court and no ruling has been made on Defendant's purported motions.

Here, the undisputed facts are the Contempt Order, which uses equitable grounds to determine that Debtor's alimony obligation to Defendant was fully satisfied. Since the Superior Court made determinations outside of the Agreement and since the parties' divorce is not within the jurisdiction of this court, there is no basis to wade into the monthly calculation by the Superior Court because Defendant does not present admissible evidence to advance her argument.

Accordingly, for the reasons stated herein, it is

**ORDERED** that Trustee's Motion for Partial Summary Judgment is hereby **GRANTED** as to Counts One, Two, Three, and Count Four.

It is **FURTHER ORDERED** that Defendant's Motion for Partial Summary Judgment is **DENIED**.

A separate judgment in favor of Trustee will be entered contemporaneously with this Order.

The Clerk is directed to serve a copy of this Order to the parties on the attached distribution list.

**END OF DOCUMENT**

**Distribution List**

Lisa D. Love
P.O. Box 3237
Alpharetta, GA 30023-3237

Lisa D. Love
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