IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANATOLIE STATI; GABRIEL STATI; ASCOM GROUP, S.A.; TERRA RAF TRANS TRAIDING LTD., Petitioners, v. REPUBLIC OF KAZAKHSTAN, Respondent.	Civil Action No. 1:14-cv-1638-ABJ-DAR

RESPONDENT'S MOTION FOR PROTECTIVE ORDER

Dated: July 16, 2019

Respectfully submitted,

/s/ Matthew H. Kirtland

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Respondent Republic of Kazakhstan ("Respondent" or "Kazakhstan"), through undersigned counsel, respectfully moves for good cause pursuant to Federal Rule of Civil Procedure 26(c)(1)(A) for a protective order staying further discovery by Petitioners Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. ("Petitioners") as irrelevant, disproportional to the needs of the case, and unduly burdensome.[1]

INTRODUCTION

In this matter, Petitioners seek discovery in aid of executing this Court's March 23, 2018 judgment confirming a foreign arbitral award. The discovery already taken by Petitioners, however, confirms that **no assets exist in the United States that Petitioners could attempt to attach to execute the judgment**. No amount of further discovery could uncover such attachable assets in the United States. As the Supreme Court has held, "information that could not possibly lead to executable assets is simply not 'relevant' to execution in the first place." *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014). Petitioners have chosen to register their judgment in a jurisdiction in which no assets can satisfy it. As a result, any further discovery would be irrelevant to the execution of the judgment, and its burden cannot justify its nonexistent benefit. Further discovery would serve only to harass and unduly burden a sovereign state.

The Foreign Sovereign Immunities Act ("FSIA") places strict limits on the property of a sovereign that can be attached in execution of a judgment. 28 U.S.C. § 1609. As applicable here, Petitioners may only attach Kazakhstan's "property in the United States … used for a commercial activity in the United States." *Id.* § 1610. The discovery obtained by Petitioners – including requests for admission, interrogatories, a Rule 30(b)(6) deposition, and a deposition of

[1] As required by LCvR 7(m), undersigned counsel for Kazakhstan asked counsel for Petitioners by email whether they consented to the relief requested herein on July 12, 2019. Counsel for Petitioners did not respond.

the individual best positioned to know of any Kazakh assets in the U.S. – shows that Kazakhstan does not engage in any commercial activity in the U.S., and it thereby does not maintain any property here for such a purpose. Instead, it maintains only minimal diplomatic assets, such as its embassy in this District. This should put an end to any discovery in this matter, since no assets exist in the United States that Petitioners could attempt to attach. Petitioners, moreover, have no need for such cumulative evidence, since they have already attached approximately $6 billion overseas to satisfy their award of approximately $500 million.

Unsatisfied with this reality, Petitioners continue to seek sweeping discovery primarily into assets that they are legally barred from attaching in this proceeding. For example, they seek discovery into all *foreign* assets belonging to either Kazakhstan or one of its supposed instrumentalities. Attachment of Kazakhstan's foreign assets is explicitly barred by the FSIA, and they are by definition irrelevant to this action and thereby outside the scope of proper discovery under Federal Rule 26(c). So too are any assets belonging to third-party "instrumentalities" that are separate legal entities against which Petitioners have no judgment and whose assets cannot be used to satisfy the judgment. The Court should accordingly stay any further discovery.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 69(a), a judgment creditor may only pursue discovery "[i]n aid of [a] judgment or execution … as provided in these rules." Rule 26(b)(1), in turn, limits discovery to information

> that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The party seeking the disclosure of information "bears the initial burden of explaining how the requested information is relevant." *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 42 (D.D.C. 2007). A court "must limit the frequency or extent of discovery … if it determines that … the discovery sought is unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(C).

Rule 26(c) provides that a court may, for good cause and to protect a party from undue burden and expense, issue a protective order that "certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters." A court possesses broad discretion in issuing such a protective order and in determining what degree of protection is required. *United States v. Sci. Applications Int'l Corp*., 04-cv-1543 (RWR/AK), 2006 WL 8435222, at *4 (D.D.C. Feb. 28, 2006). "[Rule 69 discovery] is not unlimited, and must be kept pertinent to the goal of discovering concealed assets of the judgment debtor and not be allowed to become a means of harassment of the debtor or third persons." *ITOCHU Int'l, Inc. v. Devon Robotics, LLC*, 303 F.R.D. 229, 231-32 (E.D. Pa. 2014) (quotations omitted). The decision to limit or deny discovery by means of a Rule 26 protective order requires the court to balance "the requestor's need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material; and the harm which disclosure would cause to the party seeking to protect the information." *Burka v. Dep't of Health and Human Servs*., 87 F.3d 508, 517 (D.C. Cir. 1996).

The FSIA confers two independent types of immunities on sovereign governments. First, sovereigns have jurisdictional immunity that prevents them from being sued in the United States except in enumerated circumstances. 28 U.S.C. § 1605(a)(6). Separately, the FSIA provides that sovereigns "*shall be immune* from attachment arrest and execution" except in enumerated

circumstances. *Id*. § 1609 (emphasis added). "This section codifies the longstanding common-law principle that a foreign state's property in the United States is presumed immune from attachment." *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011). This immunity "aim[s] to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery." *Id.* at 795 (citing cases). Discovery should be permitted only circumspectly in order not to unnecessarily burden the sovereign. *See*, *e.g.*, *id*. at 796 ("Discovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets."); *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("Sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.") (quotations omitted); *First City, Texas–Houston, N.A. v. Rafidain Bank,* 150 F.3d 172, 176 (2d Cir. 1998) ("In the FSIA context, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.") (quotations omitted).

The immunity to attachment does not apply to "property in the United States of a foreign state … used for a commercial activity in the United States" for a judgment based on the confirmation of an arbitral award.[2] *Id*. § 1610(a)(6). As a result, under the FSIA, only property located in the United States and used for a commercial activity in the United States can potentially be attached to satisfy this Court's judgment. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990). Furthermore, the "property must be in the United States

[2] The FSIA also specifies additional circumstances in which the property of a sovereign's agencies or instrumentalities may be attached, but none is implicated in this case. For example, the FSIA allows attachment of an instrumentality's property if the claim is based on a state's commercial activity in the United States (28 U.S.C. § 1610(b)(2)), violations of international law involving property within the United States (*id.*), or terrorism-related activity (*id.* § 1610(b)(3)).

when the district court authorizes execution" in order for it to be attachable under the FSIA. *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 589 (5th Cir. 2006).

Courts have repeatedly limited discovery into assets that could not be attached under the FSIA. *See*, *e.g.*, *Thai Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 513 (S.D.N.Y. 2013) (allowing judgment creditors to pursue discovery so long as there was a "nexus to U.S. assets used for a commercial purpose"); *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 308 F.R.D. 27, 37 (D.D.C. 2015) (holding that Rule 30(b)(6) notice to a sovereign was not overbroad because "[n]one of the areas of inquiry outlined in Continental's notice, on their face, appear to be directed at property or assets that would be categorically immune from execution under the FSIA"); *Leibovitch v. Islamic Republic of Iran*, 297 F. Supp. 3d 816, 832 (N.D. Ill. 2018) ("Plaintiffs are entitled to conduct discovery reasonably calculated to locating assets that may be subject to attachment.").

In *Rubin*, plaintiffs obtained a default judgment in this District against Iran for claims relating to a terrorist attack, and then registered the judgment in the Northern District of Illinois to attempt to attach a collection of ancient artifacts that Iran had loaned to museums in Chicago. 637 F.3d at 786. The plaintiffs served Iran with sweeping discovery regarding all its assets in the United States, and the court granted plaintiffs' motion to compel this discovery. *Id*. On appeal, the Seventh Circuit held that under the FSIA, "property of a foreign state in the United States is *presumed* immune from attachment and execution." *Id*. at 796 (emphasis original). However, by giving "the plaintiffs a 'blank check' entitlement to discovery regarding *all* Iranian assets in the United States," the district court improperly "turn[ed] this presumptive immunity on its head." *Id*. In order to comply with the FSIA, the court held that "a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject

to attachment and plausibly allege that an exception to § 1609 attachment immunity applies. If the plaintiff does so, discovery in aid of execution is limited to the specific property the plaintiff has identified." *Id*. at 798.

In *Walters v. People's Republic of China*, the court quashed subpoenas against third-party banks that sought information regarding China's foreign assets. 672 F. Supp. 2d 573, 575 (S.D.N.Y. 2009). There, the court noted that the FSIA only allowed attachment of "[t]he property in the United States of a foreign state." *Id*. (quoting 28 U.S.C. § 1610(a)). "Because assets held outside of the U.S. fall outside of the exception to sovereign immunity provided by the FSIA and the FSIA is the sole basis for obtaining jurisdiction against a foreign sovereign," the court granted the motion to quash the discovery. *Id*. Although the petitioners did not appeal that decision, the Second Circuit positively cited the decision in a later phase of the case, explaining that "petitioners there sought information pertaining to China's assets outside of the United States, which were held to be categorically immune from execution under the FSIA. Nothing in that ruling … prevents them from pursuing Rule 69 discovery from the Banks as to China's potentially recoverable assets held *within the United States*." *Walters v. Indus. & Commercial Bank of China, Ltd*., 651 F.3d 280, 297 (2d Cir. 2011) (emphasis added).

In *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, the D.C. Circuit also suggested that a "discovery order [was] overbroad because it seeks information on property that is not subject to attachment or execution under the FSIA—indeed it reaches property beyond the United States, outside of the district court's jurisdiction." 637 F.3d 373, 379 (D.C. Cir. 2011). Although it held that the argument was "serious[]," the court did not squarely address the argument because the judgment debtor did not raise it on appeal. *Id*.; *see also Stern v. Islamic Republic of Iran*, 73 F. Supp. 3d 46, 51 (D.D.C. 2014) (denying discovery into assets that could

not properly be attached); *accord Cont'l Transfert Technique Ltd.*, 308 F.R.D. at 37 (allowing discovery when the plaintiff sought "only information about Nigeria's property, assets, transactions, or investments which are used for commercial activities and which are located, or undertaken, in the United States").

The Supreme Court has also questioned the propriety of allowing discovery into foreign assets that cannot be attached to satisfy a judgment. In *Republic of Argentina v. NML Capital, Ltd.*, the district court permitted discovery into Argentina's assets outside the United States. 134 S.Ct. 2250 (2014). On appeal, Argentina only raised a "single, narrow question" of whether the FSIA barred extraterritorial post-judgment discovery. *Id*. at 2254-55. The Supreme Court held that the text of the FSIA had no such bar on discovery. *Id*. The Court, however, explicitly did not resolve the question of whether such discovery was proper under the Federal Rules, since Argentina never raised it. According to the Court, the scope of Rules 26 and 69 were "much discussed at oral argument," including what discovery is permissible "if the assets targeted by the discovery request are beyond the jurisdictional reach of the court to which the request is made" and whether a court may "permit discovery so long as the judgment creditor shows that the assets are recoverable under the laws of the jurisdictions in which they reside, whether that be Florida or France." *Id*. at 2254. However, because "Argentina has not put [these issues] in contention" in the appeal, the Court "assume[d] without deciding that in a run-of-the-mill execution proceeding the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States." *Id*. at 2255. It nevertheless cited approvingly the district court's efforts to "limit the subpoenas to discovery that was reasonably calculated to lead to attachable property." *Id*. at 2254. The Court also explained that the discovery would be impermissible "because *information*

that could not possibly lead to executable assets is simply not 'relevant' to execution in the first place" under Rule 26. *Id*. at 2257 (emphasis added).

Judgment creditors also cannot execute against the debt of a sovereign by attaching the assets of its legally distinct instrumentalities. *See De Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984) (holding that a judgment creditor could not attach the assets of a sovereign's state-owned airlines to satisfy the judgment against the sovereign). In *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba* ("Bancec"), Citibank sought to offset a debt owed to Bancec, an instrumentality of the Cuban government, with money that Cuba owed to Citibank for expropriating Citibank's assets after the 1959 revolution. 462 U.S. 611 (1983). The Supreme Court, however, held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id*. at 626-27. To hold otherwise would frustrate "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration" and thereby offend "principles of comity between nations." *Id*. at 626.

The D.C. Circuit has held that the presumption of separateness can be overcome only when the sovereign exercises such extraordinary control over its instrumentality that they are "not meaningfully distinct entities" but instead "act as one." *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000). However, a "sovereign does not create an agency relationship merely by owning a majority of a corporation's stock or by appointing its Board of Directors." *Id*. The D.C. Circuit, for example, found that the presumption of separateness was not overcome even though Venezuela owned most of the instrumentality's stock, appointed its Board, was involved in its day-to-day operations, and aided it financially. *Id*. at 850-51.

Even if the FSIA confers jurisdiction over a sovereign does not mean that it affords judgment creditors a right of discovery. Indeed, courts have recognized that, at times, the FSIA creates a right to jurisdiction over a foreign state without an actual remedy of execution. *See Exp.-Imp. Bank of the Republic of China v. Grenada*, 768 F.3d 75, 84 (2d Cir. 2014) (holding that immunity from execution "can, in some cases, still render the grant of jurisdiction under the FSIA entirely ineffectual, essentially providing a 'right without a remedy.'") (quoting *De Letelier*, 748 F.2d at 798). This is necessary because "[t]he judicial seizure of the property of a friendly state may be regarded as an affront to its dignity and may ... affect our relations with it." *Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quotations omitted). Because of these comity considerations, "Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1127-28 (9th Cir. 2010).

RELEVANT BACKGROUND

On March 23, 2018, this Court confirmed Petitioners' 2013 arbitral award after denying Kazakhstan's request for leave to present evidence that the award had been obtained by fraud. ECF 69, 70. One month after the entry of the judgment, on April 23, 2018, Petitioners moved this Court for an order permitting them to begin executing the judgment pursuant to 28 U.S.C. § 1610(c) and to register the judgment in any other judicial district of the United States. ECF 73.

On May 1, 2018, Petitioners propounded discovery pursuant to Federal Rule 69 in aid of executing the judgment. Specifically, they served on Kazakhstan 182 document requests and two deposition notices, including a Rule 30(b)(6) deposition that listed 18 topics. Exhibits A and B. Only 18 of the 182 document requests specifically seek information on assets located within the United States. Eighteen of the remaining requests demand information *solely* regarding

extraterritorial assets, including any letters of credit, bank accounts, debts, or commercial transactions outside the United States. Exhibit A at 26-45 (topics 19-36). The bulk of the remaining requests seek information regarding assets regardless of where they are located. *Id*. at 19-44 (requests 37-182). In addition, 142 of the 182 requests seek information on what Petitioners define as Kazakhstan's "instrumentalities." *Id*. at 12-44 (requests 2, 4, 6, 8-9, 11, 13, 15-18, 20, 22, 24, 26-27, 29, 31, 33-53, 57-64, 69-72, 74-91, 100-158, 160-61, 165, 167, 169, 174-82). Petitioners broadly define "instrumentality" as "any entity that the [Kazakhstan] government owns, controls or has a beneficial interest in, in whole or in part, directly or indirectly," including a list of 25 entities that Petitioners claim to be instrumentalities. *Id*. at 8-9. In its responses and objections to the document requests, Kazakhstan objected to this definition on several grounds, including that it is vague, unduly burdensome, and not calculated to lead to the discovery of any admissible evidence. Exhibit C at 5. It also objected to any request that sought information that was not relevant "given the limitations imposed by the Foreign Sovereign Immunities Act." *Id*. at 3.

With regard to Petitioners' Rule 30(b)(6) notice, seven of the 18 topics explicitly request information *solely* regarding extraterritorial assets. Exhibit B at 15-26 (topics 9-15). Eleven topics seek information regarding assets of Kazakhstan's supposed instrumentalities, which Petitioners again broadly defined. *Id*. at 6-30 (topics 2, 5, 7, 8, 10, 13-18). Kazakhstan timely objected to these topics also on the basis of relevance, undue burden, and other enumerated grounds. *Id*. at 2, 4-5.

In violation of LCvR 7(m), Petitioners moved to compel responses to their deposition notices and document requests on July 19, 2018. ECF 81; ECF 85 at 2-6. Kazakhstan subsequently opposed this motion and affirmatively moved for a protective order and a stay of

execution on August 6, 2018. ECF 83, 85, 86. The motion for a stay was based, in part, on the fact that Petitioners had already fully secured their judgment many times over in European proceedings. In four jurisdictions – Belgium, Luxembourg, Sweden and the Netherlands – Petitioners have levied attachments worth more than $5.92 billion to enforce their $500 million. *See* ECF 83-1 at 3-8. Petitioners have, in fact, conceded that their award has been fully secured. In England, for example, Petitioners halted proceedings to enforce the award because there was no need for them, given the fact that "enforcement measures outside the jurisdiction are *highly likely* to satisfy" the arbitral award. ECF 83-1 at 7-8 (emphasis added). This Court denied Kazakhstan's motion for a stay of execution, but it did not resolve "the parties' disputes over the breadth, vagueness, and relevance of the discovery requests and whether they are unduly burdensome." ECF 91. The Court referred these issues to Magistrate Judge Robinson. ECF 97.

On November 13, 2018, this Court held that a reasonable period of time had elapsed since the judgment such that Petitioners could attempt to execute on the judgment pursuant to 28 U.S.C. § 1610(c). ECF 91 at 2. However, it denied Petitioners' request to register its judgment in other judicial districts. *Id*. The Court held that Petitioners needed to show good cause to register the judgment outside the District of Columbia because the judgment had not become final by appeal. *Id*. at 7 (citing 28 U.S.C. § 1963). Petitioners, however, failed to show good cause because they had not taken any steps to establish that Kazakhstan lacked sufficient assets to satisfy the judgment in the District of Columbia or that it had "substantial assets in other forums." *Id*. (quoting *Chevron Corp. v. Republic of Ecuador*, 987 F. Supp. 2d 82, 84-85 (D.D.C. 2013)). Petitioners subsequently propounded additional discovery to address these issues on December 4, 2018. They issued requests for admission that asked Kazakhstan whether it maintained "non-diplomatic, non-military" property in the District or elsewhere in the United

States. Exhibit D at 4. Petitioners also requested that Kazakhstan admit that two third parties to these proceedings – the National Fund of the Republic of Kazakhstan (the "National Fund") and Samruk-Kazyna JSC – maintained property in the United States. *Id*. In corresponding Interrogatories, Petitioners asked Kazakhstan to identify any such property that it admitted to maintaining in this District and in other judicial districts in the United States. Exhibit E at 4.

On December 20, 2018, this Court (Magistrate Judge Robinson) held a hearing regarding Petitioners' motion to compel and Respondent's motion for a protective order. Petitioners admitted that their discovery requests were "concededly broad" and could be narrowed. Exhibit F at 6:16-18. The Court denied both motions without prejudice but ordered a step-by-step process in which Petitioners could first take the deposition of a Kazakh official whom Petitioners had noticed. ECF 99. The Court further ordered the parties, upon completion of the deposition, to meet and confer and then file a status report "regarding the need for further discovery." *Id*.

This step-by-step discovery process ordered by the Court – consisting of Petitioners' requests for admission and its depositions of two senior Kazakh government officials, including a Rule 30(b)(6) deposition – has confirmed that Kazakhstan maintains no attachable assets in the United States. For example, Kazakhstan timely responded to Petitioners' interrogatories and requests for admission on January 7, 2019. Kazakhstan investigated whether it possessed any such assets anywhere in the United States, and it responded that it did not. Exhibit G at 4-5; Exhibit H at 5.

In lieu of the deponent that Petitioners had noticed, who was no longer in Kazakhstan's employ or in the United States, Kazakhstan instead on January 18, 2019 volunteered a substitute deponent –Mr. Kalymzhan Ibraimov – a senior government official who was in the best position to know of any Kazakh assets in the United States. ECF 102 at 5-6. This was done in good faith

to comply with the Court's direction at the December 20, 2019 hearing. However, for a period of more than ten weeks, Petitioners did nothing, waiting until April 3, 2019, to communicate that they wanted to proceed with the offered deposition.[3] ECF 105. On May 9, 2019 – a mutually agreed-upon date – Petitioners took the deposition of Mr. Ibraimov, who traveled from Kazakhstan to the United States specifically for the deposition. Mr. Ibraimov is the Deputy Chair of the Committee for State Property and Privatization in the Kazakh Ministry of Finance, which oversees assets belonging to Kazakhstan, including its shareholding interests in a series of approximately 130 joint stock companies. Exhibit I at 14:24–15:6, 16:2-4, 20:7-14. As part of its purview, the Committee also maintains a comprehensive registry of assets belonging to Kazakhstan and to the joint stock companies. *Id*. at 40:2-23. The Committee also manages a process in which certain of Kazakhstan's assets are being privatized. *Id*. at 14:24–15:6, 16:2-4, 20:7-14. In his role as Deputy Chairman of the Committee, Mr. Ibraimov had broad knowledge regarding the assets of Kazakhstan and the joint stock companies.

Petitioners asked Mr. Ibraimov a total of 296 questions, the vast majority of which he answered either over objections (in 54 cases) or with no objections at all. *See* Declaration of Matthew Kirtland ("Kirtland Decl."), attached hereto at ECF 113-3, at ¶ 12. In a single case, counsel for Kazakhstan instructed the witness not to answer the question on the basis of privilege when Petitioners asked about the substance of communications with attorneys relating to preparation for the deposition. Exhibit I at 8:3-13. Finally, in 15 cases (approximately 5% of the questions), counsel for Kazakhstan instructed the witness not to answer when Petitioners sought

[3] Petitioners did, however, seek discovery through this proceeding from third parties regarding foreign assets belonging to third parties the National Fund and the National Bank of Kazakhstan. Specifically, without complying with Rule 45(a)(4)'s notice provisions, Petitioners served subpoenas *duces tecum* and *ad testificandum* on third parties State Street Corporation and Bank of New York Mellon Corp. on February 8, 2019 and April 11, 2019, respectively. Exhibit J; Exhibit K.

information into assets that were immune from attachments under the FSIA because they were not assets belonging to Kazakhstan in the United States relating to commercial activity in the United States. *See*, *e.g.*, *id*. at 25:9–28:14; Kirtland Decl. at ¶ 12. Counsel for Kazakhstan invited Petitioners to continue on to a different question, or suspend the deposition pending a ruling by this Court on the objection. Kirtland Decl. at ¶ 12. In each case, Petitioners moved on to a different question.

Mr. Ibraimov testified that, to prepare for his deposition, he searched for any assets belonging to Kazakhstan in the United States, and he confirmed that none existed except for a few diplomatic assets. *Id*. at 39:21–40:23. Specifically, **Mr. Ibraimov confirmed the absence of any attachable real property or equities belonging to Kazakhstan in the United States.** *Id*. at 39:21–40:23, 48:6–49:15; 53:23–54:5; 70:6–71:10. He testified that Kazakhstan "owns and possesses real property [in the United States], but those properties are all used by diplomatic personnel" and are thereby immune from attachment. *Id*. at 39:21–40:5. He also testified that "Kazakhstan doesn't have any stock in any corporation on the territory of the United States of America." *Id*. at 70:8–14. He testified that he knew of "no [brokerage] accounts" in the U.S. owned by Kazakhstan and that his committee maintained no bank accounts in the U.S. *Id*. at 46:23–47:2, 83:12–84:14. He also testified that he was not aware of any personal property owned by Kazakhstan in the U.S. other than cars used for diplomatic purposes. *Id*. at 49:6-15.

With regard to Kazakhstan's privatization efforts, Mr. Ibraimov testified that the assets to be sold were not specifically marketed to U.S. companies and that no assets were sold to U.S. companies. *Id*. at 92:17-22, 97:22–98:10. Petitioners' questions, however, focused largely on issues irrelevant to the execution of this Court's judgment, involving non-U.S. assets and those belonging to legally distinct entities from Kazakhstan. *See*, *e.g.*, *id*. at 15:22-17:22 (asking the

witness to identify the names of Kazakhstan's ten largest instrumentalities); 73:13-74:21 (asking the witness to identify energy projects in Kazakhstan); 90:7–91:19, 97:3-21, 111:5-16 (asking the witness about the assets of a legally distinct entity, Kazakhstan's sovereign wealth fund); 89:4–108:15 (asking the witness extensive questions regarding Kazakhstan's privatization program, even though the witness testified that it involved no sales to U.S. companies); 115:19–123:8 (asking the witness extensive questions regarding various instrumentalities, including their missions).

In a status report to the Court dated May 24, 2019, Petitioners misrepresented Mr. Ibraimov's testimony regarding the lack of Kazakh assets in the United States as the witness having "limited knowledge about such assets." ECF 106 at 3. Rather than informing the Court of the significant areas of Mr. Ibraimov's expertise and the testimony regarding the absence of attachable assets, Petitioners instead focused entirely on a few categories of assets that were outside of his knowledge. *Id*. They specifically mentioned "escrows, retainers, brokerage accounts, and assets held by the ROK in connection with the repayment of its sovereign debt and/or commercial transactions." *Id*. Although Petitioners made no effort to meet and confer with Kazakhstan after the deposition to narrow the scope of discovery, as the Court had ordered, they nevertheless orally moved the Court on May 31, 2019 to compel the Rule 30(b)(6) deposition whose topics Petitioners had previously informed the Court were "concededly broad." ECF 102 at 4. The Court granted Petitioners' request, but it limited the discovery to U.S. assets only. ECF 107.

Petitioners conducted the Rule 30(b)(6) deposition of Almat Madaliyev in London, England, on June 19, 2019. Petitioners asked Mr. Madaliyev a total of 361 questions. Kirtland Decl. at ¶ 11. Again, Mr. Madaliyev answered the vast majority of these questions, including 30

questions subject to objections. *Id*. Counsel for Kazakhstan instructed the witness not to answer 11 questions (3% of the total questions) on the basis of privilege. *Id*. This included a series of questions regarding the relationship between Kazakhstan and law firms representing it. *Id*.; Exhibit L at 97:17–98:12, 109:13–112:2. Counsel for Kazakhstan also instructed the witness not to answer 29 questions (8% of the total) because they violated the scope of the Rule 30(b)(6) deposition, which this Court limited to testimony about Kazakhstan's assets in the United States. Kirtland Decl. at ¶ 11.

Mr. Madaliyev, the Deputy Minister of Justice of the Republic of Kazakhstan, testified that he researched the noticed topics personally and through his staff in advance of the deposition. Exhibit L at 20:17-25, 25:12–27:22, 31:19–32:2. Specifically, he and his staff performed legal research and gathered information from officials at the Ministry of Finance, Ministry of Energy, Ministry of Justice, and other entities. *Id*. In his role in the Ministry of Justice, Mr. Madaliyev had no personal knowledge of Kazakh assets in the United States, only information that he obtained in preparation for the Rule 30(b)(6) deposition. *Id*. Each of the Rule 30(b)(6) topics asked the witness to identify "[a]ll Persons with knowledge of, or in possession, custody or control of Documents" relating to various topics, with a date range of January 1, 2013 to the present. Exhibit B. As shown below, **Mr. Madaliyev testified that Kazakhstan maintains no attachable assets in the United States.**

- **Topic 1** requested the identity of identification of persons with knowledge of "any Financial Institution" in the U.S. at which Kazakhstan has maintained any accounts. Exhibit B at 6. Mr. Madaliyev testified that "the Republic of Kazakhstan has no bank accounts in the United States, except for diplomatic purposes accounts" that are immune

from attachment. Exhibit L at 57:17–58:21. Pursuant to Kazakh law, any such accounts in foreign banks would be impermissible, except for diplomatic purposes. *Id*.

- **Topic 2** requested the identity of identification of persons with knowledge of "any Financial Institution" in the U.S. with accounts that are "maintained in whole or in part in the name of an ROK Instrumentality."[4] Exhibit B at 7-8. As stated above, the Supreme Court in *Bancec* held that assets of a sovereign and its legally distinct instrumentalities are not interchangeable for the purpose of satisfying judgments. 462 U.S. at 626. Mr. Ibraimov testified that these supposed instrumentalities are separate legal entities from Kazakhstan, which "doesn't get involved into the operational activity" of any such third-party "instrumentalities," but instead "only supports the rights of the shareholders." Exhibit L at 18:10–20:14.
- **Topic 3** requested the identity of persons with knowledge of "all Commercial Transactions … involving the ROK and any other Person based in the United States." Exhibit B at 9. Mr. Madaliyev testified that "there are no commercial transactions of RoK in the United States." Exhibit L at 92:18-19, 93:25–94:5. As a result, he testified that no individuals would have knowledge of such accounts. *Id*. at 92:18-19.
- **Topic 4** requested the identity of persons with knowledge of "any Debt owed to the ROK by any Person in the United States." Exhibit B at 10. Mr. Madaliyev testified that "no

[4] Petitioners defined "instrumentality" to include "any entity that the ROK government owns, controls or has a beneficial interest in, in whole or in part, directly or indirectly." ECF 81-5 at 7-8. It also included in its definition a list of 25 entities that Petitioners claimed to be instrumentalities, although this list includes entities whose status is currently being litigated in English proceedings. *Id*.; *See* Exhibit M (*State Street Corp. v. Anatolie Stati et al*., 19-mc-91107 (D. Mass. May 22, 2019) (report and recommendation staying discovery pending the resolution of English proceedings regarding "the nature of the relationship between [the National Bank of Kazakhstan] and Kazakhstan and between each of them and the National Fund")).

such debt exists, so no individuals exist who would know of such debt. Exhibit L at 92:20–93:14, 131:11-13.

- **Topic 5** requested the identity of identification of persons with knowledge of any debt owed to an instrumentality of Kazakhstan. Exhibit B at 11. Again, the Supreme Court in *Bancec* barred the attachment of such assets. 462 U.S. at 626.
- **Topic 6** requested the identity of all persons with knowledge of "any payment made by the ROK to any Person in the United States." Exhibit B at 13. Mr. Madaliyev testified that Kazakhstan made no payments regarding any commercial activities and so did not involve any attachable assets.[5] Exhibit L at 94:6–95:8.
- **Topic 7** requested the identity of identification of persons with knowledge of any payment made by any instrumentality of Kazakhstan to any person in the United States. Exhibit B at 14. Again, the Supreme Court in *Bancec* barred the attachment of such assets. 462 U.S. at 626.
- **Topic 8** concerned persons with knowledge of "contracts entered into by the RoK … relating to the sale of crude oil, petroleum oil, natural gas, other hydrocarbon products and other related products to any person in the United States or for delivery in the United States." Exhibit B at 15. Again, Mr. Madaliyev testified that no such contracts existed and that, furthermore, there had been no payments to Kazakhstan by U.S. energy companies. Exhibit L at 54:19–55:10, 134:4-12, 149:3-8, 151:22-25.

Mr. Madaliyev also filled in any gaps of information that Petitioners claimed remained after Mr. Ibraimov's testimony. Mr. Madaliyev testified that the Republic of Kazakhstan maintained no

[5] He further testified that Kazakhstan from "time to time" may make payments to "professional service providers" in the United States, including law firms. *Id*. at 51:21–52:2; 95:9-16. But since these payments did not involve any commercial activities, any such payments would be irrelevant to execution of the judgment.

escrow accounts (*id*. at 126:16-25) or brokerage accounts (*id*. at 57:17–58:21), and it engaged in no commercial activities of any sort (*id*. at 92:18-19, 93:25–94:5).

ARGUMENT

I. Petitioners Are Not Entitled to Further Discovery

Any discovery that is not calculated to lead to Kazakhstan's assets in the U.S. related to commercial activity is by definition irrelevant to the execution and thereby not proportional to the needs of the case. *See EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2007) (denying discovery into funds that "were never an attachable asset of the Republic"); *see also E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 286 F.R.D. 288, 292 (E.D. Va. 2012) ("[A]sset discovery should be tailored to the specific purpose of enabling a judgment creditor to discover assets upon which it can seek to execute a judgment and … the judgment debtor's discovery should not devolve into a fishing expedition for irrelevant or cumulative information which does not advance that purpose."). Here, since no attachable assets exist, no further discovery is appropriate. Nor is discovery appropriate into any assets that Petitioners may use to satisfy any foreign judgments, since they are similarly irrelevant to this matter under Rule 26.

A. Because No Assets Exist In the United States to Satisfy Petitioners' Judgment, Any Further Discovery Would Be Futile

The broad discovery in this case to date has confirmed that the Republic of Kazakhstan maintains no assets that can be used to satisfy this Court's judgment. In responding to Petitioners' requests for admission and in preparing a Rule 30(b)(6) witness, Kazakhstan diligently searched for any non-diplomatic, non-military assets that it had in the United States. It found none. Accordingly, in its responses to the request for admission, Kazakhstan stated that it maintained no attachable assets in the United States. Exhibit G at 4-5. The deposition of Mr. Ibraimov similarly showed no real property or equities maintained in the United States by

Kazakhstan. Exhibit I. Finally, in the Rule 30(b)(6) deposition, Kazakhstan confirmed that it maintained no bank accounts in the United States, engaged in no commercial transactions, had no debt, entered into no contracts regarding the sale of hydrocarbons, and made no payments involving commercial activities. Exhibit L. Even with regard to the legally distinct instrumentalities, both witnesses testified that to the best of their knowledge, none of them maintained any assets in the United States.

No amount of additional discovery will change that outcome. Petitioners may be disappointed with the fact that this judgment cannot be satisfied. But just because parties obtain a judgment does not mean that the judgment can be satisfied. *See CP Sols. PTE, Ltd. v. Gen. Elec. Co*., 553 F.3d 156, 160 (2d Cir. 2009) (holding that a defendant that was dissolved and had no assets could be dismissed because the plaintiff could not "procure blood from a stone"). Any further discovery in this matter will similarly be a futile attempt to get blood from a stone. It would be irrelevant to satisfying the judgment and thus, by definition, disproportional to the needs of the case, given that there would be zero benefit to Petitioners in comparison to the heavy burden it would place on Kazakhstan. As described more fully in Kazakhstan's August 6, 2018, motion for a protective order (ECF 86) and opposition to motion to compel (ECF 85), the scope of Petitioners' discovery requests is staggering and fundamentally improper, and the consequent burden of attempting to comply with these requests would be incalculable. Further discovery would serve only to harass and unduly burden Kazakhstan.

Given the futility of further discovery and the heavy burden on Kazakhstan, this Court should enter a protective order staying further discovery into Kazakhstan's assets. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) ("Where, as here, plaintiffs cannot save their claims with any further discovery because the law so clearly forecloses their demands—both on

the current record and with any additions that can plausibly be imagined—the court should not bless (or invite) a futile fishing expedition.") (Williams, J, concurring); *Ansel Adams Publ'g Rights Tr. v. PRS Media Partners, LLC*, 502 F. App'x 659, 661 (9th Cir. 2012) (barring further discovery when it would be futile); *Jones v. Physician Sales & Servs., Inc.*, 159 F.3d 1356 (5th Cir. 1998) (same); *Jicarilla Apache Nation v. Rio Arriba Cty.*, 440 F.3d 1202, 1214 (10th Cir. 2006) (same); *Ins. Co. of N. Am. v. Sec. Mgmt. Corp.*, 72 F.3d 127 (4th Cir. 1995) (same).

B. Further Discovery Is Irrelevant and Cumulative Because Sufficient Assets are Already Attached in Europe

Petitioners have already fully secured their award more than ten times over in various foreign proceedings. Any additional evidence of Kazakhstan's assets would be unreasonably cumulative or duplicative. *See In re Subpoena to Goldberg*, 693 F. Supp. 2d 81, 87 (D.D.C. 2010) (quashing deposition that would be cumulative and only marginally relevant); *John C. Flood of Virginia, Inc. v. John C. Flood, Inc.*, No. 06-civ-1311, 2008 WL 281066, at *4 (D.D.C. Feb. 1, 2008) (barring the production of additional evidence of trademark use that would be cumulative or duplicative); *Sourgoutsis v. United States Capitol Police*, 323 F.R.D. 100, 112 (D.D.C. 2017) (quashing subpoenas when the plaintiff "already has received that information" sought by the subpoenas); *Colonial BancGroup, Inc. v. PricewaterhouseCoopers LLP*, 110 F. Supp. 3d 37, 42 (D.D.C. 2015) (quashing a document subpoena that sought cumulative information in which the burden outweighed its likely benefit).

Given the extraordinary amount that Petitioners have already attached in foreign proceedings, any argument that Petitioners need further discovery into Kazakhstan's assets is disingenuous and will serve only to harass and unduly burden Kazakhstan. In Belgium, Petitioners have attached approximately $520 million to satisfy their judgment. ECF 83-1 at 3-4. This alone is sufficient to fully secure the amount of the arbitral award. In Luxembourg,

Petitioners have attached at least $400 million. *Id.* at 4-5. In Sweden, they have attached approximately $100 million. *Id.* at 5-6. And in the Netherlands, Petitioners have attached assets **in excess of $5 billion**, more than ten times the approximately $500 million arbitral award. *Id*.

Petitioners have, in fact, conceded that their award has been fully secured and have stopped enforcement proceedings in Europe on that basis. In England, Petitioners initiated proceedings in 2014 to enforce their award. *Id.* at 7-8. When Kazakhstan challenged the attachment by presenting evidence of Petitioners' fraud in securing the arbitral award, the court held that Kazakhstan had demonstrated a *prima facie* case of fraud, and it ordered a full trial on the merits. *Id*. In response, however, Petitioners filed a notice to discontinue their enforcement attempt. *Id*. One of the "compelling reason[s]" cited by Petitioners in support of a discontinuance was that the attachments they had already levied in the foreign proceedings described above removed the need for further enforcement of the arbitral award. *Id*. They explained that because "enforcement measures outside the jurisdiction are *highly likely* to satisfy" the arbitral award, the "practical need" to pursue enforcement in the London Proceedings had been removed. *Id.*(emphasis added). In response, the English courts agreed to dismiss the enforcement proceedings. *Id*.

Because their arbitral award has already been fully secured more than 10 times over, Petitioners have no need for any additional discovery regarding Kazakhstan's foreign assets. Any further discovery of cumulative or duplicative information cannot justify the incredible burden on Kazakhstan, in clear violation of the FSIA's purpose of shielding sovereigns from the "time and expense, and other disruptions attendant to litigation." *Kelly v. Syria Shell Petro*, 213 F.3d 841, 849 (5th Cir. 2000). As a result, even if Petitioners can show some marginal relevance

of their discovery requests, which they cannot, such requests would not be "proportional to the needs of the case" under this Court's balancing analysis. Fed. R. Civ. P. 26(c).

C. Discovery Into Kazakhstan's Extraterritorial Assets Is Not Relevant Under the Foreign Sovereign Immunities Act

Rather than properly focusing on Kazakhstan's assets in the U.S. relating to commercial activity, Petitioners' discovery is largely and improperly aimed at the foreign assets of both Kazakhstan and its legally distinct instrumentalities. Fully 164 of Petitioners' 182 document request seek information on assets outside the United States, as do at least seven of their 18 topics for a Rule 30(b)(6) deposition. Exhibit A at 15-44; Exhibit B at 16-26. They have also served third-party subpoenas on State Street Corporation and Bank of New York Mellon seeking information on assets outside the U.S. belonging to either Kazakhstan or its supposed instrumentalities. Exhibit J; Exhibit K. The discovery requests into Kazakhstan's non-U.S. assets are irrelevant because these assets cannot be attached in execution of this Court's judgment.

This Court (Judge Robinson) has already recognized the inappropriateness of discovery into foreign assets by ordering the Rule 30(b)(6) deposition to proceed solely with regard to information on U.S. assets. ECF 107. In addition, in its order on Petitioners' motion to register the judgment in other judicial districts, this Court (Judge Berman Jackson) correctly determined that the relevant issue in this case is whether Kazakhstan has sufficient attachable assets to satisfy the judgment in the District of Columbia and/or in other judicial districts in the United States. ECF 91 at 7; *see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 603 F. Supp. 2d 1, 2 (D.D.C. 2009) (establishing a bifurcated discovery plan in which the defendant sovereign would first provide information on assets "within the territorial jurisdiction of this Court" and only then assets outside the jurisdiction).

Granting Petitioners a blank check in discovery into Kazakhstan's assets would have serious consequences for future cases. It would give judgment creditors around the world incentives to register arbitral awards or judgments in this District, which would then serve as a clearinghouse into judgment debtors' global assets. Creditors need not have any information that the debtors maintained assets in this District or even in the United States, since the purpose of registering a judgment here would be not to execute on it, but to use this Court's authority to discover the debtors' assets all over the world. They could then use that discovery to initiate foreign execution proceedings, in which they would again confirm their arbitral award and then execute upon it. By seeking discovery here, Petitioners seek to turn this execution proceeding into an action pursuant to 28 U.S.C. § 1782, in which U.S. courts provide assistance to foreign tribunals. Even worse, Petitioners would do so without meeting the requirements of § 1782, including that information directly from a party to the foreign proceedings is not permitted. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004). As a result, allowing Petitioners unfettered discovery into Kazakhstan's foreign assets would not only open the floodgates to foreign judgment creditors, but it would also allow the creditors to circumvent the purpose and requirements of § 1782.

D. Petitioners Are Not Entitled to Discovery Regarding Third Parties' Assets

Petitioners seek discovery not only on Kazakhstan's global assets, but also those of third parties to this litigation that they claim to be Kazakhstan's instrumentalities. Just as with Kazakhstan's foreign assets, however, any assets of third parties that are legally distinct entities are by definition exempt from attachment. The caselaw firmly establishes that assets belonging to instrumentalities cannot be used to satisfy a judgment against a sovereign unless the sovereign and the instrumentalities are effectively alter egos. *Transamerica Leasing*, 200 F.3d at 848; *De Letelier*, 748 F.2d at 794. Petitioners have made no showing that any of the third parties about

which they seek discovery are Kazakhstan's alter egos such that this Court can ignore their corporate forms. Indeed, discovery has shown precisely the opposite, that Kazakhstan has no role in the operational activity of these third parties. *See* Exhibit I at 18:10–20:14 (testimony of Mr. Ibraimov that Kazakhstan "doesn't get involved into the operational activity" of the third parties); Exhibit L at 82:12-22, 84:10–85:16, 87:22–88-16, 144:19–145:10 (testimony of Mr. Madaliyev that Kazakhstan has no role in their day-to-day activities). As a result, any discovery into their assets is irrelevant to execution of this Court's judgment and thereby disproportional to the needs of the case for the same reasons stated above.

CONCLUSION

WHEREFORE, Kazakhstan respectfully requests that this Court grant this Motion for Protective Order, and issue a protective order staying further discovery in this case.