16-1227-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALDO VERA, JR., as Personal Representative of the Estate of ALDO VERA, SR.,

Plaintiff-Appellee,

v.

THE REPUBLIC OF CUBA,

Defendant,

BANCO BILBAO VIZCAYA ARGENTARIA, S.A.,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR *AMICUS CURIAE* BANKING LAW COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION IN SUPPORT OF REVERSAL OF ORDER COMPELLING WORLDWIDE DISCOVERY AGAINST APPELLANT FOREIGN BANK WITH NEW YORK BRANCH

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALDO VERA, JR. as Personal Representative of the Estate of Aldo Vera, Sr., *Plaintiff-Appellee,* v. THE REPUBLIC OF CUBA, *Defendant,* BANCO BILBAO VIZCAYA ARGENTARIA, S.A., *Appellant.*	Docket No. 16-1227-cv

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed *amicus curiae* Banking Law Committee of the New York City Bar Association ("Banking Law Committee"), by its undersigned counsel, states:

1. The New York City Bar Association (the "Association") is organized as a non-profit corporation that has no parent, subsidiary or affiliate. No publicly held corporation owns 10% or more of its stock. The Banking Law Committee is

one of the standing committees of the Association.

Dated: New York, New York
August 9, 2016

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INTEREST OF THE *AMICUS CURIAE*

The New York City Bar Association is a private, non-profit organization of more than 24,000 members who are professionally involved in a broad range of law-related activities.[1] Founded in 1870, the Association is one of the oldest bar associations in the United States, and seeks to promote reform in the law and to improve the administration of justice at the local, state, federal and international levels through its more than 150 standing and special committees. Among its purposes are "cultivating the science of jurisprudence, promoting reforms in the law, [and] facilitating and improving the administration of justice." Article II, Constitution of the Association. The Association regularly files briefs as *amicus curiae* to address a wide range of legal issues of importance.

The Banking Law Committee is a standing committee of the Association that examines current legal issues affecting banks and bank holding companies operating in the United States and abroad, and takes positions on such issues when appropriate. The Banking Law Committee is composed of members drawn from

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus curiae*, its members, or its counsel contributed any money to fund its preparation or submission. Prior to the dismissal of the turnover proceedings below except as to appellant, counsel for *amicus curiae* represented certain of the garnishee-respondents in those proceedings.

law firms, banks and other financial institutions, state and federal banking agencies, banking organizations, and law schools (professors and students) with diverse points of view. The filing of this brief was approved by a majority of the voting members of the Committee. Several members of the Committee abstained from the preparation of this brief or the vote to file it.

During the last two sessions of the New York legislature, most recently in March of this year, the New York City Bar Association opposed legislation that would amend New York's civil practice law and rules, as well as the business corporation law and related bodies of law governing the licensing to do business in the State, that would equate applying for authorization to do business in New York with a consent to the general jurisdiction of the New York courts.[2] In its opposition, the Association expressed concern that the proposed legislation (a) raised due process concerns under the U.S. Constitution, as given expression in the opinion of the Supreme Court in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), (b) imposed "unconstitutional conditions" on the privilege to do business in New York, and (c) raised dormant Commerce Clause concerns by placing an impermissible burden on interstate commerce. In addition, in June 2014, the Banking Law Committee submitted a letter to the sponsors of the legislation in

[2] http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-legislation-regarding-consent-to-jurisdiction-by-foreign-businesses-authorized-to-do-business-in-new-york

which the Committee, in addition to expressing the due process concerns raised by *Daimler*, suggested changes to the language of the proposed legislation "to make clear that its amendments to New York law do not alter existing jurisdictional rules as applied to foreign banking organizations doing business in New York."[3]

The brief *amicus curiae* now being submitted to this Court builds on the positions previously expressed in the submissions to the New York legislature.

SUMMARY OF ARGUMENT

In its decision compelling worldwide discovery to aid enforcement of a default judgment against the Republic of Cuba, the district court incorrectly held that Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA"), by operating a branch office in New York, and by appointing a New York agent for service of process in connection with any action brought against it "arising out of any transaction with its New York . . . branch" pursuant to Section 200(3) of the New York Banking Law, had submitted to general jurisdiction in New York such that it was amenable to worldwide offshore discovery of the property of Cuba and seventy-three of its agencies or instrumentalities, even though that property was unrelated to any transaction with its New York branch.

[3] http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-on-legislation-which-would-provide-that-an-application-by-a-foreign-business-organization-to-conduct-business-in-new-york-would-constitute-consent-to-the-general-jurisdiction-of-the-courts-of-new-york-for-all-actions-against-that-organization

The district court then held that BBVA's operation of a branch office in New York was sufficient to subject it to general jurisdiction in the State, rejecting (incorrectly) the relevance of the decision in *Daimler v. Bauman*, 134 S. Ct. 746 (2014), in which the Supreme Court dismantled the concept of "doing business" as a legitimate predicate for personal jurisdiction, and held that a party defendant could be hauled into court *only* in a jurisdiction in which it was organized or maintained its principal place of business and could be said to be "at home."

Having reached the wrong result with respect to jurisdiction, the district court reached the wrong result with respect to the scope of appropriate discovery that could be ordered. At best, the district court has specific jurisdiction over non-party BBVA, which would only support discovery substantively related to contacts between BBVA, through its New York branch office, and the forum. Such narrow jurisdiction does not support worldwide discovery.

Finally, in the face of a showing by BBVA that the discovery sought would require BBVA to violate the laws of Spain, its home jurisdiction, and expose it to penalties and damages under Spanish law, the district court ordered broad discovery against BBVA that disregarded these consequences and the implications for international comity. Apparently presuming that plaintiff would be able to execute overseas, not only against the property of judgment-debtor Republic of Cuba, but also against the property of its agencies and instrumentalities by utilizing

the veil-piercing provisions of the Terrorism Risk Insurance Act of 2002 (P.L. 107-297) ("TRIA"), a remedial statute limited to execution against the "blocked assets" of Cuba and its agencies or instrumentalities, the district court ordered broad post-judgment discovery in assistance of that execution. But because BBVA is not a "person subject to U.S. jurisdiction" within the meaning of the Cuban Assets Control Regulations ("CACRs"), 31 C.F.R. § 515.329, BBVA had no obligation to block any offshore property of Cuba that could have been subject to execution under TRIA, and plaintiff would therefore never be able to execute against any such overseas "blocked assets" pursuant to TRIA. With risks to BBVA and a certain challenge to Spanish sovereign and legal interests, balanced against very little if any benefit to the plaintiff and U.S. policy, comity should have counseled the district court to reject the request for worldwide discovery.

The Banking Law Committee, as *amicus curiae*, supports BBVA's appeal from the discovery order because it submits that the district court's order cannot be squared with the plain meaning of the jurisdictional limitation imposed by Section 200(3) of the Banking Law, and that the Supreme Court's decision in *Daimler*, read in conjunction with Section 200(3) and in light of principles of comity, required denial of the plaintiff's request for worldwide discovery.

Each element of BBVA's appeal from the discovery order implicates comity considerations. Section 200(3) is a legislative expression of comity, and limits by

its terms a foreign bank's consent to service of process except with respect to its branch-related activities. The jurisdictional sea change brought about by *Daimler* was similarly driven by the Supreme Court's recognition that the Ninth Circuit had "paid little heed to the risks to international comity posed by its expansive view of general jurisdiction." The Hague Convention on the Taking of Evidence Abroad, T.I.A.S. No. 7444, 23 U.S.T. 2555, codified at 28 U.S.C. § 1781 (the "Hague Convention")—too often ignored—is a treaty-based expression of comity that seeks to ensure that international discovery does not encroach on the sovereignty of a nation where documents are located by requiring its citizens to violate local laws. Hague Convention objectives are particularly pertinent where the ultimate object of the discovery—enforcement of a judgment—can only be obtained in the courts of the sovereign whose laws are being disregarded to obtain the discovery. These principles mitigate the district court's concern that a refusal to order worldwide discovery of a foreign bank would be unfair to New York-chartered and national banks located in the state, which the court incorrectly assumed would be subject to such discovery. *Amicus curiae* respectfully submits that the failure of the court below to give proper effect to each of the comity-driven elements outlined above should lead to a reversal of the decision compelling BBVA to submit to offshore discovery, and a *vacatur* of the subpoena it purported to enforce.

ARGUMENT

POINT I.

THE DISTRICT COURT'S EXERCISE OF GENERAL JURISDICTION OVER BBVA BY ORDERING WORLDWIDE DISCOVERY IS INCONSISTENT BOTH WITH NEW YORK LAW AND THE SUPREME COURT'S DECISION IN *DAIMLER*

The district court's jurisdictional analysis in *Vera* was divorced from both New York and federal law. Neither the N.Y. Banking Law nor the Supreme Court's decision in *Daimler* permit the district court to exercise general jurisdiction over BBVA. The district court was therefore required—as the Second Circuit mandated in *Gucci America, Inc. v. Li*, 768 F.3d 122 (2d Cir. 2014)—to have considered whether it could exercise specific jurisdiction over BBVA and, if so, whether plaintiff's requested worldwide discovery was consistent with that jurisdiction and comity. Here, the analysis is straightforward and does not warrant a remand: the law is clear that there is no general jurisdiction over BBVA, so worldwide discovery is inappropriate.[4] The district court's order should therefore be reversed.

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[4] While BBVA also challenges subject matter jurisdiction on this appeal, the Association does not address that issue. *Amicus curiae* would note, however, that this appeal may lend itself to the approach outlined by the Supreme Court in *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 422 (2007), in which the Supreme Court concluded that, in the interest of judicial economy, it was not necessary for a court to "conclusively establish [its own] jurisdiction before dismissing a suit on the ground of forum non conveniens." As the Supreme Court held in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999), "[w]here . . . a
(….continued)

A. A Foreign Bank's Registration of Its New York Branch Does Not Constitute Consent to General Jurisdiction

The district court's holding that a foreign bank consents to jurisdiction sufficient to subject it to general—worldwide—discovery ignores both the plain language of the New York Banking Law and New York jurisprudence.

As a prerequisite to operating a branch office in New York, Section 200(3) of the New York Banking Law requires a foreign bank to file:

> a duly executed instrument in writing . . . appointing the superintendent and his or her successors its true and lawful attorney, upon whom all process in any action or proceeding *against it on a cause of action arising out of a transaction with its New York . . . branch or branches*, may be served with the same force and effect as if it were a domestic corporation . . . .

N.Y. Banking Law § 200(3)(a) (McKinney 2006) (emphasis supplied).

Historically—prior to the Supreme Court's decision in *Daimler*—appointment of an agent for service of process under the General Corporation Law, which required appointment of "a person upon whom process against the corporation may be served within the state," had been found to be a source of consent to jurisdiction. *See Bagdon v. Phila. & Reading Coal & Iron Co.*, 217

(continued….)

district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction."

N.Y. 432 (N.Y. 1916). In *Bagdon*, the Court of Appeals held that service of process on a registered agent gave rise to personal jurisdiction over the defendant registrant. 217 N.Y. at 438-39. The defendant, a Pennsylvania corporation, had been required to appoint an agent for service of process when it registered as a foreign corporation in New York. The New York Court of Appeals rejected the defendant's argument that the statute should be read to imply that the appointment was limited to only those actions arising out of transactions in New York. 217 N.Y. at 433, 436-37 (rejecting a subject matter limitation on jurisdiction). *See also Rockefeller Univ. v. Ligand Pharm.*, 581 F. Supp. 2d 461, 465-66 (S.D.N.Y. 2008) (collecting cases for proposition that authorization of a foreign corporation under New York's Business Corporation Law (the successor to the General Corporation Law) constituted consent to general jurisdiction).

Bagdon and its progeny are inapposite as a matter of statutory construction, however, because the language contained in Section 200(3) is limited to a cause of action against the foreign bank that arises out of a transaction with its New York branch, and the language construed in *Bagdon* was not so limited. N.Y. Banking Law § 200(3)(a); *see 7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, No. 13 Civ. 981, 2015 WL 1514539, at *11 (S.D.N.Y. Mar. 31, 2015). The N.Y. Banking Law does not call on a foreign bank like BBVA to consent to service of process where the process relates to a transaction with a branch other than the New York branch,

or is wholly unrelated to branch activities. This statute cannot thus be read as a consent to general jurisdiction, even if such a consent were not otherwise open to question. Because the consent at issue is narrow and specific, it must, under Second Circuit law, be narrowly construed. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 623 (2d Cir. 2016) (holding that, although a corporate registration statute provided for appointment of an agent for service of process, the statute did not involve a clear consent to the exercise of general jurisdiction, and giving the statute broader interpretation would offend the U.S. Constitution).

The district court's ruling also ignores this Court's guidance in *Gucci America, Inc. v. Li*, 768 F.3d 122 (2d Cir. 2014). In *Gucci*, this Court held that there was no general jurisdiction over Bank of China notwithstanding the fact that it—like BBVA here—operated a New York branch. 768 F.3d 122, 135-36; *see also Motorola Credit Corp. v. Uzan*, 132 F. Supp. 3d 518, 521 (S.D.N.Y. 2015) ("*Gucci* stands for the proposition that mere operation of a branch office in a forum—and satisfaction of any attendant licensing requirements—is not constitutionally sufficient to establish general jurisdiction."). Put another way, this Court declined to find general jurisdiction over Bank of China simply because it maintained a New York branch office. *Gucci*, 768 F.3d at 135. *See also In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262, 2016 WL 1558504, at *7 (S.D.N.Y. Apr. 15, 2016) (noting that the consent "argument flies

in the face of the plain language of the statute," and criticizing *Vera* to the extent it found differently); *Motorola*, 132 F. Supp. 3d at 521-22 (finding that neither N.Y. Banking Law nor federal law supported consent to jurisdiction); *7 W. 57th St. Realty Co., LLC*, 2015 WL 1514539, at *11 ("The plain language of [N.Y. Banking Law § 200(3)] limits any consent to personal jurisdiction by registered banks to *specific* personal jurisdiction.") (emphasis in original); *Gliklad v. Bank Hapoalim B.M.*, No. 155195/14, 2014 WL 3899209 (Sup. Ct. N.Y. Cty. Aug. 4, 2014) (rejecting plaintiff's consent argument as a misinterpretation of N.Y. Banking Law § 200(3)).

The district court below noted that the Second Circuit in *Gucci* left open the question of consent, but in so doing did not acknowledge that this Court left open *only* the narrower question of whether Bank of China might have consented to *specific* jurisdiction, not general jurisdiction. (SPA-35.) The district court did not state whether it was exercising general or specific jurisdiction over BBVA, but its holding is consistent only with a finding that BBVA had consented to general jurisdiction, and such a holding is plain error.

Indeed, before and after the Supreme Court's holding in *Daimler*, it was not at all clear that any registration statute, whether under banking or corporation law, would be sufficient to confer general jurisdiction. *Brown*, 814 F.3d at 623 (registration statute not an explicit form of consent and could not be construed

broadly because of due process); *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (Indiana registration act not sufficient to support general jurisdiction); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (mere act of registering a corporate agent for service not sufficient consent to general jurisdiction); *but see Bane v. Netlink, Inc.*, 925 F.2d 637, 639-41 (3d Cir. 1991) (finding consent to general jurisdiction on basis of registration statute that expressly provided for it); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199-200 (8th Cir. 1990) (finding, pre-*Daimler*, that appointment of agent for service of process constituted consent to jurisdiction). These decisions and similar statutes are being interpreted by federal district courts around the country in light of *Daimler* as they find there was no consent and no general jurisdiction otherwise. *U.S. Bank Nat'l Ass'n v. Bank of Am.*, No. 1:14-CV-01492, 2015 WL 5971126, at *6-7 (S.D. Ind. Oct. 14, 2015); *Hazim v. Schiel & Denver Publ'g Ltd.*, No. H-12-1286, 2015 WL 5227955, at *4 (S.D. Tex. Sept. 8, 2015), *aff'd*, No. 15-20586, 2016 WL 2609772 (5th Cir. May 15, 2016); *McCourt v. A.O. Smith Water Prods. Co.*, No. 14-221, 2015 WL 4997403, at *3-4 (D.N.J. Aug. 20, 2015) (referencing *Daimler* and rejecting applicability of *Bane* to New Jersey statute); *Beard v. SmithKline Beecham Corp.*, No. 4:15-CV-1833, 2016 WL 1746113, at *2 (E.D. Mo. May 3, 2016) (rejecting *Knowlton* in light of *Daimler* and finding that foreign corporation neither consented nor was "at home"

in Missouri); *Keely v. Pfizer Inc.*, No. 4:15CV00583, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015).

B. Mere Operation of a New York Branch Is Not Sufficient to Confer General Jurisdiction Under *Daimler*

As shown above, New York law is clear that a foreign bank does not consent to general jurisdiction in New York simply by operating a branch in the state. Thus, the district court could only obtain general jurisdiction over BBVA in accordance with the principles of general jurisdiction established by the U.S. Supreme Court in *Daimler*. Because it could not so establish, the district court's order compelling worldwide discovery should be reversed.

Daimler explained that "a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915, 919 (2011)). In establishing this "at home" standard, the Court eliminated the "doing business" standard that had previously dominated the general jurisdiction landscape, and "cast doubt on previous Supreme Court and New York Court of Appeals cases" applying that significantly more permissive standard. *Gucci*, 768 F.3d at 135 (citing *Daimler*, 134 S. Ct. at 761). After *Daimler*, corporations are

typically subject to general jurisdiction in the forum hosting either their "place of incorporation [or] principal place of business." *Daimler*, 134 S. Ct. at 760. In a "truly exceptional case," general jurisdiction may be extended beyond these two locations. *Brown*, 814 F.3d at 627 (quoting *Daimler*, 134 S. Ct. at 761 n.19).

BBVA is not incorporated in New York and does not have its principal place of business in the state. Just as in *Daimler* and *Gucci*, "the nonparty Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere." *Gucci*, 768 F.3d at 135. There are no "exceptional" circumstances to be taken into account. In short, BBVA is not "at home" in New York. With only one branch in New York (*see* Appellant Br. 43), BBVA has no greater contacts with the forum than banks did in other cases where courts held that they could not properly exercise general jurisdiction. *See, e.g.*, *Brown*, 814 F.3d at 622-23 (holding that defendant's contacts fell "well below the high level needed to place the corporation 'essentially at home'" in Connecticut when the company leased four locations and employed between approximately 30 and 70 workers in the state); *Gucci*, 768 F.3d at 135 (concluding that the district court could not properly exercise general personal jurisdiction over Bank of China where the bank had "only four branch offices in the United States"); *U.S. Bank Nat'l Ass'n*, 2015 WL 5971126, at *8 (finding that maintaining ten offices in Indiana, owning over 2,000 properties in Indiana, and holding over $1 billion in deposits in Indiana branches, among other

statistics, did not render Bank of America "essentially at home" in Indiana). In short, because BBVA is not "at home" in New York, BBVA is not subject to general jurisdiction here.

C. Without General Jurisdiction, the District Court Had No Power to Order Discovery of Documents Located Outside New York

In ordering worldwide discovery against BBVA, the district court again disregarded this Court's guidance in *Gucci*. In *Gucci*, this Court vacated a subpoena that had been issued by the district court on the basis that it had general jurisdiction over Bank of China. 768 F.3d at 141. This Court specifically signaled that the scope of discovery that could be ordered on the basis of specific jurisdiction, rather than general jurisdiction, was limited, noting that "*specific* personal jurisdiction may permit the district court to order the Bank to comply with *particular* discovery demands." *Id.* (emphasis supplied). This Court went on to note that

> the test for specific jurisdiction over defendants examines whether a cause of action arises out of or relates to the defendant's contacts with the forum. . . . At least one circuit has translated this test to nonparty discovery requests by focusing on the connection between the nonparty's contacts with the forum and the discovery order at issue.

Id. (citing *Application to Enforce Admin. Subpoenas Duces Tecum of the S.E.C. v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996), and Ryan W. Scott, Note, Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery, 88

Minn. L. Rev. 968, 1005-06 (2004)). This question is now squarely before this Court: Is worldwide discovery consistent with *Daimler*? We submit that it is not.

The district court's observation that post-judgment discovery was not at issue in *Gucci*, and that *Gucci* did not evince an intent to "depart from the norm favoring broad post-judgment discovery," does nothing to alter this result. (SPA-39.) Whether the district court had personal jurisdiction over Cuba, the judgment debtor, is irrelevant to the question of whether the district court had the requisite jurisdiction over a non-party. (SPA-40.) As the district court points out, Rule 69 of the Federal Rules of Civil Procedure governs discovery in post-judgment execution proceedings (SPA-36), but it does not stand alone. It provides for discovery "as provided in these rules" (i.e., Rule 45) or "by the procedure of the state where the court is located" (i.e., CPLR 5224). Both of these prongs require personal jurisdiction over the non-party, regardless of whether there is jurisdiction over the party. *Gucci*, 768 F.3d at 141 n.20 (collecting discovery cases requiring jurisdiction over non-parties); *Leibovitch v. Islamic Rep. of Iran*, No. 08 C 1939, 2016 WL 2977273, at *5 (N.D. Ill. May 19, 2016) ("[A] court must have personal jurisdiction to order compliance with a discovery request."); *see also Gavilanes v. Matavosian*, 123 Misc. 2d 868, 869 (Civ. Ct. Queens Cty. 1984) (question of whether non-party bank conducted business in New York was threshold question, pre-*Daimler*, in determining whether to enforce information subpoena); *Eitzen*

Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 241 (S.D.N.Y. 2011) (finding general jurisdiction over garnishee Bank of India, pre-*Daimler*, in ordering compliance with information subpoenas) (Hellerstein, D.J.).

If jurisdiction is required before discovery can be ordered of a non-party, then the nature of that jurisdiction must be taken into account when considering the scope of the discovery requested. In the context of specific jurisdiction, there must be a reasonable relationship between the discovery being sought and the nature of the contacts that give rise to the specific jurisdiction, precisely as this Court suggested in *Gucci*. In *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros.*, No. 653506/11, 2013 WL 5396923 (Sup. Ct. N.Y. Cty. Sept. 24, 2013), Standard Chartered, a judgment creditor, served information subpoenas on the debtors. Following the New York Court of Appeals' guidance in *Licci v. Lebanese Can. Bank*, 20 N.Y.3d 327, 341 (N.Y. 2012), the New York court concluded that there was no relationship between the cause of action and the debtors' transaction of business in New York. 2013 WL 5396923, at *2. It therefore quashed the information subpoenas. *Id.*

The district court was required to have engaged in a similar analysis before ordering worldwide discovery to compel compliance with the information subpoena served on BBVA. New York's jurisdiction over BBVA, as discussed above, is circumscribed on the one hand by the parameters of N.Y. Banking Law

§ 200(3), which only permits service of process "in any action or proceeding against it on a cause of action" that "arises out of a transaction with its New York [branch]," and on the other hand by BBVA's contacts with New York, which are also limited to the transactions of its New York branch. The worldwide discovery ordered by the district court is simply not enforceable, as a constitutional matter, beyond those requests that call for information about "blocked assets" and deposits held with BBVA's New York branch—information that has already been provided and is not the subject of this appeal. (SPA-29.)

These precise issues were before the district court for the Northern District of Illinois earlier this year. In *Leibovitch*, No. 08 C 1939, 2016 WL 2977273, plaintiff judgment creditor served two non-party banks with post-judgment discovery seeking information about assets of the judgment debtor in Illinois and outside Illinois. *Id.* at *2. The two non-party banks were foreign banks with registered branches in Illinois. *Id.* at *1. The court found that neither bank was subject to general jurisdiction in Illinois notwithstanding registration of an agent for service of process. *Id.* at *7-9 (rejecting plaintiff's reliance on *Vera* given the Second Circuit's subsequent decision in *Brown v. Lockheed Martin*). The court also rejected plaintiff's arguments that post-judgment discovery is permissive, noting that this principle does not address the "threshold issue of personal jurisdiction." *Id.* at *9. The *Leibovitch* court then engaged in precisely the

analysis that the *Vera* court should have conducted, and evaluated whether there was a "substantial connection" between the discovery being sought and the non-party banks' contacts with the forum state. *Id.* at *10. Because there was not, the non-party banks' motions to quash discovery were granted. *Id.* at *18.

BBVA is not a party to this suit, but it is nonetheless guaranteed due process of law. This includes the protections afforded by constitutional limitations on *in personam* jurisdiction of the federal courts. The district court ruled that the "necessary regulatory oversight into foreign entities that operate within the boundaries of the United States" trumped due process protections. (SPA-38.) However, this novel interpretation of the Fourteenth Amendment is in direct conflict with the restrictive formulation of general personal jurisdiction explained in *Daimler*. The district court cannot be permitted to disregard due process solely in an effort to provide discovery to a judgment creditor. The two—due process in the exercise of jurisdiction and the power to order discovery—are married under the law.

POINT II.

THE ORDER COMPELLING WORLDWIDE DISCOVERY CONTRAVENES PRINCIPLES OF COMITY

The district court placed a great deal of importance on what it described as a policy favoring broad post-judgment discovery, suggesting it is only limited "in that it must be calculated to assist in collecting on a judgment" (SPA-36), a

limitation which in the eyes of the district court appeared to be no limitation at all. The district court failed to recognize that the discovery requested would by and large *not* assist in collecting on a judgment, insofar as it calls for information about deposits held by a number of Cuban agencies and instrumentalities that are not judgment debtors, in addition to the Republic of Cuba, and would not be subject to execution outside the United States pursuant to TRIA. (A-219-31.) Instead, worldwide discovery would set the forum on a collision path with other sovereign nations such as Spain. In such a situation, comity required the district court to limit the scope of discovery. As described above in Point I, constitutional principles of jurisdiction provide the blueprint for such a limitation.[5]

A. The Mandated Comity Analysis Should Have Led to a Denial of the Request for Discovery

While the discovery requested will not facilitate execution on a judgment, it will create conflicts with Spanish and potentially other laws. (*See* A-366-74.) An order by the district court to compel BBVA to disclose information regarding Cuba's assets in Spain conflicts with Spanish bank secrecy laws, which prevent the

[5] In rejecting BBVA's jurisdictional arguments against worldwide discovery, the district court appeared to be motivated by a concern that any other result would be unfair to state-chartered and national banks "at home" in New York. That concern is misplaced because proper application of the principles underlying comity would also lead to denial of extremely burdensome and intrusive worldwide fishing expeditions directed against New York banks.

unauthorized sharing of customer information, protect customer assets held with a financial institution, and may preclude a U.S. branch from obtaining access to the kind of offshore records the subpoena targets. Spanish authorities have taken actions to enforce Spain's bank secrecy laws. (*See* A-368 (The Bank of Spain, Spain's central bank, issued thirty-nine decisions in 2011-12 related to breaches of bank secrecy obligations).) In light of these considerations, compelling BBVA to disclose confidential customer information in violation of local law could subject BBVA to legal consequences in both its home jurisdiction of Spain and other jurisdictions in which BBVA operates.

As this Court held in *Gucci*, courts must conduct a comity analysis when considering whether to order the production of information or documents in contravention of foreign law. *See, e.g.*, *Gucci*, 768 F.3d at 142 (in evaluating subpoena on remand, the district court was required to consider potentially conflicting laws of China in international comity analysis); *U.S. v. Davis*, 767 F.2d 1025, 1034 (2d Cir. 1985) (recognizing that a comity analysis is required in the context of a discovery order where documents at issue were kept overseas); *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972) (same); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) (deferring to Canadian courts to evaluate a non-party discovery request in light of conflicting Canadian bank privacy laws); *see also Leibovitch*, 2016 WL 2977273, at *17 (finding international

comity interests to weigh against ordering a foreign non-party bank to comply with plaintiffs' discovery requests).

A proper comity analysis would consider five factors: (1) the importance to the investigation or litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated outside the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located. *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458, 2010 WL 808639, at *2 (S.D.N.Y. Mar. 8, 2010) (citing the Restatement (Third) of Foreign Relations Law § 442(1)(c)). Courts in the Second Circuit may also consider the following two factors: (6) the hardship of compliance on the party or witness from whom discovery is sought; and (7) the good faith of the party resisting discovery. *Id.*; *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522-23 (S.D.N.Y. 1987).

In *Ayyash v. Koleilat*, 115 A.D.3d 495 (1st Dep't 2014), the highest New York court to consider the scope of post-judgment discovery applied these principles to affirm the denial of a motion to compel worldwide discovery from the New York branches of several foreign banks. In so doing, the court affirmed the

lower court's application of these principles and the related comity principles underlying the separate entity rule. Not only did the Appellate Division find that "ordering compliance raise[d] the risk of undermining important interests of other nations by potentially conflicting with their privacy laws or other regulations," *id.* at 495, but it affirmed the lower court's opinion, which stated that worldwide discovery was inappropriate because it could not lead to attachment or turnover. *Ayyash v. Koleilat*, 38 Misc. 3d 916, 926 (Sup. Ct. N.Y. Cty. 2012) ("For the Court to start down this path, knowing that the ultimate goal is unavailable in this jurisdiction, would be an unproductive waste of judicial resources."), *aff'd*, 115 A.D.3d 495. *Ayyash* compels the same result here. Not only would plaintiff be unable to execute against "blocked assets" belonging to agencies and instrumentalities of Cuba abroad (because BBVA is not required to block Cuban property offshore, as explained in Point II.B), but plaintiff would be unable to execute, through a New York court, against any Cuban assets held by BBVA branches outside the United States because of limitations on execution imposed by the Foreign Sovereign Immunities Act and by the separate entity rule. *See* 28 U.S.C. §§ 1609, 1610; *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 163 (N.Y. 2014) (on question certified by Second Circuit, concluding separate entity rule did not permit judgment creditor to restrain assets held in bank's foreign branch); *Motorola Credit Corp. v. Standard Chartered Bank*, 771

F.3d 160, 161 (2d Cir. 2014) (giving effect to N.Y. Court of Appeals ruling as a matter of federal law). This Court should reject plaintiff's "attempt[] to use the New York courts as a springboard for a massive, multi-jurisdictional exercise in supplementary proceedings, instead of simply complying with the laws of the countries in which the judgment debtor's assets are actually located." *Ayyash*, 38 Misc. 3d. at 926.

The district court's October 2013 comity analysis (A-262:17:22-264:19:14) missed the mark, especially insofar as it ignored the limits of post-judgment execution abroad, and should be disregarded in its entirety. The court concluded that the discovery was important, but as demonstrated in Point II.B the discovery cannot yield information that would lead to execution abroad pursuant to TRIA. The court also found that the requests were specific, but, again, the requests are significantly overbroad on their face, and by targeting non-judgment debtors go well beyond the boundaries of post-judgment execution. The district court also found that the United States had an interest in not allowing Cuba to "hide" assets, but ignores the fact that the U.S. interest in this regard is embodied in the applicable CACRs, which do not require BBVA to block Cuban assets *outside* the United States. There could not be, therefore, any offshore "blocked assets" against which a judgment creditor could execute pursuant to TRIA, and Cuban assets held offshore should not be viewed as "hidden."

B. The Presumption Against Extraterritoriality Supports the Mandated Comity Analysis Here

Plaintiff holds a default judgment against the Republic of Cuba. Plaintiff should be able to seek execution only in the jurisdiction where the Republic's assets are located, and only against assets of the Republic itself.[6] *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-28 (1983). Even so, plaintiff requested—and the district court improperly ordered—discovery regarding the assets located *outside* the United States of seventy-three Cuban agencies and instrumentalities in addition to judgment debtor the Republic of Cuba.

Inside the United States—and nowhere else—plaintiff has the ability to veil-pierce and execute against the "blocked assets" of any agency or instrumentality of Cuba, including any "blocked assets" held by BBVA in the United States. TRIA § 201 ("[I]n every case in which a person has obtained a judgment against a terrorist party . . . the *blocked assets* of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution . . ") (emphasis added). Significantly, the CACRs do not require BBVA (which is not a person subject to U.S. jurisdiction) to block Cuban property outside

[6] The plaintiff-judgment creditor should have sought enforcement of its judgment in Spain, and pursued in support of that effort whatever disclosure is provided for by Spanish law.

the United States. *See* 31 C.F.R. § 515.329. In ordering discovery against BBVA regarding *seventy-three* such agencies or instrumentalities, whose assets outside the United States are neither "blocked" nor subject to execution pursuant to TRIA, the district court thus ignored the strong presumption against extraterritorial application of U.S. law. *See, e.g.*, *RJR Nabisco v. Eur. Community*, 136 S. Ct. 2090, 2100 (2016) ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.").

We are aware of no other jurisdiction with sanctions against Cuba or a statute similar to TRIA. Indeed, several jurisdictions have enacted legislation to protect citizens from sanctions imposed by a third country, and some jurisdictions have made it unlawful for companies to comply with U.S. sanctions imposed on Cuba, or to enforce judgments issued under the Helms-Burton Act, a U.S. statute that specifically targets companies doing business with Cuba. The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (P.L. 104-114). In Canada, for example, the Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29, amended by S.A. 1996 c. 28 s. 7 (Can.), expressly targets judgments under the Helms-Burton Act, stating that they "shall not be recognized or enforceable in any manner in Canada." In the European Union, Council Regulation (EC) No. 2271/96, art. 1 & annex, 1996 O.J. (L. 309), is intended to protect certain persons (including, *inter alia*, any EU citizen and any legal person incorporated in the EU) from any

potential application of the CACRs and the Helms-Burton Act. In the United Kingdom, the Extraterritorial U.S. Legislation (Sanctions Against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996/3171 makes it an offense to breach certain provisions of Council Regulation No. 2271/96. Some or all of these enactments could interfere with BBVA's compliance with the sort of discovery directive issued by the district court.

There is nothing in TRIA, OFAC regulations, or other U.S. law that suggests a clear legislative intent to apply U.S. jurisdictional and discovery rules to the property of sanctioned entities held entirely outside the United States by non-U.S. persons, particularly in a context such as this where the discovery sought, purportedly in aid of execution of property held overseas, would contravene foreign law. In the absence of such legislative intent, the presumption against extraterritorial application of U.S. law underscores the incorrectness of the district court's discovery order. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *Morrison v. Nat'l Austr. Bank Ltd.*, 561 U.S. 247, 265 (2010).

C. Any Discovery Should Proceed Pursuant to the Hague Convention on the Taking of Evidence Abroad

In applying its comity analysis, the district court found "[t]here are no alternative means of which we are aware to secure the information." (A-263:18:2-3). As this Court recognized in *Gucci*, the court must evaluate whether "alternative

means of securing the information" being sought are available. *Gucci*, 768 F.3d at 139 n.18 (quoting Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c)). Those means are available here. New York courts have stated that "[w]hen discovery is sought from a non-party in a foreign jurisdiction, application of the Hague Convention . . . , which encompasses principles of international comity, is virtually compulsory." *In re Estate of Augusta*, 171 A.D.2d 595, 595 (1st Dep't 1991) (quoting *Orlich v. Helm Bros.*, 160 A.D.2d 135, 143 (1st Dep't 1990)).

In *Ayyash*, which involved circumstances virtually identical to those here, a judgment creditor served *subpoenas duces tecum* on the New York branches of foreign banks, seeking information concerning accounts of the judgment debtor held in foreign countries. *Ayyash*, 38 Misc. 3d at 923-24. The court held that

> a nearly mandatory rule of comity has developed where, as here, a plaintiff seeks information from a non-party located in a foreign country. Principles of comity require that plaintiff seek that information through that country's discovery processes or through the Hague Convention.

Id. at 926. Taking into account foreign bank secrecy laws (including Spanish laws), the *Ayyash* court refused to "encroach upon another nation's sovereignty by requiring citizens to take actions within their home country that would contravene their home country's laws," leaving the Hague Convention or other local proceedings as the "sole mechanism" for discovery. *Id.* at 927.

Indeed, *Daimler* gives great impetus to the importance of using the Hague Convention when the laws of the corporation's home jurisdiction conflict with U.S. laws. Pursuing discovery requests through an international treaty like the Hague Convention will give effect to the Supreme Court's approach to personal jurisdiction because it ensures that a U.S. court will not encroach on the laws of the country where the foreign corporation is actually "at home."

CONCLUSION

For the foregoing reasons, the Banking Law Committee, as *amicus curiae*, respectfully submits that the worldwide discovery order entered against BBVA by the district court below should be reversed.

Dated: New York, New York
August 9, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,981 words, excluding the sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and footnotes.

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