No. _____

In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,
v.
NML CAPITAL, LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sections 1609 and 1610(a) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq*., limit execution on property of a foreign state to "property . . . in the United States . . . used for a commercial activity in the United States."

Whether post-judgment discovery in aid of enforcing a judgment against a foreign state can be ordered with respect to all assets of a foreign state regardless of their location or use, as held by the Second Circuit, or is limited to assets located in the United States that are potentially subject to execution under the FSIA, as held by the Seventh, Fifth, and Ninth Circuits.

LIST OF PARTIES

The petitioner in this case is the Republic of Argentina (Defendant-Appellant below). The respondent is NML Capital, Ltd. (Plaintiff-Appellee below).[1]

[1] The caption of the underlying decision of the Second Circuit Court of Appeals incorrectly includes EM Ltd., Bank of America, and numerous Argentine entities. The Republic informed the court of appeals of this error, but the caption was never amended.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Republic of Argentina (the "Republic") respectfully prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 695 F.3d 201. The order of the district court compelling discovery (Pet. App. B) is not published.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2012. A petition for rehearing *en banc* was denied on October 10, 2012 (Pet. App. E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 1604, 1605(a), 1606, 1609, and 1610(a) and (d), are reprinted at Pet. App. F.

STATEMENT OF THE CASE

This petition presents the important question, on which the courts of appeals are now divided, whether Rule 69(a) of the Federal Rules of Civil Procedure permits a United States court to order post-judgment discovery of property of a foreign state that could not be the subject of execution under the FSIA.

Section 1605 of the FSIA provides for subject matter jurisdiction to adjudicate claims *in personam* against a foreign state if one or more of the exceptions to sovereign immunity listed in that section, including waiver of immunity to jurisdiction, exists. Section 1610(a) provides for a considerably narrower scope of execution of a judgment on the property of a foreign state by limiting execution, even if there is a separate waiver of immunity to execution, to "property . . . in the United States . . . used for a commercial activity in the United States." The Second Circuit, disagreeing with the Seventh, Ninth, and Fifth Circuits, held that the existence of jurisdiction over a foreign state under Section 1605 is sufficient to permit post-judgment discovery in aid of execution on property that could not be the subject of execution under Section 1610(a).

A. Background

Between 1998 and 2002, the Republic experienced the worst economic crisis of its modern history, marked by an enduring recession, fiscal imbalance, and lack of access to the international capital markets. *See* Decl. of Noemi C. LaGreca ¶¶ 4–13, *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG) (S.D.N.Y. June 11, 2003); Decl. of Federico Carlos Molina ¶ 3, *NML*

Capital, Ltd. v. Republic of Argentina, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Mar. 24, 2005); *see also* Paul Blustein, *And the Money Kept Rolling In (and Out): Wall Street, the IMF, and the Bankrupting of Argentina* 1 (2005) (describing collapse of Argentine economy in 2001 as "one of the most spectacular in modern history"). With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period.[2] *See* Blustein, *supra*, at 1.

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden—some $80 billion in public external debt alone—while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine populace. "[U]nable to service its debts," the Republic had no choice but to defer interest and principal payments to its bondholders. *See* Panel of

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[2] The Argentine crisis has been described as the "worst-case scenario" in eight centuries of modern financial crises. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises*, at 51 (2008), *available at* http://www.economics.harvard.edu/files/faculty/51_This_Time_Is_Different.pdf; *see also* Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food. UNICEF Argentina was concerned that stunted growth and reduced mental capacities would be the long-term consequence of this economic crisis for millions of the nation's children.").

Independent Advisers, *Economic and Financial Issues Facing Argentina*, Report to the Government of Argentina and the International Monetary Fund, ¶ 1 (July 29, 2002), *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm. Like many nations that have faced economic crisis and unsustainable indebtedness, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, *Alexander Hamilton: A Biography* 163–88 (1979), the Republic was forced to seek restructuring of both its external and internal public debt.[3]

Because there is no bankruptcy regime for insolvent states, the Republic restructured its external debt on an entirely voluntary basis. The Republic did not repudiate that debt. Instead, consistent with United States policy favoring the orderly and consensual restructuring of sovereign debt, the Republic

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[3] The United States, the international financial community, and the federal courts have all recognized the importance of voluntary sovereign debt restructuring. *See, e.g.*, Brief for the United States as *Amicus Curiae* in Support of Reversal, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L), 2012 WL 1150791, at *6–10 (2d Cir. Apr. 4, 2012); Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG), 2004 WL 5475206, at *2–6 (S.D.N.Y. Jan. 12, 2004); *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) ("[A]n important channel for attempting to resolve the Argentine debt problem will undoubtedly be the effort to negotiate a debt restructuring plan."); *cf. Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("[T]he United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures . . .").

restructured its unsustainable debt burden through two global exchange offers in 2005 and 2010, in which participating holders exchanged old, nonperforming bond interests for new, performing bond interests with lower interest rates, reduced principal, and/or longer maturities. The exchange offers were extended to all beneficial owners of eligible bonds—including respondent NML Capital, Ltd. ("NML")—on the same terms, and reflected the Republic's commitment to treat its private creditors equitably. Owners tendered over 91% of the aggregate eligible debt in the exchange offers (a supermajority that would be more than sufficient to "cram down" respondent and other "holdouts" under most bankruptcy regimes), making the Republic's sovereign debt restructuring the largest in history at that time. *See* Republic of Argentina, Annual Report (Form 18-K), at 17 (Sept. 30, 2011), *available at* http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm. NML declined to participate in either restructuring.

B. Respondent NML

Plaintiff-Respondent NML is a Cayman Islands hedge fund, established exclusively to buy distressed Republic debt, that acquired beneficial interests in Republic bonds at a deep discount both immediately before, and well after, the Republic suspended payments on its unsustainable external debt in December 2001. NML and similar "vulture" hedge funds seek to take advantage of the absence of bankruptcy protection in the sovereign context by bringing lawsuits for the face value of defaulted sovereign debt, obtaining judgments on which interest

continues to run indefinitely, and then using aggressive means to try to execute them.[4]

NML has used these aggressive tactics against the Republic, while at the same time continuing to speculate in nonperforming Republic debt, filing a new complaint against the Republic as recently as 2009 on more than $100 million of defaulted Republic bond interests that it purchased in late 2008. *See NML Capital, Ltd. v. Republic of Argentina*, No. 09 Civ. 1708 (TPG) (S.D.N.Y. compl. filed Feb. 24, 2009). NML's enforcement tactics include a series of execution attempts against property of the Republic and other entities[5] that the federal courts have in most cases

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[4] *See, e.g.*, Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited Jan. 7, 2013) ("[T]he profiteering of 'vulture funds' [has been] at the expense of both the citizens of distressed debtor countries and the taxpayers of countries that have supported international debt relief efforts. . . . 'Vulture funds' have exploited the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure.") (internal quotation marks omitted); Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 2, 27 (2008) (vulture funds seek "extraordinary profits at the expense of U.S. companies, the U.S. economy and U.S. foreign relations . . . potentially affecting debt restructuring in all emerging markets").

[5] These entities are presumptively separate from the Republic and therefore presumptively immune from execution on Republic debt.

rejected as violating the FSIA,[6] and an attempt in March 2005 to disrupt the settlement of the Republic's global exchange offer by attaching—on an *ex parte* basis—the nonperforming bonds tendered by their beneficial owners into that exchange. *See EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005) (affirming vacatur of this attachment). They also include—of particular interest here—similar unsuccessful efforts to enforce its United States

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See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626–27 (1983) ("*Bancec*") ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.") (citation and footnote omitted).

[6] *See, e.g.*, *NML Capital, Ltd. v. Banco Central De La República Argentina*, 652 F.3d 172, 196–97 (2d Cir. 2011) (rejecting NML's attempt to attach property of the central bank of Argentina), *cert. denied sub. nom*, *EM Ltd. v. Republic of Argentina*, 133 S. Ct. 23 (2012); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124, 130–31 (2d Cir. 2009) (rejecting attempt by NML and others to execute upon Argentine social security funds because the Republic had not "used [the funds] for a commercial activity in the United States"), *cert. denied*, 130 S. Ct. 1691 (2010); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 465–66 (2d Cir. 2007) (rejecting NML's attempt to attach property of the central bank of Argentina), *cert. denied*, 522 U.S. 818 (2007); *NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P.*, 788 F. Supp. 2d 1111, 1127 (C.D. Cal. 2011) (rejecting NML's attempt to execute on satellite jointly launched by Argentine space agency, NASA, and other nations' space agencies); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-00197 (CKK), 2005 U.S. Dist. LEXIS 47027 (D.D.C. Aug. 3, 2005) (vacating NML's *ex parte* attachments of diplomatic and military property in Washington, D.C., and Maryland).

judgments outside the United States, ranging from an attempt to attach taxes owed to the Republic in France,[7] to attempts to attach diplomatic bank accounts in France[8] and Belgium,[9] to the attempted seizure of an Argentine naval vessel in Ghana,[10] in each case without any claim by NML that it needed discovery from a United States court to pursue these legally improper execution efforts.[11]

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[7] *See NML Capital, Ltd. v. Republic of Argentina*, Cour d'appel [CA] [regional court of appeal] Paris, 4e pôle 8e ch., Dec. 9, 2010, No. 10/00390 (Fr.) (appeal pending to the Cour de Cassation [French Supreme Court]).

[8] *See NML Capital, Ltd. v. Republic of Argentina*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2011, Bull. civ. I, No. 867 (Fr.), *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html.

[9] *See Republic of Argentina v. NML Capital, Ltd.*, Cour de Cassation [Cass.] [Court of Cassation], Nov. 22, 2012, No. C.11.0688.F/1 (Belg.).

[10] Order, *The "ARA Libertad Case" (Argentina v. Ghana)*, International Tribunal for the Law of the Seas (ITLOS) (Dec. 15, 2012), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf.

[11] Most recently, NML has sought to enjoin the Republic from paying any interest on its restructured debt unless it also pays 100% of NML's defaulted debt, an issue that is now before the Second Circuit after that court initially upheld NML's claim to injunctive relief but remanded to the district court for clarification of key aspects of the scope of the injunction. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 265 (2d Cir. 2012), *on remand*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) (stayed by the Second Circuit on Nov. 28, 2012).

C. The District Court Authorizes NML To Obtain Worldwide Discovery From Bank Of America And Banco De La Nación Argentina, And The Court of Appeals Affirms

In 2010, NML embarked on an unprecedented discovery campaign aimed at information pertaining to what it characterized as the Republic's international "financial circulatory system." *See NML Capital v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012) (Pet. App. A at 5); *see also* Hr'g Tr. at 10, *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG) (S.D.N.Y. Dec. 17, 2010) ("Dec. 17 Hr'g Tr.") (Pet. App. D at 60). As part of this effort, NML served subpoenas on Bank of America and Banco de la Nación Argentina ("BNA") on March 10, 2010, and June 14, 2010, respectively. The subpoenas sought expansive information regarding not only the Republic's assets, but also those of hundreds of Argentine public officials from the Republic's President and deceased former President on down, and separate entities (both state-owned and private), with no attempt in any instance to limit the requests to property even arguably used for a commercial activity in the United States.[12] To the

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[12] Plaintiff's subpoena served on Bank of America defines the Republic as including 136 public officials, 43 independent entities, and 148 purported "Ministries" and "Secretariats" of the Republic, as well as countless "agencies, ministries, instrumentalities, political subdivisions, employees, attorneys, representatives, affiliates, subsidiaries, predecessors, successors, alter-egos, and assigns." *See* NML Notice of Subpoena served on Bank of America, N.A., dated Mar. 10, 2010, *NML Capital, Ltd. v. Republic of Argentina*, No. 11-5065-cv(L), Joint Appendix Volume III, A-

contrary, NML made it clear that it intended the discovery requests to cover *all* property of the Republic and the hundreds of other parties and entities named in the subpoena, including property located outside the United States and property not used for a commercial activity.

The Republic moved to quash the Bank of America subpoena on May 17, 2010, and Bank of America joined. NML later moved to compel BNA and Bank of America to comply with the subpoenas, which the Republic and both banks opposed. Among other things, the Republic argued that because execution on property of a foreign state under the FSIA is limited to "property in the United States of a foreign state . . . used for a commercial activity in the United States," 28 U.S.C. § 1610(a) (Pet. App. F at 92), discovery of property *outside* the United States, and therefore by definition not subject to execution under the statute, is neither

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662–80 (2d Cir. Nov. 15, 2011). It demanded, *inter alia*, documents concerning "[e]ach asset or property of any kind whatsoever which Argentina owned directly or indirectly, in whole or in part, as sole owner or jointly with others, either of record or beneficially." *Id.* at A-673. The subpoena NML served on BNA was equally expansive, defining the Republic to include 225 entities, including all "agencies, instrumentalities, ministries, political subdivisions, representatives, [and] State Controlled Entities," and demanding documents concerning "any property, assets or accounts maintained at BNA *anywhere* in the name of Argentina or for Argentina's benefit." *See* NML Notice of Subpoena served on Banco de la Nación Argentina, dated June 14, 2010, *NML Capital Ltd.*, Joint Appendix Volume IV, A-900–09 (2d Cir. Nov. 15, 2011) (emphasis added); Attachment to letter from Joshua I. Sherman to Mark S. Sullivan, dated July 20, 2010, *NML Capital Ltd.*, Joint Appendix Volume VIII, A-1599–1606 (2d Cir. Nov. 15, 2011).

permissible under the FSIA nor relevant as a matter of law to execution under it.

After initially noting the unprecedented nature of NML's extraterritorial asset discovery request at a hearing on December 17, 2010, *see* Dec. 17 Hr'g Tr. at 17 (Pet. App. D at 66) ("I really think that now the discovery is taking a shape that it has not taken before, . . . you are seeking information about assets located in foreign countries"), the district court concluded at a second hearing that it could serve as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Hr'g Tr. at 30, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) ("Aug. 30 Hr'g Tr.") (S.D.N.Y. Aug. 30, 2011) (Pet. App. C at 31) (emphasis added). It orally granted NML's motions to compel and denied the Republic's, BNA's, and Bank of America's objections to the subpoenas as well as the motion to quash, confirming the ruling by written Order on September 2, 2011 (the "Extraterritorial Asset Discovery Order") (Pet. App. B).

The Republic appealed the district court's decision to the Second Circuit, contending that the Extraterritorial Asset Discovery Order violated the FSIA by permitting discovery on assets: 1) located outside the United States; 2) not used for a commercial activity in the United States; and 3) belonging to entities and officials that are not the Republic. NML responded that the FSIA places no limitation on discovery in aid of judgment enforcement, and that the FSIA is irrelevant because the discovery was propounded to third-party banks.

By decision dated August 20, 2012, the Second Circuit Court of Appeals adopted these arguments and affirmed the Extraterritorial Asset Discovery Order.[13] It specifically held that the FSIA does not limit post-judgment discovery on assets of a foreign state in aid of execution of a United States court's judgment, and that the FSIA's limits on execution had no bearing on the scope of such discovery. *See NML Capital*, 695 F.3d at 209 (Pet. App. A at 16) ("Whether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this determination does not affect discovery."). Instead, as to post-judgment discovery in aid of execution, the Second Circuit held that "[o]nce the district court had

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[13] NML also argued that the Republic had waived its immunity from post-judgment discovery in the Fiscal Agency Agreement governing the bonds. The Second Circuit did not discuss this point, no doubt because NML had never raised it in the district court (and therefore forfeited the argument), and because the Second Circuit, like every other court to consider the issue, had previously held that despite a waiver of immunity, a court's power is still limited to what the FSIA permits. *See EM Ltd. v. Republic of Argentina*, 473 F.3d at 481 n.19 (Republic's waiver extends "only to the 'extent permitted under the laws of the jurisdiction.' . . . Under the laws of this jurisdiction, courts may grant the remedies of attachment, arrest and execution against a foreign state's property only if the property is eligible for attachment under a specific provision of the FSIA.") (citing *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002) ("If a foreign sovereign waives its immunity from execution, U.S. courts may execute against property in the United States . . . used for a commercial activity in the United States. . . . Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria.") (internal quotation marks omitted)); *Aurelius Capital Partners*, 584 F.3d at 129–30 (*Id.*).

subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over *any other party*," and that "the banks' compliance with the subpoenas will cause Argentina *no burden* and *no expense*." *Id.* at 209–10 (Pet. App. A at 18–19) (emphasis added).[14] In reaching this conclusion, the Second Circuit expressly rejected the opinion of the Seventh Circuit in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012), *see NML Capital*, 695 F.3d at 209 (Pet. App. A at 18), which had held that "general-asset discovery" of a foreign state's property violates the FSIA, *see Rubin*, 637 F.3d at 799, and it disregarded the views of the United States, which has consistently supported the Seventh Circuit's position, *see* Brief for the United States of America as *Amicus Curiae*, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2012 WL 1891593 (May 25, 2012) (hereinafter "U.S. *Rubin* Certiorari *Amicus*"); Brief for the United States as *Amicus Curiae* Supporting Reversal, *Rubin v. Islamic Republic of Iran*, No. 08-2805, 2009 WL 8132813 (7th Cir. June 26, 2009) (hereinafter "U.S. *Rubin* 7th Cir. *Amicus*").

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[14] The one limitation the Second Circuit saw as applicable, which was not based on the FSIA, but is simply a general principle of discovery, was the court's authority to order discovery in a "prudential and proportionate way." *NML Capital*, 695 F.3d at 207 (Pet. App. A at 14). That limitation appears itself illusory, as under no definition of those terms could worldwide discovery of hundreds of entities be in any way deemed "prudential and proportionate."

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the Second Circuit's decision directly conflicts with decisions of other circuits, this Court's longstanding precedent, and the expressed interests and views of the United States Government, all of which oppose the Second Circuit's holding that the FSIA imposes no limit on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world. The Second Circuit's decision has created a clear conflict among the courts of appeals on the interpretation of the FSIA, a statute expressly enacted to provide uniformity in the treatment of foreign sovereigns in United States courts. The decision also disregards this Court's recent precedent on giving effect to Congress's determination of the geographic scope of federal statutes and imperils the foreign relations of the United States and its own rights as a litigant abroad.

I. THE SECOND CIRCUIT'S ERRONEOUS DECISION CONFLICTS WITH OTHER CIRCUITS ON WHETHER THE FSIA PLACES ANY LIMITATION ON POST-JUDGMENT ASSET DISCOVERY

Congress enacted the FSIA in 1976 with the express purpose of providing a uniform body of law to govern the sovereign immunity of foreign states in United States courts. *See, e.g.*, *Bancec*, 462 U.S. at 622 n.11 ("When it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign

sovereign to suit in United States courts." (internal quotation marks omitted)); H.R. Rep. No. 94-1487, at 13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631, 6632 (noting Congress's intent to promote a "uniformity in decision" in "cases involving foreign sovereigns" and Congress's concerns about "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area"). The holding of the Second Circuit that the FSIA places no limitation on post-judgment discovery concerning assets of a foreign state undermines this uniformity and directly contradicts decisions of the Seventh, Fifth, and Ninth Circuits. This Court's review is therefore warranted.

The Seventh Circuit's decision in *Rubin*, 637 F.3d 783, represents the weight of authority on the application of the FSIA to post-judgment asset discovery. There, the Seventh Circuit reversed a district court order permitting "general-asset discovery" of all Iranian property located in the United States. *See id.* at 799. The Seventh Circuit noted that Rule 69(a), which governs all post-execution proceedings, including discovery in aid of execution, specifically states that "a federal statute governs to the extent it applies." *Id.* at 794–95 (citing Fed. R. Civ. P. 69(a)(1)). It therefore held that, "the FSIA plainly applies and limits the discovery process" when a party seeks discovery of a foreign state's assets in aid of judgment enforcement. *Id.* at 795.

In reaching this conclusion, the Seventh Circuit explicitly rejected the Second Circuit's reliance on the existence of jurisdiction over the foreign state judgment debtor as the basis for subjecting it and its property to

general discovery under Rule 69. The Seventh Circuit emphasized the distinction between immunity from suit, *see* 28 U.S.C. §§ 1604–1605 (Pet. App. F at 89–91), and immunity from attachment and execution, *see* 28 U.S.C. §§ 1609–1610 (Pet. App. F at 92–94), noting the indisputable fact that the exceptions to immunity from attachment and execution are considerably narrower than the exceptions to jurisdictional immunity, *see Rubin*, 637 F.3d at 796–97. The Seventh Circuit reasoned that although a United States court may have subject matter jurisdiction over a foreign state for the purpose of adjudging its liability, executing on a foreign state's assets raises distinct immunity considerations. *Id.* at 797. Because one of the purposes of sovereign immunity is to "shield foreign states" from "unwarranted litigation costs and intrusive inquiries," *id.* at 796–97, the court concluded that prior to obtaining discovery of a foreign state's property, a plaintiff "must identify the specific property that is subject to attachment and plausibly allege that an exception to 1609 attachment immunity applies," *id.* at 799.

The Seventh Circuit agreed with decisions of the Fifth and Ninth Circuits (as well as the clear implication of an earlier decision from the Second Circuit itself), all of which stated that post-judgment discovery concerning property of a foreign state should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination," which means, in the post-judgment context, immunity from attachment or execution. *See id.* at 796 (quoting, *e.g.*, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir.

2002) (instructing district court as to proper scope of discovery on remand); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007)); *see also Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011) (holding that execution must be limited to specifically identified property within the United States that falls within an exception to immunity under Section 1610; "Insofar as petitioners complain that the Banks successfully moved to quash subpoenas *duces tecum* in prior proceedings in the Southern District of New York, petitioners there sought information pertaining to China's assets *outside* the United States, which were held categorically immune from execution under the FSIA." (emphasis in original)); *cf. First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 53 (2d Cir. 2002) (FSIA jurisdiction based on commercial activity in the United States continues post-judgment to include discovery of the foreign state judgment debtor's assets; "Rafidain, having participated in commercial banking transactions in the United States, submitted itself to the jurisdiction of the United States courts, as well as to the procedures and legal responsibilities associated with such jurisdiction, *to the extent those procedures and responsibilities are related to its commercial activities in the United States*." (emphasis added)).

Despite this pervasive authority, the Second Circuit reached the sweeping and remarkable conclusion that the FSIA places *no* limitation on a party's ability to seek post-judgment discovery concerning the assets of a foreign state located *anywhere* in the world. *See NML Capital*, 695 F.3d at 609 (Pet. App. A at 16). The Second Circuit recognized that its holding ran directly contrary to that of the Seventh Circuit in *Rubin*, but

nonetheless "respectfully disagree[d]" with that holding, concluding that discovery does not implicate a foreign state's immunity from execution or attachment because discovery does not itself attach a sovereign's property. *See id.* at 208–09 (Pet. App. A at 15–17). The Second Circuit thus found that the FSIA's limits on execution were irrelevant to discovery that has the sole purpose of aiding in that very execution, holding that it was enough that a district court has "subject matter and personal jurisdiction" over a foreign state. *See id.* at 209 (Pet. App. A at 18). This reductionist argument, which conflated the broader scope of jurisdiction under Section 1605 of the FSIA with the narrower scope of attachment and execution-related remedies under Section 1610, was specifically rejected by the Seventh Circuit. *See Rubin*, 637 F.3d at 797 (noting critical error in plaintiffs' contention that once a "court has exercised jurisdiction over a foreign sovereign and entered a judgment against it," a plaintiff is entitled "to the same broad discovery as any other litigant seeking to execute on a judgment under Rule 69(a)").

The Second Circuit also held that the FSIA has no application in the instant case because plaintiff served its expansive discovery requests on third-party banks rather than the Republic itself. *See NML Capital*, 695 F.3d at 210 (Pet. App. A at 19). Although the subpoenas seek detailed account information *of* the Republic, hundreds of its agencies or instrumentalities, and hundreds of its officials (including its current and deceased former president), *see id.* at 204 (Pet. App. A at 6), the Second Circuit viewed only the banks as the affected parties, and concluded that "the banks' compliance with the subpoenas will cause Argentina *no* burden and *no* expense," *id.* at 210 (Pet. App. A at 19)

(emphasis added). This holding also conflicts with the Seventh Circuit's reasoning in *Rubin*.

In *Rubin*, the Seventh Circuit properly recognized that even when execution immunity is not raised by the state itself (there, although discovery was served on the state judgment debtor Iran, the original claim of execution immunity was raised by private persons holding Iranian property), the court must nonetheless address it, because, "[t]he immunity inheres in the property itself." 637 F.3d at 799. The same logic applies to post-judgment discovery in aid of execution on that property. It is the sovereign nature of the property and its use that gives rise to the immunity in each instance, not who raises the immunity claim.

Unlike the Second Circuit, the Seventh Circuit recognized in *Rubin* the "burdens of litigation" from which sovereign immunity is intended to shield a foreign state, including the "cost and aggravation of discovery," as well as the "intrusive inquiries" that result from sweeping discovery requests like the ones present here. *Rubin*, 637 F.3d at 795, 796–97. One would be hard pressed to find a more intrusive inquiry than a "forensic examination" of the financial affairs of a foreign state's current and late president, as well as the state itself and hundreds of its separate agencies or instrumentalities. The Second Circuit's refusal to acknowledge that discovery of immune property burdens parties beyond those actually served with it is irreconcilable with the rationale set forth by the Seventh Circuit. Not only will discovery of this kind inevitably spill over into equally intrusive discovery of the party itself, but common sense suggests that when third parties are forced to submit to costly discovery

devices because they have done business with, and therefore have information regarding, a state, those costs will be passed on to the state in one form or another.

The Seventh Circuit's conclusion that discovery in aid of execution must be limited to property of the foreign state used for a commercial activity in the United States, because only property fitting that definition falls within the enforcement jurisdiction of United States courts under Section 1610 of the FSIA, *id.* at 794 (holding general asset discovery "incompatible with the text, structure, and history of the FSIA"); *id* at 799, applies equally to discovery served on a foreign state and discovery served on a third party concerning that foreign state's assets. In either case, the discovery is sought for the purpose of executing on the sovereign's property. It cannot be seriously argued, for instance, that discovery about a state's diplomatic bank accounts or military property served on a non-party bank or military contractor would not be just as intrusive and detrimental to sovereign immunity principles as such discovery served on the state itself. But the Second Circuit's ruling treats the former as raising no issue under the FSIA.[15]

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[15] The Second Circuit suggested that such concerns might be addressed as a matter of "privilege" and not sovereign immunity. *See NML Capital, Ltd. v. Republic of Argentina*, 695 F.3d 201, 210 (2d Cir. 2012)(Pet. App. A at 19–20). But it did not articulate what "privilege" would apply or why a privilege claim regarding discovery directed to a third party would not face the usual difficulties that exist when the holder of a privilege tries to assert it over a third party's documents. *See, e.g.*, *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 484–86 (10th Cir.

On this point too, the Second Circuit's false distinction between permitting discovery from a foreign state itself and permitting that same discovery from a third party conflicts with the reasoning and result in *Rubin*.

It is noteworthy that NML and its attorneys have themselves argued to this Court that *Rubin* directly conflicts with Second Circuit precedent on whether the FSIA limits discovery into the assets of a foreign state, and that this circuit split requires this Court's review. After the Seventh Circuit's decision, plaintiffs in *Rubin* petitioned this Court for certiorari, and NML's counsel represented petitioners as counsel of record before the Court, undoubtedly because of NML's interest in the same issue that was then pending before the Second Circuit in the instant case. Petitioners contended, *inter alia*, that the Seventh Circuit's decision in *Rubin* "undermines th[e] congressionally prescribed uniformity" in the treatment of sovereign nations in United States courts, and that "[t]his Court's review is warranted to resolve this circuit split and provide much-needed guidance regarding the scope of discovery available to judgment creditors under the FSIA." Petition for Writ of Certiorari, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2011 WL 4642674, at *10, *16 (Oct. 6, 2011). NML and other vulture funds then

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2011) (declining to extend the doctrine of *Perlman v. United States*, 247 U.S. 7 (1918), which allows appeal by holder of attorney-client privilege from order compelling production of documents by third party in criminal grand jury proceedings, as "[t]he underpinnings of the *Perlman* rule . . . simply do not apply with equal force to a subpoena directed at a non-party as part of discovery in civil litigation"), *cert. denied sub. nom*, *NATSO, Inc. v. 3 Girls Enters.*, 132 S. Ct. 1004 (2012).

submitted a brief as *amicus curiae* in support of petitioners, "agree[ing] with petitioners that review is warranted to resolve this Circuit conflict." Brief of NML Captial, Ltd., *et al.*, as *Amici Curiae* in Support of Petitioners, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2011 WL 5402978, at *4 (Nov. 7, 2011). At the time, NML's position was seriously overstated, because the Second Circuit had then *not* disagreed with *Rubin* and its prior precedent did not furnish a different reading of the FSIA, and this Court denied the petition. *See Rubin v. Islamic Republic of Iran*, 133 S. Ct. 23 (2012). Now, the circuit split that NML claimed indeed does exist, and this Court's review is therefore warranted, just as NML itself urged (albeit then prematurely) in its *Rubin* petition.

II. THE SECOND CIRCUIT'S ERRONEOUS DECISION CONFLICTS WITH THIS COURT'S PRECEDENT THAT FEDERAL STATUTES ARE PRESUMED TO APPLY DOMESTICALLY, NOT EXTRATERRITORIALLY

Besides the direct circuit split, the Extraterritorial Asset Discovery Order is also at odds with this Court's decision in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), which reaffirmed "the longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 2877 (internal quotation marks omitted). The Court in *Morrison* considered and rejected the Second Circuit's extraterritorial application of Section 10(b) of the Securities and Exchange Act of 1934, reasoning that irrespective of

Congress's power to exercise its prescriptive jurisdiction and regulate entities abroad that engage in conduct that might affect the United States, "Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* at 2877–78. Accordingly, the Court held that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878.

The same reasoning applies with greater force to the FSIA, a jurisdictional statute. "[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). It also "provides the sole, comprehensive scheme for enforcing judgments against foreign sovereigns." *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 496 (1983) ("The statute must be applied by the District Courts in every action against a foreign sovereign," and "[a]s the House Report clearly indicates, the primary purpose of the Act was to 'set forth comprehensive rules governing sovereign immunity'" (quoting H.R. Rep. No. 94-1487, at 12 (1976))); *Conn. Bank*, 309 F.3d at 252 (noting that prior to enactment of the FSIA, foreign sovereigns enjoyed absolute immunity from execution against their property). Under the FSIA, a federal court may exercise jurisdiction over a sovereign to adjudge its liability only if a statutory exception to immunity from suit applies, *see* 28 U.S.C. §§ 1604–1605 (Pet. App. F at 89–91), and it may provide post-judgment execution remedies to a judgment creditor only if a statutory exception to immunity from execution applies, *see* 28 U.S.C. §§ 1609–1610 (Pet. App. F at 92–94). Discovery

in aid of execution squarely falls within the category of post-judgment execution remedies. *See* Fed. R. Civ. P. 69(a); H.R. Rep. No. 94-1487, at 28 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 ("The term 'attachment in aid of execution' [in § 1610(a)] is intended to include attachments, garnishments, and *supplemental proceedings* available under applicable Federal or State law to obtain satisfaction of a judgment. *See* Rule 69, Fed. R. Civ. P.") (emphasis added); *accord* Brief of the United States as *Amicus Curiae* in Support of Appellant, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046, 2010 WL 4569107, at *27–28 (D.C. Cir. Oct. 7, 2010) (hereinafter "U.S. *FG Hemisphere Amicus*"). Indeed, the Second Circuit itself acknowledged that the district court's authority to issue the Extraterritorial Asset Discovery Order derived "from its power to conduct *supplementary proceedings*." *See NML Capital*, 695 F.3d at 208 (Pet. App. A at 16) (emphasis added).

Accordingly, where a state's liability has already been determined and a judgment creditor is seeking to enforce its judgment, as is the case here, a court's authority to order discovery in aid of execution is circumscribed by Section 1610. *See, e.g.*, *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795 (7th Cir. 2011) ("Discovery requests in aid of execution may be made pursuant to either the federal rules or the corresponding rules of the forum state, but either way, the FSIA plainly applies and limits the discovery process.") (citation omitted); *Af-Cap*, 475 F.3d at 1096 (discovery in aid of execution should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination") (internal quotation marks omitted); *Conn. Bank of Commerce*,

309 F.3d 240, 260 n.10 (5th Cir. 2002) (*Id.*). The power of United States courts to order post-judgment asset discovery is not a freestanding one, but derives from and is necessarily limited by the underlying power to order execution on such assets as Congress permits. That power is clearly limited to property in the United States. *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction.").

Morrison makes clear that such a "hint" of extraterritorial application must be expressed by Congress in the language of the relevant statute, not implied by a court because it thinks it is a good idea in a specific case. Here, the language of the statute could not be clearer that Congress did *not* intend extraterritorial application. Section 1609 of the FSIA states that "the property *in the United States* of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611," and Section 1610 states that "property *in the United States* of a foreign state . . . used for a commercial activity *in the United States*, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States" if one or more of the listed exceptions in Section 1610(a)(1)–(7) are satisfied. *See* 28 U.S.C. §§ 1609–1610 (Pet. App. F at 92–94) (emphasis added). Congress did not intend extraterritorial application

when it made these specific references to "the United States" and to nowhere else.

Ignoring the statutory limitation, the district court issued the Extraterritorial Asset Discovery Order, declaring that it would serve as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*," Aug. 30 Hr'g Tr. at 29-30 (Pet. App. at 31) (emphasis added), and the Second Circuit affirmed its authority to do so. The Extraterritorial Asset Discovery Order thus conflicts with this Court's extraterritoriality jurisprudence as most recently enunciated in *Morrison*, and warrants review on this basis, too.

III. THE PETITION PRESENTS A PURELY LEGAL DISPUTE ON A RECURRING ISSUE OF CRITICAL IMPORTANCE TO THE FOREIGN POLICY CONCERNS OF THE UNITED STATES

The importance of the issue presented by this petition is clear: in the last six years, the United States has filed at least six briefs as *amicus curiae* in which it has presented its view that the FSIA restricts post-judgment discovery of property of a foreign sovereign, and that failing to recognize the FSIA's limitations on such discovery could cause grave harm to the foreign relations of the United States and the treatment of the United States in litigation abroad.[16] Until recently, the

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[16] *See, e.g.*, U.S. *Rubin* Certioriari *Amicus*, 2012 WL 1891593, at *11–12; Brief for the United States of America as *Amicus Curiae* in Support of Reversal, *NML Capital, Ltd. v. Banco Central de la*

courts of appeals had uniformly agreed with this position; now the Second Circuit has clearly rejected it, and this Court should grant review to protect the important interests the United States has raised.

This petition squarely presents this issue: the Extraterritorial Asset Discovery Order targets property outside the United States that could not under any circumstances be the subject of execution under the FSIA. As the Second Circuit acknowledged, NML has "already obtained discovery on Argentina's assets in the United States, and so the new information it will receive pursuant to the Discovery Order relates *only* to Argentina's assets abroad." *See NML Capital*, 695 F.3d at 207 n.6 (Pet. App. A at 11 n.6) (emphasis added). Whether the FSIA prevents this is a pure question of law that this Court should resolve.

Apart from the issue of statutory interpretation, the United States has repeatedly emphasized that limiting discovery in accordance with the substantive limits of Sections 1609 and 1610 of the FSIA is necessary to advance the comity and reciprocity that underlie the FSIA and are an important part of United States policy. As made clear by the United States, extensive

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República Argentina, No. 10-1487-cv(L), 2010 WL 4597226, at *9–10 (2d Cir. Nov. 3, 2010); U.S. *FG Hemisphere Amicus*, 2010 WL 4569107, at *28–29; U.S. *Rubin* 7th Cir. *Amicus*, 2009 WL 8132813, at *13–15; Brief for the United States of America as *Amicus Curiae* in Support of Affirmance at 24 n.5, *Peterson v. Islamic Republic of Iran*, No. 08-17756 (9th Cir. June 25, 2009) (hereinafter "U.S. *Peterson Amicus*"); Third Statement of Interest of the United States, *Rubin v. Islamic Republic of Iran*, No. 03-cv-9370 (N.D. Ill. Nov. 16, 2007).

discovery into a foreign state's assets may be regarded as an affront to, or "impugn[,] the state's dignity," damaging the relationships of the United States with other nations. U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *11–12; *see also* U.S. *Peterson Amicus* at 24 n.5 ("U.S. court orders permitting private litigants to take discovery from foreign states regarding their worldwide assets, even though those assets are not within the court's execution authority under the FSIA, could cause harm to our foreign relations."). Moreover, "'some foreign states base their sovereign immunity decisions on reciprocity;'" *i.e.*, the treatment provided to foreign sovereigns by United States courts. U.S. *Rubin* Certioriari *Amicus*, 2012 WL 1891593, at *12 (quoting *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984)). Accordingly, expansive discovery on the assets of a foreign state may have consequences for the "extensive" property held by the United States overseas "as part of its worldwide diplomatic and security missions." *Id*. These well-founded concerns further argue for review by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2013

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2011

Docket Nos. 11-4065-cv(L),
11-4077-cv(CON), 11-4082-cv(CON),
10-4100-cv(CON), 11-4102-cv(CON),
11-4117-cv(CON), 11-4118-cv(CON),
11-4133-cv(CON), 11-4153-cv(CON),
11-4165-cv(CON), 11-4182-cv(CON)

[Argued: April 23, 2012
Decided: August 20, 2012]

EM LTD.,

Plaintiff,

NML CAPITAL, LTD.,

Plaintiff-Appellee,

-- v. --

REPUBLIC OF ARGENTINA,

Defendant-Appellant,

ADMINISTRACION NACIONAL DE

SEGURIDAD SOCIAL, UNION DE ADMINISTRADORAS DE FONDOS DE JUBILACIONES Y PENSIONES, ARAUCA BIT AFJP S.A. CONSOLIDAR AFJP S.A., FUTURA AFJP S.A., MAXIMA AFJP S.A., MET AFJP S.A., ORIGENES AFJP S.A., PROFESION AUGE AFJP S.A.,

Defendants,

BANK OF AMERICA, N.A.,

Intervenor.

Before: WALKER, McLAUGHLIN and CABRANES, Circuit Judges.

Defendant-Appellant the Republic of Argentina appeals from the September 2, 2011 order of the District Court for the Southern District of New York (Thomas P. Griesa, Judge) granting Plaintiff-Appellee NML Capital, Ltd.'s motion to compel non-parties Bank of America and Banco de la Nación Argentina to comply with subpoenas duces tecum, and denying Argentina's motion to quash the subpoena issued to Bank of America. We hold that the district court's order compelling compliance with the subpoenas does not infringe on Argentina's sovereign immunity. AFFIRMED.

THEODORE B. OLSON, Gibson, Dunn & Crutcher LLP, Washington, DC (Robert A. Cohen, Dennis H. Hranitzky, Eric C. Kirsch, Dechert

LLP, New York, NY, Matthew D. McGill, Gibson, Dunn & Crutcher LLP, Washington, DC, on the brief), for Plaintiff-Appellee.

JONATHAN I. BLACKMAN (Carmine D. Boccuzzi, Christopher P. Moore, on the brief), Clearly Gottlieb Steen & Hamilton LLP, New York, NY, for Defendant-Appellant.

JOHN M. WALKER, JR., Circuit Judge:

In these consolidated appeals, we consider the scope of discovery available to a plaintiff in possession of a valid money judgment against a foreign sovereign. Specifically, we review an order of the District Court for the Southern District of New York (Thomas P. Griesa, Judge) compelling two non-party banks to comply with subpoenas duces tecum seeking information about Argentina's assets located outside the United States. Argentina argues that the banks' compliance with the subpoenas would infringe on its sovereign immunity. We conclude, however, that because the district court ordered only discovery, not the attachment of sovereign property, and because that discovery is directed at third-party banks, Argentina's sovereign immunity is not affected.

BACKGROUND

In December 2001, Defendant-Appellant the Republic of Argentina defaulted on payment of its external debt. While most of Argentina's bondholders agreed to voluntary restructurings in 2005 and 2010,

others, including Plaintiff-Appellee NML Capital, Ltd. ("NML"), did not. Beginning in 2003, NML filed eleven actions in the Southern District of New York to collect on its defaulted Argentinian bonds. Jurisdiction in the district court was premised on Argentina's broad waiver of sovereign immunity in the bond indenture agreements.[1] The district court has entered five money judgments in NML's favor totaling (with interest) approximately $1.6 billion. It has also granted summary judgment to NML in the remaining six actions, in which NML's claims total (with interest) more than $900 million. Argentina has not satisfied these judgments and NML has thus attempted to execute them against Argentina's property. This litigation has involved lengthy attachment proceedings before the district court and multiple appeals to this

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[1] The waiver states, in part,

> To the extent the Republic [of Argentina] or any of its revenues, assets or properties shall be entitled . . . to any immunity from suit, . . . from attachment prior to judgment, . . . from execution of a judgment or from any other legal or judicial process or remedy, . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

Joint Appendix 1127.

court.[2] Here we will recite only the facts relevant to the instant appeals.

NML has pursued discovery concerning Argentina's property located in the United States since 2003. In 2010, "[i]n order to locate Argentina's assets and accounts, learn how Argentina moves its assets through New York and around the world, and accurately identify the places and times when those assets might be subject to attachment and execution (whether under [U.S. law] or the law of foreign jurisdictions)," NML served the subpoenas at issue in these appeals on two non-party banks, Bank of America ("BOA") and Banco de la Nación Argentina ("BNA"). NML Br. at 9. From the materials sought in these subpoenas, NML hoped to gain an understanding of Argentina's "financial circulatory system." Joint Appendix ("JA") 1021.

NML served the first subpoena, directed at BOA, on March 10, 2010. The subpoena seeks documents relating to all BOA accounts maintained by or on behalf of Argentina without territorial limitation. JA 672. In particular, it requests documents sufficient to identify the opening and closing dates of Argentina's accounts, current balances, and transaction histories

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[2] For additional background on Argentina's default and the resulting litigation, see, for example, NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254, 256 & n.4 (2d Cir. 2012); NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172, 175-76 (2d Cir. 2011); Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 124-27 (2d Cir. 2009); EM Ltd. v. Republic of Argentina, 473 F.3d 463, 466 & n.2 (2d Cir. 2007).

from 2009 through the production date. JA 667, 672. It also requests from BOA documents relating to electronic fund transfers sent through the SWIFT system.[3] JA 672-73. The BOA subpoena defines "Argentina" broadly to include Argentina's "agencies, ministries, instrumentalities, political subdivisions [and] employees," as well as Argentina's current president, Cristina Fernández de Kirchner, and her late husband, former president Néstor Carlos Kirchner. JA 666, 674.

NML served the second subpoena on BNA, an Argentinian bank with a branch in New York City, on June 14, 2010. JA 900-09. The BNA subpoena requests documents relating to any assets or accounts maintained at BNA by Argentina or for Argentina's benefit, any debts owed by BNA to Argentina, and transfers into or out of Argentina's accounts, including documents identifying the transfer counterparties. JA 908-09. Again, "Argentina" is broadly defined to include "its agencies, instrumentalities, ministries, political subdivisions, representatives, State Controlled Entities . . . , and all other Persons acting or purporting to act for or on behalf of Argentina." A "State Controlled Entity" is defined to include any entity controlled or more than 25% owned by Argentina. JA 903-04.

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[3] SWIFT (which stands for Society for Worldwide Interbank Financial Telecommunication) is an electronic messaging system that provides instructions to banks, brokerages, and other financial institutions for money transfers. Most transactions denominated in dollars are routed through banks in New York. JA 667, 1874-76.

After the subpoenas were served, Argentina, later joined by BOA, moved to quash the BOA subpoena. Both banks then set forth objections to the subpoenas, and NML moved to compel their compliance. Before the district court ruled on the objections and motions, NML agreed to modify its subpoenas, including by allowing BOA to exclude lower-level Argentinian officials from searches of SWIFT messages. NML also agreed to enter into a protective order that would permit the banks to designate documents as confidential and require that those documents receive confidential treatment by all parties. At an August 30, 2011 hearing, and in a subsequent September 2, 2011 order (the "Discovery Order"), the district court denied the motion to quash and granted the motions to compel. JA 1881, 1900-01, 1915-16. At the hearing, the district court approved the subpoenas in principle, indicating that it had made its final determination that extraterritorial asset discovery did not infringe on Argentina's sovereign immunity, and reaffirmed that it intended to serve as a "clearinghouse for information" in NML's efforts to find and attach Argentina's assets. JA 1868, 1881. The district court stated, however, that it expected the parties to negotiate further on the specific production requests contained in the subpoenas, saying that the subpoenas must include "some reasonable definition of the information being sought." JA 1868. For example, the district court noted that "there is no use getting information about something that might lead to attachment in Argentina because that would be useless information" as no Argentinian court would allow sovereign property to be attached within the country. JA 1868. Thus, the district court, while open to discovery of assets abroad, sought to limit the

subpoenas to discovery that was reasonably calculated to lead to attachable property.

Following the district court's ruling, NML and BOA negotiated further modifications to the subpoenas, including by designating search keywords.[4] BOA has begun producing documents pursuant to the subpoena. With respect to the BNA subpoena, NML agreed to limit the requested individuals to the current and most recent former president, and to exclude all documents relating to assets or transfers exclusively within Argentina. JA 1932, 1940. According to NML, BNA neither engaged in negotiations nor complied with the subpoena. On December 14, 2011, the district court ordered BNA's compliance with the modified subpoena by January 6, 2012. See Order, NML Capital, Ltd. v. Republic of Argentina, No. 03-cv-8845 (S.D.N.Y. Dec. 14, 2011), ECF No. 452.

Argentina, but not the banks, appealed the district court's September 2, 2011 Discovery Order.

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[4] On December 2, 2011, NML moved this court to supplement the record on appeal with communications among it, the banks, and the district court reflecting negotiations that occurred after September 2, 2011, the date the district court entered the Discovery Order. See Mot. to Supplement the Record, No. 11-4065-cv(L) (2d Cir. Dec. 2, 2011), ECF No. 112. Because we have sufficient information to decide these appeals based on the materials in the record and the district court dockets, of which we take judicial notice, the motion to supplement the record is DENIED. See Fed. R. App. P. 10(e); Jeffreys v. United Techs. Corp., 357 F. App'x 370, 372-73 (2d Cir. 2009); Salinger v. Random House, Inc., 818 F.2d 252, 253 (2d Cir. 1987).

DISCUSSION

Argentina challenges the Discovery Order's legal premise that compliance with the subpoenas does not infringe on Argentina's sovereign immunity. It argues that the Discovery Order, by compelling disclosure about Argentinian assets abroad, violates the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq., which provides the sole source of federal court jurisdiction over foreign nations, see Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-35 (1989). We hold that because the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed. The district court therefore did not abuse its discretion in ordering BOA and BNA to comply with NML's subpoenas.

I. Jurisdiction

Before turning to the merits, we first address NML's contention that we lack subject matter jurisdiction to consider these appeals because the Discovery Order is not a "final decision" under 28 U.S.C. § 1291. The issue arises here in the context of supplemental post-judgment proceedings instituted by NML to facilitate the execution of its judgments against Argentina. See Fed. R. Civ. P. 69(a). In post-judgment litigation, the "final decision" is not the underlying judgment that the plaintiff is attempting to enforce, but the subsequent judgment that concludes the collection proceedings. See In re Joint E. & S. Dists. Asbestos Litig., 22 F.3d 755, 760 (7th Cir. 1994). The Discovery Order is not a "final decision" in this sense

because it does not terminate NML's collection proceedings against Argentina. Under the collateral order doctrine, however, a decision is "final" if it (1) conclusively determines a disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment. Lora v. O'Heaney, 602 F.3d 106, 111 (2d Cir. 2010); see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (enumerating same three requirements). Most orders granting discovery are not final decisions because they are effectively reviewable on appeal from a final judgment, see Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 606 (2009), or by an appeal from a contempt citation after the target of a subpoena resists the challenged order, see Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992); In re Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001, 490 F.3d 99, 106-07 (2d Cir. 2007).

Under the particular circumstances of this appeal, however, the district court's decision granting discovery is a collateral order that is immediately appealable. Cohen's first two requirements are easily met. First, the district court indicated that the Discovery Order represented its final determination that extraterritorial asset discovery did not infringe on Argentina's sovereign immunity.[5] Second, the scope of discovery

[5] We consider the Discovery Order to be district court's final word despite its direction that NML and the banks continue to negotiate the details of the subpoenas. See JA 1907, 1946-47. Argentina's appeal concerns only the central legal issue of whether obtaining discovery from a third party of a foreign sovereign's assets outside the United States infringes on sovereign immunity, and not the

available to NML is separate from the merits issue of whether NML can execute against a particular asset to satisfy its judgments.

Cohen's third factor is satisfied because Argentina will be unable to obtain effective review in a United States court of the Discovery Order through a later appeal of a final judgment. Because the Discovery Order grants NML discovery respecting foreign assets, any future attachment or collection proceeding would be conducted in a foreign court.[6] Argentina would have no further opportunity to challenge the Discovery Order in this or any other United States court. Moreover, depending on the laws of the jurisdictions where any attachable property is located, NML may be able to levy Argentina's foreign assets directly, without instituting a separate proceeding, rendering the Discovery Order unreviewable by any court. See Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221,

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parameters of the document requests. See Trans. of Oral Argument on Mot. to Stay at 4, NML Capital, Ltd. v. Republic of Argentina, No. 11-4065-cv(L) (2d Cir. Nov. 1, 2011), in JA 1943, 1946 (counsel for Argentina stating that the subpoenas were subject to modification on the details and that its appeal did not concern "the details").

[6] NML argues that the subpoenas may allow it to discover the location of Argentinian assets in the United States, as well as assets held abroad. However, NML has already obtained discovery on Argentina's assets in the United States, and so the new information it will receive pursuant to the Discovery Order relates only to Argentina's assets abroad. NML's speculation that it might uncover assets in the United States that were somehow missed by its earlier discovery requests is too remote to alter our jurisdictional analysis.

1225 (7th Cir. 1993) (recognizing that an order granting discovery may be a final, appealable order where the "sole object of [a post-judgment] proceeding is discovery of the judgment debtor's assets" and the assets discovered may then be levied without a court order). Finally, because the Discovery Order does not direct compliance from Argentina itself, Argentina cannot obtain review through disobedience and contempt. See Church of Scientology, 506 U.S. at 18 n.11; Arista Records, LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010). Although the record before us is silent on BNA's compliance (or lack thereof), that BOA has begun production suggests that it would rather comply than risk being held in contempt of court.

In sum, because the Discovery Order conclusively resolves the discovery issue, is separate from the merits, and will be unreviewable through a later appeal in the United States, we have jurisdiction to consider Argentina's appeal.

II. Merits

Turning to the merits, Argentina argues that the Discovery Order violates the FSIA by requiring disclosure about assets Argentina claims are immune from attachment.

We review the district court's order for abuse of discretion. See Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 79 (2d Cir. 2012); United States v. Rigas, 583 F.3d 108, 125 (2d Cir. 2009). "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or

rendered a decision that cannot be located within the range of permissible decisions." In re Sims, 534 F.3d 117, 132 (2d Cir. 2008) (citations, alterations, and internal quotation marks omitted). A district court has broad latitude to determine the scope of discovery and to manage the discovery process. See, e.g., In re Agent Orange Prod. Liab. Litig., 517 F.3d 76, 103 (2d Cir. 2008).

At the outset, we note that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts. Post-judgment discovery is governed by Federal Rule of Civil Procedure 69, which provides that "[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2). The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment. See id.; Fed. R. Civ. P. 26(b)(1) (allowing a court to "order discovery of any matter relevant to the subject matter involved in the action"); First City, Texas-Houston, N.A. v. Rafidain Bank, 281 F.3d 48, 54 & n.3 (2d Cir. 2002) ("Rafidain II"); Libaire v. Kaplan, 760 F. Supp. 2d 288, 293 (E.D.N.Y. 2011). New York state's post-judgment discovery procedures, made applicable to proceedings in aid of execution by Federal Rule 69(a)(1), have a similarly broad sweep. The New York Civil Practice Law and Rules provides that a "judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment." N.Y. C.P.L.R. § 5223; see David D. Siegel, New York Practice § 509 (5th ed. 2011) (describing § 5223 as "a broad criterion authorizing investigation through any

person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts"). Of course, as in all matters relating to discovery, the district court has broad discretion to limit discovery in a prudential and proportionate way. See Fed. R. Civ. P. 26(b)(2); see, e.g., Crawford-El v. Britton, 523 U.S. 574, 598-99 (1998).

It is not uncommon to seek asset discovery from third parties, including banks, that possess information pertaining to the judgment debtor's assets. See Fed. R. Civ. P. 69(a)(2) (permitting discovery "from any person"); see, e.g., G-Fours, Inc. v. Miele, 496 F.2d 809, 810-12 (2d Cir. 1974) (upholding contempt citation against judgment debtor's wife and debtor's wholly-owned corporation for failing to respond to a discovery request pursuant to Rule 69); Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 561 (S.D.N.Y. 1977) (permitting discovery against the judgment debtor's bank "insofar as it relates to the existence or transfer of [the judgment debtor's] assets"); ICD Grp., Inc. v. Israel Foreign Trade Co. (USA) Inc., 638 N.Y.S.2d 430, 430 (1st Dep't 1996) (permitting discovery from debtor's accountant, citing the rule allowing discovery from "any third person with knowledge of the debtor's property"); see also 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3014 (2d ed. 2012) (third persons may be examined about the assets of the judgment debtor so long as the motive is not to harass the third party).

Nor is it unusual for the judgment creditor to seek disclosure related to assets held outside the jurisdiction of the court where the discovery request is made. See Rafidain II, 281 F.3d at 54 ("A judgment creditor is

entitled to discover the identity and location of any of the judgment debtor's assets, wherever located.") (quoting Nat'l Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982)); Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 238-39 (S.D.N.Y. 2011) (subpoena on New York branch of Indian bank "reaches all responsive materials within the corporation's control, even if those materials are located outside New York"); Raji v. Bank Sepah-Iran, 529 N.Y.S.2d 420, 423-24 (Sup. Ct. 1988) (allowing discovery into judgment debtor's foreign assets). Thus, in a run-of-the-mill execution proceeding, we have no doubt that 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.

Argentina argues, however, that the normally broad scope of discovery in aid of execution is limited in this case by principles of sovereign immunity. Argentina maintains that its property abroad is categorically immune from attachment, and that the district court cannot order discovery into those assets. Without reaching the unanswered question of whether the FSIA extends immunity to property held outside the United States, we reject Argentina's argument for two reasons.

First, the Discovery Order does not implicate Argentina's immunity from attachment under the FSIA. It does not allow NML to attach Argentina's property, or indeed have any legal effect on Argentina's property at all; it simply mandates BOA and BNA's compliance with subpoenas duces tecum. We recognize that a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign

countries. However, the district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments. Rafidain II, 281 F.3d at 53-54; cf. Riggs v. Johnson Cnty., 73 U.S. 166, 187 (1867) ("Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."). Thus in Rafidain II we held that a "waiver by a foreign state [of sovereign immunity], rendering it a party to an action, is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets." 281 F.3d at 53-54; Walters v. Indus. & Commercial Bank of China, Ltd., 651 F.3d 280, 297 (2d Cir. 2011); see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, 637 F.3d 373, 380 (D.C. Cir. 2011) (upholding contempt sanctions against foreign sovereign for failing to comply with general asset discovery order); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1477-78 (9th Cir. 1992) (holding that an instrumentality of a foreign nation must respond to discovery about its worldwide assets and that it could not use the FSIA to conceal its assets from the district court). Whether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this determination does not affect discovery. Whatever hurdles NML will face before ultimately attaching Argentina's property abroad (and we have no doubt there will be some), it need not

satisfy the stringent requirements for attachment in order to simply receive information about Argentina's assets.

The Seventh Circuit came to a different conclusion in Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), holding that the FSIA requires a judgment creditor to identify specific non-immune assets before it is entitled to further discovery about those assets. Id. at 796. We respectfully disagree with the Seventh Circuit to the extent it concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sovereign. Such a result is not required by the FSIA and is in conflict with our holding in Rafidain II that a district court's jurisdiction over a foreign sovereign extends to proceedings to enforce a valid judgment. Nor does our holding in EM, 473 F.3d 463, cited by the Seventh Circuit, support the result in Rubin. In EM, a case primarily about attachment, the district court denied a discovery request after determining that the judgment creditor made no showing of a reasonable basis to assume jurisdiction over the entity against whose funds it wished to execute a judgment. Id. at 486. That ruling was well within the district court's discretion to limit discovery where the plaintiff had not demonstrated any likelihood that the discovery it sought related to attachable assets. But EM did not hold that the discovery request would violate the FSIA.

The Discovery Order, moreover, does not infringe on any immunity from the district court's jurisdiction that

Argentina otherwise might enjoy. Argentina does not (and could not) argue that the district court lacked subject matter or personal jurisdiction over it because Argentina expressly waived any claim to immunity in the bond agreements. See, e.g., NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254, 257 (2d Cir. 2012); EM Ltd. v. Republic of Argentina, 473 F.3d 463, 481 & n.18 (2d Cir. 2007). Once the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules. First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 177 (2d Cir. 1998) ("Rafidain I"). Argentina does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable; it therefore cannot dispute that the district court has jurisdiction to order discovery designed to aid in enforcing those judgments.

In this vein, it is important to distinguish discovery requests made before a court conclusively has jurisdiction over a foreign sovereign from those made after such jurisdiction has been ascertained. Where a plaintiff seeks to initially establish that the court has subject matter jurisdiction over a sovereign, discovery and immunity are almost invariably intertwined. See Rafidain I, 150 F.3d at 174-76 (noting that the district court must engage in a "delicate balancing 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery'" where it was unclear if the defendant had a claim to jurisdictional immunity)

(quoting Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992)). Because sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation, a court must be "circumspect" in allowing discovery before the plaintiff has established that the court has jurisdiction over a foreign sovereign defendant under the FSIA. Id. at 176-77. But NML seeks discovery from a defendant over which the district court indisputably had jurisdiction. Thus, the concerns voiced in Rafidain I are not present and our precedents relating to jurisdictional discovery are inapplicable.

The second principal reason for holding that the Discovery Order does not infringe on Argentina's sovereign immunity is that the subpoenas at issue were directed at BOA and BNA--commercial banks that have no claim to sovereign immunity, or to any other sort of immunity or privilege. Thus, the banks' compliance with subpoenas will cause Argentina no burden and no expense. See id. at 177 (holding that discovery requests directed at non-immune party did not infringe on the sovereign immunity of a third party, even if the third party retained a colorable claim of immunity). To the extent Argentina expresses concern that the subpoenas will reveal sensitive information, it is asserting a claim of privilege and not a claim of immunity. The FSIA says nothing about privilege. Indeed it appears that Congress intended for courts to handle claims of privilege using the existing procedures under the Federal Rules. See H.R. Rep. No. 94–1487, at 23 (1976) ("The [FSIA] does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. . . . [If] a private plaintiff sought the production of sensitive governmental documents of a foreign state,

concepts of governmental privilege would apply."). NML has agreed to enter into a protective order with the banks, see NML Br. at 21 n.6, and Argentina and the banks can avail themselves of the other protections contained in the Federal Rules and our precedents as necessary to protect any confidential information.[7] We are confident that these mechanisms will provide Argentina all the protection to which it is entitled. And, if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others, to the extent that immunity has not been waived. The Discovery Order at issue here, however, does nothing to endanger Argentina's sovereign immunity.

CONCLUSION

For the foregoing reasons, the district court's order is AFFIRMED.

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[7] To the extent Argentina is attempting to keep sensitive data about its finances away from NML--i.e., to prevent NML from collecting on its judgments--its concerns are entitled to no weight.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Nos: 03 Civ. 8845 (TPG)
05 Civ. 2434 (TPG)
06 Civ. 6466 (TPG)
07 Civ. 1910 (TPG)
07 Civ. 2690 (TPG)
07 Civ. 6563 (TPG)
08 Civ. 2541 (TPG)
08 Civ. 3302 (TPG)
08 Civ. 6978 (TPG)
09 Civ. 1707 (TPG)
09 Civ. 1708 (TPG)

[Filed: September 2, 2011]

NML CAPITAL, LTD.,

Plaintiff,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

OPINION

On May 17, 2010, the Republic of Argentina moved to quash a subpoena dated March 10, 2010 served by NML Capital, Ltd. ("NML") on non-party Bank of America, N.A. On August 9, 2010, NML cross-moved to compel Bank of America to comply with the subpoena.

On November 1, 2010, NML moved to compel non-party Banco de la Nacion Argentina ("BNA") to comply with a subpoena dated June 14, 2010 served by NML on BNA.

For the reasons stated on the record at the hearing held on August 30, 2011, the court grants plaintiff's motions to compel Bank of America and BNA to comply with the subpoenas, subject to modifications of details. The court denies the Republic's motion to quash the subpoena served on Bank of America.

This opinion resolves the motions listed as document numbers 306 and 365 in case 03 Civ. 8845, as well as the same motions in the related cases.

SO ORDERED.

Dated: New York, New York
September 2, 2011

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 CV 2507(TPG) and 03 CV 8845(TPG)

New York, N.Y.
August 30, 2011
2:55 p.m.

EM Ltd., et al.,
Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,
Defendant.

NML CAPITAL, LTD,
Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,
Defendant.

Before:

HON. THOMAS P. GRIESA
District Judge

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* * *

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[THE COURT:]

Let's go on to the other matters before the Court.

I think the principal one is the discovery problem. Can somebody address that?

MR. COHEN: Thank you, your Honor.

Robert Cohen from Dechert for NML.

Just to set the table a little bit, your Honor, we were here in December. At that time there were motions to compel and motions to quash subpoenas to three nonparty banks. The acronym BNA is the Banco de la Nacion Argentina, and that is a government-owned bank that has a branch here in New York. The second one was to an entity called the Bank for International Settlements which is located in Switzerland. And the third was a subpoena to Bank of America located here in New York. And each of those subpoenas has slightly

different issues that have been raised with respect to them, but they have an overarching purpose.

THE COURT: When were the subpoenas issued?

MR. COHEN: From March to October of 2010.

THE COURT: 2010, OK.

MR. COHEN: When we were here in December, your Honor

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was focused on whether there was a real world purpose for all of this discovery, was this something that could yield information that could result in attachable assets someplace in the world. And that was where we left it in December and you sent us back to do a little additional briefing to elucidate principally three issues.

The first was a little bit more about what kinds of assets are attachable in the U.S. under the Foreign Sovereign Immunities Act. And I think your Honor told us the answer to that this morning in your discussion about Weltover and the nature of property that is susceptible to attachment. And the one thing that I think is worth repeating from what came out of that this morning, contract rights are attachable rights. And one of the things that we think this discovery will reveal, potentially, are existing contracts by various Argentine entities around the world, but in the U.S. as well, to acquire equipment like, perhaps, the Honeywell acquisition of parts for their satellite.

The second question we had since I was urging that this discovery could be used to find assets abroad was how do other countries approach the issue of attaching, seizing sovereign assets. And our brief gave you some examples from England, from France, from Switzerland, from Germany and from Belgium where those courts have embraced the notion that "commercial property" is available for attachment. And in

[p.26]

fact, the interpretation of commercial property in many of those jurisdictions is even broader than under the FSIA.

And since that briefing has been completed, your Honor, NML has obtained what commentators have called a landmark decision in Belgium, and I have a copy which I can leave with your Honor. In June of this year, the Court of Appeals in Brussels confirmed an attachment that we had served on a bank in Brussels, Fortis Bank, and the account that we had attached was the account of the embassy in Brussels.

Argentina argued that those kinds of accounts are immune and that the waiver of immunity that is contained in the fiscal agency agreement that covers these bonds was not specific enough to be a waiver of diplomatic property.

And the Brussels court for the first time said a waiver as broad as that that is found in the fiscal agency agreement which waives immunity to the full extent permitted by law in any of the jurisdictions

where we are seeking to attach includes diplomatic property and affirmed that attachment of the diplomatic bank account.

THE COURT: Was the Brussels court trying to apply the concept to commercial activity?

MR. COHEN: It does have a concept of commercial activity, and it found that a diplomatic bank account used to buy things is not immune and you need no special waiver, no special language in a waiver of immunity to allow a judgment

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creditor like NML to seize that property.

Similarly, your Honor, in England recently we had a case before the Supreme Court of England -- it is like our Supreme Court -- it used to be the House of Lords. You get there by the equivalent of a petition for certiorari. In that situation, your Honor, we were simply seeking to have one of our U.S. judgments recognized in England so that we could pursue recovery.

Argentina resisted tenaciously, and they told the court our motive -- and they were right in part -- for wanting to register our judgment there was because we might seek to seize the proceeds of future securities offerings if they took place in England. They recognized that we would be able to do that in England if we had a judgment, that is, they go to market and try to raise money by issuing new bonds, we might be able to seize the proceeds of those bonds in England. And we

succeeded at the trial court level defeating their arguments. The Court of Appeals reversed on all of the grounds. And the Supreme Court in what, again, commentators say is a landmark decision under English jurisprudence --

THE COURT: Do you mean the House of Lords?

MR. COHEN: It used to be the House of Lords. Two years ago they created the Supreme Court. They took the law lords and put them in a separate body called the Supreme Court.

THE COURT: What did they hold?

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MR. COHEN: They held that the waiver of immunity and the consent to jurisdiction were sufficient to allow them to recognize our judgment. That was one of the key holdings.

There was two other holdings that reconciled some inconsistencies that the lower courts had found with respect to the Code of Civil Procedure.

THE COURT: In both England and Belgium, you are trying to enforce the judgments you are trying to enforce here?

MR. COHEN: That's right, your judgments.

THE COURT: Maybe the courts of the world are getting a little sick of Argentina's lawlessness.

MR. COHEN: Then I won't go on to France and Switzerland but they are going to get sick of it soon to, but we are proceeding in all of those jurisdictions.

To bring this back to the discovery that we are seeking, your Honor, we are asking the three banks to provide us with information about the business of Argentina, what contracts do they have, where have they transferred money.

Let me take it back, for example, to BNA. BNA is the Bank of Argentina. It is the largest bank in Argentina. It has branches throughout Argentina, in New York, in Florida and abroad. New York BNA is a unified entity. It has a branch in New York. It is registered with the Banking Department.

We served a subpoena on BNA and said, tell us about accounts anywhere in your bank. We are not seizing them. We

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are not trying to take any money now. This is simply discovery. Tell us about movements of funds from those accounts, where it went. Do you have any notes that are due? Have you lent money to Argentina? Let us understand what Argentina is doing through your institution.

And we have listed ministries -- ministries like the ministry that bought the scientific equipment that your Honor found we could attach. You may remember it was something called an AMTP account -- that is an acronym for the Ministry of Science and Technology.

We learned about that account, that it was at BNA here in New York. Argentina argued that that was used for scientific and educational purposes and couldn't be attached.

And your Honor described why that was wrong, that you said that it was the fundamental kind of commercial activity, buying equipment. You don't look to the purpose. You look to the nature of the activity. And an account used to buy scientific equipment is certainly attachable. That was your ruling, and we think it was exactly right.

THE COURT: Can I just interrupt.

It seems to me, and this has been discussed before but probably not with the precision and incisiveness you are suggesting now -- let me interrupt myself.

A long time ago in this case I said, and there really was no objection by the Republic, that this court would be a

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clearinghouse for information about commercial activity or other activity that might lead to attachments or executions anywhere in the world, and there was an attempt to get information from the Republic. And I don't remember exactly what happened, but there was no objection to that. So I still have the intention of treating this court as a clearinghouse for information.

The problem I have is that there should be some reasonable definition of the information being sought. Also, there is no use getting information about something that might lead to an attachment in Argentina because that would be useless information, for obvious reasons.

And I don't see that in your subpoenas there is sufficient definition. In other words, if you want to find out from the New York branch of BNA or BNA in general what transactions the Republic has, what accounts the Republic has, everything that the Republic does with that bank, it seems to me that is too broad because I have no reason to believe that everything that the Republic did with BNA would lead to attachable property.

My problem is with making it clear that, as far as BNA, that things that might be conceivably attachable in Argentina are not being inquired about and, beyond that, for things outside the Republic, I don't sense that there is a sufficient definition.

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MR. COHEN: Your Honor, we agree that it would be futile to try to attach assets in Argentina.

THE COURT: Right.

MR. COHEN: We think that the burden of determining whether particular transactions will lead to assets that we can attach somewhere in the world is a burden that we ought to be able to assume and

pursue. The burden on BNA to produce this information is minimal, we think.

THE COURT: Why is it minimal?

MR. COHEN: Because they can run through their computer systems, properly instructed, the names of the accounts that we are asking for.

THE COURT: They could what?

MR. COHEN: Through their computer systems, they could ask for information about all of the ministries that we have listed. We say, tell us about Argentina and any of its ministries, to shorten the definition. So, for example, the Ministry of Science and Technology, do you have an account anywhere in the bank for this entity?

They can run that name through their system and give us an answer. If the answer is yes, we ask them to tell us about transactions that were conducted in that account for a limited period of time. And we will take that information and determine whether or not it is suggestive of a commercial transaction to buy goods, to invest money someplace.

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We will keep this information confidential. We will use it only for the purposes of this litigation. We have no interest in sharing that information with anyone or using it for any other purpose. It will be a forensic exercise to uncover assets.

Bank of America, similarly, they have wire transfer information on what is called a SWIFT system. Every day they get hundreds and hundreds of subpoenas, both from the government and from private parties, where they are obligated to put into their system the names of the parties who are the subject of the subpoena and produce information with respect to that, historical information.

We are not trying to interfere with transactions. We will take that information about a wire transfer from a ministry in Argentina -- I used this example last time -- to Mercedes-Benz in Germany where it says acquisition of trucks in the subject matter of the SWIFT message, and we will do the homework necessary to find that transaction and go wherever it takes us.

Bank of America, to the extent it has any burden at all, we will share the cost of it. We will take off of their hands any manual work they say they have to do.

The one complaint that they made, your Honor, was that we included a list of individuals. And we have voluntarily agreed to withdraw the names of the individuals.

[p.33]

They say we have not done any narrowing. Well, we have. We addressed the burden that Bank of America has suggested that they would have to bear if the subpoena was compelled to be responded to.

* * *

[MR. COHEN:]

The burden is minimal. And we think that all three of these subpoenas, your Honor, will yield information that has the potential to actually end this litigation. You need to have a little courage to give it to us. We are not talking about jurisdictional discovery. We are not even talking about execution on any particular asset. All that we are talking about is discovery.

There is nothing in the Foreign Sovereignty Immunities Act that even talks about discovery. In fact the legislative

[p.34]

history says that the rules in place are sufficient to deal with discovery issues that arise under the Foreign Sovereign Immunities Act. Argentina, since the beginning of this litigation, has tried to conflate the issues of jurisdictional discovery and execution with normal asset search discovery.

Now, we have some unfortunate decision out of the Seventh Circuit that you will hear about, the Rubin case that said a judgment creditor can only get discovery with respect to execution if he can identify the asset. We think that is wrong. There is a petition for certiorari being prepared.

But in contrast to that, your Honor, there is a decision out of the D.C. Circuit, in an FG Hemisphere case which focused on whether a district court could enter sanctions for a sovereign's failure to provide execution related discovery, asset discovery. And in

that case, the discovery that the Democratic Republic of Congo failed to provide was discovery relating to assets around the world. The District Court ordered them to produce it. They wouldn't produce it.

The District Court imposed sanctions of, I think it was $1,000 a day, and the D.C. Circuit affirmed the imposition of the sanctions. It said, I don't have to get to the question of whether the court had the authority to order discovery about assets abroad because nobody raised it. Nobody raised it until the government raised it in amicus on appeal. So the idea that the D.C. circuit would approve sanctions for failure to provide

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discovery related to assets worldwide suggests that they think it is perfectly permissible for the District Court to do that.

I suggest, your Honor, it is time for this Court to help us find these assets. The burden is minimal and we will share it. We ask that our subpoenas, that you compel response to the subpoenas.

And we are happy to propose orders, your Honor, that would take care of the issue --

THE COURT: Talk about the Bank of America for a minute.

MR. COHEN: Sure.

THE COURT: Why did you select the Bank of America? Do you have some reason to believe that the

Republic or its ministries have accounts at the Bank of America?

MR. COHEN: We think that the Bank of America serves as an intermediary bank because it is one of the -- what we call -- money center banks, and all transactions that are done in dollars move through -- most of them -- move through the money center banks in New York. We picked Bank of America because it is a very big bank and it was likely to be involved in the movement of funds, dollar funds through New York.

THE COURT: Are you talking about the possibility of accounts in the name of the Republic or of accounts in the name of a ministry?

MR. COHEN: These are not even accounts, although we

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do ask if they have any accounts, but the focus of our discovery is where they have been served as an intermediary bank for the movement of money from Argentina --

THE COURT: How would that be recorded with the Bank of America?

MR. COHEN: They get a SWIFT message. SWIFT is an acronym.

THE COURT: What is that? I don't know what it is.

MR. COHEN: It is Society for Worldwide International Fund Transfers. That is the acronym. I believe it is a bank-owned entity -- not solely Bank of America, but it is an entity that provides the service of electronic communications with respect to the transfer of funds, sort of like wire transfer information.

So you give a SWIFT instruction to your local bank in Argentina. Let's say the Ministry of Science and Technology wants to send money to that Mercedes-Benz producer in Germany. It will say to its bank, send dollars X to Mercedes-Benz' bank which is Deutsche Bank in Germany. That will go through a money center bank. It will get a SWIFT message: Take from our account in this bank and transfer to the bank there. And it will have a line that will say the purpose of the transfer. We want to see all of the SWIFT messages that Bank of America has --

THE COURT: The SWIFT message is a message -- go over

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it again -- from whom to whom?

MR. COHEN: It is a message from the bank of the Argentine entity. So let's say the Ministry of Science and Technology tells its bank, and let's say it is BNA -- probably not, but let's say it is BNA -- I need to send money to Germany. The bank will create a SWIFT message.

THE COURT: Well, BNA is not just going to send money to Germany. BNA, presumably, the ministry has an account at the bank?

MR. COHEN: Yes, at the bank in Argentina.

THE COURT: So there is someplace to get the money from?

MR. COHEN: Yes.

THE COURT: And they want to have money from that account sent to --

MR. COHEN: a bank in Germany --

THE COURT: -- to pay for Mercedes products?

MR. COHEN: They need to send dollars.

THE COURT: It has to be in dollars.

MR. COHEN: So the SWIFT message gives instructions to the parties in this transaction what is supposed to happen. And it says, wire from this account from the Ministry of Science and Technology's account a million dollars to Deutsche Bank in Berlin for the benefit of Mercedes-Benz.

THE COURT: Why does that have to go through New York?

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MR. COHEN: Because dollar transactions will come through New York. They will convert the pesos to dollars. The dollars will then be sent to Europe. And they may even be converted to euros, for example, if they have to be. But if payment is in dollars, money center banks in New York are involved in the transaction.

THE COURT: So your theory is that you might get information which would form the basis for an application in Germany, for instance, of an attachment of a contractual right or something attachable under German law?

MR. COHEN: Or if we had found a transfer to Honeywell.

THE COURT: Let's forget Honeywell. Let's stick to Germany.

And you say there would be evidence at the Bank of America of such transfers?

MR. COHEN: Yes, your Honor. We have a good faith belief that that is the case. In fact, we think that has to be the case.

THE COURT: Let me ask you this. What you are talking about now are transfers that have occurred?

MR. COHEN: Yes.

THE COURT: I guess it is obvious, but I am going to ask you the obvious. Why is that helpful, because it is in the past?

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MR. COHEN: Because the contract may well not have been fulfilled, like the Honeywell situation.

THE COURT: Maybe there would be a down payment?

MR. COHEN: Exactly, your Honor, or there may be a series of payments and this is one of them.

THE COURT: How broad would this discovery order be as far as time? Is it something that would require compliance in the future or just --

MR. COHEN: Through the date of response.

THE COURT: As of the time of the order -- what is on record at the time of the order?

MR. COHEN: I think we go back two years and through the date –

THE COURT: But it would not be an order directed to supplying future information?

MR. COHEN: If we are successful in doing our forensic examination and can come back with good cause to show that we need more information, we might try that, but there is no request that it be

continuing, and that is true with respect to all of these subpoenas, your Honor.

THE COURT: Now, what you are seeking as far as BNA is everything on the books of BNA, whether it might be on the books of BNA in Argentina or wherever, right?

MR. COHEN: That's right. And your Honor, the reason why they give why they shouldn't have to do that is they claim

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that internal procedures don't allow for the transfer of information among the branches.

And I suggest, your Honor, that that is just not enough. This is a unitary bank. It has a branch in New York. It is subject to regulation by the U.S. banking commissioner. It is here for all purposes. The fact that it wants to put shutters around each of its branches, I think, is insufficient.

THE COURT: My memory is that it has long since been decided, say, for a bank like Citibank -- a bank, if you serve a branch, you can get information from the central office. That is pretty overall, isn't it?

MR. COHEN: Well, when you are talking about attachments, your Honor, I think we still have remnants of what we call bank branch rule in New York.

THE COURT: No. I am talking about information.

MR. COHEN: Discovery you can get, absolutely. Absolutely.

And I think that their response that their rules don't allow access to information --

THE COURT: I thought that their rules would not prevent a court order.

MR. COHEN: That's exactly right.

THE COURT: Let's hear the other side.

MR. BOCCUZZI: Good afternoon, your Honor.

Carmine Boccuzzi for the Republic of Argentina.

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I just wanted to speak to a point your Honor made in December when we were last here, which is your comment that this discovery is taking a shape wholly different from what we have seen before.

The problem with the three subpoenas is that they go beyond any clearinghouse concept or rule of reason that your Honor has imposed in the past and are a broad-based open-ended discovery mission -- as Mr. Cohen called it -- a forensic discovery. It is really a fishing expedition. And that is not proper.

He cited the Rubin case. It is important to note that the Rubin case itself which rejected the idea of this kind of overbroad discovery in a sovereign context said it was adopting the exact same message as the Second

Circuit, and for that they cited the EM case where, of course, the Second Circuit cited earlier Second Circuit precedent said that in this context, discovery has to be order circumspectly to verify allegations of specific facts crucial to immunity determination.

Here, we are hearing speculation about what might exist in Germany with no showing --

THE COURT: No. It is not so speculative now that we have seen the Honeywell transaction.

MR. BOCCUZZI: But, your Honor, that --

THE COURT: Just a minute.

MR. BOCCUZZI: Excuse me.

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THE COURT: If the entity had been a ministry, really had been part of the Republic and if there had been an attachment that was directed to the contractual rights of the ministry, I think that that attachment would have been valid -- at least it certainly is arguable.

So we are not really talking about a fishing expedition or a lot of unknowns. There is now a focus. And I think that at least what the Court realizes now is that the Republic, through various entities, can very well be engaged in commercial activities in various places or activity which might involve attachable assets on some other theory in a foreign country.

So please don't talk about fishing expeditions. What do you expect these people to do? They have to engage in these maneuvers because of your client's behavior. And these plaintiffs now have come forward with a very credible theory illustrated by the Honeywell situation that the Republic may be purchasing abroad, may be investing abroad, may be doing a lot of things outside of Argentina which could be the subject of attachments. That's their theory. It is not fishing.

And it may be that the terms of the subpoenas need to be or the terms of any order enforcing a subpoena -- it may be that there needs to be some more specificity, but it seems to me that the plaintiffs have a very good theory. And, of course, it is a lot of work. Of course, it involves trying to

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get information in a difficult way, but who is responsible for that? It is your client. This goes on year after year because of your client, and the difficulties are caused by your client. It is difficult.

I am going to grant the order. I am overruling the objections to these subpoenas and I will enforce them. I want to see specific orders drafted, and I want to let the parties comment on the specific orders, but not continue objecting. The objections are overruled.

MR. SULLIVAN: Your Honor, on behalf of BNA, could I be heard on that point?

THE COURT: Have you submitted papers?

MR. SULLIVAN: Yes, your Honor.

THE COURT: I think so.

MR. SULLIVAN: I am Mark Sullivan on behalf of BNA.

A couple of points that I would briefly like to address; one is with respect to the focus, and the other is with respect to the so-called lack of burden that would be placed on BNA.

With respect to the focus, the subpoenas here are addressed to any property maintained at BNA anywhere in the name of Argentina. Argentina is defined as 225 entities and individuals. So I would take issue with the fact that they are focused. In fact, these subpoenas are not focused and run afoul of the Foreign Sovereign Immunities Act in a very

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specific way, and that is that they are not sufficiently directed to locating assets that would be subject to execution under the FSIA.

THE COURT: You can see the problem, can't you?

MR. SULLIVAN: Certainly.

THE COURT: If there is a way to narrow the subpoenas to eliminate entities that, realistically, where there could be nothing productive gained, I certainly would like to do that. But the general idea, who do you think is causing the trouble here? These

plaintiffs are owed a lot of money on their judgments legally obtained in this court.

MR. SULLIVAN: Certainly, and we are very mindful --

THE COURT: If there is a problem, talk to the Republic. Talk to Cleary Gottlieb primarily. They are the cause of this.

MR. SULLIVAN: Your Honor, we certainly are mindful of that. Part of the problem from a nonparty perspective is that, by their own nomenclature, NML says that what they are looking for is information about Argentina's financial circulatory system. So they begin with that broad sweep. Reference is made to the Rubin case and that is a Seventh Circuit decision that says that under the FSIA, you cannot have a discovery, a general asset discovery.

THE COURT: I am not seeking to do that. I am not seeking to do that at all. What is being sought here is to see

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specifically if the Republic or parts of the Republic are engaged in commercial activities in the United States or other activities which under the law of Germany or France would lead to attachments.

And it appears that the plaintiffs are finding some receptivity in courts abroad in their effort to recover against a republic which won't comply with its legal

obligations. So these are developments that have changed the picture. So that's really the idea.

If there's a way to narrow the subpoena, to reduce the burden on the Bank of America in some way, I think that should be done. But in my view, the theory is very clear -- maybe it is still burdensome -- and if there can be a way to fashion a subpoena or a court order to carry out that theory more clearly and narrowly, that would be fine.

MR. SULLIVAN: Your Honor, in your introductory remarks here, you talked about there being no use of attachments in Argentina with respect to BNA -- I should be careful to specify. Information about accounts and documents in New York, that has all been provided. So we are only talking here about extraterritorial information.

THE COURT: What about Belgium?

MR. SULLIVAN: Sitting here, I am not sure whether BNA has any documents that relate to anything regarding Belgium.

THE COURT: You probably don't know. But we are not

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talking about things that would lead to possible attachments in Argentina, we are not, but certainly as something that might lead to an attachment in the United States or another country besides Argentina is fair game.

MR. SULLIVAN: Then I would agree, the extent that the discovery or the subpoena is specifically focused on an asset that is located within the United States that is used for a commercial purpose in the United States --

THE COURT: -- or a foreign country.

MR. SULLIVAN: In some instances that may be the case. But here when they are seeking such broad information about Argentina's circulatory system without any more definition than that, that puts a nonparty such as BNA at a disadvantage.

THE COURT: Here's what I would suggest. I don't have the language of the subpoenas before me and I am not trying to get into that detail, but if I am going to issue a basic ruling now, I would certainly expect counsel for NML and counsel for the three banks to work together in some reasonable narrowing. It may be these things are drafted too broadly. I am not trying to get into that detail this afternoon.

Yes, sir.

* * *

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MR. GLICKMAN: Your Honor, may I be heard on behalf of Bank of America?

THE COURT: Sure.

MR. GLICKMAN: Thank you, Judge.

Barry Glickman.

I don't take sides as to whether or not I am in here today because there was an overbroad subpoena served on us or because the Republic has not paid its debt. What I am in here for is to address the specifics of this subpoena.

THE COURT: Right.

MR. GLICKMAN: Whether or not the plaintiff is entitled to discovery, that is another discussion for another day or it has already been had. The problem is the subpoena that has been served.

I heard counsel represent to the Court today about how there is this desire for SWIFT transactions. The fact is, the subpoena that was served, the subpoena that is before the Court on the motion to compel and the motion to quash, that subpoena contains 12 separate and distinct categories. It contains requests for account information. It requests –

THE COURT: I will say to you what I said to the lawyer for BNA. I am not sitting here trying to edit the subpoena. I think that you are probably correct that it is too

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broad, and I think it should be changed, but I am not going to do that this afternoon. And I am going to rely on counsel to try to work out specific changes. And I am sure you won't resolve all of your problems and we will be back.

Simply, in principle, I am not going to quash the subpoenas as to BNA or the Bank of America with the understanding that those subpoenas need to be modified, but I can't get into that this afternoon.

MR. GLICKMAN: Judge, may I understand then that at least in the context of the subpoena that is before the Court, the motion is not decided in toto, that it is being held in abeyance and if we are unable to work out parameters, that we will be back here?

THE COURT: Of course. That is one way of saying it, sure.

* * *

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[THE COURT:]

And as far as the two other subpoenas, the BNA and Bank of America, the motions to quash are denied, subject to the need for counsel to negotiate a more specifically drawn subpoena in each case and subject to a possible application to the Court on the specifics of the subpoenas.

That concludes our day.

Thank you.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 CV 2507
03 CV 8845
05 CV 6200

New York, N.Y.
December 17, 2010
11:05 a.m.

EM Ltd., et al.,
Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,
Defendant.

Before:

HON. THOMAS P. GRIESA

District Judge

APPEARANCES

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(In open court)

THE COURT: I hope that this meeting that we are having will cut down on the paperwork to some extent because there are lots of efforts before me now to get discovery and that is resisted.

Let me just list what I think are the motions that we have for today.

There is a motion by NML to compel Banco De La Nacion Argentina, or BNA, to produce documents in compliance with a June 14, 2010 subpoena. So that's one of the motions I have and which we are going to have argument on today.

* * *

[THE COURT:]

Then I have a motion by NML to compel compliance with a subpoena served on Bank of America. I think the date of that service was March 10, 2010. The subpoena served on Bank of America asks for information about the accounts of a number of so-called ministers and secretaries of the Republic and a group of independent entities. The Republic has moved to quash the subpoena. NML has moved to compel Bank of America to comply with the subpoena.

* * *

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THE COURT: I think I would like to start with the subpoena that was served March 10, 2010 on Bank of America, and I would like to hear from NML about the purpose of that

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subpoena.

MR. JACOB: Good morning.

Charles Jacob of Miller & Wrubel, representing NML.

The purpose of the March 10 subpoena is to take discovery of the flows of funds and accounts of various entities, both branches of government, government agencies and divisions and the individuals who run those divisions -- although we have negotiated that separately with counsel -- to ascertain how it is that the Republic of Argentina, which we believe is a

corrupt and cynical organization evading its obligations by using these entities and individuals, is managing its governmental operations.

And the subpoena will accomplish that, first, by the identification of accounts, but more importantly, by using what are known as SWIFT messages. And SWIFT messages are international fund transfers, or they are the documentation of international funds transfers that go through money center banks such as Bank of America in New York such that if money is being wire transferred from a government agency in Argentina to anywhere else in the world, if it involves U.S. dollars -- as it often does -- it will go through New York through a money center bank such as Bank of America and be memorialized in the SWIFT messages.

THE COURT: I don't hear anything in what you have described that would delineate property subject to process.

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MR. JACOB: It would, your Honor.

THE COURT: How?

MR. JACOB: Let me give an example.

THE COURT: What I have in mind is property used for commercial purposes. As far as I know, that's all you can get.

MR. JACOB: But there are many commercial purposes that this would identify, and there is an

example in our motion papers where Argentina, through one of its agencies, wires money to Germany to purchase equipment, let's say, and it is a commercial purpose.

THE COURT: What kind of equipment for what purpose?

MR. JACOB: A commercial activity.

THE COURT: What commercial activity?

MR. JACOB: The government's activities, whatever they might be, your Honor, so that if they are going to use equipment, let's say, to operate radio towers or other commerce, it would be commercial activity.

Let me be clear, it doesn't have to be commercial activity in the United States. I think that's where Argentina is taking an incorrect position. Under Rafidain these can be assets wherever located, so if we find assets in another country about to be purchased, the title has transferred to Argentina, we can attach those assets. It may not be in this court. It may be in a proceeding in Europe.

THE COURT: Let's back up a bit because the law about

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what is commercial activity is not simple. And I have in mind, I think that provision actually in the statute and certainly in case law, that the nature of the activity

controls, regardless of the purpose. There is some law to that effect.

Let's suppose -- and I imagine this is the case -- the Republic rents or occupies certain quarters for a UN mission. The UN mission is not commercial activity, right?

MR. JACOB: That might not be, your Honor.

THE COURT: Just as far as I said, the UN mission is not commercial activity.

Let's suppose that the Republic purchases in New York supplies for the UN mission and money is somehow found on its way to pay for supplies -- stationery, light bulbs, cleaning materials, whatever. Money, let's suppose, somehow is found deposited in a bank. And the facts are clear that the purpose of that money is to purchase supplies for the UN mission, no other purpose. It is not being invested. It is simply there to do that. Would having that deposit there be commercial activity?

MR. JACOB: No, but with respect --

THE COURT: You said no. Just answer my question. The answer is no, right?

MR. JACOB: Correct.

THE COURT: Now, obviously, a government can engage in personal commercial activity. They can invest. And I dealt

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with that in the BCRA opinion. If the Republic or its alter ego invests, that's commercial activity, generally speaking. A government can go into business. The Republic of Argentina might go into the beef business or the copper business or the oil business. There are a lot of ways that a government can engage in commercial activity, right?

MR. JACOB: Yes.

THE COURT: Now, one reason I had this hearing is, this litigation didn't start in October of this year. We have had it going for a long, long time. And we have had a lot of discussion about possibilities of commercial activity.

One reason I called you all in today is that, I will start by saying, I surely don't remember the entire record of everything that has gone on in this litigation all of these years, but I do believe there has been effort -- if there hasn't been, I would be astounded -- to discover whether the Republic is engaged in commercial activity.

MR. JACOB: Correct.

THE COURT: Maybe we have talked about some of the obvious forms, have they been in the beef business or something like that. And the thing is, I have not been informed that the Republic is engaged in commercial activity with an exception which I found in the BCRA alter ego case where I found that the Republic through the BCRA had invested here. That is

commercial activity -- at least I found that and that is a

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subject on appeal.

But I haven't been informed, and here we have all of this effort to have the Bank of America and various parties producing all this information. And I really have to understand that there is something at the end of the line that would be aided by all of this discovery.

MR. COHEN: Your Honor, may I?

It is Robert Cohen from Dechert, on behalf of NML.

Mr. Jacob has handled the Bank of America subpoena because of a conflict that my firm has, but maybe it would be useful for me to describe to you what our overall approach is with respect to these third party subpoenas and why now.

Your Honor has focused on the question of whether we are going to be able to establish some commercial activity in the U.S. that would allow us to attach assets in the U.S. We have done that for seven years through attempts to get discovery from Argentina. That really has gone almost nowhere.

We are now at the phase of this litigation, your Honor, where we need to understand the financial circulatory system of Argentina. This is a debtor that owes our client over $2 billion. We want to embark, with the help of this Court, on a forensic investigation

of what it does with its money. Where does it have bank accounts overseas, not necessarily in the U.S.? And your Honor has said numerous times that this Court can compel Argentina and parties over

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which it has jurisdiction --

THE COURT: I want to interrupt you.

I am sure that you are going farther, but as far as you have gone, to me -- what does the Republic do with its money?

MR. COHEN: Let me give you an example. I know that's at the core of your question.

THE COURT: I don't see where that goes, except we know that the Republic probably has a lot of governmental activities.

MR. COHEN: If Argentina buys trucks or heavy equipment to build roads and it buys that from Germany, from Mercedes-Benz and it pays for those trucks, if we find out about it in time, that is a commercial activity. And the German law may not be exactly the same as ours, but let's assume it is and it is a commercial activity, and buying trucks in Germany is a commercial activity because anybody can do it. We could attach those trucks in Germany and sell them for their value. They buy cell phone towers someplace as part of the ministry of telecommunications to provide telecommunications services, a private activity.

If we can identify where in the world they are buying those commodities -- liquified natural gas, your Honor, we were before you not too long ago seeking to attach a shipment of liquified natural gas, a commercial activity.

[p.12]

If we can find where that activity is being conducted and it is someplace outside of this court, outside of the U.S., we will be there. We have actions in France seeking to attach assets there; actions in Belgium, seeking to assets there; actions in Switzerland, seeking to attach assets there.

What we are trying to do through all of this discovery is to understand what Argentina is doing as a business, where does it buy things, where does it sell things as a business. And that's why we need your help, your Honor.

THE COURT: Look, I started with the example of the UN mission, and I asked if supplies were bought for the UN mission, if that would be a commercial activity or a governmental activity, and Mr. Jacob conceded it would be a governmental activity. Obviously, the purchase of stationery or cleaning materials, it is, in a sense, a commercial transaction. Somebody goes to a vendor in New York, presumably, and makes a purchase, and it is not firing a cannon or something, it is a purchase.

Now, I think I have in mind the law that the nature of the activity controls and the purpose is not to be considered -- I don't know that I am quoting it right,

but you know what I am talking about. I think that that concept -- I doubt very much if it can be carried to an extent which would allow the attachment and process on things that you talk about.

In other words, if the government of Argentina is

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building roads, that's the government doing something as a government. Now, if they purchase trucks to build the roads, if they purchase the cement or the asphalt, etc., well, they will, presumably, go to a vendor of trucks -- Mercedes, perhaps or whatever -- a vendor of asphalt, a vendor of cement. I don't know that you would buy cement in a foreign country, but you know what I am talking about just for illustrative purposes. If they are making these purchases to meet the necessities of this governmental activity, what rule of law or what theory of law or what says that those purchases are commercial activity?

MR. COHEN: Your Honor, if we were in this court attempting to enforce an attachment against those trucks, the analysis that you have described is what we would need to go through. What we are talking about here, your Honor, is pure discovery.

THE COURT: No. Wait a minute. We are talking about discovery which has to have an objective that is worth pursuing.

Let me go back because I may not have understood you, but you voiced a theory about purchasing trucks in

Germany from Mercedes, now what is it that you believe you would have a right to attach or execute on?

MR. COHEN: If they were paid for in Germany, your Honor, I believe that I would be able to take the trucks that

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would be then deliverable to Argentina.

THE COURT: On what theory would you be able to do that?

MR. COHEN: Because it was property of Argentina in Germany, fully paid for, and now I have found an asset of Argentina's. My judgment is now registered in Germany, we are assuming, and I am seeking to enforce it. I found an asset -- trucks paid for and owned by Argentina -- I seize them and sell them to satisfy my judgment. And the law of Germany will decide whether that property is used for the commercial activity or whatever the equivalent statute is in Germany.

In France, your Honor, we have attached property that your Honor would find to be diplomatic, and the law there is different than the law here. The law there is considering what the breadth of the waiver of immunity means under French law because the waiver says, to the full extent permitted by law. And that means here, the Foreign Sovereign Immunities Act. In France, it means their equivalent. And there is a strong argument in France that a sovereign can actually waive immunity over its diplomatic property if it says it is appropriate. We may be able to take that property.

That is being appealed in the courts of France right now.

So the question is, what is the law in the place where we find the asset. And the issue for this Court is, are you going to let us find where those assets are through this

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discovery. And it doesn't really matter whether, ultimately, we could seize that property in this court; it is whether the scope of discovery is appropriate, given the issues in this case; how much is involved; the burdens involved on the third parties we are asking for information from within your jurisdiction. Can we make the burden sustainable? Can we help pay for the costs?

But we should have this information, Judge, so that we can find out what our debtor is doing around the world. It shouldn't be able to hide behind the Foreign Sovereign Immunities Act commercial activity exception, because that may not be what applies when we get the information and seek to enforce it.

And that is the common thread through this third party discovery, how are we going to find out what Argentina is doing and where. The time has come for them to let us have that information. And we are willing to work with all of these third parties to minimize the burden.

* * *

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[MR. COHEN:]

And, your Honor, under Rafidain and other cases, you have the authority under Rule 69 and Rule 26 to give us broad discovery in enforcement of our judgment, and it is not limited to assets in this jurisdiction.

THE COURT: I am aware. I think a long time ago -- nobody went up to the Court of Appeals about this -- I really

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said, as far as discovery, this Court should be the clearinghouse.

MR. COHEN: Exactly.

THE COURT: And we have operated on that.

My only problem is that I really think that now the discovery is taking a shape that it has not taken before, and you are so stating and you are explaining why. And you are also explaining that you are seeking information about assets located in foreign countries so that you might take advantage of the law of foreign countries which might be different from United States law, the Foreign Sovereign Immunities Act.

So that is your position?

MR. COHEN: Yes, your Honor.

MR. BOCCUZZI: Your Honor, Carmine Boccuzzi from Cleary Gottlieb, for the Republic.

Getting to the concept of extraterritorial discovery, you are right, your Honor. You said that you wanted to act as a clearinghouse, and a common thread through all of your comments has always been there has to be a rule of reason applied.

And just talking about the Bank of America subpoena, that kind of hearkens back to the type of discovery that was served by plaintiffs early on in these actions which your Honor rejected because it was very, very broad, overbroad. For example, the Bank of America subpoena defined Argentina to

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include and lists out 148 ministries and secretariats, 136 individually named ministers and other individuals, and 43 juridically separate entities and asked for all sorts of account information, wire transfer information about all of these. And that just doesn't comport with the rule of reason that your Honor stressed throughout these proceedings, putting aside our ongoing objection to extraterritorial.

I would also add, it is all in the context of several dimensions of hypotheticals. Mr. Cohen said that he might have a judgment entered in Germany one day, and the law of Germany might allow him to attach some asset over there that remains unidentified.

And I would just point out that we are getting information about the law of some of the European

jurisdictions. For example, in France, NML's arguments about the scope of the waiver have been rejected. So even though they have lost and they cannot attach this diplomatic property, they somehow say that they should get discovery here.

THE COURT: I thought it was still pending.

MR. BOCCUZZI: It is on appeal, but to date the courts have ruled on our side, on the Republic's side as to the scope and proper construction of the waiver.

* * *

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[MR. BOCCUZZI:]

If we are looking at the picture of to what end, these theories don't hold up in European courts. So we are left with, just take it back to BNA, is a massive subpoena sort of very broad ranging, very undefined, addressed to individuals who are not in any measure liable for the debts of the Republic of Argentina, private individuals, ministers, separate entities. And that doesn't comport with the rule of reason.

Liquified natural gas was mentioned. They came in. They sought to attach it. They got discovery in that context. There were some documents. There was even a deposition. Facts came in, and your Honor denied that attempt to attach those assets. They didn't appeal that. It was a completely correct ruling. So there it was driven by a specific instance, but this is sort of blunderbuss, broad-ranging discovery that doesn't

stand up to the rule of reason that your Honor has asked that the parties follow.

THE COURT: I could go back to NML, and I will talk with either lawyer, but I don't quite understand how the subpoena would be even focused on what Mr. Cohen talks about.

MR. JACOB: May I explain, your Honor?

THE COURT: Yes.

MR. JACOB: What Mr. Cohen talked about was the lifeblood, if you will, the form of circulation of funds by which the Republic operates. And we know that it does so

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through ministries and ministers. And the SWIFT transfers in particular are the circulatory system of the funds of Argentina, and the SWIFT messages are extremely informative because you can see the sender, you can see the recipient and you can often see the purpose of the transaction.

We are not required to establish at this time that any particular agency is or is not an alter ego. What we have shown, which is sufficient, is that these agencies and these individuals might have information subject to discovery.

And the number of entities that Mr. Boccuzzi cited is not at all daunting because all of these banks, including Bank of America -- and we have documented

this very thoroughly in the record and it is not disputed -- are required to use an automated system known as either the SDN system or the OFAC system, where this could be done in an automated manner. It is not a huge burden at all. They have thousands of entities on the OFAC system already, and adding a couple hundred more is not a big effort for them.

THE COURT: I don't know whether it is big or not big, but let me just say that I have no picture at all of what a country such as the Republic of Argentina might be sending or receiving messages about of a financial nature. I don't have any picture at all. Maybe the papers illuminated more than I have absorbed, but if this were the Argentine Steel Corporation, I would assume that the communications back and

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forth to foreign countries or whatever would be about the steel business.

MR. COHEN: Can I give you an example, your Honor?

THE COURT: Just a minute.

But here you have a government. There is interesting news about the government, about some problems with the government and all, but it is a functioning government of a sizable and important country. And I am sitting here thinking that I really don't know what they would be communicating about in the way of finance.

MR. COHEN: Give you an example, your Honor?

THE COURT: Yes. But I have to assume that it would be mainly about the functions of the government. It is not the Argentine Steel Corporation. This is the Republic of Argentina.

MR. COHEN: Your Honor, in the United States, networks like CBS engage in contracts to use satellites, to beam down signals to the people who want to watch CBS and that is a private enterprise here, leasing satellite capacity.

In Argentina they have a ministry called Arsat that does that function. It engages in contracts with U.S. satellite providers for the right to beam signals off of their satellites to Argentina where they then sell it to commercial users. We have gotten discovery from those satellite providers about the Arsat relationship. Payments to the satellite

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provider is money that flowed out of Argentina to accounts in the U.S. We would argue if we had to litigate it here, commercial activity just like any other. And that is money coming of Argentina to the U.S. If we have a SWIFT communication, which is what we are seeking, that said from the ministry of telecommunications to SES Americom in Princeton, New Jersey for payment of satellite leasing capacity, we would be able to trace that relationship. We would know that they are engaging in that kind of conduct in the U.S.

What would we take? Well, if the contract had value, in other words, if there was a term left in that contract and it was a commercial activity, we might be able to step into the shoes of Arsat, sell their rights to use the capacity for more than they are paying for it and provide the proceeds to our judgment. That is a real life example, but it is just one example.

THE COURT: Is there an Argentine entity that owns the satellites?

MR. COHEN: No. It is a U.S. administered entity that owns the satellite.

THE COURT: What is the role of the Republic?

MR. COHEN: The Republic leases capacity on that satellite, that is, a transponder on that satellite is leased by Argentina to allow it to beam up signal and then broadcast it down over Argentina. And then they sublicense the right in

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Argentina to station CBS-equivalent in Argentina to have their signal --

THE COURT: So they are leasing capacity on a satellite?

MR. COHEN: That's right.

THE COURT: But they don't own the satellite?

MR. COHEN: They don't own the satellite. They just have a contract with the satellite capacity provider.

THE COURT: The thing is, what you have said, I never heard of this before today. Maybe it is in some papers but, forgive me, I just have not read every paper, but I haven't heard of this -- and I am not going to rule -- but it seems to me, arguably, that would be commercial activity.

Again, are there any other examples of that kind of thing? For instance, if there is something that is at least arguably a commercial activity, then there is. But it certainly doesn't mean, in my view, that everything that the Argentine government does on the subject of finance is of that nature.

I am aware that foreign countries may not place the emphasis on commercial activity that United States law does. You have made that point and I have heard it and I recognize it. Still, I would really not want to have the Bank of America or anybody else producing a lot of discovery material about financial communications when there is no affirmative

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indication that such communications or some segment of those communications would really relate to something attachable.

It is conceivable that a foreign country would allow an embassy to be attached. It is conceivable that a foreign country would allow a naval ship to be

attached, if it was visiting, but I really would not feel that I should allow a lot of discovery about the financing of embassies or of naval ships unless I had some indication that somewhere this would really be recognized as something that would involve an attachable asset, because I would be surprised if France or Germany or England or anybody else over there would allow the attachment of strictly government property. Maybe they would, but I wouldn't want to just start and say, well, maybe it could be done and, therefore, there should be all of this discovery. I just cannot go that route. There has to be some reasonable narrowing of this, even if you get something.

MR. COHEN: And we were working with Bank of America to try to find ways to reduce the burden. We had agreed to give up the names of the individuals, for example, your Honor. Lots of things were in the works before the motion to quash came.

But the reality is, governments buy things. They buy computers. They buy all sorts of things around the world. They really do. These are commercial transactions that governmental ministries engage in all of the time. The paper

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example is true, but it is probably not worth pursuing, but if we can find significant contracts to buy goods, which is what governments do -- they do things beyond the diplomatic realm. They buy food for hospitals. They do all sorts of things around the world.

This is a very time-consuming and forensic exercise that we are willing to engage in, but the information will be there. It is almost per se going to be there. They have to buy these things and they are not available in Argentina. We are willing to take the time and effort and money to find this stuff. We are willing to exclude ministers in the first round in the case it is going to lead to too many false hits or be embarrassing, with the exception of the President and her late husband, which is something we have re-introduced into the search, your Honor.

This is not a false errand here. We are not going to embark on this because we think that we are not going to find assets around the world, that can be attached. They are absolutely buying commodities, goods, hard products, computers and other things all over the world. And it is not money going to pay diplomatic employees in the various jurisdictions.

THE COURT: What is it to be used for? You are talking about them making purchases, and I am sure they do.

MR. COHEN: Yes, they do.

THE COURT: In a general way, what is your concept of

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the reason for these purchases? You used a highway building.

MR. COHEN: The purchase of a truck is a commercial activity under our law because you look at the activity and not the ultimate purpose. Is it something that other than governments engage in, or only governments engage in? The purchase of trucks, just like the purchase of boots for the army is a commercial activity, even though soldiers are going to wear them. That is the quintessential example in the legislative history of the FSIA. The purchase of boots is a commercial activity, when they are going to be used for the army; the same thing for trucks to build roads, that is a commercial activity.

THE COURT: The boots, I don't remember all of this, but that was part of an example given in the legislative history.

MR. COHEN: Yes, your Honor.

THE COURT: Commercial activity?

MR. COHEN: Yes, your Honor.

This exercise is one that will take time. We have experts engaged who are prepared to do it, and it will absolutely produce fruitful opportunities, maybe not here, but somewhere around the world. But at this point in this litigation where there is so much at stake, some burden on third parties and Argentina is absolutely appropriate, your Honor.

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MR. GLICKMAN: Judge, may I be heard?

THE COURT: Yes. Your name, sir?

MR. GLICKMAN: Barry Glickman, on behalf of Bank of America NA.

I just wanted to very briefly address several points that NML's various counsel have brought up, and this is really limited to our little corner of the universe as being the entity upon which the subpoena was served and the entity that would have to sustain the burden.

First of all, there have been several representations made that are simply not true, and that is, the nature of the activities that the bank would have to endure in responding.

I heard some references to OFAC and SDN platforms. All that means, and I give this as the ultimate example, if the government were to make an effort to track down wire transfers in which Osama bin Laden was involved, the name would be placed in a computer platform. Going forward, each time a transaction involving Osama bin Laden was interdicted, it would be kicked out of the system and it would be subject to review.

But by no means is what counsel is suggesting an automated procedure. Let's just pop the names in there. If you pop the names in there, that's going forward. And if what they are suggesting as well is, let's just pop the names of these hundreds of entities in there, how long would it take a computer operator to sit down and type it in? Again, that is

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not the answer either.

As the record will reflect in a submission from a bank representative which indicates, there are tens of thousands of potential hits and each one of these couldn't just be turned over blindly; they would have to be reviewed because there is certainly a possibility that they have nothing to do with anything.

I think this Court should further understand that if there is a SWIFT message -- and, by the way, a SWIFT message is just fancy terminology for a wire transfer -- the entity that is the subject could be the sender, could be the beneficiary, could be an intermediary, what have you. We don't really know. A human being on behalf of the bank would have to review each of these. This is just one little corner of the subpoena.

The other thing, Judge, is we are in here in the context of judgment enforcement, Rule 69. And Rule 69 specifically speaks to state law.

THE COURT: Speaks to what?

MR. GLICKMAN: State law, in the context of enforcing a judgment. It is not just a garden variety Rule 45 or Rule 26 discovery device. Rule 69 specifically speaks to state law unless there is federal law that would supersede it.

In the context of state law, in the smallest civil court claims case, what have you, a judgment creditor

has to have a reasonable basis that the process that is being served

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on the third party is that it is reasonable that this third party is going to have information that is relevant to the satisfaction of the judgment.

In the context of that, we have heard counsel tell us today that what they are really trying to do is to get a grasp on the financial circulatory system of Argentina, what does the Republic do with its money, alternatively, how are we going to find out what Argentina is doing and where?

This really isn't designed to identify property of or debts owed to the government. What it is really seeking to do is to say, OK, if we can't find anything in the States, but we see a wire transfer to some foreign nation, maybe we will go to that foreign nation and start a lawsuit in an effort to attach something over there, which takes us full circle to, we have to go elsewhere to take discovery. And if they were to come to the States under 28, U.S.C., 1782 and start looking for discovery, they couldn't start coming to the States to take discovery of transactions that occurred elsewhere.

And the only nexus, we are assuming, for the service on Bank of America is that Bank of America was perhaps an intermediary. We are not even talking about Bank of America as these target entities' bank. There could have been a wire transfer from Germany to Japan via New York through an intermediary --

through a corresponding bank account maintained at Bank of America as an intermediary. So the burden obviously

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is there, there are tens of thousands that we have identified already.

THE COURT: What do you mean you have identified already?

MR. GLICKMAN: Just in a preliminary review of the names that were included in the subpoena in the affidavit shows the numbers of hits for transfers --

MR. BOCCUZZI: -- because some of the names are common Spanish names, there are many false positives.

MR. GLICKMAN: Right. I think it is also very important to understand in the context of what we are looking for here, we are not talking about property of or debts owed to but really --

THE COURT: You are not talking about property what?

MR. GLICKMAN: Property of or debts owed to -- I can't even say judgment debtor because, again, we are now expanding the term "Argentina" to include these hundreds of other entities or ministries, what have you.

Really, you know, what I am hearing is, I think it is admittedly a fishing expedition. We have no idea what you have, but let's just take discovery of the third party financial institution and see what that can lead us to and then let's go to the next step and the next step and the next step.

And Your Honor said earlier today, I've got to see something at the end of the line. And the problem is, what I

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am hearing is, there are various nodes, and they want Bank of America to be, effectively, a collection agent. And the only thing that we have been told so far in the context of burden is, don't worry about it, we will pay for it. We will pay you for the time invested by your personnel. But the reality of it is, I am an attorney. I have to sit down at my desk and work on my files. If somebody offers to pay me for it, that is very nice, but I don't have time to work on my files if I am working on something else.

THE COURT: Let me say this. I take very seriously what you have said, but I am going to say something which I have said many, many times. The reasons that we are involved in these strained attempts to get assets is that a very simple thing isn't being done, that is, to pay on the bond, pay the judgments. And what goes on year after year are attempts to get, in the most difficult ways, what the Republic should be paying.

So I take very seriously what you said, and what I am saying now does not take away from that. But when

you stand up and say what difficulties, the difficulties are really caused by the Republic of Argentina, and that's it. Really, they are not caused by these plaintiffs. They are not caused by the Bank of America. They are caused by the Republic. The Republic gave all kinds of assurances in the original bonds and the original instruments of how they would submit to

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jurisdiction and they gave assurance that the judgments would be honored. All of that was basically fraud.

They have not done it. They won't do it. They have got the money to do it, but they have arbitrarily and contemptibly refused to do what they are legally obligated to do, so I am very, very sorry if various entities are put to a lot of trouble, but you could maybe write a letter to the Republic and say, why don't you put us out of this trouble.

And this is going to go on, and it has gone on. I have sat through hearing after hearing. I have written decisions. How many times has this litigation been up in the Court of Appeals itself? A lot.

So a lot of you, the Republic is your client, to some extent. Why don't you tell your client something about their legal obligation? You are making money off of the Republic, various entities and have the Republic or related entities as their clients, well, fine. And I am not saying you shouldn't do business with the Republic, but you are doing business with an entity which is defying the law of the United States basically, not the Foreign

Sovereign Immunities law, but the law that says a judgment debtor should pay the judgment.

So I take very seriously what you say, but maybe you would like to write a letter to the Republic telling them to do their duty.

Now, what is presented by all of these discovery

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requests is quite difficult. There is a legitimate objective in trying to find out if there are assets which can be attached or executed on in order to provide payment of justly obtained judgments -- judgments of this Court which are being flaunted by the Republic.

Now, everybody who has participated knows that there are certain limits, to say the least, as far as where I will permit discovery and all kinds of things because there are laws here. And no matter how I believe in the misconduct of the Republic, the Republic, through its lawyers has a right to take advantage of U.S. law, even though it may shield the Republic from doing what the Republic is legally obligated to do.

I am not prepared to quash the subpoenas that have been issued. I haven't heard of every issue sitting here, and I haven't heard a lot about BIS and so forth, but I am not going to give a blanket order of enforcement for the subpoenas, nor am I going to give a blanket turndown to those subpoenas.

I will confess, I don't have a great deal of knowledge about the financial communications that are the basic

subject of these subpoenas; but there must be some way to narrow the subject matter, I think. And just about anything I say could be wrong because I am not at these banks. I don't really know what they have or don't have. I really don't know that. But I believe that if I enforced the subpoena against the Bank of America as to what it demands on its face, I believe that

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enforcement would dredge up a great deal of material of no use to the plaintiffs.

The Republic of Argentina is a government, and I have to assume that most of its activities, including communications about finances, relate to governmental matters. And I am afraid to say that the example in the legislative history about buying boots for the army, I am not sure how far the courts would carry it. I will be frank to say that if I had evidence of money on deposit in New York to buy munitions for the Argentine army, I would not say that that is commercial activity. I could be wrong. I am, to some extent, voicing a view that is contrary to part of the legislative history. The legislative history does not ultimately decide everything.

So Mr. Cohen made certainly a reasonable argument that the purchase of supplies with the Argentine government might produce attachable assets, either in the United States or in foreign countries. He could be absolutely right on the law, but sitting here as a district judge, I have to say that, without some further submission to indicate the legitimacy of that, I just cannot agree.

I do not believe that, ultimately, United States courts will say that money which is clearly earmarked for the purchase of supplies or equipment for governmental purposes, I cannot believe that our courts will ultimately consider that to be commercial activity, despite the fact that a commercial type

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transaction is engaged in, namely, a purchase and so forth. Whether a foreign country -- what view a foreign country would take, I would need to have some indication about what a foreign country would do with that proposition before I unleashed a lot of discovery to determine whether the Republic of Argentina is engaged in purchasing transactions in countries that would produce attachable assets.

What I am trying to say is, I would like to adjourn this and ask the plaintiffs to try to define their request in terms that take into account the problems I have raised. Your mention of the satellite was very interesting. I would like to see if the plaintiffs could, in some reasonable scope without getting into an enormous amount of paperwork, respond to what I have talked about and, obviously, the other parties can answer. Now, I don't want you to all come in here and have a big gap of what we covered.

* * *

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THE COURT: Any briefing that needs to be completed should be completed.

Thank you all very much.

We are adjourned.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos: 11-4065 (Lead)
11-4077 (Con), 11-4082 (Con)
11-4100 (Con), 11-4102 (Con)
11-4117 (Con), 11-4118 (Con)
11-4133 (Con), 11-4153 (Con)
11-4165 (Con), 11-4182 (Con)

[Filed October 10, 2012]

EM Ltd.,
Plaintiff,

NML Capital, Ltd.,
Plaintiff - Appellee,

v.

The Republic of Argentina,
Defendant - Appellant,

Administracion Nacional de Seguridad Social, Union de Administradoras de Fondos De Jubilaciones Y Pensiones, Arauca Bit AFJP S.A.Consolidar AFJP S.A., Futura AFJP S.A., Maxima AFJP S.A., Met AFJP S.A., Origenes AFJP S.A., Profesion Auge AFJP S.A,
Defendants,

)
Bank of America, N.A.,)
Intervenor.)
_____)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of October, two thousand twelve,

ORDER

Appellant, The Republic of Argentina, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX F

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign

state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a

private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from

execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign

state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

* * *

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.