UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re: HO WAN KWOK, *et al.*, Debtors.	Chapter 11 Case No. 22-50073 (JAM) (Jointly Administered)
LUC A. DESPINS, CHAPTER 11 TRUSTEE FOR THE ESTATE OF HO WAN KWOK, Plaintiff, v. HCHK TECHNOLOGIES, INC., HCHK PROPERTY MANAGEMENT, INC., LEXINGTON PROPERTY AND STAFFING, INC., HOLY CITY HONG KONG VENTURES, LTD., ANTHONY DIBATTISTA, YVETTE WANG, and BRIAN W. HOFMEISTER, ASSIGNEE FOR THE BENEFIT OF CREDITORS, Defendants.	Adv. P. No. 23-05013 (JAM) RE: ECF No. 172

APPEARANCES

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MEMORANDUM OF DECISION AND ORDER
DENYING MOTION TO SET ASIDE DEFAULT

Julie A. Manning, United States Bankruptcy Judge

I. INTRODUCTION

Before the Court is the Motion to Set Aside Default (the "Motion to Set Aside Default"), filed by Defendants HCHK Technologies, Inc. ("HCHK Tech"), HCHK Property Management, Inc. ("HCHK Property"), Lexington Property and Staffing, Inc. ("Lexington Property," and together with HCHK Tech and HCHK Property, each an "HCHK Entity" and, collectively, the "HCHK Entities"), and Holy City Hong Kong Ventures, Ltd. ("Holy City" and, together with the HCHK Entities each a "Moving Defendant" and, collectively, the "Moving Defendants"). (ECF No. 172.)[1] The Motion to Set Aside Default asks the Court to set aside the default (the "Default") entered against the Moving Defendants by the Clerk of Court. (*See* ECF No. 139.) For the reasons stated below, and due to the specific and extraordinary facts and circumstances surrounding this adversary proceeding, the Motion to Set Aside Default is **DENIED**.

II. BACKGROUND

On February 15, 2022, Mr. Ho Wan Kwok (the "Individual Debtor") filed a voluntary Chapter 11 petition in this Court. (Main Case ECF No. 1.) The Individual Debtor's case is

[1] References to the docket in this adversary proceeding will be styled "ECF No. __." References to the docket in the main case, *In re Kwok*, Case No. 22-50073 (JAM), will be styled "Main Case ECF No. __."

jointly administered with two affiliated corporate Chapter 11 cases. (Main Case ECF Nos. 970, 1141.) For the reasons set forth therein, on June 15, 2022, the Court entered a memorandum of decision and order appointing a Chapter 11 trustee. (Main Case ECF No. 465.) *In re Kwok*, 640 B.R. 514 (Bankr. D. Conn. 2022). On July 8, 2022, Mr. Luc A. Despins was appointed as the Chapter 11 trustee (the "Trustee") for the bankruptcy estate of the Individual Debtor. (Main Case ECF No. 523.)

On June 8, 2023, the Trustee initiated this adversary proceeding by filing a complaint (the "Complaint"). (ECF No. 1.) The Complaint alleges that the HCHK Entities are the *alter egos* of the Individual Debtor and/or they and/or their assets are beneficially owned by the Individual Debtor. It seeks turnover of the HCHK Entities and/or their assets to the bankruptcy estate as well as related declaratory and injunctive relief.

In addition to the Moving Defendants, Mr. Anthony DiBattista ("Mr. DiBattista"), Ms. Yvette Wang ("Ms. Wang"), and Mr. Brain W. Hofmeister, as assignee (the "Assignee") for the benefit of creditors are also defendants in this adversary proceeding. The HCHK Entities are 99.9999% owned by Holy City, which is wholly owned by Ms. Wang, and 0.0001% owned by Mr. DiBattista. When the Complaint was filed, the HCHK Entities had each assigned substantially all their assets to the Assignee to initiate assignment for the benefit of creditors proceedings (the "Assignment Proceedings") in the New York state courts pursuant to deeds of assignment (the "Deeds of Assignment"). (*See* Complaint Exs. 13 (Aff. of Assignee of HCHK Tech), Ex. B (Deed of Assignment); 17 (Aff. of Assignee of Lexington Property), Ex. B (Deed of Assignment); 18 (Aff. of Assignee of HCHK Property), Ex. B (Deed of Assignment).)

On June 14, 2023, the Clerk of Court issued the Summons and Notice of Pretrial Conference (the "Summons"). (ECF No. 20.) Pursuant to Fed. R. Bankr. P. 7004(a) and (e),

within seven days of issuance of the Summons, the defendants served with the Summons and the Complaint within a judicial district of the United States had thirty (30) days from the issuance of the Summons to answer the Complaint or file an appropriate motion. Fed. R. Bankr. P. 7012(a). Thirty days from June 14, 2023 is July 14, 2023. Fed. R. Bankr. P. 9006(a). Every defendant other than Holy City, including the HCHK Entities, was served within a judicial district of the United States. (ECF No. 23.) Therefore, their deadline to respond to the Complaint was July 14, 2023. None of these defendants, including the HCHK Entities, filed an answer or other responsive pleading by the deadline.

On June 23, 2023, the Trustee filed the Motion Regarding Settlement with Assignee of HCHK Entities under New York Court Assignment Proceedings (the "9019 Motion"). (ECF No. 25.) That same day, the Trustee properly served the 9019 Motion in accordance with Fed. R. Bankr. P. 7005 on, *inter alia*, the Moving Defendants. (ECF No. 28.) On June 28, 2023, the Court issued an order scheduling a hearing on the 9019 Motion to be held on July 11, 2023 and affording parties in interest until 5:00 p.m. on July 5, 2023 to object or respond to the 9019 Motion. (ECF No. 35.) The Order Granting the Motion to Expedite Hearing was properly served in accordance with Fed. R. Bankr. P. 7005 on, *inter alia*, the Moving Defendants. (ECF No. 36.) The Moving Defendants did not file a timely objection or response to the 9019 Motion. Hearings on the 9019 Motion were held on July 11 and 18, 2023. The Moving Defendants did not appear at either hearing. Other parties, including in pertinent part 1332156 B.C. LTD., GWGOPNZ Limited, and Mr. Shih Hsin Yu (collectively, the "Proposed Intervenors"),[2] timely

[2] As will be discussed below, the Proposed Intervenors sought to intervene in these proceedings. (ECF No. 60.) The Court denied the motion and a related motion to clarify the temporary restraining order. (ECF No. 239.) In doing so, the Court concluded the Proposed Intervenors have no colorable interest in this adversary proceeding and are in active concert and participation with the HCHK Entities. This decision is currently on appeal. *See, generally*, *Shih Hsin Yu v.*

objected to the 9019 Motion. (ECF No. 40, 58.) On July 28, 2023, the Court entered an order (the "9019 Order") granting the 9019 Motion and approving the settlement between the Trustee and the Assignee. (ECF No. 70.)[3]

On July 24, 2023, upon motion of the Trustee (ECF No. 56), pursuant to Fed. R. Bankr. P. 7012(a), the Court entered an order establishing the deadline for Holy City to answer or otherwise respond to the Complaint because Holy City was served with the Summons and the Complaint in a foreign country. (ECF No. 63.) The deadline for Holy City to file an answer or responsive motion was August 25, 2023 – seventy-one (71) days after Holy City was served with the Summons and the Complaint. Fed. R. Bankr. P. 9006(a). (*See* ECF No. 23.) Holy City did not file an answer or other responsive pleading by its deadline.

On August 28, 2023, the Moving Defendants filed the Motion to Extend Time to Plead (the "Motion to Extend Time"). (ECF No. 107.) On September 1, 2023, the Trustee objected to the Motion to Extend Time and cross-moved (the "Cross-Motion") the Court to direct the Clerk of Court to enter default against all defendants. (ECF No. 110.) On September 6, 2023, the Moving Defendants filed a reply in support of the Motion to Extend Time and an objection to the Cross-Motion. (ECF No. 111.) Attached to the reply, the Moving Defendants filed the Declaration of Feng Zhu (the "Zhu Declaration"). (*Id*.)

On September 6, 2023, a hearing on the Motion to Extend Time was held. During the hearing, the Moving Defendants argued that although they were properly served with the Summons and the Complaint, they were not able to timely answer or otherwise respond because

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Despins ex rel. Kwok (In re Kwok), No. 24-cv-00071 (KAD) (D. Conn. Feb. 21, 2024) *consolidated with* No. 23-cv-01067 (KAD) (D. Conn. Feb. 21, 2024).

[3] The 9019 Order is currently on appeal. *See, generally*, *Shih Hsin Yu v. Despins ex rel. Kwok (In re Kwok)*, No. 23-cv-01067 (KAD) (D. Conn. Feb. 21, 2024).

of the March 15, 2023 arrest of their principal, Ms. Wang, and her subsequent detention without the possibility of pre-trial release pending trial in the criminal action styled *United States v. Kwok*, 23 cr 118 (AT) (S.D.N.Y. Jan. 4, 2024). Indeed, the Moving Defendants argued they were only able to retain counsel shortly before August 28, 2023 when the Motion to Extend Time was filed. The Trustee argued that Moving Defendants had taken legal and corporate actions after Ms. Wang's arrest and indeed retained counsel regarding this adversary proceeding on or before July 14, 2023, as reflected by an engagement letter (the "Engagement Letter"). The Trustee further asserted that the principal contact for the Moving Defendants' counsel was Attorney Yongbing Zhang ("Attorney Zhang"), who has been sanctioned in litigation related to the Individual Debtor's Chapter 11 case. *See An v. Despins*, No. 22-CV-10062 (VEC), 2023 WL 4931832 (S.D.N.Y. Aug. 2, 2023); *Gong v. Sarnoff*, No. 23-cv-343 (LJL), 2023 WL 5372473 (S.D.N.Y. Aug. 22, 2023).

During the hearing, the Moving Defendants requested an opportunity to file a supplemental brief on certain issues relating to the Assignment Proceedings and the 9019 Order. (Sept. 6, 2023 Hr'g Tr. at 20:10–25:16, ECF No. 124.) The Court granted this request. They also agreed to file the Engagement Letter on the docket of this adversary proceeding. (*Id.* at 30:15–32:3.)

On September 22, 2023, the Moving Defendants filed a supplemental brief (the "Supplemental Brief") regarding rights and duties they retained despite the Assignment Proceedings and the Supplemental Declaration of Feng Zhu (the "Supplemental Zhu Declaration"). (ECF Nos. 128, 129.) At this time, however, the Moving Defendants did not file the Engagement Letter. On September 27, 2023, the Trustee responded to the supplemental brief. (ECF No. 135.)

On September 29, 2023, the Order Denying Motion to Extend Time to Plead and Granting Cross-Motion for Order Directing Clerk to Enter Default (the "Order Denying Motion to Extend Time") entered, finding for the reasons stated therein that the Moving Defendants delay in answering or responding to the Complaint was not a product of excusable neglect. (ECF No. 138.) Substantially contemporaneously therewith, the Clerk of Court entered the Default.[4] (ECF No. 139.)

On October 13, 2023, the Moving Defendants filed a notice of appeal of the Order Denying Motion to Extend Time to the United States District Court for the District of Connecticut. (ECF No. 150.) On October 17, 2023, the Moving Defendants filed a motion to stay pending appeal. (ECF No. 154.) Attached to the stay motion is a copy of the Engagement Letter dated July 13, 2024 signed by the Moving Defendants on July 14, 2024, which is the first time it became part of the record in this adversary proceeding despite the representation that it would be docketed with the supplemental brief regarding the Motion to Extend Time. (*Id.* Ex. A.) Notably, the name of counsel's principal contact and an additional recipient of the Engagement Letter are redacted. (*Id.*) Subsequently, on November 6, 2023, the Moving Defendants withdrew their appeal of that Order Denying Motion to Extend Time in favor of filing the instant motion. (*See* ECF No. 170.)

On November 8, 2023, the Moving Defendants filed the Motion to Set Aside Default. (ECF No. 172.) Attached to the Motion to Set Aside Default is a proposed answer and assertion of affirmative defenses (the "Proposed Answer"). (Mot. to Set Aside Default Ex. A.) On December 1, 2023, the Trustee filed a response in opposition to the Motion to Set Aside Default.

[4] On December 1, 2023, after the Trustee repeated his request for an entry of default against all defendants during a hearing, the Clerk of Court also entered default against the non-moving defendants, Mr. DiBattista, Ms. Wang, and the Assignee. (ECF No. 222.)

(ECF No. 224.) On December 5, 2023, the Moving Defendants filed a reply in further support of the Motion to Set Aside Default. (ECF No. 226.)

On January 9, 2024, a hearing was held on the Motion to Set Aside Default. After the hearing, on January 10, 2024, the Moving Defendants filed a letter requesting the opportunity to file a post-hearing brief (ECF No. 243), which request the Court granted (ECF No. 245). On January 12, 2024, the Moving Defendants filed a post-hearing brief. (ECF No. 246.) On January 17, 2024, the Trustee filed a response to the post-hearing brief. (ECF No. 249.) On January 22, 2024, the Moving Defendants filed a letter (the "First Post-hearing Letter") requesting the Court modify the 9019 Order and/or the temporary restraining order entered in this adversary proceeding (ECF Nos. 18, 27) in the event this Court denies the Motion to Set Aside Default. (ECF No. 254.) On February 15, 2024, the Moving Defendants filed another letter (together with the First Post-hearing Letter, the "Letters"), this time about potential *res judicata* effect of a default judgment in this adversary proceeding. (ECF No. 258.)

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 adversary proceeding in which the instant matters arise is a statutorily core proceeding. 28 U.S.C. § 157(b)(2)(A) and (O). The Court concludes its exercise of jurisdiction is not precluded by Constitutional concerns. *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. DISCUSSION

The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052:

A. Legal Standard

Pursuant to Fed. R. Civ. P. 55(c), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7055, "[t]he [C]ourt may set aside an entry of default for good cause." The party moving to set aside the default bears the burden of establishing "good cause." *Sony Corp. v. Elm State Elecs., Inc.*, 800 F.2d 317, 320 (2d Cir. 1986). "Good cause" is undefined, but the United States Court of Appeals for the Second Circuit has developed three criteria to determine whether good cause exists for setting aside an entry of default, namely, (i) whether the default was willful; (ii) whether the defaulted party presents a meritorious defense; and (iii) whether setting aside the default would prejudice the responding party. *Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Constr., LLC*, 779 F.3d 182, 186 (2d Cir. 2015) (citing *Guggenheim Cap., LLC v. Birnbaum*, 722 F.3d 444, 455 (2d Cir. 2013) and *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d. Cir. 1993)); *New York v. Green*, 420 F.3d 99, 108 (2d Cir. 2005) (citing *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 166–67 (2d Cir. 2004)).

In considering these criteria, courts are mindful that "[s]trong public policy favors resolving disputes on the merits." *Am. All. Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996).[5] For this reason, "when doubt exists as to whether a default should be granted or

[5] The same criteria are assessed in determining a motion to set aside a default judgment pursuant to Fed. R. Civ. P. 55(c) and 60(b). The parties and this opinion cite decisions regarding default judgments. *See Bricklayers*, 779 F.3d at 186 n. 1 (stating because the criteria were identical, application of default judgment caselaw was appropriate on the facts and circumstances before

vacated, the doubt should be resolved in favor of the defaulting party." *Enron*, 10 F.3d at 96; *see Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981) ("While courts are entitled to enforce compliance with the time limits of the Rules by various means, the extreme sanction of a default judgment must remain a weapon of last, rather than first, resort."); *Gill v. Stolow*, 240 F.2d 669, 670 (2d Cir. 1957) (same). Nevertheless, these policy interests must be balanced "against the competing interest in maintaining 'an orderly efficient judicial system' in which default is a useful weapon 'for enforcing compliance with the rules of procedure.'" *Sony*, 800 F.2d at 320 (internal citations omitted). Ultimately, determining a motion to set aside a default is a matter of discretion, reviewed for abuse of discretion considering the preceding criteria and policy concerns. *See Bricklayers*, 779 F.3d at 186; *but see Davis v. Musler*, 713 F.2d 907, 913 (2d Cir. 1983) ("[A]n abuse of discretion 'need not be glaring' to justify reversal of a district court order denying a motion to vacate a default judgment . . .") (internal citations omitted).

B. Willful Default

Willfulness is established where a "defendant defaulted deliberately," regardless of whether such deliberate default was in "bad faith." *Gucci Am., Inc. v. Gold Ctr. Jewelry*, 158 F.3d 631, 635 (2d Cir. 1998) (holding district court made error of law in interpreting *Am. All. Ins.* to require a showing of bad faith to establish willfulness); *see Bricklayers*, 779 F.3d at 187; *but see United States v. Signed Pers. Check No. 730730 of Mesle*, 615 F.3d 1085, 1092 (9th Cir. 2010) (holding, contrary to the law of the Second Circuit, that bad faith is required to show intentional default). Willfulness is "more than merely negligent or careless" and may be found "where the conduct of counsel or the litigant was egregious and was not satisfactorily

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the court). Nevertheless, a motion to set aside a default is subject to a "less rigorous standard" than a motion to set aside default judgment. *Am. All. Ins.*, 92 F.3d at 59.

explained." *Sec. & Exch. Comm'n v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998); *see Bricklayers*, 779 F.3d at 186 (same) (citing *McNulty*). An inference of willful default is supported by the failure to deny that the defaulted party "received the complaint" and other relevant pleadings and orders coupled with failure to contend that non-compliance "was due to circumstances beyond [the defaulted party's] control." *Guggenheim*, 722 F.3d at 455 (citing *Com. Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 243 (2d Cir. 1994)); *see also Signed Pers. Check*, 615 F.3d at 1093 (distinguishing unrepresented, unsophisticated parties from "sophisticated parties represented by counsel who may be presumed to be aware of the consequences of their actions").

The Moving Defendants argue that the Default was not willful but caused by the March 15, 2023 arrest and continuing pre-trial detention of their principal, Ms. Wang. They assert that the delay in answering or responding to the Complaint was not in bad faith, devious, or deliberate, but rather the product of the Moving Entities being in corporate and management disarray after Ms. Wang's arrest. The Moving Defendants further assert that as soon as they had restored their corporate status and obtained a new director, Mr. Feng Zhu ("Mr. Zhu"), they filed their appearance and sought to extend their time to respond to the Complaint.

The Trustee argues that the Moving Defendants do not dispute they were properly served with the Summons and Complaint and they were otherwise legally active during the period between Ms. Wang's arrest and their respective response deadlines. Furthermore, the Trustee argues, the Moving Defendants cannot dispute they were represented by bankruptcy counsel prior to the deadline for the HCHK Entities to respond – let alone the deadline for Holy City to respond – and nothing outside their control prevented them from responding to the Complaint. Therefore, the Trustee asserts, the Court should draw an inference that the Default was deliberate

and willful. The Trustee disputes that bad faith or deviousness is necessary to establish willfulness but argues that the Moving Defendants have acted in bad faith because, among other things, they pursued litigation in this case through other parties before deciding to appear themselves.

1. Willfulness

The Court agrees with the Trustee. As noted above, with legally sophisticated parties, an inference from inaction to deliberate, willful default is proper if the defaulted party does not establish that they failed to receive service of the summons and complaint or that the failure to respond was outside their control. *Guggenheim*, 722 F.3d at 455; *Signed Pers. Check*, 615 F.3d at 1093. As discussed below, this inference is permissible on the facts and circumstances before the Court.

First, the Moving Defendants admit that they were properly served with the Summons and the Complaint as well as subsequent pleadings and orders filed on the docket of this adversary proceeding. *See Guggenheim*, 722 F.3d at 455. (Supp. Zhu Decl. ¶ 13; Jan. 9, 2024 Hr'g Tr. at 51:18–24, 52:4–5, ECF No. 247.)

Second, the Moving Defendants are legally sophisticated parties and were represented by counsel at all relevant times. The Moving Defendants admit that they were in discussions with bankruptcy counsel in July. (Mot. to Set Aside Default ¶ 13.) The Engagement Letter between the Moving Defendants and appearing counsel is dated July 13, 2023 and signed by the Moving Defendants on July 14, 2023. (ECF No. 154 Ex. A.) As stated above, July 14, 2023 was the response deadline for the HCHK Entities. While the Moving Defendants argue that this engagement was not effective until the retainer was paid, action could have been taken to protect the HCHK Entities' rights before their answer deadline. As to Holy City, counsel appeared on

August 25, 2023, the day of its response deadline. (ECF No. 106.) Nevertheless, Holy City did not attempt to protect its rights before the deadline passed. Importantly, filing the Motion to Extend Time on August 25, 2023, as opposed to August 28, 2023, may have made a more lenient standard apply to at least Holy City's request for an extension. *See* Fed. R. Bankr. P. 9006(b)(1) *but see* D. Conn. L. Civ. R. 7(b); D. Conn. L. Bankr. R. 7007-1. Counsel is aware of this possibility. (Jan. 9, 2024 Hr'g Tr. at 53:14–19.)

Even if the Court were to disregard the Engagement Letter, the Moving Defendants were legally sophisticated parties. The Moving Defendants admit they actively sought advice of counsel for corporate matters and in connection with the Assignment Proceedings. (Mot. to Set Aside Default ¶ 14.) While the Moving Defendants argue that their other counsel are corporate attorneys rather than bankruptcy attorneys, a lawyer should understand a summons, its response deadline, and the possibility of seeking an extension of time.

Assuming for the sake of argument that corporate counsel could not file a request for an extension of time to respond to the Complaint while the Moving Defendants sought to secure bankruptcy counsel, the Moving Defendants did not inform the Court – through corporate counsel or otherwise – regarding their efforts. Hence, the present circumstances are not the same as in *Pecarsky v. Galaxiworld.com, Ltd.*, where the Second Circuit reversed an entry of default judgment due to the difficulty in securing counsel where prior counsel was withholding the case file because of non-payment of legal fees and the corporation diligently kept the district court informed as to its efforts. 249 F.3d 167, 172–73 (2d Cir. 2001).

Signed Personal Check, a decision of the United States Court of Appeals for the Ninth Circuit relied upon by the Moving Defendants, involved an individual proceeding *pro se* who intended to begin administrative proceedings, but accidentally began court proceedings and then

failed to respond until after being notified that default had entered. 615 F.3d at 1092. The reliance upon *Signed Personal Check* is misplaced. The Moving Defendants are corporate entities admittedly aware of their need for legal counsel and admittedly seeking the same as demonstrated by the Engagement Letter. They are legally sophisticated parties. *Cf. Signed Pers. Check*, 615 F.3d at 1091 ("The technical details of its errors are explained below, but the basic deficiencies are simply stated: the district court ignored our oft stated commitment to deciding cases on the merits whenever possible, and held Mesle, a layman working without the aid of an attorney, to the same standards to which we hold sophisticated parties acting with the benefit of legal representation.").

Third, it is undisputed that the Moving Defendants failed to timely answer or otherwise respond to the Complaint.

Fourth, the Moving Defendants' failure to respond was within their control. The Moving Defendants argue that the failure to respond was outside their control due to Ms. Wang's arrest and their corporate disarray. The Court is not persuaded by this argument. By their own admission, Ms. Ya Li ("Ms. Li") remained a director of the Moving Defendants during the relevant time period. (Zhu Decl. ¶ 7; Supp. Zhu Decl. ¶ 7.) Moreover, the Moving Defendants admit that Ms. Li sought legal advice in the aftermath of Ms. Wang's arrest, including related to this adversary proceeding. (Supp. Zhu Decl. ¶¶ 7, 8, 13; Mot. to Set Aside Default ¶ 13.) Nevertheless, the Moving Defendants argue that until Mr. Zhu was appointed to the board, they were without direction. (Jan. 9, 2024 Hr'g Tr. at 46:6–47:9.) The Moving Defendants point to the fact that two of the Deeds of Assignment were signed by Mr. DiBattista and the third was signed by Mr. Joe Wang. (*See* Complaint Exs. 13, at 42, 17, at 42, 18, at 44.) However, Ms. Li authorized the assignment of HCHK Tech's assets while Mr. DiBattista authorized the

assignments of HCHK Property's and Lexington Property's assets. (*See* Complaint Ex. 13, at 44, 17, at 45, 18, at 46.) Moreover, given the record in this adversary proceeding, it appears Ms. Li signed the Engagement Letter. (*Compare* Complaint Ex. 13, at 42 *with* Mot. to Stay Pending Appeal Ex. A, ECF No. 154.) The Engagement Letter is, as noted above, dated July 13, 2023, and was signed on July 14, 2023. (Mot. to Stay Pending Appeal Ex. A, ECF No. 154.) The record fails to explain or in any way support the purported inaction of Ms. Li. The Moving Defendants had the information, ability, and personnel to timely respond to the Complaint or move for an extension of time. They have failed to satisfactorily explain their failure to answer or otherwise respond to the Complaint. *See McNulty*, 137 F.3d at 738. Therefore, it is proper to infer willful default. *See Guggenheim*, 722 F.3d at 455.

The Moving Defendants argue that, nevertheless, the Default could not have been willful because it did not benefit them. This argument is not persuasive. The issue is whether default was deliberate – not whether default is beneficial to the Moving Defendants or whether the Moving Defendants ever believed it was beneficial to them. *See Gucci*, 158 F.3d at 635. Moreover, allowing a default to enter is not as obviously disadvantageous as the Moving Defendants argue. There are numerous reasons legally sophisticated parties may choose to have a default enter, including, among other reasons, to avoid litigation costs or discovery, particularly where, as here, a principal of the Moving Defendants – Ms. Wang – is indicted in a criminal action. Even if a default results in a default judgment, parties may believe they can avoid enforcement of that judgment or that its impact will be limited, particularly where, as here, the HCHK Entities had already chosen to liquidate their assets through the Assignment Proceedings.

Indeed, on the instant facts and circumstances, beyond drawing the permissible inference, the Court finds that the Default was willful. As noted above, there were admittedly discussions

about how to proceed in relation to this adversary proceeding, including with bankruptcy counsel, prior to July 14, 2023. The Default was the outcome of those discussions. It was not merely negligent or careless, but rather an affirmative choice. *See McNulty*, 137 F.3d at 738. None of the Moving Defendants' alternative explanations satisfactorily explain the Default. *See id.* Therefore, the Court has no doubt that the Default was willful. *Cf. Enron*, 10 F.3d at 96.

2. Bad Faith

Despite the Moving Defendants' argument to the contrary, the Second Circuit has explicitly rejected the contention that willfulness requires bad faith. *Compare Gucci*, 158 F.3d at 635 *with Signed Pers. Check*, 615 F.3d at 1092. Nevertheless, the Court concludes that bad faith is present on the facts and circumstances before it. The record evidences an intent to delay and obstruct this adversary proceeding.

In the Memorandum of Decision and Order Denying Motion to Intervene and Motion to Clarify Temporary Restraining Order (the "Intervention Decision"), the Court has already determined that the Moving Defendants were connected to frivolous litigation in this adversary proceeding. (Intervention Decision ¶¶ 11, 27–46, 55–56, 61, 64 and 32–35, ECF No. 239.) The Moving Defendants have not disputed the findings of fact and conclusions of law in the Intervention Decision. The Court concludes they are law of the case. *See Arizona v. California*, 460 U.S. 605, 618 (1983).

In particular, the Court concluded in the Intervention Decision that:

> . . . First, the Proposed Intervenors have stipulated that [Mr. Xuebing Wang ("Mr. Wang")], the owner of GWGOPNZ, has acted as a representative HCHK Entities. (Fact 46.) This representation is supported by further evidence in the record, which also connects Mr. Wang to BC LTD. While speaking to protestors outside the Trustee's home, Mr. Wang discusses meetings in New York at the "3C" offices with others involved in the protest movement. (Fact 61.) HCHK Tech has offices at 3 Columbus Circle, New York, NY 10019, which are leased by HCHK Property. (Fact 11.) Moreover, Mr. Wang seemingly arranged transfers of money to the HCHK Entities from

> individuals in New Zealand without any entry into loan agreements and ordered the destruction of transfer information from members of the New Zealand Eden Farm to the HCHK Entities. (Facts 52–60.) Finally, Mr. Wang also "coordinated" transfers from individuals in Canada to the HCHK Entities, again subject to no loan agreement, through BC LTD. (Facts 64, 65.)
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> Second, the HCHK Entities and the Proposed Intervenors share the goal of disrupting these jointly administered Chapter 11 proceedings. As discussed above, Mr. Wang discusses being busy working on the movement protesting the Trustee's involvement in this case for the benefit of the Individual Debtor at what seems to be the offices of HCHK Tech. (Facts 11, 61.) Therefore, the Court concludes HCHK Tech and GWGOPNZ were involved in the protest movement. Ms. Liu, the owner of BC LTD, and Mr. Shih, also participated in the protests via social media. (Facts 68, 93.) Attorney Zhang, who leads the Purported HCHK Creditors' committee is involved in filing frivolous lawsuits to harass the Trustee's involvement in this case for the perceived benefit of the Individual Debtor. (Facts 34–39.) The Motion to Intervene and the Motion to Clarify TRO are a continuation of that effort.
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> Finally, the Trustee has represented to the Court that counsel for Holy City and the HCHK Entities is taking instructions from Attorney Zhang, on information and belief based on communications with counsel for the Proposed Intervenors. In filings in this Court, counsel for Holy City and the HCHK Entities has redacted the name of the person from whom he is taking directions. This is concerning to the Court.

(Intervention Decision at 34–35.)

During the hearing on the Motion to Set Aside Default, the Moving Defendants did not dispute the Trustee's assertion that Attorney Zhang is the redacted point of contact and an additional recipient on the Engagement Letter. (Hr'g Tr. at 41:6–16.) Rather, the Moving Defendants disputed the importance of such contact and stressed that appearing counsel was receiving direction from Mr. Zhu rather than Attorney Zhang. (*Id.*)

However, the Court concludes Attorney Zhang's involvement is relevant. In the Intervention Decision, this Court made the following findings of fact:

> 32. The Purported HCHK Creditors' Committee instructed the Proposed Intervenors to file the Motion to Intervene to get their alleged loan money back. (Second Stipulation of Fact ¶ 8.) . . .

34. Mr. Yongbing Zhang ("Attorney Zhang") was referred to by Ms. Liu in her deposition testimony, as the "creditors' representative" and is the leader of the Purported HCHK Creditors' Committee. (Second Stipulation of Fact ¶ 6.).

35. Attorney Zhang attended meetings with the Proposed Intervenors and the Purported HCHK Creditors' Committee regarding the Motion to Intervene. (Second Stipulation of Fact ¶ 7.)

36. Attorney Zhang first approached Pastore regarding representation of the Proposed Intervenors. (Oct. 3, 2023 Status Conference Tr., ECF No. 148, at 21:20–22:1 (Attorney John M. Pastore speaking).)

37. Attorney Zhang has represented the Individual Debtor in an action styled *Kwok v. U.S. Citizenship & Immigration Services*, Civil Action No. 2:23-cv-00234-SRC-JBC (D.N.J. June 28, 2023). (Trustee Ex. 27.)

38. On August 2, 2023, the United States District Court for the Southern District of New York (Caproni, J.) entered an opinion and order in the civil action styled *An v. Despins*. No. 22-CV-10062 (VEC), 2023 WL 4931832 (S.D.N.Y. Aug. 2, 2023). (Trustee Ex. 32.) The Southern District dismissed the complaint for lack of standing (Trustee Ex. 32, at *4–7) and, pursuant to Rule 11 sanctioned the plaintiffs and their counsel (Id. at *14) because it concluded, among other things, that "Plaintiffs' papers reveal that their true preoccupation is with Mr. Kwok and trying to 'defend' him by harassing those perceived to be his adversaries" (Id. at *12) and "this lawsuit is just another part of a campaign of misbehavior designed to vex Defendants, most likely by frustrating Mr. Despins's ability to perform his duties as trustee" (Id. at *13). The Southern District of New York noted:

> Although only Richard Freeth filed a notice of appearance on behalf of plaintiffs, Yongbing Zhang, who represents plaintiffs in several of the parallel cases filed against Mr. Kwok's perceived adversaries, appears to have been actively involved in this litigation. *See, e.g., Wyatt v. Univ. of Md.*, No. 23-CV-742 (D. Md. 2023). For example, Mr. Freeth copied Mr. Zhang on his most recent letter to this Court. Letter, Dkt. 28.

(Id. at *4 n. 3.)

39. On August 22, 2023, the United States District Court for the Southern District of New York (Liman, J.) entered an opinion and order in the civil action styled *Gong v. Sarnoff*. No. 23-cv-343 (LJL), 2023 WL 5372473 (S.D.N.Y. Aug. 22, 2023). (Trustee Ex. 28.) The Southern District of New York concluded that it had "no difficulty concluding that Plaintiff's FARA claim is frivolous." (Trustee Ex. 28, at *22.) Further, the Southern District of New York concluded it had "no difficulty finding that Plaintiff here initiated this action for an improper purpose," (Id. at *29) stating:

> There is every reason to believe, and the Court finds, that the Complaint was filed not to redress any injury Plaintiff suffered on December 20, 2022, or to obtain

> judicial relief, but to harass Moving Defendants because of their representation of a client in litigation against Kwok and to deter others from doing the same. Plaintiff and his counsel Zhang are affiliated with Kwok and sympathetic to him and his interests.

(Id. at *30–31) and:

> And if there is any doubt of the harassing purpose of this lawsuit, the history of lawsuits Zhang and Freeth have filed in this Court and elsewhere against PAX, persons associated with PAX, PAX's counsel, and those assisting the Bankruptcy Court settles that doubt.

(Id. at *32). "Zhang" is Attorney Zhang. (Id. at *1.) The Southern District of New York entered Rule 11 sanctions against Attorney Zhang and his co-counsel. (Id. at *34–39.)

(Intervention Decision at 14–16.)

In sum, Attorney Zhang has been sanctioned at least twice in connection with filing frivolous lawsuits for the purpose of obstructing these proceedings. Indeed, because of this pattern, the Southern District of New York held: "Finally, the Court will require Plaintiff, Zhang, and Freeth to file a copy of this Opinion and Order in all future actions opened by them for a period of one year from the date of this Opinion and Order." *Gong*, 2023 WL 5372473, at *17. In addition, the stipulated evidence in this adversary proceeding establishes that Attorney Zhang was the head of a committee that directed the parties to file the Motion to Intervene. (*See* Intervention Decision at 31.) Counsel has not sufficiently explained the Engagement Letter or Attorney Zhang's involvement in this adversary proceeding.

The Court concludes the Moving Defendants have proceeded in bad faith, attempting to delay and obstruct this adversary proceeding through the intervention of parties with no colorable interest at stake in this adversary proceeding. *See Signed Pers. Check*, 615 F.3d at 1092.

C. Meritorious Defense

Turning next to whether the Moving Defendants present a meritorious defense, "a 'defendant must present more than conclusory denials when attempting to show the existence of a meritorious defense.'" *Green*, 420 F.3d at 110 (citing *Galaxiworld*, 249 F.3d at 173); *see In re Martin-Trigona*, 763 F.2d 503, 505 n. 2 (2d Cir. 1985) (holding burden is on defaulted party to present a meritorious defense, given the effect of default, namely, that well-pleaded allegations are deemed admitted). "Although in an answer general denials normally are enough to raise a meritorious defense, the moving party on a motion to reopen a default must support its general denials with some underlying facts." *Sony*, 800 F.2d at 320–21. A meritorious defense cannot be established by "mere conclusory statements," including "sworn conclusory denials" in affidavits or declarations. *Id.*; *see Bricklayers*, 779 F.3d at 187. When evaluating the presented evidence, "[w]hether a defense is meritorious 'is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense.'" *State Street*, 374 F.3d at 167 (citing *Enron*, 10 F.3d at 98); *see McNulty*, 137 F.3d at 740.

The Moving Defendants argue the Trustee bears a heavy burden in this adversary proceeding to prove that the HCHK Entities are the *alter egos* of the Individual Debtor. They assert they have a defense: regardless of what the Individual Debtor may or may not have done with the assets of the HCHK Entities, they are part of a larger movement seeking to move money out of the People's Republic of China ("China") and use that money to effect social and political change in China rather than being mere instrumentalities of the Individual Debtor for his personal use.

The Trustee responds with two arguments. First, the Trustee argues that the Moving Defendants have no standing as insolvent entities who have assigned their rights and obligations to the Assignee. Second, the Trustee argues that the Moving Defendants rely on mere conclusory denials insufficient to establish a meritorious defense.

The Moving Defendants have failed to present a meritorious defense. The Proposed Answer consists of general denials, admissions, and rote affirmative defenses. On a motion to set aside default, the movant must put forward factual material beyond what is sufficient for an answer because of the effect of default. *Sony*, 800 F.2d at 320–21; *Martin-Trigona*, 763 F.2d at 505 n. 2. The Moving Defendants point to the Zhu Declaration and Supplemental Zhu Declaration as the underlying factual basis supporting their denials and asserted defenses. Upon review, paragraphs 9 through 11 of the Zhu Declaration are the relevant paragraphs. They state:

> 9. Notably, neither I nor the people involved with HCHKV Entitles deny its relationship with and support of a certain political and social movement to reestablish freedom and democracy in mainland China (the "Movement").
>
> 10. It is undeniable that, after paying its employees and overhead, much of the profit and assets of the HCHKV Entities' businesses have historically been made available to assist the Movement.
>
> 11. Regardless, just like the innumerable companies and people who are involved in other global religious, political, social and/or environmental causes, merely being involved with a cause does not make the assisting entity equivalent to or an alter ego of the cause's operational entities and/or persons.

(Zhu Decl. ¶¶ 9–11.) These paragraphs could be found to be an admission that the HCHK Entities' funds and assets were made available to others and contain a conclusory denial that this is evidence of *alter ego*. Under Second Circuit precedent, these paragraphs are without a doubt insufficient to present a meritorious defense in the context of a motion to set aside a default. *Bricklayers*, 779 F.3d at 187; *Green*, 420 F.3d at 110; *Sony*, 800 F.2d at 320–21; *cf. Enron*, 10 F.3d at 96. Therefore, the Moving Defendants have failed to present a meritorious defense.

D. Prejudice to the Trustee

The Court turns next to whether granting the Motion to Set Aside Default would prejudice the Trustee. In that regard "delay alone is not a sufficient basis for establishing prejudice" but "[r]ather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud or collusion.'" *Musler*, 713 F.2d at 916. However, where, as here, a court has found willful default and the lack of a meritorious defense, it "need not reach the question of whether the plaintiff would suffer prejudice as [it is] 'persuaded that the default was willful and . . . [is] unpersuaded that the defaulting party has a meritorious defense.'" *Bricklayers*, 779 F.3d at 187 (citing *McNulty*, 137 F.3d at 738) (ellipsis in original). This is because even if "the record does not strongly support a finding of prejudice . . . willful default and the absence of meritorious defenses" are sufficient to deny a motion to set aside a default. *Rafidain Bank*, 15 F.3d at 244.

The Moving Defendants argue there is no cognizable prejudice to the Trustee. While they do not deny there has been delay in this adversary proceeding, they assert that this alone is not prejudice. Moreover, they assert that if the Trustee had consented to their request for an extension of time, their proposed answer attached to the Motion to Set Aside Default would have already been filed. The Moving Defendants also argue the Trustee already has the HCHK Entities' documents because of his settlement with the Assignee and the delay occasioned by their failure to plead has not resulted in the destruction of other evidence. Finally, the Moving Defendants assert that they are prepared to proceed in this adversary proceeding expeditiously, notwithstanding their prior untimeliness.

The Trustee argues significant cost has already been expended in this adversary proceeding and but for the Motion to Set Aside Default, the adversary proceeding would have

been completed. The Trustee further argues the Moving Defendants previously colluded with the Proposed Intervenors and will likely continue to collude with the Individual Debtor's associates and associated entities to delay and obstruct this adversary proceeding.

Prejudice to the Trustee will occur if the Default is set aside because the Moving Defendants are seeking to collaterally attack the 9019 Order. In the Supplemental Brief filed in connection with the Motion to Extend Time, the Moving Defendants set forth three reasons why they are interested in this adversary proceeding despite the Assignment Proceedings, namely, (1) they retain the right to any surplus, (2) they remain exposed because there is no discharge, and (3) they retain the right to oppose the Assignee's actions.

The record does not support the Moving Defendants' first two asserted interests. First, regarding the Moving Defendants' purported concern for any surplus, the Deeds of Assignment – prepared by the Moving Defendants themselves – do not reflect a surplus for any of the HCHK Entities. (*See* Complaint Exs. 13, at 45–57 (representative HCHK Tech swearing to best of his knowledge and belief it has $17,531,285.24 in assets and $51,684,947.50 in liabilities); 17, at 45–46 (representative Lexington Property swearing to best of his knowledge and belief it has $2,160,000 in assets and $32,183,837.03 in liabilities); 18, at 46–47 (representative of HCHK Property swearing to best of his knowledge and belief it has $34,551,262.00 in assets and $48,187,299.77 in liabilities).)

Second, regarding the Moving Defendants' concern as to exposure to creditor claims, while the Moving Defendants suggest that assignment for the benefit of creditor proceedings are distinguishable from bankruptcy proceedings, liquidating corporate debtors do not receive a discharge in bankruptcy proceedings. *Compare* 11 U.S.C. § 727(a)(1) *with* 11 U.S.C. § 1141(b)(2). Indeed, many courts will similarly exclude liquidating Chapter 11 corporate debtors

from discharge. This is because a liquidated corporate entity has no assets upon which creditors could levy and there is no going concern that emerges from the insolvency proceeding. The HCHK Entities deeded substantially all their assets to the Assignee. (Complaint Exs. 13, at 34 Deed of Assignment ¶ 1 (HCHK Tech "does hereby grant, convey, assign, transfer and set over to the Assignee, and any successor assignee, all property and assets of [HCHK Tech], whatsoever, and wheresoever situated, which now are, or ever have been, used in connection with the operation of [Tech's] business"); 17, at 34 Deed of Assignment ¶ 1 (Lexington Property "does hereby grant, convey, assign, transfer and set over to the Assignee, and any successor assignee, all property and assets of [Lexington Property], whatsoever, and wheresoever situated, which now are, or ever have been, used in connection with the operation of [Lexington Property's] business"); 18, at 35 Deed of Assignment ¶ 1 (HCHK Property "does hereby grant, convey, assign, transfer and set over to the Assignee, and any successor assignee, all property and assets of [HCHK Property], whatsoever, and wheresoever situated, which now are, or ever have been, used in connection with the operation of [HCHK Property's] business").) Any purported exposure is illusory. By their own terms, the Deeds of Assignment establish that the HCHK Entities have no remaining assets or business.

While the first two concerns are unsupported by the record, the First Post-hearing Letter reiterates the Moving Defendants' interest in challenging the Assignee's actions in this adversary proceeding. In that letter, they state they intend to litigate the Assignee's settlement with the Trustee in this Court or in another forum. However, they did not timely do so in this Court and cannot do so now. Pursuant to the Deeds of Assignment, the Assignee has authority to "settle any and all claims against or in favor of [the HCHK Entities]." (Complaint Exs. 13, at 36 Deed of Assignment ¶ 4(f); 17, at 36 Deed of Assignment ¶ 4(f); 18, at 37 Deed of Assignment ¶ 4(f).)

The Assignee has settled with the Trustee in this adversary proceeding. The settlement was approved by the 9019 Order, which the Moving Defendants did not appeal.

In fact, the Moving Defendants were properly served with and had notice of the 9019 Motion, but failed to file opposition papers or appear at either hearing on the 9019 Motion. Numerous other parties *did* oppose the 9019 Motion, including the Proposed Intervenors, who opposed it in part on the basis that the Assignee's settlement with the Trustee was *ultra vires*. The Court overruled that objection and others in entering the 9019 Order. Despite representations to the contrary, the Moving Defendants seek to relitigate whether the Assignee could settle the claims against them with the Trustee. The Moving Defendants seek to set aside the Default so that they can contest an order they failed to oppose. This is prejudice to the Trustee.

For the reasons discussed above regarding bad faith, potential for collusion also exists on the present facts and circumstances. It has already occurred between the Moving Defendants and the Proposed Intervenors. This is additional prejudice to the Trustee.

E. Public Policy

The Moving Defendants argue that, considering the strong preference for the resolution of disputes on the merits, the Default should be set aside and the Trustee should be held to his burden to prove his allegations by a preponderance of the evidence rather than being allowed to rest on his allegations. The Trustee argues that the Motion to Set Aside Default should not be granted because the Moving Defendants do not meet their burden to vacate a default.

The Court agrees with the Trustee. While courts apply the criteria less rigorously to motions to set aside default than to motions to set aside default judgment, *Am. All. Ins.*, 92 F.3d at 59, motions to set aside default are denied based on failure of the movant to establish that the

default in question was not willful and to present a meritorious defense, *see, e.g.*, *Bricklayers*, 779 F.3d at 190 (affirming in part entry of default judgment and denial of cross-motion to set aside default); *Martin-Trigona*, 763 F.2d at 506 (upholding entry of default judgment and denial of cross-motion to set aside default). Here, there would also be prejudice to the Trustee in setting aside the Default. *See Bricklayers*, 779 F.3d at 187 (finding of prejudice is unnecessary where default is willful and no meritorious defense is presented).

As discussed above, there is no doubt that the Moving Defendants chose default. *Cf. Enron*, 10 F.3d at 96. Similarly, there is no doubt that the Moving Defendants have failed to present a meritorious defense. *Cf. id.* While the Moving Defendants attempt to make the Motion to Set Aside Default about the Trustee's burden, they have clearly failed to meet their own burden. Given (i) this failure; (ii) the prejudice to the Trustee in allowing the Moving Defendants to collaterally attack the 9019 Order, which they failed to oppose; (iii) the bad faith the Moving Defendants have shown in this adversary proceeding and in connection with the Proposed Intervenors; and (iv) the issues surrounding the Engagement Letter – both as to the entry into it and as to Attorney Zhang's involvement with it – the Court concludes, within its discretion, that the public policy interest in an efficient judicial system and the enforcement of procedural rules outweighs the public policy interest in resolving disputes on the merits. *See Sony*, 800 F.2d at 320. Therefore, on the very specific facts and circumstances of this adversary proceeding, these jointly administered Chapter 11 cases, and related adversary proceedings, the Court denies the Motion to Set Aside Default.

V. CONCLUSION AND ORDER

For the reasons stated above, pursuant to Fed. R. Civ. P. 55(c), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7055, it is hereby

ORDERED: The Motion to Set Aside Default (ECF No. 172) is **DENIED**. The Default (ECF No. 139) entered against the Moving Defendants remains in effect and is not set aside; and it is further

ORDERED: No action will be taken regarding the Letters (ECF Nos. 254, 258) filed by the Moving Defendants in this adversary proceeding. If the Moving Defendants have any basis to seek relief in this adversary proceeding, they must do so by filing an appropriate motion. Fed. R. Civ. P. 7(b); Fed. R. Bankr. P. 7001 advisory committee note; Fed. R. Bankr. P. 9013.

Dated at Bridgeport, Connecticut this 28th day of February, 2024.

Julie A. Manning
United States Bankruptcy Judge
District of Connecticut