Exhibit A

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New York Supreme Court

Appellate Division – First Department

No. 2020-05046

ARTHUR WONG,

Plaintiff-Appellant-Respondent,

- against -

YU DAN WONG,

Defendant-Respondent-Appellant.

- and -

KENNETH WONG,

Defendant.

BRIEF OF *AMICI CURIAE*
HER JUSTICE INC. AND SANCTUARY FOR FAMILIES
IN SUPPORT OF DEFENDANT-RESPONDENT-APPELLANT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Her Justice. Since 1993, Her Justice has been dedicated to making a real and lasting difference in the lives of women living in poverty in New York City, many of whom are victims of gender-based violence, by offering them legal services designed to foster equal access to justice and an empowered approach to life. Her Justice recruits volunteer attorneys from New York City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. In 2020 alone, Her Justice provided advice and counsel, assistance with court documents, and legal representation in the areas of family, matrimonial and immigration law to more than 6,900 women and children living in poverty in New York City. Based on its clients' experiences, Her Justice also works to reform the civil justice system in order to produce the most favorable outcomes for women similarly situated to Her Justice's clients, through processes that are as equitable, empowering, and efficient as possible.

Sanctuary for Families. Sanctuary for Families ("Sanctuary") is the State of New York's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of

gender violence. Every year, Sanctuary provides legal, clinical, shelter and economic empowerment services to thousands of survivors and their children. Sanctuary provides training on domestic violence and trafficking to community advocates, pro bono attorneys, law students, service providers and the judiciary. Sanctuary also represents survivors—the vast majority of whom are low-income women—in connection with custody, visitation, child support, family offense, and child abduction cases.

Together, amici have a strong interest in ensuring that women in New York, particularly those with limited means and those who are the victims of domestic violence, have access to fair, efficient, and equitable matrimonial proceedings. Amici know from experience that it is critical for such individuals to have access to civil remedies, particularly where they have been the victims of financial abuse at the hands of a former spouse. Amici urge this Court to reject Appellant Arthur Wong's arguments regarding res judicata because the alternative would result in lasting damage to vulnerable victims and their families.

PRELIMINARY STATEMENT

Amici Her Justice and Sanctuary for Families support Ms. Wong in this appeal. Amici submit this separate brief, however, to explain why the arguments advanced by Arthur Wong ("Arthur") pertaining to res judicata are meritless. While Arthur has plainly waived those arguments by not raising them below, Amici seek to demonstrate why, in their experience, his arguments are inconsistent with the law and would be harmful to vulnerable women and families in New York.

First, Arthur cannot invoke res judicata because he was neither a party to the matrimonial proceeding nor in privity with the parties, Ms. Wong and Kenneth Wong ("Kenneth"). It is undisputed that Arthur never intervened in the divorce proceeding and, instead, attempted to assert his own interests as a non-party. As Ms. Wong has not yet had the opportunity to assert her fraudulent conveyance counterclaims against Arthur, those claims should proceed.

Second, the circumstances underlying Ms. Wong's claims of fraudulent conveyance—the intentional transfer of Kenneth's apartment shares without fair consideration in 2012—are simply not the "transactions" giving rise to the equitable distribution of Ms. Wong's

marital property in 2019. The apartment shares were never put up for equitable distribution as marital property because they were gifted from Arthur to Kenneth without consideration in 2004, and thus constituted separate property. In any event, Supreme Court's determination as to the equitable distribution was based on weighing an array of factors, *none* of which included the fraudulent conveyance to Arthur in 2012. In addition, Supreme Court resolved claims in the marital proceeding that implicate different procedural rules and remedies from fraudulent conveyance claims in civil actions. As a result, it would be difficult, if not impossible, to litigate both actions together.

Third, holding that Ms. Wong's fraudulent conveyance claims are barred by res judicata would have disastrous consequences for vulnerable women and survivors of domestic violence. Requiring fraudulent transfer counterclaims to be brought in a matrimonial proceeding (to the extent that is feasible), would complicate and prolong such proceedings and delay resolution of vital issues like child support and custody. That would be inequitable to thousands and thousands of vulnerable women.

STATEMENT OF THE CASE

A. Arthur Lets Kenneth and Ms. Wong Live In his Apartment

In 1983, Arthur was granted shares of stock in Hillman Housing Corporation, a cooperative company, entitling Arthur to ownership and possession of an apartment in Chinatown, Manhattan. (R. 38, 41-43, 68-71, 336.) Several days later, his younger brother, Kenneth, who was "heavy into drugs" such as heroin and marijuana, and had recently served ten years in prison for robbery, gang activity, and drugs, moved into the apartment. (R. 44-48, 51-53, 286, 315-316, 322-323, 359-360, 638; *see* R. 483-484.) According to Arthur, the brothers came to a "verbal agreement" that Kenneth would pay monthly rent, consisting of half the fees to Hillman. (R. 39-41, 48-49.) Kenneth paid the rent in cash. (R. 41.)

Many years later, in 1996, Kenneth traveled to China with his parents to "search[] for a wife." (R. 75, 557.) While there, he met Ms. Wong through a relative's business partner. (R. 74-75, 557.) Ms. Wong was living with her family, including her father, a farmer. (R. 316.) Kenneth did not tell Ms. Wong about his criminal history, but he told her that she could come to America because he owned the apartment and she could live with him there. (R. 77-78, 315, 322-323, 557.)

The next year, Ms. Wong moved from China to the United States to live with Kenneth. (R. 39, 75.) After their marriage, Ms. Wong began learning English and found employment in "quality control." (R. 73-74, 340-341.) According to Ms. Wong, Kenneth insisted that Ms. Wong store jewelry she had been given in his safe deposit box, and failed to return some of the jewelry when she asked that it be returned. (R. 516-517.) Kenneth also generally handled financial dealings. (R. 346, 516-517.) They eventually came to an arrangement that Kenneth would pay the bills, while Ms. Wong would pay for food. (R. 344-348.) After marrying Ms. Wong, Kenneth revealed that Arthur owned the apartment, but said Arthur did not want it and was happy to let them live there. (R. 77-78.)

B. Arthur Gifts Partial Ownership to Kenneth

Kenneth and Ms. Wong had a child in 1999. (R. 173, 528.) Because they were running out of space, Kenneth told her that he would sell the apartment and buy another one for their family. (R. 343.)

In 2004, Arthur made Kenneth a "co-owner" of the co-op shares, with the right to sole ownership if Arthur passed away. (R. 142-143, 153-158.) Pursuant to a contract, Hillman issued a certificate "certify[ing] that Arthur Wong and Kenneth Wong [were] the owner(s) of [the]

shares." (R. 171.) According to Ms. Wong, Arthur gave the apartment to Kenneth because he neither wanted nor needed it, as he owned another house in Queens. (R. 40, 78, 328-331, 341, 557.) Arthur now maintains, however, that the transfer was solely to permit Kenneth to "gain access to the facilities and the benefits" such as the gym. (R. 57-59, 82.)

C. Kenneth Fraudulently Returns Shares to Arthur

Ms. Wong lived with Kenneth for eight more years. (R. 32.) During that time, Kenneth beat her and their daughter on many occasions. (R. 233, 236, 557.) Kenneth claimed that his daughter's black and blue marks were "from mom's makeup." (R. 332.) In the spring of 2012, for example, he physically abused them. (R. 45-47, 236.) After the police were called, Kenneth was arrested and jailed. (R. 44-47, 360.) Rather than accept responsibility, Kenneth claimed he was "set up." (R. 46-47.)

The marriage between Kenneth and Ms. Wong eventually collapsed, and Ms. Wong obtained orders of protection excluding Kenneth from the apartment. (R. 83, 236, 557.) Kenneth told Arthur, "F-ck that b-tch [Ms. Wong], I cannot afford to be paying [for] two places." (R. 66-67.) He then stopped paying maintenance, even though Ms. Wong and

their daughter lived there, and Ms. Wong had been drifting between part-time menial jobs to make ends meet. (R. 66, 83, 558.)

Kenneth also retaliated against Ms. Wong by trying to place hundreds of thousands of dollars in cash beyond Ms. Wong's reach. In June 2012, for example, he withdrew $100,000 from a bank account and "used it to pay personal debts off." (R. 188, 517-518.) Of the nearly $100,000 left in the account after Kenneth withdrew the other $100,000, only $6,000 remains today. Kenneth also took out more than $100,000 from other bank accounts but cannot explain what happened to the missing funds—claims that courts have subsequently found to undermine his credibility. (R. 188-192, 517-518, 531-533, 537.)

In addition to withdrawing money, Kenneth and Arthur signed an agreement in December 2012 that removed Kenneth's name from the stock certificate and nominal ownership of the apartment, where Ms. Wong and her daughter were living. (R. 61-62, 164-165; *see* R. 180-184, 213-215.) Arthur paid no consideration. (R. 62, 181, 194.)

Once Kenneth's name was removed, Arthur sought to evict Ms. Wong from the apartment. In May 2013, he filed a holdover proceeding to remove her. (R. 174.) *See Wong v. Wong*, No. 65642/13 (Civ. Ct. N.Y.

County). Kenneth subsequently executed an affidavit aiding him, claiming that Arthur had been the sole owner of the apartment and could evict her because she could not "claim any ownership in the [shares] under the guise of their somehow being marital property." (R. 127.)

D. The Courts Prevent Ms. Wong from Being Evicted, and Equitably Distribute the Marital Property

In June 2013, Ms. Wong instituted divorce proceedings against Kenneth (*see Wong v. Wong*, No. 400977/2013 (Sup. Ct. N.Y. County)), and separately moved for an order directing him to pay child support and maintenance pendente lite. (R. 33-34, 172-174.) She also moved to stay the holdover proceeding. (R. 174.) Upon reviewing Ms. Wong's stay motion, Supreme Court in the divorce action "ordered that the Holdover Proceeding be stayed pending [a] hearing." (R. 174-175.)

Arthur subsequently brought this action against both Kenneth and Ms. Wong, seeking a declaratory judgment that Arthur is the sole and exclusive owner of the apartment as well as damages for Ms. Wong's continued occupancy and use. (R. 84; *see* R. 89-99.) Kenneth defaulted, but Ms. Wong answered *pro se*. (R. 85-86, 139-141.) Ms. Wong subsequently added counter- and cross-claims for fraudulent transfer of the apartment. (R. 233-242.) Ms. Wong contends that Kenneth and

Arthur intended to place the apartment beyond Supreme Court's reach, making it appear as though Kenneth had insufficient assets to pay his marital debts, and making it easier for Arthur to try to evict Ms. Wong and her daughter. (R. 233-242.)

In April 2014, the matrimonial court ordered that the stay remain in place until the divorce proceedings concluded. (R. 173-179.) The court explained that Arthur had not sought to intervene in the divorce action to protect his property interests, but nevertheless had ample opportunity to advocate for his positions (R. 177), and that Arthur and Kenneth appeared to be impermissibly "working [together] to evict the wife from the marital residence," particularly because Kenneth had provided an affidavit in the holdover proceeding in support of Arthur's position and agreed to remove his name from the stock certificate immediately following the order of protection (R. 178-179).

Arthur appealed, and this Court affirmed, noting that Supreme Court "was presented with sufficient evidence that [Arthur] and [Kenneth] were acting together to evict [Ms. Wong] from the apartment" and that "a stay is warranted to avoid [Ms. Wong's] eviction pending resolution of the divorce proceeding." *Yu-Dan Wong v. Wong*, 128 A.D.3d

536, 537 (1st Dep't 2015). The court also noted that "it has yet to be determined in the divorce action whether the apartment is marital property and, if so, how it might be equitably distributed." *Id.* It was therefore still possible that Arthur's interests in the apartment may be implicated if they were deemed to be marital property.

In January 2015, the matrimonial court ordered that the issues of equitable distribution, among others, be referred to a special referee. (R. 513-514, 528.) The referee concluded that the couple's "marital property" consisted of three bank accounts totaling $338,345 and Kenneth's pension fund (prior to Kenneth's depleting such funds following the orders of protection). (R. 520-521.) After finding that the record was "replete with evidence of [Kenneth] hiding assets," and that "his demeanor in the courtroom and constant evasion of questions placed his credibility in question," the referee recommended that none of this property constituted separate property or payment for marital debts, so Ms. Wong should be entitled to a 50% share of his bank accounts and agreed-upon pension funds. (R. 195-196, 518-523.)

The matrimonial court confirmed that recommendation in 2017 and directed a judgment of divorce. (R. 531, 541.) The court also found

Kenneth in contempt and noted that his "dissipation of nearly all of his known assets has now it made it extremely difficult for [Ms. Wong] to collect the sums she is owed," restraining him from further diversion of his pension. (R. 531-540.) The court ultimately entered judgment in December 2017, explaining that "the relationship between [Ms. Wong] and [Kenneth] ha[d] broken down irretrievably," and that Ms. Wong was entitled to $169,172 and to a portion of his pension. (R. 709-711.)

Contrary to Arthur's claims that the matrimonial court "declin[ed] to find" that the apartment was partly owned by Kenneth or constituted marital property (*see* Br. for Plaintiff-Appellant-Respondent ("Arthur Br.") at 19, 22, 25), the divorce judgment did not mention the apartment or determine its status in evaluating marital property. (R. 707-714; *see* R. 13-14 ("[T]hat order . . . did not discuss the shares in the cooperative corporation as part of the equitable distribution determination.").) That is because Ms. Wong did not pursue such a claim to final judgment. (*See* R. 521 ("The only other asset presented for equitable distribution [in addition to bank accounts] was [Kenneth's] pension fund . . . .").)

E. Supreme Court's Decision

Supreme Court in this action subsequently issued a ruling on Arthur's and Ms. Wong's cross-motions for summary judgment. (R. 7-27.) The court dismissed Arthur's quantum meruit and ejectment causes of action but otherwise denied the motions, finding "triable issues of fact" as to Ms. Wong's counterclaims as well as the parties' "respective rights" to the apartment. (R. 8, 23-27.) The court did not consider whether Ms. Wong's claims for fraudulent conveyance were barred by res judicata because Arthur never raised that argument.

ARGUMENT

MS. WONG'S COUNTERCLAIMS FOR FRAUDULENT CONVEYANCE ARE NOT BARRED BY RES JUDICATA

As Ms. Wong explains in her opening brief, Arthur waived his principal argument—that Ms. Wong's counterclaims are barred by res judicata—because he never raised that argument with Supreme Court. *See* Br. for Defendant-Respondent-Appellant at 28-29. But even if that argument were preserved, it is meritless.

According to Arthur, Supreme Court should have given the matrimonial judgment "res judicata effect." Arthur Br. at 20. "'[R]es judicata' is an umbrella term encompassing both claim preclusion and

issue preclusion," which are "separate aspects of an overarching doctrine." *Rojas v. Romanoff*, 186 A.D.3d 103, 107 (1st Dep't 2020). "Claim preclusion, the primary aspect of res judicata"—which Arthur seeks to invoke here—"acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties."[1] *Id.*

The primary purposes of claim preclusion "are grounded in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy." *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 100 (2005). "However, unfairness may result if the doctrine is applied too harshly; thus [i]n properly seeking to deny a litigant two days in court, courts must be careful not to deprive [the litigant] of one." *Id.* (quotation marks omitted).

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[1] Issue preclusion, or "collateral estoppel," "pertains to the bar on relitigating *issues* that were argued and decided in the first suit." *Rojas*, 186 A.D.3d at 107 (emphasis added). Arthur does not advance arguments based on issue preclusion, but any such arguments would have been equally meritless. "[U]nlike claim preclusion, issue preclusion can be raised by one who was not a party or in privity in the first suit." *Id.* But it applies only after an identical issue was "*actually litigated and necessarily decided* in the first suit" and "*necessary* to support" the final judgment. *Id.* at 108-09 (emphases added). In this case, where the co-op shares were a gift from Arthur to Kenneth and therefore, at most *separate property* not subject to equitable distribution, the court's equitable distribution of marital assets was unaffected by Arthur's ownership or conveyance of such property. See *infra* Pt. B.

Claim preclusion accordingly "prevents relitigation *between the same parties*, or those in privity with them, of a cause of action *arising out of the same transaction* or series of transactions that either were raised or could have been raised in the prior proceeding." *Rojas*, 186 A.D.3d at 108 (emphasis added). "Stated differently, the doctrine of res judicata only bars additional actions *between the same parties on the same claims based upon the same harm*." *Id.* (quotation marks omitted) (emphasis added). That doctrine is inapplicable here.

A. Arthur Cannot Seek to Enforce the Matrimonial Judgment, Which Resolved Only the Respective Rights of the Matrimonial Parties and Their Privies.

Arthur cannot invoke the doctrine of res judicata because he was neither a party to the matrimonial proceeding nor in privity with Ms. Wong or Kenneth. "[I]n order for the doctrine of claim preclusion to apply, there must be 'identity of parties,'" such that "both actions . . . involve the same parties or their privies." *Rojas*, 186 A.D.3d at 109. "The same parties means the same *adversarial* parties." *Id.* (emphasis added).

Here, the parties to the matrimonial proceeding were Kenneth and Ms. Wong. *See Wong v. Wong*, No. 400977/2013 (Sup. Ct. N.Y. County). (*See, e.g.*, R. 173.) Arthur—Kenneth's brother—was not a party to the

matrimonial proceeding nor subject to the divorce. (*See, e.g.*, R. 173-179 (denying motion by "nonparty Arthur Wong" to vacate a stay of the matrimonial proceeding)). Indeed, in denying Arthur's motion, Supreme Court noted Ms. Wong's argument that Arthur had "no standing in th[e] matrimonial action" because he was "*not a party* . . . and ha[d] not filed for intervenor status," and rejected Arthur's claim that the stay was procedurally improper because "he [was] not a party to this divorce action, [and] was never served with any papers in th[e] action" (R. 175 (emphasis added); *see* R. 177, 179.) The court never issued a final adjudication of rights between Arthur and Ms. Wong. (R. 707-713.)

Because Arthur and Ms. Wong are "litigating a claim against each other for the first time"—namely, Ms. Wong's counterclaims for fraudulent conveyance of a property interest—Ms. Wong is not precluded from asserting those claims as counterclaims in this ejectment action. *Rojas*, 186 A.D.3d at 109. *See, e.g.*, *Chen*, 6 N.Y.3d at 100 ("In the context of a matrimonial action, [the Court of Appeals] has recognized that a final judgment of divorce settles *the parties' rights* . . . ." (emphasis added)).

The Court of Appeals decision in *City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124 (2007), is instructive. In that case, which involved

an automobile accident, passengers in one car brought a negligence action against passengers of another car, the City of New York, and a company (Welsbach Electronic) that maintained traffic signals for the City. *Id.* at 127. Welsbach asserted a crossclaim against the City, but the City did not assert any. *Id.* After a judgment dismissing Welsbach (but finding the City liable), the City brought a separate contract suit against Welsbach for indemnification, and the Court of Appeals concluded that the suit was not barred by res judicata. *Id.* at 127-28. The Court explained that the doctrine of res judicata "applies only when a claim *between* the parties has been previously 'brought to a final conclusion.'" *Id.* (citation omitted).

Similarly here, Ms. Wong has never asserted a claim or counterclaim against Arthur for fraudulent conveyance because Arthur was not even a party to the matrimonial action (and indeed never intervened in that action). Thus, Ms. Wong's assertion of fraudulent conveyance against Arthur does not implicate the "linchpin of res judicata" that there be "an identity of parties actually litigating successive actions against each other." *Id.* at 127.

Arthur devotes two pages of his appellate brief to discussing *O'Connell v. Corcoran*, 1 N.Y.3d 179 (2003), but that case is not on point. *See* Arthur Br. at 28-29. In *O'Connell*, a former wife brought successive matrimonial actions *against her ex-husband*, first in Vermont and then in New York, but each action differed in requests for equitable distribution. 1 N.Y.3d at 181-83. There, where the "parties, subject matter and causes of action [were] identical or substantially identical" in the disputes between husband and wife, the Court found that res judicata precluded successive matrimonial claims. *Id.* at 184-85. Here, unlike in *O'Connell*, Arthur was not a party to the prior matrimonial action.

Nor can Arthur "satisfy the 'same parties' requirement . . . by arguing that [he was] in privity to a party in the prior action." *Rojas*, 186 A.D.3d at 111. The term "privity" means "that under the circumstances and for the purpose of the case at hand" a person may be bound by a prior judgment to which he was not a party of record. *Id.* (citing Restatement (First) of Judgments § 83, cmt. A). The determination of whether a nonparty is in privity with a party to an action is made by analyzing "the circumstances of the actual relationship, the mutuality of interests, and

the manner in which the nonparty's interests were represented in the earlier litigation." *Id.* at 111-12.

Here, Arthur provides no argument—because there is none—that he was in privity with a spouse in their divorce proceeding. Kenneth fraudulently sought to convey the apartment shares to Arthur "*before* the [matrimonial] action was commenced" (Restatement (Second) of Judgments § 44, cmt. f), and during that action, Arthur acted separately from Kenneth and independently sought to protect his own interests when he was concerned that the apartment interest might be deemed marital property. See *supra* at 9-11. (R. 12 (denying Arthur's motion to vacate stay because "it has yet to be determined in the divorce action whether the property is marital property and, if so, how it might be equitably distributed."); *see* R. 702-703 (staying non-payment proceeding on same ground).) Arthur had no need to intervene in the Wongs' divorce proceeding because, as explained below, the property he gifted to Kenneth turned out not to be marital property, and he had no interest in the outcome of their family's divorce proceeding. See *infra* Pt. B.

B. The Transactions Underlying the Fraudulent Conveyance and Matrimonial Actions Are Different.

Even if Arthur could rely upon a judgment between two separate parties in the matrimonial action to bar the claims against him in this action (and he cannot), his reliance on res judicata would still fail because the divorce claims arose out of different circumstances than those giving rise to Ms. Wong's counterclaims in this ejectment action.

Res judicata typically dictates that once a claim is brought to a final conclusion, only "claims arising out of the *same transaction or series of transactions*" will be barred in further proceedings. *Chen*, 6 N.Y.3d at 100 (emphasis added) (quotation marks omitted). The Court of Appeals applies the common law "'pragmatic' test" to determine the nature of the transactions, "analyzing 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Id.* at 100-101 (citations omitted). "Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first." Restatement (Second) of Judgments § 24, cmt. b.

Applying these principles, Ms. Wong's counterclaims for fraudulent conveyance in this action are plainly distinct from the equitable distribution in the matrimonial action, and the circumstances underlying such claims are not "intertwined" such that they may be efficiently litigated together. *Chen*, 6 N.Y.3d at 101 (quotation marks omitted).

Matrimonial Action. In a matrimonial action for divorce, the "essential objective is to dissolve the marriage relationship." *Boronow v. Boronow*, 71 N.Y.2d 284, 290 (1988); *see Chen*, 6 N.Y.3d at 101. While the court can also resolve property issues "between the parties," Domestic Relations Law ("DRL") § 234, property determinations typically entail *equitable distribution*—or disposition of marital property "considering the circumstances of the case" and the parties, *id.* § 236(B)(5)(c).

"The concept of marital property is a critical one," as the DRL contemplates "that marriage is an economic partnership and that, upon dissolution of the marriage, the tangible fruit of that partnership, the marital property, should be equitably divided between the parties." Alan D. Scheinkman, Practice Commentaries to DRL § 236 (Westlaw 2017). Under the DRL, the process of equitable distribution begins with the

critical determination as to which of the parties' property is *marital property* or *separate property*. *See* DRL § 236(B)(5)(a).

Marital property is property that one or both of the spouses in the relationship acquired "during the marriage and before . . . the commencement of a matrimonial action." *Id.* § 236(B)(1)(c). When a court renders a final judgment of divorce, it provides for equitable disposition of any marital property, considering a number of factors such as (i) the income and property of each party; (ii) the duration of the marriage; (iii) the age and health of each party; (iv) the extent to which each party committed an act of domestic violence; and (v) "any other factor which the court shall expressly find to be just and proper." *Id.* § 236(B)(5)(d).

"*Separate property*," by contrast, includes, "property acquired *before* marriage" or—as relevant here—"property acquired by . . . *gift*" by one of the spouses. *Id.* § 236(B)(1)(d) (emphasis added). "The thought is that, if marriage is to be treated as an economic partnership, property which is not the product of that partnership should not be properly regarded as partnership property." Scheinkman, Practice Commentaries to DRL § 236, *supra*. And a gift is the voluntary transfer of property to another person without consideration, as determined by the donor's intent. *See,*

e.g., *Batease v. Batease*, 71 A.D.3d 1344, 1346 (3d Dep't 2010). If property was such a gift, it remains *separate property*, is not equitably distributed, and "retains its character as the property of the spouse who owns it." *Pensmore Invs., LLC v. Gruppo, Levey & Co.*, 137 A.D.3d 558, 561 (1st Dep't 2016).

Fraudulent Conveyance Action. New York's fraudulent conveyance statute, by contrast—the Debtor and Creditor Law ("DCL")—"is a set of *legal rather than equitable doctrines*, whose purpose is not to provide equal distribution of a debtor's estate among creditors," but rather "to aid specific creditors who have been defrauded by the transfer of a debtor's property." *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 634 (2d Cir. 1995) (emphasis added); *see Wimbledon Fund, SPC v. Weston Cap. Partners Master Fund II, Ltd.*, 184 A.D.3d 448, 450 (1st Dep't 2020). The provisions under which Ms. Wong seeks relief permit a creditor to set aside a conveyance for actual or constructive fraud.[2] (*See* A. 238-241.)

[2] In 2019, the Legislature enacted the Uniform Voidable Transactions Act, *see* Debtor and Creditor Law ("DCL") §§ 270 *et seq.*, which repealed the prior article of the DCL governing fraudulent transfers, but the new statute does not apply in this case because the transfers occurred before 2020. *See* Ch. 580, § 7, 2019 N.Y. Laws 1553, 1553.

Under the DCL, a creditor may demonstrate a constructive fraudulent conveyance through a showing that the transferor was rendered insolvent by transferring assets without receiving fair consideration. *See, e.g.*, *McCormack Fam. Charitable Found. v. Fid. Brokerage Servs., LLC*, 195 A.D.3d 420, 422 (1st Dep't 2021); *In re Vargas Realty Enters., Inc.*, 440 B.R. 224, 240 (S.D.N.Y. 2010). To demonstrate an actual fraudulent conveyance, the creditor must demonstrate intent but need not present direct proof; she may instead rely on "badges" of fraud, *e.g.*, "a close relationship between the parties to the alleged fraudulent transaction," "a questionable transfer not in the usual course of business," "inadequacy of the consideration," the "transferor's knowledge of the creditor's claim and the inability to pay it," and "retention of control of the property by the transferor." *See, e.g.*, *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dep't 1999).

Differences Between the Two Actions. Aside from the presence of property, the facts and proof necessary for resolving equitable distribution claims in a matrimonial proceeding and fraudulent conveyance claims in a civil proceeding have little if anything in common. Indeed, while the focus of equitable distribution of marital property is

"the respective rights of the parties" to the marital relationship, *i.e.*, the spouses in the relationship, based on any equitable "factor which the court shall expressly find to be just and proper" (DRL § 236(B)(5)(d)(15)), the focus of the fraudulent conveyance statute is "to protect creditors," *Weil v. Long Island Sav. Bank, FSB*, 77 F. Supp. 2d 313, 325 (E.D.N.Y. 1999); *see Pappo, Bros. v. Thompson*, 214 N.Y.S.2d 13, 15 (Sup. Ct. Nassau County Mar. 28, 1961), by examining the circumstances surrounding a conveyance of any property to a third party.

Although the court in a matrimonial action may consider as part of its equitable distribution a "transfer or encumbrance made in contemplation of a matrimonial action without fair consideration," DCL § 236(B)(5)(d)(13), that consideration is relevant *only*, if at all, after the court has determined that the property is *marital* property and not a gift to the transferor.[3] See *supra* at 22-23. And even if the property is marital property, its transfer is merely one among fourteen other factors, including "any other" the court may find "to be just and proper," to

[3] It therefore makes no difference that Ms. Wong "*could have* litigated her claims that" Kenneth owned the co-op shares, given that the shares were gifted from Arthur to Kenneth and thus constituted separate property prior to the fraudulent conveyance. Arthur Br. at 27.

consider for its determination. *Id.* § 236(B)(5)(d)(1)-(15). Likewise, in a matrimonial proceeding, there is little need to dwell on the circumstances surrounding a transfer of property and "badges" of fraud—the hallmarks of a fraudulent conveyance proceeding. See *supra* at 22-25. If both claims were litigated, there would be little overlap in evidence, and the parties would be required to pursue entirely separate causes of action.

Nor do fraudulent conveyance and equitable distribution "constitute a convenient trial unit." *Chen*, 6 N.Y.3d at 101. While fraudulent conveyance actions are generally governed by the procedures set forth in the CPLR and Uniform Supreme Court Rules, matrimonial actions are subject to unique rules[4] and to a much shorter case management timeline.[5] Some fraudulent conveyance actions may be tried by a jury,[6] "in contrast to a matrimonial action, which is typically

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[4] *See* 22 N.Y.C.R.R. §§ 202.16, 202.16-a, 202.16-b, 202.18.

[5] *See* N.Y. Courts, *Conferences & Case Management*, https://ww2.nycourts.gov/courts/1jd/supctmanh/Conferences-CaseManagement.shtml ("Matrimonial cases are an exception: the target deadline [for filing of the note of issue] is six months.")

[6] *See, e.g., Miller v. Doniger*, 293 A.D.2d 282, 282 (1st Dep't 2002).

[Footnote continued on next page]

decided by a judge."[7] Parties to a divorce action seek dissolution of the marriage and ancillary relief, like child support,[8] while "the relief to which a defrauded creditor is entitled" is "setting aside the conveyance" or money damages.[9] And a victorious plaintiff in a fraudulent conveyance action is entitled to reasonable attorneys' fees and request for punitive damages, which is generally not the case in a matrimonial proceeding.[10]

In light of such differences, the litigation related to a fraudulent conveyance between debtor, creditor, and third party cannot "be fairly and efficiently resolved" in the same equitable proceeding as a divorce action in which the court must equitably distribute property *between* two spouses. *Chen*, 6 N.Y.3d at 101 (quotation marks omitted). It is accordingly unsurprising that it "would *not* be within the parties'

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[7] *Chen*, 6 N.Y.3d at 101; *see, e.g.*, Alan D. Scheinkman, Practice Commentaries to DRL § 173 (Westlaw 2013) ("There is no right to have the jury, rather than the court, pass on . . . equitable distribution, maintenance, custody, child support, and exclusive occupancy.").

[8] *See* DRL § 236(B).

[9] *Joslin v. Lopez*, 309 A.D.2d 837, 839 (2d Dep't 2003).

[10] *Compare* former DCL § 276-A; *Blakeslee v. Rabinor*, 182 A.D.2d 390, 391-93 (1st Dep't 1992) (fraudulent conveyance), *with* DRL § 237; *Howard S. v. Lillian S.*, 62 A.D.3d 187, 193-94 (1st Dep't 2009) (matrimonial).

reasonable expectations" that the two would typically be tried together in the same proceeding. *Id.* (emphasis added).

Indeed, Arthur has not contended that parties typically seek to litigate additional, fraudulent conveyance claims within the same matrimonial action. Although matrimonial courts in certain circumstances could effectively set aside conveyances of marital property when valuing it for equitable distribution, *see Sygrove v. Sygrove*, 15 A.D.3d 291, 292 (1st Dep't 2005), parties do not reasonably expect to bring such actions in divorce proceedings. *See, e.g.*, *Ostashko v. Ostashko*, 2002 WL 32068357, at *17 (E.D.N.Y. Dec. 12, 2002) (separate fraudulent conveyance action brought by wife against soon-to-be ex-husband).

The Second Department's decision in *Dempster v. Overview Equities, Inc.*, 4 A.D.3d 495 (2d Dep't 2004), is illustrative, and persuasive. There, as here, the appellants contended that res judicata barred litigation over fraudulent conveyance issues in a separate action following an equitable distribution. The court, however, concluded that res judicata did not apply because documents relating to a conveyance *first* had been "examined [only] in the context of the valuation trial for the purpose of equitable distribution," *and then* subsequently examined

"for the purpose of determining whether 'badges of fraud' and lack of consideration existed" in the conveyance action. *Id.* at 498-99. Because of the differences in these proceedings, res judicata did not apply. *Id.* The same ruling should follow here.

C. Public Policy Considerations Support the Conclusion that Ms. Wong's Counterclaims for Fraudulent Conveyance Are Not Barred by Res Judicata.

"Significant policy considerations . . . support the conclusion" that res judicata does not apply here. *Chen*, 6 N.Y.3d at 101. Requiring fraudulent transfer counterclaims to be brought alongside claims for equitable distribution would unnecessarily "complicate and prolong the divorce proceeding, which is 'contrary to the goal[s]" of the matrimonial statute. *Herskovitz v. Klein*, 31 Misc. 3d 1202(A), at *6 (Sup. Ct. Kings County 2011) (citation omitted); *see Chen*, 6 N.Y.3d at 101 (noting that the Legislature has sought to "expedit[e] [matrimonial] proceedings and minimiz[e] the emotional damage to the parties and their families").

With equitable distribution, pretrial proceedings have become "more protracted, disclosure more time-consuming and complex, and trials longer." Alan D. Scheinkman, Practice Commentaries to DRL § 237 (Westlaw). A New York divorce "takes too long and costs too much.

. . . Even apart from costs measured in dollars, there are significant tangible costs—divorce litigants endure emotional stress and are impeded from establishing a new life." *Palermo v. Palermo*, 35 Misc. 3d 1211(A), at *5 (Sup. Ct. Monroe County 2011) (quotation marks omitted). Prolonging it further would only add "stress to an already difficult situation," where conflict is "harmful to the partners and destructive to the emotional well-being of children." *Id.* (quotation marks omitted).

Indeed, a "chronic lack of free or low-cost legal services" has recently contributed to a "crisis of unrepresented litigants in the New York State (NYS) courts,"[11] and in amici's experience, "many low-income people wishing to divorce" but who lack counsel remain "trapped in unhappy marriages," Rachel Reed, *Breaking Up Is Hard to Do, Especially When You Don't Have a Lawyer*, Harv. L. Today (Apr. 29, 2021).[12] Forcing them to bring fraud suits would make counsel all the more necessary, denying justice and prolonging their suffering. *See* Judith G.

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[11] Rochelle Klempner, *The Case for Court-Based Document Assembly Programs: A Review of the New York State Court System's 'DIY' Forms*, 41 Fordham Urb. L. J. 1189, 1189 (2014),

[12] *Available at* https://today.law.harvard.edu/breaking-up-is-hard-to-do-especially-when-you-dont-have-a-lawyer.

McMullen & Debra Oswald, *Why Do We Need a Lawyer? An Empirical Study of Divorce Cases*, 12 J. L. & Fam. Stud. 57, 81 (2010) (counsel typically hired in complex cases, lengthening matrimonial proceedings).

Requiring spouses to bring fraudulent conveyance counterclaims in matrimonial proceedings would be particularly onerous for women and victims of domestic abuse, such as Ms. Wong. Two-thirds of all divorces are initiated by women. Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 Cardozo J. L. & Gender 609, 619 (2006). But divorced women suffer pronounced declines in mental and economic well-being resulting from the separation. *See, e.g.*, Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 Univ. Cin. L. Rev. 207, 210 n.8 (2010); *see also, e.g.*, Marion Crain, *"Where Have All the Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society*, 60 Ohio St. L. J. 1877, 1882-83 (1999) ("[M]ost women—particularly those who retain custody of their children—face economic hardship following divorce.").

Likewise, a "physically or emotionally abused spouse, especially an economically dependent spouse"—such as Ms. Wong—"may be deterred

from seeking redress because of the high and difficult to control cost of litigation, and the anxiety of an unpredictable result." *Palermo*, 35 Misc. 3d 1211(A), at *5 (quotation marks omitted). More than two thirds of divorcing women leave a violent husband, Karin Carmit Yefet, *Divorce as a Substantive Gender-Equality Right*, 22 U. Pa. J. Const. L. 455, 501-02 (2020), and economic abuse has "long been recognized as a form of domestic violence," Susan L. Pollett, *Economic Abuse: The Unseen Side of Domestic Violence*, 83 N.Y. St. B. J. 40, 40 (Feb. 2011), especially where (as here) the "husband controls the marital financial resources" and has engaged in paradigmatic financial abuse, Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 Buff. L. Rev. 1153, 1173 (1999)

For victims of domestic abuse, however, a protracted divorce proceeding can be "destructive" and reinforce the "factors that contribute to the abuse in the first place," Claudia Lanzetta, *Mediation/Collaborative Law: Exploring a New Combination*, 20 Cardozo J. Conflict Resol. 329, 342 (2019), perpetuating the abuse and leading partners to use the courts for harassment, as Kenneth did. *See* Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about*

Divorce Mediation in the Presence of Domestic Violence, 9 Wm. & Mary J. Women & L. 145, 161-62 (2003) ("[S]ome batterers use the court system as a forum to harass and intimidate the abuse survivor by engaging in traumatic and expensive ongoing litigation.").[13] Frequently the wife has limited resources and access to counsel that leave her vulnerable to "adversarial tactics that prolong the divorce process and increase [her] expenses." Bryan, *supra*, at 1175-76, 1222-23, 1236.

These policy considerations are especially important where the wife has children, as does Ms. Wong. An enormous number of children experience divorce before the age of 16. *See, e.g.*, H. Patrick Stern et al., *Professionals' Perceptions of Divorce Involving Children*, 22 U. Ark. Little Rock L. Rev. 593, 593 (2000). But acrimonious and protracted divorce proceedings contribute significantly to psychological, physical, and cognitive impairments, *id.*; *see, e.g.*, Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm.

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[13] For immigrant women in particular, such as Ms. Wong, inhibiting their ability to escape an abusive relationship with their partner can be devastating, as they often face special challenges before they can even initiate divorce proceedings, let alone pursue them successfully in an unfamiliar legal system. *See* Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 Hamline L. Rev. 149, 154 (2011).

Mitchell L. Rev. 495, 497 (2001) ("The level and intensity of parental conflict is now thought to be the most dominant factor in a child's post-divorce adjustment . . . ."); John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 Fam. Ct. Rev. 97, 97 (2005).

"Acrimonious litigation polarizes parents, making co-parenting difficult," and the cost of litigation "depletes valuable family resources needed to support two households post-divorce to provide for children's needs." Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 Rev. Litig. 245, 253 (2011). Furthermore, drawing out the litigation process harms children by increasing uncertainty as to their living and supporting arrangements while they await the resolution of their parents' litigation claims.

Ultimately, requiring joinder of fraudulent conveyance counterclaims in what would otherwise be a streamlined and efficient divorce proceeding, especially where the *separate property* at issue was a gift from a third party (see *supra* at 6-7, 22-23)—would unnecessarily "complicate and prolong" an already stressful matrimonial action,

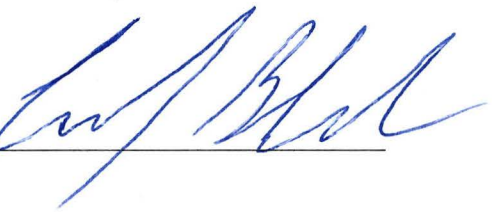
"[d]elaying resolution of vital matters such as child support and custody or the distribution of [marital] assets," causing "extreme hardship and injustice to the families involved, especially for victims of domestic violence." *Chen*, 6 N.Y.3d at 101. That result would be incorrect as a matter of law and inequitable for New York families, including women who are the victims of domestic abuse.

CONCLUSION

For the reasons set forth herein, the Court should reject Arthur's waived res judicata arguments.

Dated: New York, New York
October 29, 2021

Respectfully Submitted,

By: 

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