12-1857-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Plaintiff-Appellant,

—against—

CANADIAN IMPERIAL BANK OF COMMERCE,

Garnishee-Appellee,

WILLIAM H. MILLARD,

Defendant,

THE MILLARD FOUNDATION,

Intervenor.

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

AMICUS CURIAE BRIEF OF INSTITUTE OF INTERNATIONAL BANKERS IN SUPPORT OF GARNISHEE-APPELLEE AND IN FAVOR OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the Institute of International Bankers ("IIB") states that the IIB is not a subsidiary of any other corporation and that no member of the IIB holds more than a 10% interest in the IIB.

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STATEMENT OF INTEREST

Amicus curiae the Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing and protecting the interests of the international banking community in the United States.[1] Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions that engage in banking, securities, and other financial activities in the United States. Through its advocacy efforts, the IIB seeks results that appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. Appellee Canadian Imperial Bank of Commerce ("CIBC") is a member of the IIB.

IIB regularly appears as amicus curiae in cases that raise legal issues related to banking. IIB has a substantial interest in this action because of the adverse precedent it could set for its member banks, and for all international banks that

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the IIB states 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 IIB, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief.

have, or whose parents have, offices in New York. An order compelling CIBC's New York branch to turn over money on account of a debt owed by CIBC's separately-incorporated (and not wholly-owned) Cayman Islands subsidiary to Cayman Islands depositors (the Millard judgment debtors) would significantly and adversely affect international banks doing business in New York and their affiliates outside the jurisdiction. Such an order would render banks with an office in New York answerable for any account, anywhere in the world, held by the customer of a subsidiary, even where the local law governing the account relationship does not recognize the turnover or allow for concurrent discharge of the subsidiary's debt to the customer. Under those circumstances, a turnover order would require the garnishee bank to pay the judgment out of its own funds, an illogical and (as shown below) unconstitutional result.

The expansion of New York jurisdiction that the plaintiff seeks here would turn New York State into a magnet for the enforcement of judgments that have nothing to do with New York and a hotbed for judgment creditors attempting to circumvent the turnover procedures of the jurisdictions in which their judgment debtors' assets are located. The inevitable conflicts among banks with offices in New York, their foreign subsidiaries, the customers of those subsidiaries, and foreign courts would improperly, and needlessly, convert what otherwise would be

simple turnover proceedings, if conducted in the appropriate jurisdiction, into massive, multi-party, cross-border litigations.

Of particular concern to the IIB is that banks headquartered outside the United States, merely by virtue of their maintaining an office in New York, could be put in the untenable position of turning over funds held by non-U.S. bank subsidiaries outside the United States without assurance that the turnover will be recognized by the foreign court as extinguishing the bank subsidiary's debt to its depositor. As shown below, New York law—not the inapplicable CPLR section cited by plaintiff below, but rather the CPLR section that has been repeatedly held to apply to bank accounts—requires that the bank at which the judgment debtor's account is held must be subject to the personal jurisdiction of the New York courts and be named as the garnishee. In this way, the statutory scheme ensures that the discharge order will be effective and avoids the clear due process violation that would arise from having judgment enforcement proceedings used to transfer the burden of paying judgments from judgment debtors to innocent garnishees.

ARGUMENT

The legal issue that the appellant, Commonwealth of the Northern Mariana Islands (the "Commonwealth"), purports to raise—whether the phrase "possession or custody" in CPLR 5225(b) should also include "control" (Brief 5)—is a red herring, for two reasons. First, the notion of "possession," "custody," or even

"control" makes little sense when applied to a debt—which is what a bank account is, as the cases cited below establish—a point that the drafters of the CPLR recognized when they subjected debts to turnover under CPLR 5227, rather than as provided in CPLR 5225(b), as the Commonwealth would have it. CPLR 5227 says nothing about possession, custody, or control and instead requires that the person who owes the debt to the judgment debtor—here, First Caribbean International Bank (Cayman) ("First Cayman"), a bank that allegedly maintains accounts belonging to the Millards—be a party to the turnover proceeding, a requirement that plainly is not satisfied in this case.

Second, even if control were the standard and CPLR 5225(b) were the appropriate legal basis for seeking enforcement of the judgment, the Commonwealth purports to show only that CIBC has control over First Cayman, and then *assumes* that that control extends to control over the relevant property. CPLR 5225(b) requires proof of the latter, which does not follow from mere control over the subsidiary. Moreover, as a matter of due process, the Commonwealth's burden of showing that CIBC can turn over a Cayman Islands bank account includes a requirement of proof that Cayman law would extinguish *First Cayman's* obligation to its depositor. Without that showing, the Commonwealth could achieve only turnover of CIBC's or First Cayman's own funds, not turnover of the debt owed by First Cayman to the judgment debtor on its

deposit, which is the judgment debtors' only relevant property that could be reached under CPLR 5225(b).

I. The Commonwealth's Position Would Misapply CPLR 5225(b) to Bank Accounts and Thereby Run an Intolerable Risk of Double Liability for Garnishee Banks.

One misunderstanding that underlies the Commonwealth's effort to obtain payment from CIBC through its New York branch is the erroneous proposition that a bank account in the name of a judgment debtor is "money or other personal property" subject to garnishment under CPLR 5225(b), rather than a "debt owed" to the judgment debtor subject to CPLR 5227. The New York Court of Appeals, as shown below, has ruled that a bank account is debt owed to the depositor, *not* personal property *of* the depositor. The CPLR reflects a careful scheme that distinguishes among types of property and identifies the proper garnishee for each. Because bank accounts are debt, not personal property, they are subject to garnishment only under CPLR 5227. Importantly for this appeal, that section does not permit garnishment based on "possession or custody," let alone mere control: it requires that the person who owes money to the judgment debtor—not a parent, or a corporate affiliate, but the person who owes the money to the judgment debtor—be subject to the court's jurisdiction and a party to the proceeding. As explained in this Part I, that requirement is a crucial protection against jurisdictional overreach that could lead to improper double liability for third-party garnishees.

A. Bank Accounts Are Debts Owed to the Judgment Debtor by the Bank that Maintains the Account, Not "Money or Other Personal Property" of the Judgment Debtor.

"It is well established under New York law that the relationship between a bank and its customer for whose account funds have been deposited 'is that of debtor and creditor.'" *Middle East Banking Co. v. State St. Bank Int'l*, 821 F.2d 897, 901 (2d Cir. 1987) (quoting *Solicitor for the Affairs of His Majesty's Treasury v. Bankers Trust Co.*, 304 N.Y. 282, 291 (1952)); *see also Romero v. Sjoberg*, 5 N.Y.2d 518, 523 (1959) ("the relationship between savings bank and depositor is that of debtor and creditor"); *Geler v. Nat'l Westminster Bank USA*, 770 F. Supp. 210, 214 (S.D.N.Y. 1991) ("It is well-settled . . . that the relationship of a bank to its depositors is the contractual relation of a debtor to its creditors.").

The depositor's only interest, therefore, is a chose in action against the bank that holds the deposit. As early as 1931, the New York Court of Appeals recognized that because "the relation between a bank and its depositors is that of debtor and creditor[,] [t]he money deposited with the bank *belongs to the bank and is not the property of the depositor*." *In re Delaney*, 256 N.Y. 315, 319 (1931) (emphasis added); *see also, e.g.*, *Grain Traders, Inc. v. Citibank, N.A.*, 960 F. Supp. 784, 793 (S.D.N.Y. 1997) ("a depositor loses title to money deposited in a general account at the moment those funds are deposited") (citing *Peoples Westchester Sav. Bank v. FDIC*, 961 F.2d 327, 330, 332 (2d Cir. 1992)); *BNY Fin.*

Corp. v. Masterwear Corp., 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999) ("The bank owns the deposit, the depositor has a claim to payment against the bank, and the bank has a corresponding obligation to pay its depositor."). This is consistent with the general rule that a debt does not give the creditor an "interest" in every one—or any one—of the debtor's assets. *See State Tax Comm'n v. Blanchard Mgmt. Corp.*, 108 Misc. 2d 770, 771 (Sup. Ct. N.Y. Cnty. 1981) ("the fact that Open City was a judgment debtor of Blanchard did not give Blanchard an interest in any specific item of personal property belonging to Open City").

This rule is a basic tenet of banking law and has consequences well beyond turnover proceedings. In *Trevor's Estate*, for instance, whether a trust company held property of the decedent's estate determined whether the estate could recover under a special proceeding in Surrogate Court that (like CPLR 5225) was limited to "money or other personal property, or the proceeds or value thereof." *In re Trevor's Estate*, 309 N.Y. 389 (1955). The Court of Appeals determined that such recovery was not authorized by the relevant provisions of the Surrogate's Court Act because "[h]ere, the trust company had no specific money of the deceased in its hands. It merely owed the estate money." *Id.* at 394. Similarly, the U.S. Supreme Court's decision in *Citizens Bank of Maryland v. Strumpf* that an administrative freeze on a debtor's bank account did not violate the automatic stay in bankruptcy hinged on the conclusion that the account balance was a debt owed

by the bank, not "property of the estate." *See* 516 U.S. 16, 21 (1995) ("That view of things [that the freeze violated the automatic stay] might be arguable if a bank account consisted of money belonging to the depositor and held by the bank. In fact, however, it consists of nothing more or less than a promise to pay, from the bank to the depositor."); *see also BNY Fin.*, 229 B.R. at 310 (same). Unraveling the fundamental rule that a bank account is debt could have myriad unexpected, and undesirable, effects in other areas of the law.

Indeed, the Commonwealth's notion that cash deposited at a bank is personal property of the depositor threatens the very principle of fractional reserve banking.

> Traditionally, the business of banking has consisted of performing the intermediary role of directing funds from entities with surplus (capital surplus savers) to entities in need of funds (capital deficit borrowers), pocketing a spread along the way. Fractional reserve banking permits banks to maintain only a fraction of their depositors' funds as reserves on hand (*i.e.*, cash in vault). They can then put the nonreserved funds to productive use by lending to businesses and consumers.

R. Weber, *New Governance, Financial Regulation and Challenges to Legitimacy*, 62 ADMIN. L. REV. 783, 796 (2010). If courts were to accept the idea that currency deposited at a bank remains the "personal property" of the depositor, then banks could not lend those funds out, any more than they could sell or hypothecate a piece of jewelry left in a safe deposit box. The prudent and more consistent course

would be to follow established law on this point and hold that bank deposits are debt, not "money or other personal property."

B. CPLR 5225(b) Does Not Apply to Execution on Bank Accounts, Which Is Governed by CPLR 5227.

Allowing judgment creditors to recover bank deposits owed to the judgment debtor does not require the radical holding that cash deposited at a bank is personal property of the depositor. That is because a separate turnover statute—CPLR 5227—applies to the "[p]ayment of debts owed to [the] judgment debtor." *See JPMorgan Chase Bank, N.A. v. Motorola, Inc.*, 47 A.D.3d 293, 301-02 (1st Dep't 2007) ("Where the asset held by the garnishee is a 'debt' the garnishee owes to the judgment debtor, the statute authorizing the proceeding is CPLR 5227."). CPLR 5225—the statute invoked by the Commonwealth here—is "the wrong section" for a suit "to obtain the payment of a debt owed to the judgment debtor." *V.P. Supply Corp. v. Normand*, 27 A.D.2d 797, 797 (4th Dep't 1967).

New York courts have repeatedly held that CPLR 5227—not CPLR 5225—governs the turnover of bank accounts.[2] *See, e.g.*, *Vanderbilt Credit Corp. v. Chase Manhattan Bank, N.A.*, 100 A.D.2d 544, 545 (2d Dep't 1984) ("Since the trust

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[2] To be sure, as explained in Part C.1. below, the depositor has a right, on demand, to convert a bank deposit in a transaction account into money that would then be attachable under CPLR 5225(a). But until the depositor exercises that right, the account is simply a debt of the bank owed the depositor. Once the money is withdrawn, however, it is in the "possession or custody" of the depositor, making the depositor, not the bank, the proper respondent in a turnover proceeding. The Millards are not parties to this turnover application.

account constitutes a debt owed by the bank, CPLR 5227 . . . is the applicable statute"); *Kazanjian v. Jamaica Sav. Bank*, 105 Misc. 2d 228, 229 (Sup. Ct. N.Y. Cnty. 1980) ("It has been held that a certificate of deposit or a time deposit is a loan to a bank by a depositor for an agreed period of time at a stated rate of interest. . . . It is therefore subject to turnover pursuant to CPLR 5227."); *Michigan Assocs. v. Emigrant Sav. Bank*, 74 Misc. 2d 495, 496-97 (N.Y. Civ. Ct. Queens Cnty. 1973) ("Since this matter involves a deposit of money in a bank, which deposit constitutes a debt owing by the bank to its depositor, CPLR 5227 . . . appears to be the applicable statute.") (citation omitted).

That conclusion follows directly from the principles, noted above, that money deposited with a bank belongs to the bank and that the depositor has no property interest in the bank's assets. Under CPLR 5225(b), "[f]irst, it must be shown that the judgment debtor has an 'interest' in the property the creditor seeks to reach." *Beauvais v. Allegiance Secs., Inc.*, 942 F.2d 838, 840 (2d Cir. 1991). Thus, "a judgment creditor ([here, the Commonwealth]) cannot satisfy its claim against a judgment debtor ([the Millards]) by levying on an asset owned by a party ([First Cayman]) who owes a debt to the judgment debtor ([the Millards])." *State Tax Comm'n v. Blanchard Mgmt. Corp.*, 108 Misc. 2d 770, 772 (Sup. Ct. N.Y. Cnty. 1981). A judgment creditor of the depositor must levy on the debt owed the judgment debtor by the garnishee bank, not on unrelated assets of the garnishee:

> A creditor may satisfy his claim against a debt or property as the statute provides. He may levy on a debt owed to a defendant by another or property held by another in which a defendant has an interest. But defendant [judgment debtor] Amherst Acres, Inc. had no property interest in the mortgage held by [putative garnishee] North Forest and a creditor stands in no better position with respect to property of the garnishee than does his debtor. Appellant's only recourse, therefore, was to levy on North Forest's debt to respondent Amherst Acres, Inc.

Smith v. Amherst Acres, Inc., 43 A.D.2d 792, 792-93 (4th Dep't 1973) (citations omitted); *see also Bass v. Bass*, 140 A.D.2d 251, 253 (1st Dep't 1988) ("While petitioner may indeed stand in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own, petitioner cannot, however, reach assets [of the garnishee] in which the judgment debtor has no interest"); DAVID D. SIEGEL, NEW YORK PRACTICE § 491 (5th ed. 2011) ("If, for example, the garnishee owes a debt to the debtor, the creditor may, through appropriate devices, require payment of the debt to him instead of to the debtor. The creditor may not, however, go after any other property belonging to the garnishee.").

As shown in the following section, Sections 5225 and 5227 differ in ways that relate directly to the question of whether the issue ostensibly before this Court—whether the reference in Section 5225(b) to "possession or custody" encompasses "control" as well—is germane to this case. That question does not even arise under CPLR 5227, and rightly so, because the special scope of CPLR

5227 is necessary to avoid the risk that the turnover improperly transfers liability to the garnishee bank (or its subsidiary) by subjecting it to double liability.

C. The Commonwealth's Proposed Misapplication of CPLR 5225(b) Runs the Risk of Double Liability for Banks.

The error that the Commonwealth asks this Court to endorse threatens real disruption to New York's judgment enforcement procedures and could improperly shift costs and liability to international banks. The misapplication of CPLR 5225(b) that the Commonwealth advocates poses a grave risk that banks with a New York branch will be subjected by New York courts to double liability because of accounts at foreign affiliates that have no New York (or even United States) presence.

The only proper garnishee under CPLR 5227 is "any person who it is shown is or will become indebted to the judgment debtor." That section makes no reference to possession or custody, let alone control. CPLR 5227 says that the "court may require *such person* to pay" the debt to the judgment creditor. It is fundamental that a court cannot order a person to do anything unless the person is subject to the court's jurisdiction and served with process. Therefore, to recover a bank account under CPLR 5227, the bank at which the judgment debtor has an account—not a parent, affiliate, or some other person who supposedly "controls" the bank—must be subject to the personal jurisdiction of the court and named as the garnishee.

The unambiguous wording of CPLR 5227 is supported by compelling policy considerations. As outlined in the following sections, that statute's requirement that the person who owes money to the judgment debtor be before the court is a key protection against unconstitutionally shifting the judgment debt to the garnishee or another third party. Moreover, the vast expansion of jurisdiction that the Commonwealth's position would entail—permitting New York courts to reach assets of all members of a corporate family, where only one member is present in New York—would make New York a magnet for execution on foreign assets and would threaten to turn a manageable number of straightforward domestic turnover proceedings into a flood of multi-party, cross-border litigation. That result would burden both the courts and any party that chooses to do business in New York, with particular adverse effect on the banking industry.

1. *The Commonwealth's position risks double liability for banks whose affiliates operate in New York.*

The first policy reason not to abandon precedent and extend CPLR 5225(b) to debts is the risk that New York turnover orders directed at corporate affiliates (here, CIBC) will not extinguish the liability of non-New York banks (here, First Cayman) and that the turnover orders will thereby subject those banks to double liability. The CPLR seeks to avoid double liability by coupling turnover with discharge under CPLR 5209 and enforceable jurisdiction. CPLR 5209 provides that "[a] person who, pursuant to an execution or order . . . pays a debt he owes to

the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment." And CPLR 5227 ensures that the court has, at a minimum, personal jurisdiction over the "person who . . . is . . . indebted to the judgment debtor." *See Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A.*, 190 F.3d 16, 21 (2d Cir. 1999) ("Under § 5227, a judgment creditor seeking to collect a *debt* that is owed to the judgment debtor must proceed against the person who owes the debt: the judgment debtor's debtor."); *Trustees of 1199/SEIU Greater N.Y. Ben. Fund v. Seiger*, 2010 WL 3911474, at *7 (S.D.N.Y.) ("F.R.C.P. 69 and N.Y. C.P.L.R. § 5227 permit a judgment creditor to recover against a judgment debtor's debtor"). That rule precludes a New York court from ordering turnover of a bank account unless it can also issue an effective discharge order.

For this reason, the cases cited on pages 22 and 23 of the Commonwealth's brief, holding that CPLR 5225***(a)*** may be employed to recover bank accounts, are not relevant. CPLR 5225(a) authorizes a proceeding against the judgment debtor—not against a third-party garnishee. *Id.* ("the court shall order that the judgment debtor pay the money"); *see also Alliance Bond Fund*, 190 F.3d at 22 (noting that if a judgment debtor's contract rights are a debt, the debtor on the contract must be a party under CPLR 5227, whereas if the rights are personal property held by the judgment debtor, the proper garnishee, under CPLR 5225(a), is the judgment

debtor). The cases cited by the Commonwealth involved orders that the debtor withdraw money from his own bank account—converting a debt otherwise subject to CPLR 5227 into money subject to CPLR 5225—and turn that money over to the creditor. That procedure poses no risk for the bank, not only because the judgment debtor (and not the bank) is the party subject to the turnover proceeding, bound by the order, but also because, upon such an order, the bank merely permits a withdrawal by its depositor, which thereby discharges the bank's debt to the depositor—the bank does not pay the money over to someone else. Because CIBC is neither the accountholder nor the person who owes money to the judgment debtor, it cannot be the proper garnishee under CPLR 5225(a), 5225(b), or 5227.

Under the loose "control" test that the Commonwealth advocates, a court could compel turnover without any assurance that the jurisdiction in which the judgment debtor opened his account would enforce the discharge. Courts will not order turnover where there is a risk of double liability. *See JPMorgan Chase*, 47 A.D.3d at 301-02 (rejecting turnover because of risk of double liability and noting that "IITL is suing Motorola in India, beyond the protection of the Full Faith and Credit Clause, and . . . the 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").

Moreover, without proof that the Cayman Islands would extinguish the Millards' deposit upon the turnover of funds sought by the Commonwealth—which proof is absent from the record here—the Commonwealth cannot show—even under CPLR 5225(b)—that the account at issue is property "in which the judgment debtor has an interest." After all, if First Cayman remains indebted to its depositor, a turnover by either First Cayman or CIBC would be a taking of the bank's property, not that of the Millards. A blanket ruling that a New York court may garnish an account at a bank that is not subject to New York jurisdiction (a fact that distinguishes *Koehler v. Bank of Bermuda, Ltd.*, 12 N.Y.3d 533 (2009), where the garnishee bank conceded New York jurisdiction) would affect banks from all over the world and is an aggressive exercise of jurisdiction that foreign courts might well decline to recognize when evaluating whether to honor a New York discharge order.[3] The rule proposed by the Commonwealth not only goes

[3] Many countries recognize foreign turnovers only where the foreign (here, New York) court has *in rem* jurisdiction over the asset. *See, e.g.*, Foreign Judgment Act of 1991, Sec. 7(3)(b) (Australia) ("[T]he courts of the country of the original court are taken to have had jurisdiction . . . in the case of a judgment given . . . in an action *in rem* of which the subject matter was movable property—if the property in question was, at the time of the proceedings in the original court, 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 recognized in an Indian Court, provided that the subject matter of the action is property whether movable or immovable within the foreign country."); CHARLES PLATTO & WILLIAM G. HORTON, ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 99 (2d ed. Int'l Bar Assoc.) (same, as to Canada); *cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. c

beyond *Koehler* by ignoring corporate separateness—a further step that foreign courts may not tolerate—but also vastly expands the *number* of assets that could be subject to extra-territorial garnishment.

The U.S. Supreme Court for centuries has recognized that double liability raises concerns of a constitutional nature. As Justice Kent wrote, "[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); *see also 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."). 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." *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961). New York courts recognize the prohibition on double liability as well and have held that it is "reflected in" the CPLR's discharge provisions. *Oppenheimer v. Dresdner Bank A.G.*, 50 A.D.2d 434, 441 (2d Dep't 1975); *see also JPMorgan Chase*, 47 A.D.3d at 306-07 (requiring a bank

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(1987) ("The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor.").

to pay a debt twice over "would be 'an unconscionable result'") (quoting *id.* at 441).

2. The Commonwealth's proposed misapplication of CPLR 5225(b) could make New York a magnet for enforcement of judgments that have no connection to New York and discourage banks from operating here.

A further reason to reject the Commonwealth's atextual reading of CPLR 5225(b)—and circumvention of CPLR 5227—is that it risks turning New York into a magnet for the enforcement of judgments that have no connection to New York. This case is a worrisome example. The judgment was not issued by a New York court, nor do the judgment creditor, the judgment debtors, or the judgment debtors' bank have a presence here. Nor is the property in New York. Nor, for that matter, is the *garnishee* even a New York bank—CIBC is headquartered in Toronto and is subject to New York jurisdiction only because it has a branch here. It is undisputed that the jurisdiction in which the judgment debtors, their bank, and the account may all be found—the Cayman Islands—has procedures for enforcing judgments against assets that are located there. Permitting the Commonwealth to recover from CIBC would invite judgment creditors from all over the world to commence proceedings against any company with a New York presence that has a subsidiary or affiliate outside New York that might hold assets that the creditors assert belong to the judgment debtor. Although such an expansive reading of turnover jurisdiction could attract huge numbers of judgment creditors, that

circuitous route may be especially appealing when the jurisdiction in which the assets reside does *not* permit turnover—precisely the situation in which a garnishee is at greatest risk of double liability and a New York court's order is most likely to conflict with foreign law.

Such "unforeseen consequences" of turnover rulings are not without recent precedent. *Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 62 (2d Cir. 2009). Until 2009, under the rule in *Winter Storm Shipping, Limited v. TPI*, 310 F.3d 263 (2d Cir. 2002) (holding that maritime Rule B permitted attachment of midstream wire transfers), New York courts were flooded with attachment actions directed at wire transfers passing through New York. By 2009, "approximately one third of all cases filed in the Southern District of New York" were maritime attachments, and New York banks were served with 800-900 writs each day. *Shipping Corp. of India*, 585 F.3d at 62 (overruling *Winter Storm* and quoting *Cala Rosa Marine Co. v. Sucres et Deneres Group*, 613 F. Supp. 2d 426, 431-32 n.7 (S.D.N.Y. 2009)). The "strains on federal courts and international banks operating within our Circuit" appears to have played a significant role in the Court's decision to abandon *Winter Storm*. *Id.* at 61. This case threatens to recreate those conditions.

The expansion of attachment jurisdiction to cover worldwide subsidiaries and affiliates of any bank that has even a New York branch would also pose a

significant deterrent to banks' decisions to locate an office in New York.[4] Service of a turnover or restraining order on a New York office could require the bank to search the records of its affiliates, including those whose home jurisdictions prohibit the sharing of such information, a concern that the court below dismissed in a footnote. SA-19 n.75. Such actions would also engender cross-border litigation, as foreign judgment debtors seek to enjoin the transfer of assets to New York for execution. *See, e.g.*, *Gryphon Dom. VI, LLC v. APP Int'l Fin. Co., B.V.*, 41 A.D.3d 25 (1st Dep't 2007). That problem would be compounded if a New York court were to rely on the false assumption that a parent "controls" its independent subsidiaries even when they are subject to conflicting orders in their respective jurisdictions. Such litigation would be improperly costly to both entities and wholly unnecessary because of the availability in virtually every foreign jurisdiction of some type of turnover proceeding applicable to local assets. Finally, the prospect of turnover in New York based on judgments with no connection to the forum could discourage foreign customers from doing business with banks whose parents are subject to jurisdiction here—thus again discouraging international banks from having branches here.

[4] Indeed, though the Commonwealth identified particular accounts at First Cayman, its initial Order to Show Cause required CIBC to freeze and then turn over any accounts "in [its] possession, custody or control." A-23.

Indeed, turnover orders directed at subsidiaries will create pressure not only on non-U.S. banks, but even on some U.S. banks, not to operate in New York. Such pressure might be internal to the bank, due to increased costs and the risk of doing business, or it might flow from foreign customers who do not wish their assets to be exposed in New York. This would not only harm the State'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 today. Surely there is no policy rationale to send the message to financial institutions that having a presence in New York uniquely exposes them to double liability and third-party, cross-border disputes with which neither they nor New York have any connection.

II. General Corporate Control Does Not Equate to Control Over the Subsidiary's Debts.

Even assuming *arguendo* (and contrary to law) that bank accounts are attachable under CPLR 5225(b), and even if the Court were to read the phrase "possession or custody" to also mean mere "control," the District Court's order denying the motion for turnover should still be affirmed. That is because the Commonwealth has not even attempted to show that CIBC has "[control] *of* money or other personal property in which the judgment debtor has an interest," as CPLR 5225(b) requires. Instead, the Commonwealth argues only that CIBC has control over *First Cayman*. That, however, is irrelevant to CIBC's ability to turn over the

property in question. This is yet another respect in which the relief that the Commonwealth seeks is unprecedented and far exceeds the holding in *Koehler*—the Commonwealth seeks turnover from a court lacking both *in rem* jurisdiction over the asset and *in personam* jurisdiction over the true garnishee.

The Court's analysis should begin and end with the text of the statute. CPLR 5225(b) permits turnover only "against a person in possession or custody *of money or other personal property* in which the judgment debtor has an interest." Control as a parent, such as the ability to elect board members, is irrelevant if it does not translate into "the ability to produce the asset." *Alliance Bond Fund*, 190 F.3d at 25 (describing this as a "practical and conceptually sound requirement" in both CPLR 5225 and CPLR 5227 and holding that, if property is debt, no one other than judgment debtor's debtor has such ability). The Commonwealth has presented no evidence that CIBC has, or legally *could* have even after replacing First Cayman's directors and management, control over individual accounts at First Cayman, including the power to reduce account balances. Because the only garnishable property here is the debt allegedly owed by First Cayman to the Millards, without a showing that CIBC can erase that debt, the Commonwealth has not shown control "of . . . property" by CIBC and is not entitled to turnover under the plain text of CPLR 5225(b).

The Commonwealth's case for finding that CIBC has "control" over the Millards' accounts rests instead on CIBC's alleged influence over the management of its subsidiary. Even if that theory were factually correct, it shows at most that CIBC could direct First Cayman to turn over *money*. Even that proposition is doubtful, however, because banks in most jurisdictions are subject to safety-and-soundness regulations that restrict the transfer of funds to shareholders or parents, as well as regulations directed at liquidity that require the maintenance of minimum cash reserves. As an example, the Federal Reserve recently capped the dividends paid by certain banks—the owners of those banks may be able to replace directors, but they assuredly do not have plenary control over the disposition of the bank's assets. *See* UPI, *Fed Relaxes Restrictions on Bank Dividends* (Mar. 18, 2011), *available at* http://www.upi.com/Business_News/2011/03/18/eerestrictions-on-bank-dividends/UPI-79201300473736. Though a single account may not be large enough to imperil a bank's compliance with these rules, it would set a dangerous precedent to presume that mere ownership of a bank implies unfettered control over its assets. In addition to bank-specific regulations, this Court recognized in *EM Ltd. v. Republic of Argentina* that "[s]hareholders, even the controlling shareholder, cannot transfer or assign the corporation's properties and rights, nor apply corporate funds to personal debts or objects." 473 F.3d 463, 475

(2d Cir. 2007) (quoting 1 William Meade Fletcher, *Cyclopedia of the Law of Corporations* § 31, at 78, 84 (rev. ed. 2006)).

But even assuming *arguendo* that the Commonwealth could show, as it most certainly has not on this record, that CIBC controls First Cayman's money, that would still not establish the predicate for turnover, because that money is not property in which the Millards have an interest. As shown above, a depositor has only a claim against the bank, not a property right to specific assets. As for the *account*—the debt that the Commonwealth is trying to attach—it is a liability of First Cayman. Neither CIBC, nor, for that matter, non-party First Cayman, has any power to extinguish the claims of First Cayman's depositors, and the Commonwealth has not shown that a Cayman court faced with a New York order directed at CIBC would do so either. For that reason, neither bank has control over the account in the relevant sense. Unless the garnishee can both transfer money to the judgment creditor *and* ensure that the subsidiary's debt to the depositor is thereby extinguished, the garnishment succeeds only in turning over the garnishee's own assets, a result that neither the CPLR nor due process tolerates.

Any finding of control over an asset must take account of, among other things, foreign law that governs disposition of that asset. That is especially true where the asset is a contractual obligation between parties in another country. This issue is of immense importance to the IIB's members, whose ability to facilitate

cross-border commerce and lending depends on the willingness of national courts to recognize limits on their jurisdiction. This principle is recognized even in the discovery context, where the looser "possession, custody, or control" standard actually does apply. *See United States v. Davis*, 767 F.2d 1025, 1034-35 (2d Cir. 1985) ("because such an order may also trench upon the interests of another state, a court is required to strike a careful balance between the competing national interests and the extent to which these interests would be impinged upon by the order"). It has also sensibly been applied by courts addressing turnover, even involving branches of a single corporation. *See Shaheen Sports, Inc. v. Asia Ins. Co.*, No. 98-cv-5951 (LAP), 2012 WL 919664, at *8 (S.D.N.Y. Mar. 14, 2012) (declining to order turnover; "HBL argues that were it required to turn over Asia Insurance assets in New York, this would not discharge its obligations to Asia Insurance in Pakistan, because Pakistan's courts do not recognize judgments in U.S. courts. HBL's concern for potential inconsistent judgments and double liability is therefore very real"). Here, the Commonwealth has not shown that Cayman law permits First Cayman, let alone CIBC, to extinguish the Millards' accounts or that a Cayman court would do so in recognition of a New York court order directed at CIBC. CIBC's ability to install directors of First Cayman's parent company (SA-19 n.75) does not displace the legal constraints under which First Cayman operates and, because discharge is an essential element of "turnover" of a

debt, cannot be held to establish relevant "control" without a showing that the Cayman Islands would recognize the turnover and the discharge.

In that respect, the District Court's suggestion that "potentially conflicting laws" are simply a risk of doing business (SA-19 n.75) is deeply troubling. Though there are circumstances in which those conflicts are unavoidable, states do, and should, endeavor to respect each other's jurisdiction and laws. *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) ("Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction"). In the turnover context, foreign banking law could conflict with the CPLR only if New York courts were to order the turnover of debts that are based on bank deposits made in other jurisdictions. Especially in light of the ready availability of judicial mechanisms governing turnover of assets located in other jurisdictions, there is no reason to adopt a rule—such as that advocated by the Commonwealth—that would risk such conflicts.

Applying a corporate control test would also contravene the longstanding principle that "[t]he nature of garnishment proceedings is such that the garnishor [here, the Commonwealth] obtains no greater right against the garnishee [CIBC]

than the garnishee's creditor had." *United States v. First Nat'l City Bank*, 321 F.2d 14, 19 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 378 (1965). Here, there is no "garnishee's creditor"—the Millard judgment debtors are creditors only of CIBC's separately-incorporated subsidiary, First Cayman. However, First Cayman's creditors, such as the Millards, have no right to recover from CIBC (unless they proved a basis for piercing the corporate veil, which the Commonwealth has not attempted). Therefore, a judgment creditor of the Millards, such as the Commonwealth, steps into the Millards' shoes, and it acquires no right to proceed against CIBC. As this Court held in *First National*, "only if [the depositor] could sue [the bank] in New York to recover his deposit can the [judgment creditor], as [the depositor]'s creditor, sue in New York." 321 F.2d at 19.

Here, too, because the depositors cannot "sue [First Cayman] in New York to recover [their] deposit," neither can the Commonwealth. Familiar and unassailable principles of corporate law prohibit the creditor of a subsidiary from making a claim against a corporate parent. *See generally United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 106 (2d Cir. 2000) ("Courts must be extremely reluctant to disregard corporate form, and should do so only when the corporation *primarily* transacts the business of the dominating interest rather than its own.") (citation omitted). The Commonwealth does not, and

cannot, contend that the Millards could direct CIBC to pay over money that First Cayman holds in the Millards' names. Accordingly, the Millards cannot garnish those accounts through CIBC.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the judgment below.

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