CTQ-2014-00001

Court of Appeals
STATE OF NEW YORK

MOTOROLA CREDIT CORPORATION,

Appellant-Respondent,

—against—

STANDARD CHARTERED BANK,

Respondent-Appellant.

On Question Certified by the United States Court of Appeals for the Second Circuit (USCOA Docket Nos. 13-2535-cv(L) and 13-2639-cv(con))

BRIEF FOR AMICUS CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF RESPONDENT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of the Court of Appeals, the Securities Industry and Financial Markets Association states that it is not a corporate entity and has no parents, affiliates or subsidiaries.

The question before this Court is "whether 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."[1]

The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this proposed brief as *amicus curiae* in support of Respondent-Appellant Standard Chartered Bank to urge this Court to affirmatively answer the certified question by applying the separate entity rule, i.e., the principle that a garnishee bank (foreign or domestic) with branches in this State cannot be compelled by the courts of this State to satisfy judgments using money or assets held in non-New York branches. The purpose of this submission is to underscore key precedents requiring the retention of the separate entity rule and to reflect on the broader consequences of this case that SIFMA believes should dictate an affirmative response to the certified question.

INTEREST OF PROPOSED *AMICUS CURIAE*

SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial

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[1] *Tire Eng'g & Distribution L.L.C. v. Bank of China Ltd.*, 740 F.3d 108, 118 (2d Cir. 2014).

markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). (For more information, visit www.sifma.org.)

As discussed below, SIFMA's members include numerous international banks (both foreign and domestic) that have New York branches. They have witnessed, over the last years, growing litigation from judgment creditors – often having little connection with this State – seeking to use New York's post-judgment enforcement procedures in order to freeze and obtain turnover of assets located in non-New York branches. This particular case is but one example of such litigation, which tends to be costly and intrusive, and creates significant risks of "double liability" for the banks concerned. Hopefully, this Court can now clarify the position and reaffirm the separate entity rule.

New York's unique position in banking heightens the significance of the resolution of the question before this Court. Of the 192 branches of foreign banks in the United States, 66% are licensed by and/or located in New York.[2] Many of these branches conduct only wholesale activities in New York.

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[2] Federal Reserve Board, *Structure Data for the U.S. Offices of Foreign Banking Organizations* (Dec. 31, 2013), *available at* http://www.federalreserve.gov/releases/iba/201312/bytype.htm; *see also* Institute of International Bankers, *Regulation and Supervision of U.S. Branches and Agencies of Foreign Banks by U.S. Banking Authorities and the Treatment of Claims of their Third*

(cont'd)

Yet, without the separate entity rule, a bank that simply opens a trading desk in New York would expose all assets deposited at its other branches around the world to restraint and turnover.

Because of the obvious interest of its members in the outcome of this case, SIFMA respectfully requests that it be allowed to present its views, as *amicus curiae*, on why the separate entity rule should be preserved.

PRELIMINARY STATEMENT

This particular case involves a U.S. company, Motorola Solutions Credit Company, LLC ("Motorola" or "MCC"), trying to reach bank deposits administered in a United Arab Emirates branch of Standard Chartered Bank, a UK-licensed bank ("SCB") that also happens to have a branch in New York. The question before this Court is whether the separate entity rule precludes a judgment creditor like Motorola from seeking to force a bank like SCB to restrain, and perhaps ultimately turn over, deposits held in foreign branches, where the predicate for restraint is that the bank has a New York branch. As a matter of precedent and statutory interpretation, SCB's brief persuasively urges an affirmative answer to that question.

(cont'd from previous page)

Party Depositors in Liquidation, 2 n.2, 19 (Oct. 17, 2013), *available at* http://www.iib.org/resource/resmgr/imported/20131017BankRegOvreview_IIBfinal.pdf (citing Federal Reserve Structure Data as of March 31, 2013).

SIFMA thus submits that there is ample basis to affirm SCB's position and reject Motorola's. The courts of this State have held with virtual unanimity that the separate entity rule precludes a judgment creditor from utilizing post-judgment enforcement procedures to compel a bank with a New York branch to turn over money in non-New York bank accounts, that the Legislature had acquiesced in those rulings, and that the law on this point has long been settled. (*See* SCB Br. at 56-63.) Motorola, therefore, seeks a significant change in the law, which, if accepted, could have far-reaching negative consequences for New York's position as a banking center and for international banks whose U.S. branches are heavily concentrated in this State. Motorola's bid to overturn decades of judicial decisions should be rejected.

Banking and financial services make up a significant sector of New York's economy; 682,700 jobs in this State are in the financial industry.[3] The financial services and insurance industry accounts for roughly 15% of New York State's gross domestic product.[4] New York also holds a unique position

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[3] Office of Comptroller, *State of New York Financial Condition Report* 21 (March 31, 2013), *available at* http://www.osc.state.ny.us/finance/finreports/2013fcr.pdf.

[4] U.S. Dep't of Commerce Bureau of Economic Analysis, Gross Domestic Product by State (NAICS GDP data as of 2013) (last visited July 20, 2014), *available at* http://www.bea.gov/regional/downloadzip.cfm; *see also* Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 10 (Jan. 22, 2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

within international banking in the United States: 126 out of a total 192 branches of foreign banks in the United States are located in New York.[5] The "foreign connections" of New York banks serve a vital purpose in international transactions like international letters of credit, which are essential to today's economy. *See J. Zeevi & Sons v. Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 227 (1975).

In opening and operating bank branches in this State, the banking industry has relied upon the separate entity rule as part of the overall regulatory landscape. The rule, as it stands, avoids inconsistent decisions between the courts of this State and foreign courts – a result that not only ensures comity (a desirable end in itself), but also prevents banks from being subject to inconsistent orders of different courts, thus protecting against double liability. Indeed, once the overall policy behind the "separate entity rule" is taken into account, it is readily apparent why the Legislature has long acquiesced in the rule. If those expectations are now to be overturned, it should be done by the Legislature rather than the courts.

The likely effects of abolishing the separate entity rule are readily ascertainable. If the rule is abolished, then every bank account in the world, in whatever currency, held by an international bank with a branch in New York

[5] Federal Reserve Board, *supra* note 2.

would be subject to restraint and turnover. Because New York is a leading center for financial transactions, particularly U.S.-dollar denominated transactions (as the dollar remains a de facto "reserve currency" used by businesses and sovereigns alike), this will incentivize every judgment or award creditor in the world to come to New York in order to seek out money in the hands of the losing party, regardless of the links between the dispute and New York. New York courts already bear a heavy burden in this respect – in the last decade alone, a wide variety of foreign judgments and arbitration awards arising from business disputes have been brought to New York in an effort to pursue the losing party.[6] Abolishing the "separate entity rule" in New York would therefore ignite an explosion of new applications, likely dwarfing the courts' present caseload.

In light of the separate entity rule's longstanding precedent in New York law and the public policy considerations that support it, SIFMA urges this Court to affirm the separate entity rule's application in this case.

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[6] *See, e.g.*, *Ayyash v. Koleilat*, 38 Misc. 3d 916, 917-18 (Sup. Ct. N.Y. County 2012) (Lebanese/Saudi Arabian plaintiff sought to enforce a Lebanese criminal judgment, recognized in Maryland and domesticated in New York, against a Lebanese/Brazilian judgment debtor), *aff'd*, 115 A.D.3d 495 (2014); *Eitzen Bulk v. Bank of India*, 827 F. Supp. 2d 234, 236 (S.D.N.Y. 2011) (Danish company sought to utilize New York's judgment enforcement procedures to enforce a London arbitration award against an Indian company). It bears emphasis that many judgment enforcement applications have been filed under seal, meaning that it is difficult to measure the full extent of such applications currently before the federal and state courts located in New York.

ARGUMENT

I.
IN THE INTERESTS OF BUSINESS CERTAINTY, THE SEPARATE ENTITY RULE, A LONGSTANDING RULE OF LAW IN THIS STATE, SHOULD BE PRESERVED

A. Certainty and Stability in the Law Are Vital to the Functioning of Banks and Financial Institutions

This Court has recognized New York's role as "a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law." *J. Zeevi & Sons*, 37 N.Y.2d at 227 ("In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected."). In addition, the Legislature has passed a variety of laws designed to protect and further New York's standing as a commercial and financial center. *See IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310, 315-16 (2012) ("The goal of General Obligations Law § 5-1401 was to promote and preserve New York's status as a commercial center and to maintain predictability for the parties."); *see also* Bill Jacket, L. 1994, ch. 264 (SCB-ADD-117) (supporting an amendment to Sections 138 and 204-a of the New York Banking Law to further protect banks from double liability because of New York's "preeminence in the international financial community"); SCB Br. at 64-66.

Banks and financial institutions require a particularly stable regulatory environment in order to structure their business affairs and to continue to provide the banking services that are so essential to our economy. The common law principle of *stare decisis*, requiring adherence to past precedent, is a cornerstone of that stability. *See In re Estate of Eckart*, 39 N.Y.2d 493, 500 (1976) ("[O]n principle and authority there is generally a strict adherence to precedent in those fields of the law dealing with land titles, commercial transactions and contracts.").

Cognizant of these principles, this Court has long recognized that parties rely on precedent in determining their course of conduct, and those expectations should not be overturned lightly. *See In re Southeast Banking Corp.*, 93 N.Y.2d 178, 184 (1999) (acknowledging that in commercial matters, "reliance, definiteness and predictability are such important goals of the law itself, designed so that parties may intelligently negotiate and order their rights and duties"). Thus, when this Court was asked to consider whether the law of this State recognizes a principle of contract construction that already existed in federal common law, it acknowledged that any ruling on the issue would affect a broad range of transactions which, regardless of whether they resembled the case at bar, would share a common feature – the parties had relied on the existence of the federal rule in crafting their contracts and behavior. *Id.* ("This

practical policy consequence is a matter of legitimate concern in the common-law developmental process . . . . Parties to subordination agreements undoubtedly relied on the Rule—their lawyers would have been quite remiss had they not—since recent case law, as well as a leading authority and many commentators have consistently recognized the continued vitality of the Rule."). Similar considerations apply here.[7] They all militate in favor of a ruling that reaffirms a longstanding rule of law.

B. The Separate Entity Rule Has Been Part of This State's Law Since the Early Twentieth Century

The separate entity rule has formed part of the fabric of the law of New York throughout its reign as the world's preeminent financial center. Since the early twentieth century,[8] it has been settled in New York that "each branch of a bank is a separate entity, [and is] in no way concerned with accounts maintained by depositors in other branches or at the home office." *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (Sup. Ct. N.Y. County 1950), *aff'd*, 282 A.D. 940 (1st Dep't 1953); *see also United States v. First Nat'l City Bank*,

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[7] *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 20 (1995) ("Even in a world dominated by statutes, there remain clear, direct links with the common law.").

[8] Indeed, New York courts began articulating the separate entity rule at the same time as branch banking was making its debut in New York. *See Chrzanowska v. Corn Exch. Bank*, 173 A.D. 285, 290-91 (1st Dep't 1916) (recognizing, at the dawn of branch banking in New York, that branches are separate entities for some purposes), *aff'd*, 225 N.Y. 728 (1919). (*See also* SCB Br. at 20-25.)

321 F.2d 14, 19 (2d Cir. 1963) (tracing to nineteenth century English law the principle that "accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank"), *reh'g granted en banc*, 325 F.2d 102 (2d Cir. 1969).

The separate entity rule has been reaffirmed time and again by the courts of this State. *See Therm-X-Chemical & Oil Corp. v. Extebank*, 84 A.D.2d 787, 787 (2d Dep't 1981) ("The general rule in New York is that in order to reach a particular bank account the judgment creditor must serve the office of the bank where the account is maintained."); *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 744 (N.Y. City Ct. 1931); *Cronan*, 100 N.Y.S.2d at 476; *Clinton Trust Co. v. Compania Azucarera Central Mabay Ramona S.A.*, 172 Misc. 148, 151 (Sup. Ct. N.Y. County 1939) (denying attachment and discovery of accounts at a bank branch in Cuba), *aff'd*, 258 A.D. 780 (1st Dep't 1939). Indeed, this Court approved the application of the separate entity rule in *McCloskey v. Chase Manhattan Bank*, 11 N.Y.2d 936 (1962) (affirming an order denying attachment of funds at a U.S. bank's German branch). (*See* SCB Br. at 33-35.) Only months ago, the Appellate Division, First Department affirmed on alternative grounds a Supreme Court decision that had applied the separate entity rule to preclude a judgment

creditor from executing on assets located in a foreign bank branch and from seeking documents and information concerning those foreign assets. *See Ayyash v. Koleilat*, 115 A.D.3d 495, 495 (1st Dep't 2014).

The courts of this State have applied the separate entity rule to post-judgment restraints issued under CPLR 5222, as well as pre-judgment attachments issued under CPLR 6210 or 6211. *See Therm-X-Chemical & Oil Corp.*, 84 A.D.2d at 787; *Walsh v. Bustos*, 46 N.Y.S.2d 240 (N.Y. City Ct. 1943); *see also Fidelity Partners, Inc. v. Philippine Exp. & Foreign Loan Guar. Corp.*, 921 F. Supp. 1113, 1120 (S.D.N.Y. 1996) ("PNB's New York branch and its Manila main office should be considered separate entities for the purposes of attachment and execution.").

It would be surprising were this not the case, given the similarities in wording in the relevant CPLR provisions and the various cross-references between Articles 52 and 62. Article 62, governing attachments, and Article 52, governing enforcement of judgments, contain a number of mirror provisions. *Compare* CPLR 6203 and CPLR 5202 (addressing rights to personal property in attachment and execution, respectively); CPLR 6204 and CPLR 5209 (addressing discharge of garnishees' obligations). Both Articles provide that a debt owed to the defendant or property in which the defendant has an interest is subject to attachment/execution. Indeed, CPLR 6202 explicitly refers to CPLR

5201, stating "[a]ny debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment." CPLR 6202.

It is true that, in 1980, one federal court in New York in *Digitrex, Inc. v. Johnson*, 491 F. Supp. 66, 67-69 (S.D.N.Y. 1980), suggested a single, narrow exception to the separate entity rule. The so-called *Digitrex* exception – which does not apply to foreign bank branches – has been suggested in cases where "(1) [a] 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." *John Wiley & Sons, Inc. v. Kirtsaeng*, No. 08 Civ. 7834, 2009 U.S. Dist. LEXIS 86498, at *13 (S.D.N.Y. Sept. 15, 2009) (citation and internal quotation marks omitted); *see also Digitrex*, 491 F. Supp. at 67-69. The district court in *Digitrex*, however, *disregarded* the case law of the courts of this State solely on the grounds that it was unaware "of a single case within the past fifteen years in which the rule in question has been reaffirmed by any New York appellate court." *Id.* at 68. Besides being irrelevant as a precedential matter, this observation was plainly ill-founded because it was based on that court's expectation that the "separate entity rule" would soon be abandoned as a principle of New York state law – a prediction that did *not* come to pass.

In fact, the courts of this State have refused to embrace *Digitrex*, noting that "such an extension would require, in our view, a pronouncement from the Court of Appeals or an act of the Legislature." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Advanced Emp't Concepts, Inc.*, 269 A.D.2d 101, 102 (1st Dep't 2000). In *Therm-X-Chemical & Oil Corp.* (decided only one year after *Digitrex*), the Second Department declined to apply *Digitrex* and therefore held that a judgment creditor had no basis for suing a bank which, after receiving a restraining notice at one branch, had allowed the judgment debtor to withdraw funds from another branch of the same bank. *See Therm-X-Chemical & Oil Corp.*, 84 A.D.2d at 787. At most, the so-called *Digitrex* exception has meant that intrastate bank branch relationships are not covered by the separate entity rule. *See S & S Mach. Corp. v. Mfrs. Hanover Trust Co.*, 219 A.D.2d 249, 251 (1st Dep't 1996) (involving compliance by one Manhattan branch with a restraining notice served on the Park Avenue office).

Though far from representing the majority even of federal decisions, a few other federal district courts besides *Digitrex* have refused to apply the separate entity rule. None of these cases was reviewed either by the U.S. Court of Appeals for the Second Circuit or this Court (indeed, all were

terminated or settled before they could be reviewed on appeal),[9] and in some cases, the point seems not to have been properly preserved by the garnishee bank.[10] All of them are, in any event, outnumbered and outweighed in persuasiveness by other federal decisions affirming the rule. *See, e.g.*, *Shaheen Sports, Inc. v. Asia Ins. Co.*, No. 98-cv-5951, 2012 WL 919664, at *3, *4 (S.D.N.Y. Mar. 14, 2012) ("It has . . . long been considered *settled* law in New York . . . that where that garnishee is a bank, the court must obtain jurisdiction over the specific bank branch *holding* the asset before it may order any turnover, notwithstanding its general jurisdiction over the banking entity by virtue of its New York branch." (emphasis added)), *appeal dismissed sub nom*. *Hamid v. Habib Bank, Ltd.*, No. 12-1481, 2012 WL 4017287 (2d Cir. Aug. 14, 2012).

Moreover, the Second Circuit's past precedent has emphatically embraced the separate entity rule. *See Det Bergenske Dampskibsselskab v. Sabre Shipping Corp*., 341 F.2d 50, 53 (2d Cir. 1965) ("A review of the New

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[9] *See Eitzen Bulk v. Bank of India*, 827 F. Supp. 2d 234 (S.D.N.Y. 2011) (requiring compliance with an information subpoena regarding foreign branch accounts); *Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd.*, No. 11 Civ. 2001 (PGG), slip op. at 10 (S.D.N.Y. Mar. 29, 2013) (noting that a nonparty bank's appeal of the court's order directing turnover of funds from a branch in India "presents a significant issue").

[10] *See JW Oilfield Equip. v. Commerzbank AG*, 764 F. Supp. 2d 587, 595 (S.D.N.Y. 2011) (bank did not raise the separate entity rule as a defense to a turnover order requiring the bank to remit funds in the judgment debtor's bank account in Germany).

York cases indicates a consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment *or execution* by the process of a New York court served in New York on a main office, branch, or agency of the bank." (emphasis added)); *see also Allied Maritime, Inc. v. Descatrade, SA*, 620 F.3d 70, 74 (2d Cir. 2010) ("Under New York law, the 'separate entity rule' dictates that each branch of a bank [be] treated as a separate entity for attachment purposes.") (alteration in original; internal quotation marks and citations omitted).

The weight of history and precedent thus supports the continued application of the separate entity rule. As this Court recently commented in another case raising similar questions of longstanding law, Motorola here is asking this Court, "in effect, to reinterpret New York law so as to broaden the remedies available to creditors." *Kirschner v. KPMG, LLP*, 15 N.Y.3d 446, 457 (2010). This exercise in retroactive reinterpretation should be rejected.

II.
SOUND PUBLIC POLICY REASONS SUPPORT CONTINUING TO TREAT BANK BRANCHES AS SEPARATE ENTITIES FOR PURPOSES OF CPLR ARTICLE 52

A. Abolition of the Rule Would Encourage a New Wave of Enforcement Applications – Some with No Connection to this State

Motorola's case relies heavily on the proposition that "there is no meaningful risk that" a ruling abrogating the separate entity rule "would

disadvantage New York." (MCC Reply at 45.) Viewed objectively, the facts dictate the opposite conclusion.

Were the separate entity rule abolished in the manner Motorola seeks, the result would be that *any* international bank (wherever headquartered) with a branch in New York (however small and whatever type of business conducted) could be targeted with a New York post-judgment enforcement restraining notice (or turnover order) – and the New York branch could then be used as a "portal" for extracting cash from any other branch *in any country* in order to satisfy a judgment arising from litigation in which the bank was not involved. Not only would this constitute a radical expansion of the ambit of CPLR 5222, 5225 and 5227 in principle – but the practical realities also point towards a huge surge in litigation. Post-judgment enforcement is available not only to judgment creditors that have obtained judgments in the courts of this State, but also to parties holding sister-state judgments, foreign court judgments that have been recognized under the Uniform Foreign Country Money-Judgments Recognition Act (CPLR Article 53), arbitration awards rendered in New York and elsewhere in the United States (*see* CPLR 7501; 9 U.S.C. § 9), *and* foreign commercial and investment arbitration awards (*see* 9 U.S.C. §§ 301 et seq.; 9 U.S.C. §§ 201 et seq.; 22 U.S.C. § 1650a). Although Motorola may be a sympathetic judgment creditor in light of the massive fraud that underlies

its judgment (MCC Br. at 6-9), it admits that the facts are "irrelevant to th[e] certified question of law" before this Court. (MCC Reply at 1.) And it should not be doubted that numerous kinds of judgment creditors will seek to take advantage of any expanded judgment enforcement remedies in New York, including parties holding garden-variety breach of contract judgments and arbitration awards that involve no such wrongdoing.

This mixture – an expansionist system of judgment enforcement in the very state where more international banking occurs than in any other country – would represent a true "perfect storm." And it goes without saying that many of the judgment creditors that would seek the benefits of this new regime would be parties to disputes with no connection to this State – a result that is at odds with recent authority of this Court. *See Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 2014 N.Y. Slip Op. 02381 (Apr. 8, 2014) (holding that choice of law "interests" analysis disfavored application of New York law where transaction had no in-state connection). Moreover, these petitions may, in turn, spawn parallel – and potentially conflicting – anti-turnover litigation in the foreign branches' home countries. *See, e.g.*, *Prodprogramma-Impuls Ltd. v. Bank of India*, Nos. 12 Civ. 3036, 11 Civ. 5559, 2012 WL 2411809, at *3 (S.D.N.Y. June 25, 2012).

A recent concrete example of just this sort of chaos is *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002). There, the Second Circuit held that a federal maritime attachment could be sought over any electronic transfer by mere reason that it had a transitory connection with New York. *Id.* at 278. This led to a flood of applications, with *one third of all cases* in the United States District Court for the Southern District of New York arising out of maritime attachment actions. *See Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd*., 585 F.3d 58, 62 (2d Cir. 2009). Banks were forced to hire extra staff solely to process the mountain of new claims served on them, which piled up at the rate of 700 per day, and commentators warned that New York's standing as a center for banking and finance could be threatened. *See id.*; *see also Cala Rosa Marine Co. v. Sucres Et Deneres Grp.*, 613 F. Supp. 2d 426, 431 n.37 (S.D.N.Y. 2009) (noting that "New York banks have hired additional staff, and suffer considerable expenses, to process" the increased number of maritime attachment requests, including because "each attachment requires banks to amend 'their software screens'") (citation omitted). Ultimately, the Second Circuit was constrained to overturn *Winter Storm*, by reason of its adverse impact on New York's federal courts and the New York banking industry generally. *Shipping Corp. of India*, 585 F.3d at 61-62.

Furthermore, the *present* disruptive effect of judgment creditors (like Motorola) making over-ambitious use of Article 52 is already considerable. There is a reason why this may not be immediately evident to the Court: currently, the most aggressive uses of restraints are being done under seal – as indeed was the case with respect to Motorola's application against SCB.[11] With the proliferation of applications under seal, banks cannot publicly disclose whether they have received these applications.

In short, Motorola's application will incentivize a raft of future post-judgment and post-award litigation in the courts of this State – much of it without any relationship to the United States, let alone New York or its citizens. *See, e.g.*, *Ayyash v. Koleilat*, 38 Misc. 3d 916, 924-25 (Sup. Ct. N.Y. County 2012), *aff'd*, 115 A.D.3d 495 (1st Dep't 2014). The cost of defending these applications would be enormous (in terms of in-house counsel time, outside counsel and insurance against this litigation risk) and would provide a positive disincentive to operating branches in this State. New York's courts would similarly face increased costs: filing fees collected from judgment creditors for judgment enforcement petitions recover only a portion of the cost burden to the

[11] Motorola's application against SCB was kept under seal until the matter reached the Second Circuit. Similarly, the enforcement application in *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013) ("Marianas") was initially made under seal.

taxpayers of New York even in a routine situation, let alone complex situations involving enforcement petitions that purport to reach foreign branches. Motorola's position would turn New York into an international judgment collection center for no good reason.

B. The Separate Entity Rule Is Particularly Appropriate Given the Unique Regulatory Framework Covering the Banking Industry

Motorola's arguments seek to claim that the "separate entity rule" is somehow inappropriate because it applies only to banks, whereas ordinary corporations are treated differently. This ignores the practical reality that banks are the one class of nonparty that is most often subject to restraints and turnover proceedings, and is thus the most vulnerable to the costs, burdens and risks associated with such procedures. Moreover, banks are already treated as unique in many facets of the law.

Banks chartered within the United States are supervised by the Federal Reserve and either the applicable state regulator or the Office of the Comptroller of the Currency (OCC).[12] New York's own state banking

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[12] As the U.S. Supreme Court explained in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963):

> The governmental controls of American banking are manifold. . . Entry, branching, and acquisitions are covered by a network of state and federal statutes. . . Banks are also subject to a number of specific provisions aimed at ensuring sound banking practices. . . But perhaps the most effective weapon on federal regulation of banking is the broad visitorial power of federal bank examiners. . . In this way the agencies maintain virtually a day-to-day surveillance of the American banking system.

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regulations are extensive – and the State has established its own regulator (the New York Superintendent of Financial Services) with extensive oversight powers. *See, e.g.*, N.Y. Banking Law § 36.4 (empowering Superintendent to examine any New York-licensed branch "at any time . . . for the purpose of ascertaining whether it has violated any law and for any other purpose").

For capital and regulatory reasons, many foreign banks open branches in New York rather than a separate subsidiary bank (*see infra* at 30-31). Banks that operate through New York branches are subject to certain laws of New York *as well as* foreign regulatory obligations where their home offices or branches are located, a reality that New York's Banking Law explicitly recognizes. *See* N.Y. Banking Law § 138(1).[13] On the international level, banking regulators from more than twenty-five countries coordinate their

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Id. at 327-29.

[13] Section 138(1) of the N.Y. Banking Law provides:

> [A]ny bank or trust company or national bank located in this state which . . . shall have opened and occupied a branch office or branch offices in any foreign country shall be liable for contracts to be performed at such branch office or offices and for deposits to be repaid at such branch office or offices to no greater extent than a bank . . . organized and existing under the laws of such foreign country would be liable under its laws. The laws of such foreign country for the purpose of this section shall be deemed to include *all acts, decrees, regulations and orders promulgated or enforced by a dominant authority asserting governmental, military or police power of any kind* at the place where any such branch office is located . . . .

N.Y. Banking Law § 138(1) (emphasis added).

efforts to regulate banks in the Bank for International Settlement's Basel Committee on Banking Supervision.

What is more, the law of this State, as well as federal law, treat bank branches as "separate entities" for numerous purposes. New York's bank insolvency law (N.Y. Banking Law § 606 et seq.) treats any foreign bank branch's insolvency as limited to that branch. Section 606(4)(a) of the New York Banking Law expressly provides that the Superintendent of Financial Services is not authorized to accept "claims which would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate and independent legal entity." Federal law takes a similar approach for federally chartered bank branches. *See* 12 U.S.C. § 3102(j).

In the same vein, federal securities laws treat bank branches as separate entities in several respects. *First*, U.S. branches of foreign banks are deemed to be "banks" for purposes of the exemption given to banks from general registration requirements for securities. *See* Securities Issued or Guaranteed by United States Branches or Agencies of Foreign Banks, SEC Securities Act Interpretive Release No. 33-6661, 51 Fed. Reg. 34,460 (Sept. 29, 1986). This protection is uniquely provided to *branches* of foreign banks; foreign banks themselves do not fall within the exception. *Second*, the SEC's

Regulation S includes branches of foreign banks located in the United States within the definition of "U.S. person." 17 C.F.R. § 230.902(k)(1)(v). Regulation S also excludes branches of U.S. banks located outside of the United States, thereby enshrining the separate entity rule in both directions (foreign bank branches in the U.S. and U.S. bank branches abroad). 17 C.F.R. § 230.902(k)(2)(v).

Federal banking regulations also treat U.S. branches of foreign banks as separate entities. For example, the regulation that governs the reserve requirement of the Federal Reserve Act provides that U.S. branches are required to maintain reserves with the Federal Reserve bank only with respect to their reservable deposits in the U.S. branch, *not* deposits of the foreign bank outside the United States. 12 C.F.R. § 204.1(c)(2); *see also* 12 U.S.C. § 3102(b). Accordingly, the U.S. branches of foreign banks are entitled to discount and borrowing privileges with the Federal Reserve, privileges which are not extended to the foreign parent bank. 12 U.S.C. § 347; 12 U.S.C. § 461(b)(7); 12 C.F.R § 201.1(b).

C. Without the Separate Entity Rule, Banks Will Be at Risk of Violating Foreign Laws and Double Liability

Almost by definition, a restraining notice and/or turnover application brings with it a host of burdens for the recipient bank; a burden that has been acknowledged by the First Department. *See Ayyash v. Koleilat*, 115

A.D.3d 495, 495 (1st Dep't 2014) (holding that the lower court "providently exercised its discretion, pursuant to CPLR 5240, in denying the enforcement procedures sought by plaintiff since they would likely cause great annoyance and expense to [nonparty] respondents or their employees or agents").

Indeed, even the initial step in responding to a restraining notice – the act of conducting searches – can be costly. The costs and burdens would expand even further if a bank with branches in New York was also required to conduct searches for assets in all branches. It should not be assumed that a bank can "press a button" to search all worldwide branches. Even where the records are electronic, many banks rely on different computer systems in different locations, which is purposefully done in order to comply with laws in the various jurisdictions in which a bank operates concerning the confidentiality of bank information. In addition, many branches of foreign banks primarily conduct wholesale banking activities.[14] Moreover, many foreign jurisdictions have laws and procedures restricting the disclosure of confidential banking data and/or limiting enforcement of judgments against

[14] Some branches are purely trading platforms, without any access at all to the type of customer account information that would enable them to respond to a restraining notice. Branches in Switzerland, Singapore, Germany, France, China and other such jurisdictions are on different platforms. For this reason, a judgment creditor would in many instances be able to access more information through the New York branch of some banks than a judgment debtor could (even with respect to its own accounts) by walking into the same New York branch.

bank customers. *See, e.g., Samsun Logix Corp. v. Bank of China*, 31 Misc. 3d 1226(A), 2011 N.Y. Slip Op. 50861(U), at *6 (Sup. Ct. N.Y. County 2011) (expert testimony that Chinese law prohibits banks from complying with a foreign court order by disclosing information about bank accounts in China).

Thus, there is a real (and, it is submitted, unreasonable) risk that a bank might be ordered by a New York court to furnish information about foreign assets, while the foreign country itself prohibits even the disclosure of such information. *See Ayyash*, 38 Misc. 3d at 925 (separate entity rule avoids conflicts with competing legal systems which have "serious civil or criminal sanctions" for the breach of local law). This is inconsistent with the general principle of this State favoring comity, i.e., recognition of those foreign countries' interests in applying their own banking laws within their jurisdiction. *See id.* at 927 (acknowledging the burden on garnishee banks' foreign branches or affiliates operated under banking confidentiality or data protection laws, where post-judgment discovery would expose them, "their officers and/or employees . . . to civil or criminal penalties" for complying with the subpoenas); *CE Int'l Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship*, No. 12-CV-08087, 2013 WL 2661037, at *14 (S.D.N.Y. June 12, 2013) ("[N]otwithstanding the United States' generalized interest in the enforcement of U.S. judgments . . .

Singapore's specific interest in bank customer secrecy favors non-enforcement of the subpoena, especially in light of Deutsche Bank's non-party status.").

A further series of risks and burdens would be imposed if a bank were required, by reason of a New York order, to restrain and/or turn over accounts located overseas. Foreign courts are not bound to recognize the validity of a New York restraint that purports to freeze assets that are not located in New York. *See, e.g., JPMorgan Chase Bank, N.A. v. Motorola, Inc.*, 47 A.D.3d 293, 301-02, 305 (1st Dep't 2007) (Motorola, Inc. submitted "uncontroverted evidence of Indian law" that the Indian courts would not recognize a Delaware default judgment.); *Shaheen Sports, Inc.*, 2012 WL 919664, at *7 (noting that the bank had presented evidence that Pakistani law prohibited turnover of assets in Pakistan). Thus, even after a turnover is completed in New York, a foreign court is likely to hold both that the bank's indebtedness to its customer (the judgment debtor) has not been validly discharged – and that the customer's access to the accounts was not validly frozen – and thus order the bank to repay its customer from its own resources.[15]

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[15] *See also* Memorandum of the Federal Reserve Bank as Amicus Curiae Supporting Respondents at 5, Samsun Logix Corp. v. Bank of China, 31 Misc. 3d 1226(A), 2011 N.Y. Slip Op. 50861(U), at 7 (Sup. Ct. 2011) (No. 10105262), 2011 WL 3100393 ("The New York Fed is concerned about the ramifications of the issuance of contradictory turnover orders directed at financial institutions' world-wide assets. . . . Samsun's Petition may set off a chain reaction which ultimately threatens the balance of international banking law."); Dwight Healy & Marika Maris, *New York Court Determines that Banks*

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Indeed, Standard Chartered is threatened with double liability in this very case. (*See* SCB Br. at 10-12.)

A risk of double liability to a garnishee is inconsistent with the legislative intention behind Article 52,[16] not to mention the Due Process Clause. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (reasoning that a corporation holding funds "is deprived of due process of law if [it] is compelled to relinquish it without assurance that [it] 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").

The United States government highlighted this feature of the separate entity rule in an amicus submission to the Supreme Court:

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

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Still Have the Protection of the "Separate Entity" Doctrine After Koehler, 128 Banking L.J. 668, 669 (2011) (observing that rationale for the separate entity rule was due in part to "the recognition that any banking operation in a foreign country 'is necessarily subject to the foreign sovereign's own laws and regulations'"(citation omitted)).

[16] Because "[i]t ought to be and it is the object of courts to prevent the payment of any debt twice over," the drafters of the CPLR inserted CPLR 5209 to prevent double liability. *JPMorgan Chase Bank N.A. v. Motorola, Inc.*, 47 A.D.3d 293, 306 (1st Dep't 2007) (alteration in original) (quoting *Harris v. Balk*, 198 U.S. 215, 226 (1905)); *accord Oppenheimer v. Dresdner Bank, A. G.*, 50 A.D.2d 434, 441 (2d Dep't 1975), *aff'd*, 41 N.Y.2d 949 (1977).

Brief for the United States et al. as Amicus Curiae Supporting Petitioner, at *14, Citibank, N.A. v. Wells Fargo Asia Ltd., 110 S. Ct. 2034 (1989) (No. 88-1260), 1989 WL 1126987.

Similarly, Judge Jed Rakoff (the District Court judge in the present case) has observed that, notwithstanding Motorola's arguments, the separate entity rule "may still carry weight when the requested transfers involve banks subject to foreign laws and practices." *Motorola Credit Corp. v. Uzan*, 288 F. Supp. 2d 558, 561 (S.D.N.Y. 2003). Those considerations remain valid and further militate against Motorola's proposed abolition of the rule.

Moreover, judgment creditors have alternative means to obtain post-judgment relief without creating the risk of inconsistent obligations for the nonparty bank where the judgment debtor may have assets. If money exists in Singapore, for example, judgment creditors can go to the courts of Singapore and exercise the remedies available in that jurisdiction. Indeed, in this case, Motorola has done just that: it has obtained restraint and turnover orders in London, Hong Kong and Singapore.[17]

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[17] *See* K.C. Vijayan, *Motorola's bid to enforce $3.3b US ruling*, The Straits Times, July 8, 2014 (reporting on enforcement efforts in Singapore); Sneha Shankar, *Motorola Takes Years-Long Legal Dispute To Hong Kong*, International Business Times News, Mar. 14, 2014 (reporting on a Hong Kong court's freezing order); Nikki Tait, *Motorola Handed Uzans Victory*, Financial Times, Dec. 6, 2004 (reporting on London High Court decision domesticating U.S. judgment against the Uzans and freezing orders permitting seizure of London assets).

Motorola's assertion that the risk of double liability is a mere cost of doing business (MCC Reply at 39-42) is misguided and at odds with the legislative policy behind CPLR 5209, which is intended to protect nonparty garnishees from costs of compliance. And the notion that double liability is a risk that a financial actor would casually accept is untenable. If the separate entity rule, which shields against unreasonable risks of this kind, is abolished, banks will need to reconsider their decision to operate branches in New York.[18]

D. Overturning the Separate Entity Rule Would Undermine New York's Status as a Financial Center and Change the Calculus for Banks Deciding Whether To Operate Branches in New York

Federal and state regulatory policies directly address the status of local bank branches of international banks, thus recognizing the useful role that such operations may play in our economy. For banks dealing in more than one country, the choice of whether to operate as branches instead of creating separate banking subsidiaries is driven by a complex array of strategic

[18] Motorola cites *JPMorgan Chase Bank, N.A. v. Motorola, Inc.*, 47 A.D.3d 293, 301-02 (1st Dep't 2007) for the proposition that banks assume the risk of double liability. (MCC Reply at 39-42.) However, as explained in *Samsun Logix Corp.*, in *JPMorgan* and the cases it cites for that proposition, the banks were party defendants, not nonparty garnishees. *Id.*, 2011 N.Y. Slip Op. 50861(U), at *6. In addition, the parties in *JPMorgan* appear not to have made the First Department aware that this Court's decision in *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of N.Y.*, 253 N.Y. 23, 27 (1930), was overturned by legislation expressly designed to ensure that banks would not be subjected to double liability. (*See* SCB Br. at 25-32, 49 n.22.)

considerations. If the separate entity rule were abolished, this calculus would be changed in contravention of those well-crafted regulatory policies.

International banks often elect to operate branches in this State, rather than establish separately-licensed subsidiary banks, because the establishment of a local U.S. branch does *not* require it to separately capitalize and constitute a new bank. Provided that the international bank *as a whole* is adequately capitalized and regulated – and the federal and state regulators in this country have carefully crafted our regulations to ensure that this is so[19] – the establishment of local U.S. branches of foreign banks can contribute new sources of finance and economic growth to the United States economy, as well as facilitate international trade.

Importantly, U.S. branches of foreign banks are not mere "clones" of their home branch. U.S. branches often face constraints on their activities, compared with stand-alone banks. For example, U.S. branches of foreign

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[19] Before approving an application by a foreign bank to establish a branch, the Federal Reserve is allowed to impose a range of conditions, including to assure that there is adequate prudential supervision in the home country. *See* 12 U.S.C. § 3105(d). Once a U.S. branch of a foreign bank is established: (1) it is subject to routine examinations by the relevant federal/state regulators, *see* N.Y. Banking Law § 36.4; 12 U.S.C §3105(c)(1); (2) it is required to keep separate books and file quarterly reports of assets and liabilities with the Federal Reserve; (3) the International Banking Act of 1978 requires a foreign bank that establishes a federally chartered branch to maintain a deposit in the state where its branch is located of "not less than the greater of (1) that amount of capital (but not surplus) which would be required of a national bank being organized at this location, or (2) 5 per centum of the total liabilities of such branch or agency . . . ." 12 U.S.C. § 3102(g).

banks typically conduct wholesale, not retail, banking activities – meaning, for example, that there are relatively few, if any, individual "customers" holding checking or depositary accounts with French, German or Spanish banks in New York; relatively few conventional ATMs, queues or "tellers" of such banks and, indeed, very few "shopfront" style operations of these banks, exist even in Manhattan. Moreover, the usual "consumer" facets of these banks are often absent – deposits held by branches of foreign banks cannot be insured by the FDIC, with the exception of eight foreign bank branches that were given "grandfather" authority, under 12 U.S.C. § 3104.

By contrast, opening a subsidiary bank in New York is equivalent to obtaining a brand new bank charter, with all the attendant requirements and costs. It is a huge undertaking and involves enormous entry costs.

Motorola suggests that if the separate entity rule is abolished, then foreign banks could protect themselves from double liability simply "by doing business through a subsidiary" (Mot. Reply at 36) and then relying on this Court's holding in *Marianas* that banks with branches in New York cannot be compelled to turn over assets held by legally separate affiliates located overseas. *See Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013). But apart from the inefficiencies of such a structure, Motorola's proposed "solution" ignores the likelihood that

judgment creditors will drag banks into protracted litigation over whether separately incorporated New York affiliates are merely agents for their foreign parents. *See Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009). As such, if banks are put to that choice, it will in many cases be simpler and far less costly for banks to simply shut down their New York branches in their entirety and sever any connections with the State – perhaps finding that a foreign banking center (e.g., London or Singapore) is adequate to their needs.[20] Such a result, it is submitted, would damage the commercial and economic interests of this State – without any discernible benefit in return. This provides yet further reason to retain the separate entity rule. *See In re Thelen LLP*, No. 137, 2014 N.Y. Slip Op. 04879, at *7-9 (N.Y. July 1, 2014) (discussing public policy considerations and "marketplace realities" supporting this Court's unanimous decision on a question of statutory interpretation).

III.
KOEHLER DID NOT ABROGATE THE SEPARATE ENTITY RULE

In *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), this Court reached a particular conclusion about turnover applications based on facts that were stipulated between the parties – including, critically, an

[20] *See* Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership*, at 10-14 (Jan. 22, 2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

agreement by the garnishee entity, Bank of Bermuda Limited ("BBL"), to consent to the personal jurisdiction of the courts of New York. As such, it has no bearing on the separate entity rule.

In *Koehler*, the petitioner obtained a $2 million default judgment against his former business partner. *Koehler*, 12 N.Y.3d at 536. The judgment debtor, a resident of Bermuda, owned stock in a Bermuda corporation, and certificates representing his shares were in the possession of the Bank of Bermuda Limited ("BBL"), also located in Bermuda. *Id.*

The petitioner then filed a petition pursuant to CPLR Article 52 against BBL in the U.S. District Court for the Southern District of New York demanding delivery of the judgment debtor's property, which was served the petition on a New York subsidiary of BBL. Importantly, the New York entity was *not a bank branch*, but a subsidiary of the Bermuda corporation. Also, BBL itself consented to personal jurisdiction. *Id.* Nevertheless, BBL moved to dismiss the petition and the trial court granted the motion, holding, among other things, that the Court lacked *in rem* jurisdiction over the stock certificates situated in Bermuda. *Id.* at 537.

On appeal, the Second Circuit certified the following question:

> . . . whether a court in New York may, pursuant to N.Y. C.P.L.R. 5225(b) or N.Y. C.P.L.R. 5227, 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 N.Y. C.P.L.R. Article 52, when those stock certificates are located outside New York.

Koehler v. Bank of Bermuda, Ltd., 544 F.3d 78, 80 (2d Cir. 2008).

By majority, this Court answered the certified question in the affirmative. *Koehler*, 12 N.Y.3d at 541. In distinguishing the federal district court's ruling, which was based on *in rem* jurisdiction, this Court instead focused on personal jurisdiction and held that pre-suit attachments under CPLR Article 62 depend on *in rem* jurisdiction over an asset, but post-judgment proceedings to collect a judgment under Article 52 require only *in personam* jurisdiction over the respondent. *See id.* at 538-41. It noted that "[i]t is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction." *Id.* at 538. However, "a court sitting in New York *that has personal jurisdiction over a garnishee bank* can order the bank to produce stock certificates located outside New York." *Id.* at 541 (emphasis added).

Because *Koehler* involved a United States subsidiary – not a bank branch – and a foreign entity that consented to personal jurisdiction, this Court did not need to consider the "unusual" reliance by banking organizations on

branches rather than national subsidiaries,[21] or the other policy considerations underlying the rule.

The limited effect of *Koehler* was made clear in the more recent *Marianas* decision, where this Court held unanimously that a Canadian bank could not be compelled under CPLR 5225 to turn over foreign bank accounts in the hands of its Cayman subsidiary. *Marianas*, 21 N.Y.3d at 57-58. In so holding, this Court stated that *Koehler* is not susceptible to a "broad[]" reading and needs to be understood according to those unique facts. *Id.* at 64.

As such, this Court in *Koehler* did not abrogate, or even mention, the separate entity rule, nor did it reverse any New York precedent applying that rule. *See Global Tech., Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A), 2012 N.Y. Slip Op. 50023(U), at *12 (Sup. Ct. N.Y. County 2012) ("It therefore follows that *Koehler* . . . did not impliedly abrogate the separate entity rule."). The abrogation of a rule so well-established as the separate entity rule would require either a definitive "pronouncement from the Court of Appeals or an act of the Legislature." *Nat'l Union Fire Ins.*, 269 A.D.2d at 102; *see also Det Bergenske*, 341 F.2d at 53-54 (rejecting challenge to the "separate entity

[21] *See* Joseph H. Sommer, *Where is a Bank Account?*, 57 Md. L. Rev. 1, 78-79 (1998) (explaining that "[t]he separate entity doctrine is nearly unique to banking because international banks are unusual business organizations" in that they rely on a branch structure rather than compartmentalized national subsidiaries).

rule," and observing that a federal court "may not alter an established rule of New York law when there has been no indication by the New York lawmakers that they have changed their point of view").

Not surprisingly, therefore, the courts of this State have unanimously viewed *Koehler* as leaving the separate entity rule intact. *See Edman & Co. v. Z & M Media, LLC,* No. 102178/11, 2012 N.Y. Slip Op. 32918(U), at *6 (Sup. Ct. N.Y. County Dec. 5, 2012) ("[U]nder the separate entity rule the restraining notice served on the bank branch in Indiana does not restrain bank accounts in Florida."); *Ayyash,* 38 Misc. 3d at 924 (separate entity rule is "well-established" and observing that "courts have rejected arguments that *Koehler* impliedly abrogated the separate entity rule in post-judgment enforcement proceedings"); *accord Global Tech.*, 2012 N.Y. Slip Op. 50023(U), at *12-14; *Samsun Logix*, 2011 N.Y. Slip Op. 50861(U), at *3-5; *see also Parbulk II AS v. Heritage Mar. SA*, 35 Misc. 3d 235, 238-39 (Sup. Ct. N.Y. County 2011) ("The [separate entity rule] has been reaffirmed in court decisions rendered after *Koehler* in both the prejudgment and postjudgment contexts.").[22]

[22] *See also Dewar v. Bangkok Bank Pub. Co., N.Y. Branch*, 37 Misc. 3d 1231(A), 2012 N.Y. Slip Op. 52254(U), at *6 (Sup. Ct. N.Y. County 2012) (separate entity rule applied in case involving attempts to extract information/assets from Thailand "parent" branch of New York bank branch); *Int'l Legal Consulting, Ltd. v. Malabu Oil & Gas, Ltd.*, 35 Misc. 3d 1203(A), 2012 N.Y. Slip Op. 50546(U), at *8 (Sup. Ct. N.Y. County 2012) (holding *(cont'd)*

Accordingly, Motorola is plainly incorrect to assert that *Koehler* abrogated the well-settled separate entity rule. (MCC Br. at 27-31.)

IV.
CONSIDERATIONS OF COMITY, LIMITATIONS ON EXTRATERRITORIALITY AND RECENT SUPREME COURT PRECEDENT ALL DISFAVOR MOTOROLA'S INTERPRETATION

The interpretation of Article 52 sought by Motorola – forcing nonparty banks to disgorge assets from any corner of the world, based merely on the presence of a New York branch – would represent an aggressive extension of judicial power by the courts of this State. This would be inconsistent with this State's historic approach to long-arm jurisdiction, which has never sought to stretch concepts of permissible jurisdiction under the Due Process Clause,[23] as well as this Court's recent pronouncement that "[t]he established presumption is, of course, against the extraterritorial operation of New York law," *Global Reinsurance Corp. v. Equitas Ltd.*, 18 N.Y.3d 722, 735 (2012) (citing N.Y. Stat. Law § 149). It also would run counter to the current trend of United States Supreme Court jurisprudence concerning extraterritorial jurisdiction. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010) (holding that Section 10(b) of the Securities Exchange Act only applies to

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that "the separate entity rule is still good law" in a case involving pre-judgment attachment).

[23] *See Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 71 (1984).

"domestic" transactions and applying the canon of statutory interpretation that federal law does not apply extraterritorially); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 176 (2d Cir. 2014) (holding that plaintiffs cannot assert federal securities law claims based on purchases of securities on non-U.S. exchanges, even if those securities were also listed on a U.S. exchange).

The restraint and turnover provisions of CPLR 5222, 5225 and 5227 have been applied to require a judgment debtor itself to turn over its foreign assets, which presents no particular extraterritoriality issue because the judgment debtor typically is already subject to personal jurisdiction. These same provisions were applied in *Koehler* to mandate turnover of foreign assets by a bank – but only because there were no separate branches at issue and (as was later noted in *Marianas*) the bank had explicitly subjected itself to the personal jurisdiction of the courts of this State. But it would represent a further, more aggressive extension of these statutory provisions – one not warranted by their text – to mandate turnover of foreign assets by a *nonparty* whose only link to this jurisdiction is that it has a New York branch.[24]

[24] Motorola's observations about CPLR Rule 5224(a-1) (MCC Br. at 24) miss the point. The mere fact that CPLR Rule 5224, which deals with information subpoenas, can potentially require a recipient (usually the judgment debtor) to answer questions about overseas assets, cannot and does not answer the issue of whether and in what

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Such an interpretation would also run afoul of the United States Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which decisively limited the permissible reach of personal jurisdiction over foreign corporations by United States courts. The Supreme Court held that a company incorporated and headquartered overseas could *not*, consistent with the Due Process Clause, be presumed to be subject to the general personal jurisdiction of the United States courts based merely on the fact that it engaged in some business in part of the United States and that general personal jurisdiction would only be appropriate against companies that could truly be said to be "at home" in a state of the United States. *See Daimler*, 134 S. Ct. at 760 ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" (alterations in original) (citation omitted)).

The Court's holding expressly relied on considerations of international comity. *See id.* at 763 (noting that the court below "paid little heed to the risks to international comity its expansive view of general jurisdiction posed"). It also noted the Solicitor General's concern about

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circumstances CPLR 5222, 5225 and 5227 can be utilized against the specific class of businesses covered by the separate entity rule, i.e., *nonparty banks*.

potential negative consequences that an expansive assertion of jurisdiction may have for the ability to enforce U.S. judgments abroad:

> The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."

Id. at 763 (citation omitted).

In the wake of *Daimler*, many have already predicted that personal jurisdiction based merely on a company "doing business" in New York is no longer tenable. The Second Circuit recently observed:

> [W]e note some tension between *Daimler*'s "at home" requirement and New York's "doing business" test for corporate "presence," which subjects a corporation to general jurisdiction if it does business there "not occasionally or casually, but with a fair measure of permanence and continuity." *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915 (1917) (Cardozo, J.) (codified along with other "doing business" case law by N.Y. C.P.L.R. 301). Not every company that regularly "does business" in New York is "at home" there. *Daimler*'s gloss on due process may lead New York courts to revisit Judge Cardozo's well-known and oft-repeated jurisdictional incantation.

Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 225 n.2 (2d Cir. 2014); *see also id.* at 223 (reversing a district court order finding personal jurisdiction over a Turkish company in a petition to enforce an arbitration award); *Attorney-General v. Wirthlin Worldwide Consulting, LLC*, No. 653427/2012, 2014 WL 2727018, at *1 (Sup. Ct. N.Y. County June 13, 2014)

("*Daimler* significantly narrows the parameters for the exercise of general personal jurisdiction, and calls into question the validity of the doing business doctrine.").

These principles are of direct relevance here because the separate entity rule itself has been viewed by some courts as a limitation on personal jurisdiction.[25] In the wake of *Daimler*, it is all the more important that a court of this State not attempt to exercise personal jurisdiction over banks that have no headquarters or place of incorporation in this State.

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[25] *See, e.g., Shaheen Sports*, 2012 WL 919664, at *5 (describing the separate entity rule as a qualifier on the court's attachment power "even where personal jurisdiction over a defendant is otherwise obtained vis-à-vis a New York branch"); *Global Tech.*, 2012 N.Y. Slip Op. 50023(U), at *14 ("[T]he separate entity rule requires that service of a post-judgment restraining notice upon a bank must be made upon the bank branch where the account is maintained. Viewed as a rule for service of post-judgment enforcement process, service of a restraining notice upon one bank branch . . . would be improper, if the restraining notice sought to restrain an account that the served bank branch did not maintain, even if a basis for *in personam* jurisdiction over the bank was not in dispute."); *see John Wiley & Sons, Inc. v. Kirtsaeng*, No. 08 Civ. 7834, 2009 U.S. Dist. LEXIS 86498, at *9 (S.D.N.Y. Sept. 15, 2009) ("In New York, the 'separate entity rule' . . . limits the effect of Plaintiff's service in New York."). As noted in *Global Technology*, the First Department's decision in *National Union Fire Insurance v. Advanced Employment Concepts, Inc.*, 269 A.D.2d 101 (1st Dep't 2000), which refused to limit the separate entity rule, "is susceptible to the interpretation that, in light of the separate entity rule, personal jurisdiction over a bank's branch in the State of New York was not sufficient to confer personal jurisdiction over another branch located outside the state, even though the bank was doing business in [the] State of New York and thus present in the state. Such a view would effectively convert the separate entity rule into a rule of personal jurisdiction." *Global Tech.*, 2012 N.Y. Slip Op. 50023(U), at *8.

V.
THE LEGISLATURE INTENDED FOR BANK BRANCHES TO BE TREATED AS SEPARATE ENTITIES

Motorola argues that (1) the plain language of CPLR 5222 does not permit application of the separate entity rule and (2) the Legislature's omission of the separate entity rule from the text of the CPLR while including the concept in the UCC is evidence that the Legislature intended to reject the separate entity rule. This selective reading of the Legislature's intent is ill-founded.

A. By Enacting the CPLR, the Legislature Did Not Wish To Overturn Settled Judicial Precedent on the Separate Entity Rule

1. The Separate Entity Rule Is a Well-Settled Interpretation of Law that Predates the CPLR

At the time the CPLR was enacted, the separate entity rule was a well-settled and accepted part of New York law (*see supra* at 7-15). New York law presumes that the Legislature is "aware of the decisional and statute law in existence at the time" a new statute is passed, and as such, this Court has held that a statute will abrogate the common law only "to the extent that the clear import of the [statutory] language requires." *Arbegast v. Bd. of Educ. of S. New Berlin Cent. School*, 65 N.Y.2d 161, 169 (1985) (citing *Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 588 (1981); *Easley v. N.Y. State Thruway Auth.*, 1 N.Y.2d 374, 379 (1956); *Transit Comm'n v. Long Island R.R. Co.*, 253

N.Y. 345, 355 (1930)).[26] Moreover, the Legislature has codified a rule of statutory construction that preserves the common law wherever possible. *See* N.Y. Stat. Law § 301(a) ("[S]tatutes in derogation or in contravention [of the common law], are strictly construed, to the end that the common law system be changed only so far as required by the words of the act and the mischief to be remedied.").

The separate entity rule, far from being abrogated by the CPLR, was adopted as supplemental common law to Article 52. This Court took a similar position in *Arbegast*, where the plaintiff had expressly assumed the risk of her activity, but the relevant statute (CPLR 1411) only permitted recovery despite an *implied* assumption of risk. This Court presumed that the Legislature was aware of the common law at the time of the statute's enactment and held that Section 1411 did not foreclose a complete defense where the injured party expressly consented to the risk, in line with the pre-enactment common law rule. *Arbegast*, 65 N.Y.2d at 169-70.

Where it is not obvious that the Legislature intended or required the common law to be repealed, it should be preserved. *Id.* at 169; *see also*

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[26] Contrary to Motorola's claim (MCC Br. at 23) that *Arbegast* suggests a common law rule can only survive the enactment of legislation if the statute is sufficient ambiguous, *Arbegast* actually holds that the common law should only be abolished to the extent that the clear import of the new statute requires.

N.Y. Stat. Law § 301(a); *In re Delmar Box Co.*, 309 N.Y. 60, 66 (1955) ("It is a cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation."). The language of Article 52 simply does not compel the conclusion that the Legislature intended to abrogate the separate entity rule.

2. After the CPLR Was Enacted, the Courts Continued To Apply the Separate Entity Rule and the Legislature Never Acted To Overturn That Jurisprudence

After the CPLR was enacted, the courts continued to apply the separate entity rule as supplemental common law to Sections 5222, 5225 and 5227. If in fact the Legislature had not intended the separate entity rule to survive the CPLR, it would have spoken to this fact – but it did not. This Court has held that such silence can signal approval of the existing construction of a statute. *See Engle v. Talarico*, 33 N.Y.2d 237, 242 (1973) ("Where the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence."). The courts' consistent interpretation of a statute therefore is "as much a part of the enactment as if incorporated into the language of the act itself." N.Y. Stat. Law. § 72.

Ever since enactment of the CPLR, New York courts have repeatedly applied the separate entity rule, and the Legislature has never amended the CPLR to reject that interpretation. Far from abolishing the separate entity rule, as Motorola asserts, the Legislature's inaction should be viewed as tacit acceptance of the courts' application of the CPLR. Article 52 of the CPLR has been amended nine times since 1968, providing the Legislature with ample opportunity to correct this approach. If the courts were not effectuating its intent, the Legislature would have responded – but it has not.

3. Similarly, Recent Proposals That Have Not Been Adopted Have No Bearing on the Separate Entity Rule

Motorola's assertion that the Legislature intended to overturn decades of New York case law upholding the separate entity rule by failing to pass recent proposals to codify that rule similarly fails. Abolishing the separate entity rule would require an explicit manifestation of legislative intent, for which silence is simply insufficient. Indeed, this Court has said that "[i]t is settled that inaction by the Legislature is inconclusive in determining legislative intent." *N.Y. State Ass'n of Life Underwriters v. N.Y. State Banking Dep't*, 83 N.Y.2d 353, 363 (1994). If the rule were to be changed, this intention must come from the Legislature and "is not to be imputed . . . in the absence of a clear manifestation" of such intent. *Hammelburger*, 54 N.Y.2d at 592.

B. Motorola's Narrow Focus on CPLR 5222 Misses the Point

1. CPLR 5209 Recognizes Protection for Garnishees Against Double Liability and Must Be Read Together With CPLR 5222

CPLR 5209, which recognizes protection for garnishees against double liability, must be read together with CPLR 5222. *See* N.Y. Stat. Law § 97 ("A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent."); N.Y. Stat. Law § 98 ("All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof."). Sections of a statute "may not stand alone," but instead should be "read and applied in connection with every other section of the act." *Kaplan v. Peyser*, 273 N.Y. 147, 149-50 (1937) (citations omitted) (where an isolated reading of one section of the New York Civil Practice Act appeared to require a different result than the following section, but the context of the sections read together "does not declare so mixed a purpose," holding that the Legislature could not have intended an absurd result).

Nothing in CPLR 5209 (which recognizes protection for garnishees against double liability) suggests that the Legislature intended banks to be subject to worldwide enforcement. When read with CPLR 5209,

Motorola's exclusive focus on CPLR 5222 would create the sort of mixed purpose that this Court was concerned with in *Kaplan,* as it would require that banks to be exposed to double liability while supposedly protecting garnishees. This reading simply cannot succeed, and the statute should be construed as a whole to determine that the Legislature did not intend such a result.

2. The CPLR Should Be Read as Having Been Enacted with Intent Similar to New York's UCC

New York's UCC was enacted within two weeks of the CPLR and expressly acknowledges the bank branch's status under the separate entity rule. N.Y. U.C.C. § 4-106;[27] *see also* N.Y. U.C.C. § 4-A-105, 4-A-502(4). The CPLR, which barely preceded the UCC's passage, should be read as having been enacted with similar intent regarding the banking industry and separate

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[27] N.Y. U.C.C. § 4-106 provides:

> The receipt of any notice *or order* by or the knowledge of one branch or separate office of a bank *is not actual or constructive notice to or knowledge of any other branch or office of the same bank* and does not impair the right of another branch or office to be a holder in due course of an item.

N.Y. U.C.C. § 4-106; *see also Shaheen Sports*, 2012 WL 919664, at *3; N.Y. U.C.C. § 4-A-105(1)(b) (McKinney 2013) (statute relating to funds transfers; "A branch or separate office of a bank is a separate bank for purposes of this article."); N.Y. U.C.C. § 4-A-502(4) (McKinney 2013) ("Creditor process with respect to payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process."); *see also John Wiley & Sons, Inc.*, 2009 U.S. Dist. LEXIS 86498, at *15 (under New York commercial law, "'notice received by one branch of a bank does not [even] constitute constructive notice to any other branch of the same bank'" (alterations in original; citation omitted)); *see also id.* at *9-16.

entity rule. Given that the Legislature that enacted the CPLR clearly understood the import of branches being treated as separate entities, it is difficult to believe that they intended to erase the impact of the separate entity rule in enforcing money judgments. As explained above, the common law already had developed the separate entity rule for attachment and enforcement purposes, which the Legislature would have needed to reverse explicitly in the CPLR if it wished to do so, unlike the situation with the UCC, which went further than the existing common law.

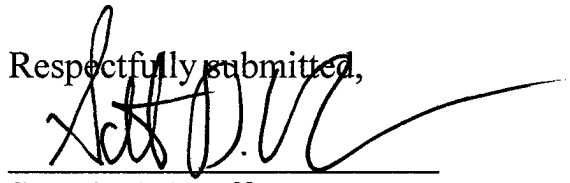
Motorola's construction of CPLR 5222 (MCC Br. at 22) is at odds with the specific protection given banks by the Legislature during the very same legislative session, especially given that Motorola's proposed interpretation would undermine stability. *See N.Y. State Ass'n of Life Underwriters*, 83 N.Y.2d at 353. Interpretation of statutes relating to it must be made with care "'not to cripple [banks] and break down their usefulness by a narrow and unreasonable construction of the statutes which will result in unwisely limiting their usefulness in the transaction of business under modern conditions.'" *Id.* at 362 (quoting *Dyer v. Broadway Cent. Bank*, 252 N.Y. 430, 434 (1930)). Motorola's construction of CPLR 5222 is precisely the sort of "narrow and unreasonable construction" that concerned this Court.

CONCLUSION

For the reasons set forth above, the Court should answer the certified question by applying and reaffirming the separate entity rule, such that a judgment creditor cannot seek to compel a garnishee bank with branches in New York to freeze or turn over a judgment debtor's assets held in its foreign branches.

Dated: July 24, 2014

Respectfully submitted,



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