UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ANATOLIE STATI, GABRIEL STATI, ASCOM GROUP, S.A., AND TERRA RAF TRANS TRAIDING LTD., Petitioners, v. REPUBLIC OF KAZAKHSTAN, Respondent.	**Civil Action No. 14-cv-1638 (ABJ)**

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SANCTIONS AND CONTEMPT

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Petitioners Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Traiding Ltd. respectfully submit this memorandum of law in support of their motion for sanctions and contempt ("Motion for Sanctions and Contempt") against Respondent the Republic of Kazakhstan (the "ROK") as a result of Respondent's willful, complete, and continuing failure to obey an order of this Court (the "August 13 Order") that required Respondent to produce documents by November 8, 2019. This Court should grant the motion for all the reasons that follow.

I. PRELIMINARY STATEMENT

The ROK's flagrant and repeated breach of its discovery obligations over the last 18 months has necessitated this motion. The ROK has engaged in a pattern of intransigence that has culminated in its deliberate flouting of the August 13 Order to produce documents responsive to Petitioners' First Set of Document Requests ("First RFP"). The ROK does not (and cannot) dispute that it has failed to produce a **single** document in accordance with the August 13 Order, much less make a good faith effort to comply with the August 13 Order. This Court should send a strong signal to the ROK that it will not continue to tolerate the ROK's open defiance of its orders or the pattern of bad faith, vexatious discovery conduct in which the ROK has engaged over the last 18 months, by holding the ROK in contempt under Rule 37(b)(2)(A) and by imposing monetary sanctions on the ROK under Rule 37(b)(2)(C) and this Court's inherent authority.

As explained more fully below, at a hearing on August 12, 2019, Magistrate Judge Deborah A. Robinson ("Judge Robinson") denied the ROK's second motion for a protective order, specifically rejected the ROK's argument that further post-judgment discovery should be limited to the ROK's assets located in the United States, and repeatedly made clear that she was prepared to order the ROK to produce **all** documents responsive to Petitioners' First RFP. She then ordered the parties to undertake one last meet and confer discussion, subject both to a deadline of August 30, 2019 and to her instruction that the discussion "will not include a limit with respect to assets

in the United States, as the Court has already rejected that argument." Dkt. 117-2, 40:24-41:2. Finally, she ordered that the parties file a joint status report by September 9, 2019 and that the ROK produce documents responsive to the First RFP (subject to any limits agreed upon by the parties) by November 8, 2019. The August 13 Order memorialized the orders issued by Judge Robinson at the August 12 hearing.

Following the entry of the August 13 Order, the parties took diametrically opposed approaches to their obligations under the Order. On August 23, 2019, pursuant to the August 13 Order and Judge Robinson's instructions at the August 12 hearing, Petitioners sent the ROK a revised and substantially narrower version of their First RFP to serve as a starting point for a discussion on an agreed document production. By contrast, the ROK openly flouted the August 13 Order and Judge Robinson's instructions. First, the ROK did not even respond to Petitioners' proposal until September 9, 2019. Second, in its response the ROK made a counter-proposal to proceed only with discovery into assets located in the United States, contrary to Judge Robinson's express instruction at the August 12 hearing that the parties' meet and confer discussion "will not include a limit with respect to assets in the United States." Unsurprisingly, Petitioners rejected the ROK's improper counter-proposal.

On August 27, 2019, the ROK filed objections to the August 13 Order pursuant to Fed. R. Civ. P. 72. Dkt. 117. Shortly thereafter, the ROK suggested to Petitioners that these objections relieved it of the obligation to comply with the August 13 Order. *See* Dkts. 119-1, ¶ 4; 119-4. Specifically, counsel for the ROK stated that "[w]e assumed that, having seen our objections, it would be common ground [between the parties] that our objections need to be resolved before discovery against our client can proceed." *Id.* Petitioners responded by noting that the ROK had not sought, and the Court had not granted, any stay of the August 13 Order, and that in the absence

of a stay, the August 13 Order remained effective and the ROK was obligated to comply with it. *Id.* The ROK did not dispute this view, and subsequently stated its intention – on multiple occasions – to move for a stay of the August 13 Order pending the adjudication of its Rule 72 objections to the Order; however, the ROK never filed a stay motion. *See id.*; Declaration of Thomas Childs dated December 2, 2019 ("Childs Decl."), ¶¶ 2-3; Ex. A; Dkt. 128-1, ¶ 9. The record thus clearly demonstrates that: (a) this Court ordered the ROK to make a full document production by November 8, 2019; and (b) the ROK was aware of the fact that the August 13 Order remained effective; and (c) despite this awareness, the ROK never sought or obtained a stay. On this set of facts – none of which the ROK can reasonably dispute – it is clear that the ROK's failure to comply with the August 13 Order was both intentional and willful. The Court should hold the ROK in contempt and impose appropriate sanctions.

II. FACTUAL BACKGROUND

Petitioners have already briefed most of the facts relevant to this motion in their Memorandum of Points and Authorities in Opposition to Respondent's Objections to the August 13 Order (the "Opposition Brief"). *See* Dkt. 119 at 4-19. Petitioners hereby incorporate by reference the factual submissions in their Opposition Brief, to which they respectfully refer the Court. *See id.* In the present section, Petitioners summarize those factual submissions insofar as they are relevant to the Motion for Sanctions and Contempt. In addition, Petitioners supplement their prior factual submissions with additional facts post-dating their Opposition Brief.

A. Petitioners' Discovery Requests

On May 1, 2018, Petitioners served the ROK with their initial discovery requests, which consisted of the First RFP, Notice of Deposition to Mr. Almas Taigulov pursuant to Fed. R. Civ. P. 30(b)(1), and Notice of Deposition pursuant to Fed. R. Civ. P. 30(b)(6). Dkts. 81-4; 81-5; 81-6. The First RFP seeks documents concerning the value and location of the ROK's assets both

inside and outside the United States, information concerning the relationships between the ROK and its instrumentalities, and information concerning specific transactions and commercial relationships involving either the ROK or its instrumentalities. The 30(b)(6) deposition notice sought a representative of the ROK who could identify relevant documents and custodians of information concerning various classes of property and commercial relationships. Mr. Taigulov, who was identified in publicly-available documents as the Director of Kazakhstan's Ministry for Investments and Development Representative Office in the United States, was sought as a deponent given his likely knowledge of the ROK's commercial property and relationships in the United States.

B. The Depositions of Mr. Ibraimov and Mr. Madaliyev

All of Petitioners' discovery requests were met with blanket, boilerplate objections. Dkts. 81-9; 81-10; 81-11. Motion practice ensued. On November 13, 2018, this Court denied the ROK's motion to stay execution and discovery, Dkt. 91, and on December 4, 2018, it referred Petitioners' motion to compel and Respondent's motion for a protective order to Judge Robinson, Dkt. 97.

On December 21, 2018, Judge Robinson denied both motions without prejudice, but ordered Respondent to make Mr. Taigulov available for deposition no later than January 17, 2019. Dkt. 99. Judge Robinson also ordered the parties to meet and confer over the scope of the remaining discovery upon the completion of the deposition of Mr. Taigulov. *Id.*

On May 9, 2019, Petitioners deposed Mr. Kalymzhan Ibraimov, a substitute 30(b)(1) witness whom the ROK had offered because Mr. Taigulov was no longer within its control. *See* Dkt. 102 at 6. Shortly after the deposition began, the ROK's counsel made a lengthy speaking objection, purportedly based on relevance and burden, to any question that might relate directly or indirectly to the ROK's assets outside the United States, and stated that he would instruct the witness not to answer any question over this objection. Dkt. 106-1, 25:9-32:5. Thereafter, the

ROK's counsel instructed Mr. Ibraimov not to answer at least 14 questions on the basis of this objection,[1] contrary to Judge Robinson's prior direction that, "except where necessary to preserve a privilege, [the witness] will be expected to answer questions over objection," Dkt. 100, 40:8-10. Moreover, Mr. Ibraimov could not answer a substantial number of questions concerning the ROK's assets and commercial relationships inside the United States, even though he was hand-picked by the ROK to testify about these topics.[2]

At a May 31, 2019 status hearing, Judge Robinson acknowledged that further discovery was justified after Mr. Ibraimov's deposition, and she ordered the ROK, over its objection, to make a deponent available pursuant to Petitioners' 30(b)(6) deposition notice. Dkt. 119-1, ¶ 2; Ex. A at 38:5-39:3. Without deciding whether discovery into the ROK's assets and commercial relationships outside of the United States was proper, Judge Robinson stated that "at this time" she was limiting the deposition to assets in the United States. *Id*. at 39:4-8.

On June 18, 2019, Petitioners deposed Mr. Almat Madaliyev, the Deputy Minister of Justice of the Republic of Kazakhstan, whom the ROK had designated as its 30(b)(6) witness. During Mr. Madaliyev's four-and-a-half-hour deposition, the ROK's counsel interposed 78 objections and instructed the witness not to answer 33 times. Once again, contrary to Judge Robinson's prior direction, the ROK's counsel repeatedly instructed the witness not to answer

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1 *See, e.g*., Dkt. 106-1, 47:5-6, 51:9-11, 51:25-52:2, 81:13-18, 86:2-4, 92:4-15, 98:15-17, 99:2-5, 108:10-12, 115:2-12, 134:3-10, 135:23-136:6, 140:22-25, 146:14-15.

2 *See, e.g*., Dkt. 106-1, 33:21, 34:16-35:19, 49:23-25; 50:2-7, 50:12-17, 52:10-14, 61:10-16, 66:24-67:23, 126:2-7.

questions on the basis of non-privilege objections, such as "relevance,"[3] "form,"[4] "scope"[5] and "confidentiality."[6] The ROK's counsel made numerous and lengthy speaking objections,[7] and at times essentially answered questions for the witness[8] or even openly coached him.[9] By these means, the ROK prevented Petitioners from obtaining virtually any meaningful information concerning the 30(b)(6) deposition topics. On July 13, 2019, the parties submitted a joint status report notifying Judge Robinson that the deposition of Mr. Madaliyev had taken place and attaching the deposition transcript. Dkts. 110, 111.

C. The ROK's Second Motion for Protective Order

On July 16, 2019, the ROK filed its second motion for a protective order (the "Second Motion for Protective Order"), requesting a stay of all further post-judgment discovery. Dkt. 113. The ROK's motion, while nominally seeking a stay of discovery, as a practical matter sought dismissal of all post-judgment proceedings on the basis of the ROK's contention that the discovery to date "confirm[ed]" that the ROK maintains no property in the United States with which to satisfy this Court's judgment, and that "[n]o amount of further discovery could uncover such attachable assets in the United States." Dkt. 113-1 at 1. In its motion, the ROK expressly flouted its unequivocal obligation to abide by the judgment, as well as the arbitral award underlying it, stating

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3 *See, e.g.*, Dkt. 111-1, 10:15-24; 30:16-31:8; 77:18-22; 119:6-12; 76:15-78:11; 79:11-80:16.

4 *See, e.g.*, Dkt. 111-1, 59:18-21; 59:22-25; 60:2-4; 60:5-10; 75:13-16; 87:10-11; 91:19-21; 95:17-24; 138:3-16; 138:25-139:6; 141:23-142:11; 141:13-18; 148:12-18.

5 *See, e.g.,* Dkt. 111-1, 30:16-31:8; 41:9-24; 42:9-18; 48:2-14; 59:18-21; 59:22-25; 60:2-4; 60:5-10; 61:24-62:8; 79:11-18; 87-14-18; 91:19-21; 95:17-24; 111:20-23; 114:5-9; 116:8-14; 118:3-15; 118:24-119:5; 129:3-130:2; 131:4-132:4; 141:23-142:11; 141:13-18.

6 *See, e.g.,* Dkt. 111-1, 10:15-24; 110:22-23.

7 *See, e.g.*, Dkt. 111-1, 42:9-18; 43: 12; 43:22-24; 44:23-45:10; 46:16-23; 49:18-23; 55:12-19; 55:21-56:14; 65:13-23; 69:12-18; 71:7-12; 76:2-13; 78:2-11; 79:3-5; 80:9-16; 116:16-23; 120:15-121:9; 138:18-23; 139-10-140:2.

8 *See, e.g.*, Dkt. 111-1, 55:6-56:14; 140:12-25.

9 *See, e.g.,* Dkt. 111-1, 54:19-56:15; 90:15-91:4; 101:10-19; 122:4-10; 125:25-126:6; 148:20-150:20.

that "just because parties obtain a judgment does not mean that the judgment can be satisfied," and likening Petitioners' efforts to enforce the ROK's obligation to pay to "procur[ing] blood from a stone." *Id*. at 20. The ROK argued that its assets and commercial relationships outside the United States, and any assets belonging to its instrumentalities, are "outside the proper scope of discovery under Federal Rule 26(c)." *Id.* at 2, 23-25. On August 7, 2019, the parties completed the briefing on the ROK's Second Motion for Protective Order. *See* Dkt. 115.

D. The August 12 Hearing

On August 12, 2019, Judge Robinson held a hearing on the status of discovery and the ROK's Second Motion for Protective Order. Dkt. 117-2, 2:7-9. She opened the hearing by noting that the ROK's motion, rather than addressing or proposing limitations on the scope of further discovery, instead "was written in a matter [*sic*] which only suggests that the respondent simply does not intend to provide discovery." *Id.* at 2:25-3:3. She then emphatically stated that "[w]e simply cannot go another number of months with disputes about the fundamental question of whether or not the respondent is going to provide discovery even though two Courts have said that the respondent must. We simply cannot continue in this vein." *Id*. at 6:16-20. Judge Robinson also noted that she had limited the deposition of Mr. Madaliyev to assets located inside the United States "in an effort to encourage respondent to do something to comply with the petitioners' discovery requests" and that this limitation was "a starting point and not an ending point" for post-judgment discovery in this case. *Id*. at 12:16-21.

Judge Robinson, evidently dissatisfied with the testimony provided by Mr. Ibraimov and Mr. Madaliyev, challenged the assertion by counsel for the ROK that it had complied with its discovery obligations to date, asking counsel "[d]id the deponents answer the questions?" and, with respect to counsel's instruction to the witnesses not to answer questions over objection, "[w]hat authority is there for an instruction not to answer a question on the ground that it is beyond

the scope?" *Id*. at 13:9-10, 15-17. She also made clear that Petitioners should be allowed "to test the veracity" of the ROK's assertion that it has no potentially attachable assets or commercial relationships inside the United States. *Id*. at 18:10-12, 38:12-40:7.

After hearing argument from counsel for both parties on the ROK's Second Motion for Protective Order, Judge Robinson denied the motion, specifically rejected the ROK's argument that discovery should be limited to U.S. assets, and stated that she was "prepared to order that the documents responsive to the petitioners' request for production of documents be produced." *Id.* at 28:24-29:6, 33:1-11, 34:1-4, 40:14-17. She then asked whether the parties would like the opportunity to meet and confer to "attempt to agree upon how to limit or refine the definition section or decide whether one or two, or a discrete number . . . [of document requests] could be stayed or withdrawn." *Id*. at 29:7-14.

Petitioners' counsel requested that the Court give the parties "a very tight leash . . . in terms of time" to meet and confer, stated that Petitioners would "come up with some significant proposals to narrow the document request," and asked that "the Republic . . . do the same thing simultaneously." *Id*. at 29:23-30:9. When the ROK's counsel stated that he was willing to meet and confer "without prejudice to our respectful disagreement with the Court's ruling denying the motion for protective order," Judge Robinson again made clear that she was prepared to order the ROK to produce **all** documents responsive to the First RFP and that "[t]he only outstanding question is whether you wish an opportunity to speak with [Petitioners' counsel] who have expressed a willingness to perhaps reduce the number . . . of requests or refine the definitions. If you are not prepared to do that, I will not include that in my order; I will simply set a date for the documents to be produced." *Id*. at 33:19-34:12.

At the conclusion of the hearing, Judge Robinson ordered the parties to "undertake an effort to meet and confer in what I will call a renewed effort to agree upon the limits of either the number of requests or the definitions." *Id.* at 40:20-23. She then instructed the parties that, "[g]iven the Court's ruling on the motion for protective order[,] that discussion . . . will not include a limit with respect to assets in the United States, as the Court has already rejected that argument." *Id.* at 40:24-41:2. Judge Robinson also ordered that: (1) "the efforts of meet and confer begin as quickly as practical, and continue through August 30th"; (2) the parties jointly file a status report by September 9, 2019; and (3) "respondent produce the documents responsive to the remaining request[s] for production of documents" by November 8, 2019. *Id.* at 41:3-11.

E. The August 13 Order

On August 13, 2019, Judge Robinson issued a minute order memorializing the orders that she had issued orally during the August 12 hearing. The August 13 Order denied the ROK's Second Motion for Protective Order; it ordered that "counsel shall, beginning as soon as practical and concluding by August 30, 2019, meet and confer in an effort to limit the number of, and definitions accompanying, the Petitioners' requests for production of documents" and that "counsel shall jointly file a status report by no later than September 9, 2019"; and it ordered that the ROK "shall produce the documents responsive to the remaining requests by no later than November 8, 2019."

F. The ROK's Failure to Meet and Confer in Accordance With the August 13 Order and Judge Robinson's Instructions at the August 12 Hearing

On August 23, 2019, pursuant to the August 13 Order and Judge Robinson's instructions at the August 12 hearing, Petitioners sent the ROK a revised and substantially narrower version of their First RFP for purposes of meeting and conferring with the ROK. *See* Dkts. 119-1, ¶ 3; 119-3; 119-4. Petitioners' proposal substantially narrowed and streamlined the scope of the First RFP

by (1) reducing the number of document requests from 182 to 40, (2) narrowing the date restriction, (3) adding a geographical limitation with respect to property and commercial relationships outside the United States, (4) imposing a threshold dollar value for responsiveness, and (5) substantially reducing the number of instrumentalities coming within the definition of "ROK Instrumentality." *See* Dkts. 119-1, ¶ 3; 119-3.

On August 27, 2019, the ROK filed objections ("Objections") pursuant to Fed. R. Civ. P. 72(a) to the August 13 Order. The ROK did not move for a stay of the August 13 Order pending this Court's adjudication of its Objections.

On August 29, 2019, having heard nothing from the ROK with respect to their August 23 proposal, Petitioners sought a response from the ROK's counsel. *See* Dkts. 119-1, ¶ 4; 119-4. On August 30, 2019, counsel for the ROK responded that they viewed the issues presented in the ROK's Objections as "critical," and that "[w]e assumed that, having seen our objections, it would be common ground that our objections need to be resolved before discovery against our client can proceed." *See id.* Counsel also noted their view that Petitioners' proposal remained "largely irrelevant to executing on this court's judgment and significantly overbroad such that they would continue to impose an undue burden on our client." *Id*. The ROK's counsel did not, however, offer any counterproposal. *See id.*

On August 31, 2019, Petitioners responded that the ROK's "assumption" that it was common ground that discovery could not proceed until the ROK's Objections had been resolved was incorrect. *Id.* Petitioners noted that the ROK had requested a stay of discovery in its Second Motion for Protective Order, but that Judge Robinson had denied that motion (and the stay) and imposed specific compliance dates. *Id.* Petitioners also noted that, "[c]ritically, the ROK has not moved Judge Jackson for a stay of Judge Robinson's order pending the adjudication of its Rule 72

objections." *Id.* Petitioners stated that the ROK's unwillingness to even engage in the meet and confer process violated Judge Robinson's instructions and "confirm[ed] that the ROK is refusing to provide any discovery whatsoever." *Id*.

On September 6, 2019 – six days after the close of the meet and confer period set forth in the August 13 Order, and one business day before the August 13 Order required the parties to file their next status report – the ROK's counsel responded that the ROK "intended to move for a formal stay pending the district court's adjudication of this matter," and offered to "discuss revisions of the document requests that focus on areas that will not prejudice our rights." *Id.* Petitioners responded the same day, requesting that the ROK send over a counterproposal to Petitioners' August 23 proposal. *Id.*

On September 9, 2019 – the day that the parties' joint status report was due – the ROK's counsel sent Petitioners an email proposing to proceed only with "discovery into assets that can potentially be attached to satisfy the court's judgment under the FSIA, which is limited to the Republic of Kazakhstan's 'property in the United States . . . used for commercial activity in the United States.'" *Id.* (ellipsis in original; citing 28 U.S.C. § 1610(a)). This proposal squarely violated Judge Robinson's instruction at the August 12 hearing that the parties' meet and confer discussion "will not include a limit with respect to assets in the United States, as the Court has already rejected that argument." *See* Dkt. 117-2, 40:24-41:2. Based upon this impermissible limitation, the ROK's counsel stated that they "would agree to undertake a reasonable search to produce any non-privileged documents" responsive to eight document requests (two of which the ROK proposed to respond to only in part). Dkts. 119-1, ¶ 4; 119-4. The ROK's counsel also stated their position that, "[w]ith respect to the time period, the only documents that would be relevant are those that show current property." *Id*. The ROK's counsel concluded that if this proposal was

"not acceptable" to Petitioners, the ROK would proceed by filing a motion for a temporary stay of the August 13 Order. *Id*.

Petitioners responded the same day, rejecting the proposal, which would have shielded from discovery any and all information concerning the ROK's property and commercial relationships outside the United States and concerning its instrumentalities, and would have put the ROK in the position of deciding unilaterally what property is "used for commercial activity in the United States" and thus allowing it to shield from disclosure all information that it did not believe met this test. *Id*. Petitioners also stated their view that "the ROK, as a result of denial of its motion for a protective order, now stands under an obligation to comply with the First Request for Production of Documents without the entry of any further order." *Id.*

Later that day, the parties submitted a joint status report informing Judge Robinson of their unsuccessful efforts to meet and confer over the scope of document discovery. Dkt. 118. In Petitioners' section of the report, they reiterated their view that, "[a]s a result of the denial of [the ROK's] motion for a protective order, and in accordance with the Court's remarks during the August 12 hearing, . . . the ROK now stands under an obligation to comply with the First Request for Production of Documents without the entry of any further order." *Id.* at 3.

On September 10, 2019, the ROK's counsel sent Petitioners an email stating that, "[a]s we have indicated several times, we intend to move for a stay pending the district court's consideration of our objections to the magistrate judge's minute order," and asking whether Petitioners would be available that afternoon "to meet and confer regarding the relief we are requesting." *See* Childs Decl. ¶ 2; Ex. A. Petitioners' counsel responded the same day, stating that they were not available for a meet and confer that day, but that they could make time the following day. *Id.* Petitioners' counsel also stated that Petitioners would "not agree to a stay of all discovery pending the

adjudication of [the ROK's] Rule 72 objections," but that Petitioners were "willing to consider any proposals [the ROK] wishes to make pursuant to which [it] would agree to exempt a subset of the document requests from [its] stay motion, and immediately begin searching for and producing documents responsive to a subset of the requests." *Id.* The ROK's counsel responded later that day, proposing a time "to discuss our stay motion" and stating that, "[a]s I indicated, we are seeking a stay pending the district court's consideration of our objections to the magistrate judge's minute order." *Id.*

On September 11, 2019, counsel for both parties met and conferred by telephone concerning (1) the ROK's proposal of September 9, 2019 to search for and produce documents responsive to a subset of eight document requests and (2) the ROK's prospective stay motion. Dkt. 128-1, ¶¶ 8-9. During the call, the ROK's counsel clarified that the ROK's proposal was contingent on Petitioners' consent to the stay motion. *Id.* ¶ 9. Petitioners' counsel stated that the ROK's proposal might be acceptable to Petitioners for the purpose of providing their consent to an interim stay, but only if the ROK would apply a date range from January 1, 2016 to the present. *Id.* The ROK's counsel stated that he would discuss Petitioners' proposal internally and revert, but he never responded to Petitioners' counsel with respect to their proposal. *Id.*

Crucially, the ROK never moved for a stay of the August 13 Order pending the adjudication of its Objections, despite numerous times clearly stating its intention to do so. Childs Decl. ¶ 3. As noted above, on August 31, 2019 Petitioners specifically disabused the ROK of its legally erroneous "assumption" that it was under no obligation to comply with the August 13 Order because it had filed Rule 72 objections to it. *See* Dkts. 119-1, ¶ 4; 119-4. In the same email, Petitioners noted that, "[c]ritically," the ROK had not moved for a stay of the August 13 Order, and they expressly reserved their right to "seek appropriate remedies" if the ROK failed to comply

with its obligations under the order. *Id.* The ROK responded by email on September 6, 2019 that it "intended to move for a formal stay" of the August 13 Order pending the adjudication of its Objections to the August 13 Order; it reiterated this intention by email on September 9 and 10, 2019 and again orally on September 11, 2019. *See id.*; Childs Decl. ¶ 2; Ex. A; Dkt. 128-1, ¶ 9. The ROK never did move for a stay, however, choosing instead merely to violate the August 13 Order.

G. The ROK's Failure to Produce Any Documents in Accordance With the August 13 Order

In clear breach of the August 13 Order, Respondent failed to produce a single document responsive to the First RFP by November 8, 2019. Childs Decl. ¶ 4. To date, Respondent still has not produced a single document responsive to the First RFP, nor given any indication that it intends to do so, despite never having moved for (much less obtained) a stay of the August 13 Order pending the adjudication of its Objections. *Id.*

III. ARGUMENT

Where, as here, a party fails to obey a court order requiring it to provide discovery, Federal Rule 37(b)(2) authorizes the court to hold the disobedient party in contempt and requires it to order the party and/or its counsel to pay the reasonable expenses caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. *See* Fed. R. Civ. P. 37(b)(2)(A), (C). Here, this Court should impose both contempt and monetary sanctions against the ROK under Rule 37(b)(2) as a result of its willful, complete, and continuing failure to obey the August 13 Order requiring it to produce documents by November 8, 2019. Far from being substantially justified, the ROK's failure to obey the August 13 Order was part and parcel of a pattern of bad faith, vexatious discovery conduct in which the ROK has engaged over the last 18 months, one that led the Court to conclude that the ROK simply does not intend to provide

discovery. To protect its authority, this Court should also impose monetary sanctions against the ROK under the Court's inherent authority.

A. The Court Should Hold the ROK in Contempt Under Rule 37(b)(2)(A)

Federal Rule 37(b)(2)(A) authorizes the court where an action is pending to impose sanctions on a party that "fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2)(A). The rule further provides that a sanctions order may include "treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination." Fed. R. Civ. P. 37(b)(2)(A)(vii).

In this district, two requirements must be met before a party may be held in contempt under Rule 37(b)(2): "First, the court must have fashioned an order that is clear and reasonably specific. Second, the [party] must have violated that order." *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9 (D.D.C. 1999) (internal citations omitted). A court must "find facts meeting these two elements by clear and convincing evidence." *Id.* (internal citations omitted). To hold a party in contempt, the court need not make a finding of bad faith, and "the contemnor's failure to comply with the court decree need not be intentional." *Id*. (internal citations omitted). Indeed, "[t]he 'intent of a recalcitrant party is irrelevant' in a civil contempt proceeding." *Food Lion v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016-17 (D.C. Cir. 1997).

To rebut a prima facie showing of contempt, a party must prove that it "took all reasonable steps within its power to comply with the court's order." *Cobell*, 37 F. Supp. 2d at 9-10 (citing *Food Lion*, 103 F.3d at 1017). This defense has two components: "(1) a good faith effort to comply with the court order at issue; and (2) substantial compliance with that court order." *Cobell*, 37 F. Supp. 2d at 10 (citing *Food Lion*, 103 F.3d at 1017).

In *Cobell*, a court in this District held the Secretary of the Interior, the Secretary of the Treasury, and the Assistant Secretary of the Interior in contempt under Rule 37(b)(2) for failing to

obey the court's document production order and its subsequent scheduling order. *Id.* at 16, 36. The court began by rejecting the defendants' argument that the document production order was neither clear nor reasonably specific, concluding that their "unilateral misinterpretation [of the order] cannot create ambiguity when one does not exist." *Id*. at 18. Next, the court rejected the defendants' argument that they had substantially complied with the order by making several productions of responsive documents, because they had failed to produce a single document falling into one category of documents required by paragraph 19 of the order. *Id.* at 19-23. Finally, the court found that the defendants had not made a good faith effort to comply with the order, because they had "made unreasonable choices and taken unreasonable positions at every major juncture" of their production. *Id.* at 24. Other courts in this District have likewise held a party in contempt for only partially complying with a discovery order. *See, e.g.*, *U.S. v. Dynamic Visions, Inc.*, No. CV 11-695 (CKK), 2015 U.S. Dist. LEXIS 9597, *12 (D.D.C. Jan. 28, 2015).

Here, the Court should hold the ROK in contempt under Rule 37(b)(2)(A) for having deliberately flouted its obligation under the August 13 Order to produce documents responsive to Petitioners' First RFP. Indeed, the ROK does not (and cannot) dispute that it has failed to produce a single document in accordance with the August 13 Order, much less to make a good faith effort to comply with the order or to achieve substantial compliance. Instead, the ROK apparently takes the position that it need not comply with the August 13 Order pending this Court's adjudication of its Objections. *See* Dkt. 119-4 (August 29, 2019 email from ROK's counsel to Petitioners' counsel stating that "[w]e assumed that, having seen our objections, it would be common ground that our objections need to be resolved before discovery against our client can proceed"). As Petitioners informed the ROK on August 31, 2019 (*see id.*), however, that position is wrong: It is well settled that the filing of objections or an appeal does not automatically stay or relieve a party from

complying with a discovery order. *See, e.g.*, *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 124 F.R.D. 75, 79 (S.D.N.Y. 1989) (filing of objection to magistrate judge's order does not stay effect of order); *White v. Burt Enters.*, 200 F.R.D. 641, 643 (D. Col. 2000) (holding that defendant's filing of Rule 72 objections did not relieve it of its obligation to comply with magistrate judge's orders, and imposing sanctions); *see also Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal."). This is because "allowing the automatic stay of magistrate's orders would not only encourage the filing of frivolous appeals, but, would grind the magistrate system to a halt." *Litton*, 124 F.R.D. 75, at 79. The ROK's violation of the August 13 Order is thus not open to debate.

The only other requirement for a prima facie showing of contempt – that the order be "clear" and "reasonably specific" – is also clearly met on the facts of this case. As discussed above, the August 13 Order required counsel to "meet and confer in an effort to limit the number of, and definitions accompanying, the Petitioners' requests for production of documents," with such meet and confer discussions to conclude by August 30, 2019, and it required Respondent to "produce the documents responsive to the remaining requests by no later than November 8, 2019." Notably, the August 13 Order did not condition the ROK's obligation to produce responsive documents by November 8, 2019 on the parties' ability to reach an agreement concerning the scope of document discovery by August 30, 2019. Rather, the August 13 Order provided that if the parties could not reach such an agreement, the ROK would be required to produce **all** documents responsive to Petitioners' First RFP. *See also* Dkt. 117-2, 33:19-34:12 ("The only outstanding question is whether you wish an opportunity to speak with [Petitioners' counsel] who have expressed a willingness to perhaps reduce the number . . . of requests or refine the definitions. If

you are not prepared to do that, I will not include that in my order; I will simply set a date for the documents to be produced.").

While the August 13 Order obligated the ROK to produce a substantial number of documents by November 8, 2019, the mere fact that the ROK deemed that obligation "burdensome" did not entitle it unilaterally to disregard the obligation pending the adjudication of its Objections. Rather, as Petitioners noted during the parties' meet and confer discussions, *see* Dkt. 119-4 (August 31, 2019 email from Petitioners' counsel to ROK's counsel noting that, "[c]ritically, the ROK has not moved Judge Jackson for a stay of Judge Robinson's order pending the adjudication of its Rule 72 objections"), the ROK was obligated to comply with the August 13 Order unless and until it obtained a stay. The ROK's counsel itself acknowledged this obligation, stating on September 6, 2019 that the ROK "intended to move for a formal stay pending the district court's adjudication of this matter" and reiterating that intention on September 9, 2019 (*see id.*), but it never subsequently requested a stay.

Moreover, the ROK has only itself to blame for the broad scope of its obligation to produce documents under the August 13 Order, for at least three reasons.

First, as discussed above, the ROK's Second Motion for Protective Order – which Judge Robinson denied in the August 13 Order – requested a stay of **all** further post-judgment discovery, rather than addressing or proposing limitations on the scope of further discovery. Dkt. 113. *See also* Dkt. 117-2, 2:25-3:3 (Judge Robinson noting at August 12 hearing that ROK's Second Motion for Protective Order "was written in matter [*sic*] which only suggests that the respondent simply does not intend to provide any discovery"). Having failed to request or propose reasonable limitations on the scope of document discovery, the ROK cannot credibly complain about the scope of the First RFP, particularly where the Court granted the ROK one last opportunity to meet

and confer with Petitioners, who it recognized had "expressed a willingness to perhaps reduce the number . . . of requests or refine the definitions." *See* Dkt. 117-2, 33:19-34:12.

Second, as Judge Robinson recognized at the August 12 hearing (*see id.* at 13:9-10, 15-17), the ROK had not complied in good faith with its discovery obligations to date. For example, the ROK's counsel had instructed both of the ROK's deponents (Mr. Ibraimov and Mr. Madaliyev) not to answer questions on the basis of non-privilege objections, contrary to Judge Robinson's prior direction that, "except where necessary to preserve a privilege, [the witness] will be expected to answer questions over objection."[10]

Third, the ROK failed to meet and confer with Petitioners in accordance with the August 13 Order and Judge Robinson's instructions at the August 12 hearing. As discussed above, Petitioners sent the ROK a revised and substantially narrower version of their First RFP on August 23, 2019. *See* Dkts. 119-1, ¶ 3; 119-3; 119-4. The ROK did not respond to that proposal until September 9, 2019, nine days **after** the close of the meet and confer period set forth in the August 13 Order. *See* Dkts. 119-1, ¶ 4; 119-4. In its counter-proposal, the ROK proposed to proceed only with discovery into assets located in the United States, contrary to Judge Robinson's instruction at the August 12 hearing that the parties' meet and confer discussion "will not include a limit with respect to assets in the United States, as the Court has already rejected that argument." *See* Dkts. 117-2, 40:24-41:2; 119-1, ¶ 4; 119-4.

Because the August 13 Order was clear and specific with respect to the ROK's obligation to produce documents responsive to Petitioners' First RFP, and because the ROK failed to comply with that obligation, Petitioners have made a prima facie showing of contempt by clear and

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[10] *See* Dkt. 100, 40:8-10; Dkt. 106-1, 47:5-6, 51:9-11, 51:25-52:2, 81:13-18, 86:2-4, 92:4-15, 98:15-17, 99:2-5, 108:10-12, 115:2-12, 134:3-10, 135:23-136:6, 140:22-25, 146:14-15; Dkt. 111-1, 10:15-24; 30:16-31:8; 77:18-22; 119:6-12; 76:15-78:11; 79:11-80:16.

convincing evidence. The ROK cannot rebut Petitioners' showing of contempt because it failed to produce a **single** document in accordance with the August 13 Order, much less to make a good faith effort to comply with the order or to achieve substantial compliance. Accordingly, this Court should hold the ROK in contempt under Rule 37(b)(2)(A).

B. The Court Should Impose Monetary Sanctions on the ROK Under Rule 37(b)(2)(C)

If a party fails to obey an order to provide or permit discovery, Rule 37(b)(2)(C) **requires** the court to "order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). Reasonable expenses may only be granted "if there has already been an order [and] [t]he expenses that may be recovered under it are those 'caused by the failure' to obey an order and therefore do not include the expense of obtaining the order itself." *Harley v. Nesby*, No. 08 Civ. 5791 (KBF)(HBP), 2012 U.S. Dist. LEXIS 61576, *18 (S.D.N.Y. May 2, 2012).

A party resisting the imposition of sanctions under Rule 37(b)(2)(C) bears the burden of showing that there was a "substantial justification for the violation, or that circumstances would make it an award of reasonable expenses unjust." *Patino v. Avalon Bay Comtys., Inc.*, No. CV 14-2376 (LDW) (AYS), 2016 U.S. Dist. LEXIS 2353, *8 (E.D.N.Y., Jan. 8, 2016) (citing *Novak v. Wolpoff & Abramson LLP*, 536 F.3d 175, 178 (2d Cir. 2008)). To determine the proper level of compensation, "the Court must set a reasonable hourly rate, or lodestar, to apply to each attorney's time." *Tequila Centinela, S.A. de C.V. v. Bacardi & Co.*, 248 F.R.D. 64, 68 (D.D.C. 2008). In doing so, the court must "choose a rate that is sufficient to attract competent counsel, but not so excessive as to produce a windfall." *Id*. (citing *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 16

(D.C. Cir. 1984)). In other words, "rates must be in line with rates charged by other attorneys of comparable skill, reputation, and ability within the community." *Id*.

Here, Rule 37(b)(2)(C) requires the Court to order the ROK, its counsel, or both to compensate Petitioners for the expenses they have incurred as a result of the ROK's failure to obey the August 13 Order. As discussed above, the ROK cannot offer any justification for its deliberate flouting of the August 13 Order, much less the "substantial justification" that might excuse its obligation to pay compensation under Rule 37(b)(2)(C). Petitioners will submit an accounting for their expenses (including their attorneys' fees for bringing this Motion for Sanctions and Contempt) in due course.

C. The Court Should Exercise Its Inherent Authority to Impose Monetary Sanctions on the ROK for Its Bad Faith, Vexatious Conduct

It is well-established that a district court has the inherent authority to order monetary sanctions against a party that has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Priority One Servs. v. W&T Travel Servs., LLC*, 987 F. Supp. 2d 1, 3 (D.D.C. 2013); *see also Fritz v. Honda Motor Co., Ltd.*, 818 F.2d 924, 925 (D.C. Cir. 1987) (affirming district court's order imposing monetary sanctions against party's attorney under district court's inherent power). This is so "even if procedural rules exist which sanction the same conduct." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991).

As discussed above, the ROK has engaged in a pattern of bad faith, vexatious conduct with respect to its discovery obligations. This conduct has included:

- the ROK's filing of blanket, boilerplate objections to Petitioners' discovery requests (Dkts. 81-9; 81-10; 81-11);
- the ROK's instructions to Mr. Ibraimov and Mr. Madaliyev not to answer questions on the basis of non-privilege objections, contrary to Judge Robinson's prior

direction that, "except where necessary to preserve a privilege, [the witness] will be expected to answer questions over objection" (*see* Dkts. 100, 40:8-10; 117-2, 13:9-10, 15-17);

- the ROK's consistent failure to meet and confer in good faith with Petitioners concerning its objections to Petitioners' discovery requests, including its failure to propose any limitation on the scope of post-judgment discovery before filing its Second Motion for Protective Order and its proposal during the parties' latest meet and confer discussion to proceed only with discovery into its U.S. assets, contrary to Judge Robinson's instruction at the August 12 hearing that this discussion "will not include a limit with respect to assets in the United States, as the Court has already rejected that argument" (*see* Dkts. 117-2, 2:25-3:3, 40:24-21:2; Dkt. 119-4);
- the ROK's failure to move for a temporary stay of the August 13 Order, after multiple times clearly stating its intention to do so and thereby acknowledging that it was obligated to comply with the August 13 Order unless and until it obtained a stay (*see* Dkts. 119-1, ¶ 4; 119-4; Childs Decl. ¶ 2; Ex. A; Dkt. 128-1, ¶ 9); and
- the ROK's repeated argument, including in its Objections to the August 13 Order, that Petitioners are not entitled to any post-judgment discovery because they have already attached sufficient assets in Europe to satisfy this Court's judgment, contrary to the Court's November 3, 2018 order denying the ROK's motion to stay execution and discovery, in which it specifically held that the foreign attachments are "plainly inadequate" as security for the judgment (see Dkts. 91, at 5; 117, at 34-37); and

- the ROK's violation of the August 13 Order to produce documents responsive to Petitioners' First RFP.

Through this pattern of bad faith, vexatious conduct, the ROK has substantially prolonged these discovery proceedings, causing Petitioners to expend hundreds of thousands of dollars litigating motions that resulted in an order that the ROK has simply chosen to ignore. It is difficult to conceive of a more obvious example of an intentional effort to prolong and complicate litigation. The Court should therefore exercise its inherent authority to impose monetary sanctions on the ROK equal to the costs, expenses, and attorneys' fees that Petitioners have incurred as a result of this conduct. Petitioners will submit an accounting for such costs, expenses, and attorneys' fees in due course.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' Motion for Sanctions and Contempt.

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December 2, 2019

Respectfully submitted,

/s/ James E. Berger

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