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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos Justice PART 53

INDEX NO. 105835/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Manson Joint Stock - v - Company

Superintendent of Banks of State of NY

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/14/09

J.S.C.

HON. CHARLES E. RAMOS

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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MONTER JOINT STOCK COMPANY,

Index No. 105835/09

Petitioner,

-against-

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK and THE DEPOSIT INSURANCE AGENCY OF THE REPUBLIC OF SERBIA,

Respondents.

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Charles Edward Ramos, J.S.C.:

Previously, the Superintendent of Banks of the State of New York (Superintendent) sought this Court's approval for the settlement (Settlement) of a dispute with the Deposit Insurance Agency (DIA), an agency of the Former Republic of Yugoslavia, concerning competing rights to administer the liquidation of the local operations of two insolvent state-owned Yugoslavian banks, Jugobanka A.D., Beograd and Beogradska Banka, A.D., Beograd (Beogradska) (together, Jugobanka). This Court denied the sought-after relief in a decision dated April 18, 2008, and similarly denied a motion for leave to reargue on September 9, 2008.

Thereafter, two creditors of Jugobanka, Sage Realty Corporation (Sage) and Monter Joint Stock Company (Monter) (together, Petitioners) commenced separate Article 78 proceedings, seeking to enjoin the Superintendent from transferring forty percent of Jugobanka's assets to the DIA

pursuant to the settlement.[1] Additionally, Monter seeks an order directing the Superintendent to release funds in its possession that Beogradska purportedly owes Monter on a standing letter of credit (SLC).

In motion sequence 001 in both proceedings, Petitioners move by order to show cause to enjoin the Superintendent from transferring assets to Jugobanka pursuant to the Settlement.

In motion sequence 002, Monter moves for summary judgment on its claim for payment of the SLC.

The DIA cross-moves in both actions to dismiss the petitions pursuant to CPLR 3211.

In light of the identical issues raised in both proceedings, namely, the Superintendent's authority to transfer assets to the DIA pursuant to the settlement, motion sequence numbers 001 and 002 in the Monter action, and motion sequence 001 in the Sage action, are consolidated for disposition.

Background[2]

The veritable odyssey of this dispute spans nearly seventeen years, when Jugobanka's assets were frozen for a decade following the imposition of economic sanctions on the regime of the former Yugoslavia by the United States government. After sanctions were lifted in 2002, Jugobanka was declared insolvent, and the Office

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[1] The identical Respondents are named in the Sage action, that bears the index number 105778/09.

[2] For a full recitation of the factual background of this dispute, see this Court's September 9, 2008 decision in the action entitled, *NYS Superintendent of Banks v Jugobanka A.D.*, and bearing the index number, 600309/2008.

of Foreign Asset Control (OFAC) released its assets, totaling approximately $100 million at that time, to the possession of the Superintendent pursuant to New York State banking laws. Thereafter, the Superintendent and the DIA became embroiled in protracted litigation in both state and federal courts. The DIA commenced an insolvency proceeding of Jugobanka in Serbia. Subsequently, it filed a 11 USC § 304 petition in the Bankruptcy Court of the Southern District of New York, seeking to repatriate Jugobanka's assets for administration in Serbia.[3]

The Byzantine path that followed this dispute involved five actions, four courts, eight judges, two interveners, twenty motions, fourteen hearings, and two appeals. 4/23/09 Transcript of the U.S. Bankruptcy Court, 22:16-21.

In early 2008, the DIA and the Superintendent reached a tentative settlement of their dispute. Under the settlement, the Superintendent would retain sixty percent of Jugobanka's assets

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[3] Section 304 of the Bankruptcy Code permits a representative of a foreign debtor to commence a proceeding ancillary to a pending foreign proceeding, in order to prevent piecemeal distribution of assets of the debtor and to facilitate a single, coordinated foreign distribution. *See Agency for Deposit Ins. Rehabilitation, Bankruptcy and Liquidation of Banks v Supt. of Banks of the State of New York*, 310 BR 793, 795 (SD NY(, *reconsideration denied* 313 BR 561 (2004), *affirmed* 482 F 3d 612 (2d Cir 2007).

In a section 304 petition, the Bankruptcy Court considers factors that will assure an economical and expeditious administration of the foreign debtor's estate, including the treatments of claimants, and international comity. In 2005, section 304 was repealed and replaced with Chapter 15 of the Bankruptcy Code, but it is not retroactive. Incidentally, the revised provisions of the Bankruptcy Code seek to prevent future receivers from repatriating bank assets.

for local administration, while the remaining forty percent would be remitted to the DIA for repatriation to Serbia, on condition that the settlement be approved by a justice of the Supreme Court.

The Court declined to approve or reject the settlement, on the ground that the applicable banking law provision, New York Banking Law (NYBL) § 618 (1) (a), does not require the Superintendent to obtain the court's approval for the settlement. The Superintendent then moved for leave to reargue (CPLR § 2221 [a]), that was denied on the identical ground.

Shortly thereafter, the DIA and the Superintendent amended the settlement (Settlement) to, inter alia, remove the condition requiring the approval of a Supreme Court justice. In anticipation of execution of the Settlement, the Superintendent and the DIA jointly moved in Bankruptcy Court to dismiss the 11 USC § 304 petition. Petitioners opposed the dismissal, on the ground that they would effectively be denied the opportunity to demonstrate that the transfer of funds to Serbia would prejudice Jugobanka's creditors.

On April 24, 2009, Judge Peck of the Bankruptcy Court dissolved the preliminary injunction and dismissed the petition with prejudice as to the Superintendent, and without prejudice as to the other parties. 4/23/09 Transcript, 39:15-18.

The following day, Sage, a judgment creditor of Jugobanka, brought an Article 78 petition. Shortly thereafter, Monter, a beneficiary of a standby letter of credit (the SLC) issued by

Beogradska, brought a separate Article 78 petition similarly seeking injunctive relief on identical legal grounds, in addition to an order directing the Superintendent to release funds.[4]

The primary basis for Petitioners' challenge is that the Superintendent lacks the statutory authority to turn over funds of a failed bank in its possession to a foreign administrator, albeit in the context of a settlement of claims, outside of a liquidation proceeding.

The Superintendent counters that it has broad discretion under the banking law to take steps to insure that assets remain to cover a portion of the claims of Jugobanka's local creditors, while limiting the litigation risk of complete repatriation of the assets to Serbia for administration there, that is achieved by the Settlement.

Discussion

Motion for Preliminary Injunction

A party seeking preliminary injunctive relief pursuant to CPLR § 6301 must demonstrate, (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in its favor. *City of New York v Untitled LLC*, 51 AD3d 509, 511 (1st Dept 2008).

Likelihood of Success on the Merits

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[4] Including Petitioners, Jugobanka has sixty-six putative creditors. Petitioners are the only creditors of Jugobanka to object to the Settlement. 4/23/09 Transcript, 8:1-11.

Petitioners argue[5] that they are likely to succeed on the merits of their claims because NYBL § 618 does not authorize the Superintendent to turn funds over to a foreign liquidator prior to liquidation. They contend that NYBL § 606 (4) permits the Superintendent to turn over assets held by it to a foreign liquidator only after local creditors' claims have been paid in full, and only in the context of a liquidation proceeding. Thus, because the liquidation of Jugobanka has yet to be occur, the Superintendent's transfer of assets to the DIA amounts to an ultra vires act.

Respondents contend that NYBL § 618 (1) (a) grants the Superintendent broad discretion to wind up the affairs of failed foreign banks, that includes the power to settle a lawsuit challenging its authority over failed banks, pre-liquidation. Further, Respondents argue that NYBL § 606 (4), cited by Petitioners as limiting the Superintendent's ability to turn over assets, applies only to surplus funds that exist at the conclusion of liquidation proceedings, and thus, is inapplicable here, because the Superintendent has yet to initiate liquidation. Finally, Respondents contend that the issue of the Superintendent's authority to enter into the Settlement was already determined in Bankruptcy Court, by the dismissal of the 11 USC § 304 petition "in contemplation of settlement," and thus,

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[5] Although Monter's arguments appear to largely mirror Sage's in support of its petition, Monter fails to submit a separate memorandum of law in support of its application for a preliminary injunction.

is res judicata.

NYBL § 618

The NYBL "give[s] the Superintendent considerable discretion with regard to the appropriate manner of gathering, liquidating and dealing with the business and property of a failed foreign banking corporation." *Matter of Liquidation of New York Agency*, 90 NY2d 410, 420 (1997); *Matter of Liquidation of New York Agency & other Assets of Bank of Credit and Commerce Intl, S.A.*, 223 AD2d 184, 192-3 (1st Dept), *lv granted* 89 NY2d 802 (1996), *affirmed* 90 NY2d 410 (1997).

That statutory authority is not limited to the liquidation of an insolvent bank, and includes acts not expressly enumerated in the statute aimed at the conservation of bank assets. *Application of Siebert*, 89 AD2d 550, 551 (1st Dept 1982).

NYBL § 618 (a) (1) provides,

> The superintendent is authorized, upon taking possession of any banking organization, to liquidate the affairs thereof and **to do all acts** and to make such expenditures as **in his or her judgment are necessary to conserve its assets** and business (emphasis added).

Further demonstrating that its statutory authority is not limited to liquidation, is the fact that insolvency alone is not a pre-requisite to taking possession of a bank. *See* NYBL § 606.

NYBL § 619

Further, the Superintendent is granted statutory authority to "prosecute and defend any and all actions relating" to troubled banks. NYBL § 619 (1) (a) states,

> For the purpose of executing any of the powers and

> performing any of the duties hereby conferred upon him, the superintendent may, in the name of any banking organization of which he is in possession, prosecute and defend any and all actions.

NYBL § 619 (1) authorized the Superintendent to defend the proceedings in Bankruptcy Court and the appeals that followed in the Second Circuit, in addition to defending these Article 78 proceedings before this Court. Logically, it follows that the Superintendent has the authority, while not explicitly enumerated in the statute, to settle claims that it is authorized to prosecute and defend in the first instance.

NYBL § 634

In addition, the Superintendent is granted statutory authority to transfer bank assets in its possession to another agency of a foreign bank (such as the DIA, the foreign administrator of Jugobanka), when it determines, in its discretion, that it is in the best interests of creditors. NYBL § 634 states,

> In addition to such other powers as he or she may possess under the law, the superintendent ... may, without obtaining the approval of ... any court, sell transfer, assign, consolidate or otherwise dispose of all or any part of the assets [of the bank] ... to another ... agency of the foreign banking corporation ... on such terms as may be determined to be in the best interests of ... other creditors.

NYBL § 606 (4)

Other provisions of the NYBL do not limit the Superintendent's authority, in this regard. NYBL § 606 (4) (a) states,

> The superintendent may also, in his or her discretion ... take possession of the business and property in

> this state of any foreign banking corporation ... [and] Thereafter the Superintendent shall liquidate **or otherwise deal with** such business and property in accordance with the provisions of this chapter applicable to the liquidation of banking organizations (emphasis added).

Giving effect to the phrase "or otherwise deal with," the provision clearly establishes the Legislature's intent that the Superintendent is authorized by the statutory framework of the NYBL to pursue action in its discretion to conserve assets, including in a non-liquidation setting. The statutory history of this provision confirms this legislative intent.

The phrase "or otherwise deal with" was added in 1950 in order to broadly authorize the Superintendent to pursue remedies outside of liquidation, as demonstrated by the 1950 sponsor's memo that states,

> Under [pre-1950] provisions whenever the Superintendent takes possession of the business and property in this State of a foreign banking corporation he must "liquidate" such business and property in accordance with the provisions of the Banking Law relating to banking organizations generally. Section 4 of the bill amends this provision by permitting the Superintendent to liquidate "or otherwise deal with" such provision of the Banking law. This would permit the Superintendent to surrender possession of such business and property whenever the conditions for such surrender specified in Article XIII of the Banking Law occur.
>
> Memorandum of New York State Banking Dept., Jan. 10, 1950, Bill Jacket, L. 1950, ch. 44, at 5.

Consequently, the Superintendent's pre-liquidation settlement of claims with a foreign representative of a failed foreign bank is a remedy available to the Superintendent, as expressly contemplated by legislative intent.

Contrary to Petitioners' urging, the statutory scheme for

liquidation does not provide an exhaustive list of the Superintendent's powers, nor does it proscribe a particular activity. *Matter of Liquidation of New York Agency & other Assets of Bank of Credit and Commerce Intl, S.A.*, 223 AD2d at 192-3. Logically, circumstances will arise that require the Superintendent to take steps that, while not specifically enumerated in the statute, necessarily flow from the obligations and authority vested in it by the statutory scheme. *Id.*

Here, seven years of litigation with the DIA has prevented the Superintendent from initiating a liquidation claims process. Under these circumstances, the Superintendent determined, in its discretion, that a settlement of claims was warranted. The Superintendent is not prevented from carrying out this action by the statutory scheme for liquidation set forth in NYBL § 606 (4), merely because it is not enumerated in the statute, or because it occurs prior to the initiation of the liquidation process.

NYBL § 606 (4) (b) does not alter this conclusion. NYBL § 606 (4) (b) states,

> Whenever the accepted claims, together with interest thereon, if interest was paid, and the expenses of the liquidation have been paid in full or properly provided for, the superintendent upon the order of the supreme court shall turn over the remaining assets to, in the first instance, other offices of the foreign banking corporation that are being liquidated ... After such payments, if any, have been made, any assets of the foreign banking corporation remaining in the hands of the superintendent shall be turned over to the principal office of such foreign banking corporation, or to the duly appointed domiciliary liquidator or receiver of said foreign banking corporation.

Petitioners argue that this provision prevents the

Superintendent from turning over bank assets to a foreign entity before the claims and related interests of New York bank creditors have been paid in full. However, while the provision establishes the claims distribution order for liquidation, namely, that the claims of New York creditors must be fulfilled before any funds can be turned over to a foreign entity, this distribution order is necessarily triggered only by liquidation itself.

The provision's reference to "accepted claims," is a term of art, defined under NYBL § 624 as claims that are determined only after the Superintendent initiates a liquidation proceeding and begins the claims procedure. Therefore, NYBL § 606 (4) (b) is inapplicable to action taken by the Superintendent prior to liquidation.

To refute this interpretation, Petitioners point to the following legislative history:

> [The amendment to the NYBL § 606 (4) (b)] provides that, after New York's Superintendent of Banks has liquidated a foreign banking corporation, any assets which remain shall, upon request, first be turned over to other regulators in the United States for the liquidation of the foreign banking corporation's offices in those states in amounts needed to settle their claims and costs. After such payments have been made, any remaining assets shall be turned over to the bank's principal office or to the duly appointed liquidator or receiver [section 6 of the bill, amending § 606 (4) (b) of the Banking Law].
>
> New York State Senate Bill Jacket 2000 S.B. 3554, Ch. 567 at 4-5.

However, the phrase "after New York's Superintendent of Banks has liquidated" demonstrates that the claims distribution

order set forth in NYBL § 606 (4) (b) only applies in the context of liquidation. No other language contained in the statute otherwise narrows the Superintendent's broad statutory authority to act outside of liquidation.

Res Judicata

Finally, this Court must reject Respondents' assertion that the issue of the Superintendent's statutory authority to enter into the Settlement is res judicata. The doctrine of res judicata bars litigation of a claim where a "judgment on the merits exists from a prior action between the same parties involving the same subject matter." *In re Hunter*, 4 NY3d 260, 269 (2005).

Judge Peck expressed a positive view of the Settlement, remarking that creditors would likely not be prejudiced by dismissal of the 11 USC § 304 proceeding. 4/23/09 Transcript, 51:1-4. However, he explicitly declined to reach the issue of the Superintendent's statutory authority to enter into the Settlement under the NYBL in the first instance. 4/23/09 Transcript: 54:2-4.

Nonetheless, Petitioners fail to demonstrate a likelihood of success on the merits. The broad statutory discretion granted to the Superintendent to take possession of a failed foreign bank, and to both liquidate and to do "all acts as necessary" with respect to the bank in its possession, which includes the authority to settle claims with a foreign administrator to insure that assets remain to cover a portion of the Jugobanka's local

creditors, while limiting the litigation risk of complete repatriation of the assets to Serbia for administration there.

B. Irreparable Harm

Irreparable harm is injury that is neither speculative nor compensable by money damages. *GFI Securities, LLC v Tradition Asiel Securities, Inc.*, 61 AD3d 586 (1st Dept 2009). Sage argues that, without the sought after relief, it will be irreparably harmed because its claim was already rejected by the Serbian court and it is "forever foreclosed from recovering anything in Serbia." While a Serbian court rejected Sage's attempt to seek recognition of its New York judgment, Petitioners have filed claims in the liquidation proceedings of Jugobanka in Serbia, the adjudication of which have been stayed pending the outcome of this action (Dolan Aff., ¶ 11, 4/23 Transcript, 27:9-16).

Further, Petitioners, as creditors of Jugobanka, may file claims with the Superintendent once the New York liquidation proceedings begin. Thus, the notion that Petitioners are forever foreclosed from collecting in Serbia is speculative, because Petitioners potentially have two forums in which to pursue their claims. In any event, the only risk of harm is that Petitioners may recover a smaller portion of their claims in the New York liquidation. Therefore, Petitioners fail to demonstrate that they will be irreparably harmed in the absence of a preliminary injunction.

C. Balance of the Equities

The potential harm to Petitioners from pursuing its claims

in Serbia, or collecting a smaller percentage of its claims in an eventual liquidation in New York, do not outweigh the harm caused by enjoining the Superintendent from entering into the Settlement, that would immediately result in a resumption of protracted litigation with no end in sight. Resumption of litigation would also not serve Jugobanka's other creditors, at least one of whom formally appeared in Bankruptcy Court to support the Settlement. The recoverable amount of claims of Jugobanka's putative creditors, that includes Petitioners, shrink each day spent further litigating. Therefore, the equities do not weigh in Petitioners' favor.

For these reasons, Petitioners' motion seeking emergency relief is denied.

Monter's Motion for Summary Judgment

Monter moves for summary judgment, seeking an order directing the Superintendent to release the proceeds of its SLC, pursuant to 31 CFR § 500.205 (1) (c) (i) and common law.

At the outset, Monter's motion for summary judgment, initiated prior to the DIA's answer to its petition and the Court's disposition of the DIA's pre-answer motion to dismiss, is procedurally improper. CPLR 3212 (a).

Moreover, the remedy that Monter seeks is beyond the purview of an Article 78 proceeding. The function of an Article 78 proceeding is to determine whether an agency has violated lawful procedures, and is limited to the determination of specific questions, including whether a governmental body failed to

perform a duty enjoined upon it by law, and whether the body proceeded without or in excess of jurisdiction. CPLR § 7803.

In addition to seeking judicial review of the Superintendent's authority to settle claims with the DIA, Monter seeks relief on its substantive claim for release of the proceeds of the SLC from Beogradska's assets in its possession, which goes well beyond judicial review of an administrative determination.

Monter's argument that the Superintendent waived its jurisdictional argument because "his lawyer agreed in Chambers and in writing to accept service ... [and] because he did not challenge jurisdiction in his first appearance arguing against the TRO in Chambers" (Monter's Memo. of Law, 6), is simply incomprehensible.

In any event, Monter's claim for an order directing the Superintendent to release the proceeds of the SLC because the funds are not appropriately part of Beogradska's bankrupt estate must be dismissed.

Monter is the beneficiary of a standby letter of credit (SLC) issued to it in New York by Beogradska. On September 10, 1992, Monter attempted to draw down on the SLC. The following day, Beogradska indicated that its operations had been suspended as of June 1, 1992 by OFAC, and that its accounts were blocked. Annexed to the Walsh Aff. Monter acknowledges that, when it attempted to draw down on the SLC, Beogradska was prohibited from honoring the draw down request as the result of the federal asset freeze in effect. 6/24/09 Transcript, 5:9-10.

Monter contends that as beneficiary of the SLC, title to the SLC proceeds passed to Monter upon draw down. Thus, Monter asserts, the SLC proceeds are not appropriately part of Beogradska's bankrupt estate, and cannot be liquidated by the Superintendent.[6]

Monter made the identical argument in support of a motion before the Bankruptcy Court in October 2007, that it later withdrew. Walshe Aff., ¶¶ 4-5, Exhibit B, annexed to the Donlon Aff.; 10/16/07 Transcript, 8:17-19. Judge Peck described Monter's argument as "border[ing] on preposterous." 10/16/07 Transcript, 6:7-8.

A letter of credit is an independent legal obligation of the issuing bank (Beogradska) to pay the beneficiary (Monter). *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 12-13 (1988). When a bank honors the letter of credit, it pays the beneficiary out of its own assets, and not with assets belonging to the debtor who originally applied for the letter of credit. *In re M.J. Sales & Distributing Co.*, 25 BR 608, 614-15 (SD NY 1982).

Generally, failure on an issuing bank's part to honor a letter of credit and pay the beneficiary leads to a claim by the beneficiary against the bank, and not the debtor, because the assets to be used in paying the beneficiary belong to the bank.

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[6] Monter previously asserted a claim against Beogradska for money due under the same SLC in a prior action bearing the index number 115962/96 before this Court, that was dismissed. *Monter Joint Stock Co. v Udruzena Beogradska Banka*, 257 AD2d 496 (1st Dept 1999). This Court recently amended the judgment in that action pursuant to CPLR 5019, providing that the dismissal of the complaint was without prejudice.

In re Ocana, 151 BR 670, 672 (SD NY 1993). Thus, until an issuing bank pays on a letter of credit, the letter of credit and its proceeds are property of the bank. *Id.*

Contrary to its unsupported assertion, title to the proceeds of the SLC did not automatically pass to Monter at the moment it attempted to draw down on the SLC, either by virtue of its status as being a beneficiary of the SLC, as the result of the lifting of the sanctions against Beogradska, or otherwise. The SLC and its proceeds remained assets of Beogradska, and became a debt of Beogradska when it failed to honor Monter's draw down request. Thereafter, the debt to Monter passed to Beogradska's bankrupt estate, that has been in the Superintendent's possession since 2002. All of the case law that Monter cites to in order to demonstrate otherwise is distinguishable or does not support its arguments.

Alternatively, Monter asserts that, when it drew down on the SLC in September 1992, Beogradska was obligated to immediately pay the obligation under 31 CFR § 500.205 (c) (3) (i). On this basis, Monter urges that, despite the executive order of the U.S. government blocking it from making any transfer, Beogradska should have paid out the SLC proceeds to Monter, and that the Superintendent is violating the CFR by continuing to refuse to release the proceeds to Monter.

The CFR does not support Monter's assertion. 31 CFR § 500.205 (c)(3) permits pay out of "**certain types** of blocked property" (emphasis added), and refers to "checks and drafts"

only. Checks and drafts are defined in the provision as "cashier's check, money order, or traveler's checks."

Thus, under the basic principle of *expressio unius*, it must be presumed that, in enumerating certain types of property within the ambit of 31 CFR § 500.205 (c)(3), the Legislature deliberately intended to exclude other types of property not enumerated therein, such as letters of credit. *Williamson v Culbro Corp. Pension Fund*, 41 AD3d 229, 232 (1st Dept 2007), *lv denied* 10 NY3d 702 (2008).

However, even assuming arguendo that Beogradska either unlawfully or under a mistake of law failed to pay Monter the proceeds of the SLC, at the time that sanctions were imposed and when sanctions were lifted, Monter's claim remains that of a creditor as against Beogradska's bankrupt estate. In order to recover on this claim, Monter must await liquidation proceedings.

Otherwise, ordering the Superintendent to release any of Beogradska's funds to Monter, would be, in effect, an ouster of the Superintendent from its statutory role as liquidator, and be an improper circumvention of the statutory scheme for liquidation set forth in the NYBL.

However, the most persuasive ground for denying Monter's motion and dismissing the petitions, is that the NYBL provides for a mandatory statutory injunction against special proceedings.

NYBL § 619 (1) (d) (1) states,

> [T]he superintendent's taking possession of any banking organization and the liquidation of same **shall operate as a stay of and as an injunction against**, as of the date the superintendent takes possession of the banking

> organization, applicable to all person or entities, of:
> (I) The **commencement or continuation** ... of a
>
> judicial ... or other **action or proceeding** ... **to recover a claim** against the banking organization that arose before the taking of possession;
> ...
> (iii) **Any act to obtain possession of property** of the banking organization or of property from the banking organization or **to exercise control over property** of the banking organization (emphasis added).

Monter's claim does not fall under any of the exceptions set forth in NYBL § 619 (1) (d) (2), and is subject to the mandatory stay and injunction. Therefore, Monter's procedurally improper motion for summary judgment is denied on multiple grounds.

Respondent DIA's Cross-Motion to Dismiss

The DIA's motion to dismiss is based upon res judicata, the Superintendent's statutory authority to enter into the Settlement, and the mandatory injunction and stay provision of NYBL § 619 (1) (d) (2).

As discussed above, the issue of the Superintendent's authority to settle claims with the DIA was not determined in Bankruptcy Court, and thus, is not res judicata.

However, the Superintendent has broad statutory authority with respect to a failed bank upon taking possession. That statutory authority includes liquidation of a bank in its possession, "do[ing] all acts ... as in [the Superintendent's] judgment are necessary to conserve a bank's assets and business" (NYBL § 618 [1] [a]), "prosecut[ion] and defen[se of] all actions" in the name of any bank in its possession (NYBL § 619

[1] [a]) and "without obtaining the approval of ... any court, [the] ... transfer ... or otherwise dispos[ition] of all or any part of the assets" of the failed bank to another agency of that bank, "on such terms as may be determined to be in the best interests of ... creditors" (NYBL § 634).

Finally, while not expressly enumerated in the NYBL, based upon the Superintendent's determination that such an act is necessary to conserve the assets of the failed bank and is in the best interests of the creditors, the Superintendent has authority to enter to into a Settlement that involves the compromise of claims with the foreign administrator of a failed bank and contemplates the transfer and disposition of a portion of the assets in its possession.

Because the petitions ultimately seek to exercise control over Jugobanka's property by preventing the Superintendent from transferring funds in its possession, the relief they seek is subject to the statutory injunction. NYBL § 619 (d) (1).

Otherwise, the Court has already determined above that Petitioners fail to demonstrate irreparable harm and the balance of the equities do not weigh in their favor. Therefore, dismissal of the petitions is proper, pursuant to CPLR § 3211.

In closing, the Court quotes Judge Peck, who reflected that "It's time to put this dispute to an end, once and for all." 4/23/09 Transcript, 549-10.

Accordingly, it is

ORDERED that Petitioners' motions for a preliminary

injunction are denied, and it is further

ORDERED that Respondent's cross-motion to dismiss is granted, and it is further

ORDERED that Petitioner's motion for summary judgment is denied; and it is further

ADJUDGED that the petitions are denied and the proceedings are dismissed.

This constitutes the decision and judgment of the Court.

Dated: September 14, 2009

ENTER:

J.S.C.

HON. CHARLES E. RAMOS