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COURT OF APPEALS
STATE OF NEW YORK

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Appellant,

-against-

No. 58

CANADIAN IMPERIAL BANK OF COMMERCE,

Respondent.

20 Eagle Street
Albany, New York 12207
March 18, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

MICHAEL S. KIM, ESQ.
KOBRE & KIM LLP
Attorneys for Appellant
800 Third Avenue
New York, NY 10022

SCOTT D. MUSOFF, ESQ.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Attorneys for Respondent
4 Times Square
New York, NY 10036

Penina Wolicki
Official Court Transcriber

1
2 CHIEF JUDGE LIPPMAN: Let's start with
3 number 58, Commonwealth of the Northern Mariana
4 Islands.

5 Counselor.

6 MR. KIM: Good morning, Your Honors. May
7 it please the court, my name is Michael Kim from the
8 firm of Kobre & Kim. And I - - -

9 CHIEF JUDGE LIPPMAN: Counselor, would you
10 like any rebuttal time?

11 MR. KIM: Yes, Your Honor. I would like to
12 reserve three minutes for rebuttal, if I may.

13 THE COURT: Three minutes. Sure, go ahead.
14 Get started.

15 MR. KIM: So my name is Michael Kim from
16 the firm of Kobre & Kim, and I represent the
17 plaintiff-appellant, the Commonwealth of the Northern
18 Mariana Islands, a United States Territory, as I did
19 in all the proceedings in the federal courts that
20 preceded this case.

21 Beyond what has already been briefed for
22 the court, I wanted to offer three additional
23 thoughts that I thought might perhaps be of
24 assistance to the court.

25 CHIEF JUDGE LIPPMAN: Counsel, let me stop

1 you for a second.

2 MR. KIM: Yes, Your Honor.

3 CHIEF JUDGE LIPPMAN: Do you think what's
4 needed here is - - - are the - - - is the statutory
5 law clear enough in this case, or can we make a
6 decision - - - are you asking us to make a decision
7 that's really not quite clear in the statutory law in
8 terms of your position?

9 MR. KIM: Your Honor, I believe - - -

10 CHIEF JUDGE LIPPMAN: The terms "custody",
11 "possession", "control", and alike.

12 MR. KIM: If Your Honor means is it
13 possible for the court to make a decision on the face
14 of the statute, I believe so.

15 CHIEF JUDGE LIPPMAN: What I'm really
16 asking is, does your position require a change in the
17 statute?

18 MR. KIM: No, Your Honor. I do not believe
19 it does.

20 CHIEF JUDGE LIPPMAN: Why not?

21 MR. KIM: Because the terms "possession"
22 and "custody" has been read to include constructive
23 possession and constructive custody in various other
24 contexts in the law, without a formal amendment to
25 the relevant statute or rule.

1 JUDGE READ: Well, Judge Kaplan makes quite
2 a big point about how, in a number of places in the
3 CPLR it says "custody and possession" and in other
4 places it says "custody, possession, and control".
5 Doesn't that kind of cut against the notion of
6 inferring control where it's not specified?

7 MR. KIM: Your Honor, I think - - - I don't
8 think it does. And I think the reason is that Judge
9 Kaplan's concern, obviously, is with the notion that
10 perhaps the legislature meant for 5225, the
11 phraseology, to be limited purely to actual physical
12 possession and custody.

13 I believe that is really actually the first
14 principle I wanted to leave the court with, which is
15 that the question of when does a court's inherent
16 power to order a person or entity before it get
17 limited by the legislature, I think, is a very
18 important one.

19 JUDGE SMITH: Well, but the question really
20 is, why is that word "control" in some of the
21 statutes but not others?

22 MR. KIM: I don't know, Judge. I don't
23 know. And - - - but I think the real question here
24 is - - -

25 CHIEF JUDGE LIPPMAN: But you don't

1 attribute any significance to it? I guess that was
2 my question.

3 MR. KIM: I don't think there could
4 possibly be any reasonable inference to - - -

5 CHIEF JUDGE LIPPMAN: So how do we get from
6 A to B, by case law, or what?

7 MR. KIM: Well, I think the fact is that
8 the practice that preceded CPLR 5225 was clearly one
9 that encompassed what we are now seeing as control,
10 constructive possession - - -

11 CHIEF JUDGE LIPPMAN: And nothing was meant
12 to change when the statute was updated?

13 MR. KIM: Other than the change in
14 phraseology, there's absolutely no evidence that
15 there was such a - - -

16 CHIEF JUDGE LIPPMAN: Well, then, why the
17 change in phraseology?

18 MR. KIM: I don't know. And I don't think
19 that it - - -

20 JUDGE GRAFFEO: Doesn't it seem to be
21 significant, though, that in - - - as Judge Read
22 said, in six provisions the word "control" is added
23 to "custody and possession", but in eleven other
24 provisions it doesn't have that word "control"? Does
25 that mean in all those other eleven provisions, the

1 legislature meant to add "control"?

2 MR. KIM: I think in those other
3 provisions, the legislature actually just copied them
4 from discovery provisions in the federal laws. And I
5 think that is the only significance that can be drawn
6 - - -

7 CHIEF JUDGE LIPPMAN: What is - - - what
8 significance does Koehler have?

9 MR. KIM: I think Koehler has significance
10 in a few different aspects. First, I think the
11 inherent power of a court to order a person or
12 company in front of it to do something or to not do
13 something is something that if the legislature is
14 going to limit it, it has to do so in a very explicit
15 way. And it would be quite a radical thing for a
16 legislature to limit it.

17 And Koehler obviously construes 5225. It
18 notes 5225(a), the exact same phrase, is construed to
19 mean that when a debtor is in front of the court, and
20 the judge says do this or do that, whether it
21 includes property that it - - -

22 CHIEF JUDGE LIPPMAN: What's the difference
23 between that in this case it's a subsidiary rather
24 than a branch - - -

25 MR. KIM: I think it's - - -

1 CHIEF JUDGE LIPPMAN: - - - of the bank?
2 Is that - - - is that a significant distinction in
3 terms of the case law and the actual realities of the
4 situation?

5 MR. KIM: I think it could be a significant
6 difference in the actual case, and it's a factual
7 question whether it makes a difference. Because what
8 the court is able to do is to order the entity that
9 is in front of it. So I submit that - - -

10 JUDGE GRAFFEO: In the Koehler case, didn't
11 the Bermuda bank have possession of the stock
12 certificates?

13 MR. KIM: It had possession in the sense
14 that it was - - - in Bermuda there is - - - the
15 record isn't quite clear. In Koehler there's a
16 suggestion earlier on that it was transferred to a
17 subsidiary in Bermuda. And then the discussion could
18 be read to be either that the same legal entity
19 possesses it or a subsidiary possesses it.

20 But the reasoning in Koehler - - - and I
21 would submit just the very basic principles of the
22 court's inherent power - - - is that it doesn't
23 matter. It only matters whether the entity that is
24 subject to the Court's power can be compelled by the
25 court to do something.

1 Now, it may be that in certain factual
2 contexts a parent company cannot actually cause a
3 subsidiary to do - - -

4 JUDGE SMITH: But that - - -

5 MR. KIM: - - - the particular act.

6 JUDGE SMITH: - - - that would be rare,
7 wouldn't it? I mean, ordinarily a parent can always
8 make a subsidiary do something?

9 MR. KIM: I disagree with that, Judge. I
10 think mere stock ownership has been held in many
11 contexts to not equate to control.

12 JUDGE SMITH: I mean, you don't run - - -
13 you don't run into cases every day where the parent
14 wants something to happen and the subsidiary says
15 sorry, not doing it.

16 MR. KIM: I - - - actually, I think I would
17 disagree with that. I think there are a number of
18 cases. The parent may not have majority control.
19 The parent, even if it has majority control, may not
20 actually be able to influence the day-to-day
21 management of the company. And it may not have
22 influence over the day-to-day policies - - -

23 JUDGE SMITH: I mean, I can - - - certainly
24 there are cases where the parent would leave the
25 subsidiary on its own, or could do that with a

1 division, too. But how - - - are you really saying
2 that the parent doesn't have the power to influence
3 it; that if the parent is distressed with the way the
4 subsidiary's being run, the parent can't do anything
5 about it? That seems extraordinary to me.

6 MR. KIM: I think if it turns out that's
7 the case in the majority of cases facing the courts,
8 that's a factual determination for the trial judge to
9 make. It is not a sweeping legal rule that has - - -

10 CHIEF JUDGE LIPPMAN: What about - - -

11 MR. KIM: - - - passed.

12 CHIEF JUDGE LIPPMAN: - - - here? What
13 about here? What's the reality of the situation?

14 MR. KIM: We don't know, Judge, because
15 there was no discovery yet. There was simply a
16 preliminary determination by the trial judge. And
17 the factual hearing and the discovery never occurred,
18 because of the appeal that occurred.

19 JUDGE RIVERA: And how at all - - -

20 JUDGE GRAFFEO: Why should we - - -

21 JUDGE RIVERA: - - - does the way you're
22 reading the statute affect the liability of the
23 subsidiary?

24 MR. KIM: It doesn't affect it at all,
25 because what we're talking about here is the power to

1 compel a garnishee to do or not do something. This
2 is not about the actual liability of CIBC or its
3 subsidiary. We are not seeking to hold them liable
4 or to take their property. I do take the point that
5 under some circumstances, conflicting laws might have
6 that effect. But that is a function of the garnishee

7 - - -

8 CHIEF JUDGE LIPPMAN: But here, it's the
9 depositor, right, that's at issue?

10 MR. KIM: At issue in what sense, Judge?

11 CHIEF JUDGE LIPPMAN: It's the depositor,
12 not the bank itself, in terms of the ultimate
13 liability?

14 MR. KIM: Correct. We are trying to take
15 the property of the judgment debtors who are the
16 Millards, who are the depositors - - - the alleged
17 depositors, in the subsidiary. And I would - - -

18 JUDGE GRAFFEO: Are there any other states
19 that have extended the garnishments to this extent?

20 MR. KIM: I am unable to answer the
21 question precisely. What I do know, generally in my
22 practice is that I have run across a number of states
23 that interpret the power of a court to order someone
24 to do or not do something as really not an
25 extraterritorial issue. In other words, the action

1 that that person is compelled to do might have to
2 occur in other states or outside the country.

3 CHIEF JUDGE LIPPMAN: What's - - -

4 MR. KIM: And that is - - -

5 CHIEF JUDGE LIPPMAN: - - - what's New
6 York's interest in all of this? What's - - - what's
7 our interest as a state?

8 MR. KIM: It is - - -

9 CHIEF JUDGE LIPPMAN: Why do we want to
10 direct this to happen?

11 MR. KIM: I think New York's interest is
12 that any entity that is subject to the courts of New
13 York should do what a New York judge says. And I
14 think that's the basic principle. And if the
15 legislature is going to limit that power, it needs to
16 do so explicitly.

17 JUDGE SMITH: And that includes compelling
18 other entities which it - - - when it is able to
19 compel them?

20 MR. KIM: If the person or entity in front
21 of the New York judge actually has the power to cause
22 something to occur, and the New York judge determines
23 it's appropriate to order that person, yes. Whether
24 that other person - - -

25 JUDGE SMITH: I mean, when you consider how

1 many important corporations are subject to New York
2 jurisdiction, isn't this coming pretty close to New
3 York rules the world?

4 MR. KIM: I think New York does rule the
5 world, Judge.

6 JUDGE READ: Maybe we don't want to be the
7 collection agency for the world.

8 MR. KIM: You - - - well, I suppose there
9 are a few different ways to look at it. The - - - I
10 would agree that we would - - - I would be proposing
11 some sort of universal collection agency law, if I
12 were reading the statute to say that the New York
13 court has direct power over out-of-state companies
14 that have no connection here; to hold them liable, to
15 hold them in contempt, to make them do things.

16 But I think the parent-subsubsidiary
17 distinction here is really just one variation of many
18 different variations that can occur in a fact
19 pattern, where a person who is standing before a New
20 York judge says, Judge, I don't have the thing in my
21 possession; I can't make it happen. And the judge
22 says yes, but there's this other person, a storage
23 facility, that's a separate company that you have put
24 your things in. Go and tell that company to bring
25 the documents or the thing of value back to New York.

1 JUDGE PIGOTT: Is one of the - - - one of
2 the factors here the fact that you cannot do what
3 you're trying to do in New York in the Cayman
4 Islands? In other words, why you can't file your
5 judgment there and execute there?

6 MR. KIM: If Your Honor means would we be
7 able to - - - be able to just register the United
8 States judgment, district court judgment, in the
9 Cayman Islands, I believe the Cayman Islands law does
10 not allow for the direct registration of tax
11 judgments.

12 JUDGE PIGOTT: So this is the closest you
13 can get to those banks in the Cayman Islands and have
14 some hope of collecting this judgment, is by going
15 after the subsidiary from here in New York?

16 MR. KIM: Yes. But I would agree with - -
17 - I would disagree with the notion of going after the
18 subsidiary, because what we are trying to do is to
19 establish a New York judge's ability to assess
20 whether the garnishee in front of him is able to obey
21 him. And it may be that Judge Kaplan, after fact-
22 finding, finds that we are wrong and that he is not
23 able to hold CIBC in contempt, based on the level of
24 control.

25 JUDGE RIVERA: But in this case he said the

1 control is like ninety-two percent.

2 MR. KIM: I think he - - -

3 JUDGE RIVERA: But what kind of control,
4 then, are you referring to?

5 MR. KIM: Right. I think he observed stock
6 ownership as one factor. And what I'm referring to
7 is a practical ability that if the parent had to do
8 so for its own purpose, because it were ordered to do
9 so, could it actually make the subsidiary give up the
10 property, essentially. And I think Judge Kaplan did
11 allude to various factors he would wish to examine,
12 such as interlocking directorates, control over
13 managers, other instances when despite official
14 policies indicating otherwise, the parent has been
15 able to influence the day-to-day management - - -

16 CHIEF JUDGE LIPPMAN: So the extent of what
17 you're seeking is that we should say that a judge can
18 do this and these are the factors?

19 MR. KIM: Correct.

20 CHIEF JUDGE LIPPMAN: I mean, that's what
21 you'd like us to rule?

22 MR. KIM: That's correct.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.
24 You'll have rebuttal. Let's have your adversary.

25 Counselor?

1 MR. MUSOFF: Good afternoon. May it please
2 the court, Scott Musoff for garnishee-respondent,
3 Canadian Imperial Bank of Commerce.

4 And Judge, let me - - - I'd like to begin
5 with the significance of Koehler, as you asked - - -

6 CHIEF JUDGE LIPPMAN: Yes, go ahead.

7 MR. MUSOFF: - - - my friend. The court's
8 decision in Koehler, far from giving comfort to the
9 appellant here, actually supports Judge Kaplan's
10 reading and the plain language of 5225, rather than
11 add words to it. And that's because in Koehler,
12 Judge Pigott, in writing the decision, explains
13 repeatedly that personal jurisdiction over the entity
14 that possesses or owns the property that you're
15 seeking to bring in is of paramount importance.

16 Indeed, the court - - - the court wrote
17 that, "The key to the reach of a turnover order is
18 personal jurisdiction over a particular defendant."
19 And then when distinguishing between 5225(a) in the
20 CPLR, which is when it's the judgment debtor itself,
21 and 5225(b), which is for a nonparty, it says you
22 have the special proceeding because "it's directed at
23 a defendant who is amenable to the personal
24 jurisdiction of the court requiring him to pay or
25 deliver money."

1 The court has no jurisdiction - - - it's
2 not disputed - - - over the subsidiaries that are two
3 levels down.

4 CHIEF JUDGE LIPPMAN: Yes, but why isn't it
5 - - - why are we - - - why are we letting this
6 technical difference between the party that controls
7 the subsidiary - - - why isn't the fair thing to do,
8 since the parent controls ninety-two percent of the
9 stock, and there are other indicia of control, why
10 isn't it, from a policy perspective, the right thing
11 and consistent with the spirit of Koehler, to allow
12 the direction to the parent?

13 MR. MUSOFF: Judge Lippman, I think a
14 couple of responses.

15 CHIEF JUDGE LIPPMAN: Go ahead.

16 MR. MUSOFF: One is, as Judge Graffeo and
17 Judge Smith pointed out, the word "control" is in
18 some places and not others. So before we even get to
19 policy, we can't use "control" as a - - -

20 JUDGE PIGOTT: Well, a lot of the control
21 is over discovery. It was the milder - - - if I can
22 use that word - - - provisions of the CPLR as opposed
23 to these, which were very hard. I mean, in other
24 words, in order to execute - - - I think Koehler
25 said, you know, what it says.

1 I want to follow up on the judge's question
2 here. If the Cayman - - - if the Mariana Islands
3 said, jeez, we just found ten million dollars that we
4 overcharged the Millards on, and we want to make sure
5 it gets to them, could they call your bank and could
6 you see that it gets there?

7 MR. MUSOFF: No, they could not - - - they
8 could not call the Canadian Imperial Bank of
9 Commerce, parent corporation, which happens to have a
10 New York branch, and at all get that money towards
11 the banks - - -

12 JUDGE PIGOTT: You would tell them to keep
13 the money and that you had absolutely no care,
14 custody, or control over anything having to do with
15 the Millards, and therefore that money can stay with
16 the Marianas?

17 MR. MUSOFF: Judge Pigott, I think that's
18 right. I think you'd say pick up the phone and call
19 the bank at which they have an account, which is a
20 separate corporate entity and would respect corporate
21 forum.

22 However, to answer the question about the
23 difference in policy and why some of the statutes
24 have control - - - and you mentioned, Judge Pigott,
25 the discovery statutes - - - there is a far cry

1 between information that you may have control over in
2 your ordinary course and having to provide
3 information to a nonparty through discovery than what
4 a turnover proceeding gets at, which is conveying
5 title to property. Or if it's 5227, which is
6 actually the proper statute for a bank debt, because
7 it's a debt owed, which doesn't even talk about
8 possession or custody in that case; it's are you the
9 person to whom the debt is owed, it - - -

10 CHIEF JUDGE LIPPMAN: So are you saying - -
11 - are you saying that the legislature would have to
12 change the statute in order to find for your
13 adversary?

14 MR. MUSOFF: Yes, Judge Lippman. Not only
15 that, but I'm not even sure under due process - - -

16 CHIEF JUDGE LIPPMAN: You think that's
17 clear under - - -

18 MR. MUSOFF: - - - or constitutionally - -
19 -

20 CHIEF JUDGE LIPPMAN: - - - the statute?

21 MR. MUSOFF: - - - they could do that.

22 I do. Not only because of the differences
23 in the use of control, but when you look at the whole
24 paradigm of turnover proceedings, getting to Judge
25 Rivera's question about - - -

1 CHIEF JUDGE LIPPMAN: But why do we - - -

2 MR. MUSOFF: - - - liability - - -

3 CHIEF JUDGE LIPPMAN: - - - respect that -
4 - - why should we respect the corporate forum in this
5 particular case? Why isn't it just, again, from a
6 policy perspective, why wouldn't you direct the
7 parent? There's a lot of money involved here. Why
8 wouldn't you?

9 MR. MUSOFF: Well, Judge Lippman, I think
10 it goes to Judge Rivera's question about liability,
11 because - - -

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MR. MUSOFF: - - - the way the statutes are
14 set up is under CPLR 5 - - -

15 CHIEF JUDGE LIPPMAN: It's the depositor
16 that's at issue here, right?

17 MR. MUSOFF: Right. Well, there's an
18 alleged depositor of a bank - - -

19 CHIEF JUDGE LIPPMAN: Right.

20 MR. MUSOFF: - - - in the Cayman Islands.

21 CHIEF JUDGE LIPPMAN: Right.

22 MR. MUSOFF: We don't even know for sure if
23 they have an account. But they've alleged they have
24 an account there.

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. MUSOFF: They want a Canadian bank that
2 happens to have personal jurisdiction in New York
3 that owns ninety-two percent of an - - -

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. MUSOFF: - - - entity that owns these
6 banks - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. MUSOFF: - - - to somehow reach down,
9 use its shareholder influence - - - not managerial
10 control like in the Supreme Court case of First
11 National City - - -

12 CHIEF JUDGE LIPPMAN: But that's my
13 question.

14 MR. MUSOFF: - - - but - - -

15 CHIEF JUDGE LIPPMAN: Why not? Why not?

16 MR. MUSOFF: Because it will subject - - -
17 one of the main reasons is under 5209, it will
18 subject the subsidiary banks to double liability,
19 because the CPLR - - -

20 CHIEF JUDGE LIPPMAN: Yes, but I'm asking
21 you a different question. I'm saying, in essence,
22 let's assume that the depositor has bilked the
23 Mariana Islands out of this money. Why - - - why
24 shouldn't they get the money?

25 MR. MUSOFF: But they - - -

1 CHIEF JUDGE LIPPMAN: Who are we protect -
2 - - why are we - - -

3 MR. MUSOFF: - - - they can get the money
4 if they can go to an entity that has their money.
5 CIBC does not have their money.

6 JUDGE SMITH: Would this case be different
7 if it were a New York tax judgment?

8 MR. MUSOFF: No, I don't believe so, Judge
9 Smith. I think it would be - - - it still wouldn't -
10 - - you wouldn't be able to go through CIBC to get to
11 First Cayman - - - to get to - - -

12 JUDGE GRAFFEO: Would it - - -

13 MR. MUSOFF: - - - FirstCaribbean.

14 JUDGE GRAFFEO: - - - be different if it
15 was a New York headquartered bank and a branch?

16 MR. MUSOFF: It might, Judge Graffeo.
17 Because this case doesn't touch directly upon the
18 separate entity rule. And there are cases, many New
19 York cases, that have said you should treat a branch
20 separate from its headquarters or separate from other
21 branches, since Judge Pigott's decision in Koehler.
22 However - - -

23 JUDGE PIGOTT: So - - -

24 MR. MUSOFF: - - - you wouldn't even have
25 that discussion about separate entities for branches

1 - - -

2 JUDGE GRAFFEO: So what - - -

3 MR. MUSOFF: - - - if my adversary's right
4 that - - -

5 JUDGE GRAFFEO: - - - what's the - - -

6 MR. MUSOFF: - - - you just ignore
7 corporate - - -

8 JUDGE GRAFFEO: - - - what's the - - -

9 MR. MUSOFF: - - - forum.

10 JUDGE GRAFFEO: - - - what's the
11 distinction that you see, then, between a branch and
12 a subsidiary?

13 MR. MUSOFF: Well - - -

14 JUDGE GRAFFEO: Why should we apply it
15 differently?

16 MR. MUSOFF: And I'm not necessarily
17 suggesting you apply it differently, because if
18 anything, it adds support when it's a separate
19 corporate entity - - - and there's no dispute, these
20 are separate corporations - - - the separate entity
21 rule for branches creates the - - - under the law, a
22 separate corporate entity for branches versus other
23 branches. But they're not truly separate entities.
24 They're still one created corporate forum under
25 similar managerial control.

1 CHIEF JUDGE LIPPMAN: But you're saying
2 it's a very basic distinction, then, between a branch
3 or a subsidiary?

4 MR. MUSOFF: Yes. There's - - - there is a
5 distinction.

6 CHIEF JUDGE LIPPMAN: That - - - I guess
7 what I've been asking, my question, is this form over
8 substance, to make that - - - that distinction?

9 MR. MUSOFF: Absolutely - - -

10 CHIEF JUDGE LIPPMAN: Why don't we pierce
11 into the real - - - the control issue and direct that
12 it be turned over?

13 MR. MUSOFF: Because again, you'd be - - -
14 you would be conveying property or assets to which
15 the person doesn't own ownership. You'd be
16 subjecting them to double liability. And the reason
17 for that, Judge Lippman, to get back to your question
18 is - - -

19 CHIEF JUDGE LIPPMAN: Who are we subjecting
20 to double liability?

21 MR. MUSOFF: The nonparty garnishees or
22 their subsidiaries. Because, for example, let's
23 assume - - - and our position is there isn't enough
24 control to even do this - - - but let's presume that
25 somehow CIBC was able to use its shareholder

1 influence to get the money up through the various
2 subsidiaries, and it turns it over to the Mariana
3 Islands. And then the Millards show up at their bank
4 and they ask to return the money, and the bank says,
5 we don't have your money anymore. We gave it over
6 because of a New York proceeding.

7 JUDGE SMITH: You'd have the same problem
8 if you - - - if you had the same corporate entity and
9 if there was no separate - - - separately
10 incorporated subsidiary.

11 MR. MUSOFF: Judge Smith - - -

12 JUDGE SMITH: And then you'd just be out of
13 luck.

14 MR. MUSOFF: - - - you wouldn't, because
15 5209 absolves - - - gives you a judgment that
16 absolves such person who pays the money. So CIBC-
17 parent would have a New York judgment that would
18 hopefully be entitled to comity there, to say no,
19 look, we're allowed to do it. The subs don't get
20 that. They don't get the protection of 5209, because
21 they're not the party paying over the money.

22 And to your question about ruling the
23 world, I can only envision if a Chinese court or an
24 Iranian court or some other foreign court, even a
25 Brazilian court says, we're going to subject the

1 nonparty's subsidiary, force them to bring money or
2 violate U.S. banking laws, or do something, simply
3 because a parent corporation and unrelated business
4 happens to be doing business in Sao Paulo or Beijing
5 or Teheran.

6 JUDGE SMITH: Isn't there a practical
7 problem that the Northern Marianas is not alone in
8 having to deal with, where you have rich people who
9 don't pay their taxes and put their money in the
10 Cayman Islands? What are you supposed to do about
11 it?

12 MR. MUSOFF: Well, I think, one, the
13 legislature can do something about it, if the policy
14 concerns are strong enough. And unfortunately, in an
15 international world, they can do that. And if they
16 don't pick that bank, they could pick a bank that has
17 no dealings with the United States.

18 But we don't ignore corporate forum and
19 longstanding precedent and the words the legislature
20 chose carefully. And one of the reasons - - -

21 CHIEF JUDGE LIPPMAN: Do you think this is
22 a giant leap from where we've been, to direct this?

23 MR. MUSOFF: I do. I think this would be
24 an unprecedented expansion of Koehler. And if
25 Koehler is sort of - - - was in and of itself

1 somewhat of an expansion of existing law - - -

2 CHIEF JUDGE LIPPMAN: Or a logical

3 extension of Koehler?

4 MR. MUSOFF: It's not a logical extension,
5 again, because when you read through Judge Pigott's
6 decision, over and over again, it talks about having
7 personal jurisdiction over that particular defendant.
8 So all - - - if you break it down to its essence,
9 what the court in Koehler was saying is, party X is
10 before the court. No ifs ands or buts about
11 jurisdiction. And with all due respect to my friend
12 next to me, they mix up the parties.

13 Going back to, I think it was to Judge
14 Graffeo's question, the entity in Koehler, BBL, Bank
15 of Bermuda Limited, owned the stock certificates. It
16 wasn't at a subsidiary of theirs. It wasn't at the
17 New York branch. And in fact, the beginning of the
18 decision starts off - - -

19 JUDGE SMITH: You don't mean owned. You
20 mean possessed, you don't mean owned.

21 MR. MUSOFF: I'm sorry, possessed - - -
22 possessed - - - had possession of the stock
23 certificates. And in fact, the court in the
24 beginning makes sure it says there was a ten-year
25 fight over jurisdiction, but BBL then submitted

1 itself to the jurisdiction of the court. You
2 wouldn't have had a ten-year fight over jurisdiction
3 if you could simply go to its affiliate in New York
4 and tag it with jurisdiction and say now make your
5 Bermuda bank bring it over.

6 So the entire decision in Koehler rested
7 upon that concession of personal jurisdiction.

8 JUDGE SMITH: The word "control" does
9 appear in Koehler at one point. What significance do
10 you attach to that?

11 MR. MUSOFF: The word "control" that
12 appeared in Koehler - - - and my friend explained to
13 Judge Kaplan that he also did not believe it was in
14 this setting - - - it was simply when the garnishee
15 itself, the party that possesses it, has control to
16 bring it in - - - I guess if it was an impossibility
17 for some reason they possessed or had custody of it
18 but couldn't, for some reason, bring it in - - -
19 there might have been a different thing - - - but I
20 don't think the word "control" located on page 540 of
21 the decision, in any way referenced the type of
22 control that's being asserted here. And I think as
23 we cited in our brief, that was the response that the
24 Mariana Islands gave to Judge Kaplan as well.

25 JUDGE RIVERA: Counsel, did I misunderstand

1 the facts? Didn't - - - didn't your client make
2 representations about the extensive amount of control
3 it has over this particular subsidiary with respect
4 to, in fact, forcing it to comply with federal
5 requirements? Did I misunderstand?

6 MR. MUSOFF: Judge Rivera, there are
7 statements that are made to comply with certain
8 antiterrorism laws and anti-money-laundering laws.
9 But it in no way suggests that CIBC has control or
10 access to individual bank accounts. And in fact - -
11 - I think it's on the last page of our brief or so -
12 - - we cite that the federal laws that require
13 international banks to comply with those, for
14 example, they may have to submit to service as an
15 agent for the U.S. Treasury, but as a - - - I think
16 it was a District of D.C. court - - - it no way gives
17 rise to civil liability. They're really a separate
18 type of control.

19 But that really goes to question number 2,
20 which we think this court doesn't have to answer.
21 But in looking at factors, if you were going to look
22 at control, it certainly can't rest - - - and I think
23 my adversary actually - - - we may agree on this
24 point. He said it can't rest simply on share
25 ownership.

1 So I think if you were going to get to
2 question 2, and we respectfully urge that the court
3 doesn't need to get there because of the
4 unprecedented way that would go, is you have to look
5 at in the ordinary course of business, is that the
6 type of control that you would have; not, I'm going
7 to use my ninety-two percent shares of FirstCaribbean
8 to vote out those directors until they put in
9 management that are willing to tell the management
10 below to break the law of the Cayman Islands.

11 JUDGE SMITH: In the real world, really, it
12 isn't that complicated. A ninety-two percent owner
13 makes a phone call and it happens, right?

14 MR. MUSOFF: Not when it's in violation of
15 the local law, I would suggest, Judge Smith. But I
16 do think - - - and I thought of this when you were
17 asking my adversary the same question. Sort of this
18 abstract notion of control and when and what
19 circumstances and the fact that you have to go back
20 and fact-find for it, is part of the policy reason
21 why when they redid the CPLR from the Civil Procedure
22 Act, they took out "control", because it is somewhat
23 amorphous and abstract.

24 And if you're looking at the personal
25 jurisdiction of the garnishee - - -

1 CHIEF JUDGE LIPPMAN: What do you have to
2 support that view that that's why they did that?

3 MR. MUSOFF: Well, we do have Judge
4 Weinstein's article - - - then Professor Weinstein,
5 from the '60s. And the quote, I think, is actually
6 from Professor Dilster (ph.), who was his assistant
7 reporter, which now sounds a little antiquated - - -
8 but he was the assistant reporter as they were
9 rewriting these. And they talked about how they went
10 through the execution provisions and did a wholesale
11 revision to make them more exact and to bring them
12 into focus.

13 So I do think that it was not an accident
14 that "control" was left out. Especially when you
15 read 5225 along with 5227, which is, again, for bank
16 accounts and debt, that clearly has no control,
17 because it doesn't even have possession or custody,
18 and along with 5209, which absolves the party - - -
19 such person who makes the payment, and not a
20 subsidiary whom you might have control over.

21 And the fact that we could debate what is
22 control shows what a gray area that would open things
23 up to. Is it shareholder control? It is financial
24 leverage? Is it persuasion? Is it I have enough, I
25 can cut off my supply chain to somebody if they don't

1 bring some - - -

2 JUDGE RIVERA: Well, why isn't that - - -

3 MR. MUSOFF: - - - asset over?

4 JUDGE RIVERA: - - - like any question that
5 the court would address, sort of weighing these
6 various factors and making that determination that
7 would then be reviewable?

8 MR. MUSOFF: Well, I - - -

9 JUDGE RIVERA: Or is that different?

10 MR. MUSOFF: But that goes to the policy as
11 to why the legislature, Judge Rivera, didn't want to
12 leave it as amorphous as it is, and left it with
13 "possession and custody", which are far more exact
14 terms. I think should you interpret "control", then
15 you could. And I think we'd like to remain the
16 capital of the world. And going this unprecedented
17 way would actually, as the amicus briefs suggest,
18 have deleterious policy provisions.

19 CHIEF JUDGE LIPPMAN: Okay, counselor.
20 Thanks.

21 MR. MUSOFF: Thank you.

22 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

23 MR. KIM: Yes. Nobody is talking about
24 disregarding corporate forum or saying that the New
25 York courts should be able to compel an out-of-state

1 company to do anything.

2 This is simply just a restatement of the
3 very basic principle that if the person in front of
4 the New York court actually has certain power to
5 cause things to happen, when the judge says it needs
6 to happen, that person needs to do their best to make
7 it happen.

8 The fact that it occurs sometimes in the
9 parent-subsubsidiary context does not change the rule.
10 And it is just a - - -

11 JUDGE GRAFFEO: Would it make a difference
12 if instead of ninety-two percent, this was forty-
13 eight or fifty percent?

14 MR. KIM: I believe in the - - - in
15 weighing all of the factors, that would be one of the
16 factors, certainly, the level of ownership power that
17 a parent company has.

18 But I would submit that if we were now to
19 start reading into 5225(b) on the phraseology
20 "possession or custody", that it means only actual
21 physical possession or custody, the implications for
22 5225(a) is actually quite staggering. Because what
23 that means now, is that any debtor in front of a New
24 York judge, unlike the samely (sic) - - - same
25 situated debtor really in front of any judge, really,

1 in any other court I've ever been in, can simply say,
2 you know, I actually don't have to obey you and you
3 can't even hold me in contempt, because I just
4 physically don't have it. Even though I can make a
5 phone call and cause it to happen, I'm just not going
6 to do it.

7 CHIEF JUDGE LIPPMAN: So your position, you
8 feel, is more in touch with reality?

9 MR. KIM: And also the reali - - -

10 CHIEF JUDGE LIPPMAN: But isn't - - - in a
11 sense though, it's disregarding the corporate forum
12 and going to the reality of the situation, no?

13 MR. KIM: I disagree it's disregarding the
14 corporate forum, because on a case-by-case basis, it
15 would matter whether the particular parent - - -

16 CHIEF JUDGE LIPPMAN: Why shouldn't you
17 disregard the corporate forum in this case?

18 MR. KIM: Well, we are not, again, talking
19 about holding the subsidiary liable for anything or
20 holding the subsidiary in contempt for the nonaction
21 of the parent.

22 CHIEF JUDGE LIPPMAN: No, no. But you're
23 going through to - - - I think your position is that
24 as you say, they can - - - you don't need actual
25 possession. They - - - they control. They have

1 possession, constructive whatever you want to call
2 it, and therefore, we should just - - - we have the
3 ability to tell them to do what you have the power to
4 do.

5 MR. KIM: If a particular company is
6 structured so that the company in front of the New
7 York judge can cause something to happen, it should
8 do so. And mere formality should not prevent it from
9 doing so.

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. KIM: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks, counselor.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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