UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN THE MATTER OF:	CASE NO. 13-51186 (JJT)
JIE XIAO, Debtor	
RONALD CHORCHES, TRUSTEE, Plaintiff,	ADV. NO. 14-05019 (JJT)
	CHAPTER 7
v	
XIN CHEN, Defendant.	RE: ECF No. 119

RULING ON MOTION FOR PRELIMINARY INJUNCTION

Before the Court is the Motion for Preliminary Injunction (the "Motion") of Ronald I. Chorches, Chapter 7 Trustee of the estate of Jie Xiao (the "Trustee"), in connection with the above-captioned adversary proceeding against Xin Chen ("Chen" or "Defendant"). The Trustee seeks an order, under 11 U.S.C. § 105(a) and Federal Rules of Bankruptcy Procedure 7064 and 7065, compelling the Defendant to, *inter alia*, repatriate assets previously transferred to China and turnover of assets remaining within the United States so as to subject them to legal process.[1] For the reasons set forth herein, the Motion is granted in part and denied in part.

I. BACKGROUND

The gravamen of the Trustee's adversary proceeding is that the Defendant received a fraudulent transfer in excess of $1 million arising from her divorce settlement with Jie Xiao ("Dr. Xiao" or "Debtor"), which transferred substantially all of the marital assets to Chen, apart from those claimed as exempt on the Debtor's schedules.

[1] To the extent that the Motion requests Court authorization to allow for the recording of the June 10, 2014 Stipulated Order (ECF No. 30) on the land records in connection with the Defendant's residence in New Jersey, such relief was previously granted (ECF No. 167) without objection from the Defendant.

Dr. Xiao and Chen were married in a civil ceremony on June 29, 1992 in Shanghai, China. Dr. Xiao has a bachelor's degree from Shanghai Jiaotong University and a Ph.D in chemistry from the University of Michigan. Chen obtained her bachelor's degree from Shanghai Jiaotong University and earned a M.S. in chemistry from the University of Michigan in 1996. Chen currently resides at 18 Parkview Road, Randolph, New Jersey, 07869, and she is currently employed with Eurofins Lancaster Laboratories in Kenilworth, New Jersey.

The Dow Corning Litigation

Dr. Xiao has been engaged in litigation with Dow Corning Corp. and Hemlock Semiconductor Corp. (collectively, "Dow Corning") since 2011. On January 3, 2011, Dow Corning filed a lawsuit in the U.S. District Court for the Eastern District of Michigan (the "District Court") against the Debtor and four of his closely-held business entities, alleging, *inter alia*, that the Debtor misappropriated Dow Corning's trade secrets in violation of the Michigan Uniform Trade Secrets Act. *See Dow Corning Corp. v. Jie Xiao*, No. 11-cv-10008-BC (E.D. Mich., Jan. 3, 2011). On June 5, 2013, Dow Corning filed a motion for default judgment against the Debtor which sought a judgment for $15.7 million, plus prejudgment interest and attorneys' fees. By order dated June 11, 2013, the District Court set a hearing on the motion for default judgment for July 30, 2013. The day before the hearing, the Debtor's primary business, LXEng filed a Chapter 7 bankruptcy petition with this Court.

The Divorce Decree and Property Settlement

On June 12, 2013 – one day after the District Court's order scheduling a hearing on the motion for default judgment – Chen filed for divorce from Dr. Xiao in the Superior Court of New Jersey Chancery Division/Family Part Morris County. *See Xin Chen v. Jie Xiao*, No. FM-14-1522-13.

Three weeks later, on July 3, 2013, Dr. Xiao and Chen executed a Property Settlement Agreement (ECF No. 119-1, Ex. 1, the "PSA") by which they purported to divide their marital assets. The judgment of divorce, which incorporated the PSA, entered the same day. Though they were represented by independent legal counsel, Dr. Xiao and Chen, respectively, waived their right to conduct discovery in connection with the PSA, and instead relied upon each other's informal representations and voluntary asset disclosures.

Under the PSA, Dr. Xiao transferred his entire interest in the couple's joint checking, savings, money market, and CD accounts at Novartis Federal Credit Union to Chen – an aggregate value of approximately $115,000.00, according to the PSA – with the exception of $25,000.00. Dr. Xiao also relinquished his interest in the marital home, valued at approximately $500,000.00, to Chen. In lieu of alimony, Dr. Xiao transferred the entirety of his interest in a TD Ameritrade account, valued at $1,654,590.00, to Chen (the "TD Ameritrade Account"). In addition, Dr. Xiao agreed to contribute $2,056.00 each month in child support payments. Dr. Xiao and Chen each retained their undivided interests in their retirement assets, totaling $676,669.00 and $468,167.00, respectively.

The Bankruptcy and Related Proceedings

On July 30, 2013 (the "Petition Date"), less than a month after executing the PSA, Dr. Xiao filed a voluntary petition for bankruptcy relief under Chapter 7 of the United States Bankruptcy Code.

On April 8, 2014, the Trustee commenced the above-captioned adversary proceeding against Chen. The Trustee's amended adversary complaint alleges claims for: (a) intentional fraudulent conveyance pursuant to 11 U.S.C. § 548(a)(l)(A); (b) constructive fraudulent conveyance pursuant to 11 U.S.C. § 548(a)(l)(B); (c) unjust enrichment; (d) turnover of estate

property pursuant to 11 U.S.C. § 542; and, (e) preferential transfers pursuant to 11 U.S.C. § 547(b). Wherefore, the Trustee seeks, *inter alia*, an order avoiding the transfers included within the PSA as fraudulent or preferential transfers and the imposition of a constructive trust on said transfers.

Contemporaneous with his commencement of the adversary proceeding against Chen, the Trustee filed an application for prejudgment remedy (the "PJR Application") seeking to attach $1,180,970 of Chen's assets and a motion for prejudgment disclosure of assets (the "Disclosure Motion").

On April 10, 2014, the Court issued an Order for Hearing and Notice on the PJR Application and Disclosure Motion. (ECF Nos. 4 and 5, respectively). The same day, the Trustee executed service of the complaint and summons on Chen by first class mail to her home. (ECF No. 7). Also on April 10, 2014, both PJR Application and Disclosure Motion, along with accompanying notices of hearing, were served upon Chen again to her home by first class mail. (ECF Nos. 8 and 9, respectively). On April 12, 2014, the Court certified notice to Chen via first class mail to her home of the hearing on the PJR Application. (ECF No. 11).

The Defendant Transfers More Than One Million Dollars to China

On April 21, 2014, Chen transferred $50,000.00 to a Bank of China account held in her mother's name. (ECF No. 119-1, Ex. 6, at 3).

On May 5, 2014, the Court granted the PJR Application (ECF No. 13, the "PJR Order") and the Disclosure Motion (ECF No. 14, the "Disclosure Order"). The same day, Chen transferred $250,000.00 to a Bank of China account held in her mother's name. (ECF No. 119-1, Ex. 6, at 3).

On May 6, 2014, Chen transferred $50,000.00 to a Bank of China account held in her father's name. *Id.*

On May 7, 2014, the Court certified notice – to Chen at her home via first class mail – of the PJR Order and the Disclosure Order. (ECF Nos. 15 and 16, respectively).

On May 12, 2014, Chen made two transfers of $500,000.00 (totaling $1,000,000.00) to accounts held by her parents at the Bank of China. (ECF No. 119-1, Ex. 6, at 3).

The Stipulated Order

On May 30, 2014, counsel first appeared for Chen and immediately moved to vacate the PJR Order and the Disclosure Order, citing the Trustee's failure to effect service of the PJR Application and Disclosure Motion by a proper officer, as required by the Court's April 10, 2014 Order. In connection with her motion to vacate, Chen averred that she first became aware of the adversary proceeding during the week of May 14, 2014, when she received, through the Court's BNC notice service via first class mail, the PJR Order and the Disclosure Order.

On June 10, 2014, the parties executed a stipulated order vacating the PJR Order and the Disclosure Order (ECF No. 30, the "Stipulated Order"). In lieu of the PJR Order, the Stipulated Order prohibited Chen from encumbering her assets or transferring them to a third party or foreign country. In addition, the Stipulated Order prohibited Chen from expending more than $12,000 per month "for her reasonable, necessary and ordinary expenses for herself, her children and her household". *Id.* at ¶ 5. To police Chen's adherence to its terms, the Stipulated Order required Chen to furnish an affidavit "attesting to her compliance" upon the Trustee's request, but no more than once every sixty days. *Id.* at ¶ 8.

On July 6, 2015, Chen testified under oath that she had transferred the entirety of $1,654,590.00 in funds from the TD Ameritrade Account, which she received through the PSA,

into accounts at four financial institutions in the United States: JPMorgan Chase, PNC Bank, Valley National Bank, and Vanguard. (ECF No. 119-1, Ex. 3, at 97:4-98:18). Though Chen was never directly asked, by the Trustee, whether all of the funds remained in those four accounts, she did not disclose the fact that she subsequently transferred $1.35 million from the JP Morgan Chase account to her parents' Bank of China accounts in 2014, despite transferring the bulk of the funds after the original PJR Order entered.

On January 18, 2016, the Trustee requested an accounting from Chen attesting to her compliance with the Stipulated Order. Chen never responded.

On September 22, 2016, the Trustee moved to modify the Stipulated Order ("Motion to Modify"), seeking to: (1) limit Chen's total expenditures to $250,000.00 during the pendency of this adversary proceeding (the "Cap"); (2) require Chen to produce documentary support for any affidavit attesting to her compliance; and (3) authorizing the attachment of up to $1,180,970.00 of Chen's assets, which he previously sought in the PJR Application.

On October 20, 2016, a hearing was held on the Motion to Modify. At the hearing, the Court directly asked Chen's counsel, Attorney Condon: "Is there any objection to the PJR entering?" (ECF No. 95, at 5:25). In response to the Court's question, Attorney Condon stated that Chen is "out of work, and has been out of work for some time. To the extent that changes the equation, I will leave it up to the Court." (*Id.*, at 5:48). The Court responded, "I don't think that's a consideration with regard to probable cause. I mean, do you either have a defense, a setoff, or other reason why this Court shouldn't reinstate the PJR?" (*Id.*, at 5:56). Attorney Condon responded, "No." (*Id.*, at 6:11).

By orders dated October 18 and 24, 2016, the Court modified the Stipulated Order (the "Modified Stipulated Order") granting the relief requested by the Trustee. (ECF Nos. 94 and 97).

Chen Provides False Affidavits Regarding Her Expenditures

On November 7, 2016, Chen, through counsel, provided the Trustee with copies of bank statements disclosing a total of $209,299.65 contained within accounts at four different institutions.

On November 15, 2016, Chen provided the Trustee a sworn affidavit stating that she "provided bank account statements reflecting the money that [she had] expended since the inception of this litigation." (ECF No. 119-1, Ex. 4, at ¶ 4). It is undisputed, however, that the bank account statement that documents the transfers to Chen's parents had not been provided.

Alarmed by the discrepancy between the more than $1.6 million in liquid assets Chen received through the PSA, and the $209,299.65 evidenced by supporting bank statements, the Trustee, through counsel, repeatedly contacted Chen's counsel seeking an explanation. None was forthcoming.

On February 8, 2017, the Trustee filed a Motion to Freeze Chen's assets (the "Motion to Freeze"), on which the Court held an expedited hearing later the same day. At the hearing, Chen was ordered to furnish an affidavit detailing her expenditures within one week.

On February 15, 2017, Chen provided a sworn affidavit attesting that the amount she expended "since the inception of this litigation is $158,996.00." (ECF No. 119-1, Ex. 5, at ¶ 5). However, documents attached to the February 15, 2017 affidavit disclosed that, through September 2016, she had spent $203,990.38 of the funds subject to the $250,000.00 Cap established by the Modified Stipulated Order. *See id* at Ex. A (failing to include $44,994.36 in tax payments, which are, in at least substantial part, subject to the Cap); *see also* (ECF No. 119-1, at ¶ 35). Further, the affidavit repeated the claim that she "provided bank account statements reflecting the money that [she had] expended since the inception of this litigation." (ECF No.

119-1, Ex. 5, at ¶ 4). Despite this claim, the bank account statement – a JPMorgan Chase statement for the period of April 11, 2014 through May 12, 2014 (ECF No. 119-1, Ex. 6, the "JP Morgan Statement") – that documents the transfers to Chen's parents still had not been provided.

It was not until the morning of February 21, 2017, just hours before a continued hearing on the Trustee's Motion to Freeze that Chen, through counsel, produced the JP Morgan Statement disclosing her transfers of $1.35 million to Bank of China accounts held by her parents.

At the hearing, Chen's counsel, Attorney Laura Catina, stated that the eleventh-hour disclosure of the JP Morgan Statement was unintentional, as she mistakenly believed that she had produced it several months earlier along with the other bank statements that were produced. In an apparent contradiction of Attorney Catina's explanation, Attorney Brian Condon, Chen's lead counsel, repeatedly stated to this Court that he and Attorney Catina drafted the erroneous affidavit language regarding having "provided bank account statements reflecting the money that [Chen] expended *since the inception of this litigation*"[2], and that, at all times, Chen mistakenly understood the affidavits to state that Chen had produced bank account statements reflecting the money that Chen expended since she allegedly became aware of the litigation on or about May 14, 2014. Therefore, according to Attorney Condon, while Chen may have been mistaken, she did not knowingly give false testimony in her affidavits.

The Preliminary Injunction Motion and Hearing

On March 2, 2017, the Trustee filed the pending Motion for Preliminary Injunction (the "Motion") pursuant to which he seeks, *inter alia*, an injunction in aid of the existing pre-judgment remedy compelling Chen to bring within the territorial jurisdiction of this Court the

[2] *See, e.g.*, (ECF No. 119-1, Ex. 5, at ¶ 4) (emphasis added).

$1.35 million that she transferred to China between April 21 and May 12 of 2014 – after this action was commenced. On March 15, 2017, Chen filed her objection to the Motion. Therein, Chen's counsel asserted that Chen transferred the funds to keep them out of the hands of a different putative creditor, Carlos Cuevas, the Debtor's initial bankruptcy attorney ("Attorney Cuevas"), who employed aggressive and questionable litigation tactics to secure his claims for unpaid legal fees. Chen's counsel also averred that Chen currently possesses sufficient funds to satisfy any judgment the Trustee might obtain against her because her home, which has been valued at approximately half a million dollars, is unencumbered by a mortgage, Chen possesses approximately two hundred thousand dollars in liquid assets, and the Trustee's alleged damages calculation of an amount in excess of $1,180,970.00 is substantially inflated.

The Court held a hearing on the Motion on March 20 and March 28, 2017. At the hearing, the Court heard the testimony of the Trustee concerning the timing of the filing of the adversary proceeding, the numerous court documents served upon Chen between April 10 and May 7, 2014, and the harm to the estate that would result if the $1.35 million – the vast majority of the liquid assets Chen received in the divorce proceeding, which are the subject of the Trustee's fraudulent transfer action – remain abroad in China. The Trustee further testified that at no time did he receive a notice indicating that any of the pleadings he served upon Chen by mail to her home, at the outset of this litigation, failed to reach their destination.

The Defendant solicited testimony from Attorney Cuevas on March 20. Cuevas testified that he served as the Debtor's bankruptcy attorney at the beginning of the case, and withdrew a few months later because the Debtor failed to pay his fees. Shortly thereafter, Cuevas commenced litigation in the Supreme Court of New York, Bronx County, against the Debtor and Chen, alleging that the couple concocted a sham divorce to shield the Debtor's assets. In

connection with that litigation, Cuevas obtained a default judgment against Chen, which was subsequently vacated for cause, but not before Cuevas temporarily restrained one of the Defendant's bank accounts in February 2014.

The Defendant gave testimony on March 28, 2017. Chen testified that she transferred $1.35 million to her parents, from April 21 to May 12, 2014, to pay for her mother's cancer treatments and to frustrate attempts by Attorney Cuevas to pursue her assets. Chen further testified that her elderly mother, who resides in Hangzhou, China, began treatment for some form of stage three cancer in 2012. According to Chen, in April 2014, the treating physician for Chen's mother ordered her to undergo a new combined therapy that was very expensive and required payment in full, up front. Though she allegedly transferred the money, in large part, to facilitate her mother's newly-prescribed therapy, Chen did not meaningfully identify what this new therapy was, how much it cost, or how long her mother allegedly engaged in the therapy. She did, however, testify that her mother underwent chemotherapy in 2014 and often relied upon herbal medications. No documentation or other corroborative evidence was adduced by Chen to support her claims.

On cross examination, Chen stated that the therapy involved black-market medications, and therefore she did not have any receipts. Chen also admitted that, prior to the transfers that she made in 2014, she had never transferred in excess of $100,000.00 to her parents in China, despite acknowledging that her mother began treatment for some form of stage three cancer in 2012.

Chen did not deny that she received the flurry of pleadings mailed to her home at the outset of this litigation. Instead, she stated that she developed a habit of ignoring her mail, and thus failed to learn of the litigation until sometime during the week of May 14, 2014 – more than

a month after the commencement of this case, yet only approximately two days after she transferred one million dollars to Bank of China accounts held by her parents.

With regard to the false affidavits, Chen's testimony mirrored Attorney Condon's representations. According to Chen, when she signed affidavits stating that she had produced all bank account statements reflecting the money that she expended "since the inception of this litigation", she mistakenly believed her sworn statement was limited to producing bank account statements reflecting funds she expended since becoming aware of the Trustee's litigation on or about May 14, 2014—that is, beginning with the statement period immediately following the period reflecting her transfers of $1.35 million to China between April 21 and May 12, 2014.

II. LEGAL STANDARD

"The typical preliminary injunction is prohibitory and generally seeks to maintain the status quo pending a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir.1995). "A mandatory injunction, in contrast, is said to alter the status quo by commanding some positive act." *Id.*

Of particular relevance here, the "'[s]tatus quo' to be preserved by a preliminary injunction is the last actual, peaceable uncontested status which preceded the pending controversy." *LaRouche v. Kezer*, 20 F.3d 68, 74 n.7 (2d Cir. 1994) (quoting Black's Law Dictionary 1410 (6th ed. 1990)); *accord Entegee, Inc. v. Korwek*, 2015 WL 5202902, at *3 (D. Conn. Sept. 4, 2015) ("[F]or purposes of a preliminary injunction, the status quo is the situation that existed between the parties immediately prior to the events that precipitated the dispute.") (internal quotation omitted). Therefore, when a positive act is required to preserve the status quo, a movant need only satisfy the prohibitory injunction standard. *See Alcatel Space, S.A. v. Loral*

Space & Commc'ns Ltd., 154 F. Supp. 2d 570, 580 (S.D.N.Y. 2001), *aff'd*, 25 F. App'x 83 (2d Cir. 2002).

To obtain a prohibitory preliminary injunction, a movant must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir.2010) (internal quotations omitted) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc*., 596 F.2d 70, 72 (2d Cir. 1979)).

Irreparable Harm

To establish irreparable harm, a party must demonstrate "an injury that is neither remote nor speculative, but actual and imminent." *Nastro v. D'Onofrio*, 263 F.Supp.2d 446, 459 (D.Conn. 2003) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). Ordinarily, "an injury compensable by money damages is insufficient to establish irreparable harm." *CRP/Extell Parcel I, L.P. v. Cuomo*, 394 Fed. Appx. 779, 781 (2d Cir. 2010); *see also In re Feit & Drexler*, Inc., 760 F.2d 406, 416 (2d Cir. 1985) ("As a general rule, of course, a party may not obtain injunctive relief where it is claiming a loss that can be adequately remedied by an award of money damages.").

However, courts within the Second Circuit have recognized exceptions to this rule where, for instance, "the claim involves an obligation owed by an insolvent or a party on the brink of insolvency", *CRP/Extell*, 394 Fed. Appx. at 781, or where "it has been shown that the defendant intended to frustrate any judgment on the merits by transfer[ring her assets] out of the jurisdiction." *Local 1303-362 of Council 4 v. KGI Bridgeport Co.*, 2014 WL 555355, at *2 (D. Conn. 2014) (quoting *In re Feit*, 760 F.2d at 416). "It is familiar law that where a non-movant's

assets may be dissipated before final relief can be granted, or where the non-movant threatens to remove its assets from the court's jurisdiction, such that an award of monetary relief would be meaningless, injunctive relief is proper." *Firemen's Ins. Co. of Newark, N.J. v. Keating*, 753 F.Supp. 1146, 1153 (S.D.N.Y. 1990); *see also Nastro*, 263 F.Supp.2d at 459 (irreparable harm existed where evidence indicated that defendant transferred his interests in companies "off-shore for the purpose of avoiding [the plaintiff's] judgment.").

Likelihood of Success on the Merits

To obtain a prohibitory injunction, the moving party "need not show that success is an absolute certainty." *Local 217 Hotel & Rest. Employees Union v. MHM, Inc.*, 805 F. Supp. 93, 105 (D. Conn. 1991), *aff'd*, 976 F.2d 805 (2d Cir. 1992) (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir.1985), *overruled on unrelated grounds, O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987)). Instead, the movant "need only make a showing that the probability of his prevailing is better than fifty percent." *Id.* As such, "[t]here may remain considerable room for doubt." *Ibid.* To obtain a mandatory injunction, however, the movant "must meet the more rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits." *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir.2008).

III. DISCUSSION

In his Motion, the Trustee seeks an injunction in aid of the existing $1,180,970.00 pre-judgment remedy compelling Chen to bring within the territorial jurisdiction of this Court the $1.35 million that she transferred to her parents in China following the commencement of this adversary proceeding. The Trustee also seeks an order compelling Chen to deliver to the clerk of court all of her cash and other liquid assets in excess of the $250,000.00 Cap established by the Modified Stipulated Order. The Court addresses each of these requests in turn.

The Repatriation of Assets Transferred Abroad

The analysis must begin by determining the applicable standard. While the parties have not addressed whether repatriation in this context constitutes prohibitory or mandatory relief, the Court concludes that repatriation of the transferred funds is necessary to preserve the status quo that existed immediately prior to the commencement of this adversary proceeding. Indeed, the Defendant upended the pre-dispute status quo by transferring funds to China in contravention of the PJR order, which was in effect when the bulk of funds were transferred. Therefore, the Court holds that the Trustee need only satisfy the prohibitory injunction standard.

As explained below, that standard is easily met here.

Irreparable Harm

The Trustee has demonstrated that he will suffer irreparable harm in the absence of an injunction. Without such relief, there is nothing to prevent Chen "from making uncollectible any judgment the Trustee may eventually obtain against her." *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985) (holding that 11 U.S.C. 105(a) authorizes courts to compel parties to repatriate assets transferred abroad when necessary to preserve court's authority to render meaningful decision on merits of dispute). Similar to the defendant in *Feit*, Chen has undertaken "numerous . . . and substantial efforts to hide and secrete assets." *Id.* Indeed, she has admitted to doing so, albeit in an alleged effort to frustrate another putative creditor, Attorney Cuevas.

The Court is unmoved by such hairsplitting. The transfers had the effect of frustrating all creditors, and particularly the Trustee, given the magnitude of his claim. Further, there is substantial evidence – including, the timing of her transfers abroad, the last-minute production of the JP Morgan Statement disclosing those transfers, and Chen's repeated false affidavits on the subject – that Chen sought to hide her funds from the Trustee in particular.

Chen and her counsel's various explanations for this track record of apparent subterfuge are far from compelling or credible. Selectively ignoring one's mail is no excuse, particularly given the number of pleadings that Chen ignored for more than a month.[3] The fact that Chen apparently continued this ostrich-like behavior in connection with at least one other matter pending before this Court only compounds suspicion.

Further, Chen's explanation for furnishing false affidavits is far from exculpatory. According to Chen, she mistakenly believed her affidavits attested to the production of all bank account statements disclosing her expenditures since the moment she allegedly first became aware of the litigation, and not "since the inception of this litigation", as her affidavits actually stated. If this arbitrary limit on disclosure had been advanced, then it would have been a true statement. Yet it would also have been a manifestly deceptive one calculated to avoid her disclosure obligations, as it conveniently omits reference to the critical JP Morgan Statement, which documents Chen's transfer of more than one million dollars to China during the pendency of this litigation.

Finally, the Court does not agree with her counsel's assertion that Chen currently possesses sufficient funds to satisfy any judgment the Trustee might obtain against her. The Trustee seeks to recover well in excess of one million dollars in liquid assets that Chen received in connection with her divorce from the Debtor. At best, Chen's current assets total approximately seven hundred thousand dollars, assuming, contrary to her prior custom, that she spent virtually no funds subject the Cap since September 2016. Moreover, Chen has offered

[3] It is settled law "that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 419, 76 L.Ed. 861 (1932); *see also Akey v. Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004) (evidence that notice was "properly addressed and mailed in accordance with regular office procedures, . . . is entitled to a presumption that the notices were received . . . Denial of receipt, without more, is insufficient to rebut the presumption.") (internal citation omitted).

nothing but conjecture to support her contention that, even if the divorce is was fraudulent, she is entitled to retain some amount of money transferred pursuant to the PSA.

Accordingly, the Court finds that the Trustee has established that he is likely to suffer irreparable harm in the absence of an injunction compelling Chen to repatriate the $1.35 million[4] in funds that she transferred abroad after the commencement of this litigation.

Likelihood of Success on the Merits

In this context, the Trustee has also met his burden of demonstrating that he is likely to succeed on the merits of his intentional fraudulent transfer claim. To prove an intentionally fraudulent transfer, a plaintiff must show that the transfer was done "with actual intent to hinder, delay or defraud" creditors. 11 U.S.C § 548(a)(1)(A). It is the intent of the debtor-transferor that is at issue, not that of the transferee. *In re Bayou Grp., LLC*, 439 B.R. 284, 304 (S.D.N.Y. 2010).

Because direct evidence of fraudulent intent is rare, "courts infer fraudulent intent by examining the circumstances surrounding the transfer to determine whether any 'badges of fraud' are present." *In re Colonial Realty Co.*, 226 B.R. 513, 522 (Bankr. D. Conn. 1998) (citing *Salomon v. Kaiser* (*In re Kaiser*), 722 F.2d 1574, 1582 (2d Cir.1983)). When a disputed transfer

[4] The Court previously ordered Chen to file with the Court, by no later than April 10, 2017, a "written accounting, sworn to under oath, of the current location and remaining amounts of those funds wired to her parents in China in April and May of 2014, a summary of the amounts expended by them to date, and the specific purposes of any such expenditures, and a statement from her concerning her intention and ability to immediately repatriate such balance of those sums as remains in China to the United States pending any further order of this Court, or a judgment or settlement in this proceeding." (ECF No. 167, at 2).

On April 13, 2017, the Trustee moved to hold Chen in contempt for failing to provide the mandated accounting of transferred funds. (ECF No. 185). On April 25, 2017, Chen objected to the motion for contempt and provided an affidavit averring that she was unable to account for any amount of the expenditures from the $1.35 million in transferred funds, apart from the general assertion that the money was spent on medical expenses for her parents. (ECF No. 197, Ex. 1 at ¶¶ 5-7). Chen also averred that only $200,000.00 of the $1.35 million that was transferred remains, and that remainder is "committed to additional treatments." *Id.* at ¶ 5. The hearing on the motion for contempt was continued to allow for further proceedings prior to its disposition. While Chen asserts an inability to comply, the Court, awaiting further evidence and cross-examination, has yet to determine whether she has met her responsive burdens.

results from a divorce settlement, courts consider specific 'badges of fraud' relevant to assess allegations of a sham divorce, including:

> the quickly agreed upon split of property, the completion of the divorce proceeding on a 'fast-track,' the fact that one of the spouses was not represented by counsel in the divorce proceeding, the existence of a short interval between the entry of the divorce decree and the bankruptcy filing, the fact that spouses continue to live together after the divorce in the very house that was transferred to one of the spouses, the fact that the transferor spouse continues to pay the mortgage, taxes, and other costs on the transferred house, the inequitable distribution of debts and assets in the divorce, and the fact that the couple holds themselves out in the public as still being married.

In re Schuadt, 2012 WL 909299, at *13 (Bankr. N.D. Ill. Mar. 16, 2012), *aff'd sub nom. Schaudt v. United States*, 2013 WL 951138 (N.D. Ill. Mar. 11, 2013). "Where a transfer of property is made to a spouse by means of a 'fast-track' divorce on the eve of bankruptcy, this is often evidence of a fraudulent scheme to keep property from creditors." *In re Hill*, 342 B.R. 183, 196 (Bankr. D. N.J. 2006).

Many of the relevant badges of fraud are present here. The divorce action was filed the day after the District Court scheduled a hearing on Dow Corning's motion for default seeking more than $15 million in damages against Dr. Xiao. The PSA was executed a mere three weeks later, without the benefit of discovery, and within less than a month of Dr. Xiao's subsequent bankruptcy filing. The Judgment of Divorce entered, upon agreement of the parties, the same day that the PSA was executed. The distribution of marital assets via the PSA was, on its face, extremely inequitable, as nearly all of the couple's significant assets were transferred to Chen without due weight or apparent disclosure of Dr. Xiao's potentially multi-million dollar liabilities to third parties or the effect of the impending bankruptcy of the Debtor's business on his earning capacity. Further, it is unclear, at this stage, for what period after the divorce the

Debtor continued to live with Chen in the very house that was transferred to her pursuant to the PSA.

While such evidence may, ultimately, prove insufficient to carry the burden at trial, the Trustee has met his burden to obtain a preliminary injunction compelling Chen to repatriate assets that she transferred abroad during the pendency of these proceedings. Accordingly, Chen is ordered and directed to repatriate any and all of the $1.35 million that she transferred abroad to a bank account located within the territorial jurisdiction of this Court within fifteen (15) days of the date of this Ruling.[5]

Turnover of Funds In Excess of the Cap

Pursuant to the Modified Stipulated Order, Chen may not expend more than $250,000.00 during the pendency of these proceedings "for her reasonable, necessary and ordinary expenses for herself, her children and her household (the 'Cap')." (ECF No. 94). This Cap allowed for certain carve-outs including, *inter alia*, emergency medical expenses for the Defendant, her children and her parents, as well as payment of attorneys' fees in connection with this litigation. (ECF No. 30). The Trustee now seeks an order transforming this prohibition into a mandate compelling Chen to turnover all of her liquid assets in excess of the Cap.

When "fashioning an injunction, the court should make the relief as narrow as required to attain the desired result." *Transamerica Rental Fin. Corp. v. Rental Experts*, 790 F. Supp. 378, 382 (D. Conn. 1992). Thus, the Court will not issue the mandatory injunction the Trustee now seeks.

[5] Failure to comply with this order, on account of alleged impossibility, must be met with evidence showing "clearly, plainly, and unmistakably" that it was impossible to comply. *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995) (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)); *see also In re Marc Rich & Co.*, 736 F.2d 864, 866 (2d Cir. 1984) ("The burden of proving plainly and unmistakably that compliance is impossible rests with the contemnor.") (internal quotation omitted).

However, the Court finds good and sufficient cause to immediately freeze Chen's liquid assets up to the amount of $209,299.65, without carve-outs, pending the resolution of this litigation or the repatriation of funds from abroad sufficient to secure the Trustee's likely judgment, whichever occurs first. Absent an injunction freezing Chen's assets, the irreparable harm that the Trustee currently faces by pursuing an increasingly judgment proof Defendant will continue to worsen as Chen expends the remainder of her assets, effectively on the honor system, during the pendency of these proceedings. Further, the carve outs established by the Modified Stipulated Order, such as the exclusion for allegedly emergency medical expenses for Chen's parents, are clearly inappropriate, given the more than one million dollars already transferred to her parents for largely unspecified medical treatments.

While an asset freeze necessarily works some hardship upon the Defendant, the Court finds, under the circumstances, that the balance of interests weighs decidedly in favor of the Trustee. Prior to the entry of the Modified Stipulated Order, Chen effectively conceded that she had no basis, apart from the fact that she was then unemployed, to contest the prejudgment attachment of her assets or the $250,000.00 Cap on her reasonable, necessary and ordinary expenses for herself, her children and her household during the pendency of this litigation. The limit of that Cap is fast approaching, if not already exceeded, when considered in the context of Chen's February 15, 2017 disclosure that she had already spent the bulk of funds subject to the Cap by September 2016. Further, Chen is now employed and therefore less dependent on any funds subject to the asset freeze.

IV. CONCLUSION

Based on this record, and for the reasons expressed *infra*, the Court finds that:

1. The Trustee has established that he is likely to suffer irreparable harm in the absence of a preliminary injunction compelling Chen to repatriate the $1.35 million in funds that she transferred abroad after the commencement of this litigation.
2. The Trustee has met his burden of demonstrating that he is likely to succeed on the merits of his intentional fraudulent transfer claim.
3. There is good cause to believe that, unless restrained and enjoined by order of this Court, the Defendant will dissipate, conceal, or transfer from the jurisdiction of this Court assets that could be subject to avoidance, as fraudulent transfers, by the Trustee, as specified *infra*, and therefore an asset freeze is necessary to preserve the status quo and to protect this Court's ability to award equitable relief sought by the Trustee.

Therefore, the Trustee's Motion for Preliminary Injunction (ECF No. 119) is GRANTED IN PART AND DENIED IN PART; and

IT IS HEREBY ORDERED that, pending resolution of a trial on the merits, settlement or further order of the Court:

A. The Defendant, Xin Chen, shall, within fifteen (15) days hereof, repatriate to a bank account located within the State of Connecticut any and all of the $1.35 million that she transferred to Bank of China Accounts held by her parents following the commencement of this litigation.
B. Upon repatriation of all or some portion of said monies, the Defendant, Xin Chen, shall file with this Court, and swear to under oath, a Certificate of Compliance stating

the sum returned and the identity of the account and financial institution at which it is held, whereupon the Trustee may obtain from this Court a supplemental prejudgment remedy order to attach such sums.

C. The assets, funds, or other personal property held by or under the direct or indirect control of the Defendant, Xin Chen, whether held in her name or for her direct or indirect beneficial interest, wherever located, up to the amount of $209,299.65, are frozen.

D. The Defendant, Xin Chen, and her agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with her who receive actual notice of this order by personal service or otherwise, and each of them, shall hold and retain within their control, and otherwise prevent any disposition, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal whatsoever of any of their funds or other assets or things of value presently held by them, under their control or over which they exercise actual or apparent investment or other authority, in whatever form such assets may presently exist and wherever located, up to the amounts identified in paragraph C.

E. Any bank, financial or brokerage institution or other person or entity holding any funds, securities or other assets of the Defendant, Xin Chen, up to the amounts identified in paragraph C, held in the name of, for the benefit of, or under the control of Defendant Chen or her agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them, and each of them, shall hold and retain within their control and prohibit the withdrawal, removal, transfer or other disposal of any such funds or other assets.

F. No person or entity, including the Defendant, Xin Chen, or any creditor or claimant against the Defendant, or any person acting on behalf of such creditor or claimant, shall take any action to interfere with this asset freeze; provided, however, that any party or non-party may seek leave from, or modification of the terms of, this order upon a proper showing of good and sufficient cause.

IT IS SO ORDERED at Hartford, Connecticut this 15th day of May 2017.

James J. Tancredi
United States Bankruptcy Judge
District of Connecticut