11-3934-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GUCCI AMERICA, INC., *ET AL.*,

Plaintiffs-Appellees,

—against—

BANK OF CHINA,

Appellant,

WEIXING LI, *ET AL.*,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. AND THE INSTITUTE OF INTERNATIONAL BANKERS IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for The Clearing House Association L.L.C. ("The Clearing House") hereby certifies that The Clearing House is not a subsidiary of any other corporation. The Clearing House is a limited liability company and as such has no shareholders. Rather, each member holds a limited liability company interest in The Clearing House that is equal to each other member's interest, none of which is more than a 10% interest in The Clearing House. Further, the undersigned counsel for the Institute of International Bankers ("IIB") hereby certifies that IIB is not a subsidiary of any other corporation and that no member of IIB holds more than a 10% interest in IIB.

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The Clearing House Association L.L.C. ("The Clearing House")[1] and the Institute of International Bankers ("IIB"),[2] each an association of major commercial banks, submit this brief as *amici curiae* in the appeals filed by Bank of China (No. 11-3934-cv (the *Gucci* Action)) and by Bank of China, the Industrial and Commercial Bank of China and China Merchants Bank (No. 12-2317-cv (the *Tiffany* Action)).[3] The pending motions to dismiss challenge this Court's jurisdiction to hear the appeals because the Bank of China, the Industrial and

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[1] The Clearing House was established in 1853. It is the United States' 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 Clearing House 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. *See* The Clearing House's web page at www.theclearinghouse.org. The members of The Clearing House are Banco Santander, S.A.; Bank of America, N.A.; The Bank of New York Mellon; The Bank of Tokyo-Mitsubishi UFJ, Ltd.; Branch Banking and Trust Company; Capital One, N.A.; Citibank, N.A.; Comerica Bank; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; KeyBank, N.A.; PNC Bank, N.A.; The Royal Bank of Scotland N.V.; The Toronto-Dominion Bank; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

[2] IIB is the only national association devoted exclusively to representing and protecting the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from 35 countries around the world doing business in the United States. Appellants Bank of China and Industrial and Commercial Bank of China are members of the IIB.

[3] Though these cases have not been consolidated before this Court, the motions to dismiss filed by Appellees present substantially the same issues in each case. Accordingly, The Clearing House and IIB file a single brief as *amici curiae*. Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Local Rule 29.1(b), The Clearing House and the IIB state as follows: (1) no party's counsel authored this brief in whole or in part; (2) no party or its counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

Commercial Bank of China and China Merchants Bank (collectively, "Appellants") allegedly have no interest at stake if they comply with the orders below to freeze accounts at their offices in China. In fact, that is inaccurate – under Chinese law, Appellants have a substantial interest – their liability to their customers will not be reduced if accounts are frozen or transferred. Indeed, it is only Appellants that are placed at risk by the orders below.[4] The Clearing House and IIB appreciate the difficulties faced by leading retail merchants in dealing with counterfeit goods, but those difficulties cannot justify subversion of a fundamental principle of law – the right of an entity not to be directly and substantially harmed by a court order without an opportunity for appellate review of that order. For the reasons stated herein, The Clearing House and IIB support the position of the Appellants that this Court has jurisdiction over their appeals, and agree with them that Appellees' motion to dismiss should be denied.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Clearing House and IIB regularly appear as *amicus curiae* in cases that involve significant legal issues related to banking. The Clearing House and IIB have a substantial interest in these motions because of the negative precedent they could set for their member banks and for all international banks

[4] Appellees note that the defendants below have not appeared to oppose the injunctive relief. (*Gucci* Br. at 3; *Tiffany* Br. at 2). Of course not; defendants have nothing at risk under Chinese law – only the Appellants do.

with offices in New York. Requiring international banks to comply with orders issued by New York courts concerning accounts held abroad places an unjustifiable burden on such banks because those orders (1) potentially subject them to double liability by requiring them to turn over assets held abroad without the discharge of their obligations with respect to those assets, or (2) require the bank to violate the laws of the jurisdiction where the account or information is held, or both. Upholding the district court's orders would thereby create serious problems for international banks solely because of their New York presence and would adversely affect New York's position as a preeminent financial center.

PRELIMINARY STATEMENT

The pending motions concern whether this Court has jurisdiction to hear appeals of orders that require non-party international banks with New York offices to be accountable, without recourse, for the liability of foreign account holders accused of selling counterfeit goods in the U.S. The Clearing House and IIB submit that this Court does indeed have jurisdiction over orders, such as those under review here, that drastically and directly affect the rights and liabilities of such banks, even though those banks are not parties to the underlying actions, because they are subject to those orders.[5]

[5] No member of The Clearing House or IIB is a party to the underlying dispute, and *amici* take no position on the merits of that dispute.

This appeal concerns the plaintiffs' efforts to force non-party international banks to restrain accounts held in China,[6] such that any account obligations there can be used to satisfy a potential judgment that plaintiffs might obtain in courts located in New York, despite the fact that such restraint and payment could be in violation of Chinese law and could subject the Appellants and their employees to double liability and possible sanction. Tiffany and Gucci, both of which have a number of stores in China,[7] are free to subpoena information or attempt to restrain the accounts in China, where the Appellants can respond to lawful orders issued where the accounts are located, but Tiffany and Gucci refuse to pursue that remedy.

Further, because deposits made in a bank result in the bank having a contractual liability to the account holder for the deposited amount, the Appellants certainly have an interest in that property. *Citizens' Bank of Maryland* v. *Strumpf*, 516 U.S. 16, 21 (1995). If the accounts were in New York, the Appellant could turn over the funds and by operation of law their liability to the account holders would be decreased by the same amount. But, as the Appellants' Chinese law

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[6] The Appellants are in an awkward position in that Chinese law will not permit them even to confirm that defendants maintain such accounts (*Gucci*, Decl. of Zhipan Wu ¶¶ 23, 25 ("*Gucci* Wu Decl."); *Tiffany*, Decl. of Zhipan Wu ¶¶ 24, 26 ("*Tiffany* Wu Decl."), but *amici* assume for the purposes of this brief that such accounts do in fact exist.

[7] Gucci Store Locator, http://www.gucci.com/us/storelocator (last visited Oct. 26, 2012); Tiffany Store Locations, http://international.tiffany.com/locations/default.aspx (last visited Oct. 26, 2012).

expert explains, in cases such as these, where the foreign jurisdiction will not discharge the liability because it will not recognize the turnover order's enforceability, the Appellants may be subject to "double liability" by having to pay both the plaintiffs in satisfying the judgment and the defendants again when they attempt to withdraw the same amount of money. *See Gucci* Wu Decl. ¶¶ 13-15, 19-21; *Tiffany* Wu Decl. ¶¶ 14, 20-22. In effect, the Appellants would be liable for the account holders' conduct because they have New York branches, even though not a single allegation of wrongdoing has been made against them.

Yet, with an order in hand from a district court, which plaintiffs presumably intend to enforce on pain of sanction, plaintiffs argue against even the possibility of appellate review. To the contrary, fundamental principles of law do not allow a district court to issue an order that subjects a non-party bank to significant liability without the opportunity for meaningful appellate review.

ARGUMENT

I. The Banks Have Standing To Appeal To This Court

Although the Appellants are just bystanders to the underlying case, they are the subject of the preliminary injunctions on appeal here. As a threshold matter, non-parties such as the Appellants may appeal from a judgment by which they are bound or from a judgment affecting their interests. *Official Comm. of Unsecured Creditors of WorldCom, Inc.* v. *SEC*, 467 F.3d 73, 78 (2d Cir. 2006).

This Circuit does not require that "a nonparty prove that it has an interest affected by the judgment; stating a plausible affected interest [is] sufficient." *Id*. Two important interests of the Appellants are undeniably affected here: *First*, the Appellants are exposed to the unconstitutional risk of double liability because the account holder may still claim under Chinese law that he is owed the full amount that was in his account, even if all or part of that amount has been debited from the account to satisfy the district courts' orders. *Second*, the order to conduct worldwide searches for records and to locate and restrain funds held by account holders in China will likely require the Appellants to violate Chinese law. Each of these interests is sufficiently plausible to confer standing to appeal to this Court.

A. The Appellants Have a Plausible Interest in Not Being Subjected To the Unconstitutional Risk of Double Liability

The Appellants have a significant interest that is plausibly affected by the district courts' orders – not being subjected to double liability. In most jurisdictions, until the bank's liability to the depositor is lawfully discharged, the funds that have been deposited into the depositor's account are the property of the bank, *Strumpf*, 516 U.S. at 21 (a bank account does not consist of "money belonging to the depositor and held by the bank. In fact . . . it consists of nothing more or less than a promise to pay, from the bank to the depositor"); *In re Delaney*, 256 N.Y. 315, 319 (1931). The depositor is a creditor of the bank, and the bank is

contractually liable to the depositor for the amount of the deposit. *Bank of Marin* v. *England*, 385 U.S. 99, 101 (1966).

When the bank account of a depositor in New York is attached by a judgment creditor in New York, the bank must pay the judgment creditor, but by statute the bank's liability to the depositor is reduced by the amount of the payment. C.P.L.R. §§ 5209, 6204. Therefore, it is the judgment debtor, and not the bank, that is actually paying the judgment creditor. Because these provisions of state law do not apply extra-territorially, if the Appellants are forced to pay Gucci or Tiffany an amount payable to the depositor in China, the district courts can offer no assurances that a Chinese court would recognize the payment as discharging the bank's liability to the depositor. To the contrary, under Chinese law, the Appellants may be liable to the account holders for the amount of their deposits even if the assets are merely restrained. *See Gucci* Wu Decl. ¶¶ 13-15, 19-21; *Tiffany*, Decl. of James V. Feinerman ¶¶ 43, 50-51.[8]

After ordering restraints of assets—and eventual turnover of those assets—courts in the United States cannot provide any "assurance that [the Banks] will not be held liable again in another jurisdiction," thus exposing the Appellants to the unconstitutional risk of double liability in violation of their right to due

[8] The Wu and Feinerman declarations make clear that the Appellants are exposed to double liability regardless of who technically owns the deposit under Chinese law.

process. *W. Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961); *see also United States* v. *First Nat'l City Bank*, 379 U.S. 378 (1965). The risk of double liability is a plausible and substantially affected interest that the Appellants have in the preliminary injunction entered by the district court. *Official Comm.*, 467 F.3d at 78. That is enough to confer standing.

B. The Appellants Have A Plausible Interest In Not Potentially Violating Chinese Law

U.S. courts have long followed the tradition of avoiding, if at all possible, application of U.S. laws that are inconsistent with the laws of other nations. *See, e.g.*, *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 other nations' sovereign authority."). Therefore, "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." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 (1987); *see also United States* v. *Ross*, 302 F.2d 831, 834 (2d Cir. 1962) ("[N]o court should order the performance of an act in a foreign country when that act will violate the foreign country's laws."). This rule "is a fundamental principle[] of international comity." *Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39, 60 (2d Cir. 2004) (internal quotation omitted).

The November 3, 2011 letter from Chinese banking authorities (the "Chinese Regulators") to several district judges indicated that the Appellants' compliance with the preliminary injunctions would violate Chinese law, which imposes an "affirmative obligation" on banks to maintain customer confidentiality. (Weigel Ex. 25.) The Chinese Regulators explained that under China's Banking Law, banks are not permitted to "inquire into, freeze and deduct funds from accounts in China," unless authorized to do so by a "Chinese judicial department or government agency," which expressly excludes doing so "*pursuant to a U.S. court's order*." (*Id.* (emphasis added).) Indeed, the Chinese Regulators threatened "further investigation to evaluate the severity of the infraction and determine the appropriate sanctions" for what the Bank of China had done by complying with the preliminary injunction. (*Id.*) Stating a plausible affected interest is sufficient to confer standing, *Official Comm.*, 467 F.3d at 78, and the Chinese Regulators' letter makes it clear that the Appellants' interests are indeed plausibly affected.

II. This Appeal Has The Potential Significantly To Disrupt Foreign Banking in New York

The type of extraterritorial asset restraint imposed upon Appellants below is disruptive of banking in New York. Restraints imposed upon international banks merely as a result of their having an office in New York increase costs and risks to the banks and their customers. When faced with extra-territorial asset restraints like those sought here, banks are forced to devote

significant resources in response, merely as a price of having operations in New York. Asset restraint orders served on a New York office of a global bank may require that bank to search its entire organization to determine whether property belonging to the defendant could be found at any of its branches or affiliates anywhere in the world and take whatever steps are necessary to ensure those assets are frozen. Even in an era of computer technology and electronic records, this is likely a substantial operational burden.

Additionally, even if foreign law did not threaten double liability, customers will be reluctant to maintain accounts in international banks that have branches in New York because of the additional risk to which those customers are exposed. As a result, international banks may either lose business outside New York based on their decision to maintain a New York presence or, more likely, decide not to maintain a New York presence. This would not only harm New York's economy and status as a center of international finance and commercial activity, but also would adversely affect customers of banking services who benefit from the choice and competition fostered by the wide array of financial institutions present in New York today.

CONCLUSION

The Clearing House and IIB respectfully urge the Court to deny the motions to dismiss the appeals.

Dated: October 26, 2012
New York, New York

Respectfully submitted,

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