B&M Kingstone, LLC v Mega Intl. Commercial Bank Ltd.
2018 NY Slip Op 30743(U)
April 25, 2018
Supreme Court, New York County
Docket Number: 158577/14
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------x

B&M Kingstone, LLC, as assignee of Super Vision International, Inc., a Florida Corporation,

Petitioner,

-against-

Mega International Commercial Bank Ltd. f/k/a International Commercial Bank of China,

Respondent.

----------x

DECISION AND ORDER

Hon. Kathryn E. Freed, J.S.C.
Index Number 158577/14
Motion Sequence 004

The following e-filed documents, listed by NYSCEF document numbers 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 280, 281, 284, and 289 were considered in deciding the instant motion.

In this proceeding commenced by petitioner B&M Kingstone, LLC (B&M) seeking to enforce a judgment, the New York branch (NY Branch) of respondent Mega International Commercial Bank, Ltd. (Mega), formerly known as the International Commercial Bank of China, moves for an order, pursuant to CPLR 2304, 5223, and 5240, quashing four December 2016 deposition subpoenas served by B&M. Respondent also seeks a protective order, pursuant to CPLR 3103, 5223, and 5240, and requests an award of its costs and reasonable attorneys' fees on this motion, citing Rules of Chief Admin of Cts (22 NYCRR) § 130-1.1.

B&M opposes Mega's motion and cross-moves for an order, pursuant to CPLR 5224, compelling it to comply with those four deposition subpoenas and, thus, to produce Vincent S.M. Huang (Huang), Chien-Du Jan (Jan), Huei-Ying Chen (Chen), and an unnamed "officer with knowledge." Michelle Englander (Englander) cross-moving affirmation, exhibit W. B&M also seeks an order compelling Mega to comply with a September 2016 subpoena duces tecum, and holding Mega in contempt. Additionally, B&M seeks an order awarding it damages and its attorneys' fees associated with its cross motion. Last, B&M requests an order directing Mega to pay its attorneys' fees relating to its October 2016 contempt motion.

Background

Brett Kingstone (Kingstone), a B&M member and a developer of fiber optic products, founded nonparty Super Vision International, Inc. (Super Vision), which manufactured fiber optic lighting and sold its products internationally. B&M is the 2009 assignee of Super Vision's 2003 Florida state court judgment in a 1999 action against Samson Wu (Wu), his wife, Susan Sumida Wu, his mother, Debbie Wu, Ruby Lee, Wu's brother, Thomas Wu (*see* NYSCEF Doc. 14, David Winkler's affidavit[1]), Marsam Trading Corp., an entity owned by Wu and his wife (*id.*, ¶ 3) and Wu's principal business in Florida, where he lived, David Winkler (Winkler), former Senior Vice President of Marsam Trading Corp. (*id.*) and allegedly Wu's right-hand man there, Travis Pochintesta, Jack Caruso, Marsam Trading Corporation (HK) Ltd., Optic-Tech International Corp.,

[1] This court takes judicial notice of the e-filed documents in this proceeding. In addition, respondent asks this court to take judicial notice of, and incorporate by reference, various papers on other motions in this proceeding. *See* Respondent's memorandum in support of its motion at 4. Further, the history of other motions in this proceeding is relevant to one's understanding of the instant applications.

an entity owned by the "Wu family" (*id.*), and Shanghai Qiaolong Optic-Tech International. In that action, Super Vision claimed that, not long after it was founded in 1990 (*see* NYSCEF Doc. 48, Kingstone aff in support of motion seq no. 002, ¶¶ 13-14), Wu and his business associates executed a scheme in which they misappropriated Super Vision's proprietary information, counterfeited its fiber optic products, and flooded the market with those counterfeits, selling them at lower prices and devastating Super Vision's presence in the industry. In July 2014, B&M filed and recorded the judgment in the Supreme Court, Nassau County. The judgment, which exceeded $39,000,000.00, is now claimed, with statutory interest, to exceed $73,000,000.00.

In this 2014 proceeding, B&M claims that the judgment debtors, especially Wu, have been hiding funds in offshore accounts to avoid paying the judgment. Mega is a Taiwanese bank, with its principal place of business in Taipei City. Mega has a few United States branches, including one in New York and, as relevant herein, two in Panama, where it has a branch in Panama City and another in the Colon free trade zone (free trade zone). Michele Englander (Englander), of B&M's counsel's office, contends that judgment debtors Wu, Susan, Debbie, and Thomas Wu, and Ruby Lee (Wu debtors), and their affiliated companies have accounts in Mega branches in Panama and Taiwan, and that, on "information and belief," there is a connection between Wu and Mega's free trade zone branch. Englander cross-moving affirmation, ¶¶ 44, 45.

B&M claims that, in October 2003, Wu, to avoid paying the judgment, "donat[ed]" his family's Panamanian home/apartment to an entity called Stefanie, S.A., which he controlled, and was named for one of his daughters. Englander cross-moving affirmation, exhibit N's exhibit C, Panamanian registration certificate. Mega holds a $250,000.00 first mortgage on that donated apartment. *See* NYSCEF Doc. 19, Verified Petition, exhibit R (2003 report prepared for Super

Vision by B.M. Investigations regarding Wu's Panamanian assets, and related documents, including the apartment's Panamanian registration certificate). B&M asserts that Mega, as the mortgage's holder, authorized the home's donation to Stefanie, S.A. Englander cross-moving affirmation, exhibit C, Kingstone's 10/14/2016 affidavit in support of B&M's second contempt motion, ¶ 30.

To demonstrate Wu and his wife's connection to various entities, including Stefanie, S.A., B&M provides a copy of an undated security agreement between a Miami branch of Ocean Bank, as the secured party, and debtors/pledgors, Stefanie, S.A., Marsam de Mexico, S. A. and SamsonLiu Com. Rep. Inp. & Exp., Ltda (SamsonLiu), in which they pledged, inter alia, their accounts, inventory, equipment, instruments, and investment documents to Ocean Bank. That agreement was signed by Wu, and sets forth the pledgors' addresses as to Wu's attention, at his address in Miami, where his family has another home. *See* Englander cross-moving affirmation, exhibit N's exhibit A. B&M further provides a 2002 assignment agreement between Ocean Bank and Marsam Trading Corp., in which Wu signed for the latter as its CEO. *Id.* Also set forth is an unsigned copy of a February 2002 settlement agreement between Ocean Bank, the holder of a number of promissory notes and mortgages, and Wu and Susan Wu, Stefanie, S.A., Marsam Trading Corp., Marsam de Mexico, S.A., and SamsonLiu, all listed as guarantors, and others. That agreement recites that Wu and/or Susan Wu owned and/or controlled Stefanie, S.A., Marsam de Mexico, S.A., and non-guarantor parties to that agreement, Optic-Tech International Corp, and Cornell Corporation. *See* Englander cross-moving affirmation, exhibit N, and its attachment, exhibit B at 4.

Angel Leonardo Caballero Bethancourt (Caballero), allegedly a former and/or current manager or officer of Mega's free trade zone branch, or who was claimed to be at least a de facto officer of that branch, because, on "information and belief," he was in charge of Wu's accounts at

that branch (Englander cross-moving affirmation, ¶¶ 46-47), was, according to B&M, listed as an officer of Stefanie, S.A. and of Stacie, S.A., an entity named for Wu's other daughter, in order to mask Wu's connection to those entities. *Id.*, ¶¶ 26, 27. B&M provides a 2003 Panamanian registration certificate for Stefanie, S.A., which sets forth the "subscriptores" as Susana (presumably, Susan) Sumida Wu, Di Qing Xing, and "Otro" (Spanish for "other"). Englander cross-moving affirmation, exhibit N's attached exhibit C. B&M notes, based on a copy of the May 2000 minutes of a Stefanie, S.A. shareholders' meeting, over which Caballero, as its President, presided, Wu resigned as Director Secretary and was replaced by one "Silka Cespedes W." Englander cross-moving affirmation, exhibit N's attached exhibit D. B&M claims that, before that meeting, Wu or his judgment debtor wife was that entity's majority shareholder. Englander claims that Caballero was a "straw man" who used his positions as president of Stefanie, S.A. and of another Panamanian entity, Gato Optica, S.A. (Gato), to conceal the Wu debtors' assets by means of wire transfers between various Mega accounts.

B&M provides a copy of a September 1998 e-mail from judgment debtor Thomas Wu to Rich&Paul<sales@oasisfelis.com, and copied to judgment debtor Winkler, at Marsam.com, presumably judgment debtor Marsam Trading Corporation, where Winkler worked. That e-mail advises that Gato was in the process of being set up, and that, until it was, "any urgent quote or sales on hand may use this company's name," i.e., Stefanie, S.A. Englander cross-moving affirmation, exhibit N, and its attached exhibit F. The e-mail indicates that Caballero was the president; that wire money transfers were to go through the Swiss Bank Corporation at a specific Manhattan post office box for the account of Bancafe, a bank in the free trade zone, payable to Stefanie, S.A., also located in the free trade zone; that once Gato was set up, the only change in that procedure was the

substitution of Gato for Stefanie, S.A.; and that the e-mail's recipient should print the e-mail and "stick it up somewhere." *Id.* B&M further sets forth a copy of Gato's October 1998 Panamanian registration, listing Caballero as its president, and Silka Cespedes Wilson as its treasurer. *Id.*

B&M provides a copy of a notarized September 24, 2002 report, on Super Vision letterhead, of an investigation conducted by two individuals on Super Vision's behalf. Those individuals asserted that they had spoken that day to a named employee of the Bancafe free trade zone branch, who stated that, about three years earlier, Stefanie, S.A. closed its Bancafe account and opened one in Mega's free trade zone branch. They further claimed that they had contacted a named Mega branch employee, inquired about Stefanie, S.A.'s account, received a specified account number, and were told that the amount in the account was "substantial." *Id.*, exhibit N's attached exhibit E. B&M asserts that all of the foregoing documentation demonstrates that the judgment debtors are involved with, and control, Stefanie, S. A. and Gato, and are using Panamanian free trade zone banks, including Mega's, to wire transfer funds in order to hide assets and avoid paying the judgment.

B&M claims that, in 2004, Super Vision attempted to enforce its judgment in Panama, including by presenting Wu's Consent to Disclosure,[2] but was only able to obtain limited relief from Mega in the form of a small account in Wu's name. Super Vision later commenced what was

---

[2] In 2004, pursuant to the Florida state court's order, Wu was required to make disclosure in aid of execution, including signing a Consent to Disclosure of Bank Account Information, in which he directed any bank or trust company at which he had an account of any kind, or at which a corporation had a bank account of any kind from which he was authorized to draw, to disclose all information and to deliver documents of every nature in the bank or trust company's control or possession, which related to such accounts, to a specific Florida law firm (presumably Super Vision's), including documents relating to a request to enforce the judgment, for the period of 2002 through the present. Englander cross-moving affirmation, exhibit C, attachment B.

primarily a RICO action against Mega in a Federal District Court in Florida, asserting that Mega had engaged in a scheme with Wu to prevent Super Vision from satisfying its judgment, and that Mega failed to reveal the full extent of Wu-controlled assets held in Mega's Panamanian branches. That action was dismissed in 2008, with prejudice, for failure to state a claim. *See* Stewart Lee (Lee) affirmation in support, exhibit J .

History of the Instant Proceeding

In August 2014, B&M served Mega with an information subpoena accompanied by a questionnaire for each judgment debtor. The questionnaires sought to ascertain, as of the date of the subpoenas and two years earlier, whether Mega had any record of account or property in which each judgment debtor may have had an interest, whether in the judgment debtor's name, under a trade or corporate name, or with others, and, if so, Mega was to describe each such account or property. The questionnaires also sought information as to whether each judgment debtor was indebted to Mega and had ever provided it with an account application or a statement of financial condition. Mega replied, as to each judgment debtor, that the NY Branch was not holding any of their accounts or property, nor were the judgment debtors indebted to the NY Branch, and that every other question was inapplicable.

In September 2014, B&M commenced this proceeding seeking, among other things, an "[o]rder," compelling Mega to comply with the information subpoena and to respond to the questionnaires, or holding Mega in contempt for failing to comply. NYSCEF Doc. 28, Order to show cause; *see also* NYSCEF Doc. 1, Petition, ¶ 2. By order dated September 15, 2014, this Court (Wright, J.) held that the "motion" (seq. no. 001) to hold Mega in contempt for failing to comply

with the information subpoena was granted only to the extent of directing Mega to "respond to the information subpoena, a/p/o." NYSCEF Doc. 36. By order dated September 16, 2014 (*B&M Kingstone, LLC v Mega Intl. Commercial Bank, Ltd.*, 2014 NY Slip Op 33549 [U] [Sup Ct, NY County 2014]), Justice Wright found, among other things, that Mega had failed to demonstrate that foreign laws prevented the enforcement of the information subpoena, and noted that, at least as to Wu, any concerns as to foreign law were waived by his Consent to Disclosure. Justice Wright also directed Mega to reply to the information subpoena.

Mega appealed Justice Wright's orders. In August 2015, the Appellate Division, First Department (First Department) affirmed Justice Wright's determination that the NY Branch was to respond to the information subpoena. *See Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.*, 131 AD3d 259 (1st Dept 2015). The First Department found that New York lacked general jurisdiction over Mega's branches outside this state, but that such determination did not end its inquiry, because the issue was "whether the separate entity rule[3] bar[red] New York courts from compelling [the NY Branch] to produce information pertaining to Mega's foreign branches." *Id.* at 264-265, 266. The First Department held that, because respondent, in being permitted to operate in New York, consented to its regulatory oversight, it was "subject to jurisdiction requiring it to comply with the appropriate information [s]ubpoenas," citing *Vera v Republic of Cuba,* (91 F Supp 3d 561, 571 [SD NY 2015], *revd* on other grounds, 867 F 3d 310 [2d Cir 2017]). 131 AD3d at 265. The First Department observed that, in *Vera*, the information requested could be secured by electronic searches conducted in the bank's New York office, within the court's jurisdiction. *Id.* at 267. In

[3] That rule provides that "each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other [branches] or at the home office." *Id.* at 266 (internal citations and quotation marks omitted).

addition, the First Department found that, because respondent did not contend that complying with the information subpoena would be onerous or excessively expensive, or that the information sought was unavailable in New York, the court's jurisdiction over the NY Branch permitted the court to compel compliance with the information subpoena. *Id.* at 267.

After the Court of Appeals denied leave to appeal the First Department's decision (*Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd*, 26 NY3d 995 [2015]), Mega, in December 2015, by its counsel, responded to the information subpoena by objecting to it as unduly burdensome, claiming that B&M had not provided sufficiently specific information about the judgment debtors for respondent to "identify responsive information," and by submitting the answers to the questionnaires, sworn to by Jan, one of the vice presidents and deputy general managers. Lee moving affirmation, exhibit B. In its answers, the NY Branch denied that it had a record of any account or property in which each judgment debtor had an interest, whether under each debtor's name, a trade or corporate name, or in association with others. The NY Branch also denied that the judgment debtors were indebted to it or that they had provided it with any account applications or financial statements.

Subsequently, B&M learned that, in 2015, the New York State Department of Financial Services (DFS) and another regulator had commenced an examination of the NY Branch. That examination led to a 22-page, August 2016 Consent Order (Consent Order), which was signed by Mega's president and, on behalf of its NY Branch, by Huang, then its senior vice president and general manager. The Consent Order required Mega to pay a $180,000,000.00 penalty, because it had an "inadequate and deficient compliance program," as described therein. Englander cross-moving affirmation, exhibit L. In particular, Mega and its NY Branch "failed to maintain an

effective and compliant anti-money laundering program and Office of Foreign Assets Control of the United States Department of Treasury compliance program, failed to maintain and make available in the NY Branch "true and accurate books and accounts reflecting all transactions and actions," and failed to immediately provide a report to the Superintendent upon discovery of "fraud, dishonesty, making false entries and omissions of true entries, and other misconduct," all in violation of law. *Id.*, ¶¶ 14, 34-36.

DFS observed that a conflict of interest arose because the bank's compliance and operational functions were commingled, and that compliance personnel had little training and were ignorant of applicable law. *Id.*, ¶¶ 6-13. Further, the NY Branch did not "perform adequate reviews of the Bank's affiliates' correspondent banking activities at the NY Branch," and there were serious flaws in the NY Branch's "overall risk assessments," including a failure to follow established policies for an increased level of scrutiny for high-risk customers. *Id.*, ¶¶ 17, 23, 26. Additionally, of the customer files reviewed, about one third lacked information regarding beneficial ownership. *Id.*, ¶ 25. DFS expressed concern over the deficiencies it found, particularly because Mega had branches in Panama City and in Panama's free trade zone, notorious high-risk zones for money laundering, as recently demonstrated by the publication of the Panama Papers and the revelations regarding the Mossack Fonseca law firm,[4] as well as by the fact that there was a "significant amount of financial activity" between the NY Branch and Mega's Panamanian branches. *Id.* at ¶¶ 19-20.

---

[4] Within a few days of the issuance of the Consent Order, DFS issued a press release stating that its investigation revealed that a "substantial number" of customer entities that had or have accounts at several Mega branches were "apparently formed" with the help of the Mossack Fonseca law firm, one of the firms at the heart of creating shell company activity, possibly to avoid tax and banking laws or to assist in money laundering around the world. Englander cross-moving affirmation, exhibit M.

DFS found numerous instances which "were indicative of possible money laundering and other suspicious activity." *Id.*, ¶ 21. DFS discovered that the NY Branch had "acted as an intermediary paying bank in connection with suspicious and unusual" transactions related to Mega's Panamanian branches, and that the NY Branch's personnel failed to address the DFS's examiners' concerns in that regard. *Id.* B&M points out that the Consent Order found that a corporate customer of the free trade zone branch had received funds from the NY Branch and that the account's beneficial owner had "been the subject of significant adverse comment in the media," and had evidently been "linked to violations of U.S. law concerning the transfer of technology." *Id.*, ¶ 22. The deficiencies found by DFS were especially disturbing because the credit transactions between the NY Branch and Panama's free trade zone branch totaled $3.5 billion and $2.4 billion, respectively, in 2013 and 2014, and $1.1 billion and $4.5 billion during those years, respectively, between the NY Branch and the Panama City branch; Mega's main office "acted with indifference toward the risks associated with such transactions"; and the NY Branch's overall risk assessment was seriously flawed. *See id.*, ¶ 20-29. Moreover, the NY Branch gave dismissive and troubling responses to the DFS examiners. *Id.*, ¶ 30-33. Consequently, Mega and the NY Branch were required to take extensive remedial steps, all of which had to be to DFS's satisfaction, to address their deficient policies and procedures. Mega and the NY Branch each had to engage a compliance consultant of DFS's choosing and an independent monitor, who was to report to DFS, and was to review, among other things, the NY Branch's dollar-clearing transactions between 2012 through the end of 2014, decide if there were any suspicious or possible money laundering activities, and report its findings.

After learning of the Consent Order, B&M, in September 2016, purportedly served deposition subpoenas on Chen and Huang, individually. Englander cross-moving affirmation, exhibit O (affidavits of service). B&M did not tender traveling expenses and witness fees. *Id.* Additionally, B&M served the NY Branch with a subpoena duces tecum, seeking the production of documents purportedly relevant to the judgment's satisfaction, including various items mentioned in the Consent Order, including DFS's examination report. *Id.* When the NY Branch failed to produce anything responsive to the subpoena duces tecum, and neither Chen nor Huang appeared for deposition, B&M moved (motion seq. no. 002), in October 2016, for an order holding the NY Branch in contempt (the second contempt motion), for failing to comply with the two deposition subpoenas and with the subpoena duces tecum (collectively, the September 2016 subpoenas), or, alternatively, compelling the NY Branch to comply with them. NYSCEF Doc. 68. In providing background information for that motion, its papers advised Justice Wright that the only responses received in connection with the 2014 information subpoena, after the First Department affirmed his 2014 order, were the NY Branch's December 2015 questionnaire responses. *See* NYSCEF Doc. 47, ¶ 25.

Mega opposed B&M's motion, and moved (motion seq. no. 003) to quash the September 2016 subpoenas. Stewart W. Lee (Lee) of defense counsel's office, relying on Jan's November 2016 affidavit (Lee moving affirmation, exhibit E), maintained that the 2015 responses to the questionnaires were different from the 2014 responses, because the 2014 responses were only as to the NY Branch, whereas the 2015 responses related to all Mega branches, to the extent that any electronic searches of the judgment debtors performed at the NY Branch could turn up any information regarding the other branches, which they allegedly could not. Claiming that its 2015

information subpoena responses were proper, the NY Branch urged that it was unnecessary to respond to the September 2016 subpoenas. NYSCEF Doc. 87, Lee affirmation in opposition to B&M's motion to hold Mega in contempt as to the September 2016 subpoenas, ¶¶ 25-30.

As for the alleged adequacy of the 2015 responses, Mega provided the joint affidavit of three NY Branch employees, who were members of its Electronic Data Computing Division and were familiar with its computer and network system, and what electronic data and records could be accessed through that system. NYSCEF Doc. 83, ¶ 3. They opined that the NY Branch lacked "direct" electronic access to the data and records of other branches' customer accounts and of Mega's main office. *Id.*, ¶ 4. That system could only access the data and records of the NY Branch's customer accounts and transactions. *Id.*, ¶ 6. Mega also sought to quash the September 2016 subpoenas on the ground that B&M was engaging in an ongoing fishing expedition and in an improper effort to conduct pre-action discovery against Mega, even after the dismissal of the RICO action. Mega also asserted that the two deposition subpoenas should be quashed because they were unaccompanied by the requisite witness fees. *See* CPLR 2303 (a).

By order dated December 9, 2016 (the Quash Order), Justice Wright denied Mega's motion, which he characterized, in part, as one to quash the information subpoena, but quashed, without explanation, the "other subpoenas served on it, . . . as more fully set forth in [the] decision" on B&M's second contempt motion, also signed on December 9, 2016. NYSCEF Doc. 162. In the latter decision, Justice Wright granted B&M's motion to hold Mega in contempt, but only as to the 2014 information subpoena, and directed Mega to respond to that subpoena. Justice Wright further found Mega "responsible to [B&M] for legal fees incurred in bringing such motion," and indicated that B&M "may move for such relief on proper papers." Englander affirmation, exhibit A.

Because B&M did not, on its second contempt motion, seek any relief with respect to the information subpoena (*see* NYSCEF Doc. 68), and neither order dated December 9, 2016 specifically mentioned the subpoena duces tecum, confusion ensued, resulting in a dispute between the parties regarding the meaning of the decisions. By undated letter received by Mega's counsel on December 19, 2016, Englander, who took the position that Justice Wright's references to the information subpoena were actually references to the September 2016 subpoena duces tecum, inquired as to when Mega would be responding to the subpoena and whether Mega's counsel was authorized to accept deposition subpoenas along with the witness fees. Englander cross-moving affirmation, exhibit R. In a December 21, 2016 letter in reply, Charlotte Licker (Licker), an attorney for Mega, simply referred Englander to Justice Wright's decision quashing all of the September 2016 subpoenas and ignored the question of whether her firm was authorized to accept service of deposition subpoenas. *Id.*, exhibit S.

In response, B&M's counsel, by letter dated December 27, 2016, adhered to the position that references to the information subpoena were to the subpoena duces tecum. *Id.*, exhibit U. B&M added that, unless respondent provided the materials requested by the subpoena duces tecum within 10 days, it intended to move to hold respondent in contempt, but indicated that it waived "its request for information [in that subpoena] with respect to the DFS report." *Id.* That day, Licker e-filed a letter to Justice Wright, copied to B&M's attorneys, requesting a conference to help resolve the parties' dispute and avoid further motion practice. Englander cross-moving affirmation, exhibit V. B&M's counsel responded that day by e-filing a letter to Justice Wright claiming that the court's December 9, 2016 decision required respondent to respond to the September 2016 subpoena duces tecum, requesting that the court again direct respondent to respond to that subpoena, except as to that

which B&M had waived but indicating that, if the court wished to schedule a conference, as per Mega's request, to gain clarity regarding the court's decisions, B&M's counsel asked that it be held as soon after January 1, 2017 as possible.

On December 28, 2016, B&M purportedly "served upon Mega" four new deposition subpoenas (Englander cross-moving affirmation, ¶ 78) addressed, respectively, to Mega "by an officer with knowledge," and "[t]o" Chen, Huang, and Jan, to take their testimony as to all matters relevant to the judgment's satisfaction at 10:00 a.m. on January 17, 2017. *Id.*, exhibit W. Under each individual deponent's name was Mega's name, followed by its address. Each subpoena was accompanied by a witness fee check in the name of each individual prospective deponent, and in Mega's name as to the officer with knowledge. *Id.* By letter dated December 30, 2016, Lee wrote Justice Wright regarding the prior conference request and advised him of the service of four new deposition subpoenas, and that two of them sought the testimony of individuals whose subpoenas Justice Wright had just quashed on December 9, 2016. Lee requested that the issue of the new deposition subpoenas be added to the previously requested conference, noting that B&M's counsel, in her December 27, 2016 letter to the court, effectively indicated that she did not oppose a conference. *Id.*, exhibit X. B&M's counsel apparently did not send a letter to the court objecting to Lee's request or asserting that Mega's objection to the four subpoenas was invalid because the earlier two deposition subpoenas had been quashed solely because witness fees had not been proffered.

Almost two weeks later, on January 12, 2017, Englander wrote Lee, again asking when the response to the subpoena duces tecum would be produced and also seeking confirmation that the four subpoenaed witnesses would be produced on January 17. On January 16, 2017, Lee telephoned

Englander and advised her that neither Mega nor its three named "employees" would be appearing on January 17, and that Mega would be moving for a protective order and to quash the four deposition subpoenas, and sending Englander a copy of that motion. *See* Englander cross-moving affirmation, exhibit Z (Lee's email to Englander of 1/17/17). On "01/17/2017 12:00 am," respondent began e-filing that motion (motion seq. no. 004), which is now before this Court, and at about 4:00 a.m., shortly after the e-filing was concluded (*see* NYSCEF Docs. 168-185), Lee confirmed, by e-mail to Englander, the contents of their January 16th telephone call, requested that the four deposition subpoenas be withdrawn, and indicated, that, "[a]s discussed," a copy of [Mega's] motion for a protective order and to quash the four subpoenas was attached. Englander cross-moving affirmation, exhibit Z. On February 17, 2017, B&M served its opposition to that motion and cross-moved to compel compliance with the four deposition subpoenas, as well as with the September 2016 subpoena duces tecum, and seeking related relief.

However, two days before B&M served the instant cross motion, B&M moved (motion seq. no. 005) to resettle/reargue both decisions signed on December 9, 2016, and sought an order clarifying that the court's reference to the "information subpoena," and the requirement that respondent comply with it, were references to the September 2016 subpoena duces tecum and a direction that respondent comply with it. NYSCEF Doc. 194, Englander's affirmation in support of B&M's application to resettle/reargue, ¶¶ 14 (a), 53-56. B&M further sought clarification as to whether the court had quashed the two deposition subpoenas solely because B&M had failed to proffer the witness fees. *Id.*, ¶¶ 14 (b), 62 (b).

In an order dated June 2, 2017, Justice Wright denied B&M's motion to resettle/reargue, indicated that B&M had misread his decision on its second contempt motion, which decision had

merely confirmed the First Department's decision directing respondent to respond to the information subpoena, and stated that such was the sole relief he granted, and that respondent was only to respond to that subpoena and to "no others." NYSCEF Doc. 290. Justice Wright further held that, because there was no order requiring respondent to comply with the two September 2016 deposition subpoenas, respondent could not have been held in contempt with respect to such subpoenas, which he quashed. With respect to B&M's request for legal fees, Justice Wright stated that he had not previously awarded legal fees, but had only permitted B&M to move for legal fees so that Mega would have the opportunity to dispute the amount and nature of the fees. Justice Wright also indicated that he had not directed Mega to comply with any subpoena duces tecum.

In February 2017, Mega filed a motion (seq. no. 006) to reargue B&M's second contempt motion (motion seq no. 002), and sought to vacate Justice Wright's order dated December 9, 2016, and to replace it with a decision denying B&M's second contempt motion on the grounds that Mega had properly responded to the information subpoena in 2015, and that B&M had not, on its second contempt motion, sought any relief or contempt with respect to the 2014 information subpoena. Although B&M agreed with Mega's latter assertion, it opposed Mega's motion and urged the court to order Mega to comply with the September 2016 subpoena duces tecum and to produce the subpoenaed witnesses who were since re-served with the appropriate witness fees. NYSCEF Doc. 249, Herbert affirmation in opposition to Mega's reargument motion, ¶ 8; *id.*, Wherefore clause. Justice Wright granted reargument and explained in his order, dated "July 18, 2016" [sic],[5] that his

[5] That decision was incorrectly dated 2016, rather than 2017.

"decision of October 19, 2016"[6] did not decide any question of [Mega's] compliance or lack of compliance with the September 2016 subpoenas, that it only directed [Mega] to respond to the information subpoena, and that the contempt could "be purged by such compliance." NYSCEF Doc. 292.

The Instant Motion and Cross Motion

Mega, in moving to quash the four December 2016 deposition subpoenas, seeking the "testimony of its employees," Huang, Chen, Jan, and an officer with knowledge (Englander cross-moving affirmation, exhibit W, deposition subpoenas), urges that B&M cannot circumvent the order dated December 9, 2016, which quashed substantially identical deposition subpoenas as to Chen and Huang. Lee moving affirmation, ¶ 2. Mega further seeks an order protecting it and its employees from any of B&M's future attempted violations of the Quash Order and from continuing to inappropriately seek pre-action discovery from it. In addition, Mega requests the imposition on B&M of its costs and reasonable attorneys' fees arising from the motion.

Lee claims that B&M seeks to conduct the proposed depositions for the purpose of obtaining information relating to the Consent Order and to seek confidential information. Lee notes that B&M had previously waived its request, contained in the September 2016 subpoena duces tecum, for information with respect to the DFS report. Lee also contends that the judgment debtors are not customers of the NY Branch and that none of that branch's employees has personal knowledge of the judgment debtors or their assets. Lee observes that Super Vision's RICO and related claims have

---

[6] Justice Wright's reference to his order of October 19, 2016 appears to have been in error. Although Justice Wright signed an order to show cause on October 19, 2016, the order to which he appears to refer was dated December 9, 2016. NYSCEF Docs. 68, 161, 292.

been dismissed, with prejudice, and that B&M is engaged in an harassment campaign against Mega and in a continuing effort to improperly seek pre-action disclosure from it, thereby unduly burdening it with expenses.

Mega's motion is supported by Jan and Huang's affidavits and by Chen's affirmation. They each claim that they never worked at or managed any Panamanian Mega branch. They also deny "personally" knowing or having "personally" communicated with any judgment debtor or having any "personal" knowledge of the judgment debtors and any accounts or assets any judgment debtor might have. *See* Jan aff, ¶¶ 5, 14, 16; Chen affirmation, ¶¶ 4, 11; Huang aff, ¶¶ 4, 9. Chen indicates that she was formerly the NY Branch's chief compliance officer, is currently one of Mega's vice presidents, and has been in Taiwan since 2015, where she resides. Chen affirmation of 1/16/17, ¶¶ 1, 12. Mega, in a footnote in its moving memorandum of law, adds that, aside from the reasons raised by it on this motion to quash the deposition subpoenas, the subpoena as to Chen should also be quashed because she resides in Taiwan and has not resided in New York since 2015. Mega's memorandum of law in support at 5, n 2. Chen avers that "for various personal factors" it would be a "severe burden" for her to testify here. Chen affirmation of 1/16/17, ¶ 12. She maintains that the only information she could give relevant to the judgment debtors or their assets is that previously set forth in the 2014 information subpoena answers, in her aforementioned 2014 affidavit in support of a stay from the First Department, and in her affidavit of September 11, 2014. In that latter affidavit, she claimed that each Mega branch maintains records of accounts separate from the other branches', that the NY Branch has no access to records of accounts and assets maintained by other branches, and that the records of the NY Branch only pertain to the accounts of customers of that branch. Chen also asserted in that affidavit that the NY Branch personnel were "primarily responsible for banking

operations pertaining to" that branch. Lee affirmation in support, exhibits C, D. Chen maintains that no judgment debtor is a NY Branch customer.

Huang avers, in his January 2017 affidavit, that he is the former general manager of the NY Branch,[7] and that the only information he would be able to testify about or know is that which is contained in the 2014 and 2015 information subpoena answers, which were prepared by Mega's former counsel, without any personal or direct involvement by Huang. He also contends that, if he is called to testify, his testimony will be the same as to the matters contained in his affidavit.

Jan, one of Mega's vice presidents and deputy general managers, and the NY Branch's current chief compliance officer, asserts, based on the NY Branch's records, that none of the judgment debtors is a NY Branch customer, and that any knowledge he has of the judgment debtors is based on the information which that branch possesses, which information was set forth in his aforementioned November 2, 2016 affidavit in opposition to B&M's second contempt motion and in the answers to the 2014 and 2015 information subpoenas. Jan also relies on the aforementioned joint affidavit of the three members of the NY Branch's Electronic Data Computing Division's contention, that the NY Branch lacks "direct" electronic access to the other branches' customer

---

[7] According to papers submitted on B&M's second contempt motion, Huang was allegedly "removed from his position" on an unspecified date after the August 2016 Consent Order's execution, as allegedly discovered on or before September 14, 2016 by Englander when she read an article in the Taipei Times about the firing of some "Mega Bank executives," and confirmed with Lee that one of those persons listed was Huang. *See* NYSCEF Doc. 74, respondent's November 3, 2016 memo of law in opposition to B&M's second contempt motion (motion seq. no. 002), at 19, n 7; NYSCEF Doc. 75, Lee affirmation in opposition to B&M's second contempt motion, ¶ 38. Mega alleged in its memorandum of law that such removal was "by virtue of a decision of the Financial Services Commission . . . in Taiwan." NYSCEF Doc. 74 at 19. However, those claims were not supported in that motion by any admissible evidence. Similarly, only Lee asserted on that motion that Chen had "departed the NY Branch long before the [September] 2016 [s]ubpoenas." *Id.*

accounts and records. Jan asserts, "[u]pon information and belief" that no NY Branch employee will have any "personal" knowledge of the judgment debtors or their assets, because none is a NY Branch customer. Jan affidavit in support of the instant motion, ¶ 14. Jan maintains that B&M has failed to set forth any basis upon which to depose him, and that, if called upon to testify, his testimony will be the same as it is in his affidavit.

B&M, besides opposing Mega's motion and cross-moving for an order compelling Mega to comply with the September 2016 subpoena duces tecum and with the four December 2016 deposition subpoenas, requests an award of $73,000,000.00 and an order directing Mega to pay its attorneys' fees on this cross motion. B&M also seeks an award of its attorneys' fees on its second contempt motion, in accordance with Justice Wright's order dated December 9, 2016. Although B&M's notice of cross motion is headed by a contempt warning, the relief sought in its notice of motion does not specifically seek to hold Mega in contempt. However, Englander states, in her opposing and cross-moving affirmation, that B&M seeks an order holding Mega in contempt for failing to comply with Justice Wright's order, signed on December 9, 2016, by failing to appear, pursuant to the four deposition subpoenas served on December 28, 2016, and to respond to the September 2016 subpoena duces tecum. Englander cross-moving affirmation, ¶ 2. Englander alleges that Mega's failures to comply with those subpoenas constitute violations of CPLR 5223 and CPLR 5224 and requests that Mega be held in contempt. Englander cross-moving affirmation, ¶¶ 83, 85, 132.

Englander maintains that Justice Wright, in his Quash Order, quashed the September 2016 deposition subpoenas on the sole ground that B&M had failed to pay the requisite witness fees.

Englander advises that she did not previously seek Jan's testimony because he was in China,[8] but, now that he has returned, she wants to depose him because, as the person who signed the responses to the information subpoena questionnaires, he is an individual with knowledge. Englander asserts that (on an unspecified date) after the service of the September 2016 deposition subpoenas (*see* Englander affirmation in support/opposition, ¶¶ 56, 58), both Chen and Huang left the NY Branch and relocated, "upon information and belief" to Taiwan. Englander claims that, because the four December 2016 deposition subpoenas have been served, accompanied by witness fees, and proof of service of those subpoenas has been attached to exhibit W of her cross-moving affirmation (*id.*, ¶ 78), Mega should be compelled to comply with those subpoenas.

Discussion

Before a judgment's satisfaction, a judgment creditor can "compel disclosure of all matter relevant to [its] satisfaction," including by service of a subpoena. CPLR 5223; *U.S. Bank N.A. v APP Intl. Fin. Co., B.V.*, 100 AD3d 179, 183 (1st Dept 2012). To assist in judgment enforcement, "judgment creditors are entitled to broad disclosure." *Id.; Gryphon Dom. VI, LLC v GRB Info. Servs., Inc.*, 29 AD3d 392, 393 (1st Dept 2006). New York's public policy is to place "no obstacle in the path of those seeking to enforce a judgment." *U.S. Bank N.A. v APP Intl. Fin. Co. B.V.*, 100 AD3d at 183 (internal quotation marks and citation omitted); *see also Alpert v Alpert*, 151 AD3d 541, 542 (1st Dept 2017). "A judgment creditor is entitled to discovery from either the judgment

[8] It is unclear whether that is accurate, because the process server's affidavits relating to the September 2016 service of the deposition subpoenas, reveal that the person accepting process was a male, Chien Do [sic] Jen [sic], the "Compliance Manager," who appears to be Jan. Englander cross-moving affirmation, exhibit O.

debtor or a third party in order to determine whether the judgment debtor[] concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment." *George v Victoria Albi, Inc.*, 148 AD3d 1120, 1121 (2d Dept 2017) (internal quotation marks and citations omitted). Although a subpoena served outside this state is invalid, when a corporation that is doing business in New York is subpoenaed to give testimony of transactions, through its officers, employees, or other individuals under that corporation's control with knowledge of the transactions, the corporation is required to produce the witnesses regardless of whether they are within the state. *Matter of Standard Fruit & S. S. Co. v Waterfront Commn. of N.Y. Harbor*, 43 NY2d 11, 15-16 (1977), *affg* 56 AD2d 802, 802 (1st Dept 1977); *see generally Coutts Bank (Switzerland) v Anatian*, 275 AD2d 609, 610-611 (1st Dept 2000).

Notwithstanding this expansive discovery policy, CPLR 5240 allows the court to "make an order denying, limiting, conditioning, regulating, extending, or modifying, the use of any enforcement procedure," such as a subpoena. *Alpert v Alpert*, 151 AD3d at 542. This provision gives the court "broad discretionary power to control and regulate the enforcement of a money judgment under CPLR article 52 to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." *George v Victoria Albi, Inc.*, 148 AD3d at 1121 (internal quotation marks and citation omitted). When a subpoena is returnable in court, an application to quash it is required to be made promptly in the court in which it is returnable. CPLR 2304. When a subpoena is not returnable in court, the party to whom it is issued must first ask the issuer to withdraw it, and a motion to quash "may thereafter be made in the supreme court . . . ." *Id.* However, "an application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious." 148 AD3d at 1121. (internal

quotation marks and citation omitted); *Alpert v Alpert*, 151 AD3d at 542. In addition, "[t]here is no public policy favoring the repeated assertion of unsustainable arguments, a pattern of delaying tactics designed to inflict extensive costs on the adversary, dishonesty or disingenuousness with the court . . . or contempt of court orders." *U.S. Bank N.A. v APP Intl. Fin. Co. B.V.*, 100 AD3d at 183 (internal quotation marks and citation omitted). Furthermore, the party seeking to quash a subpoena has the burden of "conclusively establish[ing] that it lacks information to assist the judgment creditor in obtaining satisfaction of the judgment." *George v Victoria Albi, Inc.*, 148 AD3d at 1121; *Kozel v Kozel,* 145 AD3d 530, 531 (1st Dept 2016); *see also Matter of Kapon v Koch*, 23 NY3d 32, 39 (2014).

When a person is subpoenaed as a witness and refuses or neglects to "obey the subpoena, or to attend, or to be sworn, or to answer as a witness," the court has the power to punish, as a civil contempt, by fine and/or imprisonment, such a "neglect or violation of a duty, or other misconduct, where the rights or remedies of a party to a civil proceeding "may be defeated, impaired, impeded or prejudiced." Judiciary Law § 753 (A) (5). The party seeking to hold another in civil contempt for its contemptuous conduct in failing to respond to a subpoena has the burden of proving, by clear and convincing evidence, that the one subpoenaed has refused or willfully neglected to obey the subpoena. *Gray v Giarrizzo*, 47 AD3d 765, 766 (2d Dept 2008); *see also* CPLR 5251. Where the party to the special proceeding establishes that it has, by reason of the offender's misconduct, suffered actual loss or injury, an action can be instituted to recover damages for that loss or injury, and a fine, adequate to "indemnify the aggrieved party, must be imposed upon the offender . . ." Judiciary Law § 773. If the aggrieved party does not meet its burden of establishing its actual loss or injury, the court may impose a fine on the offender in an amount not exceeding the aggrieved

party's costs and expenses, and an additional $250.00. *Id.*; *see also Matter of Barclays Bank v Hughes*, 306 AD2d 406, 407 (2d Dept 2003); *Matter of McDonnell v Frawley*, 23 AD2d 729, 730 (1st Dept 1965).

With respect to Mega's motion to quash the four deposition subpoenas, it is initially noted that Mega does not specifically argue that service of any of those subpoenas should be quashed on the ground of improper service or lack of jurisdiction except, perhaps, to the extent that it indicates in a footnote in its memorandum of law that, in addition to the reasons for quashing the deposition subpoenas set forth in its motion, B&M's "attempted [December 2016] service on Ms. Chen through [the] . . . NY Branch," should also be quashed, because Chen resides in Taiwan and has not resided in New York since 2015. B&M does not refute this statement, possibly because it was only mentioned as an aside in a footnote, and not as a ground for any relief. *See* respondent's memorandum in support at 5, n 2; *see also* Chen affirmation in support of respondent's instant motion, ¶ 12 ("I am no longer in New York, and have been in Taiwan since 2015"). Given that this assertion was raised only tangentially in a footnote, it will not be considered in connection with these applications. Moreover, Mega fails to specifically assert as a ground for quashing the subpoenas, at least as to Chen and Huang, that the motion must be granted because they are no longer employed by Mega (*see generally Selmani v City of New York*, 100 AD3d 861, 861-862 [2d Dept 2012]), or subject to Mega's direction or control. *See Matter of Standard Fruit & S. S. Co. v Waterfront Commn. of N.Y. Harbor*, 43 NY2d at 15-16, 15 n1. Although Huang and Chen set forth their former positions with the NY Branch, neither they nor the NY Branch specifically asserts that they are no longer under the NY Branch's control. Indeed, this Court further notes that, in his January 17, 2017

e-mail to Englander, and in his moving affirmation, Lee refers to Huang and Chen as Mega employees. *See* Englander cross-moving affirmation, exhibit Z; Lee moving affirmation, ¶ 2.

Mega's claim, that the four deposition subpoenas must be quashed because Justice Wright previously quashed the two September 2016 deposition subpoenas served on two of the prospective witnesses named in the December 2016 subpoenas, is unavailing. To support this claim, Mega relies on two cases involving a trial court's lack of power to substantively correct a judgment, where the relief sought could only be obtained via a timely appeal. *See Johnson v Societe Generale S.A.*, 94 AD3d 663, 664-665 (1st Dept 2012); *Pjetri v New York City Health & Hosps. Corp.*, 169 AD2d 100, 103-105 (1st Dept 1991). Those cases are inapposite because, in the instant case, B&M does not challenge the validity of, or seek relief from, a judgment.

What is involved here are Justice Wright's "orders" resulting from prior "motions" in this proceeding and the binding effect, if any, those orders have on the court.[9] While not specifically raised by Mega, law of the case appears to be inapplicable herein because it "applies only to legal determinations that were necessarily resolved on the merits in the prior decision." *Gilligan v Reers*, 255 AD2d 486, 487 (2d Dept 1998) (internal citations and quotation marks omitted). Although Justice Wright quashed the first set of deposition subpoenas, the grounds for his determination were not set forth, and neither this Court nor any appellate court would be able to discern precisely what Justice Wright necessarily resolved, other than that the September 2016 deposition subpoenas were quashed. In this motion sequence, this Court must address the propriety of a different and

[9] Even in his initial decision on the first application in this proceeding, which was accompanied by the petition, and sought the same relief as requested by the petition, Justice Wright, possibly because the order to show cause styled the matter as a "motion" seeking an "order," issued an order, rather than a judgment, but marked it as a final disposition. *See* NYSCEF Docs. 28, 37.

subsequent set of deposition subpoenas. It is impossible to determine that Justice Wright's orders regarding the September 2016 deposition subpoenas have any bearing on the December 2016 deposition subpoenas. Moreover, the September 2016 deposition subpoenas only named two of the four individuals noticed in the December 2016 subpoenas. This Court notes that, to the extent that B&M takes the position that Justice Wright quashed the two September 2016 deposition subpoenas on the sole ground that the witness fees were not paid, B&M offers no evidence of what Justice Wright specifically said to both counsel that substantiates that position.

Turning to the underlying merits of this branch of Mega's motion, several of the documents presented by B&M in opposition to this motion and to substantiate its claims against the judgment debtors constitute hearsay, including unsigned documents and documents that are not in affidavit form. B&M also presents nothing in evidentiary form establishing that the judgment debtors, or an entity they control, including Stefanie, S.A., has or had an account in a Mega branch. That the Consent Order refers to a free trade zone corporate customer, whose beneficial owner had been linked to violations of law involving the transfer of technology and to significant negative media comment does not, standing alone, link that customer to a judgment debtor. However, the fact that Wu's family's apartment in Panama was donated to an entity, Stefanie, S. A., named for Wu's daughter, and over which Wu seemingly, according to the Ocean Bank security agreement, exercises some measure of control, is troubling, and might constitute a badge of fraud (*see generally Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004]) and could eventually assist B&M in establishing that Stefanie, S.A. is an alter ego for Wu and/or his judgment debtor wife, Susan (*see generally O'Brien-Kreitzberg & Assoc. v K.P., Inc.*, 218 AD2d 519, 520 [1st Dept 1995]), especially given that Wu was removed as an officer of that entity, presumably so that his name would not

appear on the company's Panamanian registration, and was replaced by Cespedes, who along with Caballero, Stefanie, S.A.'s president, were both listed on the Panamanian registration as Gato's officers.

Thomas Wu's e-mailing of instructions to an apparent client/customer to send funds to a Swiss banking corporation's New York post office box, as an intermediary, with instructions to have it transmit the funds to Stefanie, S.A.'s account in Bancorp's free trade zone branch, and that, once Gato was set up, to send funds in the future in the exact same way, except that the Swiss bank corporation was to transmit the funds to a Gato's Bancorp account, is an unconventional and elaborate payment mode and is highly suspicious. This e-mail, and the fact that Thomas Wu instructed the e-mail's recipient to tape the payment instructions to its wall, strongly suggests that the e-mail's recipient would be doing repeat business, with payment in this manner, with Thomas Wu, or with an entity with which he was involved, given that the e-mail was copied to Winkler, at Marsam.com, judgment debtor Marsam Trading Corp., Wu's principal Florida business, where Wu was its CEO. *See also* NYSCEF Doc. 14, ¶ 3, Winkler aff (although Thomas Wu had no technical standing in Marsam Trading Corp., he was an "integral part[]" of it). That the e-mail's recipient was to first have the funds wired out of the country, via a Swiss banking corporation, to one entity, Stefanie, S.A., then to Gato, neither of with which the recipient was seemingly familiar, which had overlapping officers, and were Panamanian entities with having had Bancafe free trade zone accounts, suggests that the Wu family was shifting money to accounts of non-judgment debtor entities which had nothing to do with the transactions of the e-mail's recipient, to prevent B&M from finding and acquiring the funds.

That B&M believes that Stefanie, S.A. opened an account in Mega's free trade zone branch, after its Bancafe free trade zone account was seemingly deactivated, is not an unreasonable assumption, given that Mega lent money and held the first mortgage on Wu's Panamanian home and, as the mortgage holder, presumably had to agree to the property's donation to Stefanie, S.A. It is also not unreasonable for B&M to assume that Wu would shift Stefanie, S.A's assets to another free trade zone bank, given his and his brother's apparent predilection for using banking entities of countries, such as Switzerland and Panama, with reputations for safeguarding their clients' identities, thereby enabling them to secret their assets.

The dismissal of the RICO action against Mega does not exclude the possibility that the judgment debtors fraudulently deposited assets in Mega accounts in the names of others or that entities having Mega accounts are the mere alter egos of one or more judgment debtors. Neither does it exclude the possibility that the NY Branch has been acting as an intermediary in wiring assets to or from any of the judgment debtors. Jan and Chen appear to regard NY Branch's customers as only those who have accounts or assets which remain at that branch. Jan, for example, denies on "information and belief" that any NY Branch employee would have "personal" knowledge of the judgment debtors or their assets because none was a NY Branch customer, and contends that the assets and records at the NY Branch relate only to the accounts of customers of that branch, and that the NY Branch does not have access to the assets and accounts "maintained in other branches." Jan aff in support, ¶¶ 9, 14. Chen claims that, when the NY Branch did a search of bank records to answer the information subpoena in 2014, the search revealed no bank accounts or assets of the judgment debtors "held at" the NY Branch. Chen moving affirmation, ¶ 5. The affiants fail to specifically discuss assets that do not remain at its branch, but which are transmitted, upon receipt,

to another branch. They also do not indicate whether the NY Branch served as an intermediary for transmitting funds to other Mega branch accounts belonging to any judgment debtors; receiving funds from a judgment debtor to be transmitted to another Mega branch account of any individual or entity which was not a judgment debtor; or whether any other Mega branch account funds were transmitted through the NY Branch, as an intermediary, to any judgment debtor.

Moreover, the fact that Jan, Huang, and Chen denied having "personal" knowledge of the judgment debtors, their assets, or any information concerning them, does not exclude the possibility that they had relevant hearsay information regarding the judgment debtors. That any of the individuals whose depositions are sought may only possess hearsay information relevant to B&M's satisfaction of its judgment is not determinative, since such information may ultimately lead to the discovery of admissible proof so as to enable B&M to satisfy its judgment in whole or in part. *Cf. Wiseman v American Motors Sales Corp.*, 103 AD2d 230, 236 (2d Dept 1984) (admissibility is not the applicable test in deciding a motion for discovery). Further, they may be aware of a person(s), who works at the NY Branch who might have relevant knowledge.

Whether the NY Branch acted as an intermediary in any of the foregoing manners is an area ripe for exploration, particularly in light of the contents of the Consent Order, which found that the NY Branch was involved as an intermediary in transmitting billions of dollars between it and each of Mega's Panamanian branches in each of two specified years involved in the DFS investigation. Although Chen asserted that the NY Branch personnel were "primarily" responsible for banking activities at the NY Branch (Lee affirmation in support, exhibits C, D), Chen did not indicate what the NY Branch's other activities consisted of, and whether such banking activities involved the NY Branch's actions as an intermediary in dealing with wire transfers to and from Mega's Panamanian

branches. Further, the Consent Order indicates that DFS suspected money laundering and other nefarious behavior on the part of Mega, which acted with indifference about the risks associated with transfer transactions between it and the NY Branch, as well as on the part of the NY Branch, which gave dismissive and troubling answers to DFS resulting, in the imposition of an enormous fine, and the placement of an independent monitor to investigate the NY Branch's activities, determine whether the bank was engaging in suspicious activities, and to prepare a report of its findings.

Additionally, although B&M presented no evidence that Caballero was employed by Mega, and while respondent has taken the position that Mega has no employee named Caballero, Jan, Chen, and Huang do not indicate that they lack knowledge, personal or otherwise, of: Caballero, Cespedes, or of any other individual having acted as an officer for entities or individuals having Panamanian Mega accounts actually controlled and/or owned by others; of either of Mega's Panamanian branches having referred its prospective or existing account holders to a person, an entity, or a Panamanian law firm which provided individuals to act as officers to mask the account's true ownership or control; or of either of Mega's Panamanian branches having directly referred its prospective or actual account holder to persons known to serve as such officers. Neither do Jan, Chen, and Huang indicate whether or not they are aware of funds having been repeatedly wired from the NY Branch, as an intermediary, to Caballero, Cespedes, or another individual, on behalf of different Mega Panamanian accounts, or of funds having been repeatedly transmitted by Caballero, Cespedes, or another person on behalf of various Panamanian Mega accounts, to the NY Branch, as an intermediary, under suspicious or peculiar circumstances which could suggest that any such person was a "straw man" for those who actually owned or controlled the accounts.

Furthermore, the assertion by the NY Branch's computer system personnel that said branch's computer network system did not permit "direct" electronic access to the records of any other Mega branch (Lee moving affirmation, exhibit F, ¶ 4), fails to exclude the possibility that one or more NY Branch employees or officers have the means to indirectly access records of another Mega branch, especially those in Panama, through the NY Branch's computer, or otherwise, while in New York State, which might bear on the NY Branch's answers to questionnaires in the information subpoenas.

As the person who signed the answers to the information subpoena questionnaires in 2014 and 2015, and as a NY Branch vice president, its deputy general manager, and its current chief compliance officer, Jan may well have information regarding matters relevant to the judgment's enforcement. The same can be said of Huang, who signed the Consent Order on the NY Branch's behalf and was the NY Branch's general manager, and of Chen, the NY Branch's former chief compliance officer and a Mega vice president. Chen's claims that it would impose a "severe burden" on her and that she would have to consider "various personal factors" (Chen affirmation, ¶ 12) if she had to travel to New York to testify, are conclusory and Chen ignores the fact that deposition via electronic means is a mode that the parties are free to explore. None of these three individuals denies involvement in DFS's investigation, or that he or she lacks knowledge of the wire transfers between the NY Branch and the Panamanian branches.

In light of all of the foregoing, Mega has failed to conclusively demonstrate that it lacks information to help B&M satisfy its judgment, that the "futility of the process to uncover anything legitimate is inevitable or obvious," and that the information sought is completely irrelevant to any appropriate inquiry. *George v Victoria Albi, Inc.*, 148 AD3d at 1121 (internal quotation marks and

citations omitted). Accordingly, the branch of Mega's motion which seeks an order quashing the four deposition subpoenas is denied.

Nevertheless, Mega will have the right to determine, in the first instance, which witness, set forth in the four deposition subpoenas, with knowledge relevant to B&M's satisfaction of its judgment, will first be deposed on its behalf. If, after any such witness's testimony, B&M believes that it has been unproductive or incomplete, and that the testimony of anyone else whose testimony has been sought by the four deposition subpoenas is necessary, B&M, if Mega is unwilling to voluntarily produce any such witness, may renew that portion of its cross motion to compel respondent to produce one or more such witnesses, subject to Mega's right to object, for example, that any such witness's testimony is unnecessary and/or would be duplicative, and move for any relief it deems appropriate to "prevent unreasonable annoyance, expense, . . . or other prejudice." *George v Victoria Albi, Inc.*, 148 AD3d at 1121 (internal quotation marks and citation omitted). Depending on the prior witness(es)' testimony, more than one motion to compel compliance may be necessary. Also, if Mega fails to produce any witness, B&M may move to renew its cross motion to compel compliance with the deposition subpoenas and for any other relief it deems appropriate. Any motion to renew to compel compliance with any of the December 2016 deposition subpoenas must, as a threshold matter, be supported by a prima facie showing of proper service of the subpoena. In this regard, although Englander asserted that she appended proof of service to her affirmation, at exhibit W (Englander cross-moving affirmation in support, ¶ 78), she has not provided the process server's affidavits of service. Instead, she has attached an unsigned "Subpoena Questionnaire," allegedly from an unidentified "VP," clearly insufficient to constitute proof of service. *Id.*, exhibit W.

The branch of Mega's motion which seeks an order granting it its costs and attorneys' fees in connection with this motion is denied because respondent has failed to demonstrate that B&M's actions in seeking the testimony of those to whom the December 2016 deposition subpoenas were addressed were completely without merit or that they were undertaken mainly to "harass or maliciously injure" movant. 22 NYCRR 130-1.1 (a), (c). Similarly, the branch of the motion which requests a protective order in connection with B&M's future pre-action discovery applications against Mega, including future violations of the Quash Order, is denied. If what B&M seeks from Mega in the future is solely for the purpose of discovering whether B&M has any claim against Mega, then Mega may be permitted to seek certain proper relief from the court. However, if the discovery sought is also, or only, relevant to B&M's satisfaction of its judgment, B&M may be entitled to that discovery absent some legal reason to the contrary. However, this Court will not prevent B&M from making a proper discovery request.

The branch of B&M's cross motion seeking an order granting B&M its legal fees in connection with its second contempt motion is denied. In response to this branch of B&M's cross motion, respondent asserts that Justice Wright's order required B&M to move for such relief on proper papers so that the propriety and reasonableness of such fees could be challenged. A review of this Court's e-filed records in this proceeding reveals that, subsequent to the instant motion and cross motion, and in August 2017, shortly after Justice Wright issued his decisions on the parties' motions to resettle and/or reargue, B&M moved (motion seq. no. 007) for those legal fees, such motion has been briefed by both sides, and oral argument has been scheduled. *See* motion seq. no. 007, NYSCEF Docs. 285-288, 312-321. Therefore, the issue of B&M's entitlement to any such legal fees will be resolved under motion seq. no. 007.

The branch of B&M's cross motion which seeks an order compelling Mega to comply with the September 6, 2016 subpoena duces tecum is denied. Because this cross motion was made before B&M moved to resettle/reargue, B&M was under the misapprehension that Justice Wright had, in his order dated December 9, 2016, on B&M's second contempt motion, ordered Mega to comply with that subpoena. However, Justice Wright has since clarified, in his order deciding B&M's application to resettle/reargue, that he had only ordered Mega to comply with the 2014 information subpoena and to "no others." Similarly, Justice Wright's Quash Order granted Mega's motion to quash all subpoenas other than the 2014 information subpoena. Given the foregoing, the branch of B&M's cross motion seeking an order holding Mega in contempt for failing to comply with the subpoena duces tecum is also denied. This Court notes, in passing, that Justice Wright's two decisions signed on December 9, 2016 (NYSCEF Docs. 302, 308, 309), and his orders dated July 18, "2016" [sic] (NYSCEF Docs. 300, 304) and June 2, 2017 (NYSCEF Doc. 310), respectively, on Mega's application to reargue and on B&M's application to resettle/reargue, are all on appeal. Thus, the issue of B&M's entitlement to Mega's compliance with the 2016 subpoena duces tecum may be resolved on appeal.

The branch of B&M's cross motion seeking an order holding Mega in contempt for failing to comply with the four December 2016 deposition subpoenas is denied because, as previously noted, B&M, as cross movant, failed to meet its prima facie burden of demonstrating that it properly served those subpoenas. Furthermore, even if B&M demonstrated that had properly served the four December 2016 deposition subpoenas, to the extent that B&M cross-moves for an order holding Mega in contempt "for failing to comply with the Order of Justice Wright, dated December 9, 2016, by failing to appear, pursuant to four" deposition subpoenas served on December 28, 2016

(Englander cross-moving affirmation, ¶ 2), such application is without merit, because Justice Wright could not have held Mega in contempt on December 9, 2016 with respect to deposition subpoenas served after that date. Also, although it is unclear whether B&M is seeking an order holding Mega in contempt with respect to those deposition subpoenas on any other ground, even if it were, such application is without merit, because B&M has failed to demonstrate, by clear and convincing evidence, that Mega wrongfully refused or neglected to comply with the deposition subpoenas. Specifically, within two days of their service, Mega sought the court's intervention by requesting that the issue of their propriety be added to the agenda of the recently sought conference, because the court had, a few weeks earlier, quashed subpoenas seeking to depose two of the four witnesses. Given the quashing of the two prior deposition subpoenas, which sought Chen and Huang's testimony, the fact that Mega sought their quashing on multiple grounds, and the lack of any rationale having been set forth for Justice Wright's decision to quash them, as well as the parties' confusion about the meaning of the December 9, 2016 orders, it is understandable that Mega sought a court conference in an attempt to resolve the issue and avoid motion practice.

B&M's counsel is well aware, as demonstrated by the parties' correspondence attached to the cross motion, that Mega did not simply ignore the four deposition subpoenas but, instead, promptly sought the court's guidance. There is no indication here that B&M responded to or opposed Mega's request of Justice Wright, that the issue of the four deposition subpoenas be added to the requested conference's agenda. Rather than attempting to resolve the issues, B&M waited 13 days, and only 5 days before the deposition date set forth in the subpoenas, to seek confirmation that Mega would be producing the four witnesses for deposition at 10:00 a.m. on January 17, 2016. In response, B&M was made aware that neither Mega nor its "employees" would be appearing, and that

Mega would be moving to quash the subpoenas and for a protective order, all before the depositions were to commence, albeit during the middle of the night.

This Court notes that B&M does not urge as a basis for any relief that Mega failed to ask it to withdraw the four deposition subpoenas before it moved to quash them. Nor does B&M urge that the request to withdraw was untimely. *See* CPLR 2304 (when a "subpoena is not returnable in court, a request to withdraw or modify the subpoena shall first be made to the person who issued it" before the motion to quash is made). Even if B&M did urge those grounds for relief, and assuming that such a timely withdrawal request was required, under the circumstances here, where Lee promptly sought to add the issue of the four subpoenas to the requested conference urging that Justice Wright had, only weeks before quashed two substantially similar subpoenas, and where, in response to Englander's January 12, 2016 letter, Lee advised her that Mega and its "employees" would not be appearing, and that Mega was moving to quash the subpoenas, and would be sending B&M a copy of that motion, such actions on Lee's part constituted an oral rejection of the subpoenas sufficient to constitute a withdrawal request. *See Matter of Temporary State Commn. on Living Costs & Economy v Bergman*, 80 Misc 2d 448, 450, (Sup Ct, NY County 1975).

Because the application to hold Mega in contempt is denied, so too is B&M's application for its attorneys' fees related to this cross motion and for an award of $73,000.000. As to the latter item, B&M's cross motion is also devoid of merit, because B&M has not shown that any failure on Mega's part to cooperate cost B&M any specific amount, much less the amount of its judgment with accumulated interest. *See Matter of Barclays Bank v Hughes*, 306 AD2d at 407. In view of B&M's previously noted failure to establish that it properly served the four deposition subpoenas, the branch of its cross motion seeking an order compelling Mega to comply with those subpoenas is denied,

without prejudice to B&M moving to renew that branch of its cross motion, supported by a prima facie showing of proof of proper service of any of those four deposition subpoenas, as discussed previously in connection with Mega's motion to quash the said deposition subpoenas. Given that when B&M served the four deposition subpoenas, it was under the impression that Justice Wright had ordered Mega to comply with the subpoena duces tecum, it is not apparent whether B&M intends to wait for the resolution of its appeals affecting that subpoena before it takes any witness's testimony.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by respondent Mega International Commercial Bank, Ltd., formerly known as the International Commercial Bank of China, seeking an order quashing the four December 2016 deposition subpoenas, is denied, except, that respondent will have the right, in the first instance, to determine which one of the witnesses whose testimony has been sought pursuant to the four deposition subpoenas will first be produced for deposition, subject to the right of petitioner B&M Kingstone, LLC to move, in accordance with the terms of this order, to renew the branch of its cross motion which seeks to compel respondent to produce any of the remaining witnesses whose testimony has been sought by those subpoenas, and subject to respondent's right to object and move for appropriate relief; and it is further

ORDERED that the branch of respondent's motion seeking an order protecting it and its employees from petitioner's future attempts to violate the Quash Order, signed on December 9, 2016, and to seek pre-action discovery from respondent is denied; and it is further

ORDERED that the branch of respondent's motion seeking an award of its costs and reasonable attorneys' fees in connection with this motion is denied; and it is further

ORDERED that the branch of the cross motion by petitioner, B&M Kingstone, LLC, seeking an order directing respondent to pay petitioner's attorneys' fees in connection with its October 2016 contempt motion, is denied, as that issue will be determined under motion sequence number 007 in this proceeding; and it is further

ORDERED that the branch of petitioner's cross motion seeking an order compelling respondent to comply with the September 2016 subpoena duces tecum, and holding respondent in contempt for failing to do so, is denied; and it is further

ORDERED that the branch of petitioner's cross motion seeking an order holding respondent in contempt for failing to produce witnesses in accordance with the four December 2016 deposition subpoenas is denied; and it is further

ORDERED that the branch of petitioner's cross motion seeking an order compelling respondent to comply with the four December 2016 deposition subpoenas and, thus, to produce the deponents, is denied, without prejudice to renewal of this branch of the cross motion, in accordance with the terms of this decision, supported by a prima facie showing of proof of service of any of the December 2016 deposition subpoenas with which compliance is sought to be compelled; and it is further

ORDERED that the branch of petitioner's cross motion seeking an order granting it its attorneys' fees related to this cross motion, and an award of $73,000,000.00, is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: April 25, 2018

ENTER:

KATHRYN E. FREED, J.S.C.