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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
In re:	:
	:
	: Chapter 11
	:
QUEEN ELIZABETH REALTY CORP.,	:
	: Case No. 13-12335 (SMB)
	:
Debtor.	:
	:
	:
-----X	

**REPLY IN FURTHER SUPPORT OF RECEIVER DEAN K. FONG'S
MOTION TO (i) DISMISS OR SUSPEND THE BANKRUPTCY CASE, OR
IN THE ALTERNATIVE, (ii) FOR RELIEF UNDER SECTIONS 543(c) AND
543 (d) OF THE BANKRUPTCY CODE FROM TURNOVER OF PROPERTY**

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*Attorneys for Dean K. Fong, Esq., as
Receiver of the Property of Phillip Wu*

Dean K. Fong, Esq., as Receiver of the Property of Phillip Wu (the “Receiver”), by and through the undersigned counsel, hereby submits this reply (the “Reply”) in further support of his Motion for Entry of An Order (i) Dismissing the Case Pursuant to 11 U.S.C. § 1112(b), or (ii) in the Alternative, Abstaining pursuant to 11 U.S.C. § 305; or (iii) for Relief under 11 U.S.C. § 543 (c) and (d) from Turnover of Property (the “Motion”).¹

PRELIMINARY STATEMENT

In its opposition papers and its supplement, filed yesterday, the Debtor has raised a raft of state law issues concerning the alleged equity interests of Jeffrey, Lewis, and Phillip Wu in the Debtor, and the Debtor’s secured creditor, Shanghai Bank, has filed opposition papers arguing that because it may be willing to support a plan, dismissal is not warranted.² However, as explained in the Receiver’s Motion and below, the adjudication of a dispute based in state law among three brothers who claim to have ownership interests in the Debtor has no place in Bankruptcy Court. And, Shanghai Bank’s position is not dispositive as to whether this case is a bad faith filing or whether it should be dismissed for other reasons – particularly since Shanghai Bank has not represented that any mortgage payments were missed, and, in fact, it is fully secured and its interests are fully protected.

¹ Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Motion.

² Debtor’s Objection to Motions for Entry of Order (I) Dismissing the Case Pursuant to 11 U.S.C. § 1112(b), or (II) in the Alternative, Abstaining Pursuant to 11 U.S.C. § 305; or (III) Excusing Receiver’s Compliance with 11 U.S.C. § 543, dated October 21, 2013, shall be referred to as the “Opposition.”

The Opposition of Shanghai Commercial Bank LTD. (“Shanghai Bank”) to Margaret Wu’s Motion to Dismiss and the Receiver’s Motion to Dismiss or Suspend the Bankruptcy Case, or in the Alternative for Relief under Section 543 (c) and (d) of the Bankruptcy Code from Turnover of Property, dated October 24, 2013 shall be referred to as the “Shanghai Opposition.”

More important to the Court's adjudication of the Motion is what the Debtor has *not* addressed: the intractable conflicts of interest of the Debtor's insiders, including the conflict of Jeffrey Wu, the Debtor's alleged president, in pursuing relief that will enable him to stop the enforcement of a \$3 million judgment against the Debtor's tenant, Hong Kong Supermarket, a company he owned and/or controlled, which otherwise would benefit the Debtor. As explained below (as well as in the Motion), these conflicts, as well as numerous other facts, support dismissal or suspension of this case.

ARGUMENT

I. THE DEBTOR AND ITS SECURED CREDITOR HAVE FAILED TO EXPLAIN ANY LEGITIMATE BASIS FOR THIS BANKRUPTCY CASE³

A. The Debtor and Its Secured Creditor Have Failed To Rebut the Central Conflict of Interest of the Debtor's Insiders That Permeates This Bankruptcy Case

1. While the Debtor focuses on the irrelevant (and unfounded) allegation that the Receiver should not be able to seek dismissal of this Case because he is non-neutral, the Debtor does not dispute the facts central to whether this Case should be dismissed: Jeffrey Wu and Phillip Wu, both alleged one-third owners of the Debtor, both have intractable conflicts of interest in commencing and pursuing this bankruptcy case and the related proceedings against the Debtor's tenant, as well as against Margaret Wu and the Receiver. As explained below, these conflicts of interest are highlighted by the Debtor's opposition papers.

2. The Debtor has not disputed the following key facts militating towards dismissal of this Case:

- Jeffrey Wu owned and/or controlled Hong Kong Supermarket.

³ No meeting under 11 U.S.C. § 341 has yet taken place. The meeting, scheduled for October 25, 2013, was adjourned due to the alleged unavailability of the Debtor's principal.

- 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, including the proceeding against Hong Kong Supermarket, and at least as early as September 2011, the Hugh Mo Firm indicated that it represented the Debtor in certain litigation involving the receivership.
- While Hong Kong Supermarket continued to occupy the Real Property for a substantial period of time, the Receiver attempted to negotiate a new lease with Hong Kong Supermarket, through its counsel – the Hugh Mo Firm – at a market rate, as well as for payment of past due rents that Hong Kong Supermarket owed for occupying the Real Property, but no agreement on rents or a new lease was ever reached.
- After an inquest, the Receiver obtained the Judgment Against HKS, dated June 13, 2013, in the sum of \$3,256,000, and the Warrant of Eviction was issued fifteen days later on June 28, 2013.
- Jeffrey Wu signed the petition commencing this bankruptcy case, on July 17, 2013.

3. Debtor's counsel also admitted, at the initial hearing on this Case, that:

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.) This earlier statement plainly admitting an intention to interfere with execution of the Judgment Against HKS, an asset of the Debtor, belies the self-serving statement, made in the Debtor's Opposition, that the "purpose of the Chapter 11 filing was to protect the interests of its stakeholders, including its largest creditor," the secured creditor Shanghai Bank. (Opposition, at p. 21, ¶ 95).

4. In its Opposition, the Debtor protests vehemently against the Receiver's pursuit of a judgment against an affiliate of the Debtor's alleged President, Jeffrey Wu. (Opposition, at p. 7-8, ¶¶ 32 and 39.) The Debtor also argues that "upon information and belief, more than sixty (60) people will lose their jobs if HKS is wrongfully evicted." (*Id.*, at p. 8, ¶ 40.) In addition, in

the Adversary Proceeding, the Debtor pursues a separate declaratory judgment that the Judgment Against HKS belongs to the Debtor.

5. Although the Debtor ostensibly seeks turnover of the judgment to the Debtor's estate, given the other statements and allegations in the Debtor's motion papers and its Amended Complaint against the Receiver, this is not the Debtor's true purpose in asserting this claim. Rather, it is a thinly-veiled effort at obtaining the judgment so that the Debtor *will not enforce it*.⁴

6. Further, it is clear from the Opposition that the Debtor is focused on the welfare of the Debtor's *tenant*, Hong Kong Supermarket – which the Debtor's alleged president owned and/or controlled – rather than the welfare of the Debtor itself.

7. In sum, even though there is no dispute that the Debtor has a right to collect more than \$3 million from Hong Kong Supermarket and to evict a tenant that is paying below-market rent and to re-lease the space to a company that would pay market rent, the Debtor, whose alleged president Jeffrey Wu, owned and/or controlled Hong Kong Supermarket, is seeking to prevent that judgment from being enforced.

8. This intractable conflict of interest by the Debtor's insiders is grounds alone for dismissal of this Case.

9. The Debtor requests, in the alternative, that the Court retain the bankruptcy case “in order to facilitate the goals of bankruptcy proceedings.” (Opposition, at p. 22, ¶ 102.) None of the cases cited by the Debtor supports a basis for such a request in the context of a bad faith

⁴ It should be noted that the Debtor has provided no evidence of whether it is still collecting, or even seeking, rents from Hong Kong Supermarket, which are not being paid to the Receiver even though Hong Kong Supermarket still is an occupant of the Debtor's Real Property.

bankruptcy filing.⁵ Moreover, it cannot be a goal of the Bankruptcy Code for a debtor to use the bankruptcy process as a litigation tactic to prevent the effect and enforcement of state court orders – particularly in order to protect a company owned and/or controlled by the Debtor’s alleged president. The Debtor’s request in this regard should be denied.

**B. The Debtor Is Focused on Facts and Legal Issues
That Have No Legitimate Place in Bankruptcy Court**

10. The Debtor seeks to draw the parties and this Court into a factual analysis concerning the ownership of the Debtor that already has been addressed by a state court. This dispute over the equity interests in the Debtor has no place in Bankruptcy Court.

11. Rather, this is a dispute between Phillip Wu and Jeffrey Wu, which could – and should – be resolved either in the Matrimonial Action or in a separate state court action between them. In essence, this bankruptcy case and the Adversary Proceeding against the Receiver are efforts to contrive federal jurisdiction over an ownership dispute between brothers over family-owned real estate.

12. Bankruptcy Court is not the venue for seeking redress of alleged due process violations between or among brothers in a state court family dispute – particularly where the parties have not filed any appeal.⁶

⁵ For example, in *Bank of American Nat’l Trust & Sav. Ass’n v. 203 North LaSalle St. P’ship*, 526 U.S. 434, 437 (1999), the issue, in a Chapter 11 reorganization, was whether “a debtor’s prebankruptcy equity holders may, over the objection of a senior class of impaired creditors, contribute new capital and receive ownership interests in the reorganized entity, when that opportunity is given exclusively to the old equity holders under a plan adopted without consideration of alternatives.” *Id.* The other cases cited by Debtor are equally inapplicable. *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984) involved the rejection by a debtor of a collective bargaining agreement. *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 368 (1988) addressed the issue of whether a party was due monthly payments for the use and value of its loan collateral.

⁶ This due process argument is disingenuous, as explained more fully below.

C. The Debtor and Its Insiders Could, and Should, Litigate the Issues over the Insiders' Equity Interests in State Court

The State Court Provided the Debtor With Due Process

13. The Debtor contends, repeatedly, that neither it nor Jeffrey Wu nor Lewis Wu has received “due process” because they were not served with various papers in the Matrimonial Action or in the related proceedings. (See Opposition, at pp. 5-7, 12-15.) Consequently, the Debtor argues, there is no alternative forum in which these issues could be resolved – one of the factors relevant to abstention (among other things). However, the Debtor’s arguments are belied by the facts and, indeed, the documents attached to its own Opposition.

14. *First*, the Debtor, in fact, has had knowledge of all the relevant papers in the Matrimonial Action, through its agent, Phillip Wu. According to the Directors’ Certificate of Resolutions, dated as of June 6, 2008,⁷ Phillip Wu was a director and the President of the Debtor; indeed, Phillip Wu was designated as the “Authorized Officer.” The Debtor also admits that Phillip Wu entered into a lease agreement “on behalf of QERC” with New Enterprise. (Opposition, at p. 4, ¶ 14(d).)

15. Given Phillip Wu’s admitted officer and director status, as well as his power to bind the Debtor to various agreements, his knowledge should be imputed to the Debtor; there is no reasonable basis for arguing that the Debtor did not have fair notice of the Matrimonial Action or related proceedings.⁸ If Phillip Wu failed to accurately represent the equity interests of his brothers to the referee or the State Court in the Matrimonial Action, or to protect those

⁷ (See Opposition, Exh. 2.)

⁸ “Thus, the knowledge of an officer, director or sole shareholder can be imputed to a corporation.” *J.J.J. Props. Inc. v. Travelers Indem. Co.*, No. 07 CIV. 0135 (WCC), 2008 WL 2735865, at *3 (S.D.N.Y. July 7, 2008) (citing *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 255 (2d Cir. 1995)) (indicating that where one brother, who owned a corporation with his father and brother, and was alleged to be the President of that corporation, received notice of an injury, knowledge would be imputed to the company if these facts were proven).

interests in that case, that is a dispute between Phillip Wu and his brothers – not between the Debtor and the Receiver.

16. *Second*, as the Motion makes clear, and the Debtor does not deny, Jeffrey Wu, allegedly now the Debtor's president, was well aware of the Matrimonial Action, the receivership, and related proceedings, as acknowledged by stipulations signed by the Hugh Mo Firm, which is undisputedly counsel for Jeffrey Wu and the company he controls, New Enterprise. For the same reasons set forth above, given Jeffrey Wu's alleged officer status, there is no reasonable basis for arguing that the Debtor did not have fair notice of the state court proceedings.

17. *Third*, as the Debtor admits, Jeffrey Wu and Lewis Wu filed, on behalf of the Debtor, the Intervention Motion in the Matrimonial Action. Further, the Debtor does not dispute either (i) that the State Court has not ruled upon that motion, or (ii) that they have not requested that the State Court rule upon that motion forthwith. Plainly, the Debtor and the two brothers, Jeffrey Wu and Lewis Wu, who claim to have been disenfranchised by Phillip Wu, have not pursued their remedies in the State Court.

The Alleged State Court Delay Is of the Debtor's Own Making

18. The Debtor argues that pursuing its remedies in State Court is futile, based on its belief that the state court justice is not *likely* to grant Jeffrey Wu's and Lewis Wu's Intervention Motion. The Debtor alleges that this belief is justified by the fact that the State Court has not yet ruled on the motion. (Opposition, at p. 21, ¶99.)

19. However, the Debtor fails to mention the fact – which is undisputed – that Jeffrey Wu and Lewis Wu, by their counsel, repeatedly sought adjournments of the motion to intervene

from the Court. (*See Fong Decl.*, June 6, 2012 transcript, 6:15-18, 23:1-6.)⁹ As this Court has stated at the hearing on October 10, 2013, the Debtor should request that the State Court rule on its motion, and if it is denied, pursue an appeal.

20. Given the foregoing, whether this Case is dismissed as a bad faith filing or on abstention grounds, the Debtor and the three brothers who allegedly own equity interests in the Debtor have – and have had – an adequate forum to litigate their state law ownership issues.

D. Despite the Debtor’s Unfounded Allegations, the Receiver Is Only Complying With State Court Orders¹⁰

21. While not directly relevant to the issues raised in the Motion, the Debtor’s Opposition is replete with misstatements of facts and of law. Below are the three most egregious such misstatements.

22. *First*, the Debtor contends that the “Receiver seeks, by Order to Show Cause in Supreme Court, to sell not only Phillip Wu’s one third interest in the Real Property, but the Real Property itself.” (Opposition, at p. 20, ¶ 87.) However, in fact, it was Margaret Wu that filed such a motion; the Receiver was not involved with that motion at all. (*See Fong Decl.*, ¶41, and Ex. 17.)

23. *Second*, the Debtor contends that the Receiver secured “for himself a judgment in his own name,” which the Debtor states “is nothing other than outright theft from QERC.” (Opposition, at p. 7, ¶ 32.) This false – and outrageous – statement is belied by the facts. The

⁹ *See also* October 10, 2013 transcript in this Case, 21:20 - 22:3, Exhibit 2 to Declaration of Thomas J. Schell in Support of the Motion, dated October 29, 2013 (“Schell Decl.”).

¹⁰ The Debtor also misstates the chronology of the marital disputes between Phillip Wu and Margaret Wu. (Opposition, at pp. 5-8.) Although the current Matrimonial Action commenced in 2009, a prior matrimonial proceeding between Phillip Wu and Margaret Wu was filed in 2008. (*See Schell Decl.*, Exh. 1.)

pleadings, motions, and orders in the HKS Holdover Action referred to “Dean K. Fong, Esq., *as Receiver of the Property of Phillip Wu*” as the named Plaintiff. (Fong Decl., Exs. 13,15, 18.)

24. *Third*, the Debtor contends that the Receiver is not neutral. However, as explained in the Receiver’s Motion, all of the Receiver’s actions were taken, indeed were required, in accordance with the New York State Supreme Court’s orders:

- The Receivership Order provided that the Receiver “shall take possession of the businesses and property,” which, as set forth in the Receivership Order, included Debtor (Fong Decl., Exs. 1 and 2);
- The Receivership Order required the Receiver to take certain steps, “including the collection of all rents, income and revenues,” which thus required the Receiver to pursue a judgment against Hong Kong Supermarket, as it was not paying rent to the Receiver (a judgment that inures to the benefit of the Debtor’s estate) (*id.*); and
- The May 2, 2012 Order and the May 14, 2013 Order, entered, with Phillip Wu’s consent, in the Matrimonial Action, directed Receiver to disburse \$500,000 to Margaret Wu for child support arrears and maintenance, and later to pay \$5,000 in maintenance and \$50,000 in child support arrears to Margaret Wu (Fong Decl., Ex. 14.)

II. THE DEBTOR AND SHANGHAI BANK HAVE FAILED TO ESTABLISH WHY BANKRUPTCY IS IN THE INTEREST OF THE CREDITORS

25. The Debtor relies heavily on its allegation that Shanghai Bank, the Debtor’s secured creditor (and the only listed creditor) – which now also opposes the Motion – needs protection. Notably, however, neither the Debtor nor Shanghai Bank has stated that Shanghai Bank failed to receive any mortgage payments. Nor has either opponent of this Motion established that there is any danger that future payments would not be made if the Receiver were left in place and permitted to collect rents and make such payments therefrom.

26. Indeed, Shanghai Bank is protected because New Enterprise is a co-obligor on the loan, and, as the Debtor admits, Jeffrey Wu has guaranteed the Debtor’s obligations pursuant to the commercial mortgage. (Opposition, at p. 3, ¶ 10.) And, enforcement of the \$3 million

judgment for back rent against Hong Kong Supermarket would ensure a stream of mortgage payments for years – if the Debtor chose to pursue it.

27. On the other hand, neither the Debtor nor Shanghai Bank explains how failing to enforce a \$3 million judgment for back rent and refusing to re-lease the space to a new tenant that pays market (instead of below-market) rent benefits the Debtor or its secured creditor.

28. Under such circumstances, Shanghai Bank's position is of little relevance to whether this case should be dismissed as a bad faith filing or on abstention grounds. For example, the court in *In re Landmark Capital Co.*, 27 B.R. 273, 280 (Bankr. D. Ariz. 1983), dismissed the bankruptcy case for lack of good faith where 73 of the 76 unsecured creditors holding prepetition debts, listed on the debtor's schedules and amendment, had been paid, or satisfied, prior to the filing of the Chapter 11 proceedings, and where three of the four secured creditors "receive payments on a current basis."). Another court, in *In re 801 S. Wells St. Ltd. P'ship*, 192 B.R. 718, 725 (Bankr. N.D. Ill. 1996), in deciding to abstain from the bankruptcy case pursuant to 11 U.S.C. § 305, found that "resolution of the dispute ha[d] no bearing on the recovery of other creditors" (*id.*), where (i) no unsecured creditors existed with claims against the estate (as a result of the receiver's payments of obligations on an ongoing basis), and (ii) the only secured creditor could be paid in full as a result of sale proceeds from the underlying foreclosure.

29. Similarly, here, the Debtor lists no unsecured creditors on its schedules, and the Debtor's schedules establish that the secured creditor, Shanghai Bank, is more than fully secured. Further, the Debtor has admitted that "it believes that on a balance sheet basis [it] is likely to be solvent."¹¹ Whatever Shanghai Bank's reasons for opposing the Receiver's Motion, it is fully protected outside of bankruptcy.

¹¹ See Plaintiff's Memorandum of Law in Opposition to Motion to Defendant Dean K. Fong, Receiver to Dismiss the Complaint, dated October 23, 2013, at p. 21, n.3.

III. THE RECEIVER HAS STANDING TO SEEK THE RELIEF IN HIS MOTION

30. The Debtor contends that the Receiver does not have standing to seek dismissal of this Case, or the other relief he seeks in this Case, because he is not a creditor. However, the Receiver (i) has standing because he is, indeed, a creditor, and (ii) he would have standing, as a “party in interest” in any event. Moreover, the Bankruptcy Court has the power, *sua sponte*, to dismiss the Case.

A. The Receiver Is a Creditor

31. On October 25, 2013, the Receiver filed a proof of claim (the “Receiver POC”), for (i) payment of his pre-petition commissions (liquidated and contingent), and (ii) payment of pre-petition professional fees and expenses incurred by his counsel.

32. A properly filed proof of claim is *prima facie* evidence of the validity and amount of the claim, and the party that filed said proof of claim is therefore presumptively a creditor. *See In re Georg Jensen, Inc.*, 1 B.R. 239, 244-45 (Bankr. S.D.N.Y. 1979) (“In Bankruptcy Proceedings the creditor has the burden of establishing his claim . . . However, he is aided by the presumption arising under Bankruptcy Rule 301(b) that a proof of claim executed and filed in accordance with the Bankruptcy Rules constitutes prima facie evidence of the validity and amount of the claim, in which case the burden of going forward with rebutting evidence is on the debtor.”) (internal citations omitted); *In re Irons*, 343 B.R. 32, 39 (Bankr. N.D.N.Y. 2006) (“A proof of claim executed and filed in accordance with Fed. R. Bankr. P. 3001(c) ‘shall constitute prima facie evidence of validity and amount of the claim.’”) (internal citations omitted); *In re Moreau*, 161 B.R. 742, 744-45 (Bankr. D. Conn. 1993) (“The defendants argue that because they challenge the enforceability of the plaintiff’s claim, the plaintiff is not their ‘creditor’ and therefore he lacks standing to bring these actions. That argument is wholly without merit. By the

defendants' logic, a debtor who listed a creditor in the schedules accompanying the bankruptcy petition can eliminate the right of that creditor to challenge the debtor's discharge or the dischargeability of the corresponding claim by merely disputing its validity. That argument overlooks the plain language of the statute and the case law on that subject. A 'creditor' is an 'entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.' ... A 'claim' includes any right to payment, even if that right is disputed.") (internal citations omitted).

33. Thus, the Receiver is a creditor and may seek the relief sought in the Motion.

B. The Receiver Has Standing for Other Reasons

34. Moreover, while challenging the Receiver's standing, Debtor ignores the fact that he has sued the Receiver in an adversary proceeding, in this Case. The Receiver has argued in his motion to dismiss the claims against him in that proceeding (among other things) that this bankruptcy case should be dismissed and, consequently, the Adversary Proceeding should be dismissed as well. It cannot be disputed that the Receiver has a stake in the adversary proceeding, and the disposition of that proceeding is inextricably intertwined with the issue of whether this case should be dismissed. Therefore, the Receiver is a "party in interest" with a sufficient stake in this case to seek its dismissal.¹²

¹² See *In re Peachtree Lane Assocs., Ltd.*, 188 B.R. 815, 826 (N.D. Ill. 1995) (the court noted that "in order to succeed in having the adversary proceeding transferred to a different forum," the parties seeking transfer of venue would "have to overcome the presumption that the district in which the underlying bankruptcy case is pending is the appropriate district for an adversary proceeding. Thus, [their] unquestionable stake in the proper venue of the adversary proceeding is inextricably intertwined with the issue of the proper venue for the underlying bankruptcy case. [They] could only effectively challenge venue of the adversary proceeding by challenging the venue of the bankruptcy case. We must ask then, whether [their] interest in not having to defend the adversary proceeding in a potentially improper forum constitutes a sufficient stake or a legally protectable interest entitling them to be heard on the issue of the venue of the bankruptcy case. We conclude that it is"), *aff'd*, 150 F.3d 788 (7th Cir. 1998).

35. The Debtor also fails to address the other, and alternative, forms of relief that the Receiver seeks in his Motion. In addition to the motion to dismiss the case under 11 U.S.C. § 1112(b)(4), the Receiver seeks the following relief, for which standing either is not in dispute or is not an issue:

- (a) lack of jurisdiction under the *Rooker-Feldman* doctrine and 28 U.S.C. § 1257(a) – Courts may always consider subject matter jurisdiction at any point.
- (b) abstention under 11 U.S.C. § 305 – Issue is whether “creditors and the debtor would be better served by ... dismissal or suspension.”
- (c) relief under 11 U.S.C. § 543(d) – There is no dispute that the Receiver has standing to seek relief from the turnover requirements in his capacity as a custodian.

C. The Court May, *Sua Sponte*, Dismiss the Case

36. In any event, the Second Circuit has made it clear that the Court may, *sua sponte*, dismiss, as a bad faith filing, a chapter 11 petition filed solely to prosecute a collateral attack of a state court judgment, where the debtor has no realistic chance or intention of reorganizing. *See, e.g., In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1309-10 (2d Cir. 1997). As explained above and in the Receiver's Motion, the Debtor has no unsecured creditors, and its primary intention is to frustrate the effects and consequences of state court orders.

37. Therefore, even if the Receiver did not have standing, the Court should, *sua sponte*, dismiss this Case as a bad faith filing.

IV. THE *ROOKER-FELDMAN* DOCTRINE BARS THE DEBTOR'S ATTACK ON STATE COURT ORDERS AND JUDGMENTS, EVEN IF THE RECEIVERSHIP IS CONSIDERED A PROVISIONAL REMEDY

38. As discussed in the Motion, this Case and the Adversary Proceeding improperly seek to attack through the federal forum the Receivership Order, entered in the Matrimonial

Action and various judgments and orders in related State Court proceedings involving the Debtor and its insiders.

39. As a preliminary matter, Debtor's argument relating to *Rooker-Feldman* and its application focuses solely on the attack against the Receivership Order, and fails to address the other orders at issue, including the order to stay the effectuation of the State Court Judgment Against HKS and the Warrant of Eviction against Hong Kong Supermarket, an insider affiliate of the Debtor. (Motion, at p. 22.) These other orders alone establish that the *Rooker-Feldman* doctrine should be sustained.

40. Debtor's attack on the Receivership Order is improper under the *Rooker-Feldman* doctrine, which bars actions "brought by state-court losers 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." *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005) (internal quotation marks and citations omitted). Indeed, this Circuit has indicated that *Rooker-Feldman* bars federal actions that, in effect, seek appellate review of interlocutory state court orders, especially where – as here – those interlocutory proceedings have "ended" review of the state determination that is being challenged. *Id.* at 89; *see also Glatzer v. Barone*, 614 F. Supp. 2d 450, 467 (S.D.N.Y. 2009) (*Rooker-Feldman* applied to challenged portions of interlocutory order that could no longer be appealed), *aff'd*, 394 F. App'x 763 (2d Cir. 2010); *see* Motion, at pp. 23-24 (discussing the opportunities Debtor's insiders had to challenge the Receivership Order and other state court orders and judgments).

41. In its Opposition, Debtor concedes that the *Rooker-Feldman* doctrine applies to interlocutory state court orders, and instead argues that the Receivership Order here is not an

interlocutory order, but an order providing “provisional relief.” (Opposition, at pp. 16-19, ¶¶72-83.) This is a distinction without any difference. That the Receivership Order effectuates a provisional remedy under Article 64 of the CPLR does not mean that it is not subject to the *Rooker-Feldman* doctrine. In fact, courts in this Circuit have applied *Rooker-Feldman* to bar attacks on interlocutory orders granting provisional relief. For instance, in *Value Manufactured Homes, LLC v. Key Bank, N.A.*, 919 F. Supp. 2d 303, 307-08 (W.D.N.Y. 2013), the Court barred the plaintiff’s efforts to challenge a state court order appointing a receiver in a foreclosure action. The court held that plaintiff could not avoid the effect of the Receivership Order concerning its real property and all ‘tangible and intangible property’ used in connection with that property by bringing a federal action challenging the effect of that order, as the federal action was “‘inextricably intertwined with earlier state court determinations.’” *Id.* (internal quotation marks and citations omitted). Likewise, in *Robinson v. Cusack*, No. 05-CV-5318 (DLI) (JMA), 2007 WL 2028112, at *5-6 (E.D.N.Y. July 11, 2007), the Court dismissed an action that effectively challenged a state court order granting a preliminary injunction. In holding *Rooker-Feldman* applied, the Court indicated that the preliminary injunction – which, as Debtor concedes, constitutes a provisional remedy (see Opposition at pp. 17-18, ¶¶78-82) – was “an *interlocutory order*” that the plaintiff failed to timely appeal, and, therefore, all federal questions concerning the preliminary injunction “‘have been finally resolved in the state court proceedings.’” *Robinson*, 2007 WL 2028112, at *5-6 (emphasis added) (internal quotation marks and citations omitted).

42. Finally, none of the cases cited by Debtor support its position that the *Rooker-Feldman* doctrine does not apply to orders regarding provisional remedies. Aside from the cases relied upon by the Receiver in its own motion, none of the cases cited deal with *Rooker-*

Feldman, Rather, the Debtor's cases discuss preliminary injunctions, the "law of the case" doctrine, or Federal Rule of Civil Procedure 60(b)(5). (*See* Opposition at pp. 17-18, ¶¶75-82.) The Receiver is not making any arguments concerning the "law of the case" doctrine. Nor do any of the cases cited by Debtor indicate that Rule of Civil Procedure 60(b) may be used to allow a party to collaterally attack a state court judgment or order.

43. Accordingly, and as more fully set forth in the Receiver's Motion, the *Rooker-Feldman* doctrine bars this case and the related Adversary Proceeding, and both proceedings should be dismissed on that basis alone.

V. THE DEBTOR AND SHANGHAI BANK HAVE FAILED TO ESTABLISH WHY ABSTENTION IS NOT WARRANTED OR WHY THE RECEIVER IS NOT ENTITLED TO RELIEF UNDER SECTION 543(d) OR (c)

44. The Debtor principally relies on the position of Shanghai Bank, its secured creditor, as its argument against abstention and against the relief the Receiver seeks under section 543(d). As explained above, Shanghai Bank's position on this Motion is of little relevance to these issues.

45. Shanghai Bank contends that the Receiver's motion under 543(c) is premature because the Receiver has not yet submitted an application detailing its fees and expenses. (*See* Shanghai Opp., at p. 8, ¶29.) Since Shanghai Bank's filing, the Receiver has filed a proof of claim for pre-petition amounts and will file an application for post-petition fees and expenses, if necessary. However, as explained above, this case should be dismissed, in which case the Receiver need not expend any further resources in preparing such an application.

VI. THE DEBTOR'S SUPPLEMENT HAS NO RELEVANCE TO THE RECEIVER'S MOTIONS

46. In a supplement, filed on October 28, 2013 (the "Supplement"), the Debtor notes three developments that he contends "represent major changes in the underlying legal and factual background relevant to the determination of the Motions." (Supplement, at p. 4, ¶ 6.) However, as explained below, these developments add nothing relevant to the Motion.

A. The Receiver's October 23, 2013 Letter Is Irrelevant to the Issues To Be Determined on the Receiver's Motions and, In Any Event, the Debtor's Characterization of the Letter Misstates the Facts

47. As the Debtor notes, on October 23, 2013, the Receiver transmitted a letter to counsel for Phillip Wu, Margaret Wu, and the Debtor, as well as the Chapter 13 Trustee in the bankruptcy case *In re Phillip Wu*, Case 13 Case No. 13-16873 (ELF), pending in the Bankruptcy Court for the Eastern District of Pennsylvania, advising of the status of the Elizabeth Street Wine and Liquor Store, one of the assets of Phillip Wu, and requesting that the parties explore a potential sale of the store. ***The Liquor Store is not an asset of the Debtor.***¹³

48. As noted in that letter, it is the Receiver's understanding that Margaret Wu has been unable to operate the Liquor Store in large part because she lacked access to funds as a result of the coordinated bankruptcies of the Debtor and Phillip Wu. The Receiver transmitted the letter in an effort to maximize the value of one of the assets of the Wu marital estate, while the Receiver is essentially prohibited from taking any significant action as a result of the automatic stay in the *Phillip Wu* bankruptcy case.

49. However, in its Supplement, the Debtor mischaracterizes the state of affairs of the Liquor Store in an effort to divert the Court's attention from the undisputed conflict of interest of

¹³ The letter was directed to counsel for the Debtor, along with counsel to Phillip and Margaret Wu, as a courtesy.

the Debtor's insiders, Jeffrey and Phillip Wu, who, through their misuse of the bankruptcy process, have hampered the Receiver's efforts to maximize Phillip Wu's property.

50. In any event, the Liquor Store has nothing to do with this bankruptcy case or the Adversary Proceeding against the Receiver. The Debtor's allegations in this regard need not be considered here.

B. The Receiver's Proofs of Claim Do Not Vitate the Receiver's Motion to Dismiss the Adversary Proceeding

51. As the Debtor notes in its Supplement, the Receiver filed the Receiver POC for (i) payment of his pre-petition commissions (liquidated and contingent), and (ii) payment of pre-petition professional fees and expenses incurred by his counsel.¹⁴ However, the Receiver POC does not result in a waiver of any of the arguments on which the Receiver's Motion to Dismiss the Adversary Proceeding are based.

52. The cases the Debtor cites, *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990), concern whether the filing of proofs of claim waive the right to a jury trial of certain claims in adversary proceedings, and the case *Stern v. Marshall*, 131 S. Ct. 2594 (2011), concerns whether a bankruptcy court has the power to enter final orders in certain instances where proof of claim are filed.¹⁵ None of these cases have any bearing on (i) whether this bankruptcy case is a bad faith filing, (ii) whether the Court lacks jurisdiction over this Case and related proceedings under the *Rooker-Feldman* doctrine, (iii) whether the Court should abstain from hearing the case or the Adversary Proceeding against the Debtor, or (iv)

¹⁴ As the Debtor also notes, Bryan Cave LLP also submitted a proof of claim, out of an abundance of caution, for its pre-petition professional fees and expenses, which are also included in the Receiver POC.

¹⁵ The Debtor also cites *De Nunez v. Bartels*, 264 A.D.2d 565, 695 N.Y.S.2d 31 (NY App. Div. 1999). This case concerns evaluation of a receiver's commissions and, similarly, has no relevance to the issues raised in the Receiver's motions to dismiss.

whether the Debtor has failed to state a claim, under Rule 12(b)(6), because (among other things) he has failed to allege certain required elements of conversion, fraudulent transfer, and state law accounting claims.

53. The Receiver POC is relevant to, and supports, the Receiver's standing to pursue his Motion to Dismiss the Bankruptcy Case. Although the Debtor apparently plans to object to the Receiver POC, this is not relevant to the Receiver's standing. *See, e.g., In re Moreau*, 161 B.R. 742, 744-45 (Bankr. D. Conn. 1993) ("The defendants argue that because they challenge the enforceability of the plaintiff's claim, the plaintiff is not their 'creditor' and therefore he lacks standing to bring these actions. That argument is wholly without merit. By the defendants' logic, a debtor who listed a creditor in the schedules accompanying the bankruptcy petition can eliminate the right of that creditor to challenge the debtor's discharge or the dischargeability of the corresponding claim by merely disputing its validity. That argument overlooks the plain language of the statute and the case law on that subject. A 'creditor' is an 'entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.' ... A 'claim' includes any right to payment, even if that right is disputed.") (internal citations omitted).

C. The Position of Shanghai Bank Should Not Alter the Conclusion

54. As the Debtor also notes, Shanghai Bank has filed papers in opposition to the Receiver's Motion. As discussed above, Shanghai Bank is a fully secured creditor and has not alleged that any mortgage payments have been missed or will be missed,¹⁶ and the Debtor's

¹⁶ As noted above, Shanghai Bank is also protected because New Enterprise is a co-obligor on Shanghai Bank's loan, and Jeffrey Wu has guaranteed the Debtor's obligations pursuant to the commercial mortgage.

schedules list no unsecured creditors. Thus, Shanghai Bank's submission should not alter the Court's conclusion concerning dismissal of the bankruptcy filing.

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
October 29, 2013

Respectfully,

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