UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., AND VETERAN PETROLEUM LTD.,	Case No. 1:14-cv-01996-BAH
Petitioners,	Judge Beryl A. Howell
v.	
THE RUSSIAN FEDERATION,	
Respondent.	

RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITIES

Respondent hereby respectfully submits this Notice of Supplemental Authorities.[1] Specifically, in **Part I** of this Notice, Respondent describes important recent events in the set-aside litigation, Case No. 200.303.103/01, pending before the Amsterdam Court of Appeal ("Amsterdam Court"). As further detailed below, the Amsterdam Court has now scheduled the parties' final exchange of written briefs (October 24, 2023) and oral arguments (November 21, 2023) to address Petitioners' fraud on the arbitral tribunal.

In **Part II**, Respondent also summarizes recent decisions issued by the courts of Canada and Sweden in disputes arising under the Energy Charter Treaty ("ECT") and UNCITRAL Arbitration Rules ("UNCITRAL Rules") (ECF 63-8). These foreign decisions fully support Respondent's arguments regarding this Court's responsibility to decide independently and *de novo*

[1] The length of this Notice is justified by the number and significance of the developments described herein and reflected in the attached Exhibits.

Indeed, Petitioners have made at least one even longer submission of 14 pages (ECF 266) concerning supplemental authorities.

whether the parties agreed to arbitrate under the ECT, irrespective of the ECT's incorporation of the UNCITRAL Rules. These decisions are relevant to the parties' understanding of the UNCITRAL Rules in this case because, much like Respondent itself and like Petitioners' jurisdictions of incorporation (Cyprus and the United Kingdom), both Canada and Sweden have also enacted legislation modeled on the 1985 UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Law") (ECF 118-6).

Significantly, Respondent's interpretation is also supported by the European Union and the Kingdom of Spain ("Spain") in several appeals now pending before the U.S. Court of Appeals for the District of Columbia. *E.g.*, *Blasket Renewable Investments, LLC v. Kingdom of Spain*, No. 23-7038 (D.C. Cir.).

As this Court has observed, the D.C. Circuit's decision in *Blasket* may ultimately be "dispositive" as to the framework for deciding "whether this Court has subject matter jurisdiction" under the ECT and Foreign Sovereign Immunities Act ("FSIA"). Minute Order, *Watkins Holdings S.À.R.L. et al. v. Kingdom of Spain*, No. 1:20-cv-01081-BAH (D.D.C. June 9, 2023) (Howell, J.) (ordering a stay of litigation over the petitioners' partial objection pending the D.C. Circuit's resolution of the *Blasket* appeal).

Finally, in **Part III**, Respondent objects to and addresses the false statements and material omissions contained in a recent email sent from Petitioners to the chambers of this Court.

I. Developments in the Amsterdam Litigation

In this case, Petitioners have repeatedly asked this Court to defer to the conclusions of the arbitral tribunal or the Dutch courts. Deference, however, is always precluded—and, indeed, additional discovery of evidence is appropriate—where a "'full and fair trial'" was prevented by

one party's "'fraud in procuring the judgment.'"[2] Even Petitioners have now conceded that "discovery has been permitted" in cases where "the party seeking discovery has shown 'clear evidence of impropriety' or some other 'fundamental defect' in 'the arbitration proceeding itself'" (*see* ECF 251 at 4 (citation omitted)).

On remand from the Supreme Court of the Netherlands, the Amsterdam Court is currently evaluating precisely these questions—*i.e.*, whether Petitioners "made untruthful statements, concealed relevant information and withheld crucial documents" during the arbitration, and then "continued their fraud" during the Dutch litigation. *See* Resp't's Amsterdam Br. ¶¶ 3-4, 33, 182-189 (May 17, 2022) (ECF 244-17) ("By deceiving the arbitral tribunal and the opposing party with false statements . . . and by concealing relevant evidence from the arbitral tribunal and the opposing party, the right to a fair trial is violated to the core . . . ."); *see also* Judgment § 8 (Neth. Sup. Ct. Nov. 5, 2021) (annulling the prior decisions of the Court of Appeal of The Hague and remanding to the Amsterdam Court "for further examination and decision" on the fraud challenge). The parties have so far exchanged five principal briefs concerning these issues in the Dutch litigation, as reflected in the attached printout of the Amsterdam Court's docket (**Exhibit 1**).

To provide this Court with accurate information, the undersigned have consulted with Respondent's Dutch counsel regarding the status of the Amsterdam litigation. As communicated previously, Respondent's Dutch counsel was appointed in June 2022 by the Dean of the Amsterdam Bar pursuant to Article 13 of the Dutch Counsel Act (*Advocatenwet*). *See* Kondakov

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[2] *See De Csepel v. Republic of Hung.*, 714 F.3d 591, 606-08 (D.C. Cir. 2013) (remanding to "develop [the] factual record" as to purported impropriety during "the Hungarian proceedings" (quoting *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895))); *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 846 F.3d 35, 56-57 (2d Cir. 2017) ("Given appellants' assertions of fraud [in a French proceeding] . . . we find the district court's application of . . . issue preclusion was inappropriate. On remand, appellants should be allowed to conduct discovery with respect to the fraud claims.").

Third Decl. ¶ 6 (ECF 244-2). In light of the ongoing sensitivities surrounding this appointment, the name of Respondent's Dutch counsel and other identifying information have been redacted from the documents submitted herewith. Respondent respectfully asks Petitioners not to reveal the name of Respondent's Dutch counsel unnecessarily.

With respect to the current status of the Dutch litigation, the Amsterdam Court informed the parties on August 2, 2023, of its decision regarding the procedural schedule going forward. *See* Email from the Amsterdam Court to Counsel (Aug. 2, 2023) (**Exhibit 2**). On October 24, 2023, the parties will simultaneously exchange written submissions of up to 25 pages. The parties will then present their oral arguments to the Amsterdam Court on November 21, 2023. Each party will present a 90-minute initial submission, followed by each party's 30-minute rebuttal submissions.

These submissions will address the documentary evidence of Petitioners' fraud. Both this Court and the Amsterdam Court are already familiar with some of this documentary evidence, including the 2003 Deed of Accession (ECF 202-1) and the 2004 Contracts (ECF 202-3) signed by Leonid Nevzlin on GML's behalf concerning an option (granted to the counter-party, Konstantin Kagalovsky) to buy the "shares of YUKOS" held by Petitioners. As Respondent has explained, Petitioners were obligated to disclose these specific documents during the arbitration, but Petitioners failed to do so. *See* Mot. for Evid. Hr'g 6-10 (ECF 244) (explaining the relevance of these documents); Reply on Evid. Hr'g 8 & n.6 (ECF 254) (explaining why, *e.g.*, Nevzlin's 2004 Contracts were subject to disclosure under Procedural Order 12).

In addition, as Respondent's Dutch counsel has concluded, other documents also warrant consideration by the Amsterdam Court in accordance with due process and the Dutch Code of Civil Procedure ("DCCP").

For example, Petitioners apparently committed yet another fraud during the arbitration by denying the existence of any "letters of wishes" pertaining to Palmus Trust. *See* Letter from Kelvin Hudson to Tim Osborne (Dec. 14, 2011) (**Exhibit 3**) (responding to the arbitral tribunal's instruction "under Procedural Order No 12" by asserting that no "letters of wishes . . . exist" for the "Palmus" trust). In reality, such letters of wishes actually did exist, as described in emails exchanged by Kelvin Hudson shortly before the arbitration commenced in October 2004. *E.g.*, Email from Kelvin Hudson to Maria Puzitskaya (Sept. 8, 2004) (**Exhibit 4**) (referencing a "letter of wishes" pertaining to an "income distribution" to the beneficiary of "Palmus Trust"). As reflected in the arbitral tribunals' order concerning these documents' disclosure, and as confirmed by many authorities, such "letters of wishes" are necessarily relevant to the use of trust structures "to perpetrate fraud" where "settlors . . . transfer assets into a trust and then falsely claim they have relinquished control over the assets."[3]

This is precisely what Kelvin Hudson (testifying here at ECF 241-2) and the Russian Oligarchs have done in the present case, as the Amsterdam Court will be asked to consider over the next four months. As Respondent has explained previously, the Russian Oligarchs' abuse of Petitioners' corporate formalities—including the purported trust structures holding GML's shares—is directly relevant to the application of the "veil-piercing" doctrine recognized under

[3] *E.g.*, OECD, *Behind the Corporate Veil: Report on the Misuse of Corporate Vehicles for Illicit Purposes* 26 (2001) (**Exhibit 5**) ("[T]rusts may be used to perpetrate fraud. . . . [D]espite adhering to the formal requirements of the law, settlors can still exercise control through the use of a letter of wishes and a protector. . . . While a letter of wishes is not legally binding on trustees, they usually follow the wishes expressed in the letter of wishes. To ensure that the trustee acts in accordance with . . . the letter of wishes . . . , the trust laws of many common law jurisdictions provide for a 'protector' to be named in the trust deed. The protector is appointed by the settlor and often is a trusted friend or advisor of the settlor. While the protector may not force the trustee to effectuate a distribution to a particular beneficiary, it may replace the trustee for any reason and at any time. Consequently, trustees that do not adhere to the trust deed and the letter of wishes can be quickly replaced.").

international law. *See* Mot. for Evid. Hr'g 4-7 (ECF 244); Reply on Evid. Hr'g 18-23 (ECF 254). Under the Vienna Convention on the Law of Treaties, the "veil-piercing" doctrine must be considered when interpreting any purported offer to arbitrate with legal persons under the ECT. *See* Mot. for Evid. Hr'g 4-5 (ECF 244); Reply on Evid. Hr'g 18-19 (ECF 254).

Accordingly, in the coming days, Respondent will serve an amended Request for Documents (*see* ECF 248-1) on Petitioners in relation to the "letters of wishes" described in **Exhibit 4** and, upon receipt of the requested documents, will also seek to depose Petitioners' four proffered witnesses on these topics. If Petitioners fail to comply with these legitimate and appropriate requests, Respondent reserves the right to pursue a Motion to Compel in accordance with the appropriate procedure for resolving a "discovery dispute," as described in the Standing Order § 7 (ECF 62).

II. Developments in the D.C. Circuit and Other ECT Litigation

Petitioners sent an email to this Court's chambers on July 24, 2023, which implied that this Court must decide Respondent's "motions to dismiss based on the Foreign Sovereigns Immunities Act (ECF 24 & 108), as soon as possible." Without question, this Court possesses "broad discretion to manage its docket" for the fair and efficient administration of justice. *Morrissey v. Mayorkas*, 17 F.4th 1150, 1157 (D.C. Cir. 2021).

Petitioners are wrong, however, to imply that Respondent's dispositive motions can be decided "as soon as possible," without first addressing the Respondent's pending request to cross-examine Petitioners' four proffered witnesses (*see* ECF 241-02, 241-05, 241-06, 241-07, 241-08, 241-16, 241-28) concerning the disputed jurisdictional facts relevant to the FSIA. *See* Mot. for Evid. Hr'g 3-10 (ECF 244). As Respondent has previously explained, Petitioners themselves have sought to address the disputed jurisdictional facts with over 100 pages of testimony, and

Respondent is entitled to test Petitioners' witnesses through cross-examination. *See* Mot. for Evid. Hr'g 1, 3-10 (ECF 244); Reply on Evid. Hr'g 3-7 (ECF 254) (collecting cases where courts have permitted cross-examination and discovery of evidence in relation to "piercing the corporate veil" and other issues during post-arbitration litigation).

Indeed, this Court's independent responsibility to decide the "jurisdictional fact" of "whether an arbitration agreement exists" is precisely the issue raised by the European Union ("EU") and Spain in the ongoing appeals before the D.C. Circuit. *See, e.g.*, EU Amicus Br. 26-27, *Blasket*, No. 23-7038 (D.C. Cir. July 6, 2023) (**Exhibit 6**) (arguing that, where "Spain had not validly offered to arbitrate . . . with Appellant," this was "fatal to subject-matter jurisdiction over this action" because "whether an arbitration agreement exists is a key jurisdictional fact for the court to determine"); Spain Br. 2-3, 28-29, *Blasket*, No. 23-7038 (D.C. Cir. June 29, 2023) (**Exhibit 7**) (arguing that "to find jurisdiction, the district court must 'satisfy itself' that an arbitration 'agreement between the parties' exists . . . . Federal courts cannot outsource deciding their own jurisdiction to arbitrators . . . . Here, no agreement formed because, while Spain offered in the Energy Charter Treaty to arbitrate . . . that offer does not extend to . . . claimants. There was no offer for claimants to accept." (quoting *Chevron Corp. v. Ecuador*, 795 F.3d 200, 205 & n.3 (D.C. Cir. 2015)).[4]

[4] Petitioners have wrongly suggested (ECF 266 at 2) that the European Union's amicus submissions should be disregarded because they are supposedly "not authorities at all." This characterization is contrary to black-letter law. As Petitioners have never disputed, the European Union is not only a Contracting Party to the ECT, but also "'was the determining actor in the creation of the ECT.'" Forwood Decl. ¶ 11 (ECF 180-9) ("'[T]he ECT was essentially the brainchild of the EU.'" (quoting the European Union's amicus submission)).

Accordingly, the European Union's "official position" on the ECT's interpretation is "'entitled to the Court's 'respectful consideration'" as a matter of law. *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 21-cv-3249, 2023 U.S. Dist. LEXIS 54502, at *17 n.6 (D.D.C. Mar. 29, 2023) (quoting *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018)).

Relatedly, two recent decisions by the Canadian and Swedish courts have also confirmed Respondent's argument that, in the specific "context" of the present case, the UNCITRAL Rules do not provide any "clear and unmistakable evidence" that the parties exclusively delegated questions of arbitrability to the arbitrators. *E.g.*, Reply on Evid. Hr'g 16-17 (ECF 254). As Respondent has explained, the meaning of the UNCITRAL Rules in the present case must be understood in the context of the UNCITRAL Law, which has been enacted by Petitioners' jurisdictions of incorporation (Cyprus and the United Kingdom), as well as by Respondent. *See id.* The UNCITRAL Law contains a so-called "competence-competence" clause at Article 16(1)—which is materially identical to Article 21(1) of the UNCITRAL Rules, the clause that Petitioners have invoked as purportedly excluding judicial review in the present case.[5]

Much like the German decision exhibited earlier this year in another case under the UNCITRAL Rules (*see* ECF 265-3 at 15) ("the state court is not bound by the arbitral tribunal's decision on competence"), the Canadian decision and the Swedish decision both directly reject Petitioners' interpretation of the "competence-competence" clause in cases arising specifically under the ECT and the UNCITRAL Rules. These Canadian and Swedish decisions provide further evidence, therefore, that neither Respondent nor Petitioners actually understood the UNCITRAL Rules' "competence-competence" clause as excluding courts from conducting *de novo* review of arbitrability questions, as detailed below.

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[5] *Compare* UNCITRAL Law, Article 16(1) (ECF 118-6) ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.") *with* UNCITRAL Rules, Article 21(1) (ECF 63-8) ("The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.").

First, in *Russian Federation v. Luxtona Ltd.*, 2023 ONCA 393 (Ontario Ct. of Appeal, June 2, 2023) (**Exhibit 8**), one of Canada's highest appellate courts identified "strong international consensus" that such a "competence-competence" clause "promotes efficiency" only at the beginning of arbitration "by limiting a party's ability to delay arbitration through court challenges." Exhibit 8, ¶¶ 30-34, 43-49. After the arbitral award has been issued, however, such a clause "does not require any special deference . . . to an arbitral tribunal's determination of its own jurisdiction" and, rather, allows the reviewing court to conduct "a *de novo* hearing" of this issue. *Id.* (confirming that "a *de novo* hearing was appropriate").

Second, in *Kingdom of Spain v. Novenergia II - Energy & Environment (SCA)*, Case No. T 4658-18, A181 (Svea Ct. App. Dec. 13, 2022) (**Exhibit 9**), the Swedish Court of Appeal likewise analyzed legislation that "mirrors the provisions of the New York Convention and the UNCITRAL Rules" and was enacted based on the UNCITRAL Law. As the Swedish Court found, even though "the arbitration panel issued its award" under the UNCITRAL Rules, this did not prevent the Swedish Court from concluding independently and *de novo* that "Spain and Novenergia could never have agreed, either in advance or in retrospect, that the issues in question were to be resolved through arbitration" under the ECT. *Id.* at A181, 195-96, 200 (setting aside the arbitral award on this basis).

Accordingly, as the European Union is now arguing before the D.C. Circuit, and as the Canadian and Swedish courts have both concluded in other recent ECT disputes, this Court is not precluded by the UNCITRAL Rules from evaluating *de novo* and independently whether Respondent ever offered to arbitrate with Petitioners.

To the contrary, this is a core question of this Court's jurisdictional analysis under the FSIA, as this Court recently concluded in *Watkins*. Min. Order, *Watkins Holdings S.À.R.L. et al.*

v. Kingdom of Spain, No. 1:20-cv-01081-BAH (D.D.C. June 9, 2023) (Howell, J.) (staying litigation because the D.C. Circuit's decision in *Blasket* may ultimately be "dispositive" as to application of the FSIA in ECT disputes). The issue of whether the parties agreed to arbitrate is an issue of subject-matter jurisdiction under the FSIA, which is integral to Respondent's pending Motions to Dismiss.

III. Petitioners' Email to this Court's Chambers

Finally, Respondent notes respectfully that Petitioners' email to this Court's chambers on July 24, 2023, was inappropriate. Petitioners' email was sent without prior notice to Respondent and was not contemplated by the Local Civil Rules or this Court's Standing Order (ECF 62). To the contrary, the Standing Order envisions "communications with chambers" in only limited circumstances, none of which are present in this case. In addition, Petitioners' email contained a number of false or misleading statements and omissions, as explained below.

Petitioners' email voiced concern that Petitioners will somehow be "disadvantaged" in comparison to other categories of claimants. Respectfully, Petitioners' suggestion of any financial disadvantage cannot be taken seriously. Petitioners are offshore shell companies with no employees, business activities, or significant expenses—and their ultimate beneficial owners are among the wealthiest Russian Oligarchs on the planet. *See, e.g.*, *Forbes List of Russia's 200 Wealthiest Businessmen* (ECF 129-4); Email from Alan Sipols to James Jacobson of Feb. 17, 2004 (ECF 244-9) (reflecting Petitioners' transmittal of funds to the Russian Oligarchs' holding company, GML, equaling more than US$ 4.3 billion).

In any event, a petitioner's interest in "quickly collecting" under an arbitral award is "less acute" where, as here, the arbitral award continues to accrue post-award interest. *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, No. 1:19-cv-03783, 2021 WL 1226714, at *3

(D.D.C. Mar. 31, 2021); *see also Hulley Enters. v. Russian Fed'n*, 502 F. Supp. 3d 144, 163 (D.D.C. 2020) (observing that any hardship from delayed payment "is tempered . . . by the fact . . . that post-award interest will compensate for any delay").

Further, Petitioners' description of "other creditors" who are supposedly "now close to executing on Russian assets" contains a number of misrepresentations. In reality, as the relevant dockets show, these parties have not yet completed service of process under the FSIA in any of these cases. *E.g.*, Aff. Req. Foreign Mailing (ECF 280), *Chabad v. Russian Federation*, No. 15-cv-1548-RCL (D.D.C. May 4, 2023); Aff. Req. Foreign Mailing (ECF 53), *Yukos Capital v. Russian Federation*, No. 22-cv-798-CJN (ECF 51) (D.D.C. June 16, 2023). In at least four of these cases, no court in the United States has yet made any conclusions with respect to Respondent's sovereign immunity or any other substantive issues.

Indeed, contrary to Petitioners' assertions, none of these cases have resulted in the identification of any "Russian Federation assets in this country" that would otherwise be legally subject to seizure by Petitioners. To the contrary, as explained by another judge of this Court, these claimants have brought claims only against the property of third-party entities with separate legal personality. *E.g.*, Mem. Order 2-3 (ECF 198), *Agudas Chasidei Chabad v. Russian Federation*, No. 1:05-cv-1548-RCL (D.D.C. Dec. 20, 2019) (describing the several "corporate tiers" separating a third-party entity from Respondent and finding that plaintiffs' characterization of this entity as "an 'instrumentality' of Russia" was "a stretch"). No court has entered any findings as to whether these entities' assets could be attached by Respondent's creditors.

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Accordingly, for the reasons stated above, Petitioners' efforts to mischaracterize the record must be rejected.

August 9, 2023

Respectfully submitted,

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