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2 UNITED STATES COURT OF APPEALS  
3 For the Second Circuit  
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5 August Term, 2012

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8 (Argued: August 22, 2012

Decided: May 15, 2013)

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10 Docket No. 12-1857-cv  
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13 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

*Plaintiff-Appellant,*

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15  
16 —v.—

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18 CANADIAN IMPERIAL BANK OF COMMERCE,

*Garnishee-Appellee,*

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20  
21 WILLIAM H. MILLARD,

*Defendant,*

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23  
24 THE MILLARD FOUNDATION,

*Intervenor.*

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29 Before: CABRANES, STRAUB AND HALL, *Circuit Judges.*  
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32 Appeal from an April 12, 2012 order of the United States District Court for the Southern District  
33 of New York (Lewis A. Kaplan, *Judge*) denying Plaintiff-Appellant's application for a turnover  
34 order pursuant to N.Y. CPLR § 5225(b). Recognizing that this case turns upon unresolved issues  
35 of New York State law, we certified to the New York Court of Appeals the following two  
36 questions:

- 37  
38 (1) May a court issue a turnover order pursuant to N.Y. CPLR § 5225(b) to an entity that does  
39 not have actual possession or custody of a debtor's assets, but whose subsidiary might  
40 have possession or custody of such assets?  
41 (2) If the answer to the above question is in the affirmative, what factual considerations  
42 should a court take into account in determining whether the issuance of such an order is  
43 permissible?  
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1 The New York Court of Appeals has responded in the negative to the first question and thus  
2 declined to answer the second. In light of this decision, we **AFFIRM** the order of the District  
3 Court and **VACATE** the injunction which has been in place pending appeal.  
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6 MICHAEL S. KIM, Kobre & Kim LLP, New York, NY, Melanie L. Oxhorn,  
7 Ithaca, NY, for *Plaintiff-Appellant*.

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9 SCOTT D. MUSOFF (Timothy G. Nelson, Gregory A. Litt, *on the brief*)  
10 Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, for  
11 *Garnishee-Appellee*.  
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13 PER CURIAM:

14 This is an appeal from an order of the District Court for the Southern District of New  
15 York (Lewis A. Kaplan, *Judge*) denying Plaintiff Commonwealth of the Northern Mariana  
16 Islands’ (“CNMI”) motion for a turnover order under Rule 69 of the Federal Rules of Civil  
17 Procedure and N.Y. CPLR § 5225(b), and granting an injunction pending appeal. After hearing  
18 oral argument, we certified to the New York Court of Appeals the following questions:

19 1. May a court issue a turnover order pursuant to N.Y. CPLR § 5225(b) to an entity that  
20 does not have actual possession or custody of a debtor's assets, but whose subsidiary  
21 might have possession or custody of such assets?

22 2. If the answer to the above question is in the affirmative, what factual considerations  
23 should a court take into account in determining whether the issuance of such an order is  
24 permissible?

25 *N. Mar. I. v. Canadian Imperial Bank of Commerce, et al.*, 693 F.3d 274, 275 (2d Cir. 2012).

26 The New York Court of Appeals accepted certification. *N. Mar. I. v. Canadian Imperial*  
27 *Bank of Commerce*, 19 N.Y.3d 1040, 954 N.Y.S.2d 2 (N.Y. 2012). The court answered the first  
28 question in the negative, holding that in order “for a court to issue a post-judgment turnover  
29 order pursuant to CPLR 5225(b) against a banking entity, that entity itself must have actual, not  
30 merely constructive, possession or custody of the assets sought. That is, it is not enough that the  
31 banking entity’s subsidiary might have possession or custody of a judgment debtor’s assets.” *N.*

1 *Mar. I. v. Canadian Imperial Bank of Commerce*, No. 58, 2013 WL 1798585, slip op. at 1-2  
2 (N.Y. Apr. 30, 2013). The court thus declined to answer the second question. *Id.* at 4. In light  
3 of its decision, we now AFFIRM the order of the District Court and VACATE the injunction.

4 Familiarity with the facts of this case, as set forth in the District Court opinion below and  
5 the New York Court of Appeals’ opinion, is presumed. Previously, the District Court, in a well-  
6 reasoned and thoughtful opinion, denied Plaintiff’s motion for turnover, finding that the  
7 Canadian Imperial Bank of Commerce (“CIBC”) could not be said to have “possession or  
8 custody” over Defendant Millard’s Cayman Islands bank accounts within the meaning of N.Y.  
9 CPLR § 5225(b). *N. Mar. I. v. Millard*, 287 F.R.D. 204, 213-14 (S.D.N.Y. 2012). In support of  
10 its motion, CNMI had pointed to, *inter alia*, CIBC’s 92 percent ownership of CIBC  
11 FirstCaribbean International Bank (“CFIB”), a governance structure by which CIBC had full  
12 oversight of CFIB’s operations, as well as overlaps in personnel between the two entities. *Id.* at  
13 206-07. Examining the plain language of the statute, the District Court reasoned that omission in  
14 the relevant section of the word “control,” which was used elsewhere in the CPLR, could not be  
15 treated as inadvertent. *Id.* at 210-11. Thus, the court found that while CNMI had focused on the  
16 “practical ability” of CIBC to order CFIB to turn over the judgment debtors’ assets, *id.* at 208, it  
17 had not satisfied its burden under N.Y. CPLR § 5225(b) to show that CIBC was in “possession  
18 or custody” of the Millards’ CFIB accounts. Further, although the Millards’ accounts were  
19 housed at CFIB, that entity, “however closely linked to CNMI,” was not served in this action.  
20 *Id.* at 214.

21 The New York Court of Appeals unambiguously confirmed the District Court’s  
22 conclusion when it held that in order “for a court to issue a post-judgment turnover order  
23 pursuant to CPLR 5225(b) against a banking entity” it was “not enough that the banking entity’s

1 subsidiary might have possession or custody of a judgment debtor’s assets.” *N. Mar. I.*, 2013  
2 WL 1798585, slip op. at 2. The New York Court of Appeals, much like the District Court,  
3 reasoned that the plain language of § 5225(b) “refers only to ‘possession or custody,’ excluding  
4 any reference to ‘control, ’” *id.*, slip op. at 6, and that “[t]he absence of this word is meaningful  
5 and intentional,” *id.*

6           With this answer to the dispositive certified question, we now AFFIRM the District  
7 Court’s opinion.

8           Recognizing that it was dealing with an “unsettled question of New York law on which it  
9 [was] unlikely to have the last word,” the District Court issued an injunction preventing the  
10 further dissolution or movement of the Millards’ accounts pending appeal. *N. Mar. I.*, 287  
11 F.R.D. at 214-215. Upon affirmance of the District Court’s order denying the motion for a  
12 turnover order, we hereby VACATE that injunction. The mandate shall issue forthwith.