New York County Clerk's Index No. 151471/2012

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ADNAN ABU AYYASH,

Plaintiff-Petitioner-Appellant,

—against—

RANA ABDUL RAHIM KOLEILAT,

Defendant-Judgment Debtor.

BANCO BRADESCO, S.A., BANCO DO BRASIL, S.A., BANCO SANTANDER, S.A., CRÉDIT AGRICOLE, S.A., CREDIT SUISSE (USA), INC., CREDIT SUISSE GROUP, A.G., HSBC BANK USA, N.A., ITAÚ UNIBANCO, S.A., UBS, INC. and UBS A.G.,

Non-Party-Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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REPRODUCED ON RECYCLED PAPER

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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Index No. 151471/2012

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS PROPOSED AMICI CURIAE

PLEASE TAKE NOTICE that upon the annexed affirmation of Dwight A. Healy, dated October 3, 2013, the Institute of International Bankers, The Clearing House Association L.L.C., European Banking Federation, and New York Bankers Association, by their attorneys White & Case LLP, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on October 15, 2013 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting the proposed *amici curiae* to serve and file a brief *amici curiae* in support of the Non-Party-Respondents.

Dated: October 3, 2013
New York, New York

WHITE & CASE LLP

By: [signature]

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SUPREME COURT OF THE STATE OF NEW YORK
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AFFIRMATION OF DWIGHT A. HEALY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

DWIGHT A. HEALY, an attorney duly admitted to practice before the courts of the courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am a member in good standing of the Bar of the State of New York and a partner with the law firm of White & Case LLP, attorneys for the proposed *amici curiae,* the Institute of International Bankers, The Clearing House Association L.L.C., European Banking Federation, and New York Bankers

Association (the "*amici*"). I make this affirmation in support of the *amici*'s Motion for Leave to File Brief as *Amici Curiae.* The *amici* have a demonstrated interest in the issues in this matter and can be of special assistance to the Court. A copy of the *amici*'s proposed brief is attached hereto as Exhibit A. The Plaintiff Petitioner-Appellant and all Non-Party-Respondents that have appeared in this action consent to the filing of this brief.

2. The Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing, advancing and protecting the interests of the international banking community in the United States, with a membership comprised of internationally headquartered banks and financial institutions from over thirty-five countries that have operations throughout the United States, particularly in New York. U.S. operations of IIB members have assets of approximately $5 trillion, are an important source of credit for U.S. borrowers, enhance the depth and liquidity of U.S. financial markets, and contribute more than $50 billion each year to the economies of major cities across the country in the form of employee compensation, sponsorship of local and national charities, tax payments to local, state and federal authorities, as well as other operating and capital expenditures.

3. Established in 1853, The Clearing House Association L.L.C. (the "Clearing House") is the nation's oldest banking association and payments

company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the U.S. and hold more than half of all U.S. deposits. The Association is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs, and white papers—the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States.

4. The European Banking Federation ("EBF") is the leading professional organization of European banks. It provides a forum for European banks to discuss best practices and legislative proposals and to adopt common positions on matters affecting the European banking industry. EBF also actively promotes the positions of the European financial services industry, and the banking industry in particular, in international fora.

5. The New York Bankers Association ("NYBA") is an association comprised of approximately 150 community, regional and money center commercial banks in New York with over 200,000 employees in the State. A number of NYBA's member banks are internationally headquartered and many conduct business internationally as well as in New York.

6. The IIB, Clearing House, EBF, and NYBA appear as *amici curiae* regularly on matters that raise legal issues of significance for foreign financial institutions operating in the United States and for the United States as an international financial center. The *amici* have a substantial interest in this action because of the adverse precedent it could set for their member banks, and for all international banks, with branches or offices in New York.

7. This appeal addresses the question of whether Special Term was correct in finding that the long-standing "separate entity rule" bars the post-judgment restraint of assets outside the United States held at non-party banks and that the policies underlying such rule also militate against ordering global discovery against non-party banks on the basis of the presence here of a branch or office. As leading organizations of international banks—many of which would be at risk of being implicated in complicated international judgment enforcement proceedings if this Court were to reverse Special Term's decision—proposed *amici* are well positioned to address the impact this Court's decision would have on the international banking community.

8. The *amici* believe that their brief will assist the Court in resolving the significant issues presented here, because the interests of the judgment creditor and the respondent banks may not necessarily be representative of the concerns of the major international banks, many based in New York, for whom the *amici* speak,

and the brief of the *amici* may therefore provide the Court with a broader perspective on the issues presented on the appeal.

9. The impact of a reversal of Special Term's decision in the circumstances presented here could have dramatic adverse consequences for New York and its traditional role as the leader of the international financial community. Granting Appellant's request for an extraterritorial order of restraint and discovery would significantly and adversely affect the business of banks in New York and their affiliates outside the jurisdiction, as the precedent would render them answerable in New York for any bank account or property entrusted to them anywhere in the world by their customers. International banks operating in New York would not only bear the administrative burden and cost of searching the entire worldwide organization to determine whether property belonging to a judgment debtor could be found at any branch anywhere in the world and taking the steps necessary to freeze that property, but also would potentially violate local laws—e.g., those regarding bank secrecy, attachment, priority and a bank's duties to its customers—governing their non-New York operations and establishing their legal duties to their non-New York customers.

10. Banks and other financial institutions not only maintain deposit accounts but also hold property for their clients in a variety of capacities: as secured parties on loans, as bailees, as trustees and as broker-dealers, among

others. Moreover, the accounts or property held by the bank often are subject to security agreements, liens and other property interests of third parties. Thus, international banks would be faced with significant risks if ordered to search for and freeze property regardless of where it is held in the world or under what circumstances, as described in greater detail in the attached proposed brief. Among these risks is the potential for multiple exposure; forcing a New York bank to freeze assets in a foreign jurisdiction, which regards its law and not New York law as governing rights to those foreign assets, could mean that the bank will be held liable in two jurisdictions.

11. Reversing Special Term's decision thus would create serious problems for major international banks solely because of their New York presence, and thereby adversely affect New York's position as a pre-eminent world financial center.

WHEREFORE, on behalf of the *amici*, I respectfully request that the Court grant the *amici*'s motion to participate in this appeal as *Amici Curiae*.

Dated: October 3, 2013
New York, New York

Dwight A. Healy

EXHIBIT A

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BRIEF FOR *AMICI CURIAE* INSTITUTE OF INTERNATIONAL BANKERS, THE CLEARING HOUSE ASSOCIATION L.L.C., EUROPEAN BANKING FEDERATION, AND NEW YORK BANKERS ASSOCIATION IN SUPPORT OF THE NON-PARTY RESPONDENTS, BANCO BRADESCO, S.A., BANCO DO BRASIL, S.A., BANCO SANTANDER, S.A., CREDIT AGRICOLE, S.A., CREDIT SUISSE (USA), INC., CREDIT SUISSE GROUP, A.G., HSBC BANK USA, N.A., ITAU UNIBANCO, S.A, UBS, INC. AND UBS A.G.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing, advancing and protecting the interests of the international banking community in the United States, with a membership comprised of internationally headquartered banks and financial institutions from over thirty-five countries that have operations throughout the U.S., particularly in New York. U.S. operations of IIB members have assets of approximately $5 trillion, are an important source of credit for U.S. borrowers, enhance the depth and liquidity of U.S. financial markets, and contribute more than $50 billion each year to the economies of major cities across the country.

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[1] The *amici* state that (A) no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person other than the *amici*, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States.

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The IIB, Clearing House, EBF, and NYBA (the "*amici*") appear as *amici curiae* regularly on matters that raise legal issues of significance for their member banks and in particular have supported the role of the United States in general and New York in particular as an international financial center. The *amici* have a substantial interest in this action because of the adverse precedent it could set for their member banks, and for all international banks with branches or offices in

New York. As set forth in more detail below, a rule that authorizes post-judgment, global discovery or restraints of accounts or assets held at non-U.S. branches or offices of international banks with New York branches or offices would create serious problems for international banks doing business in New York, and would adversely affect New York's position as a pre-eminent financial center.

PRELIMINARY STATEMENT[2]

Appellant asserts that New York's judgment enforcement rules empower a party having no contact with New York and seeking to enforce a judgment of a foreign court against a foreign judgment debtor with no assets here, to restrain the foreign assets of the judgment debtor that might be held at branches of international banks located around the globe, and to compel discovery about all such accounts, merely by reason of the presence in New York of a branch or other office of those banks. Justice Coin correctly found that Appellant's position implicates the longstanding separate entity rule, and rejected the proposed restraints and discovery.

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2 The following definitions are used herein: appellant Adnan Abu Ayyash ("Appellant"); non-party respondents banks ("Respondent Banks"), court below (Coin, J.) ("Special Term"); October 22, 2012 Special Term Opinion (the "October 22 Opinion"); Brief of Plaintiff-Petitioner-Appellant Ayyash, dated August 2, 2013 ("Appellant Br."); Federal Reserve Bank of New York ("FRBNY"); FRBNY amicus brief filed in Samsun Logix Corp. v. Bank of China, et al., Index No. 105262/2010 (N.Y. Sup. Ct. 2010) ("FRBNY Samsun Amicus"); FRBNY amicus brief filed in Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd., 12-788-cv(L) (2d Cir. June 4, 2013) ("FRBNY Amaprop Amicus").

The separate entity rule recognizes the unique function and importance of banks here and the severe practical and legal issues raised should U.S. courts attempt to reach non-U.S. assets or accounts belonging to a bank's customer under the laws of another nation. The rule provides that, even if a bank is subject to personal jurisdiction due to the presence of a New York branch or office, for certain purposes the other branches and offices of the bank will nonetheless be treated as separate and juridically distinct entities.

Appellant states that he does not seek to overturn the separate entity rule[3] (App. Br. at 25) but argues that it has no role to play in this case because Appellant does not, at this stage of the proceeding, seek turnover of property located abroad. In fact, the separate entity rule, as well as the policies on which it rests, calls for the rejection of Appellant's position. Courts have historically applied the separate entity rule to post-judgment enforcement generally, including to restraining notices under Article 52 of the New York Civil Practice Law and Rules ("C.P.L.R."),

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[3] Although some judgment creditors have in recent years argued that Koehler v. Bank of Bermuda, Ltd., 12 N.Y.3d 533, 541 (2009), overturned the separate entity rule, every New York state court and the most recent federal courts considering the issue have concluded that Koehler did not abrogate the separate entity rule, and indeed did not even address that rule because it was not implicated in that case. As the courts addressing the issue have correctly found, in view of its long history and strong supporting policy considerations, "it is not unreasonable to expect that if the New York Court of Appeals had chosen to eliminate [the separate entity rule], it would have said so." October 22 Opinion at 13 (citing Shaheen Sports, Inc. v. Asia Ins. Co., Nos. 98-cv-5951(LAP) and 11-cv-920(LAP), 2012 WL 919664, at *5 (S.D.N.Y. Mar. 14, 2012)); see also Nat'l Union Fire Ins. Co. of Pittsburgh v. Advanced Emp't Concepts, Inc., 269 A.D.2d 101, 101, 703 N.Y.S.2d 3, 4 (1st Dep't 2000).

which are part of New York's judgment enforcement scheme and serve as a predicate to orders requiring the turnover of assets encompassed by the restraint.[4]

Restraining notices pose the same problems as do turnover orders or other forms of execution. Moreover, as Justice Coin recognized, there are important policy considerations that underlie the separate entity rule. Those policy considerations, which are also applicable to the global restraining notice Appellant argues for, remain highly relevant in today's age of global banking.

First, as Special Term recognized, "[t]he importance of the separate entity rule is underlined by the existence of laws in the foreign jurisdictions in which the institutions are headquartered or in which other of their branches are located, laws providing for serious civil and criminal sanctions in the event of their breach."

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[4] The separate entity rule has been applied in the pre- and post-judgment context in New York (including by this Court) and other U.S. jurisdictions for literally scores of years. See, e.g., Cronan v. Schilling, 100 N.Y.S.2d 474, 476 (Sup. Ct. N.Y. Cnty. 1950), *aff'd,* 282 A.D. 940, 126 N.Y.S.2d 192 (1st Dep't 1953); see also Det Bergenske Dampskibsselskab v. Sabre Shipping Corp., 341 F.2d 50, 53 (2d Cir. 1965) ("A review of the New York cases indicates a consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment *or execution* by the process of a New York court served in New York on a main office, branch, or agency of the bank") (emphasis added); see also Shaheen, 2012 WL 919664, at *8; Fid. Partners, Inc. v. Philippine Export & Foreign Loan Guarantee Corp., 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996) (separate entity rule recognized "by courts throughout the country"); Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823, at *3 (Sup. Ct. N.Y. Cnty. Jan. 11, 2012); Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 WL 1844061 (Sup. Ct. N.Y. Cnty. May 12, 2011). Other countries – including England – have also adopted the separate entity rule. See, e.g., Societe Eram Shipping Co Ltd v. Compagnie Internationale de Navigation, [2004] 1 A.C. 260, 263 (H.L. 2003) (U.K.); see also International Law Association, Res. No. 3/2012 (Aug. 30, 2012) ("[A] bank's offices, branches, agencies and other establishments are generally to be treated as separate entities which do not have possession, custody or control of property maintained by depositors in offices, branches or agencies or at the home office in another state").

October 22 Opinion at 11. Applying U.S. court orders to bank accounts or assets located abroad would enmesh international banks in a web of inconsistent and irreconcilable laws and orders. The restraining notices which Appellant seeks to have given global effect here would render any bank answerable in New York for any bank account or property entrusted to it anywhere in the world merely by virtue of a New York presence, even where the account in question has no U.S. connection and the local law governing the account relationship affirmatively prohibits restraint or does not recognize the effectiveness of a New York restraint or relieve the bank of local repayment liability to its customer based on the terms of a New York order.

Second, absent the separate entity rule, the burdens placed on banks with New York branches or offices would be significant – in terms of cost, time, resources, and ability to satisfy and retain customers. In addition to the cost of global searches, banks would become embroiled in the inevitable conflicts among competing legal systems and parties – a multiplication of litigation that is avoidable by requiring, as has historically been the case, creditors to bring enforcement proceedings against banks in the jurisdiction where assets or deposits are located.

Appellant's position on the global reach of information subpoenas poses similar problems. Compliance with a New York subpoena subjects banks to the

same types of conflicting legal requirements as restraints do. Banks are, of course, heavily regulated, both in New York (and in other U.S. jurisdictions) and in jurisdictions around the world. As the record in this case (and other reported decisions) makes clear, international banks are frequently subject to statutory, regulatory and/or common law restrictions on the disclosure of information about customers and customer accounts located in the regulating jurisdiction. Process that requires the banks to produce such information in a New York proceeding without the benefit of a court (or regulatory body) direction from the jurisdiction where the account is located places the bank in the same quandary as does a restraint – comply with the New York process and face regulatory or criminal sanction and civil liability in the foreign jurisdiction or refuse to provide the information and face contempt proceedings in New York. Further, the process of searching for accounts in multiple jurisdictions is itself burdensome. At the very least, allowing such process imposes on the banks the significant costs of seeking relief from the court here every time a subpoena is served on a New York branch or office of a bank with non-U.S. operations.

The potential burden of this situation is highlighted by the facts of this case, where "notwithstanding the absence of any connection of the parties, the underlying controversy, or any *res* in New York, plaintiff is attempting to use the New York courts as a springboard for a massive, multijurisdictional international

exercise in supplementary proceedings, instead of simply complying with the laws of the countries in which the judgment debtor's assets are actually located." October 22 Opinion at 12. Adoption of Appellant's position will only invite large numbers of similar actions, threatening to enmesh international banks located here in litigation about extraterritorial restraints and discovery requests on a frequent and recurring basis.

As Justice Coin properly found, requiring discovery about overseas assets which are not subject to ultimate recovery here by reason of the separate entity rule should not be permitted. Appellant cites no authority to suggest that Article 52, which on its face is directed at recovery of assets to satisfy a judgment entered or registered here, can be used for the sole purpose of facilitating enforcement proceedings elsewhere, particularly where, as here, the parties and the judgment have nothing to do with New York.

ARGUMENT

I. THE SEPARATE ENTITY RULE HAS HISTORICALLY BEEN APPLIED TO POST JUDGMENT RESTRAINTS AND THE POLICIES UNDERLYING THE RULE APPLY FULLY TO SUCH RESTRAINTS

A. Courts Have Treated Restraints Like Attachment And Turnover Orders And Digitrex Did Not Alter That Treatment

The separate entity rule has been applied historically not only to attachments and turnover orders, but also to post-judgment asset restraints. See Samsun, 2011

WL 1844061; Global Tech., 2012 WL 89823; Motorola Credit Corp. v. Uzan, No. 02 Civ. 666, 2013 WL 4452014, at *5 (S.D.N.Y. Aug. 21, 2013); Shaheen, 2012 WL 919664, at *8. Thus, a post judgment restraining notice served on a branch or office of a bank in New York would not reach branches or offices of the bank outside of the jurisdiction.

Although Appellant does not directly argue that the separate entity rule has been overturned for purposes of post judgment asset restraints (because indeed, it has not), Appellant argues that the so-called Digitrex exception to the separate entity rule would permit the restraint of assets held at non-U.S. branches or offices of international banks by virtue of the presence of a branch or office in New York. Appellant Br. at 44 (citing Digitrex, Inc. v. Johnson, 491 F. Supp. 66, 68 (S.D.N.Y. 1980)). The very cases Appellant cites demonstrate that this is simply wrong.

As Appellant states, "[t]oday, the *Digitrex* exception generally stands in the form first set forth by the court in *Limonium Maritime, S.A. v. Mizushima Marinera, S.A.,* 961 F Supp 600, 607 [SD NY 1997], which framed its applicability to situations where: (1) the restraining notice is served on a bank's main office; (2) the bank's main office and branches are within the same jurisdiction; and (3) the bank's main office and branches are connected by high-speed computers and are under the centralized control of the main office." Appellant Br. at 45; see also

John Wiley & Sons, Inc. v. Kirtsaeng, No. 08 Civ. 7834, 2009 WL 3003242, at *4 (S.D.N.Y. Sept. 15, 2009).

This Court in Nat'l Union, 269 A.D.2d at 102, 703 N.Y.S.2d at 4, expressly found that Digitrex did *not* permit the extraterritorial reach of a restraining order and order of attachment, and refused to apply the restraining and attachment orders to accounts located outside New York where the accounts were "not in the same jurisdiction as the New York office that petitioner served."

In doing so this Court made clear that the Digitrex exception would not be expanded absent "a pronouncement from the Court of Appeals or an act of the Legislature." Id. Appellant cites no authority for extending the Digitrex exception.

Nonetheless, after recognizing that the three-part Digitrex exception is "today['s]" law (Appellant Br. at 45), Appellant argues that he should be permitted to reach assets located outside of New York where only the third element of the Digitrex exception is present, even where he has admittedly failed to satisfy the first two elements. Id. at 46. No case supports Appellant's argument that he can reach assets located outside of New York by satisfying only the third element of the Digitrex rule. [5]

[5] Even if there were such authority, Appellant has failed to carry its burden of demonstrating that New York branches of international banks are normally linked to a global computer network. Although Appellant alleges that the Respondent Banks here use high speed

B. The Separate Entity Rule Allows Banks To Avoid Having To Choose Among Competing Legal Regimes

By limiting the reach of orders affecting assets to the jurisdiction in which the assets are located, the separate entity rule serves the important policy of avoiding conflicts among competing legal regimes. See, e.g., Shaheen, 2012 WL 919664, at *8; see also FRBNY Amaprop Amicus at 11. This respect for non-U.S. law was highlighted by the U.S. government in an amicus submission to the U.S. Supreme Court:

> In terms of international banking law, the separate entity doctrine thus gives recognition to the fact that any banking operation in a foreign country is necessarily subject to the foreign sovereign's own laws and regulations. . . .

Brief for the United States as Amicus Curiae Supporting Petitioner, Citibank, N.A. v. Wells Fargo Asia Ltd., No. 88-1260, 1989 WL 1126987, at *14 (U.S. 1989) (footnote and citation omitted).

Although it is beyond the scope of this brief to survey the laws of all other jurisdictions, there can be no dispute that efforts to obtain information about, restrain, or transfer to New York, foreign customer assets or deposits located in

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computers, it does not cite any evidence for that proposition, nor, more importantly, does it explicitly submit that any computer "networks" used by bank branches in New York are typically "connected" to the networks allegedly used at branches and head offices located outside New York. Appellant Br. at 47. As set forth below, the New York branches and offices of international banks frequently are not connected to the computer systems of non-U.S. branches and offices. See infra at 18-19. Recognizing that fact, New York courts have recently emphasized that the practical inability of New York branches of banks to address global asset restraints and turnover orders continues to be a compelling reason to employ the separate entity rule. See, e.g., Samsun, 2011 WL 1844061, at *4; see also Lok Prakashan Ltd. v. India Abroad Publ's, Inc., No. 00 Civ. 5852, 2002 WL 1585820, at *1 (S.D.N.Y. July 16, 2002).

every country where the bank has a branch or office would create conflicts with other jurisdictions as banks may face civil or regulatory – and indeed even criminal – liability for restraining (or turning over) or providing information about, non-U.S. assets by virtue of a U.S. court order. See, e.g., Samsun, 2011 WL 1844061 (Chinese law prohibits banks from complying with an order issued by a court outside of China to disclose information about, freeze, or transfer funds from accounts in China, and noting that violation of such laws could expose the bank's officers and employees to sanction and civil liability); Tiffany (NJ) LLC, et al. v. Qi Andrew, et al., 276 F.R.D. 143 (S.D.N.Y. 2011) (similar); Shaheen, 2012 WL 919664, at *7 (bank presented colorable evidence that Pakistani law prohibited bank taking action in Pakistan in response to U.S. court order); In re Union Bank of Switz., 158 Misc.2d 222, 225, 601 N.Y.S.2d 253, 256 (Sup. Ct. N.Y. Cnty. 1993) (bank would be subject to criminal and civil liability in Switzerland for violating Swiss bank secrecy laws); Intercont'l Credit Corp., Div. of Pan Am. Trade Dev. Corp. v. Roth, 154 Misc.2d 639, 640, 595 N.Y.S.2d 602, 602 (Sup. Ct. N.Y. Cnty. 1991) (disclosure would violate Israeli secrecy laws and subject the bank to civil, criminal and regulatory penalties); Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972) (Swiss bank secrecy laws provided for civil and criminal penalties); October 22 Opinion (separate entity rule avoids conflicts with competing legal systems which have "serious civil or criminal sanctions" for

the breach of local law). It is of course not surprising that a foreign country would choose to regulate banks within that country – indeed, bank branches operating in New York are subject to extensive New York and federal regulations.[6] Just as U.S. regulatory bodies regulate banks here, other governments have legitimate reasons for regulating bank branches in their jurisdictions.

It has long been U.S. policy – embodied in the concept of comity – to avoid applying U.S. laws in a way that interferes with the laws of other nations. See, e.g., Peterson v. Chem. Bank, 5 Tiffany 21, 32 N.Y. 21, 29 How. Pr. 240 (N.Y. 1865); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 (1987) ("a state may not require a person to do an act in another state that is prohibited by the law of that state or the law of the state of which he is a national").[7] "That rule is 'a

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[6] A state licensed branch is regulated by both the New York State Department of Financial Services (N.Y. Banking Law §§200 – 209) and the Board of Governors of the Federal Reserve System (12 U.S.C. §§3105 – 3111). A federally licensed branch is regulated by the Office of the Comptroller of the Currency (12 U.S.C. §3102) and the Board of Governors of the Federal Reserve System (12 U.S.C. §§3105 - 3111). Recent legislation has precipitated proposals for additional regulation by these regulators. For example, as required by Sections 165 and 166 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L.111-203, 124 Stat.1423 – 1432), the Board of Governors of the Federal Reserve System has recently proposed enhanced standards for foreign banking organizations (77 Fed. Reg. 76628 et seq. (Dec. 28, 2012)).

[7] In addition, there is a well-established presumption in both New York and federal law against extraterritorial application of substantive or jurisdictional law. See Kiobel v. Royal

fundamental principle[] of international comity.'" Motorola Credit Corp. v. Uzan, 388 F.3d 39, 60 (2d Cir. 2004) (quoting Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960)); see also Gen. Aniline & Film Corp. v. Bayer Co., 281 A.D. 668, 669, 117 N.Y.S.2d 497, 499-500 (1st Dep't 1952). Consistent with that precept, courts in New York have refused to enforce orders that require international banks to act in violation of the law of a foreign jurisdiction. See, e.g., citing references supra at 12; see also Richbell Info. Servs., Inc. v. Jupiter Partners L.P., 32 A.D.3d 150, 155-157, 816 N.Y.S.2d 470, 475-76 (1st Dep't 2006); In re Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962); Ings, 282 F.2d at151-52; Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

The separate entity rule has been and remains an important buffer, minimizing conflicts between U.S. and foreign laws and protecting international banks from the untenable position of having to choose between respecting U.S. law or the laws of other jurisdictions where they are headquartered or do business.

C. An Asset Restraint Presents Banks With The Risk Of Multiple Exposure

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Dutch Petroleum Co., 133 S.Ct. 1659, 1665 (Apr. 17, 2012); Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2877 (2010); Global Reinsurance Corp. v. Equitas Ltd., 18 N.Y.3d 722 (2012). This case presents the classic "f-cubed" scenario relating to a *foreign* party seeking to enforce a judgment against another *foreign* party with respect to assets wholly *foreign* to the United States. Under those circumstances, the mere presence in the U.S. of a branch or office of an international bank that may hold assets of the judgment debtor in other branches abroad does not justify the extraterritorial application of U.S. law. Nothing in CPLR Article 52 speaks to this sort of extraterritorial enforcement.

Appellant's attempt to dissociate the restraint he seeks from turnover – implying that he is just seeking restraint via New York to later seek turnover in jurisdictions elsewhere (Appellant Br. at 48) – ignores the fact that the burdens banks face apply to restraint *and* turnover, and that an asset restraint that imposes restrictions on the foreign branch of a bank from taking action with respect to assets located abroad – particularly where such restraint violates the laws of the local jurisdiction – has a practical effect not dissimilar from a turnover order.

An asset restraint, like a turnover order, can subject the bank to the risk of multiple exposure. If a bank is prohibited by a New York restraint from transferring assets or paying deposits in another country but, according to the law of the jurisdiction where the assets or deposits are located, has to allow the customer to withdraw the assets,[8] the bank could be liable for the assets twice – it can be liable here for contempt if it does allow a customer to withdraw funds as required by the local law of the jurisdiction where the account is located, and, alternatively if it does honor the restraint and refuses to allow a withdrawal, it can

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[8] Indeed, a number of foreign jurisdictions will refuse to give effect to a judgment from another country if that judgment relates to the disposition of property located outside the territorial jurisdiction of the court issuing the judgment. See, e.g., FOREIGN JUDGMENT ACT 1991, § 7(3)(b) (Austl.) ("[T]he courts of the country of the original court are taken to have had jurisdiction ... if the property in question was . . . situated in the country of that court"); A.I.R. 1963 S.C. 1 (India) ("A court of a foreign country has jurisdiction to deliver a judgment in rem which may be enforced or recognised in an Indian Court, provided that the subject matter of the action is property . . . within the foreign country"); Charles Platto & William G. Horton, ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE, 99 (2d ed. Int'l Bar Assoc. 1993) (Canadian court will enforce foreign judgment determining status of property if property was situated within the territorial jurisdiction of foreign court).

be liable to the customer in the foreign jurisdiction for the full amount of the account balance or, at the very least, for the loss of use of the funds while the restraint is in effect. See, e.g., Samsun, 2011 WL 1844061, at *5 (a bank that freezes (or turns over) a judgment debtor's assets held at a foreign branch could "potentially violate local laws," and thus be subject "to double liability" – to both judgment debtor and judgment creditor – if foreign law does not recognize the validity of the action).

Thus, adopting a rule that an asset restraint extends to assets in a foreign jurisdiction creates the risk that non-parties having nothing to do with the dispute (the banks), will ultimately bear the cost of the judgment.

The Supreme Court has long recognized that double liability raises concerns of a constitutional nature. Harris v. Balk, 198 U.S. 215, 226 (1905) ("It ought to be and it is the object of courts to prevent the payment of any debt twice over"). As Justice Kent wrote nearly a century before Harris, "[n]othing can be more clearly just, than that a person who has been compelled, by a competent jurisdiction, to pay a debt once, should not be compelled to pay it over again." Embree v. Hanna, 5 Johns 101, 102 (1809). Applying that principle, the Supreme Court warned that, even where the court has *in rem* jurisdiction, "the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a

suit brought by a claimant who is not bound by the first judgment." W. Union Tel. Co. v. Pa., 368 U.S. 71, 75 (1961) (citing Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 242-43 (1944); Sec. Sav. Bank v. Cal., 263 U.S. 282, 286-90 (1923)).[9]

This and other New York courts have similarly found that where a judgment enforcement device creates the potential for double liability, this would be "an unconscionable result." Oppenheimer v. Dresdner Bank A.G., 50 A.D.2d 434, 441, 377 N.Y.S.2d 625, 632 (2d Dep't 1975); see also JPMorgan Chase Bank, N.A. v. Motorola, Inc., 47 A.D.3d 293, 300-01, 846 N.Y.S.2d 171, 77-178 (1st Dep't 2007) (citation omitted) (rejecting turnover because of risk of double liability: "[T]he record evidence indicates that the Indian courts will not give the judgment appealed from the effect to which it is entitled under New York law"); Samsun, 2011 WL 1844061, at *5. The separate entity rule prevents the risk of multiple exposure.

Although Appellant suggests that he seeks discovery and restraint to ultimately seek turnover in other jurisdictions, Appellant leaves open the possibility that he will seek turnover in New York. To the extent that Appellant in

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9 Notably, Section 5209 of the CPLR seeks to prevent double liability in certain circumstances, reflecting the legislature's concern with the fundamental unfairness of subjecting a garnishee to double liability for turning over assets to satisfy an outstanding judgment. But that rule does not alleviate the exposure of an international bank under foreign laws that do not recognize the validity of a New York enforcement order on property located outside New York and in the foreign jurisdiction; nor does it address the risk of multiple liability arising from post-judgment restraints.

fact does not intend to or ultimately does not seek enforcement in a foreign jurisdiction and will ultimately seek turnover in New York, such effort will present a significant risk of double liability, in contravention of the policies underlying the separate entity rule and the case law cited above.

D. International Banks Would Be Unduly Burdened If Required To Address Global Asset Restraints Issued In New York Proceedings

Historically, the separate entity rule also recognized that requiring any branch or office other than the branch or office at which an account is located to handle an order relating to that account would place "an intolerable burden upon banking and commerce." Cronan, 100 N.Y.S.2d at 476. The FRBNY recently recognized in an amicus submission in Samsun that this concern remains relevant in the context of world-wide post judgment restraint and garnishment orders:

> Even when records are electronic, many banks rely on different computer platforms... It's a huge undertaking, and [if required to respond to such orders] banks will also become routine players in costly and complicated international lawsuits . . .

Transcript of Oral Argument at 75-6, Samsun, Index No. 105262/2010 (Feb. 4, 2011).

These concerns are equally present here. When served with a subpoena, restraint or turnover order directed to assets or deposits abroad, the New York branches of international banks often lack practical access to accounts located at

non-U.S. branches. See, e.g., Samsun, 2011 WL 1844061, at *6 (noting that banks filed affidavits "to the effect that the computer systems in the New York branches of the Banks do not provide access to customer account information at the head office or at branches outside of the United States"); Lok, 2002 WL 1585820, at *1.

Even if a bank's New York branch or office could access accounts located abroad, and the bank were not prohibited under the law of the jurisdiction where the account is located from restraining such accounts, such requests would still be unduly burdensome and costly not only in terms of money, but in terms of time, resources, and customer relationships.

First, extraterritorial restraints like that sought by Appellant would compel banks to search the entire worldwide organization to determine whether property belonging to the judgment debtor could be found at any branch or office anywhere in the world, and take the steps necessary to freeze that property. This will impose substantial costs and risks on banks merely because they have New York operations. This reality has recently been evidenced in the context of federal maritime enforcement procedures. See Cala Rosa Marine Co. v. Sucres Et Deneres Grp., 613 F. Supp. 2d 426, 431 n. 37 (S.D.N.Y. 2009). As a result of the Second Circuit's adoption of a new and expansive interpretation of the federal maritime attachment rule, there was a surge in maritime attachment requests, which resulted in "New York banks . . . hir[ing] additional staff, and suffer[ing] considerable

expenses, to process the attachments," including because "each attachment requires banks to amend 'their software screens.'" The massive increase in use of maritime enforcement procedures following the adoption of the new interpretation led the Second Circuit to reconsider and abandon its new approach. Shipping Corp. of India v. Jaldhi Overseas PTE Ltd., 585 F.3d 58, 61 (2d Cir. 2009).

Second, banks with New York branches or offices will be forced, at their own expense, to become frequent participants in complex cross-border legal disputes. As the FRBNY has made clear in two recent *amicus* submissions, efforts to compel international banks to search for information about, restrain, and turn over all property of certain judgment debtors "anywhere in the world," would be "a recipe for trouble," including because "[t]here may be competing claims to the asset, by parties who think they have as much right to it as the judgment creditor." FRBNY Samsun Amicus at 5 (citing Koehler, 12 N.Y.3d at 542); see FRBNY Amaprop Amicus at 11 (if a U.S. court was to issue an order affecting assets in another jurisdiction, "[t]he result is chaos, with multiple judgment creditors each asserting superior ownership to a single asset"); see also Levin v. Bank of N.Y., No. 09 Civ. 5900 RPP, 2011 WL 812032, at *12 (S.D.N.Y. Mar. 4, 2011) (where one group of plaintiffs claimed priority interest in assets at New York branch of bank due to service of purportedly extraterritorial attachment writs served on the bank in Maryland, court applied separate entity rule to find that service of writ of

attachment in Maryland did not reach Bank's New York branch).

Third, as the FRBNY further cautioned, were a New York court to enter an order directed to assets or deposits held abroad at foreign branches or offices, other jurisdictions and countries might follow New York's example, and enter orders affecting bank accounts located in the United States. See FRBNY Samsun Amicus at 7. This web of reciprocal laws, by which courts around the world might begin entering orders affecting assets outside of their jurisdictions, would further expand the burden on international banks and, in the FRBNY's words, "ultimately threaten[ ] the balance of international banking law." Id.[10] Particularly because New York courts have long been a reference point for other jurisdictions on banking issues,[11] the expansive exercise of extraterritorial power advocated here might be followed by courts in other nations to the detriment of international banks and New York's status as an international banking center.

Fourth, customers may be reluctant to make deposits in or otherwise have property in banks with New York branches because of the additional risk to which

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[10] Indeed, such concerns also have been echoed by commentators, who have observed that ordering foreign banks to take action with respect to accounts located abroad "might expose U.S. banks to similar rulings abroad, with severe effects, since it would tilt what has been a level playing field against foreign banks." Clyde Mitchell, *Separate Entity Rule - U.S. Branches of Non-U.S. Banks,* N.Y.L.J. 3, col. 1 (Nov. 18, 1998).

[11] See, e.g., Unicredito Italiano v. JPMorgan Chase Bank, No. 2-104, 2002 WL 1378226, at *4 (D. Del. June 26, 2002) (recognizing that "New York City remains the Financial center of the United States, if not the world"); Int'l Multifoods Corp. v. Commercial Union Ins. Co., 98 F. Supp. 2d 498, 502 (S.D.N.Y. 2000) ("New York is a leading center of banking, commerce and insurance in the United States, and the law developed by its courts is generally recognized and respected in such a light").

customers would be exposed. For example, customers in other countries might prefer to bank with an institution without a New York presence (or with no U.S. presence at all), for fear that their bank's presence in New York could threaten their property outside of the United States. As a result, foreign banks might lose business based on their decision to maintain a New York presence.

Ultimately, extraterritorial restraints will increase the pressure on non-U.S. and even U.S. banks not to operate in New York. This would not only create substantial harm to New York's economy, but also would affect customers of banking services who benefit from the choice and competition fostered by the wide array of financial institutions present in New York currently. State of New York, Banking Department, Report of the Superintendent's Advisory Committee on Transnational Banking Institutions (March 1, 1992), p. 9 ("The ability of foreign banks to do business through branches and agencies is . . . important to New York and its economy . . . greater access to international credit markets that the branch/agency form affords to businesses in the United States is beneficial to the American economy as a whole"). Foreign banks that could avoid having a presence in New York might choose to do so, in order to minimize risk, expense, and loss of customers.

What is anomalous about all this is that garnishee banks historically protected by the separate entity rule are mere bystanders to myriad underlying

legal disputes. Justice Coin properly recognized that there is no unfairness in imposing on judgment creditors the costs of proper enforcement in the jurisdiction where assets or deposits are located, and refusing to allow those costs to be shifted to banks whose only act was opening a New York branch or office.

II. APPELLANT IS NOT ENTITLED TO THE GLOBAL DISCOVERY ORDER HE SEEKS

Appellant's argument that he is entitled to global discovery against non-party banks despite the separate entity rule ignores the significant policies applicable in the context of global, non-party discovery against international banks that militate against such discovery. Where, as here, the separate entity rule prevents recovery of assets at branches located outside of New York, the considerations that limit the reach of asset recovery militate in favor of circumscribing discovery.

A. Banks Would Be Exposed To Inconsistent Laws If Ordered To Comply With New York Discovery Orders Directed To Assets In Other Jurisdictions

Just as the local jurisdictions where banks are located often prohibit restraint of assets in response to a U.S. court order, foreign jurisdictions often have strict bank secrecy laws, prohibiting banks from disclosing information about customer accounts absent a direction from a local court or regulator. See supra at p. 11-13. Banks may be subject not only to civil liability or fines, but also sanctions and criminal liability if they disclose customer information in response to a U.S. court

order. Id. Indeed, that is the case here. Justice Coin noted in her opinion that the Respondent Banks "have shown that were this Court to require that they comply with plaintiff's demands, their officers and/or employees could be subject to civil or criminal penalties merely for such compliance." October 22 Opinion at 14.

Recognizing that branches of banks located abroad are subject to the laws of foreign jurisdictions, courts in New York have found that, particularly where discovery is sought from a bank as a non-party, "application of the Hague Convention, which encompasses principles of international comity, is virtually compulsory." Orlich v. Helm Bros., 160 A.D.2d 135, 144, 560 N.Y.S.2d 10, 15 (1st Dep't 1990); see also Intercont'l, 154 Misc.2d at 640, 595 N.Y.S.2d at 602 (same); Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987) (requiring use of Hague Convention in first instance even where discovery was sought from defendant). And even absent such a presumption, in light of the evidence before Special Term of foreign law prohibiting disclosure of customer information concerning accounts at branches of the Respondent Banks in foreign countries, and the fact that New York (and U.S.) courts generally respect principles of comity and strive to avoid conflicts with foreign law (see supra p. 13-14), it was entirely appropriate for Justice Coin to limit the reach of Appellant's subpoenas to New York and to require Appellant to resort to the Hague Convention for any non-U.S. discovery he seeks from the Respondent Banks. October 22 Opinion at 14.

B. Limiting The Reach Of Discovery To New York Minimizes The Practical Burdens On Banks

Responding to repeated subpoenas seeking information about accounts at a bank located anywhere in the world would impose burdens on international banks similar to those that they would experience in addressing global asset restraints.

First, extraterritorial discovery orders like that sought by Appellant would compel banks to search the entire worldwide organization to determine whether property belonging to the judgment debtor could be found at any branch or office anywhere in the world. Indeed, Appellant's own submissions highlight the many banks, countries, and branches involved implicated by its request. Appellant has indicated that he seeks discovery from banks operating in dozens of countries and with literally hundreds of branches as part of its global fishing expedition. Appellant Br. at 38.

Appellant's arguments only serve to underscore the burden. Appellant asserts that as the *party* seeking to enforce its judgment, he should not have to go to the jurisdictions where he actually seeks to execute on assets, but rather that *non-party* banks should be burdened with having to search dozens, scores or even hundreds of branches in response to a subpoena issued here. And he maintains this position even where, as here, he has little or no basis for believing that any branches of the banks served with the subpoena had assets of the judgment debtors.

In Appellant's view, finding out that various banks do not hold any assets of the judgment debtor anywhere in the world is itself useful information justifying global subpoenas. Appellant Br. at 39. Appellant is simply wrong. See, e.g., Samsun, 2011 WL 1844061, at *5 (citing with approval amicus curiae submission which presented policy arguments favoring banks' motion to dismiss proceeding, including the fact that banks would "bear the administrative burden and cost of searching for information responsive to broad, invasive discovery requests . . .").

Second, banks with New York branches or offices will be forced to dedicate resources both here and abroad to litigate against the broad, burdensome subpoenas they receive. Every time they receive a global subpoena, banks would have to consider the laws of all jurisdictions in which they operate, and where, as is often the case, those laws prohibit them from providing the information called for by the subpoena, would have to incur the expense of making an application for a protective order involving full, detailed and lengthy briefing on issues of foreign law, and comity. Having to make such detailed applications every time they receive a subpoena – which Appellant envisions would be "repeatedly" (Appellant Br. at 48) – would obviously be a complicated and expensive endeavor for banks such as the Respondent Banks. Further, banks would be forced to insure against this litigation risk and recover the costs from customers—all of which would disrupt, and increase the cost of, banking services around the world.

The burdens associated with discovery on their own are significant reasons that might compel international banks to avoid having a New York presence. The Court should not create a precedent that discourages international banks from operating in New York.

C. CPLR 5224 Does Not Prevent Application Of The Separate Entity Rule To Discovery

Appellant's argument that the separate entity rule cannot apply to discovery because Section 5224 of the CPLR states that it applies extraterritorially ignores the history of the separate entity rule, a judicially developed rule that limits the reach of attachment and judgment enforcement devices as applied to banks because of the particular policy concerns, discussed above, applicable to such entities. There is nothing in Section 5224 that precludes the application of that rule to limit discovery from foreign bank branches of banks with New York branches or offices.

The cases Appellant cites on this point do not assist it. Koehler did not involve the separate entity rule, let alone alter that rule. Necessarily it did not address whether, in circumstances where the separate entity rule bars recovery of assets, CPLR 5224 authorizes discovery as to assets that cannot be recovered in the New York enforcement proceeding.

Nor do the other cases cited by Appellant support the conclusion that Section 5224 can be used to obtain discovery as to accounts at bank branches located abroad despite the fact that a New York judgment creditor cannot reach such assets in proceedings here by reason of the separate entity rule.

The decision in CE International Resources Holdings, LLC v. S.A. Minerals Ltd. Partnership, No. 12 Civ. 08087, 2013 WL 2661037, at *17 (S.D.N.Y. June 12, 2013), rests on a misconception of the scope of the separate entity rule. Contrary to the case law, noted above, the court assumed that the rule did not apply to either pre or post judgment restraints (but applied only attachments or turnover orders).[12] In any event it simply does not address the question of whether Article 52 can be

[12] The cases cited by Magistrate-Judge Netburn in CE Int'l do not support that conclusion. Appellant Br. at 31-32. United States v. First Nat'l City Bank, 379 U.S. 378, 384 (1965), dealt with an action by the United States to enforce statutory liens – unlimited in geographic reach – expressly created by the Internal Revenue Code, and later Supreme Court authority has indicated that the case is limited to cases involving the public interest. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 329 (1999). It did not articulate a general rule that post-judgment restraints of assets held by non-party banks in branches located outside of New York are permissible despite the separate entity rule. Abuhamda v. Abuhamda, 236 A.D.2d 290, 290, 654 N.Y.S.2d 11, 12 (1st Dep't 1997), a one paragraph decision, involved a prejudgment asset freeze and not discovery, and in any event, did not address the separate entity rule. Any suggestion that Abuhamda reflects a general rule that a court may issue a prejudgment global asset restraint that applies to assets in a bank account located at a foreign bank branch to secure a money judgment has been put to rest by Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 548 (2000), which held that there is a "settled proscription against preliminary injunctions merely to preserve a fund for eventual execution of judgment in suits for money damages." The court in Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 240 (S.D.N.Y. 2011), improperly found – contrary to the uniform state cases and the majority and more recent federal decisions, including Shaheen – that the separate entity rule had been abrogated by Koehler in post judgment enforcement proceedings. In EM Ltd. v. Republic of Argentina, 695 F.3d 201, 208 (2d Cir. 2012), the focus of the decision was on Foreign Sovereign Immunity Act issues. The only discovery issue on appeal was raised by the debtor, Argentina, and not by any bank, and the court was not called upon to, and did not, address the separate entity rule or its impact on discovery proceedings.

used to obtain discovery of assets located abroad that are not subject to recovery here under Article 52. To the extent the case suggests that Article 52 can be used to obtain discovery about assets located abroad that are not subject to recovery here under Article 52, it is wrongly decided, for the reasons discussed below at p. 31-33. Further, the CE Int'l decision is actually consistent with Special Term's decision and the policies underlying the separate entity rule. In that case the court ultimately denied the plaintiff's motion to compel, finding that a "court should not encroach upon another nation's sovereignty by requiring citizens to take actions within their home country that would contravene that country's laws" and requiring plaintiff to resort to the Hague Convention for information located abroad. Id. at *18.

Commonwealth of Northern Mariana Islands v Canadian Imperial Bank of Commerce, 21 N.Y.3d 55 (2013), does not address the separate entity rule, does not address post-judgment discovery from non-party foreign bank branches, and does not support a conclusion that such discovery is appropriate where recovery of any assets held at such bank branches would be prohibited by the separate entity rule. Thus, the Court's conclusion that the use of the word "control" in Section 5224 rendered that provision broader than Section 5225's turnover provisions does not assist Appellant.

Moreover, the information Appellant seeks via a global subpoena should not be considered in the possession, custody or control of the New York branch served with the subpoena. Since such branches are often not linked to the computers of non-New York branches, they cannot be assumed to have the type of "practical" "control" (Northern Mariana, 21 N.Y.3d at 62) over information held at the head office or branches located outside New York that supports a discovery order. And the reality is that a New York branch of a foreign bank may well not have the practical ability to direct the production of information located in non-U.S. branches in a New York proceeding. Compare First Nat'l. City Bank of N.Y. v. IRS, 271 F.2d 616, 618 (2d Cir. 1959) (recognizing that the head office of a U.S. bank headquartered in New York had "actual, practical control" over documents at its branch in Panama) with Ings, 282 F.2d at 151-52 (distinguishing First National City Bank v. IRS and finding that there may be a "serious question as to whether the manager of a New York Agency would have the power to direct the officers of a Canadian bank to send Canadian branch bank records out of the country in violation of a prohibitory statute"); see also United States v. First Nat'l City Bank, 321 F.2d 14, 22-23 (2d Cir. 1963) (distinguishing cases like First National Bank v. IRS in which the question was whether "the main office had sufficient control over its branch to order the return of certain records for examination.") (rev'd on other grounds, 379 U.S. 378 (1965)); Zenith Elecs. LLC v. Vizio, Inc., Misc. No. M8-85,

2009 WL 3094889, at *2 (S.D.N.Y. Sept. 25, 2009) (finding lack of control where one entity did not have "demonstrated access" to other's documents in the ordinary course of business or documents did not "flow[ ] freely" between them); Linde v. Arab Bank, PLC, 262 F.R.D. 136, 141-42 (E.D.N.Y. 2009) (similar); New York ex rel. Boardman v. Nat'l R.R. Passenger Corp., 233 F.R.D. 259, 268 (N.D.N.Y. 2006) (refusing to compel production of documents of one state agency (OSC) through another state agency (DOT) where court found that "DOT does not have access or control over OSC records . . . nor the practical ability to [access] those underlying documents").

III. APPELLANT IS NOT ENTITLED TO USE ARTICLE 52 AS A GLOBAL OVERSIGHT MECHANISM

Appellant's effort to use Article 52 as a discovery and restraint mechanism ancillary to asset recovery proceedings which Appellant evidently recognizes will have to take place elsewhere is an unwarranted expansion and distortion of the purpose of Article 52. The article is focused, of course, on the recovery and application of assets to a judgment in proceedings in New York. Virtually the entire first half of the article's provisions identify the types of property subject to enforcement and exemptions from enforcement and priorities with respect to such assets, and the bulk of the remaining provisions are directed to how such assets are collected and applied to a judgment. Under Appellant's approach, all such

provisions are irrelevant, and Article 52 can be used solely to collect information about assets located elsewhere that under the existing law of New York are not subject to judgment enforcement here.

Appellant's reading of Article 52 is particularly troubling in this case, where there is absolutely no New York connection to the parties or the underlying action. Recognizing that that he will have to proceed to enforce the judgment in places where assets are located, Appellant suggests that a creditor with a judgment having nothing to do with New York seeking to enforce against a debtor with no New York presence or assets can come to New York and burden New York courts and non-parties simply so that he can eventually seek ultimate enforcement elsewhere. Where the ultimate device of a turnover is not available because it is known that no assets are in New York (and indeed, there is apparently not even contact between the judgment debtor and New York), then a creditor should not be entitled to use restraint and discovery just to reach assets held in bank branches located outside of New York. If Appellant actually has some basis to believe that the Respondent Banks have assets in some foreign jurisdiction (as, on the one hand, Appellant seems to suggest is the case (Appellant Br. at 9)), Appellant should go to that jurisdiction to seek discovery and restraint – not to a jurisdiction which has no connection to the dispute or any assets. If Appellant has no basis to believe that the Banks have assets in any particular jurisdiction (as, on the other hand,

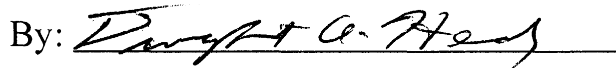
Appellant also seems to suggest (Appellant Br. at 34)), then Appellant has served the Respondent Banks with subpoenas and restraints based only on rank speculation, and its efforts should not be condoned in any event. Justice Coin correctly concluded that a creditor should not be permitted to come to New York where there is absolutely no New York connection to the dispute just to use New York enforcement devices as a "springboard" for enforcement in other jurisdictions. October 22 Opinion at 12.

CONCLUSION

For the foregoing reasons, the *amici* respectfully urge the Court to affirm Special Term's decision which refused to grant Appellant the global discovery and restraint orders he seeks.

Dated: October 3, 2013
New York, New York

WHITE & CASE LLP

By: 

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