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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Obtaining Discovery From a Foreign Corporation Through Its Domestic Affiliate

By **Edward M. Spiro**

And **Christopher B. Harwood**

Parties to civil litigation often seek to obtain records held by foreign companies by subpoenaing their U.S. subsidiaries or affiliates. In such circumstances, the subpoenaing party must demonstrate that a close relationship exists between the foreign and domestic entities. This issue recently arose in *Hake v. Citibank, N.A.*, 2020 WL 1467132 (S.D.N.Y. March 26, 2020), where the plaintiffs—individuals who were injured in terrorist attacks allegedly committed by the Islamic Republic of Iran (Iran) and its agents—moved to compel HSBC Bank USA N.A. (HBUS), a domestic entity, to produce records held by its foreign parent, HSBC Holdings plc (HSBC Holdings). Southern District Magistrate Judge Katherine H. Parker denied plaintiffs' motion on various grounds, including because they had failed to show a sufficiently close relationship between HBUS and HSBC Holdings to justify an order requiring HBUS to produce the records.

EDWARD M. SPIRO *and* CHRISTOPHER B. HARWOOD *are principals of Morvillo Abramowitz Grand Iason & Anello P.C. Mr. Spiro is the co-author of 'Civil Practice in the Southern District of New York' 2d Ed. (Thomson Reuters 2020), and Mr. Harwood is the former co-chief of the Civil Frauds Unit at the U.S. Attorney's Office for the Southern District of New York.*

'Hake'

Plaintiffs currently are pursuing two lawsuits in the U.S. District Court for the District of Columbia (D.D.C.) against Iran, its central bank (Bank Markazi Jomhouri Islami Iran (Bank Markazi)), another Iranian bank (Bank Melli Iran (Bank Melli)), and the National Iranian Oil Company (NIOC): the Hake case and the Gill case. Plaintiffs filed proceedings in the Southern District of New York to compel compliance with several third-party subpoenas that they served on HBUS pursuant to Federal Rule of Civil Procedure 45 (Rule 45) to obtain documents that they claim to need in connection with their D.D.C. lawsuits.

In the Hake case, the defendants—Bank Markazi, Bank Melli, and NIOC—have defaulted and the Hake plaintiffs are in the process of submitting an application for a default judgment, in which they must establish their claims and right to relief through "evidence satisfactory to the court." 28 U.S.C. §1608(e). The Hake plaintiffs' subpoena to HBUS was aimed at obtaining documents that would assist them in their motion for a default judgment. Specifically, the Hake plaintiffs sought documents that would establish that Bank Markazi, Bank Melli, and NIOC provided material support to the specific agents of Iran who the Hake plaintiffs claim are responsible for the terrorist attacks in which they were injured—namely, the Islamic Revolutionary Guard Corps (IRGC), the IRGC's Qods Force (IRGC-QF), Hamas, and Hezbollah. HBUS cleared U.S. dollar-denominated transactions in New York for Iranian banks, and the Hake plaintiffs believe that at least some of those transactions were (1) for the benefit of Bank Markazi, Bank Melli, and NIOC, and (2) associated with the terrorist attacks in which they were injured.

> The subpoenaing party must demonstrate that a close relationship exists between the foreign and domestic entities.

In the Gill case, the plaintiff brought claims against Iran, and already has prevailed on those claims and obtained a judgment for $30 million. The Gill plaintiff served two subpoenas on HBUS to try to identify Iranian assets to satisfy the judgment.

The Hake and Gill plaintiffs (collectively, plaintiffs) had reason to serve HBUS with their subpoenas. In December 2012, HBUS and HSBC Holdings, the indirect and ultimate corporate parent of HBUS, entered into a deferred prosecution agreement for offering U.S. dollar clearing services to Iranian banks (the DPA). The services were offered through HBUS's foreign affiliates' correspondent accounts with HBUS, in violation of U.S. laws and U.S. sanctions against Iran. In connection with the DPA, HBUS and HSBC Holdings, which is located in the United Kingdom, were represented by the same outside counsel (the outside counsel).

Prior to entering into the DPA, HSBC Holdings engaged Deloitte LLP in the United Kingdom (Deloitte U.K.) to conduct a review of U.S. dollar funds passing through its U.K. and Hong Kong SWIFT messaging networks. The review was conducted under the supervision of the outside counsel.

Upon receiving plaintiffs' subpoenas, HBUS negotiated a search protocol with plaintiffs' counsel, pursuant to which it conducted comprehensive searches of the database though which all of its transactions were routed. The search, however, did not reveal many transactions linked to the defendants in the Hake and Gill cases (collectively, the defendants). The low number of transactions likely was due to the fact that HBUS's foreign affiliates intentionally avoided entering into the database information that might have linked a transaction to Iran. Believing that a report prepared by Deloitte U.K. (the Deloitte Report) contained information that would reveal additional transactions linked to the defendants, plaintiffs asked HBUS to produce the Deloitte Report and the data that Deloitte reviewed in preparing the Deloitte Report (the source data).

HBUS refused, however, claiming that the Deloitte Report and the source data (collectively, the requested discovery) are in the possession, custody and control of HSBC Holdings, not HBUS. In response, plaintiffs moved for an order compelling HBUS to produce the Deloitte Report and the source data.

Relevance and Proportionality

In resolving plaintiffs' motion to compel, Judge Parker first observed that to prevail, plaintiffs had to demonstrate both that (1) the requested discovery is relevant to their claims in the D.D.C. cases, and (2) requiring HSBC Holdings to produce the requested discovery is proportional to the needs of their cases. *Hake*, 2020 WL 1467132, at *4 (citing Fed. R. Civ. P. 26(b)).

As an initial matter, Judge Parker concluded that the Deloitte Report is not relevant, because it "contain[s] only aggregate information and d[oes] not provide details of any individual HBUS transactions." Id. at *6. Accordingly, she found that plaintiffs' motion to compel the Deloitte Report properly was denied on this ground alone. Id.

As to the source data, Judge Parker found that it was, at best, "only marginally relevant." Id. at *5. Turning first to the Hake case, Judge Parker acknowledged that the source data "would have information identifying [transactions involving] Bank Melli [and] Bank Markazi," but she found that it "would not necessarily contain information about the underlying clients," and therefore it was "unclear to what extent any transaction … could be linked to IRGC, the IRGC-QF, Hamas or Hezbollah." Id. Judge Parker further observed that the Hake plaintiffs "arguably[] do not need" the source data given (1) their "low burden of proof [under 28 U.S.C. §1608(e)] for obtaining a default judgement," and (2) that they "already [have] obtained some records from HBUS, and the many other banks they subpoenaed, that will assist them with their motion for a default judgment." Id. (observing that "[t]o obtain a default judgment, the Hake plaintiffs need only introduce sufficient evidence to allow an issue to go to a jury … a burden akin to the requirement of substantial evidence in administrative law" (citations omitted)).

As to the Gill case, Judge Parker found that the source data "do[es] not appear [to be] relevant … at all." Id. She observed that the Gill plaintiff sought the source data "for purposes of locating assets to satisfy a judgment," but that "records of completed wire transfers … demonstrate the movement of funds on a particular date," not "attachable assets." Id. In addition, Judge Parker concluded that it was "highly unlikely that transfer records from 2010 and earlier," which is what would be reflected in the source data, would "enable [the Gill plaintiff] to find assets that could satisfy his judgment today." Id.

In light of "the marginal relevance of [the source data], the burden of restoring and searching archived data [which HBUS had represented

would have been necessary to produce the source data], and the potential issues that may arise when transferring the [D]ata to the United States due to privacy concerns," Judge Parker concluded that plaintiffs' motion to compel production of the source data properly was denied as "not proportional to the needs of their respective cases." Id. at *6.

Possession, Custody or Control

Although Judge Parker concluded that the motion to compel properly was denied on relevance and proportionality grounds alone, she nevertheless went on to address "the separate question of whether [the source data] is within the possession, custody, and control of HBUS," such that HBUS could be compelled to produce it. Id. Because Judge Parker found that "HBUS never had the source data, the Data never entered the United States, and it was not produced in connection with the … DPA," she noted that whether HBUS could be compelled to produce the source data—which was "held by [HSBC Holdings,] its foreign parent"—"turn[ed] on the nature of the relationship between [HBUS and HSBC Holdings]." Id. (citations omitted).

Specifically, Judge Parker observed that "absent evidence that [HSBC Holdings'] control over [HBUS]'s activities … [is] so complete that [HBUS] is, in fact, merely a department of [HSBC Holdings]," HBUS could not be compelled to produce the source data. Id. at *7; see also *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F2d 117, 120-22 (2d Cir. 1984) (identifying as relevant considerations to evaluating control (1) whether the parent and subsidiary have common ownership, (2) whether the subsidiary is financially dependent on the parent, (3) the degree to which the parent controls personnel and other matters of the subsidiary, and (4) whether the parent fails to observe corporate formalities with respect to the subsidiary). Moreover, Judge Parker noted that "[t]he burden of establishing control rest[ed]" with plaintiffs, as they were the "part[ies] seeking the production." *Hake*, 2020 WL 1467132, at *6 (citation omitted).

Judge Parker held that HBUS could not be compelled to produce the source data because plaintiffs had failed to demonstrate that HBUS "operates as a mere department of HSBC Holdings" and thus has "possession, custody, or control over the source data." Id. at *7.

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In reaching this conclusion, Judge Parker observed that plaintiffs had not shown that "there is overlap of management or board members" between the two entities, or that "HSBC Holdings effectively dictates HBUS's operations." Id. The only support plaintiffs had provided for their position that HBUS should be compelled to produce the source data is that HBUS previously was represented by the same outside counsel as HSBC Holdings in connection with the DPA. Id. Judge Parker found this joint representation irrelevant, however, because the source data "never [was] produced as part of their joint defense or shared with HBUS." Id.

In these circumstances—where HBUS and HSBC Holdings lack a sufficiently close relationship—Judge Parker concluded that if plaintiffs want to pursue discovery from HSBC Holdings, they must serve a Rule 45 subpoena on HSBC Holdings directly "by an internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention." Id. at *8; see id. at *8 n.6 (noting that "[t]he Hague Convention sets forth certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state" (citation omitted)).

Conclusion

A party seeking to obtain discovery from a foreign entity through its domestic affiliate must overcome a high bar and make a significant factual showing. In addition to demonstrating that the discovery sought is relevant and proportional, the party also must show that a sufficiently close relationship exists between the foreign entity and domestic affiliate.

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