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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of: KATHLEEN A. McGUIRE, Debtor.	CHAPTER 7 Case No.: 09-19497 (MS)
LIGGERO ARCHITECTURE, LLC, JOHN A. LIGGERO, and JON M. JUENGLING, individually and as assignees of David Wolff, Chapter 7 Trustee, Plaintiffs, vs. KATHLEEN A. McGUIRE, and MARK McGUIRE, Defendants.	Adv. Pro. No.: 09-02666 (MS) Hearing Date: March 28, 2011 **BRIEF IN OPPOSITION TO MOTION OF DEFENDANT MARK McGUIRE TO VACATE DEFAULT, DISMISS AMENDED COMPLAINT, AND FOR RELATED RELIEF**

Plaintiffs, by and through their counsel, LoFaro & Reiser, L.L.P., submit the within Brief in opposition to the motion of defendant Mark McGuire ("Mr. McGuire") seeking to: (i) vacate default, (ii) dismiss the Amended Complaint for failure to state a claim, and (iii) for related relief. In addition, Plaintiffs rely upon the Certification of Glenn R. Reiser ("Reiser Cert."), and Certification of John Liggero ("Liggero Cert.") submitted herewith.

PRELIMINARY STATEMENT

A few days after Mr. McGuire filed his motion to vacate default, on March 10, 2011 the Court entered an order revoking the Debtor's discharge. Said Order was entered in the related adversary action filed by the Chapter 7 Trustee and captioned, Wolff v. McGuire, Adv. Pro. No.: 10-02113. Thus, in the context of the within adversary action the issue of non-dischargeability of the Debtor's debt to Plaintiffs is now a moot issue because the Debtor's discharge has been revoked.

Plaintiffs wish to clarify that their pending motion for entry of a partial default judgment against Mr. McGuire is limited strictly to the issue of the IBM stock; namely, declaring that Mr. McGuire holds no interest in the disputed IBM stock held by his sister the Debtor. Plaintiffs purchased the Chapter 7 Trustee's rights and interest in the disputed IBM stock. The record submitted with Plaintiffs' motion for entry of partial default judgment reveals that the IBM stock is still in the name of the Debtor, and that she continues receiving and declaring dividends from the IBM stock on her federal income tax returns.

Mr. McGuire's Verified Application does nothing to dispel these facts. He doesn't even provide proof of any funds he claims to have loaned to his sister as consideration for receiving an alleged security interest in the IBM stock. His own sister testified that he gave her periodic cash payments over the years, but no records have been produced to substantiate this unlikely story. Also, Mr. McGuire omits the fact that his aunt served as the notary for the alleged promissory note between him and his sister.

Turning to Mr. McGuire's motion to vacate default, Plaintiffs maintain that he does not meet his burden under Fed. R. Bankr. P. 7055 and the attendant criteria established by the Third Circuit. However, should this Court be inclined to vacate default then Plaintiffs respectfully ask that the Court condition such on the following: (i) Mr. McGuire's payment of counsel fees and costs incurred by Plaintiffs in connection with the entry of default, preparation of the motion for

entry of default judgment (docket entry #25 in the adversary case), and in opposing the within motion;[1] and (ii) Mr. McGuire's posting of a bond to secure replacement paper certificates for the IBM stock which he conveniently but vaguely claims the Debtor transferred to him in "the early 2000s" but which he has failed to produce the actual original certificates (or copies) despite making numerous representations through his counsel that he is in possession of same.

Default was entered against Mr. McGuire approximately ten (10) months ago on May 14, 2010. Mr. McGuire was properly served with the Summons and Amended Complaint by regular mail at 1160 Franklin Lakes Road, Franklin Lakes, New Jersey 07471 – which he concedes is his mailing address. Further, the Debtor, who is Mr. McGuire's sister, scheduled him as a creditor at the same address and thus the Bankruptcy Court Clerk's Office mailed all notices to him at this location, including the most recent notice concerning the Order transferring this adversary action to the Trenton Vicinage mailed on March 12, 2011 (docket entry #39 in the adversary action).

In reliance upon Mr. McGuire's mailing address listed in the Debtor's bankruptcy schedules, Plaintiffs' counsel served Mr. McGuire with notice of the entry of the default along with several motions and other correspondence addressed to his Franklin Lakes, New Jersey mailing address. In fact, the Honorable Morris Stern specifically found that Mr. McGuire was served with Plaintiffs' motion to compel turnover of certain IBM stock as a result of Mr. McGuire personally appearing in Court on the July 6, 2010 hearing date. Even assuming arguendo that Mr. McGuire can establish good cause to vacate default, the unique and particular circumstances of this case do not justify a blanket vacation of the default without imposing the reasonable conditions precedent suggested by Plaintiffs.

[1] If the Court finds it appropriate to award counsel fees and costs as a condition precedent to vacating default against McGuire, then Plaintiffs' counsel will submit the appropriate Affidavit of Services.

As for the balance of Mr. McGuire's motion requesting that Plaintiffs' Amended Complaint should be dismissed for failure to state a claim pursuant to Fed. R. Bankr. P. 7012, absent the Court vacating default he cannot be heard on this issue. Even if the Court elects to adjudicate the merits of Mr. McGuire's motion to dismiss, it is tantamount to a motion for summary judgment under Fed. R. Bankr. P. 7056 because he relies on matters outside the pleadings. Mr. McGuire has not met his burden of establishing the absence of any genuine issues of material fact, and consequently his motion to dismiss should be denied. Furthermore, absent pretrial discovery a dismissal of the Amended Complaint would not only be premature but also improper.

One of Mr. McGuire's primary objectives to avoid appearing for his deposition under oath. In fact, in the infancy of this adversary action he deliberately "evaded" attempts by process servers retained by both the Chapter 7 Trustee's counsel and plaintiff's counsel to subpoena him to appear for a deposition. This desperate motion to dismiss is just a continuation of his efforts to evade appearing for a deposition.

It is particularly troubling that Mr. McGuire finds it appropriate to interpose an "after the fact" objection to an arms-length settlement reached between the Chapter 7 Trustee and Plaintiffs more than a year ago, and which resulted in Plaintiffs acquiring the Trustee's rights, interest and claim to claims involving the IBM stock in exchange for valuable consideration. The Chapter 7 Trustee filed Notice of Information of Settlement of Controversy ("NOS") in the main Chapter 7 case so that all creditors would be provided with notice of the terms and the opportunity to object. In response to the NOS, the Court Clerk issued a separate notice advising creditors of the proposed settlement and the date upon which objections had to be filed. According to the Clerk's Certification of Mailing (document entry #41 in the underlying Chapter 7 case), the NOS was mailed to Mr. McGuire on January 30, 2010 to the following address:

509580146 Mark McGuire, 1160 Franklin Lakes, Franklin Lakes, NJ 07417-1147

Neither Mr. McGuire nor any other creditor objected to the proposed settlement. In reliance thereupon, Plaintiffs tendered the consideration to the Chapter 7 Trustee and since then have expended significant time, effort and money in pursuing the recovery of the IBM stock. Mr. McGuire has failed to demonstrate any valid reason why at this late juncture this Court should disturb the Chapter 7 Trustee's sound business judgment in entering into a settlement with Plaintiffs.

The procedural history cited below is primarily repeated from Plaintiffs' separately filed Verified Application submitted with their partial default judgment motion (docket entry #25 in the adversary case)(hereafter referred to as the "Verified Application").

PROCEDURAL HISTORY

1. Kathleen McGuire ("Debtor") filed a Chapter 7 bankruptcy on April 16, 2009 (the "Petition Date").

2. On April 17, 2009, David Wolff, Esq. was appointed as Chapter 7 panel trustee.

3. A first meeting of creditors was conducted on May 29, 2009.

4. Prior to the Petition Date, on September 26, 2006 Plaintiffs obtained a default judgment against the Debtor and others in the amount of $256,544.28 in a civil action captioned, Liggero, et al., vs. McGuire, et al., Superior Court of New Jersey, Law Division, Bergen County, Docket No.: BER-L-008939-06 (the "State Court Judgment"). (Exhibit A to Verified Application). The State Court Judgment resulted from the Debtor's breach of contract and fraud relating to a $200,000 investment that Plaintiffs made with her to develop property commonly known as 607 Orchard Lane, Franklin Lakes, New Jersey (the "Property").

5. The bar date for creditors to file nondischargeability complaints under certain sections of the Bankruptcy Code or to object to discharge was initially set for July 28, 2009. Plaintiffs obtained several extensions of the bar date, initially to September 28, 2009 and thereafter to October 28, 2009.

6. Plaintiffs timely commenced this action on October 21, 2009 to determine dischargeability of their State Court Judgment claim pursuant to 11 U.S.C. 523(a)(2), (a)(4), and (a)(6), and for other legal and equitable relief including establishing a constructive trust over shares in IBM common stock which Plaintiffs believed the Debtor purchased with their $200,000 investment and then transferred to her brother Mark McGuire as part of a fraudulent conveyance to avoid the repayment of Plaintiffs' debt. Plaintiffs initially named the Chapter 7 trustee as a defendant in this adversary action in order to establish the priority of any claims the Trustee could assert against the IBM stock.

7. On January 27, 2010 Plaintiffs entered into a Stipulation of Settlement and Mutual Release ("Stipulation of Settlement") with the Chapter 7 Trustee. In exchange for receiving payment of $15,000 the Trustee assigned to Plaintiffs the "…right, title and interest, if any, in and to all claims or causes of action against the Debtor and her brother pertaining to the IBM stock, including claims under Section 547, 548, and 544 of the Bankruptcy Code, as well as the New Jersey Fraudulent Transfer Act N.J.S.A. 25:2-20 et. seq." (Exhibit B. to Verified Application).

8. On January 27, 2010, the Chapter 7 Trustee filed the NOS disclosing the terms of the Stipulation of Settlement with Plaintiffs. According to the Certificate of Notice appended to the NOS, on January 30, 2010 the Clerk of the Bankruptcy Court mailed a copy of the NOS to Mr. McGuire at the same Franklin Lakes, New Jersey address the Debtor (his own sister) listed on the creditors' mailing list.

9. On February 9, 2010, the Court entered an Order Discharging Debtor.

10. On February 17, 2010, the Clerk filed a Certification of No Objection regarding the Stipulation of Settlement between Plaintiffs and the Chapter 7 Trustee.

11. On March 2, 2010 Plaintiffs filed an Amended Complaint based on the rights they acquired from the Trustee. On April 16, 2010, the Debtor filed her Answer generally denying the allegations.

12. Default was entered on the docket against Mark McGuire on May 14, 2010.

13. On May 27, 2010, Plaintiffs filed a motion for turnover of the IBM stock as an asset of the bankruptcy estate, and for injunctive relief preventing the defendants from transferring or otherwise disposing of the IBM stock. The motion was served upon the Debtor and Mark McGuire, each of whom reside at 1160 Franklin Lakes Road, Franklin Lakes, New Jersey.

14. On June 15, 2010, Plaintiffs' counsel issued subpoenas to Computershare Investor Services ("Computershare"), the registered stock transfer agent for IBM, requesting disclosure of documents that would establish whether either of the defendants ever held ownership of IBM stock. (Exhibit C to Verified Application).

15. On June 29, 2010, Kathleen McGuire filed a Certification in opposition to the turnover motion alleging that she relinquished the IBM stock to her brother as collateral for a $175,000 loan which he gave to her. (Exhibit D to Verified Application). Attached as Exhibit A to Ms. McGuire's Certification is a 1-page document purporting to be a promissory note from Ms. McGuire to her brother dated November 8, 2005 in the amount of $175,000 – the exact amount of the first check that Plaintiffs issued to Ms. McGuire only four (4) months earlier on July 1, 2005. The last sentence of the first paragraph of this purported promissory note states, "The principal will be secured by stock listed in Schedule A."[2] The IBM stock is not specifically referenced in this alleged note, and Ms. McGuire did not produce a copy of Schedule A referenced therein. (The purported Note is attached as Exhibit E to the Verified Application).

[2] At her deposition, the Debtor admitted that she does not have a form of the promissory note that contains a copy of Schedule A. See paragraph 37 of Verified Application.

16. Also attached as Exhibit B to Ms. McGuire's Certification is a June 10, 2008 statement from IBM reflecting that as of that date she held 596 shares of IBM in certificate form and 90.61 electronic or book shares, for a total of 683.892 shares under an account designated in her name and bearing the Holder Account Number C0004664183. (Exhibit F to Verified Application**.**

17. On July 6, 2010 the Court conducted a hearing on Plaintiffs' turnover motion. Mark McGuire personally appeared in the courtroom, acknowledged his presence on the record but declined to participate. At the conclusion of the hearing the Court opined that Plaintiffs did not establish that Ms. McGuire actually possessed the IBM stock based on the motion record, and that Plaintiffs would have to develop additional information through pretrial discovery. The Court did, however, find that Plaintiffs satisfied the criteria to obtain a preliminary injunction prohibiting the defendants from selling, transferring, pledging and/or assigning their rights in the IBM Stock.

18. By Order entered on July 7, 2010, the Court issued an injunction prohibiting the defendants from selling, transferring, pledging and/or assigning their rights in the IBM stock. (Exhibit G to Verified Application).

19. Pursuant to a subpoena issued to the Debtor requesting her examination under oath, she appeared and testified on July 27, 2010. In response to the subpoena, the Debtor produced copies of her state and federal income tax returns for 2004, 2005, 2006, 2007, 2008, and 2009.

20. Plaintiffs' counsel attempted to subpoena defendant Mark McGuire to attend a deposition also noticed for July 27, 2010. However, Mr. McGuire successfully "evaded" service by Guaranteed Subpoena. (Exhibit H to Verified Application).

21. A Joint Scheduling Order was entered on March 7, 2011.

22. On March 7, 2011, Mr. McGuire filed the instant motion to vacate default, dismiss the Amended Complaint, and for related relief.

23. By Order entered on March 10, 2011, venue of this adversary action was transferred to the Trenton Vicinage. A trial date remains to be scheduled.

24. By Order entered on March 10, 2011, the Court entered a default judgment against the Debtor in the related adversary proceeding filed by the Chapter 7 Trustee seeking a revocation of the Debtor's discharge (Adv. Pro. No. 10-02113). As a result of this Order, the Debtor's discharge previously entered on February 9, 2010 is revoked pursuant to 11 U.S.C. § 727(d)(1).

25. On March 12, 2011, the Bankruptcy Court Clerk's Office mailed Mr. McGuire a notice of the entry of the order transferring venue by sending it to the same address listed by the Debtor on her bankruptcy petition. (Docket entry # 39 in the adversary case).

COUNTER STATEMENT OF FACTS

Plaintiffs adopt and incorporate by reference herein the following Statement of Facts appearing in corresponding paragraph numbers 22 through 42 of their Verified Application in support of their motion for partial default judgment (docket entry #25 in the adversary action).[3] In addition, Plaintiffs rely upon such additional statements set forth in the Reiser Cert. and Liggero Cert.

[3] The proofs submitted with the plaintiffs' Verified Application in support of the partial default judgment motion unequivocally establish that as of July 6, 2010 the Debtor owned 596 shares of IBM in paper form, and 117.9250 shares in electronic or book form. Verified Application, at ¶¶35, 38. IBM's stock transfer agent confirms that a portion of the IBM stock in paper form has been registered to Ms. McGuire since 1986, and that she received additional stock certificates registered to Ms. McGuire since 1986, and that she received additional stock certificates registered in her name in 1989 and 2002. Verified Application, at ¶35. Despite Mr. McGuire's attempted charade, there never was any transfer of the IBM stock to him. This is further evidenced by the fact that his sister (the Debtor) continued reporting dividends from the IBM stock on her federal income tax returns, including the most recent tax return filed in 2009. Verified Application, at ¶¶38-39.

A. Verified Application Filed 9/7/10

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22. The individual Plaintiffs John Liggero and Jon Yuengling appeared at the 341(a) creditors' meeting in this case. During the 341(a) meeting the Debtor gave conflicting and false testimony under oath regarding Plaintiffs' investment and the Property. For example, public records confirm that Ms. McGuire purchased the Property in April 2005. Plaintiffs' $175,000 check made payable to the Debtor was dated July 1, 2005 – two (2) months after the Debtor purchased the Property - but she falsely testified that she purchased the Property in 2007 and used Plaintiffs' investment as the down payment for the purchase. (Transcript of 341(a) meeting dated May 29, 2009, Tr. 15:5 – Tr. 16:3, annexed as Exhibit I to Verified Application).

23. In addition, Ms. McGuire testified at the 341(a) meeting that her mother was helping her pay the mortgage for the Property. (Id., Tr. 19:25 – Tr. 20:7; Tr.22:15-22).

24. Ms. McGuire also responded falsely when answering affirmatively to the Trustee's inquiry about whether her bankruptcy petition accurately reflected all of her assets and liabilities. (Id., 4:7-14). For example, she did not disclose her record ownership in IBM stock in response to question 13 of Schedule B of her bankruptcy petition, which required her to list her ownership in stock and interests in incorporated businesses. Also, in Schedule D of her bankruptcy petition she listed the IBM stock (with a $0 value) being pledged as collateral for a $50,000 loan[4] to her brother in Schedule D of her bankruptcy petition. In addition, in response to question 2 on the Statement of Financial Affairs she failed to report her receipt of IBM stock dividends in 2008 and 2009.

[4] The $50,000 loan amount which the Debtor discloses in Schedule D of her bankruptcy petition is substantially less than the $175,000 amount that she certifies having borrowed from her brother pursuant to the purported $175,000 promissory note attached as Exhibit A to her Reply Certification filed in opposition to the turnover motion.

25. At the conclusion of this meeting, the Chapter 7 Trustee instructed the Debtor not to transfer the IBM stock which the Debtor represented was being held by her brother, the defendant Mark McGuire. See Exhibit I to Verified Application, Tr. 30:13-23; Tr.32:3-5).

26. Mr. Liggero first met Mark McGuire in late January 2005 when he came to Mr. Liggero's office to discuss retaining Liggero Architecture to prepare design plans for the "Property that Mr. McGuire intended to purchase and develop.[5]

27. Some few months later, Mark McGuire informed Mr. Liggero that he was not going to purchase the Property and asked Mr. Liggero if he and his partner might be interested in purchasing it.

28. After speaking with a realtor and visiting the Property, in or about June 14, 2005 Liggero Architecture entered into contract to purchase the property, which the company and individual Plaintiffs believed was owned exclusively by Kathleen McGuire, Mark McGuire's sister.

29. On or about July 1, 2005, a check in the amount of $175,000.00 drawn on the business account of Liggero Architecture and made payable to the Debtor was given to Mark McGuire in furtherance of Plaintiffs' purchase of the Property. A true copy of the front and back of the $175,000 check is annexed as Exhibit J to the Verified Application. A second check in the amount of $25,000.00 drawn on the business account of Liggero Architecture made payable to the realtor was also given to Mark McGuire at that time. A true copy of the $25,000 check is annexed as Exhibit K to the Verified Application.

[5] However, in paragraph 7 of her Certification filed in opposition to the turnover motion Ms. McGuire presented an entirely different story by representing that she used Plaintiffs' $200,000 to pay the mortgage for the Property and when she exhausted those funds then borrowed money from her brother Mark McGuire, resulting in her pledging and relinquishing her IBM stock to him. See Exhibit D, at ¶7. Her story changed for a third time during her deposition, when Ms. McGuire testified that she had borrowed $175,000 from her brother in the form of "cash" given to her periodically over the years. When pressed about providing documentary proof of the funds she claims to have borrowed from her brother, Ms. McGuire incredibly testified that her mother, whom she described as a "neutral party," kept track of the cash loans by recording each transaction on a yellow pad; the yellow pad no longer exists, Ms. McGuire claims.

30. The deal to purchase the Property fell through. Thereafter, Plaintiffs Jon M. Juengling and Mr. Liggero entered into an agreement dated September 9, 2005 (the "Investor Agreement"), that characterized the $200,000 they previously tendered ($175,000 to Kathleen McGuire, and $25,000 to her realtor) as an investment in a joint venture to purchase and improve the Property by constructing new single family home, reselling it, and sharing the sale proceeds and profits. A true copy of the Investor Agreement is attached as Exhibit L to the Verified Application.

31. As consideration for this investment, Kathleen McGuire represented in the Investor Agreement to the individual Plaintiffs that she was the sole owner of the Property, that she would repay the entire $200,000 upon the sale of the Property before any other funds would be distributed or paid to her or anyone else, and that she would simultaneously execute and deliver a mortgage against the Property as security for the investment.

32. The Debtor's brother Mark McGuire and her father Joe McGuire each joined in these representations by promising Plaintiffs that the family would abide by the Investor Agreement. In fact, all of Plaintiffs' direct communications concerning the Property and its development were with Mark McGuire and Joe McGuire.

33. In reliance upon Kathleen McGuire's written representations and the oral representations of her brother Mark McGuire and her father Joe McGuire, Plaintiffs executed and delivered the Investor Agreement and tendered the $200,000 in proceeds to Kathleen McGuire.

34. Kathleen McGuire did not use the funds to improve the Property, and never repaid Plaintiffs their $200,000.

35. By correspondence dated July 7, 2010, Computershare, IBM's registered stock transfer agent, confirmed that Kathleen A. McGuire is the registered holder of Account Number C0004664183 and that as of July 6, 2010 the account held 596 shares of IBM stock in paper certificate form, and 117.9250 plan shares. See Exhibit M to Verified Application. As

concerning the 596 shares represented by paper certificates, according to Computershare's certified records dated June 8, 2010 a total of four (4) actual certificate numbers were issued in the Debtor's name between 1986 to 2002. See Exhibit N to Verified Application.

36. As previously mentioned, the Debtor did not disclose her ownership of the above referenced IBM stock [Account Number C0004664183] as an asset in Schedule B of her bankruptcy petition. Instead, in Schedule D of her bankruptcy petition she listed her brother Mark McGuire as a secured creditor having a $50,000 personal loan "secured w/IBM stock."

37. At her July 27, 2010 deposition, the Debtor testified that in November 2005 she signed a $175,000 promissory note to her brother to document that she borrowed $175,000 from him over a period exceeding fifteen (15) years. The Debtor conceded that her brother did not give her any money at the time she signed the promissory note, but represented that she signed the note after numerous years of borrowing at the recommendation of her brother's divorce lawyer who said her brother needed to "account" for the loans. When asked if she could produce proof of the amounts borrowed, the Debtor testified that her brother gave her all funds in "cash." In addition, the Debtor testified that she does not possess a form of the promissory note that contains a copy of the "Schedule A" referenced therein, and that her aunt served as the notary for her signature. (Deposition of Kathleen McGuire, July 27, 2010, Tr. 21:25 to Tr. 25:3; Tr. 31:22 to Tr. 32:12; Tr. 54:16 to Tr. 55:2; Tr. 56:13 to Tr. 57:9. Copies of the relevant excerpts of this deposition are annexed as Exhibit O to the Verified Application.)

38. The Debtor also testified that her mother was selected as a "neutral arbitrator" to record all the loans given by her brother on a yellow pad, but the yellow pad no longer exists. (Id., Tr. 23:25 to Tr. 24:13, incorporated in Exhibit O to the Verified Application.)

39. The Debtor further claims that she initially signed over an IBM stock certificate to her brother approximately 8 years ago, and then gave him a second IBM certificate about 2 or 3 years later. The Debtor also claims she doesn't know how many shares she transferred on each

occasion or where her brother keeps the stock certificates despite their residing in the same house – 1160 Franklin Lakes Road, Franklin Lakes, NJ. (Id., Tr. 26:10 to Tr. 28:25; Tr. 32:16 to Tr. 34:4, incorporated in Exhibit O to the Verified Application.)

40. Notwithstanding her testimony that she transferred several IBM stock certificates to her brother, the first transfer allegedly dating back at least 8 years ago, the Debtor continued declaring IBM stock dividends on her federal income tax returns. (Id., Tr. 59: 7 to Tr. 60:1, incorporated in Exhibit O to the Verified Application.)

41. In response to the question of why she listed the value of her brother's claim as being only $50,000 on Schedule D of her bankruptcy petition when she had just testified she owed her brother $175,000 as per the promissory note, the Debtor stated that she was under the impression that her brother wasn't going to get anything anyway so it wouldn't have mattered. (Id., Tr. 60:2-21.)

42. Despite Ms. McGuire's contention that she "relinquished" the IBM shares to her brother, she continued reporting dividend income from IBM on her federal and state tax returns including her 2004, 2005, and 2009 tax returns. (Id., Tr. 58:7-18) Collectively annexed as Exhibit P to the Verified Application are redacted portions of the Debtor's 2004, 2005 and 2009 income tax returns confirming she received dividend income from IBM stock for those years.

B. Service of Process of Summons and Amended Complaint

On March 5, 2010, Plaintiffs served Mr. McGuire with the Summons and Amended Complaint by regular mail and certified mail/return receipt requested, addressed to him at the same address used by the Bankruptcy Clerk's Office; namely, 1160 Franklin Lakes, New Jersey 07417. See Exhibit B to Reiser Cert. For his part, Mr. McGuire admits that this is his mailing address. Mr. McGuire refused to claim the certified mail delivery, however the regular mailing was not returned.

C. Entry of Default and Notice Thereof to Mr. McGuire

As previously noted, the Court entered default against Mr. McGuire on May 14, 2010. By correspondence addressed to Mr. McGuire at the same Franklin Lakes, New Jersey address, Plaintiffs' counsel served notice of the entry of default on Mr. McGuire and specifically advised him as follows:

> My firm represents the plaintiffs in the above-referenced matter. On May 14, 2010 the Court entered default against you for failure to answer or otherwise respond to plaintiffs' Amended Complaint.
>
> Please note that the failure to answer or respond to the Complaint in the manner required by the Federal Rules of Bankruptcy Procedure may result in the entry of a judgment by default against you.

See Exhibit C to Reiser Cert. Mr. McGuire omits any reference to this letter in his Verified Application.

D. Actual Knowledge of the Adversary Proceeding

There is no disputing that Mr. McGuire had actual knowledge of this adversary action in June 2010 when he contacted Plaintiffs' counsel to request an adjournment of Plaintiffs' motion for turnover of the IBM stock because he was retaining counsel. He also contacted Judge Stern's Chambers as well. Reiser Cert., at ¶¶12-13. Plaintiffs' counsel copied Mr. McGuire on a June 17, 2010 letter filed on the ECF confirming that the turnover motion was adjourned to July 6, 2010. See Exhibit D to Reiser Cert.

Mr. McGuire received the adjournment notice because he appeared in Judge Stern's courtroom on July 6, 2010, acknowledged his appearance on the record, declined to approach the counsel table, and fled the courtroom before Judge Stern issued a ruling. See Transcript of motion hearing held on July 6, 2010, Tr. 18:25 to Tr. 21:14, incorporated in Exhibit E to Reiser Cert.

In addition, Plaintiffs' counsel served Mr. McGuire with a copy of Judge Stern's July 7, 2010 injunction order prohibiting the transfer of the IBM stock. See Exhibit F to Reiser Cert.

Mr. McGuire has continued receiving service of all court notices at the same address, including the most recent March 12, 2011 notice issued by the Clerk's Office. (Docket entry # 39 in the adversary case).

E. Creditors File Proofs of Claim in Response to Asset Notice Following Settlement

According to the Claims Register, some of the Debtor's unsecured creditors have filed proofs of claim in response to the asset notice issued by the Bankruptcy Court Clerk following the settlement between Plaintiffs and the Chapter 7 Trustee.

LEGAL ARGUMENT

POINT I

MR. McGUIRE HAS NOT SATISIFIED HIS BURDEN TO VACATE THE DEFAULT ENTERED ON MAY 14, 2010

A. Mr. McGuire's Failure to Submit a Proposed Answer With his Motion

Motions to set aside default are governed by Fed. R. Civ. P. 55(c) made applicable by Fed. R. Bankr. P. 7055. "In conjunction with a motion under Fed. R. Civ. P. 55(c) to set aside a default, the moving party is required to file its proposed answer." Amato v. Mastria, 2007 U.S. Dist. LEXIS 18735 (D.N.J. Mar. 15, 2007). "The proposed answer is supposed to allow the court to evaluate the specific factual allegations therein for the purpose of determining whether there is a meritorious and complete defense to the action." Id. at *5, citing $55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3rd Cir. 1984). Mr. McGuire has not filed any proposed answer with his motion pleadings as is required. Consequently, Mr. McGuire is in default in connection with a critical component of the very relief he now seeks. On this basis alone, plaintiffs urge this Court to deny Mr. McGuire's motion to vacate default.

B. Good Cause Requirement To Vacate Default

Mr. McGuire, as the moving party, must demonstrate "good cause" to set aside the default entered approximately ten (10) months ago. See Fed. R. Civ. P. 55(c) made applicable

by Fed. R. Bankr. P. 7055. "A motion to vacate an entry of default and an application for entry of a default judgment are governed by identical standards." Tellock v. Davis, 2003 U.S. Dist. LEXIS 22892, at *3 (E.D.N.Y. December 17, 2003). In his Verified Application, Mr. McGuire correctly states that the Court must consider the following factors in determining whether to vacate default: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; (3) whether the default was the result of the defendant's culpable conduct." See Budget Blinds, Inc. v. White, 536 F.3d 244, 255 (3rd Cir. 2008) (citing $55,518.05 in U.S. Currency, supra. These are the same three factors the Third Circuit considers in determining whether a default judgment should be granted. Chamberlain v. Giampapa, 210 F.3d 154, 164 (3rd Cir. 2000).

Plaintiffs recognize that the Third Circuit disfavors defaults and encourages decisions on the merits, leaving the decision to set aside the default to the sound discretion of the trial court. Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979, 982 (3rd Cir. 1988); Gross v. Stereo Component Systems, Inc., 700 F.2d 120, 122 (3rd Cir. 1983). Plaintiffs also acknowledge that a standard of "liberality" rather than "strictness" should be used in deciding whether to vacate a default so that "any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits." Medunic v. Lederer, 533 F.2d 891, 893-94 (3rd Cir. 1976) (quoting Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245-46 (3rd Cir. 1951).

Despite the Court's liberal policy for vacating defaults Mr. McGuire cannot satisfy the good cause requirement. To reach this conclusion, the Court needs to look no further than to Mr. McGuire's culpable conduct in deliberately failing to respond to the Amended Complaint served upon him more than a year ago at his admitted mailing address, evading service of subpoenas, and the numerous material omissions from his Verified Application including, but not limited to, his failure to disclose his July 6, 2010 court appearance in Judge Stern's courtroom.

The inescapable conclusion is that the May 14, 2010 default resulted from Mr. McGuire's culpable conduct in deliberately turning a blind eye in the face of his affirmative obligation to respond to the Amended Complaint that was served upon him at his Franklin Lakes, New Jersey residence on March 5, 2010. There simply is no excusable neglect on the part of Mr. McGuire in failing to respond to the Amended Complaint in a timely fashion. In point of fact, he was served with notice of the entry of default within two (2) weeks of it being entered by the Court. See Exhibit C to Reiser Cert.

Assuming arguendo that the Court finds that Mr. McGuire's conduct was not culpable, he cannot satisfy another of the criteria necessary to vacate default judgment – the absence of prejudice to Plaintiffs. As set forth in the Liggero Cert., Plaintiffs have expended significant time, efforts and legal fees in connection with this adversary litigation. In the process, Plaintiffs have uncovered the Debtor's ownership in the IBM stock, have preserved this asset with IBM's stock transfer agent by virtue of the injunctive relief granted by Judge Stern, have proceeded with the Debtor's deposition, and have engaged in substantial motion practice including the motion for entry of partial default judgment against Mr. McGuire. Plaintiffs would indeed be prejudiced if Mr. McGuire were allowed to waltz into the Court at the 11th hour and upset the finality of the settlement with the Chapter 7 Trustee, for which Plaintiffs paid valuable consideration for and have placed significant reliance upon.

Furthermore, other creditors have relied upon the finality of the settlement by filing proofs of claims in response to the Court's mailing of a notice of assets. Mr. McGuire neglects to mention this important fact in his Verified Application.

C. Sufficiency of Service of Process

Once a defendant challenges the sufficiency of service of process, the party alleging adequate service of process has the burden of proving that such service was proper. Myers v American Dental Ass'n, 695 F.2d 716, 725 n.10 (3rd Cir. 1982). In the instant case, Plaintiffs

clearly have met their burden in establishing proper service of the Summons and Complaint upon Mr. McGuire.

Fed. R. Bankr. P. 7004 is the cornerstone for service of process in bankruptcy cases. The service requirement is not only applicable to service of process in an adversary proceeding, but also to contested matters. Fed. R. Bankr. P. 9014 incorporates Fed. R. Bankr. P. 7004 and requires a motion initiating a contested matter to be served in the same manner as a summons and complaint. Together, these Rules reflect the wide-reaching effect of bankruptcy court jurisdiction and congressional intent to facilitate service of process for debtors and ensure that due process rights of creditors and other parties in interest are protected.

Fed. R. Bankr. P. 7004(b) authorizes regular mail service upon an individual, to wit:

> Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) - (j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:
>
> (1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

Id. The Federal Rules of Civil Procedure also allow service by mail to the person's last known address. Pursuant to Fed. R. Civ. P. 5(b)(2)(C) made applicable by Fed. R. Bankr. P. 7005, service is deemed complete upon mailing to the person's last known address.

Federal common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee. "The presumption of receipt arises upon proof that the item was properly addressed, had sufficient postage, and was deposited in the mail." Konst v. Fla. E. Coast Ry. Co., 71 F.3d 850, 851 (11th Cir. 1996); see also Standley v. Graham Prod. Co., 83 F.2d 489 (5th Cir. 1936)(applying the presumption to determine that mailing notice of a sale of property to a creditor established the creditor's receipt of notice); In re Prescott, 285 B.R. 763, 767 (Bankr. S.D.Ga 2001)("Proof that a letter, properly directed and stamped, was mailed to the

last known address of an addressee satisfies due process because it was 'reasonably calculated' to provide notice, . . . and creates a presumption that the letter was received by the addressee." (citations omitted)). Numerous other bankruptcy courts have found due process exists based on mailing of notices to the party's last known address. See e.g., In re DeVore, 223 B.R. 193, 196 (9th Cir. BAP 1998); In re Peralta, 317 B.R. 381 (9th Cir. BAP 2004)("The mailing of a properly addressed and stamped item creates the rebuttable presumption that the addressee received it. A certificate of mailing raises the presumption that the documents sent were properly mailed and received."). See also Wasserman v. Farah (In re Farah), 2007 Bankr. LEXIS 3170 (Bankr. D.N.J. Sept. 11, 2007)(Judge Steckroth found effective service of summons and complaint by regular mail sent to defendant's PO Box – which was the defendant's last known address – even though defendant refused certified mail delivery because the regular mailing was not returned).

"The presumption of receipt may be rebutted . . . by producing evidence which would 'support a finding of the non-existence of the presumed fact.'" Prescott, 285 B.R. at 767. The mere denial of receipt, without more, is insufficient to rebut the presumption. Id.; In re Hobbs, 141 B.R. 466, 468 (Bankr. N.D. Ga. 1992). But direct testimony of nonreceipt, combined with other evidence, may be sufficient to rebut the presumption. Hobbs, 141 B.R. at 468.

A review of the motion record in the instant action reveals that Plaintiffs complied with Fed. R. Bankr. P. 7004(b) by serving Mr. McGuire with the Summons and Amended Complaint by regular mail addressed to him at 1160 Franklin Lakes Road, Franklin Lakes, New Jersey 07417 – the same address that the Clerk's Office has been mailing all notices to Mr. McGuire. See March 5, 2010 correspondence annexed as Exhibit B to Reiser Cert. See also the May 13, 2010 Certification filed in support of Plaintiffs' initial request for entry of default (docket entry #14 in the adversary action).[6] Plaintiffs simultaneously attempted to serve process upon Mr. McGuire at his residence by certified mail, however he refused to accept delivery and it was

[6] Plaintiffs' May 13, 2010 Certification satisfies the entry of default requirements specified in D.N.J. LBR 7055-1(a).

returned "unclaimed." Reiser Cert., at ¶9. Pursuant to Fed. R. Civ. P. 5(b)(2)(C), service on Mr. McGuire was deemed complete on March 5, 2010 when it was sent by regular mail to his last known address of 1160 Franklin Lakes Road, Franklin Lakes, New Jersey.

Mr. McGuire offers no credible evidence to rebut the presumption that he was properly served with the Summons and Amended Complaint on March 5, 2010. In fact, he doesn't even deny receiving service, instead claiming that Plaintiffs have not met their burden. Critically, Mr. McGuire admits that the Franklin Lakes, New Jersey location is his mailing address though he conveniently claims to reside there for intermittent periods of time. This is complete and utter nonsense! The Debtor, his own sister, scheduled him as a creditor at the same address and testified during her deposition that he lives in the basement of the home and receives his mail there. The Bankruptcy Court Clerk mailed all notices to Mr. McGuire at the same address. In addition, subsequent to serving process upon Mr. McGuire at this address Plaintiffs' counsel also served him with several motions and correspondence – none of which was returned as undeliverable. As previously mentioned, back on July 6, 2010 Judge Stern found that Mr. McGuire received service of Plaintiffs' motion to compel turnover (which was sent to the same Franklin Lakes, New Jersey address) because he personally appeared in Judge Stern's courtroom on the return date of the motion.

Furthermore, at no point did Mr. McGuire, who claims to hold a security interest in the IBM stock, notify the Bankruptcy Court of a change in his address. Nor did the Debtor report a change in address for her brother. Under these circumstances, it is undisputed, and Mr. McGuire admits, that he receives mail at 1160 Franklin Lakes, Road, New Jersey. Indicative of this is when he personally contacted Plaintiffs' counsel by telephone in June 2010 requesting a 30-day postpone of the motion to compel turnover – proving that he was served with that motion. In the same conversation, he represented to Plaintiffs' counsel that he was retaining the services of

Barbara Edwards, Esq., and that he knew nothing about the IBM stock except that he believed his sister received it years ago as part of a personal injury settlement. See Reiser Cert., at ¶12.

In addition, after it was brought to Judge Stern's attention that "the defendant Mark McGuire" was in the courtroom on July 6, 2010, Judge Stern invited Mr. McGuire to approach the counsel table and offer up anything in his defense, but Mr. McGuire declined. The following colloquy is illustrative:

> MR. REISER: Thank you, Your Honor. Your Honor, let me first reflect that a gentleman is in the courtroom says he's Mark McGuire who is a named defendant in the action, but who has not answered or responded to the motion. But, I understand he's sitting in the back of the courtroom here today. I'd like that to be known on the record.
>
> THE COURT: All right. Thank you. Mr. McGuire, are you in the process of getting counsel?
>
> MR. McGUIRE: Your Honor, I came to find out what was going on here today.
>
> THE COURT: Okay. Fair enough. Would you like to come closer, so you can hear?
>
> MR. McGUIRE: I'm fine. Thank you.

Transcript, July 6, 2010, Tr. 3:20 to Tr. 4:7. (Emphasis added). See Exhibit E to Reiser Cert.

Mr. McGuire then abruptly left the courtroom before Judge Stern issued his ruling, and wasn't heard from again until more than three (3) months later in early October 2010 when he retained his present counsel. As the Chapter 7 Trustee's counsel pointed out during the July 6, 2010 hearing:

> MR. HONIG: -- and his departing from this room, Your Honor, is not just because he had some appointment. To affirm what Mr. Reiser has represented to the Court, implicitly, Mr. McGuire is illusive [sic]. The trustee tried serving him on numerous occasions with subpoenas. Mr. McGuire avoided service, refused to accept the certified mail, refused to return phone calls. So, it was interesting that –
>
> THE COURT: No, look, I understand --

MR. HONIG: -- he appeared in Court today and now has fled.

THE COURT: -- the problems of practice, but apparently he was served.

Id., Tr. 20:4-18. (Emphasis added).

Even following his surprise visit to Judge Stern's courtroom on July 6, 2010, Mr. McGuire continued deliberately avoiding any involvement in this case. For example, Plaintiffs' process server made extensive efforts to serve Mr. McGuire with a subpoena to testify in this adversary action. However, he purposely "evaded" service – a fact confirmed by Guaranteed Subpoena. (See Exhibit G to Reiser Cert.). Not surprisingly, in his Verified Application Mr. McGuire omits his July 6, 2010 appearance in Judge Stern's courtroom and his purposeful evasion of service of a subpoena. He also neglects to inform the Court that received correspondence from Plaintiffs' counsel dated May 27, 2010, June 17, 2010, and July 7, 2010 concerning this adversary action. See Exhibits C, D and F to Reiser Cert.

In his Verified Application, Mr. McGuire walks a very fine line in carefully choosing his words when it comes to his addressing the issue of receiving service of the Amended Complaint. When read closely, his statements are more telling for what he doesn't say than for what he does say. For example, in paragraph 15 of his Verified Application he states, "[P]laintiffs have failed to establish that Mr. McGuire was ever successfully served with the underlying Complaint." Id. Interestingly, Mr. McGuire does not disclaim that he was served with the Complaint; instead he attempts to thrust the onus back to Plaintiffs by falsely claiming that they have failed to prove service. Quite the opposite is true; namely, that Mr. McGuire has failed to verify that he was not served with the Amended Complaint.

Why would the Debtor schedule her brother as a creditor at the Franklin Lakes, New Jersey location unless he lives and receives his mail there? Why does Mr. McGuire claim he resides at the Franklin Lakes, New Jersey location only part of the time when his sister already testified that he lives there? Where are the IBM stock certificates that Mr. McGuire vaguely

claims he received from his sister "in the early 2000s"? If the Debtor transferred the IBM stock to Mr. McGuire as he alleges, then why has the Debtor continued receiving IBM dividends and declaring such as income on her federal tax returns? If Mr. McGuire received the IBM stock from his sister in the "early 2000s" as he alleges, then why does IBM's stock transfer agent maintain an account under the Debtor's name which contains all of the stock?

There are just too many holes and inconsistencies in Mr. McGuire's conveniently scripted story. How is it possible that Mr. McGuire did not receive service of the Amended Complaint sent by first class mail on March 5, 2010 to his admitted mailing address in Franklin Lakes, New Jersey when that is the exact same address the Court Clerk mailed him notices of his sister's bankruptcy, including the NOS that resulted in the settlement between Plaintiffs and the Chapter 7 Trustee, and the most recent March 12, 2011 notice of the transfer of this adversary case to the Trenton Vicinage? Why did Mr. McGuire contact Plaintiffs' counsel in June 2010 to request an adjournment of the motion to compel turnover of the IBM stock if he was not aware of this lawsuit at that time? Why did Mr. McGuire appear in Judge Stern's courtroom several months later on July 6, 2010 which was the hearing date on Plaintiffs' motion to compel turnover of the IBM stock after receiving the motion pleadings addressed to him at the same Franklin Lakes, NJ address, and more importantly why does he fail to disclose this court appearance in his Verified Application?

When considering these and other apparent holes in Mr. McGuire's twisted version of events, it simply is not possible to find the existence of good cause to vacate the default. Under the totality of these circumstances, Plaintiffs respectfully submit that Mr. McGuire has not met his burden to vacate the default entered some ten (10) months ago on May 14, 2010.

POINT II

ALTERNATIVELY, THE COURT SHOULD IMPOSE CONDITIONS PRECEDENT TO VACATING DEFAULT BY COMPELLING MR. McGUIRE TO REIMBURSE PLAINTIFFS FOR REASONABLE COUNSEL FEES AND COSTS, AND POST A BOND FOR PROCURING REPLACEMENT STOCK CERTIFICATES FOR THE IBM STOCK

Alternatively, as demonstrated herein, if the Court is inclined to vacate the default then the Court should impose several conditions precedent; namely, that (i) Mr. McGuire reimburse Plaintiffs for counsel fees and costs they have incurred in connection with the entry of default, preparation of the motion for entry of default judgment, and in opposing the within motion;[7] and (ii) Mr. McGuire's post a bond to secure replacement paper certificates for the IBM stock that he claims he received in the "early 2000s" but which he has failed to provide despite claiming to be in possession of same through the many representations he made through his counsel of record. According to information obtained from IBM's stock transfer agent, a bond fee of 2% of the stock's value is required in order to have new paper certificates issued. Reiser Cert., at ¶25.

Federal courts have frequently imposed conditions precedent in relieving a party from his failure to answer or respond to a compliant. See e.g., In re Hanley, 2008 Bankr. LEXIS 4311 (Bankr. D.C. 2008), citing Thorpe v. Thorpe, 364 F.2d 692, 694, 124 U.S.App.D.C. 299 (D.C. Cir. 1966)(Conditioning vacation of default on the defendant or his attorney paying the reasonable attorney's fees and costs of the plaintiff arising from the defendant allowing a default judgment to be entered); Federal Home Loan Mortgage Corp. v. B&C Investment Associates, 1998 U.S.Dist. Lexis 23521 (D.N.J. 1998)(Vacating default conditioned on defendant posting a bond representing the amounts he collected in real estate rents (minus operating expenses) which belonged to the lender under its mortgage).

Additional support for imposing conditions on Mr. McGuire's application to vacate default lies in 11 U.S.C. § 105, which provides in relevant that "[t]he court may issue any order,

[7] If the Court conditions relief to Mr. McGuire on the payment of counsel fees and costs to Plaintiffs, then Plaintiffs' counsel will file the appropriate Affidavit of Services.

process, or judgment that is necessary and appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). It is well-settled that bankruptcy courts are courts of equity. Katchen v. Landy, 382 U.S. 323, 336, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966); Pepper v. Litton, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939). Bankruptcy Code Section 105(a) incorporates this principle. However, "section 105(a) does not authorize the bankruptcy court to create rights not otherwise available under applicable law." Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137, 141 (3rd Cir. 1985). The Third Circuit has observed that "[s]ection 105(a) of the Bankruptcy Code supplements courts' specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy code. However, section 105(a) has a limited scope. It does not 'create substantive rights that would otherwise be unavailable under the Bankruptcy Code.'" In re Continental Airlines, Inc., 203 F.3d 203, 211 (3rd Cir. 2000)(quoting United States v. Pepperman, 976 F.2d 1213, 131 (3rd Cir. 1992)). Expanding upon this reasoning, the Third Circuit has stated that "§105(a) is a powerful tool, but that it operates only within the context of bankruptcy proceedings." In re Joubert, 411 F.3d 452, 455 (3rd Cir. 2005).

Pursuant to this Court's inherent powers as noted in the aforementioned case law, including the Court's equity powers under Bankruptcy Code Section 105(a), this Court should indeed impose reasonable conditions precedent in vacating default in favor of Mr. McGuire. If Mr. McGuire truly wants his day in Court then let him reach into his wallet and reimburse Plaintiffs for their reasonable attorneys' fees and costs in entering default, moving for entry of a partial default judgment and opposing his motion to vacate, and in addition requiring him to post a bond for the 2% bond fee necessary to issue replacement paper stock certificates for the IBM paper shares still appearing in his sister's ownership but for which he has not produced the actual certificates.

POINT III

MR. McGUIRE'S MOTION TO DISMISS SHOULD BE TREATED UNDER THE SUMMARY JUDGMENT STANDARD, AND THERE EXISTS GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT

A. Rule 12(b)(6) Standards on Motion to Dismiss

Fed. R. Civ. P. 12(b)(6) made applicable to these proceedings by Fed. R. Bankr. P. 7012 provides the Court with authority to dismiss a party's complaint for failure to state a claim. Pursuant to Fed. R. Civ. P. 12(c):

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Ibid. (Emphasis added).

Under the Rule 12(b)(6) failure-to-state-a-claim standard - which is designed to streamline litigation by dispensing with needless discovery and fact finding - a court may dismiss a claim based on a dispositive issue of law without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 102 L.Ed.2d 32 (1989). In deciding a motion to dismiss for failure to state a claim, all allegations in the pleadings must be accepted as true, and the plaintiff must be given the benefit of every favorable inference that can be drawn from those allegations. See Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 n. 1 (3rd Cir. 1987); Phillips v. County of Allegheny, 515 F.3d 224, 233 (3rd Cir. 2008).

In Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) the Supreme Court announced a new two-step method for adjudicating a Rule 12(b)(6) motion. Rather than merely taking a quick look at the complaint, district courts should first carefully

examine the complaint to smoke out pure "legal conclusions" resting on the other "factual allegations." After removing those legal conclusions, district courts should weigh the remaining facts and determine if they are sufficient to render the plaintiff's claim plausible.

B. The Summary Judgment Standard

Because Mr. McGuire relies upon matters outside of the Amended Complaint, in particular his Verified Application and the exhibits appended thereto, his motion to dismiss should be treated under the summary judgment standard as expressly stated by Fed. R. Civ. P. 12(b)(6).

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Id. As the Supreme Court has indicated, "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the Federal Rules as a whole which are designed to secure the just, speedy, and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). "In deciding a motion for summary judgment, the judge's function is to . . . determine if there is a genuine issue for trial." Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3rd Cir. 1993).

As the moving party, Mr. McGuire bears the initial burden of demonstrating the absence of a genuine issue of material fact. Huang v. BP Amoco Corp., 271 F.3d 560, 564 (3rd Cir. 2001) (citing Celotex Corp., supra, 477 U.S. at 323). In determining whether a factual dispute warranting trial exists, the court must view the record evidence and the summary judgment submissions in the light most favorable to the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 105 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). Issues of material fact are those "that might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. An

issue is genuine when it is "triable," that is, when reasonable minds could disagree on the result. Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 301 (3rd Cir. 1995).

For the reasons set forth herein, there are numerous genuine issues of material fact that preclude this Court from granting summary judgment in Mr. McGuire's favor resulting in a complete dismissal of Plaintiffs' Amended Complaint with prejudice. First of all, Plaintiffs have not had the opportunity to conduct any pretrial discovery with respect to Mr. McGuire. This is particularly important because Plaintiffs verify that Mr. McGuire signed the reverse side of the $175,000 check that Plaintiffs tendered to his sister as part of a real estate investment. Plaintiffs maintain that the Debtor and her brother misappropriated these funds. Suddenly when the IBM stock shows up as an asset in the Debtor's name as a result of Plaintiffs' due diligence investigation, Mr. McGuire comes forth at the 11th hour and conveniently claims that his sister transferred this stock to him "in the early 2000s." Yet, he represented to Plaintiffs' counsel during a June 2010 telephone conference that "he knew nothing about the IBM stock." Regardless, his sister has continued receiving dividends from the IBM shares and reporting same as income on her federal tax returns. All of these facts are more particularly set forth in the Verified Application accompanying Plaintiffs' motion for entry of partial default judgment (docket entry #25 in the adversary action).

C. Mr. McGuire is not Entitled to Summary Judgment Vacating the Settlement Between Plaintiffs and the Chapter 7 Trustee

In the instant adversary case, an experienced bankruptcy trustee having the benefit of the advice of his equally experienced and respected bankruptcy counsel, determined in the exercise of his business judgment that a settlement with Plaintiffs was appropriate and in the best interests of the bankruptcy estate. Mr. McGuire is not entitled to overturn the Trustee's business judgment, let alone by summary judgment.

The Trustee initially was named as a defendant in this action. Facing the prospects of uncertain litigation over the recovery of an uncertain asset (the IBM stock) which the Trustee

believed was no longer in the Debtor's possession, and without the financial resources to pursue the Debtor's claims against her brother concerning the stock, the Trustee elected to offer Plaintiffs all of his claims in and to the stock in exchange for the consideration of $15,000. At the time Plaintiffs were presented with this settlement, they too believed the stock was no longer owned by the Debtor. In the face of this uncertainty and with no guarantee that they would be any better off by investing another $15,000 into what could have been an empty bag of shells, Plaintiffs nevertheless decided to take a risk and agreed to the settlement.

The proposed settlement was negotiated in good faith and represented arms-length negotiations, was noticed to creditors in the main Chapter 7 case which included Mr. McGuire at his mailing address, and no creditor or other party in interest objected. Mr. McGuire falsely claims that the Chapter 7 Trustee only filed the NOS in the Adversary Action, but not in the main Chapter 7 case. However, a review of the electronic docket sheet in the Chapter 7 case reflects that the NOS was filed as entry #40, and the Certificate of Mailing as entry #41. Furthermore, the Certification of No Objection appears as entry #45 in the Chapter 7 case. In any event, the Trustee and Plaintiffs consummated the settlement with each of them relying upon the finality of same. More than a year later, Mr. McGuire comes strolling into Court to challenge the validity of the settlement despite the fact that he received the required notice of the proposed transaction and never objected until now.

Assuming the Court even entertains Mr. McGuire's motion to dismiss because he is in default, he is nevertheless out of time to object to the settlement based on the 1-year limitation imposed by Fed. R. Civ. P. 60 made applicable by Fed. R. Bankr. P. 9045. Motions for relief from a final judgment, order or proceeding must be brought within a "reasonable time," and if based on excusable neglect cannot be brought more than a year after the entry of the judgment, order or the date of the proceeding. Here, on February 17, 2010 the Bankruptcy Court Clerk certified that there was no objection to the proposed settlement – at that point the settlement was

final. More than a year later, on March 7, 2011, Mr. McGuire filed his motion to dismiss objecting to the settlement. Certainly, his motion was not filed within a reasonable time under any of the bases set forth in Fed. R. Civ. P. 60, and falls outside the 1-year period if based on excusable neglect.

D. The Trustee's Business Judgment Cannot be Overturned on Summary Judgment

Mr. McGuire is not entitled to summary judgment overturning the Trustee's business judgment in entering into a settlement with Plaintiffs. It is well settled that the bankruptcy court does not substitute its own judgment for that of the Trustee. In re 110 Beaver Street Partnership, 244 B.R. 185, 187 (Bankr. D. Mass. 2000). Bankruptcy trustees are cloaked with the protection of the "business judgment" rule regarding decisions they make in carrying out their fiduciary duties. "The purpose of the business judgment rule is to protect corporate directors from personal liability that would result from second-guessing undertaken by courts with the benefit of 20/20 hindsight and to promote the free exercise of managerial power." In re Classica Group, Slip Copy, 2006 WL 2818820 (Bankr. D.N.J. 2006)(internal citations omitted).

Bankruptcy courts routinely apply the business judgment test to evaluate bankruptcy trustee's administration of assets. See e.g. Matter of Taylor, 103 B.R. 511 (D.N.J. 1989)(Remarking that the only test to employed to aid judicial review of a trustee's decision to reject an executory contract is the business judgment test); In re Eastwind Group, Inc., 303 B.R. 743, 750 (Bankr. E.D.Pa. 2004)(In evaluating whether to approve or reject a settlement proffered by a bankruptcy trustee, the court should avoid second-guessing the bankruptcy trustee's exercise of business judgment); In re Federal Mogul Global, Inc., 293 B.R. 124 (D.Del. 2003); In re Interpictures, Inc., 168 B.R. 526, 535 (Bankr. E.D.N.Y. 1994)(Courts defer to trustee's judgment and place the burden on the party opposing abandonment of property to prove a benefit to the estate and an abuse of the trustee's discretion). As one court explained:

> [T]he commencement of bankruptcy gives the trustee the right to pursue recovery of fraudulently conveyed assets to the exclusion of all creditors…A creditor who had the right to bring, outside of bankruptcy, a UFTA[7] claim to recover prepetition transfers fraudulently made by the debtor, has no standing to commence or continue the suit during the bankruptcy case, until and unless the trustee relinquishes the Section 544(b) claim or the trustee no longer has a viable cause of action.

In re Integrated Agri, Inc., 313 B.R. 419, 424 (Bankr. C.D.Ill. 2004)(internal citation omitted). (Emphasis added).

Numerous courts have approved a Chapter 7 trustee's sale of the avoidance power to a creditor. See Cadle Co. v. Mims (In re Moore), 608 F.3d 253 (5th Cir. 2010)(5th Circuit held that a trustee's Section 544(b) claims can be sold as property of the estate); In re P.R.T.C., Inc., 177 F.3d 774 (9th Cir. 1999); Briggs v. Kent (In re Professional Inv. Properties of Am.), 955 F.2d. 623, 626 (9th Cir. 1992), cert. den., 506 U.S. 818, 113 S.Ct. 63, 121 L.Ed.2d 31 (1992); Integrated Agro, supra 313 B.R. at 424 (citing an individual creditor's lack of standing to pursue a fraudulent conveyance claim "until and unless the trustee relinquishes the Section 544(b) claim or the trustee no longer has a viable cause of action."); Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 287 (B.A.P. 9th Cir. 2005) ("Causes of action owned by the trustee are intangible items of property of the estate that may be sold."); In re Nicole Energy Servs., Inc., 385 B.R. 201, 230 & n.25 (S.D.Ohio 2008).

In P.R.T.C., supra, the Ninth Circuit upheld an express assignment to the debtor's largest creditor to pursue a variety of claims and rights actionable under Bankruptcy Code sections 541 through 552 arising out of a series of specified transactions. Id. at 776. The trustees proposed the assignment after concluding that the estate lacked sufficient funds to pursue those claims or rights, but believed that they might have significant value. The creditor was required by the agreement to remit to the bankruptcy estate 50% of the net proceeds in the event that the creditor pursued the claims.

Assuming the Court were to entertain Mr. McGuire's untimely challenge to the settlement between Plaintiffs and the Chapter 7 Trustee, his reliance upon In re Cybergenics Corporation, 226 F.3d 237 (3rd Cir. 2000) is entirely misplaced. The Cybergenics decision is not applicable here because the transaction between Plaintiffs and the Chapter 7 Trustee was not a sale of assets but rather represented a settlement between litigants, Cybergenics was a Chapter 11 case whereas the present case is a Chapter 7 filing, and the sale order in Cybergenics did not disclose the fraudulent conveyance claim as an asset of the estate. By contrast, the settlement agreement between Plaintiffs and the Chapter 7 Trustee expressly referenced the Trustee's avoidance powers as it related to the IBM stock. Consequently, the uncertainty presented in Cybergenics – whether the asset sale included the fraudulent conveyance claim – does not present itself in the case at bar.

The circumstances in this adversary proceeding are not analogous to Cybergenics, where a creditors' committee was pursuing the cause of action for recovery on behalf of the bankruptcy estate. But for the creditors' committee's vigilance, the debtor in Cybergenics was not going to pursue the fraudulent conveyance action. By contrast, the Chapter 7 Trustee would have pursued the action on his own but for the Ms. McGuire's fraud in misrepresenting the status of ownership of the IBM stock. Faced with a choice of abandoning the cause of action or the prospect of spending thousands of dollars to litigate the dispute with my clients in what he believed to be a "no asset case," the Trustee made what he felt was the best business judgment decision – to assign the stock claim to Plaintiffs and let them expend the resources pursuing the recovery of the IBM stock in a "no-asset case."

E. Mr. McGuire Waived his Rights to Object to the Settlement

Here, the doctrine of waiver prohibits Mr. McGuire from belatedly challenging a settlement more than a year after he received advanced notice of its terms. Interestingly, in his

Verified Application Mr. McGuire is silent about the fact that he received the NOS and failed to object at that time.

New Jersey common law defines waiver the voluntary and intentional relinquishment of a known right. W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958). An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. Id. at 153. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. See Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J.Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962). The party waiving a known right must do so clearly, unequivocally, and decisively. Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J.Super. 376, 380 (App. Div. 1983).

In the face of an affirmative obligation to object to the NOS, Mr. McGuire chose to remain silent. His silence in this regard is particularly troublesome when one considers that he appeared in Court several months after the settlement was consummated – and when Plaintiffs were pursuing the turnover of the IBM stock in furtherance of the settlement – and fled the courtroom in the midst of the hearing. Under these circumstances, it must be concluded that Mr. McGuire waived his rights to object to the settlement.

F. Mr. McGuire is Equitably Estopped From Challenging the Settlement

The Court should also conclude that Mr. McGuire is estopped from seeking relief from the settlement more than a year after it was consummated. Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law." Casamasino v. City of Jersey City, 158 N.J. 333, 354 (1999). The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. Mattia v. Northern Ins. Co. of New York, 35 N.J.Super. 503, 510 (App. Div. 1955). The doctrine is invoked in "the interests of justice, morality and common fairness." Palatine I v. Planning Bd.,

133 N.J. 546, 560 (1993)(quoting Gruber v. Mayor of Raritan Township, 39 N.J. 1, 13 (1962)). Estoppel, unlike waiver, requires the reliance of one party on another. Country Chevrolet, supra, 190 N.J. Super. at 380. In short, to establish equitable estoppel, a plaintiff must show that defendant engaged in either intentional conduct or under circumstances that induced reliance and that plaintiffs acted or changed their position to their detriment. Miller v. Miller, 97 N.J. 154, 163 (1984).

Here, both the Plaintiffs and Chapter 7 Trustee relied to their detriment on the validity and finality of the settlement which they reached, and for which no creditor or party in interest objected to until Mr. McGuire's belatedly stepped forward more than a year later. According to the Claims Register for the Chapter 7 case, other creditors have also relied upon the finality of the settlement by filing proofs of claim in response to the Court's mailing of a notice of assets.

Despite having received notice of the proposed settlement at his admitted mailing address, Mr. McGuire simply did nothing. Under these circumstances, Plaintiffs and the Chapter 7 Trustee would most certainly suffer an injustice if Mr. McGuire were permitted to come into Court at the 11th hour and throw a wrench into an arms-length settlement that was consummated more than a year ago. Fundamental fairness and equity do not justify granting Mr. McGuire relief from the settlement, which is binding and conclusive.

CONCLUSION

For the foregoing reasons and authorities cited, the Court should deny Mr. McGuire's motion to vacate default. Simply put, Mr. Mcguire has not satisfied "good cause" to vacate the default. He was properly served with the Summons and Amended Complaint on March 5, 2010, and failed to timely answer. Default was entered against him on May 14, 2010, he received notice of the entry of default just several weeks later, he appeared in open Court just two (2) months later on July 6, 2010, and received several other motions and correspondence concerning this matter. Yet he waited until March 7, 2011, almost ten (10) months after the default was

entered, in seeking to vacate same. Under these circumstances, his application is doomed by his culpable conduct in deliberately failing to answer the Amended Complaint and falsifying the circumstances by omitting the disclosure of key material facts and events both preceding, and subsequent to, the entry of default.

Alternatively, if the Court is inclined to vacate default then the Court should require Mr. McGuire to reimburse Plaintiffs for their counsel fees and costs incurred in entering default, moving for entry of partial default judgment, and in opposing his motion to vacate, as well as compel him to pay the 2% bond fee necessary to issue replacement paper stock certificates for the IBM stock.

Lastly, the Court should deny Mr. McGuire's motion to dismiss Plaintiffs' Amended Complaint in its entirety. Not only is the motion untimely, it should be treated as one for summary judgment and Mr. McGuire has not met his burden in establishing the absence of a genuine issue of material fact.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: March 21, 2011

By: /s/ Glenn R. Reiser
Glenn R. Reiser