

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

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| |) | |
| In re: |) | Chapter 11 |
| |) | |
| HO WAN KWOK, <i>et al.</i> , |) | Case No. 22-50073 (JAM) |
| |) | |
| Debtors. |) | (Jointly Administered) |
| |) | |
| |) | |
| U.S. BANK NATIONAL ASSOCIATION, AS ESCROW |) | Adv. P. No. 23-05012 (JAM) |
| AGENT, |) | |
| |) | Re: ECF No. 28 |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| HK INTERNATIONAL FUNDS INVESTMENTS (USA) |) | |
| LIMITED, LLC; OFFICIAL COMMITTEE OF |) | |
| UNSECURED CREDITORS; and LUC A. DESPINS, |) | |
| CHAPTER 11 TRUSTEE FOR THE ESTATE OF |) | |
| HO WAN KWOK, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |
| LUC A. DESPINS, CHAPTER 11 TRUSTEE FOR THE |) | |
| ESTATE OF HO WAN KWOK, |) | |
| |) | |
| Cross-Complainant, |) | |
| |) | |
| v. |) | |
| |) | |
| HK INTERNATIONAL FUNDS INVESTMENTS (USA) |) | |
| LIMITED, LLC, and OFFICIAL COMMITTEE OF |) | |
| UNSECURED CREDITORS, |) | |
| |) | |
| Cross-Defendants. |) | |
| |) | |

APPEARANCES

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**MEMORANDUM OF DECISION AND ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT**

Julie A. Manning, United States Bankruptcy Judge

I. INTRODUCTION

Before the Court is the Motion for Summary Judgment (the “Motion for Summary Judgment”) filed by Defendant and Cross-Complainant Mr. Luc A. Despins, in his capacity as Chapter 11 trustee (the “Trustee”) for the bankruptcy estate (the “Estate”) of Mr. Ho Wan Kwok

(the “Individual Debtor”). (ECF No. 28.¹) The Trustee seeks summary judgment on his Crossclaim (defined below) against Defendants and Cross-Defendants HK International Funds Investments (USA) Limited, LLC (“HK USA”) and the Official Committee of Unsecured Creditors (the “Committee”), asserting that certain funds (the “Escrow Funds”) formerly held in escrow by Plaintiff U.S. Bank, N.A. (the “Escrow Agent”) should be disbursed to the Trustee. (ECF No. 27.) For the reasons stated below, the Motion for Summary Judgment is **GRANTED**.

II. BACKGROUND

On June 6, 2023, the Escrow Agent commenced the instant adversary proceeding by filing the Complaint for Interpleader (the “Complaint”). (ECF No. 1.) The Complaint sought to resolve the Escrow Agent’s liability to the various Defendants by depositing the Escrow Funds into the Registry of the Court and requiring the Defendants to interplead among themselves in this action. (*Id.*)

When the Complaint was filed, the Escrow Agent was faced with competing demands. On the one hand, the Trustee was asserting that the Escrow Agent must deliver the Escrow Funds to the Trustee because the Memorandum of Decision and Order Granting Motion for Partial Summary Judgment on Second Counterclaim (the “Alter Ego Decision”) found that all property of HK USA – including the Escrow Funds – is property of the Estate and ordered the delivery of such property to the Trustee. (*See* HK ECF No. 221.) On the other hand, HK USA was asserting that the underlying escrow agreement (the “Escrow Agreement”) as incorporated by the Stipulated Order Compelling HK International Funds Investments (USA) Limited, LLC to

¹ References to the docket in this adversary proceeding will be styled “ECF.” References to the docket in the main case, *In re Kwok*, Case No. 22-50073 (JAM), will be styled “Main Case ECF.” References to the docket in the related adversary proceeding styled *HK International Funds Investments (USA) Limited, LLC v. Despins ex rel. Kwok (In re Kwok)*, Case No. 22-50073 (JAM), Adv. P. No. 22-05003 (JAM) will be styled “HK ECF.”

Transport and Deliver that Certain Yacht, the “Lady May” (the “Stipulated Delivery Order”) provides HK USA the contractual right to prevent disbursement of the Escrow Funds absent a final non-appealable order by this Court. (*See* Main Case ECF No. 299.) For its part, the Committee, while a party to the Escrow Agreement, supports disbursement of the Escrow Funds to the Trustee.

On June 13, 2023, the Escrow Agent filed the Motion to Authorize Deposit of Interpleader Funds into the Registry of the Court and to Discharge Plaintiff from Interpleader Action (the “Motion to Deposit”). (ECF No. 19.) On June 28, 2023, after a hearing on the Motion to Deposit, the Consent Order Granting Motion to Deposit (the “Consent Deposit Order”) entered. (ECF No. 40.) The Consent Deposit Order provided for the transfer of the Escrow Funds into a segregated account held by the Trustee (the “Segregated Account”) rather than into the Registry of the Court as originally contemplated. (*Id.*) The Consent Deposit Order also discharged the Escrow Agent “from further liability to any of the defendants named herein relating to the allegations in the Complaint” and dismissed the Escrow Agent from this adversary proceeding. (*Id.*) Finally, the Consent Deposit Order provided that nothing in the Consent Deposit Order “shall be considered by the Court in determining the merits of the Interpleader Action and all parties’ rights to the Interpleader Funds are fully preserved.” (*Id.*)

On June 14, 2023, the Trustee filed his Answer and Cross Claim (the “Crossclaim”). (ECF No. 27.) That same day, the Trustee filed the Motion for Summary Judgment, the Memorandum of Law in Support of Motion for Summary Judgment, the Local Rule 56(a)(1) Statement of Undisputed Material Facts in Support of Motion for Summary Judgment (the “Local Rule 56(a)(1) Statement”), and the Declaration of Luc A. Despins in Support of Motion for Summary Judgment (the “Despins Declaration”) with attached exhibits. (ECF Nos. 28–31.)

On July 6, 2023, HK USA filed the Memorandum in Opposition to Motion for Summary Judgment and the Local Rule 56(a)(2) Statement of Facts in Opposition to Motion for Summary Judgment (the “Local Rule 56(a)(2) Statement,” and, together with the Local Rule 56(a)(1) Statement, collectively, the “Local Rule 56(a) Statements”). (ECF No. 47.) The Committee filed no timely response or opposition to the Motion for Summary Judgment. On July 7, 2023, the Trustee filed the Reply in Support of Motion for Summary Judgment. (ECF No. 50.) The Motion for Summary Judgment is fully briefed.

On July 11, 2023, a hearing was held on the Motion for Summary Judgment. This matter is ripe for decision.

III. JURISDICTION

The United States District Court for the District of Connecticut has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This Court has authority to hear and determine this matter pursuant to 28 U.S.C. § 157(a) and the Order of Reference of the United States District Court for the District of Connecticut dated September 21, 1984. The instant proceedings are statutorily core proceedings. 28 U.S.C. §§ 157(b)(2)(A), (E), (O). The Crossclaim implicates no constitutional concerns precluding this Court’s exercise of jurisdiction. *Cf. Stern v. Marshall*, 564 U.S. 462, 487–99 (2011).

Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

IV. UNDISPUTED FACTS

Upon review of the Local Rule 56(a) Statements, the Despina Declaration and the exhibits attached thereto, and the record of this adversary proceeding, the jointly administered Chapter 11 cases, and related adversary proceedings, the following are the undisputed facts for purposes of the Motion for Summary Judgment:

1. On February 15, 2022 (the “Petition Date”), the Individual Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code with the Court (hereinafter, the “Bankruptcy Code”), commencing the above-captioned Chapter 11 case. (Main Case ECF No. 1.)

2. On March 1, 2022, creditor Pacific Alliance Asia Opportunity Fund L.P. (“PAX”) filed a motion seeking an order confirming the inapplicability of the automatic stay, or, in the alternative, relief from stay (the “PAX Stay Motion”), in connection with a state court contempt fine awarded to PAX prior to the Petition Date relating to the Individual Debtor’s failure to return the Lady May to the jurisdictional waters of New York. (Main Case ECF No. 57.) The Individual Debtor filed an objection to the PAX Stay Motion, arguing that he did not own or control the Lady May. (Main Case ECF No. 83.)

3. On March 19, 2022, the Office of the United States Trustee (the “U.S. Trustee”) filed the Motion for an order Directing the Appointment of an Examiner or, in the Alternative, Motion for Order Directing the Appointment of a Chapter 11 Trustee (in pertinent part, the “Chapter 11 Trustee Motion”). (Main Case ECF No. 102.)

4. On April 6, 2022, PAX filed the Motion to Dismiss Chapter 11 Case, or, in the Alternative, Partial Joinder to Chapter 11 Trustee Motion (in pertinent part, the “PAX Joinder to Chapter 11 Trustee Motion”). (Main Case ECF No. 183.)

5. On April 11, 2022, HK USA appeared in the Individual Debtor’s Chapter 11 case and filed a statement in opposition to the PAX Stay Motion. (Main Case ECF Nos. 201–03.)

6. That same day – April 11, 2022, HK USA commenced an adversary proceeding (*i.e.*, *HK Int’l Funds Invs. (USA) Ltd., LLC v. Despins ex rel. Kwok (In re Kwok)*, Case No. 22-50073 (JAM), Adv. P. No. 22-05003 (JAM) (Bankr. D. Conn. June 28, 2023) (hereinafter, the “HK

Adversary Proceeding”)) by filing a complaint against the Individual Debtor and PAX, asserting that HK USA was the owner of the Lady May (the “HK Complaint”). (HK ECF No. 1.)

7. Following a hearing on the PAX Stay Motion held on April 13, 2022, the Individual Debtor, PAX, the Committee, and HK USA reached an agreement to resolve the PAX Stay Motion. The agreement provided for, among other things, HK USA paying \$37 million into escrow pending fulfillment of certain conditions – the above-defined Escrow Funds. The agreement was announced to the Court during a hearing on April 27, 2022, and it was filed as a stipulated order and approved by the Court on April 29, 2022 – the above-defined Stipulated Delivery Order. (Main Case ECF Nos. 294, 299.)

8. Thereafter, HK USA paid the Escrow Funds to the Escrow Agent, which held the funds pursuant to the Escrow Agreement between the Escrow Agent, HK USA, and the Committee. (Despins Decl. Ex. 1.)

9. On June 15, 2022, the Court entered a memorandum of decision and order granting the PAX Joinder to Chapter 11 Trustee Motion and appointing a Chapter 11 trustee. (Main Case ECF No. 465.)

10. On July 8, 2022, Mr. Despins was appointed as the Trustee. (Main Case ECF No. 523.)

11. On September 23, 2022, the Trustee, appearing in the HK Adversary Proceeding as the Individual Debtor’s successor, filed in that proceeding, among other things, the Answer and Counterclaims (the “Counterclaims”) against HK USA and Ms. Mei Guo (together, collectively, the “HK Parties”), the Individual Debtor’s daughter. (HK ECF No. 36.)

12. The Trustee’s First Counterclaim sought a ruling pursuant to 11 U.S.C. §§ 541 and 542 declaring that the Lady May is property of the Estate based on the doctrine of collateral

estoppel and ordering the turnover of the Lady May to the Estate. (*Id.* ¶¶ 105–11.) The Trustee’s Second Counterclaim sought a ruling pursuant to 11 U.S.C. §§ 541, 542, and 544, declaring that HK USA’s property, including the Escrow Funds, is property of the Estate and ordering the turnover of HK USA’s property to the Estate, on the grounds that HK USA is an *alter ego* of the Individual Debtor. (*Id.* ¶¶ 112–19.) The Third Counterclaim alleges that the Individual Debtor beneficially owns HK USA and, hence, pursuant to 11 U.S.C. §§ 541, 542, and 544, Ms. Guo’s membership interest in HK USA is property of the Estate, which the HK Parties must turnover to the Estate. (*Id.* ¶¶ 120–23.)

13. Through the Consent Order Granting HK USA’s Motion for Order Establishing Repair Reserve entered October 7, 2022, the Court ordered the Escrow Agent to transfer and deliver \$4 million of the Escrow Funds to the Trustee for the creation of a separate repair reserve (the “Repair Reserve”). (Main Case ECF No. 930.)

14. Between October 25, 2022 and March 17, 2023, the Escrow Funds remained in escrow pursuant to consent orders (collectively, the “Consensual Adjournments”) between the Trustee and the HK Parties regarding the scheduling of an evidentiary hearing on the Trustee’s Application for Pre-judgment Remedy (the “PJR Application”) and Motion for Preliminary Injunction (the “PI Motion”). (HK ECF Nos. 37, 50, 67, 76, 86, 96.)

15. The PJR Application and PI Motion were fully briefed between September 23, 2022, and March 8, 2023, in anticipation of an evidentiary hearing, which was ultimately – after the Consensual Adjournments – scheduled to begin on March 15, 2023. (HK ECF Nos. 38, 50, 77, 101.)

16. On December 22, 2022, the HK Parties filed a motion to dismiss the Second, Third, Fourth, and Fifth Counterclaims (the “Motion to Dismiss”). (HK ECF No. 87.) Between

December 22, 2022 and March 1, 2023, the Motion to Dismiss was fully briefed. (HK ECF No. 88, 90, 97.) Following a hearing on April 11, 2023, the Memorandum of Decision and Order Denying in Part Motion to Dismiss Counterclaims entered on April 14, 2023. (HK ECF No. 202.)

17. Before any evidence was introduced at the hearing on the PJR Application and PI Motion held on March 15, 2023, the HK Parties consented to the entry of a prejudgment remedy (the “PJR”) and preliminary injunction (as amended, the “PI,” and together with the PJR, collectively, the “PI/PJR”). (HK ECF Nos. 140, 142, 182.) Thereafter, on March 17, 2023, the Court entered the PI/PJR, and the PI was consensually amended on March 30, 2023. (HK ECF Nos. 140, 142, 182.)

18. Between March 17, 2023 and the entry of the Consent Deposit Order on June 28, 2023, the Escrow Funds remained in escrow pursuant to the PI/PJR. (HK ECF Nos. 140, 142, 182.)

19. On March 19, 2023, the Trustee filed his Motion for Partial Summary Judgment (the “First Motion for Summary Judgment”) and supporting materials, seeking summary judgment on the First Counterclaim. (HK ECF No. 146.) HK USA objected. (HK ECF No. 160.) A hearing was held on March 27, 2023. Thereafter, for the reasons stated on the record and later set forth in the Supplemental Memorandum of Decision in Support of Oral Ruling Granting Motion for Partial Summary Judgment (the “Collateral Estoppel Memo”), (HK ECF No. 177), the Court entered an order granting the First Motion for Summary Judgment (the “Collateral Estoppel Order”), (HK ECF No. 172).

20. The Collateral Estoppel Order held that the Lady May is property of the Estate and that the sole owner of the Lady May is the Trustee, for the benefit of the Estate. (Collateral

Estoppel Order ¶ 3.) On March 31, 2023, upon the consent of the HK Parties, the Court entered an amendment to the Collateral Estoppel Order (together with the Collateral Estoppel Memo and Collateral Estoppel Order, collectively, the “Collateral Estoppel Decision”), holding that another yacht, the Lady May II, is also property of the Estate. (HK ECF No. 183.)

21. On April 3, 2023, the Trustee filed the Motion for Partial Summary Judgment on Second Counterclaim (the “Second Motion for Summary Judgment”) and supporting documents, seeking summary judgment on his Second Counterclaim. (HK ECF No. 185.) On April 14, 2023, HK USA objected to the Second Motion for Summary Judgment. (HK ECF No. 203.)

22. Following a hearing on April 27, 2023, the Alter Ego Decision entered on May 18, 2023. (HK ECF No. 221.) Among other things, the Alter Ego Decision determined that:

- a. HK USA is and was at all relevant times the *alter ego* of the Individual Debtor;
- b. all property of HK USA at all relevant times to the present, including HK USA’s interest in the Escrow Funds, is property of the Estate;
- c. the HK Parties must deliver all property of HK USA to the Trustee on or before June 2, 2023; and
- d. the Alter Ego Decision became effective immediately upon its entry and the Court retained jurisdiction with respect to its implementation, interpretation, and enforcement. (*Id.* at 36.)

23. On May 26, 2023, the HK Parties appealed the Alter Ego Decision. (*See, generally, HK Int’l Funds Invs. (USA) Ltd. v. Despins ex rel. Kwok (In re Kwok)*, Case No. 23-cv-690 (KAD) (D. Conn. June 6, 2023), consolidated with Case No. 23-cv-458 (KAD) (D. Conn. Aug. 2, 2023).)

V. DISCUSSION

A. Legal Standard

The Trustee seeks summary judgment on the Crossclaim. Under Fed. R. Civ. P. 56(a), made applicable in the instant adversary proceeding by Fed. R. Bankr. P. 7056, a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” While a movant “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact,” a movant is not required to “support its motion with affidavits or other similar materials *negating* the opponent's claim.” *Celotex Corp. v. Catrett ex rel. Catrett*, 477 U.S. 317, 323 (1986).

“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. Where the movant meets its factual burden, an “opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Finally, to succeed on the motion, the movant must be entitled, upon the undisputed material facts, to judgment as a matter of law – the judge, in ruling on the motion, is not acting as a finder of fact. *Anderson*, 477 U.S. at 250. Summary judgment should enter “where the evidence is such that it ‘would require a directed verdict for the moving party.’” *Id.* at 251 (internal citations omitted).

B. *Res Judicata*

The Trustee argues that the Alter Ego Decision is *res judicata*, supporting summary judgment in his favor. “The preclusive effect of a federal-court judgment is determined by federal common law,” *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). “Uniform federal rule[s]” of *res judicata* apply to judgments issued under federal question jurisdiction. *Sturgell*, 553 US. at 891. The law of a federal court’s forum state determines the preclusive effect of decisions issued under diversity jurisdiction. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

Here, the United States District Court for the District of Connecticut has bankruptcy rather than federal question or diversity jurisdiction. In particular, the District Court has “arising under” jurisdiction, *see* 28 U.S.C. § 1334(b), because the Alter Ego Decision determined that HK USA’s property was property of the Estate under section 541 and ordered its turnover and delivery under section 542 – substantive rights created by the Bankruptcy Code, *see Glinka v. Murad (In re Housecraft Indus. USA, Inc.)*, 310 F.3d 64, 69–70 (2d Cir. 2002) (holding that arising under jurisdiction exists where parties seek relief as to substantive rights created by the Bankruptcy Code). Therefore, while the Court has not found binding precedent on the issue, the Court concludes federal common law applies to the determination of the *res judicata* effect of the Alter Ego Decision. *See Covert v. LVNV Funding, LLC*, 779 F.3d 242, 245 (4th Cir. 2015) (holding federal law determines the preclusive effect of prior bankruptcy court rulings). Nevertheless, the relevant Connecticut standards will also be set forth below. The parties cite to cases applying both federal common law and Connecticut law and, as set forth below, they are substantially similar.

Importantly, under both federal common law and Connecticut law, the pendency of an appeal alone does not prevent the Alter Ego Decision from being *res judicata*. *Enfield Fed. Sav.*

& *Loan Ass'n v. Bissell*, 440 A.2d 220, 222 (Conn. 1981); *Carnemolla v. Walsh*, 815 A.2d 1251, 1257–58 (Conn. App. Ct. 2003) (citing *Salem Park, Inc. v. Salem*, 176 A.2d 571 (Conn. 1961) and *Capalbo v. Planning & Zoning Board of Appeals*, 547 A.2d 528 (Conn. 1988)), *cert. denied*, 821 A.2d 768 (Conn. 2003)); *United States v. Nysco Labs., Inc.*, 215 F. Supp. 87, 89 (E.D.N.Y. 1963) (applying *res judicata* in a federal question case during the pendency of an appeal), *aff'd* by 318 F.2d 817, 818 (2d Cir.1963). In practice, however, *res judicata* often does *not* apply to Connecticut state court judgments during the pendency of an appeal because Connecticut Practice Book section 61-11 provides for an automatic stay pending appeal in many cases. Bankruptcy Rule 8007, however, does not provide for an automatic stay pending appeal. Additionally, there is no order staying the Alter Ego Decision pending appeal. Therefore, the Alter Ego Decision is not stayed pending appeal.

Res judicata is alternatively understood as either solely claim preclusion or as both claim preclusion and issue preclusion, also known as collateral estoppel. *Compare, e.g., Monahan v. N.Y. City Dept. of Corrections*, 214 F.3d 275, 284 (2d Cir. 2000) (identifying *res judicata* with claim preclusion) with *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001) (discussing difference between claim and issue preclusion as two species of *res judicata*); *see also LaSalla v. Doctor's Assocs., Inc.* 898 A.2d 803, 811 (Conn. 2006) (“Claim preclusion, sometimes referred to as *res judicata*, and issue preclusion, sometimes referred to as collateral estoppel, are first cousins. Both legal doctrines promote judicial economy by preventing relitigation of issues or claims previously resolved.”).

The Trustee raises an argument sounding in claim preclusion in his initial brief. He asserts the Alter Ego Decision precludes HK USA from arguing against the Estate’s claim to the Escrow Funds and precludes HK USA from arguing it has contract rights under the Escrow

Agreement because those contract rights are property of the Estate. In his reply brief, the Trustee additionally asserts issue preclusion by arguing that the Alter Ego Decision precludes HK USA from relitigating the issue of whether HK USA may enforce the Stipulated Delivery Order against the Trustee. HK USA responds that *res judicata* does not apply because (a) claim preclusion is inapplicable since HK USA is not seeking to relitigate whether it is the *alter ego* of the Individual Debtor; and (b) issue preclusion is inapplicable because the Alter Ego Decision did not determine whether HK USA had a right to contest disbursement absent a final, non-appealable order.

The Court will first consider the Trustee’s claim preclusion argument and then consider his issue preclusion argument.

1. Claim Preclusion

Under federal common law, the elements of claim preclusion are “(1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.” *Soules v. Connecticut*, 882 F.3d 52, 55 (2d Cir. 2018) (citing *Monahan*, 214 F.3d at 285, which as noted above identifies *res judicata* with claim preclusion). Connecticut law applies essentially the same standard:

“[T]he doctrine of . . . claim preclusion . . . [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to any other admissible matter which might have been offered for that purpose. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it. . . .”

Tarro v. Mastriani Realty, LLC, 69 A.3d 956, 962 (Conn. App. Ct. 2013) (citing *Bruno v. Geller*, 46 A.3d 974 (Conn. App. Ct. 2012), *cert. denied*, 52 A.3d. 732 (Conn. 2012)) (alterations in original).

HK USA does not dispute that the Alter Ego Decision meets the first two elements. The Court agrees that the Alter Ego Decision was an adjudication on the merits and the HK Adversary Proceeding involves HK USA and the Trustee. Therefore, only the third element is in contention – namely, whether HK USA has any contract rights under the Escrow Agreement to prevent disbursement of the Escrow Funds absent a final, non-appealable order and whether it did or could have raised the issue in the HK Adversary Proceeding.

The Trustee argues that HK USA asserted its claim to the Escrow Funds in the HK Adversary Proceeding, including its rights under the Stipulated Delivery Order, and could also have asserted its rights under section 4a of the Escrow Agreement. Moreover, the Trustee argues under the Alter Ego Decision all of HK USA's property is property of the Estate – including its contract rights under the Escrow Agreement – and HK USA could and did assert that its property was not property of the Estate.

In response, HK USA argues that it is not seeking to relitigate whether the Escrow Funds are property of the Estate – it is simply trying to assert its contract rights that it did not and could not raise in the HK Adversary Proceeding. HK USA further argues that the Alter Ego Decision did not give the Trustee control of HK USA, and therefore HK USA may assert its contract rights under the Escrow Agreement.

HK USA is correct that there is a difference between whether the Escrow Funds are property of the Estate and whether absent a final, non-appealable order, it may assert contract rights to prevent disbursement of the Escrow Funds. HK USA is also correct that the Alter Ego

Decision does not give the Trustee control of HK USA because its membership interest is personal property of Ms. Guo. *See* DEL. CODE ANN. tit. 6, § 18-701 (West 2023). The Alter Ego Decision does not provide for the transfer of any property directly owned by Ms. Guo. (*See* HK ECF No. 221, at *25–26 (explaining the difference between the Second and Third Counterclaims).) The Trustee seeks Ms. Guo’s membership interest in HK USA through the Third Counterclaim. (*Id.*)

Although HK USA’s observations are correct, its observations are not responsive to the Trustee’s argument. The Second Counterclaim in the HK Adversary Proceeding sought a ruling pursuant to 11 U.S.C. §§ 541, 542, and 544 (i) declaring that HK USA’s property, including the Escrow Funds, is property of the Estate and (ii) ordering the delivery of HK USA’s property to the Trustee, on the grounds that HK USA is an *alter ego* of the Individual Debtor. (HK ECF No. 36 ¶¶ 112–19.) The parties litigated whether HK USA is the Individual Debtor’s *alter ego* and whether HK USA’s property is property of the Estate. (HK ECF Nos. 36, 38, 50, 77, 88, 90, 97, 101, 185, 203.) This is because, as stated in the Alter Ego Decision:

Alter ego and/or piercing the corporate veil as sought by the Second Counterclaim renders one entity liable for the debts of another individual or entity. *Tronox*, 549 B.R. at 44 (“Under Delaware law, veil piercing is a doctrine of equity. . . . Veil piercing is thus not a purely independent cause of action. Instead, piercing the corporate veil effectively amounts to the imposition of joint and several liability between a direct actor and its corporate affiliate for some underlying wrong committed by the direct actor.”) In conjunction with sections 541 and 542, alter ego thus accomplishes the transfer of assets into the bankruptcy estate.

(HK ECF No. 221, at *25.)

The Alter Ego Decision decides these issues, holding, for the reasons stated therein, that “HK International Funds Investments (USA) Limited, LLC (‘HK USA’) is and was at all relevant times the alter ego of Mr. Ho Wan Kwok (the ‘Individual Debtor’)” and, resultingly, “[a]ll property of HK USA at all relevant times to the present, including the Lady May, the Lady

May II, and the Escrowed Funds constituted and constitute, as applicable, property of the Individual Debtor's Chapter 11 estate (the 'Estate')." (HK ECF No. 221, at *36.) The Alter Ego Decision orders turnover of HK USA's assets to the Estate through delivery to the Trustee. (*Id.*)

Under Second Circuit precedent, the property turned over to the Estate includes HK USA's contract rights under the Escrow Agreement. *See U.S. Bank Trust Nat'l Ass'n v. AMR Corp. (In re AMR Corp.)*, 730 F.3d 88, 102–03 (2d Cir. 2013) (holding that a creditor could not decelerate debt to affect debtor's contractual right to pay accelerated debt without make-whole payment because the debtor's contractual rights became property of the estate upon the filing of the bankruptcy petition) (citing *In re Enron Corp.*, 300 B.R. 201, 211–12 (Bankr. S.D.N.Y. 2003) (citing *Elder-Beerman Stores Corp. v. Thomasville Furniture Indus., Inc. (In re Elder-Beerman Stores Corp.)*, 195 B.R. 1019, 1023 (Bankr. S.D. Ohio 1996) (collecting cases for the proposition that contract rights are property of the estate)) (holding in pertinent part that employment contract was property of the estate and employee violated automatic stay in sending demand letters)); *see also EBC I, Inc. v. Am. Online, Inc. (In re EBC I, Inc.)*, 356 B.R. 631, 639–40 (Bankr. D. Del. 2006) (holding contract rights are property of the estate that may be the subject of fraudulent transfer actions under section 548). These holdings flow from section 541 which states that property of the bankruptcy estate includes, "wherever located and by whomever held," all "legal and equitable interests of the debtor in property" and "any interest in property that the estate acquires after the commencement of the case." 11 U.S.C. §§ 541(a)(1), (7); *see United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–05 (1983). HK USA's claim to all its property at the relevant times – including any contract rights under the Escrow Agreement – was decided by the Alter Ego Decision.

For the reasons stated above, HK USA is precluded from asserting the claim that it has contract rights under the Escrow Agreement. Those contract rights belong to the Estate and are controlled by the Trustee. On this basis, the Trustee is entitled to judgment as a matter of law on the Crossclaim.

2. Issue Preclusion

While the above is sufficient to determine the Motion for Summary Judgment, the Court also considers the parties' arguments regarding issue preclusion. "Under federal law, a party is collaterally estopped from relitigating an issue if a four-part test is met: '(1) the identical issue was raised in a previous proceeding; (2) the issue was 'actually litigated and decided' in the previous proceeding; (3) the party had a 'full and fair opportunity' to litigate the issue; and (4) the resolution of the issue was 'necessary to support a valid and final judgment on the merits.'"

Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998). The elements of collateral estoppel under Connecticut law are essentially the same. To be subject to collateral estoppel under Connecticut law, an issue must have been (1) "fully and fairly litigated," (2) "actually decided," (3) "necessary to the judgment" in the first action, and (4) "identical" to the issue to be decided in the second action. *Faraday v. Blanchette*, 596 F. Supp. 2d 508, 515 (D. Conn. 2009) (citing *Virgo v. Lyons*, 551 A.2d 1243 (Conn. 1988) and *State v. Joyner*, 774 A.2d 927 (Conn. 2001)).

The Trustee argues that (1) HK USA's ability to enforce the Stipulated Delivery Order – which incorporates the Escrow Agreement – against the Trustee was at issue in the HK Adversary Proceeding; (2) the Trustee and HK USA briefed and argued whether HK USA could enforce the Stipulated Delivery Order against the Trustee in the HK Adversary Proceeding; (3) HK USA had a full and fair opportunity in the HK Adversary Proceeding to litigate whether it could enforce the Stipulated Delivery Order against the Trustee; and (4) it was necessary in the

HK Adversary Proceeding to determine whether HK USA could enforce the Stipulated Delivery Order against the Trustee in concluding that the Escrow Funds are property of the Estate to be delivered to the Trustee. HK USA responds that the issue of whether HK USA could enforce the Escrow Agreement did not arise in HK Adversary Proceeding.

As HK USA observes, the Escrow Agreement is incorporated by reference in the Stipulated Delivery Order. (Main Case ECF No. 299 §§ 4, 5.) Indeed, the Escrow Agreement is part of the stipulation between the parties that the Court approved in entering the Stipulated Delivery Order. (*Id.* Ex. A.)

The enforceability of the Stipulated Delivery Order by HK USA against the Trustee was at issue and actually decided by the Alter Ego Decision. (HK ECF No. 221, at *28–35.) In the Alter Ego Decision, the Court determined that:

Under Connecticut law, contract formation requires, *inter alia*, a meeting of the minds such that a mutual understanding of the terms is achieved between the parties. *L & R Realty v. Conn. Nat'l Bank*, 732 A.2d 181, 188–89 (Conn. App. Ct. 1999), *cert. denied*, 734 A.2d 984 (Conn. 1999). “If the minds of the parties have not truly met, no enforceable contract exists.” *L & R Realty*, 732 A.2d at 188–89. Therefore, a party cannot prosecute an action on a contract where it contracted with itself – although some other beneficiary to the contract may. *Moore v. Denslow*, 14 Conn. 235, 237–38 (1841); *accord Animazing Ent., Inc. v. Louis Lofredo Assocs., Inc.*, 88 F. Supp. 2d 265, 270–71 (S.D.N.Y. 2000) (stating that under New York law it is well-established that there must be (at least) two parties to a contract – otherwise it is void). Because the Court has concluded that HK USA is the alter ego of the Individual Debtor, the Court concludes that as between HK USA and the Individual Debtor – into whose shoes the Trustee steps, in this regard – the Stipulated Delivery Order was void *ab initio*. Therefore, HK USA may not enforce the Stipulated Delivery Order against the Trustee and the Trustee may recover the Escrowed Funds.

(*Id.* at *30–31) and:

While the HK Parties are correct that generally a trustee will be bound by a bargain made by a former debtor-in-possession, the policy concerns militating this general result do not support binding the Trustee to the terms of the Stipulated Delivery Order. Unlike in *Armstrong*, *Superior Toy*, and *Seidle*, it is undisputed that neither HK USA nor Ms. Guo is a creditor of the Individual Debtor.⁹ Therefore, the policy concern that creditors must be comfortable in reaching agreements with debtors-in-possession is not implicated on

the instant facts. *See, e.g., Armstrong*, 964 F.2d at 801. Furthermore, because the Court has found HK USA is a mere instrumentality of the Individual Debtor with no separate economic existence, there can be no prejudice to HK USA in holding it liable for the debts of the Individual Debtor. *See, e.g., Ionosphere*, 85 F.3d at 1001; *Superior Toy*, 78 F.3d at 1176; *Seidle*, 778 F.2d at 665; *Feldman*, 497 F.2d at 355. Further still, there is no public interest in allowing an Individual Debtor to self-deal in bankruptcy to shield assets from bankruptcy proceedings, which would be accomplished by binding the Trustee to the Stipulated Delivery Order. *See In re Alma Energy, LLC*, No. CIV. 10-80-ART, 2010 WL 4736905 (E.D. Ky. Nov. 16, 2010); *Coan v. Licata (In re First Conn. Consulting Grp.)*, Case No. 02-50852 (JJT), Case No. 02-51167 (JJT), Adv. P. No. 09-05010 (JJT), 2023 WL 2746826 (Bankr. D. Conn. Mar. 31, 2023); *Coan v. Licata (In re First Conn. Consulting Grp.)*, Case No. 02-50852 (JJT), Case No. 02-51167 (JJT), Adv. P. No. 09-05010 (JJT), 2023 WL 2752489 (Bankr. D. Conn. Mar. 31, 2023). This is because such self-dealing and bankruptcy-proofing constitutes “fraud or bad faith.” *Feldman*, 497 F.2d at 356; *see Superior Toy*, 78 F.3d at 1175; *Am. Int’l Airways*, 74 B.R. at 694. Finally, unlike in *In re MatlinPatterson Global Opportunities Partners II L.P.*, the Stipulated Delivery Order here does not expressly bind the Trustee, despite (a) the pendency at that time of a motion to appoint a Chapter 11 trustee and (b) discussing dismissal in light of PAX’s then-pending motion to dismiss. 644 B.R. 418, 427–28 (Bankr. S.D.N.Y. 2022); *see In re Phila. Athletic Club, Inc.*, 17 B.R. 345, 347 (Bankr. E.D. Penn. 1982).

At the same time, the public’s interest underlying the appointment of the Trustee, on these facts and circumstances, is of utmost concern. The Trustee was appointed in this case for cause. *See* 11 U.S.C. § 1104(a)(1). Among other things, the Trustee was appointed to investigate allegations that the Individual Debtor is engaged in shell games to hinder, delay, and defraud his creditors. The Second Counterclaim represents the sort of claim the Trustee was appointed to pursue. Piercing the corporate veil “may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved.” *Pauley Petroleum*, 239 A.2d at 633. The Court has determined that HK USA’s corporate form does injustice in that it serves to shield assets beneficially owned and controlled by the Individual Debtor from his creditors. This injustice would be served by holding the Trustee to be bound by the Stipulated Delivery Order. The public interest supports the Trustee’s recovery from the Escrowed Funds.

(*Id.* at *33–35).²

This issue was briefed and argued in the Motion to Dismiss as it pertained to the Second Counterclaim – the subject of the Alter Ego Decision. (*See* HK ECF Nos. 87, 88, 90, 97, 202.) In particular, HK USA argued that section 12 of the Stipulated Delivery Order prevented the

² Footnote 9 stated: “While HK USA points to the fact that certain creditors were parties to the Stipulated Delivery Order, the Trustee is not seeking relief against such creditors.” (HK ECF No. 221, at *33 n. 9.)

Trustee, as the successor of the Individual Debtor, from obtaining a judgment awarding the Escrow Funds to the Estate. Section 12 provides:

PAX, the Debtor, the Committee, and the creditors, Rui Ma and Zheng Wu, shall not take any act to assert, create, perfect or enforce any right, title, lien or other interest in the Escrow Funds while in the possession of the Escrow Agent or their proceeds while in the possession of HK USA or any other person, including, but not limited to, through the enforcement of any judgment or service of any prejudgment remedy or other legal process

(Main Case ECF No. 299 § 12.) HK USA reiterated this position in opposition to the Second Motion for Summary Judgment and this position was before the Court in the HK Adversary Proceeding. (HK ECF No. 203.) HK USA had a full and fair opportunity to litigate this issue. (HK ECF Nos. 77, 88, 97, 203.)

To determine whether the Trustee could recover the Escrow Funds, the Court necessarily had to decide if the Stipulated Delivery Order barred the recovery of the Escrow Funds as part of a judgment. The Court determined ultimately that both as a matter of law – because under Connecticut law a party cannot enforce a contract against itself – and as a matter of equity – because the Trustee could not be bound by the Individual Debtor’s bargain with his *alter ego* to shield his assets from creditors – HK USA could not enforce the Stipulated Delivery Order against the Trustee. (HK ECF No. 221, at *35.) Without making this determination, the Court could not have held that the Escrow Funds were property of the Estate.

Therefore, HK USA is collaterally estopped from enforcing against the Trustee the Escrow Agreement. On this alternative basis, the Trustee is also entitled to judgment as a matter of law on the Crossclaim.

C. Contract Interpretation

1. Parties' Intent in Entering into Escrow Agreement

Although the Court has determined above that the present matter is *res judicata* – both as a precluded claim and as a precluded issue, the Court nevertheless considers the parties' arguments on contract rights. The Trustee argues that section 4a of the Escrow Agreement only requires a final, non-appealable order if the Court determines that HK USA failed to meet its delivery obligations under the Stipulated Delivery Order. The Trustee additionally argues that purpose of the Escrow Agreement, by its own terms, was to secure the return of the Lady May in good working condition. The Trustee contends this purpose is exhausted and, hence, the requirement of a final, non-appealable order does not apply.

In response, HK USA argues that the Escrow Agreement clearly and unambiguously requires a final non-appealable order even if HK USA met its delivery obligation so long as HK USA is not seeking release of the Escrow Funds through the certification process set forth in the Stipulated Delivery Order. HK USA further argues that the Trustee's arguments as to the intent of the parties cannot be adjudicated through summary judgment as it goes beyond the terms of the contract.

The Escrow Agreement is governed by Connecticut law. (Main Case ECF No. 299 Ex. A, § 18.) Under Connecticut law, “[a]lthough ordinarily the question of contract interpretation, being a question of the parties’ intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law.” *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d 1277, 1287 (Conn. 2000). Therefore, the Escrow Agreement may be interpreted as a matter of

law on summary judgment insofar as its terms provide a clear and unambiguous account of the parties' intent.

The text of section 4a of the Escrow Agreement reads as follows:

a. Escrow Agent shall disburse the Escrow Funds at any time upon receipt of, and in accordance with, (i) the HK USA Certification, accompanied by a certificate executed by HK USA's counsel, Zeisler & Zeisler, P.C., Bridgeport, Connecticut, to the effect that such HK USA Certification has been duly submitted to the Escrow Agent in accordance with the Stipulated [Delivery] Order, upon which documents Escrow Agent shall conclusively rely, (ii) a final, non-appealable order entered by the Bankruptcy Court on or after July 16, 2022, directing delivery of the Escrow Funds, accompanied by a certificate executed by the Party requesting disbursement to the effect that such order of the Bankruptcy Court is a final, non-appealable order of the Bankruptcy Court, upon which certificate Escrow Agent shall conclusively rely (a "Final Order"), (iii) a final, non-appealable award, order, decision, judgment or ruling of an arbitrator or court of competent jurisdiction entered on or after July 16, 2022, determining the rights of HK USA, the [Individual] Debtor and the Committee, creditors of the [Individual] Debtor, including, but not limited to, Pacific Alliance Asia Opportunity Fund, L.P., an investment fund organized as an exempted limited partnership under the laws of the Cayman Islands ("PAX"), with respect to the Escrow Funds or a portion thereof and directing delivery of the Escrow Funds, accompanied by a certificate executed by the Party requesting disbursement to the effect that such award, order, decision, judgment or ruling of an arbitrator or court is a final, non-appealable award, order, decision, judgment or ruling of an arbitrator or court of competent jurisdiction upon which certificate Escrow Agent shall conclusively rely (a "Final Determination") or (iv) an order not subject to any stay entered by the Bankruptcy Court on or after July 16, 2022, directing delivery of the Escrow Funds in accordance with Section 9 of the Stipulated Order, accompanied by a certificate executed by the Party requesting disbursement to the effect that such order of the Bankruptcy Court is an order of the Bankruptcy Court not subject to any stay, upon which certificate Escrow Agent shall conclusively rely (a "Section 9 Order"). The Party requesting disbursement shall provide a copy of its certificate simultaneously via e-mail to all other Parties in accordance with Section 15 of this Escrow Agreement and Escrow Agent shall, prior to any disbursement, confirm based solely upon its review of such e-mail full compliance with the notice obligations set forth in this sentence. Such HK USA Certification, Final Order, Final Determination, Section 9 Order (or certificate accompanying such HK USA Certification, Final Order, Final Determination Section 9 Order), as the case may be, shall contain complete payment instructions, including wiring instructions or an address to which a check shall be sent.

(*Id.* Ex. A, § 4a.)

The Trustee argues that the first release condition applies to the circumstances presently before the Court. Although the non-technical conditions precedent existed for the HK USA

Certification, the Trustee argues that HK USA never sought it because (i) after October 25, 2022 a series of consent orders culminating in the consensual PI/PJR restricted HK USA's ability to pursue the HK USA Certification; and (ii) upon entry of the Alter Ego Decision, HK USA would be required to immediately deliver the Escrow Funds to the Trustee upon receiving them.

HK USA disagrees with the Trustee and argues that the present circumstances clearly match the second release condition. If section 4a of the Escrow Agreement were to be read in isolation, HK USA would be correct. The Alter Ego Decision is an order of this Court, entered after July 16, 2022, and is not a final, non-appealable order.

When taken alone, section 4a of the Escrow Agreement appears to support HK USA's position. However, under Connecticut law the Escrow Agreement must be read in its entirety, "with each provision read in light of the other provisions." *Nation-Bailey v. Bailey*, 112 A.3d 144, 192 (Conn. 2015) (internal citations omitted). Upon an examination of the clear and unambiguous text of the entirety of the agreement including the Stipulated Delivery Order, the Court concludes the intent of the Escrow Agreement is neither that advanced by the Trustee nor that advanced by HK USA.

As a starting point, the Escrow Agreement explicitly states its purpose. Background paragraph D of the Escrow Agreement states:

The Stipulated Order provides that, among other things, HK USA shall deposit the Escrow Funds (as defined below in Section 3) contemporaneously with the execution of this Escrow Agreement into a segregated escrow account to be held by Escrow Agent for the purpose of securing the performance of the "Delivery Obligation" as provided for in Stipulated Order.

(Main Case ECF No. 299 Ex. A, ¶ D.) Therefore, section 4a must be read in the context of the Stipulated Delivery Order and the terms therein regarding the Delivery Obligation. The Stipulated Delivery Order provides that "HK USA shall transport and deliver the Lady May in

good working order (subject to any outstanding service and maintenance to be separately addressed pursuant to Section 11 of this Order) to the navigable waters of Connecticut, and such delivery shall occur on or before July 15, 2022 (the ‘Delivery Obligation’).” (*Id.* § 1.)

The first release condition in section 4a of the Escrow Agreement requires the HK USA Certification. The HK USA Certification is defined in the Escrow Agreement as “the ‘HK USA Certification’ as defined by and in accordance with the Stipulated [Delivery] Order.” (*Id.* Ex. A, § 1d.) Section 3 of the Stipulated Delivery Order defines the HK USA Certification as a certification that HK USA (i) delivered the Lady May in accordance with the Delivery Obligation, (*id.* §§ 1, 3); (ii) served the Stipulated Delivery Order on the captain and manager of the Lady May, (*id.* § 3); (iii) evidenced such service with a certificate of service, (*id.* § 3); (iv) had the captain and management of the Lady May file declarations to the effect that they were bound by the orders of this Court, (*id.* § 3); and (v) established a repair reserve, (*id.* §§ 3, 11).

Under the Stipulated Delivery Order, the HK USA Certification is to be first filed with this Court. (*Id.* § 3.) PAX, the Committee, the Individual Debtor, and the U.S. Trustee then have fifteen days to object and assert that one of the certification conditions has not been met. (*Id.* § 4.) Absent objection, HK USA may provide the Escrow Agent with the HK USA Certification and obtain release of the Escrow Funds. (*Id.* § 4.) Even with a meritorious objection, the HK USA Certification may still ultimately be the release condition, except where the Court determines HK USA has inexcusably defaulted on its Delivery Obligation. (*Id.* §§ 5(i), (iii), (iv), 10.)

The second release condition requires the Final Order. The Final Order must be entered on or after July 16, 2022. (*Id.* Ex. A § 4a.) Conspicuously, July 16, 2022 is the day after delivery of the Lady May is due under the Stipulated Delivery Order. (*Id.* § 1.) In that

connection, section 10 of the Stipulated Delivery Order provides that, should this Court find, absent “good cause for delay,” HK USA has failed to “fully, completely, and timely perform the Delivery Obligation,” the Court shall order the Escrow Funds be transferred out of escrow and into another account, whereafter the parties could file motions seeking to satisfy their interest in the Lady May from the Escrow Funds. (*Id.* § 10.) Moreover, section 5 of the Stipulated Delivery Order only contemplates one circumstance where the HK USA Certification, when sought, is *not* the release condition. (*Id.* § 5.) Namely, section 5(ii) contemplates that if HK USA fails to meet the Delivery Obligation and nevertheless files the HK USA Certification, section 10 applies. (*Id.* §§ 1, 5(ii), 10.)

The third condition is essentially the same as the second condition, except the non-appealable order is the order of some tribunal other than this Court. (*Id.* Ex. A, § 4a.) The fourth condition concerns the possibility of dismissal of the Individual Debtor’s Chapter 11 case, perhaps in light of PAX’s then pending motion, and a transition to resumed litigation in the New York Supreme Court between PAX and the Individual Debtor – which is also contemplated by the Stipulated Delivery Order. (*Id.* § 9, Ex. A, § 4a.)

Section 4c of the Escrow Agreement makes clear that the four (4) release conditions outlined in section 4a and discussed above are the *only* circumstances under which the Escrow Agent is to disburse the Escrow Funds. (*Id.* Ex. A, § 4c.) In this connection, another relevant section of the Stipulated Delivery Order is section 12, upon which HK USA relied in its argument that the Trustee could not recover the Escrow Funds through an *alter ego* judgment.

Section 12 of the Stipulated Delivery Order provides:

PAX, the Debtor, the Committee, and the creditors, Rui Ma and Zheng Wu, shall not take any act to assert, create, perfect or enforce any right, title, lien or other interest in the Escrow Funds while in the possession of the Escrow Agent or their proceeds while in the possession of HK USA or any other person, including, but not limited to, through the

enforcement of any judgment or service of any prejudgment remedy or other legal process . . .

(*Id.* § 12.) Section 12 serves, in pertinent part, to channel all litigation about the Escrow Funds among the parties to the Stipulated Delivery Order through sections 4, 5, 9, and 10, discussed above.

The Court concludes that the problem with the Trustee's argument is that HK USA has not provided the HK USA Certification. Regardless of HK USA's current ability to do so and its reasons for not doing so, the first release condition requires the HK USA Certification.

Therefore, the first release condition has not been met.

However, the Court also disagrees with HK USA. Section 4a of the Escrow Agreement must be read in light of paragraph D and section 4c of the Escrow Agreement and sections 1, 3, 4, 5, 9, 10, and 12 of the Stipulated Delivery Order, which detail how the Delivery Obligation is to be secured by the Escrow Agreement. *See Bailey*, 112 A.3d at 192. In this context, for the reasons stated below, it is clear and unambiguous that the second release condition is concerned solely with disbursement of the Escrow Funds where the Court has concluded that HK USA defaulted on the Delivery Obligation.

The Stipulated Delivery Order contemplates release of the Escrow Funds upon (i) the HK USA Certification; (ii) a determination by the Court that HK USA defaulted on the Delivery Obligation; or (iii) dismissal of the Individual Debtor's Chapter 11 case and the existence of certain other conditions. (*Id.* §§ 4, 5, 9, 10.) This is an exclusive list. (*Id.* § 12.) The circumstance before the Court – where HK USA has been ordered to deliver the Escrow Funds to the Trustee for reasons unrelated to its Delivery Obligation – is not contemplated by the text of the Stipulated Delivery Order because section 12 was intended to prevent such a judgment.

Therefore, despite the lack of contemplation by the Stipulated Delivery Order, the issue is whether the Escrow Agreement nevertheless contemplated release of the Escrow Funds pursuant to a judgment other than a judgment that HK USA failed to comply with its Delivery Obligation. As noted above, July 16, 2022 is the day after performance of the Delivery Obligation was due. Suppose the Alter Ego Decision entered on July 15, 2022. On such facts, section 4a(ii) of the Escrow Agreement would not be implicated – there would be no “order entered on or after July 16, 2022.” However, section 4a in combination with section 4c would have prevented disbursement of the Escrow Funds in connection with an order entered before July 16, 2022. That is, section 4c of the Escrow Agreement is analogous to section 12 of the Stipulated Delivery Order. It prevents disbursement of the Escrow Funds except (a) to HK USA on production of the HK USA Certification; (b) to a depository pending an adjudication on the merits as to whether the Lady May is property of the Estate and its value; or (c) to a depository designated by the New York state court should the case be dismissed and certain other facts obtain.

Reading the Escrow Agreement and the Stipulated Delivery Order together, the Court concludes that the purpose of section 4c is analogous to the purpose of section 12. The Court further concludes that section 4a(ii) is referring to an order under section 10 of the Stipulated Delivery Order regarding a determination that HK USA has inexcusably failed to perform its Delivery Obligation. As HK USA has argued, the intent of the Stipulated Delivery Order and the Escrow Agreement was that, if the Estate or the Estate’s creditors were entitled to the Lady May, they would receive either the Lady May or some portion of the Escrow Funds – but not both. For the reasons stated in the Alter Ego Decision, this is not the circumstance before the Court. The requirement that the Court’s order enter on or after July 16, 2022 ties section 4a of the

Escrow Agreement to an order determining that HK USA inexcusably failed to perform its delivery obligation. No such order has entered.

It is clear and unambiguous that, as a matter of law, the plain text of the Escrow Agreement would bar disbursement under section 4c in the present circumstances. The Court need not reach evidence extrinsic to the contract and, therefore summary judgment is proper as to the intent of the parties. *See Tallmadge Bros*, 746 A.2d at 1287. As a matter of law, the Court determines that neither the Trustee's nor HK USA's arguments are persuasive. However, the Court notes that its analysis of the Escrow Agreement reinforces its conclusions above regarding *res judicata*. The issue that would remain before the Court is whether HK USA could enforce the Escrow Agreement against the Trustee. For the reasons stated above and drawn out in the analysis of how the Stipulated Delivery Order and Escrow Agreement function as one agreement as between HK USA and the Trustee, the Court concludes HK USA is collaterally estopped from litigating this issue.

2. Frustration of Purpose

The Trustee also argues that the Escrow Agreement no longer serves any purpose. Under Connecticut law,

“A party claiming that a supervening event or contingency has frustrated, and thus excused, a promised performance must demonstrate that: (1) the event substantially frustrated his principal purpose; (2) the nonoccurrence of the supervening event was a basic assumption on which the contract was made; (3) the frustration resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes.”

Howard-Arnold, Inc. v. T.N.T. Realty, Inc., 109 A.3d 473, 479 (Conn. 2015) (citing *O'Hara v.*

State, 590 A.2d 948, 954 n. 7 (Conn. 1991) (citing RESTATEMENT (SECOND) OF CONTRACTS §

265 (2023))). The Restatement also provides that a party may be excused from a contract where

the purpose of the contract was frustrated at the outset “by a fact of which he has no reason to know” in addition to the above factors. RESTATEMENT (SECOND) OF CONTRACTS § 266.

In entering into the Stipulated Delivery Order, the Individual Debtor’s stated purpose in the plain text, as the then debtor-in-possession and representative of the Estate, was “to secure HK USA’s performance of the Delivery Obligation” as a resolution of the PAX Stay Motion, so that absent dismissal of his case, the Estate’s interest in the Lady May would be determined in this Court rather than in continued litigation in the New York state courts. (Main Case ECF No. 299.) It was not the stated intent of the Estate (or the not then present Trustee) to shield certain potential assets of the Estate, namely the Escrow Funds, in order to secure other potential assets of the Estate pending an adjudication on the merits, namely the Lady May. If the stated intent of the Estate was to abandon its interest in the Escrow Funds under section 554 – other than its interest in them as a source of recovery should the Lady May not be delivered – the stipulation would have stated such. Therefore, the Estate’s purpose in entering into the Stipulated Delivery Order was frustrated at the outset by the fact that HK USA is the *alter ego* of the Individual Debtor. *See* RESTATEMENT (SECOND) OF CONTRACTS § 266.

The plain text of the Stipulated Delivery Order and the Escrow Agreement assumes that, while the Lady May is potentially an asset of the Estate, the Escrow Funds are not an asset of the Estate. Hence, the Stipulated Delivery Order and the Escrow Agreement provide that the Escrow Funds can be recovered by the Estate to the extent of the value of the Lady May only if (i) HK USA failed to timely deliver the Lady May; and (ii) the Lady May was determined to be an asset. Moreover, HK USA and the Individual Debtor both entered into the Stipulated Delivery Order. Under Connecticut law, contracts with oneself are unenforceable. *Moore v. Denslow*, 14 Conn. 235, 237–38 (1841). For these reasons, it is a basic assumption of the Stipulated Delivery Order

and the Escrow Agreement that the Individual Debtor and HK USA were separate parties – not *alter egos*. See RESTATEMENT (SECOND) OF CONTRACTS § 266.

For the same reasons the Court found in the Alter Ego Decision that it would be inequitable to allow HK USA to enforce the Stipulated Delivery Order against the Trustee, it is inequitable to impute to the Trustee any knowledge that HK USA was the *alter ego* of the Individual Debtor. Any unstated intent to *sub rosa* shield assets, or any fault in relation to the fraud or injustice furthered by the Stipulated Delivery Order, which knowledge, intent, or fault the Individual Debtor or HK USA may have had at the time of entry into the Stipulated Delivery Order and Escrow Agreement is not imputed to the Trustee. Pursuant to Fed. R. Civ. P. 54, made applicable in this adversary proceeding by Fed. R. Bankr. P. 7054, the Court in its discretion incorporates that rationale, quoted in full above, herein as law of the case. *Cangemi v. United States*, 13 F.4th 115, 140 (2d Cir. 2021). Among other things stated therein, the following support not imputing the Individual Debtor’s or HK USA’s knowledge, intent, and fault to the Trustee: (i) self-dealing through stipulations with an *alter ego* to shield assets is disfavored and an abuse of process; (ii) the Stipulated Delivery Order did not expressly bind a future Chapter 11 trustee despite the pendency of the Chapter 11 Trustee Motion; and (iii) there is no prejudice to HK USA because it is the *alter ego* of the Individual Debtor. Therefore, neither the Trustee nor the Estate is at fault regarding the frustration of the Stipulated Delivery Order and the Escrow Agreement. See RESTATEMENT (SECOND) OF CONTRACTS § 266.

Finally, the obligation imposed on HK USA to deliver the Escrow Funds to the Trustee is required by sections 541, 542, and 544 and Delaware *alter ego* law. This obligation is not heavier than any obligation imposed by the law. See *id.*

The Court concludes that the Escrow Agreement has been frustrated by conditions existing at the time of formation and the Trustee is excused from being bound by its provisions. *See Howard-Arnold, Inc.*, 109 A.3d at 479. Therefore, for the reasons stated above, the Trustee is entitled to judgment as a matter of law on contract as an alternative basis for this decision.

VI. CONCLUSION AND ORDER

For the above three reasons – claim preclusion, issue preclusion, and frustration of purpose, each being alone sufficient, the Court grants the Motion for Summary Judgment. Accordingly, it is hereby

ORDERED: The Motion for Summary Judgment, (ECF No. 28), is **GRANTED** as set forth herein; and it is further

ORDERED: The Trustee may remove the Escrow Funds from the Segregated Account and deposit them into the Estate's general account(s).

Dated at Bridgeport, Connecticut this 7th day of September, 2023.

Julie A. Manning
United States Bankruptcy Judge
District of Connecticut

