

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMISSIONS IMPORT EXPORT S.A.,

Plaintiff-Judgment Creditor,

- against -

REPUBLIC OF THE CONGO,

Defendant-Judgment Debtor.

COMMISSIONS IMPORT EXPORT S.A.,

Plaintiff-Judgment Creditor,

- against -

THE REPUBLIC OF THE CONGO and
CAISSE CONGOLAISE
D'AMORTISSEMENT,

Defendants-Judgment Debtors.

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ORDER

17 Misc. 245 (PGG)

17 Misc. 246 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Plaintiff-Judgment Creditor Commissions Import Export S.A. has obtained two money judgments against Defendant-Judgment Debtor the Republic of the Congo (“Congo” or the “Republic”) and seeks to attach certain alleged assets of Congo in satisfaction of those judgments. At issue in these miscellaneous actions are two restraining notices Plaintiff has issued to Delaware Trust – pursuant to N.Y. C.P.L.R. § 5222(b) – regarding funds held by Delaware Trust in its capacity as the trustee and paying agent under an indenture agreement related to a promissory note issued by Congo.

Pursuant to N.Y. C.P.L.R. § 5240, Delaware Trust has moved for a protective order vacating the restraining notices. (Dkt. Nos. 1, 7) Plaintiff has cross-moved for a stay,

pending joinder of Congo as a necessary party and discovery concerning Congo's alleged interest in the funds currently held by Delaware Trust. (Dkt. No. 11) For the reasons set forth below, Delaware Trust's motion to vacate will be granted, and Plaintiff's cross-motion for a stay will be denied.

BACKGROUND

I. FACTS

A. Plaintiff's Judgments Against Congo

Between 1984 and 1986, Plaintiff and Congo entered into several contracts relating to public works and the supply of equipment. (Jacob Decl., Ex. 8 (Dkt. No. 13-8) ¶ 9) On October 14, 1992, the parties signed Protocol No. 566, which provides for Congo to make payment on certain promissory notes issued to Plaintiff. (Id.) The agreement contains a dispute resolution clause providing for arbitration in the event of non-payment. (Id. ¶ 10)

In 1998, Plaintiff brought an arbitration proceeding against Congo pursuant to the 1992 Protocol, and on December 3, 2000, it obtained an award against Congo (the "First Arbitral Award"). (Id. ¶ 11) In 2003, Plaintiff and Congo signed Protocol No. 706, which provides for Congo to make payment to Plaintiff of Congo's remaining debt. (Id. ¶ 12)

Plaintiff later brought a second arbitration proceeding against Congo pursuant to the 2003 Protocol and, on January 21, 2013, it obtained a second award against Congo (the "Second Arbitral Award"). (Id. ¶¶ 12, 16)

Since then, Plaintiff has sought to enforce these awards. With respect to the First Arbitral Award, on July 31, 2015, the United States District Court for the District of Columbia entered a judgment against Congo enforcing the award, in the amount of \$189,781,887.17. (See Jacob Decl., Ex. 4 (Aug. 25, 2015 Am. Judgment) (Dkt. No. 13-4)) Plaintiff registered that

judgment in the Southern District of New York on May 26, 2017. (Jacob Decl., Ex. 5 (Dkt. No. 13-5))

With respect to the Second Arbitral Award, on October 9, 2013, the District of Columbia district court entered a judgment against Congo enforcing the award, in the U.S. dollar equivalent amount of \$771,060,106.00. (See Jacob Decl. (Dkt. No. 13) ¶ 2, Ex. 1) Plaintiff registered that judgment in this District on June 18, 2014. (Id., Ex. 2)

Congo has not satisfied either judgment, and has disregarded court orders directing it to respond to post-judgment discovery requests. On March 30, 2017, a District of Columbia district judge imposed sanctions on Congo, directing that it answer Plaintiff's post-judgment interrogatories within 45 days and, absent compliance, ordering Congo to pay Plaintiff \$5,000 per week, with that sanction doubling every four weeks until it reaches a maximum of \$80,000 per week, unless and until the Republic satisfies its discovery obligations. (See Jacob Decl., Ex. 7 (Mar. 30, 2017 Order) (Dkt. No. 13-7))

B. Plaintiff's Efforts to Attach Funds Held by Delaware Trust

The present dispute relates to Plaintiff's efforts to attach \$21,151,763.30 in funds paid by Congo to Delaware Trust on June 27, 2017, pursuant to an indenture agreement.

1. The Indenture

Delaware Trust is the successor trustee, paying agent, and registrar under an indenture agreement dated November 15, 2007 (the "Indenture") between Congo and HSBC Bank USA, N.A., which was the original trustee. (See Halpern Aff. (Dkt. No. 6) ¶ 3, Ex. A)

The Indenture relates to a note issued by Congo in the principal amount of \$477,790,000.00 (the "Note") as part of a debt restructuring with a group of private creditors. (See Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10); see also Jacob Decl., Ex. 11 (Prospectus))

(Dkt. No. 13-11) at 2, 12)¹ Pursuant to this restructuring, the private creditors tendered the entirety of Congo’s debt that they held. That amount “was reconciled, converted into U.S. dollars[,] and multiplied by a mutually agreed discount factor,” and was then exchanged for an interest in the Note that was proportional to each creditor’s reconciled and discounted share of the debt. (See Jacob Decl., Ex. 11 (Prospectus) (Dkt. No. 13-11) at 2) The Note matures on June 30, 2029. (Id.)

To effectuate the debt restructuring, the Indenture provides that Congo will “initially issue[] . . . one or more Global Securities in definitive, fully registered form” and that “[e]ach such Global Security shall be registered in the name of a nominee of, and deposited with, a common depository of Euroclear and Clearstream, Luxembourg.” (See Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at §§ 2.3(a)-(b)) The Indenture contemplates that the private creditors will hold “beneficial interests in th[e] global security.” (See id. at §§ 2.5(b)-(c), 2.6) Pursuant to the Indenture, Congo is to make “[i]nterim installments of principal payments, and payment of interest . . . to the Trustee,” and the Trustee is to “hold the[] funds in trust for the Trustee and the beneficial owners of the [Global Security].” (Id., Ex. A at § 2) “[F]or payments on [the] Global Security, [the Indenture provides that the Trustee will] make a wire transfer . . . in U.S. dollars to the Depository, which . . . receive[s] the funds in trust for distribution to the beneficial owners. . . .” (Id.) Congo ultimately issued only a single “Global Security” – the Note – which is registered with and held by HSBC Bank PLC in its capacity as the common depository and the holder of the Note. (Halpern Aff. (Dkt. No. 6) ¶ 5; Supp. Halpern Aff. (Dkt. No. 8) ¶ 4)

¹ The page numbers of documents referenced in this Order correspond to the page numbers designated by this District’s Electronic Case Filing system.

As trustee and paying agent under the Indenture, Delaware Trust collects principal and interest payments from Congo, holds those payments in trust, and distributes the payments to HSBC Bank PLC, as the depository and the holder of the Note. (Halpern Aff. (Dkt. No. 6) ¶ 4) Section 3.1 of the Indenture provides that

[a]ll monies . . . paid to the Trustee under the Securities and this Indenture shall be held by [the Trustee] in trust for itself and the Holders of Securities in accordance with their respective interests to be applied by the Trustee to payments due under the Securities and this Indenture at the time and in the manner provided for in the Terms of the Securities and this Indenture.

(Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at § 3.1)

The Indenture defines “Holder” as the “Person in whose name a Security is registered in the Register.” (Id. at § 1.1) As explained above, HSBC Bank PLC serves as the sole registered holder of the Note. (See Halpern Aff. (Dkt. No. 6) ¶ 5; Supp. Halpern Aff. (Dkt. No. 8) ¶ 4) Accordingly, while the Indenture speaks of “Securities” and “Holders,” there is only one security at issue here – the Note – and there is only one holder – HSBC Bank PLC. There are many entities that hold a beneficial interest in the Note, however.

As a result of this structure, Delaware Trust does not distribute payments of principal and interest directly to entities holding a beneficial interest in the Note. Instead, Delaware Trust transfers monies to HSBC Bank PLC as the sole registered holder of the Note, and HSBC Bank PLC, in turn, arranges for distribution of the principal and interest payments to certain clearing systems located in the European Union. (See Supp. Halpern Aff. (Dkt. No. 8) ¶ 4; see also Halpern Aff., Ex. A (Indenture) (Dkt. No. 6-1) Ex. A at § 2; Jacob Decl., Ex. 11 (Prospectus) (Dkt. No. 13-11) at 63, 88) The clearing systems then remit payment, through securities brokerage houses, to those entities holding a beneficial interest in the Note. (See Supp. Halpern Aff. (Dkt. No. 8) ¶ 4)

Section 3.5(a) of the Indenture provides that, pending Delaware Trust's distribution of payments to the Holder of the Note,

such [payment] amounts shall be held in trust by the Trustee for the exclusive benefit of the Trustee and the Holders entitled thereto in accordance with their respective interests and the Republic shall have no interest whatsoever in such amounts.

(Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at § 3.5(a))

2. The Restrained Funds

On June 27, 2017, Congo made a payment to Delaware Trust in the amount of \$21,151,763.30, consisting of \$13,617,015.00 in principal and \$7,534,748.30 in interest due on the Note (the "Restrained Funds"). (Halpern Aff. (Dkt. No. 6) ¶ 6) These monies were scheduled to be distributed to the Holder – HSBC Bank PLC – on June 30, 2017. (*Id.*)

On June 29, 2017, Delaware Trust received two restraining notices – one for each of the judgments outstanding against Congo – prohibiting Delaware Trust from transferring the Restrained Funds, on the ground that Congo "has or may have an interest" in the funds. (Halpern Aff. (Dkt. No. 6) ¶¶ 7-9, Exs. B, C)

II. PROCEDURAL HISTORY

On July 11, 2017, Delaware Trust moved by order to show cause to vacate the restraining notices, on the ground that Congo does not possess any interest in the Restrained Funds. (Dkt. Nos. 1, 7) Plaintiff has cross-moved for a stay, pending joinder of Congo as a necessary party and discovery concerning Congo's alleged interest in the Restrained Funds.² (Dkt. Nos. 11, 12)

² On July 20, 2017, Plaintiff filed a petition for the turnover of the Restrained Funds. (*See* 17 Misc. 267 (Dkt. No. 2)) The Court has accepted that case as related.

On August 22, 2017, this Court conducted a hearing on Delaware Trust's motion and Plaintiff's cross-motion. (See August 2, 2017 Order (Dkt. No. 14))

DISCUSSION

I. MOTION TO VACATE THE RESTRAINING NOTICES

Delaware Trust has moved to vacate the restraining notices, on the grounds that Congo holds no interest in the Restrained Funds, and therefore the Restrained Funds are not subject to attachment by Congo's creditors. (See Delaware Trust Moving Br. (Dkt. No. 7) at 6-9) In support of its motion to vacate, Delaware Trust cites language in the Indenture providing that Congo retains no interest in monies paid to Delaware Trust in accordance with the Indenture. (See id. at 7-8)

Plaintiff argues, however, that (1) Congo retains an interest in and control over monies it has paid to Delaware Trust pursuant to its obligations under the Indenture, and therefore the Restrained Funds are properly subject to the restraining notices; and (2) the Indenture does not constitute a valid trust that shields the Restrained Funds from attachment. (See Pltf. Opp. Br. (Dkt. No. 12) at 17-25) Plaintiff also cross-moves for a stay concerning Delaware Trust's motion, pending joinder of Congo as a necessary party and discovery concerning Congo's interest in the Restrained Funds. (See id. at 15-16, 25-26)

A. Whether Congo Has Any Interest in the Restrained Funds

1. Applicable Law

"A party seeking to enforce a judgment may seek to restrain or prohibit the transfer of a judgment debtor's property in the hands of a third party pursuant to [N.Y.] C.P.L.R. § 5222(b)" through the use of a restraining notice. See Verizon New England, Inc. v. Transcom

Enhanced Servs., Inc., 21 N.Y.3d 66, 70 (2013). Section 5222(b) states, in relevant part, that a restraining notice

is effective only if, at the time of service, . . . [the third party] . . . is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest[.]

N.Y. C.P.L.R. § 5222(b).

In this regard, “[r]estraining notices issued pursuant to [Section] 5222 are effective against assets in which the judgment debtor has an ‘interest,’ and they ‘only reach property and debts with such a connection to the judgment debtor.’” JSC Foreign Econ. Ass’n Technostroyexport v. Int’l Dev. & Trade Servs., Inc., 295 F. Supp. 2d 366, 391 (S.D.N.Y. 2003) (quoting AG Worldwide v. Red Cube Mgmt. AG, No. 01 Civ. 1228, 2002 WL 417251, at *8 (S.D.N.Y. Mar. 15, 2002)). “The ‘[j]udgment debtor’s “interest” in property must be understood to mean a direct interest in the property itself which, while it may require a court determination, is leviabale and not an indirect interest in the proceeds of the property. . . .” Id. (quoting Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co., 47 Misc. 2d 741, 746 (N.Y. Cnty. Sup. Ct. 1965), aff’d, 25 A.D.2d 499 (1st Dept. 1966)); accord Preferred Display, Inc. v. CVS Pharmacy, Inc., 923 F. Supp. 2d 505, 509 (S.D.N.Y. 2013). “A restraining notice may be employed against contingent property interests, including trusts that are managed by independent trustees with full control over disbursements to the judgment debtor.” Amtrust N. Am., Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp., LLC, No. 15 Civ. 7505 (CM), 2016 WL 6208288, at *6 (S.D.N.Y. Oct. 18, 2016) (citing Kates v. Marine Midland Bank, N.A., 143 Misc. 2d 721, 723 (N.Y. Sup. Ct. Monroe Cnty. 1989)).

A party “cannot [restrain or] ‘reach . . . assets in which the judgment debtor has no interest,’” however. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi

Negara (“Pertamina”), 313 F.3d 70, 83 (2d Cir. 2002) (quoting Bass v. Bass, 140 A.D.2d 251, 253 (1st Dept. 1988)). “To the extent a restraining notice purports to affect any property other than that of the judgment debtor, th[e] [restraining notice is] improper under CPLR § 5222.” Amtrust N. Am., 2016 WL 6208288, at *5.

2. Analysis

Plaintiff contends that: (1) Congo “retains an[] interest in, and control over, the funds that it transmits to Delaware Trust as paying agent”; (2) “the Indenture evidences the parties’ intent that [Congo] and its Governmental Entities (as defined) hold a beneficial ownership interest in the [Note]”; and (3) “the ‘trust’ structure of the Indenture as a whole does not create a valid trust under New York law.”³ (Pltf. Opp. Br. (Dkt. No. 12) at 17)

a. Direct Interest in the Restrained Funds

Delaware Trust argues that the Indenture “clearly and unequivocally” states that Congo holds no interest in the principal and interest payments it makes to Delaware Trust once those monies are transmitted to Delaware Trust. (Delaware Trust Moving Br. (Dkt. No. 7) at 7-9) This Court agrees.

Section 3.1 of the Indenture – which sets forth Congo’s payment obligation – provides that

[a]ll monies . . . paid to the Trustee under the Securities and this Indenture shall be held by [the Trustee] in trust for itself and the Holders of Securities in accordance with their respective interests to be applied by the Trustee to payments due under the Securities and this Indenture. . . .

³ The Indenture defines “Governmental Entity” as including “(i) all ministries of the central government of [Congo], and all administrative divisions, departments and agencies thereof, now existing or hereafter created[,] and (ii) all State-Controlled Entities.” (Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at § 1.1) “State-Controlled Entity” means “any entity or company ‘controlled’ by [Congo], including any public institution of a commercial nature.” (Id.)

(Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at § 3.1) (emphasis added) Similarly, Section 5.5 of the Indenture – entitled “Monies Held by Trustee” – provides that

[a]ll monies received by the Trustee shall, until used or applied as herein provided, be held in trust for itself and the Holders [of Securities] in accordance with their respective interests. . . .

(Id. at § 5.5) (emphasis added)

The plain import of these provisions is that, once Congo makes payment to Delaware Trust, the payment amounts are held in trust for the Trustee and the Holder – that is, HSBC Bank PLC – and Congo retains no interest in these monies. See Petrohawk Energy Corp. v. Law Debenture Tr. Co. of New York, No. 06 Civ. 9404 (DLC), 2007 WL 211096, at *4-5 (S.D.N.Y. Jan. 29, 2007) (“Once the funds [are] deposited to be held in trust for the purpose of paying the Noteholders, [the issuer] no longer ha[s] control over the funds”; payment was made pursuant to indenture providing that paying agent would hold the funds “in trust for the benefit of Holders or the Trustee”). Moreover, Section 3.5(a) of the Indenture – which addresses the mechanics of how Congo’s payment obligations are to be satisfied – explicitly states that Congo does not retain any interest in payment monies once they are transmitted to the Trustee:

such [payment] amounts shall be held in trust by the Trustee for the exclusive benefit of the Trustee and the Holders entitled thereto in accordance with their respective interests and the Republic shall have no interest whatsoever in such amounts.

(Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at § 3.5(a)) (emphasis added)

The Indenture provisions cited by Plaintiff (see Pltf. Opp. Br. (Dkt. No. 12) at 18-19) do not demonstrate that Congo retains an interest in monies transmitted to the Trustee for purposes of making principal and interest payments to the Holder. For example, although Sections 3.3(b), 3.5(a), 3.5(d), and 5.8 authorize Congo to determine the Indenture’s paying

agent or trustee (see Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at §§ 3.3(b), 3.5(a), 3.5(d), 5.8), these provisions confer on Congo no “interest” in the payments themselves.

Section 3.5(c) authorizes Congo – in the event that the paying agent and the Trustee are not one in the same – to direct that payment funds being held by the paying agent in trust for the Holder be returned to the Trustee “in trust for itself and the Holders”:

[Congo] may at any time, for the purpose of obtaining a satisfaction or discharge of this Indenture or for any other reason, pay or cause to be paid to the Trustee all sums held by any trustee paying agent in trust for the Holders hereunder, as required by this Section, such sums to be held by the Trustee in trust for itself and the Holders in accordance with their respective interests.

(Id. at § 3.5(c)) Acknowledging that this provision confers on Congo the authority to direct that funds being held in trust by the paying agent be transferred to the Trustee, the provision states that such funds will be “held by the Trustee in trust for itself and the Holders.” (See id.) This provision does not confer on Congo a “direct interest in the property itself.” See JSC Foreign Econ. Ass’n, 295 F. Supp. 2d at 391.

Sections 4.5 and 8.4 of the Indenture – also cited by Plaintiff (see Pltf. Opp. Br. (Dkt. No. 12) at 18) – likewise do not warrant the restraint of the funds at issue here. Section 4.5 governs the distribution of monies collected by the Trustee following the occurrence of certain events of default, and provides for “the payment of the remainder, if any, to the Republic” after all those holding a beneficial interest in the Note have been paid. (See Jacob Decl., Ex. 10 (Indenture) (Dkt. No. 13-10) at §§ 4.1, 4.5) Section 8.4 – found in the portion of the Indenture addressing satisfaction and discharge, and the disposition of unclaimed monies – provides that

[s]ubject to applicable abandoned property laws, any monies deposited with the Trustee for the payment of the principal of or interest . . . on any Security and not applied but remaining unclaimed for five years after the date upon which such principal and interest shall have become due and payable shall be repaid to the Republic upon written request without interest. . . .

(Id. at § 8.4)

Other courts have ruled – in analogous contexts – that a debtor’s right to unclaimed or excess funds does not constitute a direct legal interest in those funds. See Petrohawk Energy Corp., 2007 WL 211096, at *5 (indenture provision providing “for return of unclaimed funds to [the debtor-issuer]” does not constitute an “ongoing interest” in those funds; “[t]he right to unclaimed funds does not presently confer upon [the debtor] ownership or control over the funds at issue”); see also Matter of O.P.M. Leasing Servs., Inc., 46 B.R. 661, 668 (Bankr. S.D.N.Y. 1985) (debtor’s “contingent right” to repossess excess funds in escrow account “was not an interest which a judgment creditor . . . could reach”); Valerio v. Coll. Point Sav. Bank, 48 Misc. 2d 91, 92 (N.Y. Sup. Ct. Suffolk Cnty. 1965) (judgment creditor sought turnover of tax and insurance payments held in trust by bank that had issued a mortgage to debtor; the judgment creditor contended these monies were the property of the judgment debtor, and thus subject to a turnover order pursuant to CPLR §§ 5225 and 5227; held that “[t]he creditor . . . has no interest in the moneys paid to the mortgagor-bank while any part of the principal and interest obligation is owing to the bank, any more than the judgment debtor himself would have”).

Moreover, Delaware Trust represents that, if the restraining notices are vacated, the funds at issue will be distributed in their entirety to the Holder pursuant to the Indenture. (See Supp. Halpern Aff. (Dkt. No. 8) ¶ 7; Delaware Trust Reply Br. (Dkt. No. 10) at 11)

The Court concludes that Congo does not retain a direct interest in principal and interest payments once these monies are transmitted to Delaware Trust. Accordingly, the restraining notices cannot be justified on this basis.

b. Beneficial Interest in the Note

In opposing Delaware Trust’s motion to vacate the restraining notices, Plaintiff argues that Congo may “own[] . . . a beneficial interest in the [Note],” citing “provisions of the Indenture [that] expressly contemplate that the Republic itself, and/or its parastatal entities . . . will be holders of [a beneficial interest in the Note].” (Pltf. Opp. Br. (Dkt. No. 12) at 21) Several provisions of the Indenture acknowledge the possibility that Congo or its subordinate governmental entities might acquire a beneficial interest in the Note. (See Section 3.14 (providing that “[t]he Securities may be repurchased by the Republic or any Government Entity . . . at any price and at any time”); Section 6.4 (providing that “Securities Owned by the Republic or Any Governmental Entities” will be disregarded for purposes of (1) a vote concerning any proposed modification to the Indenture; or (2) determining “whether sufficient Holders are present for [a] quorum”); Section 10.1(e) (requiring Congo to certify to the Trustee the amount of Securities held by Congo in the event that a vote by Holders of Securities occurs))

Plaintiff has not proffered any evidence that Congo or its subordinate governmental entities own a beneficial interest in the Note, however. This Court will not enforce the restraining notices based on speculation, and that is all Plaintiff has offered on this point. And it is not an answer to say – as Plaintiff does – that this issue is “an appropriate subject of discovery.” (See Pltf. Opp. Br. (Dkt. No. 12) at 22, 26) Plaintiff already has access to, and has

utilized, post-judgment discovery mechanisms.⁴ Indeed, it has served subpoenas on HSBC Bank PLC and Delaware Trust, as well as interrogatories on Congo.⁵ (See *id.* at 26)

B. Whether the Indenture Created a Valid Trust

In seeking to justify the restraining notices, Plaintiff also argues that “the Indenture does not create a valid trust[] and so cannot shield the Restrained Funds.” (*Id.* at 22)

In arguing that no valid trust was created, Plaintiff alleges that

- (1) Congo has “‘tie[d] up [its] property in such a way that [it] can still enjoy [the property] but can prevent . . . creditors from reaching [the property].’” (*Id.* (quoting *EM Ltd. v. Republic of Arg.*, 389 F. Appx. 38, 42 (2d Cir. 2010) (quoting *Vanderbilt Credit Corp. v. Chase Manhattan Bank, N.A.*, 100 A.D.2d 544, 546 (2d Dept. 1984)))); and
- (2) Cleary Gottlieb – the law firm that drafted the Indenture – has been sanctioned in unrelated proceedings concerning the enforcement of a separate judgment against Congo. See *Kensington Int’l Ltd. v. Republic of Congo*, No. 03 Civ. 4578 (LAP), 2007 WL 2456993, at *1 (S.D.N.Y. Aug. 24, 2007). In that case, the district court found that Cleary Gottlieb had attempted to dissuade a non-party witness from sitting for a deposition during post-judgment discovery. See *id.* Plaintiff argues that this history “create[s] a strong presumption” that the Indenture was drafted “to defraud [Congo’s] creditors.” (Pltf. Opp. Br. (Dkt. No. 12) at 12, 24)

To the extent that Plaintiff argues that the Indenture permits Congo to retain an interest in principal and interest payments that it has transmitted to Delaware Trust, this Court

⁴ “Federal Rule of Civil Procedure 69(a)(2) states that, ‘[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person – including the judgment debtor – as provided in the rules or by the procedure of the state where the court is located.’” *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2254 (2014). “And New York law entitles judgment creditors to discover ‘all matter relevant to the satisfaction of [a] judgment,’ permitting ‘investigation [of] any person shown to have any light to shed on the subject of the judgment debtor’s assets or their whereabouts.’” *Id.* (assuming that district court was “within its discretion to order . . . discovery from third-party banks about the judgment debtor’s assets located outside the United States”).

⁵ What those subpoenas have yielded is unknown. For its part, Delaware Trust represents that “[t]he identities of beneficial owners [of an interest in the Note] are not available to an indenture trustee,” and that it “has no information indicating that the Republic is a beneficial owner of [any such interest].” (Supp. Halpern Aff. (Dkt. No. 8) ¶ 5)

has rejected that argument, based on clear language in the Indenture stating the precise opposite. To the extent that Plaintiff argues that the trust created by the Indenture is invalid on its face – because it permits Congo to hold a beneficial interest in the Note – Plaintiff has cited no law in support of that proposition. Finally, the mere fact that Cleary Gottlieb was sanctioned in unrelated post-judgment proceedings in which it represented Congo does not demonstrate that the Indenture was drafted to defraud Congo’s creditors.

* * * *

The Court concludes that Plaintiff has not demonstrated that Congo has any interest in the Restrained Funds. Because “[r]estraining notices . . . are effective [only] against assets in which the judgment debtor has an ‘interest,’” see Amtrust N. Am., 2016 WL 6208288, at *5, Delaware Trust’s motion to vacate the restraining notices will be granted.

II. CROSS-MOTION FOR A STAY

Plaintiff has cross-moved for a stay, pending joinder of Congo as a necessary party and discovery concerning Congo’s alleged interest in the Restrained Funds. (See Notice of Motion (Dkt. No. 11); Pltf. Opp. Br. (Dkt. No. 12) at 15-16, 25-26)

To the extent that Plaintiff seeks a stay in order to pursue discovery concerning Congo’s potential beneficial ownership interest in the Note, the application will be denied. As explained above, the Court will not restrain the disputed funds based on pure speculation.

To the extent that Plaintiff seeks a stay in order to join Congo as a necessary party, the application also will be denied. Fed. R. Civ. P. 19(a) requires the joinder of any person (1) “in [whose] absence, the court cannot accord complete relief among existing parties,” or (2) who “claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may . . . impair or impede the person’s ability to protect the

interest[] or . . . subject [that person] to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.” Fed. R. Civ. P. 19(a)(1). Here, Congo has not claimed any interest in the Restrained Funds and, for the reasons set forth above, this Court finds no evidence that Congo has an interest in the Restrained Funds. Because this Court can grant “complete relief among [the] existing parties,” Congo is not a necessary party under Fed. R. Civ. P. 19.⁶

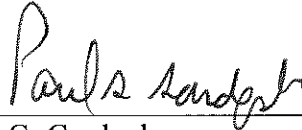
Plaintiff’s cross-motion for a stay will be denied.

CONCLUSION

For the reasons stated above, Delaware Trust’s motion to vacate the restraining notices (Dkt. Nos. 1, 7) is granted, and Plaintiff’s cross-motion for a stay (Dkt. No. 11) is denied. The Clerk of Court is directed to terminate the motions and to close these miscellaneous proceedings.

Dated: New York, New York
August 22, 2017

SO ORDERED.



Paul G. Gardephe
United States District Judge

⁶ Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 87 A.D.3d 119 (1st Dept. 2011) – the sole case cited by Plaintiff in support of its joinder argument – is not to the contrary. That case involved an effort to execute a judgment against certain funds located in New York. The Republic of the Philippines contended that the funds were “corruptly acquired and removed from its territory by its former president,” and “claim[ed] to be the true owner of the fund[s].” Id. at 123. The court dismissed the proceeding for “nonjoinder of an indispensable party,” because the Republic of Philippines asserted an interest in the funds but refused to waive sovereign immunity, and thus could not be joined. See id. Here, by contrast, Congo does not claim an interest in the Restrained Funds, and there is no evidence that it has an interest in the Restrained Funds.