20-602

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NIKE, INC., CONVERSE INC.,

Plaintiffs,

NEXT INVESTMENTS, LLC,

Interested Party Appellant,

—against—

BANK OF CHINA, AGRICULTURAL BANK OF CHINA, BANK OF COMMUNICATIONS, CHINA CONSTRUCTION BANK, CHINA MERCHANTS BANK, INDUSTRIAL AND COMMERCIAL BANK OF CHINA LIMITED,

Appellees,

(*Caption continued on inside cover*)

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 APPELLEES AND AFFIRMANCE

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Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed *amicus curiae* the Banking Law Committee of the New York City Bar Association ("Banking Law Committee"), by its undersigned counsel, states that the New York City Bar Association (the "City Bar") is organized as a nonprofit 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 City Bar's standing committees.

Dated: September 3, 2020

Respectfully submitted,

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The New York City Bar Association ("City Bar") is a voluntary association of more than 25,000 lawyers and law students who are professionally involved in a broad range of law-related activities. The City Bar's mission is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. Founded in 1870, the City Bar is one of the oldest bar associations in the United States. The City Bar 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. The City Bar regularly files briefs as *amicus curiae* in state and federal court to address a wide range of legal issues of importance.[1]

The Banking Law Committee is a standing committee of the City Bar that examines current legal issues affecting banks, bank holding companies, and other financial institutions operating in the United States and abroad, and that takes positions on such issues when its members agree it is important to do so. The

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2) & (4)(E) and Local Rule 29.1(b), *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; no person other than *amicus curiae*, its members, or its counsel contributed any money that was intended to fund the preparation or submission of the brief; and all parties to this appeal have consented to the filing of this brief.

Banking Law Committee is composed of members drawn from law firms, banks, state and federal bank regulatory agencies, and other financial institutions and organizations, and they approach the law from unique perspectives. The voting members of the Banking Law Committee unanimously approved this brief, with two members abstaining.

The Banking Law Committee previously submitted a brief as *amicus curiae* in support of New York's separate entity rule before the New York Court of Appeals in *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014), the seminal 2014 decision reaffirming the vitality of the separate entity rule under New York law, which preceded this Court's adoption of the rule in *Motorola Credit Corp. v. Standard Chartered Bank*, 771 F.3d 160, 161 (2d Cir. 2014).

SUMMARY OF ARGUMENT

New York's separate entity rule provides that even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for certain purposes, including pre-judgment attachments and post-judgment restraining notices and turnover orders. Under the separate entity rule, if a bank's New York branch is served with a valid restraining notice or turnover order, the bank is required to freeze assets in the New York branch, but is not required to freeze assets in other branches, including those located outside the United States.

New York state and federal courts have consistently upheld the separate entity rule for over a century, and the rule has played a vital role in shaping New York's status as the world's premier financial center, encouraging foreign banks to do business here by alleviating the risk that by doing so they might subject themselves to the extraterritorial application of U.S. law at all of their branches across the world. Courts have consistently upheld the separate entity rule both because its abolition would endanger the vibrancy and prosperity of New York, and because it is supported by numerous compelling rationales, including comity for international and state law, the need to guard against double liability, and the potentially enormous burdens on both banks and our court system associated with worldwide asset searches and post-judgment enforcement.

At its core, this appeal is about whether judgment assignee Next Investments, LLC ("Next Investments") may execute a money judgment against assets in bank branches located outside the United States. Under the Federal Rules of Civil Procedure, the enforcement of a money judgment is governed by Rule 69,[2] which states that the procedure for executing a money judgment "must accord with the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1). Because this case was brought in the Southern District of New York, the court

[2] All references herein to named "Rules" refer to the Federal Rules of Civil Procedure, unless otherwise stated.

applies the procedure of the state of New York. As recently confirmed by the New York Court of Appeals in *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014), New York's procedures for executing money judgments under CPLR § 5222 incorporate the separate entity rule. The separate entity rule therefore clearly applies in this case. This Court should affirm the district court's ruling that, under the separate entity rule, the Banks[3] cannot be held in contempt for their failure to restrain assets held in foreign bank branches.

ARGUMENT

I. THE SEPARATE ENTITY RULE IS VITAL TO MAINTAINING NEW YORK'S STATUS AS THE WORLD'S PREMIER FINANCIAL CENTER.

A. New York is one of the world's leading centers for banking and finance.

New York is currently the world's most important financial center and the world's leading center for banking. Z/Yen Grp. Ltd., *The Global Financial Centres Index 26* (2019), at 4, 37, *available at* https://www.longfinance.net/media/documents/GFCI_26_Report_2019.09.19_v1.4.pdf. For this reason, any bank that wants to be seen as a truly "global" bank must, generally speaking, maintain a branch in New York.

And just as New York powers the global financial system, the global financial system powers New York. Finance and banking generate about 30% of

[3] "The Banks" refers to appellees Bank of China, Agricultural Bank of China, Bank of Communications Limited, China Construction Bank, China Merchants Bank, and Industrial and Commercial Bank of China Limited.

the earnings of workers in New York City—or $3 out of every $10—and account for 28.5% of GDP for the state of New York as a whole. James Orr, *How Important is the Finance Sector to the New York City Economy*, Econ. Studies Grp. (June 9, 2017), https://esg.gc.cuny.edu/2017/06/09/how-important-is-the-finance-sector-to-the-new-york-city-economy/; *2019 Financial Condition Report: Economic and Demographic Trends*, N.Y. State Comptroller, https://www.osc.state.ny.us/reports/finance/2019-fcr/economic-and-demographic-trends (last visited June 28, 2020). More than 330,000 New Yorkers work in finance, leading New York City's government to boast that New York is the home of the "deepest capital pools" and "the finest international talent" in the global financial services industry. City of New York, *Finance Industry*, https://www1.nyc.gov/site/internationalbusiness/industries/finance-industry.page (last visited June 28, 2020).

But New York's preeminence in banking and finance is not a foregone conclusion. New York faces stiff competition from other leading financial centers, including London, Hong Kong, and Singapore. And one of the primary ways financial centers compete with each other is their legal and regulatory environment. According to a survey of hundreds of finance industry CEOs and leaders, "a fair and predictable legal environment was the second most important criterion determining a financial center's competitiveness," second only to the availability of talent. Michael R. Bloomberg & Charles E. Schumer,

Sustaining New York's and the US' Global Financial Services Leadership 16 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf. In recent years, "the increasing extraterritorial reach of US law and the unpredictable nature of the legal system" have become "significant factors that caused New York to be viewed negatively," potentially driving business away from New York to competitors such as London. *Id.* at 16, 73.

B. New York state and federal courts have applied the separate entity rule for over a hundred years, encouraging foreign banks to do business in New York, and strengthening our city's prosperity and vibrancy.

New York's longstanding separate entity rule is one reason why New York has ascended to the world's top financial perch, and why many foreign banks have opened branches here. The separate entity rule has long been a key feature of New York's bank regulatory landscape: as the New York Court of Appeals recently explained, the rule "has been a part of the common law of New York for nearly a century." *Motorola,* 24 N.Y.3d at 162.

The separate entity rule dates back to the First Department's 1916 decision in *Chrzanowska v. Corn Exch. Bank*, 173 A.D. 285, 291 (1st Dep't 1916), *aff'd without op.*, 225 N.Y. 728 (1919), and it was first applied to post-judgment asset restraints on foreign bank branches as early as 1943, *see Walsh v. Bustos*, 46 N.Y.S.2d 240, 241 (City Ct., N.Y. Cty. 1943). It has since been repeatedly reaffirmed in both state and federal court decisions, including those of this Circuit.

See, e.g., *United States v. First Nat'l City Bank*, 321 F.2d 14, 21-22 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 378 (1965); *Fidelity v. Philippine Export & Foreign Loan Guar. Corp.*, 921 F. Supp. 1113, 1120-21 (S.D.N.Y. 1996); *Nat'l Union Fire Ins. Co. v. Advanced Emp't Concepts, Inc.*, 703 N.Y.S.2d 3, 4 (1st Dep't 2000); *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (Sup. Ct., N.Y. Cty. 1950). These decisions have recognized a range of different policies underlying the rule (as discussed in more detail below), including comity for state and international law, protection against double liability, and preventing the significant burdens imposed by global asset searches.

"Undoubtedly, international banks have considered the doctrine's benefits when deciding to open branches in New York, which in turn has played a role in shaping New York's 'status as the preeminent commercial and financial nerve center of the Nation and the world.'" *Motorola*, 24 N.Y.3d at 162 (quoting *Ehrlich-Bober & Co. v. Univ. of Hous.*, 49 N.Y.2d 574, 581 (1980)). The separate entity rule has thus played an important role in strengthening New York's prosperity and vibrancy.

C. In 2014, the New York Court of Appeals' decision in *Motorola v. Standard Chartered Bank* settled once and for all that the separate entity rule is the law of the state of New York.

Despite having been widely recognized by lower courts for decades, the New York Court of Appeals did not definitively weigh in on the rule until

2014, when it reaffirmed the continuing vitality of the separate entity rule under New York law after receiving a certified question from this Court in *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014).

Motorola was instrumental in clearing up confusion caused by two earlier decisions, *Digitrex, Inc. v. Johnson*, 491 F. Supp. 66 (S.D.N.Y. 1980), and *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009). In *Digitrex*, Judge Knapp questioned whether computerized banking rendered the separate entity rule unnecessary, ultimately ruling that service of a restraining notice on New York bank Manufacturers Hanover's main office was "sufficient and legally effective" to restrain assets in the bank's other branches located in New York. *See* 491 F. Supp. at 69. "[C]ourts subsequently limited the so-called *Digitrex* exception to cases where (1) the restraining notice is served on the bank's main office; (2) the bank's main office and branches are within the same jurisdiction; and (3) the bank branches are connected to the main office by high-speed computers and are under the centralized control of the main office." *Motorola*, 24 N.Y.3d at 162 n.6. Nevertheless, critics of the separate entity rule continued to cite *Digitrex* in arguing that the rule had become obsolete in the digital age. *See id.* at 167-68 (Abdus-Salaam, J., dissenting).

Further confusion ensued with *Koehler*, in which the New York Court of Appeals held that "a court sitting in New York may order a bank over which it

has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to [New York Civil Practice Law and Rules ("CPLR")] article 52, when those stock certificates are located outside New York." 12 N.Y.3d at 536. Although *Koehler* did not explicitly address the separate entity rule, some concluded that the decision implicitly abrogated the rule by implying that CPLR article 52—which governs New York's procedures for enforcing money judgments—applies extraterritorially. *See, e.g.*, *Motorola*, 24 N.Y.3d at 171 (Abdus-Salaam, J., dissenting); *Tiffany (NJ) LLC v. Dong*, No. 11 Civ. 2183, 2013 U.S. Dist. LEXIS 114986, at *33-35 (S.D.N.Y. Aug. 9, 2013) ("There is a split of authority as to whether *Koehler* abrogates the separate entity rule when a judgment creditor seeks to compel a garnishee in New York to turn over assets of the judgment debtor outside New York's territorial boundaries.").

The New York Court of Appeals' decision in *Motorola* put an end to this confusion and reaffirmed the continuing vitality of the rule. In *Motorola*, plaintiff Motorola brought a fraud suit in the U.S. District Court for the Southern District of New York against several members of the Uzan family, who are from Turkey. 24 N.Y.3d at 156. Ultimately, the court awarded Motorola $1 billion in punitive damages, but the Uzans successfully stymied Motorola's attempts to collect on the judgment. *Id.* After finding the Uzans in contempt, the court

entered a restraining order pursuant to Federal Rules of Civil Procedure 65 and 69 and CPLR § 5222 prohibiting the Uzans and anyone with notice of the order from selling, assigning, or transferring the Uzans' property. *Id.* at 156-57. Motorola served this order on the New York branch of U.K.-based bank Standard Chartered. *Id.* at 157. The bank conducted a global asset search that failed to discover any Uzan assets in its New York branch but roughly $30 million in its United Arab Emirates ("U.A.E.") branches, which Standard Chartered duly froze in accordance with the restraining order. *Id.* But the asset freeze prompted retaliatory action from the central bank of the U.A.E., which debited $30 million from Standard Chartered's central bank account, as well as the central bank of Jordan, which sent a bank examiner to seize documents at Standard Chartered's Jordan branch. *Id.*

Facing the prospect of double liability under U.S. and U.A.E. law as well as repercussions in Jordan, Standard Chartered sought relief from the restraining order, arguing that under New York's separate entity rule it was not obligated to freeze funds outside its New York branch. *Id.* Motorola opposed, arguing that *Koehler* had abrogated the separate entity rule. *Id.* After the district court agreed with Standard Chartered, Motorola appealed to the Second Circuit, which in turn certified the following question to the New York Court of Appeals: "[W]hether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in

foreign branches of the bank." *Id.* at 157-58 (quoting *Tire Eng'g & Distrib., LLC v. Bank of China*, 740 F.3d 108, 118 (2d Cir. 2014)).

The Court of Appeals answered in the affirmative. *Id.* at 163. The court began by explaining that "[t]he separate entity rule, as it has been employed by lower New York courts and federal courts applying New York law, provides that even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for certain purposes, particularly with respect to CPLR article 62 prejudgment attachments and article 52 postjudgment restraining notices and turnover orders." *Id.* at 158 (citations omitted). In other words, a pre-judgment attachment, a post-judgment restraining notice, or a post-judgment turnover order "served on a New York branch will be effective for assets held in accounts at that branch but will have no impact on assets in other branches," regardless of whether the issuing court has personal jurisdiction (whether specific or general) over the bank. *Id.* at 158-59.

In reaching its decision upholding the application of the rule, the Court of Appeals emphasized the rule's long pedigree under New York's common law, and explained that the rule was underpinned by three compelling rationales: (1) international comity; (2) the need to protect banks from double liability; and (3) the "intolerable burden" that banks would face if they were required to monitor and ascertain the status of bank accounts in numerous branches outside New York.

Id. at 159. The Court rejected Motorola's invitation to cast aside the rule because "the underlying reasons that led to the adoption of the separate entity rule still ring true today" and the "abolition of the separate entity rule would result in serious consequences in the realm of international banking to the detriment of New York's preeminence in global financial affairs." *Id.* at 162-63.

Importantly, the Court of Appeals also expressly rejected the argument that *Koehler* abrogated the rule, explaining that the foreign bank in *Koehler* had not raised the issue, giving the court no occasion to address it. Further, and in any event, the separate entity rule did not apply on the facts of *Koehler* because that case "involved neither bank branches nor assets held in bank accounts." *Id.* at 161.

For all these reasons, the Court of Appeals concluded that "a judgment creditor's service of a restraining notice on a garnishee bank's New York branch is ineffective under the separate entity rule to freeze assets held in the bank's foreign branches." *Id.* at 163. *Motorola* therefore removed all doubt as to the continuing viability of the separate entity rule.

D. Following *Motorola*, the Second Circuit recognized the separate entity rule applies to post-judgment asset restraints used to enforce a money judgment.

Following the Court of Appeals' decision in *Motorola*, the Second Circuit held that "the district court correctly concluded that the separate entity rule

precludes the restraint of assets held in Standard Chartered Bank's foreign branches." *Motorola Credit Corp. v. Standard Chartered Bank*, 771 F.3d 160, 161 (2d Cir. 2014) (per curiam). And in instructing the district court to unconditionally "vacate the restraining order on defendants' assets," *id.*, this Court made clear that a district court's inherent authority to issue injunctions under Rule 65 does not trump the limitations the separate entity rule imposes on post-judgment asset restraints used to enforce a money judgment. This Circuit therefore adopted the separate entity rule, as applied to the enforcement of money judgments in New York federal district courts.

E. A decision undermining the continued vitality of the rule would endanger New York's preeminence in international banking as well as the economy of New York as a whole.

Motorola assured foreign banks that the separate entity rule will continue to be applied by state and federal courts in New York, encouraging those banks to do business here and alleviating their fears that by doing so they could be subject to the extraterritorial application of U.S. law at all of their branches across the world. Any decision undermining the continued vitality of the rule—such as a reversal here—would endanger New York's status as the world's premier location for banking and finance and the economy of New York as a whole, as this Circuit has previously recognized. *See Tire Eng'g*, 740 F.3d at 117 ("A decision that branches of a bank anywhere in the world are subject to post-judgment

enforcement orders if that bank maintains a New York branch could potentially affect decisions of international banks to maintain New York branches.”).

II. COURTS HAVE CONSISTENTLY UPHELD THE SEPARATE ENTITY RULE FOR OVER A CENTURY BECAUSE IT IS SUPPORTED BY NUMEROUS COMPELLING RATIONALES.

Courts in both the United States and other common law nations have repeatedly upheld the separate entity rule because it is supported by several compelling rationales, including international comity, respect for state law, the need to guard against double liability, and the potentially enormous burdens on both banks and our court system associated with worldwide asset searches and post-judgment enforcement.

A. The separate entity rule promotes comity.

Courts have repeatedly upheld the separate entity rule because it promotes comity both for the laws of other sovereign nations and for the law of the state of New York.

1. The separate entity rule promotes international comity.

The separate entity rule promotes comity for the laws of a foreign bank’s home country as well as all other countries in which it operates branches. “Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). As the Supreme Court explained 125 years ago:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163 (1895). Under principles of international comity, "any exercise of jurisdiction to prescribe and enforce sanctions based on the effects of foreign activity in a domestic court requires the court to balance the interests it seeks to protect against the interests of any other sovereign that might exercise authority over the same conduct." *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 76 (3d Cir. 1994).

The separate entity rule is widely recognized as an expression of comity for the laws of other sovereign nations in which banks operate. *See generally* Geoffrey Sant, *The Rejection of the Separate Entity Rule Validates the Separate Entity Rule*, 65 SMU L. Rev. 813, 819-25, 835-38 (2012). And for many years, courts have recognized that the rule assures international comity by promoting harmony, uniformity, and reciprocity between the United States and other nations.

a. The rule promotes harmony.

The separate entity rule promotes harmony by ensuring that the restraint of assets in foreign bank branches is conducted pursuant to the procedures

and laws enacted by the country in which they are located and by the international treaties that country has signed—not potentially conflicting and extraterritorially applied U.S. law.

This Court has long recognized that "complications . . . arise out of the fact that different branches may be subject to the laws of other countries." *First Nat'l City*, 321 F.2d at 22; *see also Tire Eng'g*, 740 F.3d at 116 ("[I]nternational banks are subject to the competing laws of multiple jurisdictions, and turnover or restraining orders by New York courts may cause conflicts with the regulations, laws, and policies of other sovereign jurisdictions."). In particular, the laws of many foreign nations prohibit banks from restraining customer accounts under certain circumstances. For instance, as relevant here, Chinese law prohibits banks from restraining customer funds at bank branches in China under certain circumstances absent a formal instruction from a competent organ of the Chinese government.

The separate entity rule "serves to avoid conflicts among competing legal systems," *Motorola*, 24 N.Y.3d at 162, by preventing the "encroach[ment] upon another nation's sovereignty" caused by requiring foreign banks "to take actions within their home country that would contravene their home country's laws," *Ayyash v. Koleilat*, 957 N.Y.S.2d 574, 582 (Sup. Ct., N.Y. Cty. 2012), *aff'd*, 981 N.Y.S.2d 536 (1st Dep't 2014). The separate entity rule promotes harmony by

ensuring that only one set of laws governs the restraint of assets held in a foreign bank branch: the laws of the country where the branch is located.

b. The rule promotes uniformity.

The separate entity rule also promotes uniformity among the legal systems of common law nations and between the United States and the European Union ("EU").

In England, the rule has been the law in lower courts for nearly a hundred years, and it was recently adopted by the House of Lords. *Societe Eram Shipping Co. v. Hong Kong & Shanghai Banking Corp.* [2003] UKHL 30 ¶ 57 (appeal taken from Eng.); *Richardson v. Richardson*, [1927] Prob. 228, All Eng. 92; *N. Joachimson v. Swiss Bank Corp.*, [1921] 3 KB 110 (Ct. App.). The rule is also applied by Scottish courts, as well as in New Zealand and Hong Kong. *Stewart v. Royal Bank of Scotland plc*, (1994) S.L.T. (Sh. Ct.) 27 (Scot.); *Ludgater Holdings Ltd. v. Gerling Aus. Ins. Co. Pty Ltd* [2010] NZSC 49; *Nanus Asia Co. v. Standard Chartered Bank*, [1988] HKC 377 (H.K.). The rule therefore promotes uniformity among the legal systems of common law nations.

Additionally, the European Union gives effect to the rule through the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Dec. 21, 2007, 2007 O.J. (L339) (the "Lugano Convention"). Specifically, the European Court of Justice ("ECJ") has interpreted

Article 16(5) of the Lugano Convention to apply the separate entity rule with respect to the garnishment of or execution against accounts held with bank branches in other member states. *See AS-Autoteile Service GmbH v. Pierre Malhe* (Case 220/840) [1985] ECR 2267, 2271 ("[T]he enforcement of judgments are matters which, because of their particular difficulty or complexity, require that the court having jurisdiction should be particularly familiar with the relevant national law."); *Denilauler v. SNC Couchet Freres* (Case 125/79) [1980] ECR 01553, 1570 ("The courts of the place or, in any event, of the Contracting State, where the assets . . . are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought.").

The rule therefore ensures uniformity among the rules regarding the enforcement of judgments applied by courts in the leading—and competing—financial centers of New York, London, and Hong Kong.

c. The rule promotes reciprocity.

The separate entity rule also promotes reciprocity. This is a straightforward and common-sense principle: those jurisdictions that respect the laws of other jurisdictions are likely to receive such respect in return. Likewise, failing to extend comity could encourage the retaliatory foreign treatment of judgments by courts in this Circuit.

Consider, as one example, the jurisdiction in which the bank branches and assets at issue in this appeal are located: the People's Republic of China. Article 281 of China's Civil Procedure Law allows a party to apply to an Intermediate People's Court for the ratification and enforcement of a foreign judgment, and article 282 provides that Chinese courts may recognize and enforce foreign judgments if required by (a) a treaty or (b) the principle of reciprocity.[4] However, because the U.S. and China have not signed a treaty governing the recognition and enforcement of each other's judgments, Chinese courts' recognition of U.S. court judgments depends entirely on reciprocity and good will.

Recently, there have been positive developments with respect to reciprocal relations between the Chinese and U.S. legal systems. For instance, in 2009, the U.S. District Court for the Central District of California enforced a substantial money judgment awarded by the Higher People's Court of Hubei Province against a California-based aircraft manufacturer in a decision later affirmed by the U.S. Court of Appeals for the Ninth Circuit. *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-CV-01798-FMCSSX, 2009 WL 2190187, at *7 (C.D. Cal. July 22, 2009), *aff'd*, 425 F. App'x 580 (9th Cir. 2011). And on June 30, 2017, the Wuhan Intermediate People's Court in

[4] Additionally, to recognize a foreign judgment, the Intermediate People's Court must also determine that doing so does not violate the basic principles of the laws of the People's Republic of China, or the sovereignty, security, or public interest of the Chinese state.

China issued a decision recognizing and enforcing a civil money judgment issued by a California state court based on principles of reciprocity between the United States and China.[5] Commentators have noted that this decision "reinforce[s] China's recent efforts to implement a change in Chinese law on the recognition and enforcement of foreign judgments more widely." Richard Keady & Aline Mooney, *Recognition and Enforcement of Foreign Judgments in China*, Bird & Bird (July 2018), https://www.twobirds.com/en/news/articles/2018/hong-kong/recognition-and-enforcement-of-foreign-judgments-in-china. Failing to recognize the separate entity rule here could potentially damage the spirit of reciprocity that has been building between the United States and China.

Imagine, if you will, that a Chinese court with jurisdiction over an American bank's Chinese branch is asked to freeze assets in the bank's U.S. branches. If American courts do not provide comity to Chinese courts—for example, by failing to uphold the separate entity rule and insisting that U.S. asset freezes apply to assets held in bank branches in China—why then would a Chinese court refrain from insisting that *its* asset freezes apply on American soil? The separate entity rule prevents such retaliation and potential conflicts between legal

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[5] *See* Craig I. Celniker, Timothy W. Blakely & Sarah Thomas, *PRC Court Recognizes a U.S. Court Judgment for First Time Based on Principle of Reciprocity*, Morrison Foerster (Sept. 11, 2017), https://www.mofo.com/resources/insights/170908-prc-court-principle-reciprocity.html.

systems by ensuring proper respect for other jurisdictions' sovereignty, thereby making it more likely that other jurisdictions will respect ours.

Additionally, the rule promotes reciprocity by ensuring that the procedure for executing a money judgment is consistent with legislative enactments and treaties premised on the reciprocal recognition and enforcement of the judgments of foreign jurisdictions, such as the Hague Judgments Convention. In fact, many other countries' legal systems already provide for such reciprocity in the form of summary proceedings that allow for the creation of an enforceable domestic judgment based an existing U.S. court judgment. For this reason, affirming the district court's decision as to the separate entity rule would not necessarily foreclose plaintiffs from collecting on U.S. court judgments from foreign bank branch accounts, as that is often possible under the laws and procedures of the jurisdiction in which the bank branch is located.

In sum, upholding the separate entity rule and requiring plaintiffs to avail themselves of the judgment-enforcement procedures available in foreign jurisdictions would promote reciprocity between the U.S. legal system and the legal systems of the other countries that are part of the global banking system. The separate entity rule thus helps to ensure that the law and judgments of this Circuit receive appropriate deferential treatment under foreign law.

2. The separate entity rule embodies respect for the settled law of the state of New York, as interpreted recently by the New York Court of Appeals.

The Supreme Court has instructed lower federal courts to give comity not only to international law, but also to state law. Comity for state judicial decisions ensures "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010) (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 112 (1981)). The Second Circuit has also repeatedly expressed its "preference that states determine the meaning of their own laws in the first instance," *Joseph v. Athanasopoulos*, 648 F.3d 58, 68 (2d Cir. 2011), and has noted that "[w]here a decision is to be made on the basis of state law . . . the Supreme Court has long shown a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts," *Allstate Ins. Co v. Serio*, 261 F.3d 143, 150 (2d Cir. 2001). Further, this Circuit has held that "under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts," *Wallace v. Kern*, 481 F.2d 621, 622 (2d Cir. 1973) (per curiam), such as New York's procedure for enforcing a money judgment under CPLR § 5222.

Principles of federalism and comity therefore counsel toward respecting the judgment of the New York Court of Appeals and applying the separate entity rule as required under CPLR § 5222.

B. The separate entity rule guards against the danger of double liability.

As mentioned above, the separate entity rule reflects the practical reality that a foreign bank branch is subject to the laws and regulations of the country in which it is located, and that freezing or seizing assets held in accounts at that foreign branch could potentially violate local laws (such as foreign confidentiality and deposit obligations) and subject the bank to double liability and adverse regulatory consequences. Even the earliest court decisions regarding the separate entity rule focused on the danger that a foreign bank could be subject to competing claims or conflicting judgments regarding the assets in question. *See, e.g. Chrzanowska*, 173 A.D. at 291; *Woodland v. Fear*, (1857) 119. Eng. Rep 7; E. & B. 519, 1339 (K.B.) (Eng.); *Prince v. Oriental Bank Corp.*, (1877-1878) 3 App. Cas. (P.C.) (appeal taken from Supreme Court of New South Wales) (U.K.); *E.B. Savory & Co. v. Lloyds Bank, Ltd.*, (1932) 2 K.B. 122 (C.A.) (Eng.), *aff'd*, [1933] A.C. 201 (P.C.) (U.K.). Indeed, "the separate entity rule from its inception was designed to target the concerns of banks susceptible to such multiple claims, first across branches, and more recently across borders." *Shaheen Sports, Inc. v. Asia Ins. Co.*, No. 98-CV-5951, 2012 WL 919664, at *8 (S.D.N.Y. Mar. 14, 2012).

Protecting foreign banks from the prospect of unfair double liability therefore provides a powerful and longstanding justification for the rule.

C. The separate entity rule protects banks from the impracticality and potentially enormous costs of conducting global asset searches—costs that remain of grave concern even in today's digital world.

This Circuit has recognized that even in today's digital age, "banks face practical constraints and considerable costs in determining whether a judgment debtor's property is located in any branch in the world." *Tire Eng'g*, 740 F.3d at 117. It was for this reason that in 2014 the New York Court of Appeals held that it would prove an "intolerable burden" for foreign banks with New York branches to require them to monitor and ascertain the status of the bank accounts of every federal judgment debtor in every one of their branches in every country in the world. *Motorola*, 24 N.Y.3d at 159-62. This burden will only continue to grow as data protection and privacy laws across the world continue to add to the already considerable complexities of conducting global asset searches.

Moreover, failure to recognize the separate entity rule here could cause the U.S. District Court for the Southern District of New York to become the clearinghouse of choice for disputes that bear little to no actual connection to New York, in a repeat of the scenario that ensued after the now-overruled 2002 decision in *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), *overruled by Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 60 (2d Cir.

2009). In *Winter Storm*, this Court held that electronic fund transfers (EFTs) that passed through New York are attachable property. *Id.* at 273. This decision prompted an avalanche of maritime attachment cases in which international creditors attempted to use New York courts to attach funds by virtue of EFTs through bank branches located in New York. By 2009, maritime attachment cases accounted for approximately a third of all cases in the Southern District of New York, placing a severe strain on the court. *Shipping Corp.*, 585 F.3d at 62. Eventually the situation threatened to "damage New York's standing as an international financial center" by "discourag[ing] dollar-denominated transactions" and encouraging banks to route EFTs to avoid New York. *Id.* In response, this Court overruled *Winter Storm* in 2009 with the unanimous consent of all active judges. *Id.* at 61. This Court can avoid a repeat of this type of scenario by upholding the separate entity rule.

III. BECAUSE RULE 69—NOT RULE 65—GOVERNS ATTEMPTS TO EXECUTE PURELY MONETARY JUDGMENTS AGAINST NONPARTY BANKS, NEW YORK'S SEPARATE ENTITY RULE APPLIES HERE.

At its core, this appeal is about whether an interested party can execute a judgment for Lanham Act statutory damages against assets in a nonparty foreign bank's branches outside the United States. Under Rule 69, the procedure for executing a money judgment "must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."

Fed. R. Civ. P. 69(a)(1). Here, because this case was brought in the Southern District of New York, the court applies the procedure of the state of New York. As explained above, New York's procedures for executing money judgments incorporate the separate entity rule, specifically via CPLR § 5222. *Motorola*, 24 N.Y.3d at 162-63. Accordingly, the separate entity rule applies in this case.

Appellant Next Investments argues that the district court can order the foreign banks to restrain the foreign bank branch assets at issue under Rule 65, which governs injunctions and restraining orders. But a freestanding Rule 65 injunction is not an appropriate post-judgment enforcement mechanism in a case where equitable relief is otherwise unavailable—as is the case where, as here, the judgment creditor is exclusively seeking statutory damages. *See, e.g.*, *WowWee Grp. Ltd. v. Meirly*, No. 18-CV-706, 2019 WL 1375470, at *11 (S.D.N.Y. Mar. 27, 2019) ("Because Plaintiffs have elected statutory damages . . . there is no basis to continue to maintain an asset freeze designed to facilitate an equitable recovery."); *Klipsch Grp., Inc. v. Big Box Store Ltd.*, No. 12 Civ. 6283, 2012 U.S. Dist. LEXIS 153137, at *26 (S.D.N.Y. Oct. 24, 2012) ("Because the Court has determined that statutory damages would not have been a remedy available in courts of equity, *Grupo Mexicano* therefore precludes a freeze of assets for the purpose of preserving an award of statutory damages." (citing *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999))).

Further, if this Court were to incorporate the court's inherent authority to issue equitable relief under Rule 65 into Rule 69, the result would be to render Rule 69's limitation to state enforcement procedures meaningless. *Cf. Grupo Mexicano*, 527 U.S. at 330-31 ("The remedy sought here could render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance. Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available?"); *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir.1983) (rejecting attempt to avoid Foreign Sovereign Immunities Act requirements "merely by denominating . . . restraints as injunctions against the negotiation or use of property rather than as attachments of that property" and holding that "courts in this context may not grant, by injunction, relief which they may not provide by attachment"). For this reason, courts in this Circuit have unanimously rejected this approach. *See, e.g.*, *Allstar Mktg. Grp., LLC v. 158*, No. 1:18-cv-4101-GHW, 2019 U.S. Dist. LEXIS 141913, at *4-5 (S.D.N.Y. Aug. 20, 2019) ("The Court is . . . skeptical that Rule 65 or 15 U.S.C. § 1116(a) can be used to support an injunction that blatantly circumvents the requirements of Rule 69."); *Shamrock Power Sales, LLC v. Scherer*, No. 12-CV-8959, 2016 U.S. Dist. LEXIS 144773, at *6 (S.D.N.Y. Oct. 18, 2016) ("[A] preliminary injunction under Rule 65 would be an inappropriate mechanism for seeking postjudgment relief, as the

execution of judgments is governed by Rule 69."); *Ecopetrol S.A. v. Offshore Exploration & Prod. LLC*, 172 F. Supp. 3d 691, 699 (S.D.N.Y. 2016) ("[T]he Judgment in this case is a money judgment under Rule 69 and is not an injunction enforceable through contempt."); *Tiffany (NJ) LLC v. Qi Andrew*, No. 10-cv-9471 (KPF), 2015 WL 3701602, at *12 & n.9 (S.D.N.Y. June 15, 2015) ("[T]he Court is unconvinced that a Rule 65 injunction is an appropriate vehicle for the postjudgment restraint. A plaintiff's ordinary recourse upon securing a money judgment is to look to postjudgment remedies provided by Fed. R. Civ. P. 69 and state law.").

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision recognizing the separate entity rule and holding that the Banks accordingly cannot be held in contempt for their failure to restrain assets held in foreign bank branches.

Dated: September 3, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 29.1(c) because the brief contains 6,818 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared using Microsoft Word in the proportionally spaced typeface Time New Roman, size 14 for the text and footnotes, and all case names have been italicized or underlined.

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I hereby certify that on September 3, 2020, I electronically filed a true and correct copy of the foregoing Brief of *Amicus Curiae* Banking Law Committee of the New York City Bar Association with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system and served it upon all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

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