UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Maureen K. Ohlhausen
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter

In the Matter of	)	**PUBLIC**
	)	**VERSION**
SUBPOENA *DUCES TECUM* AND	)	**File No. 181-0030**
SUBPOENA *AD TESTIFICANDUM* ISSUED TO	)	**June 26, 2018**
BANIBU II HOLDINGS, INC. DATED MAY 7, 2018	)	
	)	

ORDER DENYING PETITION TO LIMIT AND QUASH SUBPOENA DUCES TECUM AND SUBPOENA AD TESTIFICANDUM DATED MAY 7, 2018

By SLAUGHTER, Commissioner:

Banibu II Holdings, Inc. ("Banibu") has filed a petition to limit and quash a subpoena *duces tecum* ("SDT") and a subpoena *ad testificandum* ("SAT") issued by the Commission on May 7, 2018. The SDT and SAT ask "the Company" – defined to include Banibu, its parents (most notably, Banco Inbursa, S.A. ("Inbursa")), and its officers and employees – to produce documents and provide testimony. Inbursa created Banibu for the sole purpose of bidding in a bankruptcy auction for certain manufacturing assets in Corpus Christi, Texas. Banibu refuses to provide, however, what it considers to be "Inbursa-related" information.

Banibu's petition to limit and quash advances three arguments: (1) that the request for any documents maintained by Inbursa is not valid because Inbursa was not served in Mexico; (2) that Banibu does not possess or control subpoenaed documents maintained by Inbursa; and (3) that the Federal Trade Commission ("FTC" or "Commission") lacks the authority to compel Banibu's Mexican principals to travel to the United States to testify at an investigational hearing. For the reasons described below, we deny Banibu's petition to limit and quash, although we modify the location of the SAT.

I. BACKGROUND

The FTC is investigating a proposed acquisition of a Corpus Christi-based production facility for polyethylene terephthalate ("PET") resin, a plastic polymer used to make synthetic clothing fibers (referred to by its common name, polyester), bottles, and food packaging. The North American PET resin market is highly concentrated and dominated by only a few market participants.

The transaction under investigation arises out of a bankruptcy proceeding. M&G USA Corporation, Inc. ("M&G"), an American subsidiary of an Italian corporation, was building, in Corpus Christi, Texas, what was expected to be the largest and most efficient vertically integrated PET resin facility in North America. Before the project was completed, M&G filed for Chapter 11 bankruptcy protection on October 30, 2017. *In re: M&G USA Corp*., No. 17-12307-BLS (Bankr. D. Del.). On March 29, 2018, the bankruptcy court approved the sale of the Corpus Christi assets for $1.1 billion to a trilateral joint venture named Corpus Christi Polymers LLC, consisting of Indorama Ventures USA ("Indorama"), DAK Americas LLC ("DAK"), and Far Eastern New Century Corporation. FTC staff is investigating the potential competitive effects of this proposed transaction. The bankruptcy court also approved Banibu as the backup bidder for the Corpus Christi assets. *See M&G USA Corp*., *supra* (Doc. No. 1300). Banibu will acquire the assets if the joint venture fails to close the transaction.

On February 27, 2018, Inbursa, a Mexican financial institution, created Banibu, a Delaware corporation, as its wholly owned subsidiary, specifically to bid on the Corpus Christi assets. Pet. 2-3. Banibu has four directors, who also serve as its only officers: Javier Foncerrada Izquierdo (President), Luis Roberto Frias Humphrey (Vice President, Treasurer), Guillermo Rene Caballero Padilla (Vice President, Secretary), and Frank Ernesto Aguado Martinez (Vice President). Pet. 3. These same four individuals are also officers, directors, or senior employees of Inbursa. Inbursa was the principal lender for M&G's PET resin facility project, and it is the primary lienholder and largest secured creditor on the Corpus Christi assets.

[redacted]

[redacted] On March 12, 2018, GFI filed the required pre-merger notification, regarding Banibu's bid for the Corpus Christi assets, to the Commission under the Hart-Scott-Rodino Act. *See* 16 C.F.R. pt. 803.

Pursuant to its investigation, on May 7, 2018, the Commission issued two substantively identical subpoenas to Banibu – one for documents and one for testimony. Pet. Exhs. A, B.[1] On May 9, 2018, the SDT and SAT were served via FedEx to Banibu's antitrust counsel in Washington, D.C. Both subpoenas ask about: "the Company's" financial interest in, rationale for bidding on, and evaluation of, the Corpus Christi assets; communications with M&G, other lienholders, bidders, potential bidders, and any other persons about the potential acquisition of the Corpus Christi assets or the bankruptcy proceeding; plans for the assets, should the Company acquire them (including whether the Company intends to operate or sell the assets); and an April 17, 2018 letter from Inbursa's counsel to FTC staff concerning the bid and the Company's future plans regarding the assets. This information is relevant to the Commission's investigation. Among other things, it will enable an assessment of what would likely happen to the assets if Banibu acquired them as the backup bidder, and in analyzing any "failing firm" defense that the joint venture might raise. The SAT requests that the Company designate a person "to testify on its behalf," pursuant to Commission Rule 2.7(h), 16 C.F.R. § 2.7(h).

On May 17, 2018, Banibu filed its petition to limit and quash the SDT and SAT. It asserts it will produce responsive non-privileged documents it possesses or controls (including "documents relating to its formation, bid proposal, and related business," Pet. 5), but not documents within the possession, custody, or control of its parent Inbursa (and presumably GFI). Banibu also requests that the SAT be quashed, because all of its corporate representatives are Mexican nationals residing in Mexico.

II. ANALYSIS

A. The subpoena *duces tecum* should be enforced.

Under Section 9 of the FTC Act, 15 U.S.C. § 49, the Commission has the authority "to require by subpoena. . . the production of. . .documentary evidence relating to any matter under investigation . . . from any place in the United States, at any designated place of hearing. . . ." *See also* 16 C.F.R. § 2.7(c) (FTC's implementing rule). We have held that Section 9 authorizes subpoenas, issued both in agency investigations and in administrative adjudicatory proceedings, for testimony and documents located abroad if the subpoena is served properly on a domestic corporation over which the Commission has jurisdiction. *See In re Petition to Quash Subpoena, Nippon Sheet Glass Co.*, 113 F.T.C. 1202, 1204, 1209 (1990) (Section 9 provides authority to serve an investigational subpoena on the U.S. agent or alter ego of a foreign entity); *In re General Foods Corp.*, 95 F.T.C. 383, 383-384, 1980 WL 339002, at *1 (1980) ("Section 9 authorizes the Commission to subpoena documents located abroad, as well as documents located anywhere within the United States.") (citations omitted). Courts analyzing identical language in other statutes likewise have held that the language did not limit an agency's ability to subpoena documents located abroad in response to an administrative subpoena validly served in the United States. *See Federal Maritime Comm'n v. DeSmedt*, 366 F. 2d 464, 471 (2d Cir. 1966) (agency

[1] The SDT and SAT were issued pursuant to a January 11, 2018 resolution authorizing compulsory process to investigate whether the proposed acquisition of the Corpus Christi assets by Indorama and/or DAK would violate the FTC Act or the Clayton Act. *See* Pet. Exhs. A (last page), B (last page).

could "require a resident by subpoena to produce documents under his control wherever they are located" pursuant to a statute authorizing the agency to compel documents "from any place in the United States."); *SEC v. Minas de Artemisia, S.A.*, 150 F.2d 215, 217-18 (9th Cir. 1945) (court could enforce an SEC subpoena for the production of books and records located in Mexico, "provided only that service of the subpoena is made within the territorial limits of the United States" where the statute authorized the SEC to require the production of documents "from any place in the United States.").

1. Banibu must produce documents in its possession, custody, or control.

While Section 9 itself does not expressly define the scope of a document demand, we are guided by analogous law that the person subpoenaed must produce responsive non-privileged documents within its "possession, custody, or control." *See, e.g.*, 15 U.S.C. § 57b-1(c)(1) (FTC's civil investigative demands); Fed. R. Civ. P. 34(a), 45(a) (party and nonparty production in federal civil litigation). Thus, Banibu – a Delaware corporation, whose principal place of business is in Corpus Christi, Texas – must produce all documents within its possession, custody, or control, even if those documents are located abroad or held by a foreign parent. *See, e.g.*, *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968) (requiring production of documents from German branch of United States bank in criminal antitrust investigation, holding that "a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person [corporation] in possession or control of the material") (citation omitted); *Camden Iron and Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 442-44 (D.N.J. 1991) (United States subsidiary had control of documents possessed by Japanese parent relating to transaction); *NML Capital Ltd. v. Republic of Argentina*, No. 2:14-cv-492-RFB-VCF, 2014 WL 3898021, at *10 (D. Nev. Aug. 11, 2014) (federal court's subpoena power under Rule 45 "reaches all documents – no matter where they are located – that are within a resident corporation's custody or control") (citation omitted); *see also* 9A Charles Alan Wright and Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2456 (3d ed. April 2018 update) (records kept beyond the territorial jurisdiction of the issuing court are covered by Rule 45 if they are controlled by a person, including a corporation, subject to the court's jurisdiction).

Banibu argues that the SDT is invalid to the extent it asks for documents from Inbursa because the FTC did not serve Inbursa pursuant to the Hague Convention, which it asserts is the only authorized method to obtain such materials from the Mexican company. Pet. 6-7. To support this argument, Banibu relies on cases that quashed compulsory process where an individual or corporation was improperly served outside of the United States. *See, e.g., CFTC v. Nahas*, 738 F.2d 487, 493-95 (D.C. Cir. 1984) (administrative subpoena improperly served on a Brazilian citizen in Brazil where the agency lacked statutory authority to serve subpoena extraterritorially); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (service of FTC investigatory subpoena by registered mail on French company in France was unauthorized as it was not the customary and legitimate method of serving administrative compulsory service abroad). But here the Commission lawfully served its subpoena in the United States on Banibu, a Delaware corporation, which is obligated to produce all documents within its possession, custody, or control, whether or not its Mexican parent Inbursa maintains those materials.

2. Documents maintained by Inbursa are in Banibu's possession, custody, or control.

Banibu next argues that it does not possess or have control over Inbursa or its documents. Pet. 8-9. We agree with Banibu that the separate corporate identities of parent and subsidiary ordinarily should be respected. We conclude, however, that Banibu has an obligation to produce documents it argues belongs to Inbursa for two reasons.

First, it is very likely that Banibu's principals possess many of the requested documents, even beyond the specific Banibu-related documents that it has or has stated it will produce. The SDT is narrowly focused on documents relating to the Corpus Christi assets, including why the Company bid on the assets, its evaluation of and plans for those assets, and its discussions with M&G, other lienholders, bidders, and potential bidders. Thus, responsive documents relating to the topics in the SDT possessed by Banibu's four principals must be produced. *See, e.g.*, *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973) ("knowledge of officers and employees of [defendant corporation], relevant to the subject matter of the instant cause, is imputed to the corporation itself.") (citation omitted); *see also Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131, 138 (3d Cir. 1988) ("knowledge of officers and key employees of a corporation, if relevant to the subject matter of an interrogatory or production request direct to the corporation, may be imputed to the corporation itself.") (citations omitted).[2] Banibu's four officers and directors are also officers, directors, or senior employees of Inbursa, which has a major investment stake in the Corpus Christi assets, and were directly involved in Banibu's bid for the Corpus Christi assets.[3] Indeed, [redacted] and the Asset Purchase Agreement submitted with Banibu's bid indicated that all notices and communications should be directed to Messrs. Frias and Caballero. *See M&G USA Corp.*, *supra* (Doc. No. 1277-13 at PDF pg. 100) (Exh. H-1 at 94).

[2] At the same time, we are unpersuaded by Banibu's reliance on *Gerling* to support its petition. *See* Pet. 9. In *Gerling*, the Third Circuit held that the president of a Delaware corporation, which had a contractual relationship as a reinsurer of a Swiss insurance company, had no obligation to disclose the extent of his holdings in the Swiss company, which he owned in his *personal* capacity. 839 F.2d at 139. Indeed, *Gerling* reiterated the well-established principle that corporate officers and directors have an obligation to provide business information they possess *on behalf of the corporation* they operate, but not personal information obtained outside the scope of their official duties. *See id.* ("Nothing in the record suggests that Gerling's ownership in [the Swiss company] has anything to do with the business of [the Delaware company]"). Here, the SDT is only requesting documents from Banibu and its officers and directors in their official, not personal, capacities.

[3] [redacted]

Second, we conclude that Banibu has the requisite control over all the documents responsive to the SDT, including those maintained by Inbursa. As Banibu acknowledges, an entity has the requisite "control" of documents if it has the "the legal right, authority or ability to obtain documents upon demand." Pet. 8 (quoting *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (citation omitted)); *accord Bush v. Ruth's Chris Steak House, Inc.*, 286 F.R.D. 1, 5 (D.D.C. 2012) ("Control does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather 'the right, authority or practical ability to obtain the documents from a non-party to the action.'") (citation omitted); *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2018 WL 2348669, at *2 (W.D. Tex. May 23, 2018) (same) (citations omitted); *Shell Global Solutions (US) Inc. v. RMS Eng'g, Inc.*, No. 4:09-cv-3778, 2011 WL 3418396, at *2 (S.D. Tex. Aug. 3, 2011) (same) (citations omitted). The D.C. Circuit has recognized five instances in which a subsidiary has the requisite control over documents in its parent corporation's possession, more specifically where:

> (1) the alter ego doctrine ... warranted 'piercing the corporate veil';
>
> (2) the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit;
>
> (3) [t]he relationship is such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation;
>
> (4) [t]here is access to documents when the need arises in the ordinary course of business; [or]
>
> (5) [the] subsidiary was [a] marketer and servicer of the parent's product. . . in the United States.

ASAT, 411 F.3d at 254 (citing *Camden Iron*, 138 F.R.D. at 441-42 (citing *Gerling*, 839 F.2d at 140–41)); *accord CMACO Auto. Systems, Inc. v. Wanxiang America Corp.*, No. 05-60087, 2007 WL 656893, at *2 (E.D. Mich. Feb. 26, 2007) (citing *Camden Iron* and applying same factors), *aff'd*, 2007 WL 2331863 (E.D. Mich. Aug. 13, 2007); *Shell Global*, 2011 WL 3418396, at *2 (applying similar factors) (citation omitted); *Uniden America Corp. v. Ericsson Inc*., 181 F.R.D. 302, 306 (M.D.N.C. 1998) (applying similar grounds to conclude that subsidiary may be required to produce parent's documents where there is sufficient "intermingling of directors, officers, or employees, or business relations."). A finding of any one of the five factors can satisfy the "control" requirement. *See Camden Iron*, 138 F.R.D. at 441; *Pitney Bowes, Inc. v. Kern Intern., Inc.*, 239 F.R.D. 62, 66-67 (D. Conn. 2006). The party seeking the documents has the burden to show that the subsidiary controls the parent's documents. *ASAT*, 411 F.3d at 254.

We conclude that the *ASAT* factors demonstrate that Banibu "controls" the documents requested in the SDT, even if they are nominally possessed by Inbursa. Documents produced in the bankruptcy proceeding, and those reflecting communications both before and after the bankruptcy auction, reveal that Banibu is acting as Inbursa's agent "in the transaction giving rise to" a portion of the Commission's investigation – Banibu's potential acquisition of the Corpus Christi assets (satisfying the second *ASAT* factor). Inbursa created Banibu as a shell corporation, for the express purpose of bidding on the Corpus Christi assets, installed its own principals as

Banibu's principals, [redacted] Further, as noted above, [redacted] and those regarding Banibu's asset purchase agreement with Messrs. Frias and Caballero.

Satisfaction of the second *ASAT* factor is sufficient to find that Banibu has the requisite control over the requested documents. But, additionally, we conclude that given Banibu's purpose and Inbursa and Banibu's close relationship, including overlapping officers, directors, and employees, it is highly likely that Banibu would have access to Inbursa's documents regarding its potential acquisition of the Corpus Christi assets "when the need arises in the ordinary course of business," and the ability to "secure documents of [Inbursa] to meet its own business needs" – even those prepared before Banibu was created. This satisfies the third and fourth *ASAT* factors.

The documents sought in the SDT relate specifically to the activities for which Inbursa incorporated Banibu and its plans for the assets should it obtain them. While Banibu has produced some documents relating to the bid itself, it claims not to possess or have control over documents relating to other aspects of the Corpus Christi assets that are important to the FTC staff's investigation (particularly those created prior to Banibu's creation), such as how Inbursa valued the assets and came up with its bid amount, what its future plans are for the site, and what return it expects if it obtains the assets and sells them. These are relevant documents for the Commission's investigation and must be produced pursuant to the SDT.

Inbursa should not be able to create a shell corporation as an acquisition vehicle under the protection of United States law with the express purpose of engaging in a significant business transaction here, yet disclaim any obligation to respond to valid law enforcement inquiries about that proposed transaction. Banibu was created for the sole purpose of doing business in the United States on behalf of its principal Inbursa and should not be allowed to evade law enforcement inquiries due to such machinations. In sum, we find there is a sufficient "nexus between the subpoenaed documents and [Banibu's] relationship with [Inbursa], taking into account, among other things, [Banibu's] business responsibilities," *ASAT*, 411 F.3d at 255, to support our conclusion that Banibu controls the requested documents.[4]

Courts have found sufficient control by subsidiaries over documents nominally possessed by their parent corporations in situations very similar to here. *See, e.g.*, *Camden Iron*, 138 F.R.D. at 442-44 (finding control by wholly owned domestic subsidiary of transaction-related documents possessed by its foreign parent, which played a significant role in setting up and benefitting from transaction and where subsidiary obtained documents relating to transaction from parent in the normal course of business, even where there was little overlap of the companies' officers and directors); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D.

[4] Indeed, these facts may show that Banibu was Inbursa's alter ego for purposes of the Corpus Christi asset transaction such that the corporate veil between them should be pierced to allow Commission access to the documents. But we need not make that finding to conclude that Banibu has sufficient control over the requested documents to comply with the SDT.

918, 919-20 (S.D.N.Y. 1984) (finding control by a domestic distributor and service company over subpoenaed service manual and blueprint documents possessed by foreign airplane manufacturer affiliate such that it would have been "inconceivable that [the domestic company] would not have access to these documents and the ability to obtain them for its usual business."); *CMACO Auto. Syst.*, 2007 WL 656893, at *2 (holding that domestic subsidiary controlled subpoenaed documents held by foreign counterparts under the second, third, and fourth *ASAT* factors); *see also Ysleta del Sur Pueblo*, 2018 WL 2348669, at *3 (defendant Indian tribe controlled documents held by nominally independent tribal fraternal organization because tribe had legal right and practical ability to obtain documents, where organization was "wholly controlled" by tribe and tribal official was also official of the organization with apparent access to the requested documents).

The cases upon which Banibu relies in its petition present circumstances distinguishable from the instant case. In those cases, courts found insufficient control by the domestic subsidiary over its foreign parent's documents where the subsidiary did not have routine access to the subpoenaed documents, which were unrelated to the subsidiary's business activities. *See, e.g.*, *ASAT*, 411 F.3d at 255 (finding lack of control by subsidiary of documents possessed by foreign parent because "[i]t is quite conceivable that [the subsidiary] does not have routine access to [its foreign parents' subpoenaed] documents because they do not seem to relate directly to its principal activities."); *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143, 145-46 (D. Del. 2005) (finding lack of control where domestic subsidiary had arms-length vendor relationship with foreign parent and subsidiary did not use the subpoenaed information "in the normal course of its business"). The current matter is more analogous to those cases finding the domestic subsidiary controls documents maintained or possessed by a parent corporation, given the complete overlap of Banibu's officers and directors with Inbursa, the interconnectedness of Inbursa's and Banibu's business interests and activities regarding the Corpus Christi assets, and the SDT's request for documents relating specifically to those assets. For these reasons, we reject Banibu's objections and deny its petition to quash the SDT.

B. **The subpoena *ad testificandum* should be enforced.**

Banibu also argues that the SAT must be quashed because it exceeds the Commission's Section 9 subpoena authority by "compel[ing] a Mexican national to travel to the United States and sit for a deposition." Pet. 10-11. It relatedly argues, relying on Fed. R. Civ. P. 45, that it has "no representative within the jurisdictional reach of any U.S. district [court]." *Id*. Both arguments fail for the reasons described below.

1. The Commission's subpoena authority under Section 9 compels testimony of Banibu's officers, directors, or managing agents, or designees who consent, to testify on its behalf.

Like its authority to require the production of relevant documentary materials, the Commission has broad authority to require the testimony of United States corporations in furtherance of its investigations. *See supra* at 3. Under Section 9 of the FTC Act, the Commission has the "power to require by subpoena the attendance and testimony of witnesses. . . relating to any matter under investigation. . . . Such attendance of witnesses. . . may be required

from any place in the United States, at any designated place of hearing. . . . The Commission may order testimony to be taken by deposition in any proceeding or investigation . . . at any stage of such proceeding or investigation. . . ." 15 U.S.C. § 49; *see also* 16 C.F.R. § 2.7(c) (FTC's implementing rule). When the Commission issues a subpoena for oral testimony from a corporate entity, "the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf*. . . ." 16 C.F.R. § 2.7(h) (emphasis added); *cf.* Fed. R. Civ. P. 30(b)(6) (applying similar language for corporate depositions in federal civil discovery). The witnesses appear on behalf of "the Company," not in their individual capacities.

Banibu asserts that the Commission "has no power to subpoena an alien nonresident to appear before it from a foreign land." Pet. 10 (quoting *Nahas*, 738 F.2d at 495 (quoting *SEC v. Zangeneh*, 470 F. Supp. 1307 (D.D.C. 1978)). The cases on which Banibu relies involve service on a foreign national on foreign soil (*Nahas*) or service in the United States requiring a particular nonresident alien to appear before the agency from a foreign land (*Zanganeh*). But here, the Commission subpoenaed Banibu – a Delaware corporation, whose principal business activity is related to its bid on the Corpus Christi assets in Texas. Banibu is indisputably within the Commission's subpoena authority. The SAT seeks testimony from knowledgeable corporate officers, directors, managing agents, or designees, not particular individuals located in Mexico, personally. While Banibu may designate its Mexican officers to testify on its behalf, the SAT does not require it to do so.

2. Banibu's invocation of Fed. R. Civ. P. 30(b)(6) and 45 is unavailing.

Banibu further argues, citing Fed. R. Civ. P. 30(b)(6) and 45(c), that the SAT must be quashed because Banibu does not employ anyone within 100 miles of any United States judicial district. Pet. 10-11. It cites no authority, however, that the Commission's subpoena authority under Section 9 of the FTC Act is subject to Rule 45's territorial limits. Indeed, as noted above, Section 9 explicitly states that witness testimony "may be required from any place in the United States, at any designated place of hearing."

But, as noted above, even if we were to consider the Federal Rules of Civil Procedure as guidance for our investigatory subpoenas, Banibu's argument still fails. Rule 45(c)(1)(A) limits a subpoena issued to a nonparty to testify "within 100 miles of where the person resides, is employed, or regularly transacts business in person." The cases relied upon by Banibu simply stand for the unremarkable proposition that a nonparty nonresident organization cannot be compelled to designate a suitable employee to testify who works over 100 miles from the district where the litigation is pending or a deposition is noticed. *See, e.g., Estate of Klieman v. Palestinian Auth.*, 293 F.R.D. 235, 239 (D.D.C. 2013) (subpoena issued to the BBC based in the United Kingdom where relevant documentary was produced), order stayed on other grounds, 18 F. Supp. 3d 4 (D.D.C. 2014); *Krueger Invs. LLC v. Cardinal Health 110, Inc.*, No. CV 12-0618-PHX-JAT, 2012 WL 3264524, at *3 (D. Ariz. Aug. 9, 2012) (no responsive DEA witness worked within 100 miles of Arizona litigation). But the subpoenas were issued to Banibu, a domestic corporation over which the Commission indisputably has jurisdiction. Thus, even using Rule 45(c)(1)(A) as guidance (which we are not obliged to do given the language of Section 9), Banibu needs to designate an officer, director, managing agent, or other person to

testify on its behalf, who resides, works, or regularly transacts business within 100 miles of a suitable investigational hearing location.

While Banibu claims that all four of its officers and directors are Mexican nationals who work and reside in Mexico, Pet. 3, Exh. C ¶ 4, Banibu has an affirmative obligation to "select a designee and educate her in accordance with its duty" to designate a corporate deponent whose testimony "represents the knowledge of the corporation," because "the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." *Wultz v. Bank of China Ltd*., 298 F.R.D. 91, 99 (S.D.N.Y. 2014) (citations omitted); *accord NML Capital*, 2014 WL 3898021, at *10 ("the unique status of the corporate person permits a federal court to compel a non-party resident corporation to designate a nonresident employee to 'thoroughly educate' an in-forum employee to testify on the corporation's behalf") (citing *Wultz*); *Rahman v. The Smith & Wollensky Rest. Group, Inc*., No. 06 Civ. 6198LAKJCF, 2009 WL 773344, at *1 (S.D.N.Y. Mar. 18, 2009) ("A corporation has an affirmative duty to prepare the designee 'to the extent matters are reasonably available, whether from documents, past employees, or other sources.'") (citations omitted). In *Wultz*, the court found that requiring a nonparty bank in Israel with a New York branch office, to educate a person in New York to comply with a corporate subpoena, did not impose an undue burden. 298 F.R.D. at 99. Therefore, Banibu must either send one of its four Mexican officers to the United States to testify, or designate and prepare a person with relevant knowledge to testify on its behalf.[5]

Finally, we note that one court, in requiring a foreign witness to travel more than 100 miles, from abroad, to testify on behalf of nonparty resident shell corporations, observed that "[a] company cannot purposefully avail itself of the law's benefits by incorporating in this jurisdiction and then excuse itself from the court's subpoena power by abusing the corporate form. This would allow a corporation to exploit the benefits created by the law without shouldering the concomitant burdens and responsibilities imposed by the law." *NML Capital*, 2014 WL 3898021, at *11-**12 (observing that shell corporations "exalt artifice above reality," citing *Abramski v. United States*, 134 S. Ct. 2259, 2270 (2014)). While we do not suggest that Inbursa incorporated Banibu for a nefarious purpose, we conclude that similar considerations apply here. Foreign companies that operate in the United States through shell companies, enjoying the benefits and protections of United States law, and engaging in significant domestic transactions, should not be permitted to shield their officers or directors with knowledge of the transaction from the reach of a United States law enforcement investigation. Nothing indicates that Congress intended to limit the Commission's investigatory subpoena authority under Section 9 in the manner that Banibu suggests.

For the reasons described above, we deny Banibu's motion to quash the SAT. While we are not bound by the Federal Rules of Civil Procedure, in an effort to lessen the burden on witnesses consistent with the purposes underlying Rule 45(c), we are modifying the place for the investigative hearing, and order that it take place within 100 miles of either Corpus Christi,

[5] Indeed, we note that the Company retains several agents working in the United States in various consulting and advisory roles, including the Company's attorneys and corporate restructuring consultants.

Texas (where Banibu transacts business) or Wilmington, Delaware (where Banibu is incorporated), or at another place in the United States agreed to by the parties.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Banibu II Holdings, Inc.'s Petition to Limit and Quash Subpoena Duces Tecum and Subpoena Ad Testificandum Dated May 7, 2018 be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Banibu II Holdings, Inc. shall comply in full with the Commission's subpoena *duces tecum* by 10 days from the date of this order; and shall appear to testify on the topics in the subpoena *ad testificandum* at a mutually agreeable date and location, which is within 100 miles of either Corpus Christi, Texas or Wilmington, Delaware, or at another place in the United States agreed to by the parties.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: June 26, 2018