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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:	: Chapter 11
QUEEN ELIZABETH REALTY CORP.,	: Case No. 13-12335 (SMB)
Debtor.	:
	:
	:
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**MOTION BY RECEIVER DEAN K. FONG, ESQ. (i) TO DISMISS OR SUSPEND THE  
BANKRUPTCY CASE, OR IN THE ALTERNATIVE, (ii) FOR RELIEF  
UNDER SECTION 543(c) AND (d) OF THE BANKRUPTCY CODE  
FROM TURNOVER OF PROPERTY**

TO: THE HONORABLE STUART M. BERNSTEIN  
UNITED STATES BANKRUPTCY JUDGE

Dean K. Fong, Esq., as Receiver of the Property of Phillip Wu (“the Receiver”), by and through the undersigned counsel, hereby moves (the “Motion”) this Court pursuant to sections 1112(b), 305(a), and 543(c) and (d) of title 11 of the United States Code (11 U.S.C. §§ 101 *et seq.*) (“the Bankruptcy Code”) for (i) an order dismissing this case (“the Case”) under Bankruptcy Code § 1112(b) based on lack of good faith and for cause shown; and/or (ii) an order dismissing or suspending the proceedings in this Case under Bankruptcy Code § 305(a), as the interests of the creditors and debtor would be better served by dismissal or suspension; or in the alternative, (iii) an order (a) excusing the Receiver from complying with any turnover under

Bankruptcy Code § 543(d), and/or (b) protecting the property held by the Receiver and for payment of the Receiver's reasonable costs and expenses under Bankruptcy Code § 543(c).

### **PRELIMINARY STATEMENT**

This Case is a classic example of a chapter 11 filed in bad faith for the improper purpose of halting an ongoing state court action:

- the Debtor's schedules reflect it has only one primary asset – a commercial real estate condominium – and no unsecured creditors, and there are no known employees;
- the Debtor's schedules further list no income or tax paid in the last three years;
- the Debtor's assets have been in the hands of the Receiver since he was appointed in May 2010 pursuant to an order entered by the New York Supreme Court in the Matrimonial Action (as defined below) between Margaret Wu and Phillip Wu, a principal of the Debtor;
- neither the Debtor, nor Jeffrey Wu or Lewis Wu (brothers of Phillip Wu, brothers-in-law of Margaret Wu, and insiders of the Debtor), nor any other party, appealed the order appointing the Receiver;
- Jeffrey Wu and Lewis Wu, by their counsel, sought to intervene in the Matrimonial Action, but agreed to several adjournments while their attorney attempted to work out a global settlement;
- Jeffrey Wu, through other companies he owned and/or controlled, was involved in various actions and litigation against the Receiver since at least September 2010, and, through various stipulations, his counsel's correspondence, and other conduct showed that he acknowledged the role and authority of the Receiver;<sup>1</sup>
- Jeffrey Wu attempted, unsuccessfully, to stop an eviction proceeding by the Receiver against a company that he owned and/or controlled, based on that company's failure to make rental payments to the Receiver for many months;
- this Case was filed shortly after the Receiver obtained a judgment against the company that Jeffrey Wu owned and/or controlled in that eviction proceeding;

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<sup>1</sup> For example, as explained in more detail below, a corporation Jeffrey Wu owned and/or controlled named the Receiver in another state court action involving one of the Debtor's tenants, and entered into a stipulation which expressly authorized payments to be made to the Receiver.

- the Debtor’s counsel admitted that the Case – the petition for which was signed by Jeffrey – was filed in order to stop that eviction proceeding against the company that Jeffrey owned and/or controlled; and
- the Debtor filed an adversary proceeding, in which it seeks an “assignment” to the Debtor of the Receiver’s judgment against the company Jeffrey Wu owned and/or controlled.

The essential controversy here is a two party dispute between Margaret Wu, on the one hand, and her husband Phillip Wu, on the other hand, over what she is entitled to in the Matrimonial Action, and Jeffrey Wu’s effort to use this Court to help Debtor avoid paying rent to the Receiver – and ultimately to Margaret Wu.

As set forth below, as well as in the Margaret Wu Motion (defined below), the Debtor’s chapter 11 case was filed for the sole purpose of delaying the Matrimonial Action, frustrating the receivership in that proceeding, and ultimately, subverting the rights of the plaintiff Margaret Wu in that action. It is beyond peradventure that the use of the bankruptcy process for these purposes is improper. Even if the Court were to excuse these extreme deficiencies, however, abstention is warranted under 11 U.S.C. § 305. In the alternative, the Receiver is entitled to relief under 11 U.S.C. § 543(d), because leaving the Debtor’s assets in the hands of the Receiver is in the best interests of the creditors – as opposed to the conflicted interests of Jeffrey Wu, who purports to speak for the Debtor.

## **FACTUAL AND PROCEDURAL BACKGROUND**<sup>2</sup>

### **Relationships Between the Relevant Parties**

1. On July 17, 2013, Queen Elizabeth Realty Corp. (“Debtor”), a single asset real estate entity that owns a commercial condominium unit located at 157 Hester Street, a/k/a 68-82

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<sup>2</sup> References to the Declaration of Dean K. Fong, Esq., dated September 18, 2013, and submitted in connection with this Motion, shall be “Fong Decl.” References to the Declaration of Suzanne M. Berger, Esq., dated September 18, 2013, and submitted in connection with this Motion, shall be “Berger Decl.”

Elizabeth Street, New York, New York (the “Real Property”), commenced this Case by filing a voluntary petition for relief pursuant to Chapter 11 of the Bankruptcy Code.

2. The petition was signed by Jeffrey Wu, Debtor’s purported President. *See* Docket No. 1.

3. Pursuant to a master lease, Debtor leased the Real Property to New Enterprise Realty, LLC (“New Enterprise”), an entity in which Jeffrey Wu has served as the managing member. *Id.* ¶¶6, 9; *see* Fong. Decl., Ex. 3.

4. New Enterprise, in turn, subleased the Real Property to, among others, Hong Kong Supermarket Inc. and/or Hong Kong Supermarket of Hester Street Corp. d/b/a/ “Hong Kong Supermarket” (collectively, “Hong Kong Supermarket”), and Salon de Tops, Inc. (“Salon”). *Id.* ¶8. Jeffrey Wu is also the principal owner of Hong Kong Supermarket. *Id.* ¶8, 10; *see* Fong. Decl., Ex. 4.

5. The law firm of Hugh H. Mo P.C. (the “Hugh Mo Firm”) represented Jeffrey Wu, New Enterprise, and Hong Kong Supermarket throughout the Matrimonial Action, the New Enterprise Action, and all related proceedings. *Id.* ¶11. In addition, at least as early as September 2011, the Hugh Mo Firm indicated that it represented the Debtor in certain litigation involving the receivership. *Id.* ¶¶11, 25-26.

#### **The Underlying State Court Matrimonial Action**

6. This Case is not the first dispute involving the Receiver, Debtor, and Debtor’s purported principals, Jeffrey, Phillip and Lewis Wu. In 2009, a matrimonial action involving Margaret Wu and Phillip Wu, captioned *Wu v. Wu*, was commenced in the Supreme Court of the State of New York, New York County (“the State Court”) (Index No. 300080/09) (the

“Matrimonial Action”). The Matrimonial Action was between Margaret Wu, as plaintiff, and Phillip Wu (the brother of Jeffrey Wu), as defendant. *Id.* ¶¶1-2.

7. By an order dated May 11, 2010, the State Court appointed Margaret Wu and Dean K. Fong, Esq. as co-receivers of the property of defendant Phillip Wu (the “Receivership Order”).

8. In pertinent part, the Receivership Order stated and found the following:

WHEREAS the defendant [Phillip Wu] is the nominal and/or beneficial owner[] of several businesses, including ... Queen Elizabeth Realty, ....

WHEREAS a hearing was conducted before Special Referee Marilyn Sugarman on the issue of the extent of defendant’s ownership interests in the remaining properties [including Queen Elizabeth Realty] and the need for appointment of a receiver to protect plaintiff’s equitable distribution interests therein, and

WHEREAS, the Special Referee, after a hearing on the issues, concluded and recommended that plaintiff be appointed co-receiver of all properties, along with the appointment of a person ... to act as co-receiver with plaintiff; and

WHEREAS the Report and Recommendations of the Special Referee dated April 5, 2010 was confirmed by this court by Order of May 10, 2010;

**IT IS HEREBY ORDERED** that pursuant to CPLR §6401, plaintiff Margaret Wu, plaintiff herein, and Dean Fong, Esq., ... are hereby appointed co-receivers of all of the assets and property of defendant as listed above, during the pendency of this action; and it is further

**ORDERED** that ... [the Receiver] and Margaret Wu ... shall take possession of the businesses and property and shall take such steps as they in their discretion deem advisable consistent with their fiduciary duties, including the collection of all rents, income and revenues, and payment of mortgages, salaries, taxes and other obligations and liabilities attributable to the properties, to the end of preserving those assets for ultimate distribution to the parties in this action; and it is further ....

**ORDERED** that defendant, his representatives, agents, servants, or employees and each of them are hereby enjoined and restrained from interfering in any manner with said Receivers; and it is further

**ORDERED** that the co-receivers may incur at the expense of the parties, such costs and charges, and make such disbursements as may be actually necessary for executing the duties imposed by this order, including such legal and accountancy fees as are actually necessary, and that the receivers are authorized to institute and carry on all actually and necessary legal proceedings to accomplish the duties imposed herein; and it is further ....

**ORDERED** that the co-receivers, or either of them, may at any time apply to this court for an order or instructions or powers necessary to enable them to properly fulfill their duties hereunder; and it is further

**ORDERED** that the co-receivers shall continue to perform said duties until further order of this Court.

Fong Decl., Ex. 1.

9. The Receivership Order was amended by order dated May 24, 2010 to make Dean K. Fong, Esq. the sole Receiver in the Matrimonial Action. Fong Decl., Ex. 2.

10. As the Receivership Order<sup>3</sup> expressly states, the Receiver was granted exclusive possession and control of the Debtor, and as a result, the Real Property. In addition, the Receivership Order prohibited Phillip Wu “from interfering in any manner” with actions taken by the Receiver. Fong Decl., Ex. 1.

11. Pursuant to the Receivership Order, the Receiver made several disbursements in the ordinary course of business from the Real Property. Phillip Wu never objected to these disbursements, and in fact, the disbursements were often used to satisfy obligations of Phillip Wu to pay maintenance and support to Margaret Wu. *Id.* ¶5.

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<sup>3</sup> References to the Receivership Order going forward are intended to refer to the order as amended on May 24, 2010.

12. No appeal was ever taken from the Receivership Order. Instead, as discussed in greater detail below, the Matrimonial Action proceeded – with the Receiver in control of the Real Property – for over three years.

**Related State Court Litigation Involving the Debtor and the Entities Controlled by Jeffrey Wu**

13. In or about August 2010, pursuant to the Receivership Order, the Receiver requested that the current subtenants of the Real Property – Salon and Hong Kong Supermarket – attorn the Real Property to the Receiver. *Id.* ¶12.

14. Thereafter, Salon made payments to the Receiver. However, Hong Kong Supermarket – the entity controlled by Phillip Wu’s brother, Jeffrey Wu – refused to make any payments at that time to the Receiver. *Id.* ¶13.

15. Instead, on or about September 3, 2010, New Enterprise, the master tenant and yet another entity controlled by Jeffrey Wu, commenced a summary eviction proceeding against Salon (the “New Enterprise Action”) for non-payment of rent. *Id.* ¶14.

16. In early 2011, New Enterprise, through its counsel the Hugh Mo Firm, executed a stipulation in the Matrimonial Action that permitted the Receiver to be added as an interpleader-respondent in the New Enterprise Action (the “February 14, 2011 Stipulation”). *Id.* ¶16; Fong Decl., Ex. 5. Significantly, the February 14, 2011 Stipulation included the following clause:

“WHEREAS, the Receiver believes it is consistent with the Order of Appointment and his responsibilities thereunder to collect all rents, income and revenues and to preserve those assets for ultimate distribution to the parties to participate as a Respondent in the [New Enterprise Action].”

Fong Decl., Ex. 5, at p. 2.

17. The Receiver thereafter answered and filed counterclaims in the New Enterprise Action, including a counterclaim asserting that New Enterprise had not paid the Receiver rent for nine months. *Id.* ¶¶18-19; Fong Decl., Ex. 6.

18. The New Enterprise Action ultimately settled in July 2011. Pursuant to a July 14, 2011 so-ordered Stipulation of Settlement (the “July 14, 2011 Stipulation”), the parties acknowledged the Receiver’s crucial role in collecting rents on behalf of the Debtor, and permitted the Receiver to continue collecting rents. Specifically the July 14, 2011 Stipulation provided that: (i) Salon would continue making its rent payments to the Receiver; (ii) New Enterprise agreed to pay to the Receiver the ongoing rents it owed to Debtor and to pay to the Receiver previous rents owed (subject to certain credits, including real estate taxes and the rent Salon was paying directly to the Receiver); and (iii) New Enterprise consented to entry of a final judgment of possession against it and the immediate issuance of a warrant of eviction in the event that New Enterprise failed to make the requisite payments (the “Judgment Against New Enterprise”). *Id.* ¶¶20-21; Fong Decl., Ex. 7.

**The Execution of Judgment Against New Enterprise and the Subsequent Intervention Motion and Holdover Proceeding Against Hong Kong Supermarket**

19. Shortly after the July 14, 2011 Stipulation was entered, the parties had a disagreement about the amount of credit that the Receiver should give to New Enterprise on its rental payments. *Id.* ¶23.

20. In a September 1, 2011 letter – written by the Hugh Mo Firm, on behalf of New Enterprise, in response to an August 3, 2011 letter sent by the Receiver – New Enterprise and Debtor expressly acknowledged, among other things, that: (i) New Enterprise was obligated to make certain payments (subject to certain credits) to the receivership (although the amount was in dispute), and (ii) “the Receiver is now responsible for maintaining [Debtor] as a supposed asset of the marital estate in the matter of Wu v. Wu.” *Id.* ¶¶24-26; Fong Decl., Ex. 9 at pp. 1-2.

21. Despite these acknowledgements, several months passed where New Enterprise failed to make rental payments to the Receiver. As a result, the Receiver executed the Judgment



against New Enterprise and gave notice of an eviction proceeding to all parties. On March 1, 2012, a marshal evicted New Enterprise and took legal possession of the Real Property. *Id.* ¶¶27-28; Fong Decl., Ex. 10.

22. Hong Kong Supermarket continued to occupy the Real Property and an eviction of Hong Kong Supermarket was not immediately pursued. Rather, the Receiver attempted to negotiate a new lease with Hong Kong Supermarket, though its counsel – also the Hugh Mo Firm. *Id.* ¶29.

23. The Receiver sought to negotiate a new lease with Hong Kong Supermarket, at a market rate, as well as for payment of past due rents that Hong Kong Supermarket owed for occupying the Real Property. No agreement on rents or a new lease was ever reached. *Id.*

24. Instead, on May 2, 2012, Jeffrey Wu and Lewis Wu (Jeffrey and Phillip Wu’s brother), purportedly acting on behalf of the Debtor, filed a motion in the Matrimonial Action (“Intervention Motion”), seeking (among other things) to intervene, to vacate the Receivership Order, and to recover sums collected through the receivership. *Id.* ¶30; Fong Decl., Ex. 11.

25. The Intervention Motion was held in abeyance by the State Court at the movant’s request, pending settlement discussions. However, in open court on June 6, 2012, counsel for the movant agreed to make interim payments for use and occupancy in the amount of \$40,000 per month, allowing credit for certain real estate taxes and mortgage expenses (the “June 6, 2012 Open Court Stipulation”). *Id.* ¶31; Fong Decl., Ex. 12 at pp. 6-7.

26. Unfortunately, the Receiver never received any payments pursuant to the June 6, 2012 Open Court Stipulation. *Id.* ¶32.

27. On July 24, 2012, because the agreement was breached, the Receiver commenced a landlord-tenant holdover action against Hong Kong Supermarket (the “HKS Holdover Action”). *Id.* ¶33.

28. For several months thereafter, the parties agreed to adjourn the trial dates of the HKS Holdover Action, as well as the Matrimonial Action, while they sought to negotiate a global resolution. As a condition of these adjournments, Hong Kong Supermarket was required to pay \$25,000 per month to the receivership. Hong Kong Supermarket made those payments through May 2012. *Id.* ¶¶34-35.

29. At a conference in the Matrimonial Action in May 2013, the State Court was reluctant to provide further adjournments to the parties because the matter had been pending for so long. Consequently, the Receiver informed the Hugh Mo Firm that he could no longer agree to continue adjourning the HKS Holdover Action. *Id.* ¶36.

30. On May 14, 2013, the State Court in the Matrimonial Action also directed the Receiver to pay \$5,000 in maintenance and \$50,000 in child support arrears to Margaret Wu pursuant to a so ordered Stipulation between the parties (the “May 14, 2013 Order”). This followed a separate order, dated May 2, 2012, which directed the Receiver to disburse \$500,000 to Margaret Wu for child support arrears and maintenance (the “May 2, 2012 Order”). Fong Decl., Ex. 14.

31. On June 4, 2013, Jeffrey Wu, the principal owner of Hong Kong Supermarket as well as a purported officer of the Debtor, filed papers in the Matrimonial Action, seeking an emergency stay of the HKS Holdover Action. But, the Court in the Matrimonial Action denied the stay. *Id.* ¶38; Fong Decl., Ex. 4 at p. 2.

32. Thereafter, a trial in the HKS Holdover Action was held. At the close of the trial, the Receiver obtained a judgment, dated June 13, 2013 (the “Judgment Against HKS”), in the sum of \$3,256,000 against Hong Kong Supermarket. A warrant of eviction (the “Warrant of Eviction”) was issued fifteen days later on June 28, 2013. *Id.* ¶39; Fong Decl., Ex. 15.

33. About a month later, on July 10, 2013, Jeffrey Wu (through a new attorney, Mark Lubelsky, Esq.), sought another *ex parte* stay in the Matrimonial Action, to enjoin efforts to evict Hong Kong Supermarket. The requested stay was denied. *Id.* ¶40; Fong Decl., Ex. 16.

34. The next day, on July 11, 2013, Margaret Wu moved the State Court, by order to show cause, for an order holding Phillip Wu in contempt for his failure to attend a deposition as ordered by the court, directing an inquest on the equitable distribution of marital property, and directing an immediate sale of the remaining marital property, including Debtor, and imposing other sanctions (the “Sale Motion”). *Id.* ¶41; Fong Decl., Ex. 17.

**This Case, the Adversary Proceeding, and Phillip Wu’s Bankruptcy Case**

35. On July 17, 2013 – six days after Margaret Wu’s Sale Motion and a mere month after the Receiver obtained the judgment against Hong Kong Supermarket, a company that Jeffrey owned and/or controlled – this Case was commenced by voluntary petition, signed by Jeffrey Wu.

36. On the same day as the petition in this Case was filed, Hong Kong Supermarket filed both (i) a notice of appeal of the Judgment Against HKS in the HKS Holdover Proceeding, and (ii) a notice of removal of the HKS Holdover Proceeding (*see* 13-cv-04988). The HKS Holdover Proceeding was thereafter transferred to this Court (*see* 13-ap-1496). *Id.* ¶42; Fong Decl., Exs. 18-19.

37. Just a few weeks later, on August 1, 2013, Debtor separately removed the Matrimonial Action to the United States District Court for the Southern District of New York (*see* 13-cv-05394). The Matrimonial Action was also transferred to this Court (*see* 13-ap-1495). *Id.* ¶44; Fong Decl., Ex 20.

38. One week after that, on August 5, 2013, Phillip Wu commenced a parallel Chapter 13 proceeding in the Eastern District of Pennsylvania (Case No. 13-16873(ELF)). *Id.* ¶45; Fong Decl., Ex. 21.

39. The same day that Phillip Wu commenced his Chapter 13 bankruptcy case in Pennsylvania, the Debtor in this Case filed the summary of schedules, and schedules A-H, excluding schedule C (the “Schedules”).<sup>4</sup> As discussed, the Schedules reveal that Debtor’s sole asset is the Real Property, which is valued at approximately \$20 million.<sup>5</sup> The Schedules further reflect a \$12 million secured claim against Debtor. There are no unsecured priority claims or unsecured non-priority claims listed. In other words, according to Debtor’s Schedules, this is a single asset case with no unsecured creditors.<sup>6</sup>

40. In addition on or about July 29, 2013, the Debtor filed a separate adversary proceeding against the Receiver and Margaret Wu (the “Adversary Proceeding”) in this Court (Adv. Proc. No. 13-01386). The Adversary Proceeding also nominally named Phillip Wu as a defendant.

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<sup>4</sup> *See* Docket No. 11.

<sup>5</sup> The Schedules filed by the Debtor also indicate that Debtor has a nominal amount in a bank account, containing \$3.99. *Id.*

<sup>6</sup> Notably, the Schedules were accompanied by the required declaration under penalty of perjury, signed by Jeffrey Wu.

41. The Adversary Proceeding represents yet another attempt by Debtor, Jeffrey and Phillip Wu to avoid the State Court judgments against New Enterprise and Hong Kong Supermarket, the three-year old Receivership Order, the Warrant of Eviction and other proceedings in the State Court.

42. In the Adversary Proceeding, Debtor seeks, among other things,

- declaratory judgments regarding the respective ownership interests of Phillip, Jeffrey, and Lewis Wu in the Debtor and the corresponding right to manage the Debtor (First and Second Causes of Action);
- a turnover of the Real Property to Debtor (Third Cause of Action);
- damages for the Receiver's purported "conversion" of funds from Debtor (Fourth Cause of Action);
- an accounting against the Receiver (Fifth Cause of Action);
- claims to avoid transfers made by the Receiver (Sixth Cause of Action); and
- a declaratory judgment that the Judgment and Warrant of Eviction issued in the Matrimonial Action are property of the Chapter 11 Estate, and not the Receiver.

Debtor makes these assertions despite the existence of the valid – and unappealed – Receivership Order. All of these claims could have been raised in Jeffrey's and Lewis's Intervention Motion.

43. In making its claims in the Adversary Proceeding, the "Debtor" – acting ostensibly through Jeffrey Wu – contradicts Jeffrey's acknowledgement of the Receivership Order, as well as of the Receiver's role and authority in various state court proceedings, as explained above. The Debtor, without a doubt, had notice and actual knowledge that the Receiver was appointed and was in control of the Real Property for almost three years prior to the Chapter 11 filing. Further, while Jeffrey and Lewis now challenge the ownership interests in the Debtor in this Court, the Receivership Order found that the Debtor was owned by Phillip Wu. *See Fong Decl., Ex. 1.* The time and place for challenging that was in the Matrimonial Action.

44. Once Jeffrey, Lewis, and Phillip Wu and the entities that they owned or controlled failed to obtain the relief they sought in various state court proceedings, they collectively filed two bankruptcy cases and two notices of removal – all within a matter of a few weeks – solely for the purpose of staying the Receiver’s rightful actions for the benefit of the marital estate under the Receivership Order.

**Margaret Wu’s Motion to Dismiss the Case**

45. Jeffrey Wu, who signed the petition and schedules, has an intractable conflict of interest in filing and prosecuting this Case. This conflict may be at the heart of the filing of the Case. The Receiver has two judgments and a Warrant of Eviction against two entities controlled by Jeffrey Wu, the individual who commenced the Case. These judgments and the Warrant of Eviction – assuming this Case was properly filed – would be a valuable asset of the Debtor. But yet, the Debtor appears to be seeking to eviscerate this asset.

46. Indeed, the primary purpose of filing this Case was to do so, as admitted by Debtor’s counsel at the August 29, 2013 hearing in this Case:

Queen Elizabeth Realty Corp. filed for Chapter 11 relief on July 17th of this year in order to stay the eviction by a receiver for a one-third shareholder of the debtor of Hong Kong Supermarkets.

Berger Decl., Ex. A at 5:23-6:1.

47. Recognizing this conflict of interest and the Debtor’s transparent attempt to avoid and frustrate the judgments, Warrant of Eviction, and Receivership Order in the Matrimonial Action and related State Court proceedings, Margaret Wu has moved to dismiss the Case (the “Margaret Wu Motion,” *see* Docket No. 12), based on the Debtor’s bad faith actions in bringing these proceedings. Margaret Wu contends that there is no prospect of reorganization, as shown by the fact that Debtor declared under penalty of perjury that it has no unsecured creditors and has only one asset (*i.e.*, the Real Property). The Margaret Wu Motion further points out that the

Debtor has no income or tax information in its Schedules, “leav[ing] no doubt that there is a scheme to frustrate creditors here.” The Margaret Wu Motion separately moves to dismiss or suspend the proceedings under Bankruptcy Code § 305(a). The Receiver incorporates the arguments set forth in the Margaret Wu Motion into this Motion.

48. As the Margaret Wu Motion states, this Case, the Adversary Proceeding, and the Chapter 13 bankruptcy case brought by Phillip Wu are “part of a scheme to defeat the legal rights of Margaret Wu” and the rights and powers of the Receiver. *See* Docket No. 12 ¶8. Accordingly, dismissal or suspension of this Case is warranted for these reasons and the reasons set forth below.

### **RELIEF REQUESTED**

49. The Receiver seeks to dismiss or suspend the Case pursuant to Bankruptcy Code § 1112(b) or § 305(a); or, in the alternative, if the Court does not dismiss or suspend the Case, seeks an order (i) excusing the Receiver from complying with any turnover under Bankruptcy Code § 543(d) and/or (ii) protecting the property held by the Receiver and for payment of the Receiver’s reasonable costs and expenses under Bankruptcy Code § 543(c).

### **BASIS FOR THE RELIEF REQUESTED**

#### **I. THIS CASE SHOULD BE DISMISSED UNDER SECTION 1112(b) OF THE BANKRUPTCY CODE**

50. Bankruptcy Code § 1112(b) provides that, upon motion of any “party in interest,” “the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate,” upon a showing of “cause.” 11 U.S.C. § 1112(b).

51. Although Bankruptcy Code § 1112(b)(4) provides a list of certain acts or defaults by the debtor which amount to grounds for dismissal for “cause,” “these examples are not

exhaustive” and a case may be dismissed for any number of reasons, such as where: (i) it is shown that the petition was not filed in “good faith” (*Clear Blue Water, LLC v. Oyster Bay Mgmt. Co.*, 476 B.R. 60, 68 (E.D.N.Y. 2012)); (ii) the individual that filed the petition lacked authority to commence the case (*In re Gee*, 53 B.R. 891, 894 (Bankr. S.D.N.Y. 1985)); or (iii) the petition is “solely designed to attack” or circumvent a judgment or order of a state court collaterally (*In re 698 Flushing Realty Corp.*, 335 B.R. 17, 20 (Bankr. E.D.N.Y. 2005); *see also In re Wally Findlay Galleries (N.Y.), Inc.*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984)).

“Bankruptcy judges have wide discretion to determine whether cause exists to dismiss or convert a case under § 1112(b).” *In re FRGR Managing Member LLC*, 419 B.R. 576, 580 (Bankr. S.D.N.Y. 2009).

**A. The Petition in this Case Was Filed in Bad Faith**

52. As established in the Margaret Wu Motion, the Case should be dismissed because the voluntary petition was filed in bad faith. The Receiver adopts and joins in all of the arguments in the Margaret Wu Motion, and sets forth the following additional points concerning Debtor’s bad faith filing.

53. As stated above, dismissal of a bankruptcy case is warranted where it is shown that the petition was not filed in “good faith.” *See Clear Blue Water, LLC*, 476 B.R. at 68. “Th[e] standard of good faith ‘protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons (*i.e.*, avoidance of liens, discharge of debts, *marshaling and turnover of assets*) available only to those debtors and creditors with clean hands.’” *Id.* (emphasis added).

54. In deciding whether to dismiss a case based upon a debtor’s “bad faith,” the bankruptcy court examines several factors, including whether:

- i) the debtor has one asset;



- ii) that asset is encumbered by liens of secured creditors;
- iii) the pre-petition conduct of the debtor has been improper;
- iv) there are generally no employees except for principals;
- v) there is little or no cash flow;
- vi) there are no available sources of income to sustain a plan of reorganization;
- vii) there are few if any unsecured creditors;
- viii) the property has been posted for foreclosure;
- ix) the debtor and one creditor have come to a standstill in state court litigation and the debtor has lost or has been required to post a bond which it cannot afford; and
- x) the filing of the petition effectively allows the debtor to evade court orders.

*In re Gucci*, 174 B.R. 401, 410 (Bankr. S.D.N.Y. 1994).

55. Further, courts will not hesitate to dismiss a case where it is being used merely to avoid negative results in a separate litigation. For example, in *In re Wally Findlay Galleries*, 36 B.R. at 851, a debtor commenced a Chapter 11 case only after a state court issued a judgment against its owner. The filing of the Chapter 11 case brought to a halt a related state court proceeding for ejection of real property operated by Debtor. The United States Bankruptcy Court for the Southern District of New York dismissed the case, holding:

It is clear that the debtor did not file its petition to reorganize, but rather as a litigating tactic. ... The petition was filed the same day that judgments ... were entered in the state court. Neither the debtor [nor its owner] has sufficient assets to post a bond in order to stay these judgments pending appeal. The debtor filed its petition herein to avoid the consequences of adverse state court decisions while it continues litigating.

*In re Wally Findlay Galleries*, 36 B.R. at 851; *see also In re 698 Flushing Realty Corp.*, 335 B.R. 17, 20 (Bankr. E.D.N.Y. 2005) (dismissing the case as “a two-party dispute between the debtor, on the one hand, and the movants, on the other” where there was no possibility of reorganizing); *In re Purpura*, 170 B.R. 202, 207 (Bankr. E.D.N.Y. 1994) (dismissing a Chapter

11 case filed only after a divorce decree was issued against the debtor because the “debtor’s Chapter 11 effort involves essentially a two party dispute based on state law, and the filing for relief represented a litigation tactic to stall and impede the enforcement of legal rights against the debtor”).

56. Once an issue is raised concerning “whether the petition was filed in good faith, the burden shifts to the debtor to demonstrate that the petition was filed in good faith.” *Clear Blue Water, LLC*, 476 B.R. at 68-69.

57. This Case is nothing more than a transparent attempt by Phillip Wu, the defendant in the Matrimonial Action, and his brothers, Jeffrey and Lewis Wu, to circumvent the Judgment Against HKS, Warrant of Eviction, Receivership Order, and other State Court proceedings. Phillip Wu and his assets, including Queen Elizabeth Realty, are subject to the Receivership Order. Jeffrey and Lewis Wu, Phillip’s brothers, have been engaged in state court litigation with the Receiver in various actions, as described above, for almost three years. Jeffrey Wu even consented to the Receiver’s collection of rents in one of those proceedings, although subsequently he and Lewis sought to intervene in the Matrimonial Action.

58. However, the state court litigation apparently was not proceeding as Jeffrey, Lewis, and Phillip Wu had hoped. By June 13, 2013, the Receiver had obtained a judgment against Hong Kong Supermarket, controlled by Jeffrey Wu, and by July 11, 2013, due to Phillip’s alleged sanctionable misconduct in discovery, Margaret Wu had filed the Sale Motion, seeking to auction off all of Phillip’s assets, including the Debtor. Jeffrey Wu signed the petition commencing this case only six days after the Sale Motion, and only a month after the Receiver obtained the judgment against Hong Kong Supermarket, a company that Jeffrey controlled. As Debtor’s counsel admits, the primary purpose of this bankruptcy was to stop the Receiver from

effectuating the Judgment Against HKS and Warrant of Eviction for the benefit of the Debtor. Berger Decl., Ex. A at 5:23-6:1. Similarly, in the Adversary Proceeding, the Debtor seeks an “assignment” of the Judgment Against HKS, a \$3 Million judgment that should benefit the debtor, if not because it is enforceable then because it will permit the Debtor to lease the space to a new entity that is paying market rent. To create yet another obstacle to the effectuation of State Court judgments and orders, Phillip Wu filed a Chapter 13 bankruptcy case in the Eastern District of Pennsylvania. Fong Decl., Ex. 21.

59. In essence, the Debtor’s insiders – Jeffrey, Lewis, and Phillip Wu – have sought to use this bankruptcy proceeding as a litigation tactic – to thwart the State Court Matrimonial Action, which has produced an unfavorable result for Phillip Wu. This Case is being used to prevent the Receiver from effectuating other orders and judgments that would enable the Debtor to evict insiders (companies owned and/or controlled by Jeffrey Wu) and to obtain new tenants that would pay market rent to the Debtor. Such a litigation tactic plainly taken to avoid a state court action cannot be sustained. *See In re Wally Findlay Galleries*, 36 B.R. at 851; *In re Purpura*, 170 B.R. at 207.

60. Dismissal is also warranted for another reason. Jeffrey Wu, who signed the petition and Schedules, has an intractable conflict of interest in filing and prosecuting this Case. The Judgment Against HKS and Warrant of Eviction are against an insider controlled by Jeffrey Wu. The Judgment Against HKS and Warrant of Eviction would ordinarily be a valuable asset of the Debtor. Yet, through this Case and the Adversary Proceeding, Debtor seeks to eviscerate this asset. Debtor’s conduct can be explained only by a bad faith motive: to preserve a benefit to insiders, while preventing the Debtor from obtaining higher, market rate rents. Rather than seeking a bona fide reorganization, Debtor, purportedly through Jeffrey Wu, seeks to use the stay

and turnover provisions to prevent the enforcement of the judgment and Warrant of Eviction against Hong Kong Supermarket, a company that he owned and/or controlled.

61. The Debtor cannot provide a single valid reason for filing bankruptcy. The Debtor has only one asset – the Real Property. The Debtor has sworn under penalties of perjury that it has no unsecured creditors, meaning that Debtor need not propose a bona fide plan of reorganization. The Schedules show no income for the past three years, and the Debtor does not appear to have any employees. Further, because the Schedules reflect assets of approximately \$20 million and liabilities of only approximately \$12 million, the only beneficiaries of the bankruptcy, and the automatic stay, are the putative equity holders of the Debtor. *See* Docket No. 11. *See In re Original IFPC Shareholders, Inc.*, 317 B.R. 738, 751 (Bankr. N.D. Ill. 2004) (stating bad faith tends to exist where the Debtor “lack[s] creditors, other than insiders and its own professionals,” and finding that this could be a factor warranting in favor of dismissal because “the number of *bona fide* creditors (as opposed to equity security holders) is currently indeterminate.”) (internal quotation marks omitted).

62. The only purpose of this bankruptcy is an impermissible one: to “allow[] the debtor to evade court orders,” including the Receivership Order, Judgment Against HKS, and Warrant of Eviction. *See In re Gucci*, 174 B.R. 401, 410 (Bankr. S.D.N.Y. 1994). Accordingly, and as also shown in the Margaret Wu Motion, dismissal based on bad faith is warranted because all of the relevant *Gucci* factors are present.<sup>7</sup>

63. Simply put, the Debtor cannot meet its burden of showing that this Case was commenced in good faith because this Case is nothing more than a litigation tactic to avoid the

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<sup>7</sup> *See* Docket No. 12 ¶¶13-20.

effect of State Court judgments and orders and proceedings in a dispute between Debtor's principals and Margaret Wu. Therefore, the Case should be dismissed.

**B. The Bankruptcy Court Lacks Jurisdiction Over This Matter under the Rooker-Feldman Doctrine**

64. This Court lacks jurisdiction to hear this Case because, by filing this Case, as well as the Adversary Proceeding (among other procedural machinations), the Debtor improperly seeks what amounts to appellate review of the Receivership Order entered in the Matrimonial Action and various judgments and orders in related State Court proceedings involving the Debtor and its insiders, Jeffrey Wu, Phillip Wu, and Lewis Wu.

65. Federal review of state court judgments can be obtained only in the United States Supreme Court under 28 U.S.C. § 1257(a). This principle, known as the *Rooker-Feldman* doctrine, prevents parties from relitigating cases and “complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (“*Exxon Mobil*”); *see also Hoblock v. Albany Cnty. Bd. Of Elections*, 422 F.3d 77, 83-92 (2d Cir. 2005) (explicating *Exxon Mobil* and *Rooker-Feldman* doctrine). The doctrine thus prevents a party who had an opportunity to contest, through the state court system, the propriety of the state court judgment ““from seeking what in substance would be appellate review”” from the federal court. *Johnson v. De Grandy*, 512 U.S. 997, 1005-6 (1994).

66. Although the *Rooker-Feldman* doctrine has been described as a mechanism that prevents parties from contesting state court “judgments,” the Second Circuit has made clear that the *Rooker-Feldman* doctrine applies with equal force to state court interlocutory orders, precluding a party from collaterally attacking a state court order through the federal system. *See Campbell v. Greisberger*, 80 F.3d 703, 707 (2d Cir. 1996) (“[i]t cannot be the meaning of

*Rooker–Feldman* that, while the inferior federal courts are barred from reviewing final decisions of state courts, they are free to review interlocutory orders.”); *Zuneska v. Cuomo*, 12-CV-0949 MKB, 2013 WL 431826, at \*4 (E.D.N.Y. Feb. 1, 2013) (“The *Rooker–Feldman* doctrine applies not only to final orders but also to interlocutory decisions.”).

67. Courts have also made clear that *Rooker–Feldman* applies in this exact scenario – to prevent litigants from challenging receivership orders through bankruptcy. *See, e.g., In re Gen-Air Plumbing & Remodeling, Inc.*, 208 B.R. 426, 431 (Bankr. N.D. Ill. 1997) (dismissing chapter 11 petition and stating that the case was “a thinly disguised collateral attack on the state court’s appointment of the Receiver and other subsequent orders it has entered in the corporation dissolution proceeding,” and that “[t]he bankruptcy court is not the proper forum to collaterally attack any actions of the state court.”); *In re Larsen*, 399 B.R. 634, 636 (Bankr. E.D. Wis. 2009) (stating that “[u]nder the well settled *Rooker–Feldman* doctrine, a federal court cannot act as an appellate court to a state court,” where debtor filed a bankruptcy petition as an attack on the distribution of his retirement accounts by a receiver appointed in state court).

68. Here, this entire Case and related proceedings are in effect no more than a collateral attack on the Receivership Order properly entered in the Matrimonial Action and various other State Court orders. As the Debtor’s counsel admitted, this Case was filed in order to stay the effectuation of the State Court Judgment Against HKS and the Warrant of Eviction against Hong Kong Supermarket, an insider of the Debtor. Berger Decl., Ex. A at 5:23-6:1. In addition, all within a matter of a few weeks of the issuance of that judgment, the Debtor filed notices of removal of the entire HKS Holdover Proceeding and of the Matrimonial Action, and filed the Adversary Proceeding, in which the Debtor seeks to unravel the most fundamental

portion of the Receivership Order – the Receiver’s possession and control of the Debtor – by seeking a turnover of the Debtor’s sole asset.

69. In sum, this Case and the related adversary proceedings collaterally attack state court orders in the following ways (among others):

- The Amended Complaint in the Adversary Proceeding directly attacks the Receivership Order by challenging that order’s findings concerning ownership of the Debtor and by seeking a declaration that the Receivership Order is void because other purported owners of Debtor were not involved in the proceedings to install the Receiver;
- The claims against the Receiver for fraudulent transfers and conversion in the Adversary Proceeding attack the May 2, 2012 and May 14, 2013 Orders, which directed the Receiver disburse \$500,000 to Margaret Wu for child support arrears and maintenance, and later directed the Receiver to pay \$5,000 in maintenance and \$50,000 in child support arrears to Margaret Wu pursuant to a so ordered Stipulation between the parties (*see* Fong Decl., Ex. 14);
- The claims against the Receiver for conversion, an accounting, and fraudulent transfers in the Adversary Proceeding collaterally attack the Receivership Order’s mandate that Phillip Wu be “enjoined from interfering in any manner” with actions taken by the Receiver;
- The other adversary proceedings, which are cases transferred upon removal from State Court, are a direct attack on the State Court’s orders evicting Hong Kong Supermarket and denying the repeated requests of the Debtor’s insiders for a stay of those orders, and a direct attack on the Receivership Order and all the other orders entered therein.

70. The Debtor and Phillip Wu, and its other purported owners, Jeffrey Wu and Lewis Wu, all had a full and fair opportunity to challenge the various State Court orders that they seek to impede through this Case and its related proceedings. As explained above, they availed themselves of those opportunities: by seeking to intervene in the Matrimonial Action and to vacate the Receivership Order therein, by litigating directly against the Receiver in the New Enterprise Action and the HKS Holdover Proceeding, and by seeking emergency stays of the execution of the Judgment Against HKS. Over the course of nearly three years, the insiders who purport to have authority to file this Case entered into various stipulations, with the Receiver in State Court, in which (among other things) (i) Jeffrey Wu (who signed the bankruptcy petition)

and Lewis Wu, by their counsel, repeatedly entered into adjournments in the Matrimonial Action, and (ii) New Enterprise and Hong Kong Supermarket, both controlled by Jeffrey Wu, consented to and/or made payments to the Receiver on account of amounts owed to the Debtor. And, while disputing the amounts owed, the Hugh Mo Firm, speaking for New Enterprise, even acknowledged the Receiver's role in maintaining the Debtor and the Receiver's right to receive payments on account of the Debtor. Finally, Phillip Wu never appealed the Receivership Order.

71. Phillip Wu and his brothers Jeffrey and Lewis Wu, both directly and through entities they owned and/or controlled, have litigated issues in the Matrimonial Action and related State Court proceedings against the Receiver for nearly three years. Now unhappy with the results of various State Court orders, they seek, through various procedural devices, including this Case, to collaterally attack those orders in Bankruptcy Court – both in this Case and in Phillip Wu's Chapter 13 case.

72. These challenges in federal court to the State Court's orders must be rejected under the *Rooker-Feldman* Doctrine. Moreover, to the extent there is any dispute about the Receiver's powers under the Receivership Order, the proper remedy is to move the State Court for an amendment of the Receivership Order – as Jeffrey and Phillip Wu did, but failed to pursue – since the state “appellate courts can remedy any reversible error allegedly committed by the state trial court.” *In re Gen-Air Plumbing & Remodeling, Inc.*, 208 B.R. at 432.

73. The Debtor's machinations invite “review and rejection” of various state court orders, in violation of *Rooker-Feldman*. Accordingly, this Case should be dismissed for that reason alone.



**II. THE COURT SHOULD DISMISS OR SUSPEND THE PROCEEDINGS UNDER SECTION 305(a) OF THE BANKRUPTCY CODE**

74. Even if the Court does not dismiss the Case under Section 1112(b), the Court should exercise its discretion to abstain from the proceedings under Bankruptcy Code § 305(a).

75. Section 305(a)(1) of the Bankruptcy Code “permits a bankruptcy court to dismiss any bankruptcy case where “the interests of creditors and the debtor would be better served by such dismissal ....” *In re TPG Troy, LLC*, 492 B.R. 150, 160 (Bankr. S.D.N.Y. 2013) (citing 11 U.S.C. § 305(a)(1)). In determining whether abstention is proper under Section 305(a)(1), courts generally examine the following factors:

- (1) The economy and efficiency of administration;
- (2) Whether another forum is available to protect the interests of both parties or there is already a pending proceeding in a state court;
- (3) Whether federal proceedings are necessary to reach a just and equitable solution;
- (4) Whether there is an alternative means of achieving an equitable distribution of assets;
- (5) Whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
- (6) Whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and
- (7) The purpose for which bankruptcy jurisdiction has been sought.

*Id.*

76. Based on these factors, courts have dismissed a case under Section 305 where:

- another forum would be better suited to the issues presented (*see, e.g., In re TPG Troy*, 492 B.R. at 160) (dismissing a case under Section 305(a) where “the primary claims at issue are based on state law and ... can be adequately determined in the state court proceedings.”); *or*
- where keeping the case in the federal forum would amount to a waste of time and resources because of the existence of an equitable receivership (*see, e.g., In re Michael S.*

*Starbuck, Inc.*, 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981) (finding “the best interests [of the creditors] will be served by the continued administration of the equity receivership”));  
*or*

- where the case was brought for an improper purpose (*see, e.g., In re Trina Assocs.*, 128 B.R. 858, 868 (Bankr. E.D.N.Y. 1991) (dismissing a case where it was determined that it was brought by “a general partner maneuvering to minimize his personal liability for partnership debt”)).

77. “Section 305 of the Bankruptcy Code recognizes that there are situations under title 11 where it would be proper for the Bankruptcy Court to decline jurisdiction. ... [T]he decision to abstain lies solely within the discretion of the Court.” *In re Fitzgerald Grp.*, 38 B.R. 16, 17 (Bankr. S.D.N.Y. 1983)

78. Dismissal or suspension of the Case is warranted here. The only creditor listed in this proceeding is Margaret Wu. Margaret Wu’s interests have been – and continue to be – adequately protected in the Matrimonial Action and through the State Court receivership. The State Court had previously ordered the Receiver to disburse \$500,000 from Phillip Wu’s property for the benefit of Margaret Wu – which Phillip Wu never objected to or asserted was wrongful on the basis that said funds were property of his brothers, Jeffrey and Lewis Wu; most recently, the Court ordered the Receiver to disburse to Margaret Wu \$5,000 per month for maintenance. *Id.* The Debtor’s Case, the Adversary Proceeding, and the other related adversary proceedings resulting from removal of State Court proceedings merely raise issues of state law concerning the propriety of the Receivership Order and the effectuation of other State Court judgments and orders. These issues are best handled by the State Court, as it was the State Court that issued the Receivership Order and other orders in related proceedings. The State Court is also the judicial body most familiar with these parties and Debtor’s sole asset, the Real Property, and the various proceedings in which the Debtor and its insiders have participated for over nearly three years.

79. Indeed, the underlying dispute has been before the State Court since 2009. Basic principles of comity and judicial efficiency further support a dismissal, as this Case, the Adversary Proceeding, and other related adversary proceedings before this Court require this Court to revisit issues already determined by the State Court.

80. Moreover, as discussed above, this Case has all the indicia of a proceeding commenced in bad faith. Jeffrey Wu has a clear conflict of interest in filing the petition, the Case was filed directly after the issuance of the Judgment Against HKS and Warrant of Eviction in the State Court, and all of the “bad faith” factors demonstrate that the petition does not seek a bona fide reorganization.

81. In sum, with respect to the relevant factors:

- (a) there are already pending State Court proceedings – the Matrimonial Action and the HKS Holdover Action – in which the interests of the Debtor and the only other interested party, Margaret Wu, could be protected; indeed, until recently changing litigation strategy, Phillip, Jeffrey, and Lewis Wu had been litigating the issues raised in this Case in the Matrimonial Action and the HKS Holdover Action for months;
- (b) administering this Case would be inefficient and uneconomical, as this Court will be required to become familiar with, and make – and often, remake – decisions on various issues already before the State Court in the Matrimonial Action and the HKS Holdover Action;
- (c) federal proceedings are not necessary to reach a just and equitable solution, because the only issues relevant here are state law issues that were already determined in the Matrimonial Action and the HKS Holdover Action; to the extent any of those issues could be revisited, they should be addressed only by the State Court in those proceedings;
- (d) the State Court in the Matrimonial Action has authority to, and could, provide alternative means of achieving an equitable distribution of assets, which would be more efficient than re-litigating issues already raised in the Matrimonial Action before this Court;
- (e) the Debtor and Margaret Wu, the only other interested party, have been engaged in settlement discussions for months in the Matrimonial Action in efforts to work out an out-of-court arrangement;

- (f) the Matrimonial Action and the HKS Holdover Action have both proceeded so far that it would be costly and time consuming to start afresh with the federal bankruptcy process; indeed, all that remains in the HKS Holdover Action is to effectuate the eviction of the Debtor's insider, Hong Kong Supermarket; and
- (g) the purpose for which bankruptcy jurisdiction has been sought is to stay the eviction of an insider's company from the Debtor's Real Property, an entirely impermissible purpose.

82. Given the foregoing, to protect the interests of Debtor's creditors and satisfy basic principles of economy and efficiency, the Court should exercise its discretion to dismiss the Case pursuant to Bankruptcy Code § 305(a).

**III. ALTERNATIVELY, IF THE CASE IS NOT DISMISSED OR SUSPENDED, THE RECEIVER IS ENTITLED TO THE PROTECTIONS OF SECTIONS 543(c) AND (d) OF THE BANKRUPTCY CODE**

83. Even if this Case is not dismissed or suspended, under Bankruptcy Code § 543(d), the Receiver should be excused from turning over property, and, in any event, the Receiver is entitled to the protection of Bankruptcy Code § 543(c).

**A. The Receiver Should Be Permitted to Maintain Control Over the Real Property Under Section 543(d) of the Bankruptcy Code**

84. While Sections 543(a) and (b) of the Bankruptcy Code generally require a custodian, such as a state court receiver, "to turn over to the bankruptcy trustee or debtor-in-possession any property of the debtor that is in the possession, custody or control of the ... custodian," Bankruptcy Code § 543(d)(1) provides an exception to this requirement. *In re Dill*, 163 B.R. 221, 225 (E.D.N.Y. 1994); *see also In re 245 Assocs., LLC*, 188 B.R. 743, 748 (Bankr. S.D.N.Y. 1995).

85. Section 543(d)(1) of the Bankruptcy Code states: "After notice and hearing, the bankruptcy court . . . may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors . . . would be better served by permitting a custodian to continue in possession, custody, or control of such property."

86. “Section 543(d)(1) is a modified abstention provision that reinforces the policies set forth in [Section] 305” of the Bankruptcy Code, *supra. In re 245 Assocs., LLC*, 188 B.R. at 749. When determining whether to excuse the custodian from turning over assets, the Court examines the following factors:

[i] whether there will be sufficient income to fund a successful reorganization;

[ii] whether the debtor will use the turnover property for the benefit of the creditors;

[iii] whether there has been mismanagement by the debtor;

[iv] whether or not there are avoidance issues raised with respect to property retained by a receiver, because a receiver does not possess avoiding powers for the benefit of the estate; and

[v] the fact that the bankruptcy automatic stay has deactivated the state court receivership action.

*In re Dill*, 163 B.R. at 225; *see also In re Constable Plaza Assocs., L.P.*, 125 B.R. 98, 103 (Bankr. S.D.N.Y. 1991) (discussing the same factors).

87. “The interests of the debtor . . . are not part of the criteria considered when applying section 543(d)(1).” *In re Dill*, 163 B.R. at 225. Moreover, a court will not deny a receiver the protections of Section 543(d)(1) merely because there is an automatic stay, for to do otherwise would “read out of the Bankruptcy Code the operative effect of section 543(d)(1).” *Id.* at 226; *see also In re CCN Realty Corp.*, 19 B.R. 526, 529 (Bankr. S.D.N.Y. 1982) (excusing a receiver from complying with turnover where the debtor lacked incentive to collect rents on the subject premises).

88. The Receiver should be excused from turning over the Real Property or any other property in this Case. As discussed above, Debtor does not seek a bona fide reorganization. The Schedules indicate there are no unsecured creditors. The conduct of Phillip and Jeffrey Wu, purported owners of Debtor, has demonstrated thus far that the Debtor will not use the Real

Property to benefit the only other interested party in this Case, Margaret Wu. Quite the opposite: the Debtor (through Jeffrey and Phillip Wu and entities they owned and/or controlled) has sought at every turn of the Matrimonial Action and the HKS Holdover Action – and now this Case, the Adversary Proceeding, and other related adversary proceedings in this Court – to avoid payment of any sums that may be used to benefit Margaret Wu. For instance, (i) in the Matrimonial Action, the conduct of one of Debtor’s insiders, Hong Kong Supermarket, forced the Receiver to commence a holdover proceeding, (ii) Phillip Wu refused to appear for a deposition in the Matrimonial Action, forcing Margaret Wu to file a motion to auction the Real Property in the Matrimonial Action, (iii) this Case was filed only days after that motion was filed and only a month after the Receiver obtained a judgment against Hong Kong Supermarket, and (iv) shortly thereafter, Phillip Wu filed a Chapter 13 case in Pennsylvania. The two-party dispute involved in this Case is simply another ploy to avoid the unfavorable outcome reached in the Matrimonial Action and related State Court proceedings.

89. In sum, with respect to the relevant factors:

- (a) the Debtor’s Schedules reflect that the Debtor has no tax information and zero income available to fund a successful reorganization;
- (b) there are no creditors, according to Debtor’s Schedules, so the turnover property could not benefit any creditors; rather, the Debtor is using this Case in order to prevent the only other interested party, Margaret Wu, from receiving payments owed to her under the Receivership Order;
- (c) with respect to management of the Debtor’s affairs, there is only one primary asset, the Real Property, which has been under the control of the Receiver, rather than Phillip, Jeffrey, and Lewis Wu, for more than three years; otherwise, the Debtor’s Schedules reflect that the Debtor has no tax information and zero income.

90. While Debtor has asserted avoidance claims in the Adversary Proceeding, the only transfers the Debtor seeks to avoid are those to the Receiver and Margaret Wu, the judgment creditor in the Matrimonial Action. As explained above, this entire Case is essentially

a two-party dispute between the Debtor (along with its principals) and Margaret Wu. There are no avoidance issues relevant to the section 543(d) analysis. Further, as will be set forth in more detail in the Receiver's motion to dismiss the Adversary Proceeding, the avoidance claims against the Receiver and Margaret Wu are without merit because (among other reasons) the Receiver was acting in accordance with the Receivership Order of the State Court. *See Phelan v. Middle States Oil Corp.*, 220 F.2d 593, 608 (2d Cir. 1955) (“[I]t would be patently absurd to hold a receiver liable for complying with an order that was within the jurisdiction of the court that appointed him.”); *Kohlman v. Alexander*, 1 A.D.2d 334, 336, 150 N.Y.S.2d 134, 138 (1956), *aff'd*, 4 N.Y.2d 823, 149 N.E.2d 898 (1958) (“It should be noted that the receiver ought not to be personally exposed to a possible claim for making the payment to the Government, since he complied with an order valid at the time.”).

91. Finally, as explained in *In re Dill*, 163 B.R. at 225, the fact that there may be an automatic stay under Bankruptcy Code § 362 is not dispositive on an application for relief from turnover pursuant to Section 543(d)(1). Here, the availability of the stay should be of no moment because Debtor filed this Case *only* as a litigation tactic to stay the proceedings in the Matrimonial Action and the effectuation of the Judgment against Hong Kong Supermarket, one of the Debtor's insiders. Indeed, the stated purpose of this Case was to stay the eviction of one of the Debtor's insiders – an eviction that would have benefited the estate by allowing the Debtor to obtain market rent for the Real Property. The Debtor should not be permitted to use the bankruptcy stay to prevent Margaret Wu, one of its insider's creditors, from recovering what is owed to her in the Matrimonial Action.

92. The Section 543(d)(1) factors strongly weigh in favor of excusing the Receiver from complying with any turnover of the Real Property, and the Receiver respectfully requests

that the Court exercise its discretion to permit the Receiver to continue to manage the Real Property – as it has done for over three years – and with the full knowledge of Jeffrey, Lewis, and Phillip Wu.

**B. The Receiver Should Be Accorded the Protections of Bankruptcy Code § 543(c)(1) and Provided with Its Reasonable Compensation, Costs and Expenses Pursuant to Bankruptcy Code § 543(c)(2)**

93. Section 543(c)(1) of the Bankruptcy Code provides: “The court, after notice and a hearing, shall ... protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property.” Pursuant to this Section, “[w]hen turnover occurs, the Bankruptcy Court is required to protect the persons to whom the custodian is indebted.” *In re 400 Madison Ave. Ltd. P’ship*, 213 B.R. 888, 898 (Bankr. S.D.N.Y. 1997). In this regard, a custodian, including a receiver, is entitled to all of [its] unpaid bills, including those of his counsel, subject only to a determination of reasonableness.” *Id.*; see also *In re Euro-Am. Lodging Corp.*, 357 B.R. 700, 718 (Bankr. S.D.N.Y. 2007) (“[s]ince the receiver may owe debts that he lacks the wherewithal to pay, § 543(c)(1) provides a mechanism for the bankruptcy court to ‘protect’ the receiver’s creditor.”).

94. Moreover, Section 543(c)(2) states that, after notice and hearing, the Court “shall ... provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian.” The section allows the custodian to apply, “[a]fter being superseded, . . . for reasonable compensation for services rendered and costs and expenses incurred, including legal fees reasonably incurred in connection with the custodian's services.” *In re Snergy Props., Inc.*, 130 B.R. 700, 705 (Bankr. S.D.N.Y. 1991). “The receiver is entitled to compensation for properly incurred expenses notwithstanding that there was no previous authorization by the [bankruptcy court] because 11 U.S.C. § 543(c)(2) do[es] not require such prior authorization.” *Id.* Moreover, the court need not wait until the end of the case before



awarding the receiver its compensation, fees and expenses. *See, e.g., In re Marichal-Agosto, Inc.*, 12 B.R. 891, 893 (Bankr. S.D.N.Y. 1981).

95. Even if the Court requires the Receiver to turn over the Real Property and/or any other property here, Section 543(c)(1) requires that the Receiver be accorded protection by permitting the Receiver to obtain funds from the Debtor's property in order to pay its unpaid bills, including its attorneys' fees. Moreover, Section 543(c)(2) similarly requires that, if a turnover occurs, the Receiver receive its reasonable compensation and expenses. Accordingly, if this Case is not dismissed or suspended, and the Receiver is also required to turn over the Real Property and/or any other property, the Receiver respectfully invokes the full protections of Section 543(c)(1) and (2).

**CONCLUSION**

**WHEREFORE** the Receiver respectfully requests that an Order be entered (i) dismissing the Case under Bankruptcy Code §1112(b) based on lack of good faith and for cause shown; and/or (ii) dismissing or suspending the proceedings in this Case under Bankruptcy Code §305(a), as the interests of the creditors and debtor would be better served by dismissal or suspension; or in the alternative, (iii) excusing the Receiver from complying with any turnover under Bankruptcy Code § 543(d); and/or protecting the property held by the Receiver and for payment of the Receiver's reasonable costs and expenses under Bankruptcy Code § 543(c); and (iv) granting such further relief as this Court deems just and proper.

Dated: New York, New York  
September 18, 2013

Respectfully,

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