ירושלים, 30 בחודש אוקטובר 2022

בבית משפט המחוזי
בירושלים **ת"א** _____

בעניין שבין: **אגודת חסידי חב"ד בארצות הברית, תאגיד זר (ארה"ב) מס' רישום 11-1782102**
מרח' 770 Eastern Pkwy, Brooklyn, NY 11213
ע"י משרד עו"ד ונוטריון נבו קידר בלום
עוה"ד אורי קידר (מ"ר 20922) ו/או אבי בלום ואח'
ממגדל פסגות (קומה 18), שד' רוטשילד 3, תל אביב
טלפון: 03-5668665; פקס: 03-5667665
דוא"ל: office@nkblaw.co.il **התובעת**

- נ ג ד -

הפדרציה הרוסית
להמצאה באמצעות משרד החוץ (ס' 13 לחוק חסינות מדינה זרה)
משד' יצחק רבין 9, קרית הלאום, ירושלים, 9103001 **הנתבעת**

כתב תביעה בסדר דין רגיל

1. **סוג התביעה ונושאה**: תיק אזרחי בסדר דין רגיל בנושא "אכיפת פסק חוץ".

2. **סעדים**: אכיפת פסק חוץ שניתן ביום 20.12.2019 בבית משפט במחוז קולומביה, ארצות-הברית.

3. **אגרה**: 1,179 ₪, לפי תקנה 3(7) ופרט 10 לתוספת לתקנות בתי המשפט (אגרות), התשס"ז-2007.

4. **הליכים נוספים בקשר לאותה מסכת עובדתית**: Agudas Chasidei Chabad of United States V. Russian Federation, Case No. 1:05-cv-01548-RCL (United States District Court for the District of Columbia, The Honorable Royce C. Lamberth, 2019).

5. **הזמנה לדין**: הואיל ואגודת חסידי חב"ד בארצות הברית הגישה כתב תביעה זה נגדך, את/ה מוזמן/ת להגיש כתב הגנה בתוך **60** ימים מיום שהומצא לך כתב תביעה זה. **לתשומת ליבך, אם לא תגיש/י כתב הגנה, אזי לפי תקנה 130 לתקנות סדר הדין האזרחי, התשע"ט-2018, תהיה לתובע/ת הזכות לקבל פסק דין שלא בפניך.**

חלק שני: תמצית הטענות

א. תיאור תמציתי של בעלי הדין

6. **התובעת**, אגודת חסידי חב"ד בארצות הברית (להלן גם: "**חב"ד**"), היא מלכ"ר שהתאגד במדינת ניו יורק בארה"ב בשנת 1940. התובעת מהווה את הגוף המאגד את חסידות חב"ד העולמית. מרכז החסידות העולמית מצוי במדינת ניו יורק בארה"ב, ומנוהל באמצעות התובעת. ארה"ב מהווה מוקד פעילות מרכזי והגדול בעולם לחסידות חב"ד, והנהגת חב"ד העולמית יושבת בניו יורק כדרך קבע. לתובעת קשר הדוק ורציף עם מוסדות חב"ד השונים בארץ ישראל. התובעת שימשה כתובעת בהליך המשפטי בארה"ב מושא הבקשה דנן לאכיפת פסק חוץ נגד הנתבעת.

7. **הנתבעת**, הפדרציה הרוסית (להלן גם: "**רוסיה**"), היא מדינה זרה כהגדרתה בחוק חסינות מדינות זרות, התשס"ט-2008 (להלן: "**חוק החסינות**"). הנתבעת שימשה כנתבעת בהליך המשפטי בארה"ב מושא הבקשה דנן.

ב. הסעד המבוקש באופן תמציתי

8. במסגרת התובענה דנן יתבקש בית המשפט הנכבד להכריז על פסק הדין שניתן בבית המשפט המחוזי של מחוז קולומביה בארה"ב (United States District Court for the District of Columbia) ביום 20.12.2019, ע"י כב' השופט The Honorable Royce C. Lamberth, בתיק שמספרו 1:05-cv-01548-RCL, כאכיף בישראל.

[א'] העתק פסק החוץ מיום 20.12.2019 במחוז קולומביה בארה"ב שאכיפתו מתבקשת בהליך זה, מאושר על ידי רשות מוסמכת בארה"ב, **מצ"ב ומסומן כנספח א'**.

9. כמו כן, יתבקש בית המשפט הנכבד לחייב את הנתבעת בהוצאות משפט ובשכ"ט עו"ד בתוספת מע"מ ובצירוף הפרשי הצמדה וריבית מיום פסיקתם ועד ליום תשלומם בפועל לטובת התובעת.

ג. תמצית העובדות

10. בהתאם להוראות תקנה 353 לתקנות סדר הדין האזרחי (אכיפת פסקי חוץ), תשמ"ד-1984 (להלן: "**תקנות האכיפה**"), יצוינו בבירור הפרטים הבאים הנדרשים בתקנה:

- שם בית המשפט: United States District Court for the District of Columbia.
- מענו של בית המשפט: 333 Constitution Avenue N.W. Washington D.C. 20001
- תאריך הפסק: 20.12.2019.

11. "אוסף שניאורסון" הוא אוסף היסטורי של חסידות חב"ד העולמית. מדובר באוסף הכולל כ-12,000 ספרים וכתבים מקוריים, וכן כ-25,000 כתבים ודרשות שנכתבו, נאספו בהדרגה ונשמרו מאז סוף המאה ה-18 ועד ימינו, על ידי הנהגת חב"ד העולמית, לרבות האדמו"רים עצמם. זהו אוסף ייחודי מסוגו בעולם כולו, ומהווה נכס מורשת עבור העם היהודי כולו, באופן החורג מגדרי חסידות חב"ד.

12. מסיבות היסטוריות שיתוארו להלן, מאז תום מלחמת העולם הראשונה מצוי אוסף שניאורסון

בחזקת השלטון ברוסיה (בעבר המשטר הסובייטי בברית המועצות, וכיום ממשלת רוסיה). התובעת, המהווה את הגוף המאגד את חסידות חב"ד העולמית, עומדת על כך שהבעלות באוסף הספרים הייתה ונותרה שלה לאורך כל השנים, ומזה עשרות שנים שהחסידות דורשת מהשלטון ברוסיה להשיב את אוסף שניאורסון לחזקת אגודת חסידי חב"ד, שמקום מושבה בארה"ב.

13. בתוך כך, התובעת פנתה להליכים משפטיים בארה"ב, בהם ניתנו שורה של פסקי דין והחלטות נגד ממשלת רוסיה, המכירים בבעלות חב"ד על אוסף שניאורסון ואשר מורים לרוסיה להשיב את אוסף שניאורסון לחזקת חב"ד. רוסיה לקחה חלק פעיל בשנים הראשונות לניהול ההליכים נגדה, לרבות הגשת כתבי הגנה ובקשה לסילוק על הסף (רוסיה אף הגישה ערעור מטעמה על ההחלטה בעניין הסילוק על הסף). בשלב כלשהו לאורך הדרך, רוסיה הודיעה על הפסקת התייצבותה בהליך, ומאותו מועד ואילך הפסיקה כל התדיינות או פעולות מטעמה בהליך המשפטי. בהתאם, עם מתן פסק הדין נגדה בשנת 2010, סירבה רוסיה למלא אחר פסק הדין בארה"ב וסירבה להשיב את הספרים.

14. בשל סירובה של רוסיה למלא אחר הוראות פסק הדין בארה"ב, הוטל עליה בשנת 2013 קנס משמעותי לטובת חב"ד בגין ביזיון בית המשפט בארה"ב, בסך 50,000 $ (דולר ארה"ב) ליום. סירובה של רוסיה למלא אחר פסק הדין עומד בעינו גם כיום, ומשכך הקנס ממשיך וגדל מיום ליום.

15. ביום 20.12.2019 ניתן פסק דין עדכני לעניין גובה הקנס שהושת על רוסיה בגין אי-ציותה לפסק הדין. בהתאם לפסק דין זה, גובה הקנס נגד רוסיה עומד על סך של 122 מיליון דולר ארה"ב. פסק דין זה הוא פסק החוץ שאכיפתו מתבקשת בהליך דנן.

16. לשלמות התמונה יצוין כי באי-כוח התובעת בארה"ב מעריכים שכיום עומד גובה הקנס כבר על סך של למעלה מ-170 מיליון דולר ארה"ב. חרף כלל האמור לעיל, ממשלת רוסיה מסרבת להשיב את אוסף שניאורסון לידי חב"ד, וכן מסרבת לשלם את הקנס. בנסיבות אלה, מצאה לנכון חב"ד לפעול בערוצים ובמישורים נוספים על מנת להביא להשבת אוסף שניאורסון לידיה, לרבות דרישה לאכיפת פסקי הדין מארה"ב במדינות נוספות, וישראל ביניהן.

17. מכאן התובענה דנן.

ד. <u>סמכות</u>

18. לבית המשפט הנכבד הסמכות **העניינית** לדון בתובענה זו בין היתר נוכח מהותה והסעד המתבקש בה, מתוקף הסמכות השיורית של בתי המשפט המחוזיים לפי ס' 40(1) לחוק בתי המשפט [נוסח משולב], התשמ"ד-1984. לבית המשפט הנכבד סמכות **מקומית** לדון בתובענה זו, מתוקף הסמכות השיורית של בתי המשפט בירושלים לפי תקנה 8 לתקנות סדר הדין האזרחי, התשע"ט-2018 (להלן: "**התקנות**").

חלק שלישי: פירוט הטענות

ה. עיקרי העובדות הצריכות לענייננו

ה.1. אודות התובעת ו"אוסף שניאורסון"

19. חסידות חב"ד היא אחת מהחסידויות הגדולות והמשמעותיות ביותר בארץ ובעולם. החסידות צמחה והתפתחה במזרח אירופה, החל מסוף המאה ה-18 ועד ימינו. לאורך השנים עמדה בראש החסידות שושלת אדמו"רים אשר כללה שישה אדמו"רים.

20. כבר מימי האדמו"ר הראשון מייסד החסידות, רבי שניאור זלמן מלאדי המכונה "בעל התניא", נכתבו ונאספו בחסידות ספרי קודש רבים, לרבות ספרים שנכתבו על ידי אדמו"ר החסידות עצמו בכתב ידו, וכן כתבים ורישומים מגוונים בעניינים בהם עסקה החסידות. אוסף זה כלל למעשה שני רכיבים עיקריים:

א. "**הספרייה**": אוסף של כ-12,000 ספרים וכתבי יד בנושאי דת.

ב. "**הארכיון**": אוסף של כ-25,000 דרשות, מכתבים ומסמכים שונים בכתב יד שכתבו האדמו"רים עצמם לאורך השנים.

21. שני רכיבים אלה יחדיו מהווים אוסף אחד מנקודת מבטה של התובעת, והם יכונו להלן יחדיו – "**אוסף שניאורסון**". אוסף שניאורסון הלך וגדל לאורך השנים, וכלל האדמו"רים שכיהנו בחסידות חב"ד הוסיפו את פרי עטם לאוסף, כך שהאוסף הפך למוקד ידע עשיר ויחיד מסוגו, בעל חשיבות תרבותית והיסטורית למורשת ישראל, וזאת בנוסף להיבט הדתי, המסורתי, הקהילתי והחסידי של האוסף.

22. במהלך מלחמת העולם הראשונה נאלץ האדמו"ר רבי שלום דובער שניאורסון (האדמו"ר הרש"ב, החמישי בשושלת אדמו"רי חסידות חב"ד) לעזוב את ליובאוויטש, מרכז החסידות עד אותם ימים, ולהגר לרוסיה. בשלב זה, נפרדו דרכי שני הרכיבים של אוסף שניאורסון: הספרייה נשלחה לאחסנה במקום אחסון מוגן במוסקבה שברוסיה, שהייתה מחוץ לחזית המלחמה באותה העת. הארכיון נארז בארגזים אטומים, והאדמו"ר הרש"ב שמר אותו עם מטלטליו כאשר היגר ממקום למקום במהלך המלחמה. כך, הארכיון בלבד נותר בחזקה הפיזית של החסידות בזמן מלחמת העולם הראשונה.

23. בתום מלחמת העולם הראשונה, התנהלה מלחמת האזרחים והמהפכה הבולשביקית ברוסיה בשנים 1917-1925. לאחר עליית הבולשביקים לשלטון, בוצעה הלאמת רכוש ונכסים נרחבת ברחבי רוסיה על ידי השלטון. בין היתר, אותרה ה"ספרייה" כהגדרתה לעיל, נתפסה, והועברה לספריית לנין במוסקבה, הספרייה הלאומית של רוסיה באותה עת.

24. הארכיון נותר בידי האדמו"ר רבי יוסף יצחק (האדמו"ר הריי"ץ, השישי בשושלת אדמו"רי חב"ד), אשר שב להתגורר בפולין לאחר מלחמת העולם הראשונה. בשנת 1941, במהלך מלחמת העולם השנייה כאשר הנאצים כבשו את פולין, הם אפשרו לאדמו"ר הריי"ץ לברוח מפולין לארה"ב (כפי שאכן עשה), אך החרימו את מטלטליו וביניהם הארכיון. עם תום המלחמה, עבר הארכיון לידי הצבא האדום כ"שלל מלחמה" ואוחסן בארכיון צבאי ברוסיה. עם השנים אוחדו

מחדש הארכיון והספרייה ונותרו בחזקת ובשליטת הריבון הרוסי.

25. במשך עשרות שנים התעלמה ברית המועצות הסובייטית מפניות חב"ד או סירבה לדרישה להשבת הספרים, מהטעם שמדובר באוצר לאומי יקר לברית המועצות לכאורה. עם התפרקות ברית המועצות, החל להיווצר שיח בין חב"ד לבין בכירי הממשל הרוסי החדש, שהבטיחו להשיב את הספרים לידי חסידות חב"ד.

26. בפועל, חרף ההבטחות, הספרים לא הועברו. תחת זאת, בשנת 2013 החליט נשיא רוסיה ולדימיר פוטין להעביר את אוסף שניאורסון לרשות המוזיאון היהודי במוסקבה. גם במשכנו הנוכחי, מצוי האוסף תחת שליטתה, פיקוחה ואחריותה של ממשלת רוסיה, ומחב"ד נמנעת כל גישה פיזית אליו או מעורבות בניהולו ושימורו. חב"ד רואה בהשבת האוסף כמצוות "פדיון שבויים", ונציגים מטעם חב"ד שמונו לעניין עמלים מזה כמה עשורים על השבת אוסף שניאורסון למרכז החסידות הממוקם כיום בארה"ב.

ה.2. <u>ההליכים המשפטיים בארה"ב</u>

27. ביום 9.11.2004 פתחה התובעת דכאן בהליכים משפטיים נגד הנתבעת כאן, לצד גופים קשורים רוסיים נוספים. במסגרת התביעה התבקש סעד הצהרתי בדבר היותה של התובעת הבעלים החוקיים של אוסף שניאורסון, וכן צו עשה המורה לרוסיה להשיב את אוסף שניאורסון במלואו לחזקת התובעת בארה"ב (להלן: "**התביעה בארה"ב**" או "**ההליך העיקרי בארה"ב**").

28. ביום 2.5.2005 הגישה רוסיה בקשה לסילוק על הסף של התביעה בארה"ב, בין היתר בשל היעדר עילת תביעה, בשל טענת "פורום בלתי-נאות", ובשל חוסר סמכות של בית המשפט בארה"ב בהינתן חוק חסינות מדינות זרות האמריקאי, Foreign Sovereign Immunities Act (להלן: "**FSIA**"). על ההחלטה שניתנה בבקשה זו בערכאה הדיונית, הגישו שני הצדדים ערעור לבית המשפט לערעורים של מחוז קולומביה. במסגרת הערעור הוכרה זכאות התובעת להגיש את תביעתה בארה"ב, והוכרה סמכותם של בתי המשפט בארה"ב לדון ולהכריע בתביעה בארה"ב. ההחלטה הפכה חלוטה לאחר שלא הוגשה בקשת ערעור לבית המשפט העליון של ארה"ב.

[ב'] העתק החלטת בית המשפט לערעורים של מחוז קולומביה בארה"ב מיום 13.6.2008, **מצ"ב ומסומן כ<u>נספח ב'</u>.**

29. למען הסדר הטוב יצוין כי **<u>לאחר</u>** שבית המשפט לערעורים במחוז קולומביה דחת את עמדת רוסיה לעניין הסמכות, הגישה רוסיה במהלך 2008-2009 כתבי הגנה מטעמה בתביעה לבית המשפט בארה"ב. רק לאחר מכן, בחודש יוני 2009, הודיעה רוסיה לבית המשפט כי מעתה ואילך היא תפסיק לקחת חלק בהליך המשפטי משום כפירתה בסמכות בית המשפט בארה"ב, וזאת חרף השתתפותה בהליך לגופו גם לאחר שנדחו טענותיה במישור זה עוד קודם לכן. בהתאם, משרד עוה"ד שייצג את רוסיה בארה"ב, משרד עו"ד Squire, Sandres & Dempsey, התפטר מייצוג.

30. בהמשך לכך, התובעת המשיכה לנהל את התביעה בארה"ב וביקשה לקבל פסק דין גם בהיעדר ייצוג (בדומה לפסק דין בהיעדר התייצבות/הגנה). ביום 30.7.2010 ניתן פסק הדין בהליך העיקרי בארה"ב, המקבל את התביעה. בפסק הדין שם הכיר בית המשפט בארה"ב בבעלותה החוקית

של התובעת על אוסף שניאורסון בכללותו. יודגש כבר עתה כי בפסק הדין הובאה התייחסות לגופן של הטענות השונות שהעלתה רוסיה בכתבי ההגנה מטעמה שהוגשו בהליך.

[ג'] העתק פסק הדין בהליך העיקרי בארה"ב מיום 30.7.2010, **מצ"ב ומסומן כנספח ג'.**

31. פסק הדין בהליך העיקרי בארה"ב קבע מספר קביעות חשובות נוספות לגופם של דברים, הרלוונטיות גם להליך דנן. כך למשל, נקבע כי הלאמת האוסף על ידי רוסיה נעשתה בניגוד לדין הבינלאומי, שכן מדובר בהפקעה שלא למטרה ציבורית, שנעשתה באופן מפלה וללא פיצוי ראוי (ממצא שנקבע לראשונה בהחלטה שעניינה הבקשה לסילוק על הסף ואף לא הותקף בערעור שהגישה רוסיה בשנת 2006 הנזכר לעיל). עוד צוין כי רוסיה פעלה בניגוד להתחייבויותיה להשיב את אוסף שניאורסון לחב"ד - התחייבויות בכתב שהיא עצמה העניקה לחב"ד ולארה"ב לאורך השנים.

32. זאת ועוד, כחלק מבחינת הסמכות תחת FSIA, נדרש להכריע בית המשפט בארה"ב בשאלה האם הגופים שהחזיקו מטעם הממשלה הרוסית באוסף שניאורסון מבצעים תפקידים ממשלתיים או מסחריים, ובית המשפט הכריע בפסק הדין בתביעה בארה"ב כי מדובר בתפקידים מסחריים – וזה היה אחד מהתנאים להסרת החסינות לפי FSIA.

33. רוסיה בחרה במפגיע שלא לכבד את פסק הדין בהליך בארה"ב, ודבקה בסירובה להשבת אוסף שניאורסון גם לאחר פרסומו. בנסיבות אלה, פנתה התובעת להליכים לאכיפת פסק הדין, ובכלל זאת בקשה להטלת סנקציות כספיות על רוסיה, בדומה להליכים לפי פקודת בזיון בית המשפט בישראל. בשלב ראשון, בהחלטה מיום 26.7.2011, הכיר בית המשפט בכך שרוסיה אינה מקיימת את פסק הדין נגדה, אך לא אישר הטלת סנקציות כספיות. לאחר שבית המשפט נתן לרוסיה שהות של כשנתיים, ולאחר שהוגשה לבית המשפט חוות דעת מטעם ממשלת ארה"ב לעניין זה, ביום 16.1.2013 ניתנה החלטה המאשרת את בקשת הביזיון שהגישה חב"ד. במסגרת ההחלטה הושת על רוסיה קנס של 50,000 $ (דולר ארה"ב) מדי יום עד לביצוע פסק הדין והשבת אוסף שניאורסון לידי חב"ד.

[ד'] העתק ההחלטה בהליך העיקרי בארה"ב מיום 26.7.2011, **מצ"ב ומסומן כנספח ד'.**

[ה'] העתק ההחלטה בעניין ביזיון בית המשפט בהליך העיקרי בארה"ב מיום 16.1.2013, **מצ"ב ומסומן כנספח ה'.**

34. במסגרת ההחלטה מיום 16.1.2013 נקבעו מספר קביעות חשובות אף לענייננו בהליך דנן. כך, בית המשפט בארה"ב בחן את שאלת הסמכות לנקוט בהליכי ביזיון בימ"ש נגד מדינה זרה, וקבע שיש לו סמכות לעשות כן –מכוח סמכותו הטבועה, בהיעדר מניעה לכך ב-FSIA, ובהתבסס על תקדימים משפטיים בהליכים קודמים שנוהלו בבית המשפט במחוז קולומביה בעניין זה (עמ' 151-153 להחלטה מיום 16.1.2013).

35. לגופו של עניין, נתן בית המשפט משקל לכך שעצם הגשת בקשת הביזיון ע"י חב"ד בהליך העיקרי בארה"ב הביאה את עורכי הדין של רוסיה להסכים לקיים פגישות מו"מ עם באי-כוח חב"ד בארה"ב,, לראשונה מאז התפטרו מייצוג בשנת 2009 (עמ' 153 להחלטה). מכך ניתן ללמוד כי רוסיה מייחסת משקל כלשהו ל"איום" שבאכיפת פסק הדין שניתן נגדה בארה"ב, במסגרת

שיקוליה בנוגע לאוסף שניאורסון.

36. ברמה המעשית, בשים לב לגודלה וחוזקה הכלכלי של רוסיה, ובהשוואה להשתת קנסות ביזיון על מדינות קטנות יותר ותאגידים רווחיים גדולים בארה"ב במקרים קודמים, פסק כאמור בית המשפט בארה"ב את גובה הקנס שיושת על רוסיה בסך 50,000 $ (דולר ארה"ב) ליום, בהם תחויב רוסיה עד למילוי אחר הוראות פסק הדין בהליך העיקרי בארה"ב, דהיינו עד להשבת אוסף שניאורסון לחב"ד.

37. לאחר ההחלטה האמורה, החלה חב"ד באמצעות באי-כוחה בארה"ב לפעול לאכיפת הסנקציה נגד רוסיה באמצעות מימוש נכסים בבעלות רוסיה בארה"ב. במסגרת זו נפתחו בין היתר הליכי מימוש נגד תאגידים בשליטה רוסית הפועלים ומחזיקים בנכסים בארה"ב, כגון חברת האנרגיה Tenex-USA. יצוין כי משרד עוה"ד White & Case, אשר מייצג את Tenex-USA בהליכי האכיפה המתנהלים כנגדם, הוא אותו משרד עו"ד אשר מייצג כיום את רוסיה עצמה בהליכים נוספים ואחרים לדוגמה: *Hulley Enterprises Ltd. v. Russian Federation*, No. 14-cv-1996 (U.S. District Court for the District of Columbia).

38. במקביל, מפעם לפעם נדרש בית המשפט בארה"ב לאשרר את החלטת הביזיון וליתן כלים לאכפה, תוך מתן "פסיקתות" על הסכום העדכני אותו ניתן לגבות. לאחרונה, ביום 20.12.2019 ניתנה החלטת "פסיקתא" כזו, היא-היא פסק החוץ שאכיפתו מתבקשת בהליך דנן (נספח א' לעיל). יודגש כי בהתאם לפסק החוץ שאכיפתו מתבקשת, הקנס שעל רוסיה לשלם לחב"ד עומד על סך כולל של 122,000,000 $ (שכן מדובר בפסיקתה המוסיפה עוד 78,300,000 $ לסך של 43,700,000 $ שנקבע בהחלטה קודמת משנת 2015).

[ו'] העתק החלטה בהליך העיקרי בארה"ב מיום 10.9.2015 הקובעת את גובה הקנס על סך של 43,700,000 $ (דולר ארה"ב), **מצ"ב ומסומן כנספח ו'.**

39. מאז ועד היום נחלה חב"ד הצלחה חלקית בלבד בהליכי האכיפה בארה"ב. כמו כן, לחב"ד ידוע כי לממשלת רוסיה ישנם נכסים במדינת ישראל. חב"ד סבורה כי למדינת ישראל, כמדינת העם היהודי, יש אינטרס ברור בכך שיקויים פסק הדין בהליך העיקרי בארה"ב, וזאת מפאת חשיבותו של אוסף שניאורסון לעם היהודי כולו, כמפורט לעיל.

40. בנסיבות אלה, החליטה חב"ד לפנות לבית המשפט הנכבד ולבקש את אכיפת פסק החוץ בישראל. כפי שיפורט להלן בטיעון המשפטי, חב"ד סבורה שבנסיבות העניין מתקיימים מלוא התנאים לצורך אכיפת פסק החוץ.

ו. <u>הטיעון המשפטי</u>

41. התובענה דנן מהווה בקשה לאכיפתו בישראל של פסק חוץ שניתן בארה"ב נגד רוסיה, שהיא יישות מדינית זרה שאינה ישראל או ארה"ב. לכן, בענייננו על חב"ד לעמוד בתנאים שנקבעו בשני חיקוקים עיקריים: הראשון, חוק החסינות; והשני, חוק אכיפת פסקי חוץ, התשי"ח-1958 (להלן: "**חוק האכיפה**"). הפרק המשפטי להלן ינתח את ההוראות הרלוונטיות ויראה מדוע בענייננו מתקיימים התנאים למתן הסעד המבוקש.

ו.1.<u>חוק חסינות מדינה זרה</u>

42. בטרם ייסקרו התנאים לאכיפת פסק החוץ בענייננו, יש ליתן את הדעת לכך שהנתבעת בהליך זה היא מדינה זרה, כהגדרתה בחוק החסינות. ס' 2 רישא לחוק החסינות קובע כלל לפיו למדינה זרה תהא חסינות מפני סמכות השיפוט של בתי המשפט בישראל. חסינות זו מהווה מעין מחסום דיוני א-פריורי מפני דיון בתביעות נגד מדינות זרות בבתי המשפט בישראל, ועל כן יש לדון בה ראשית כמעין טענת סף.

43. בית המשפט העליון קבע ברע"א 7484/05 **The United States of America נ' יוסף שוחט ז"ל**, בפס' 15-16 (נבו, 3.8.2010) (להלן: "**עניין שוחט**"), כדלקמן:

> **"נקודת המוצא היא שההכרה בחסינות הדיונית של המדינה הזרה נעשית על דרך הצמצום, ובמקרה של ספק יש להכריע לטובת סמכותו של בית המשפט...**
>
> **ככלל, חסינותה של מדינה זרה שרירה וקיימת, כל עוד לא חל אחד החריגים השוללים את תחולתה. גישה בסיסית זו מקובלת בדין הבינלאומי הנוהג..."**.

44. עוד יצוין כי בדברי ההסבר לחוק החסינות צוין במפורש כי החוק מיועד לקלוט לתוך המשפט הישראלי את המשפט הבינלאומי הנוהג בעניין החסינות היחסית של מדינות זרות. בתוך כך, נסמך חוק החסינות הישראלי על מספר חוקים מקבילים ברחבי העולם, שאחד מהם הוא ה-FSIA האמריקאי. משכך, קיימת רלוונטיות בענייננו לפרשנות המשפטית שהעניק בית המשפט בהליך העיקרי בארה"ב להוראות FSIA על המקרה הנדון.

45. לכן, התובעת תטען, כנקודת מוצא, שיש ליתן משקל לעצם העובדה שבית המשפט בארה"ב בחן את טענת הסמכות מכוח FSIA לגופה ומצא כי הייתה לו סמכות לדון בתביעה נגד רוסיה. כך, גם בענייננו, ישנו בסיס לאכוף את פסק הדין בישראל חרף הוראות חוק החסינות.

46. ואולם, גם אם נתייחס אך ורק להוראות חוק החסינות הישראלי לגופן, נמצא כי לכלל החסינות האמור בס' 2 לחוק החסינות קבועים מספר סייגים עיקריים, שעיקרם עניינים פליליים (ס' 2 סיפא לחוק החסינות), וסייגים הקבועים בסימן ב' לפרק א' לחוק החסינות). כיוון שבענייננו מתבקשת אכיפת חיוב כספי כלפי רוסיה, התובעת תטען כי בענייננו חל סייג "העסקה המסחרית" הקבוע בס' 3 לחוק החסינות, אשר יפורט להלן.

47. ס' 3 לחוק החסינות קובע כי "***למדינה זרה לא תהא חסינות מפני סמכות שיפוט בתביעה שעילתה עסקה מסחרית***". בס' 1 לחוק החסינות מוגדרת "עסקה מסחרית" כדלקמן:

> **"כל עסקה או פעולה שהיא מתחום המשפט הפרטי ובעלת אופי מסחרי, לרבות הסכם למכר טובין או שירותים, הלוואה או עסקה אחרת, למימון, ערובה או שיפוי, ואשר איננה כרוכה, במהותה, בהפעלת סמכות שלטונית".**

48. בעניין שוחט שהוזכר לעיל נאמר, בפס' 22 לפסק הדין, כי:

> **"סיווג הפעולה כמסחרית או שלטונית אינו פשוט כלל ועיקר. ההסדרים הקבועים בחוקי המדינות השונות לא נותנים תשובה אחידה לשאלה אימתי**

תישלל החסינות ממדינה זרה תחת כנפיו של חריג העסקה המסחרית, ומהן סוג התביעות הנכנסות לגדרו".

49. בענייננו, התובעת תטען כי פסק-החוץ שאכיפתו מתבקשת עוסק בחיוב כספי נגד הנתבעת, אשר הושת על הנתבעת בשל אי-ציותה לפסק דין בהליך אזרחי. לכן, ההליך דנן עונה על ההגדרה "***פעולה מתחום המשפט הפרטי ובעלת אופי מסחרי***" המצויה ברישא ס' 1 להגדרת עסקה מסחרית בחוק החסינות.

50. המבחן העיקרי שנקבע בפסיקה להבחנה בעסקה מסחרית הוא מבחן הטיב והמהות, שמטרתו לבחון האם עסקינן בפעולה בעלת אופי שלטוני או בפעולה מתחום המשפט הפרטי (ר' למשל: רע"א 7092/94 **Her Majesty The Queen in Right of Canada נ' שלדון ג. אדלסון**, פ"ד נא(1) 625 (1997)).

51. ביישום המבחן לענייננו, פסק דין בהליך אזרחי שלא קוים על ידי אחד הצדדים, ובעקבותיו מושתים עליו קנסות מכוח דיני ביזיון בית משפט, מהווה פעילות שהיא בטיבה ובמהותה פרטית. גם אדם פרטי, כמו הנתבעת במקרה דנן, עשוי להימצא חייב בתשלום קנסות בשל אי-ציות לצווים שיפוטיים. אין בעניינו משמעות יתרה כלשהי להיותה של הנתבעת יישות מדינית.

52. לשלמות התמונה יוזכר כי ס' 15(א) ו-16(3) לחוק החסינות קובעים כי נכסי מקרקעין בישראל מוחרגים מהאיסור לנקוט בהליכי הוצאה לפועל נגד מדינה זרה. גם בכך יש כדי ללמד על תכלית חוק החסינות והשיקולים שעמדו מאחורי חקיקתו, במובן זה שאכיפת פסק חוץ שעניינו חיוב כספי רלוונטית ואפשרית ואין להחיל עליה חסינות מדינה זרה.

53. לאור כלל האמור, יש לקבוע כי בענייננו סייג העסקה המסחרית מתקיים ולא קיימת לנתבעת חסינות מכוח חוק החסינות. משכך, יש לבחון את התנאים לאכיפת פסק החוץ בענייננו.

ו.2.<u>חוק אכיפת פסקי חוץ</u>

54. בהיעדר חסינות לנתבעת בענייננו מפני תביעה בישראל, נעבור לדון לגופם של דברים בתנאים לאכיפת פסק החוץ המבוקש בישראל. כידוע, בחוק האכיפה נדרש קיומם של מספר תנאים על מנת שניתן יהיה להכריז על פסק חוץ כאכיף בישראל:

א. תנאים הנוגעים לטיבו של הפסק ולסמכות לתתו במדינה בה ניתן (ארה"ב בענייננו), המנויים בס' 1 ו-3 לחוק האכיפה;

ב. תנאים פרוצדורליים הנוגעים לאכיפת פסקי חוץ בישראל - דרישת הדדיות באכיפת פסקי חוץ הקבועה בס' 4 לחוק, וקביעת התיישנות לאחר 5 שנים בלבד, הקבועה בס' 5 לחוק;

ג. סייגים הנוגעים לטיבו של ההליך שקדם לפסק לצורך וידאו קיומו של הליך שיפוטי הוגן בארה"ב, אשר קבועים בס' 6 לחוק;

55. להלן תובא התייחסות לכלל התנאים המנויים בחוק האכיפה, לפי סדרם כמפורט לעיל.

ו.2.א. <u>הפסק תקין, ניתן בסמכות, הוא בר ביצוע וניתן לאכיפה (ס' 1, 3 לחוק האכיפה)</u>

56. בהתאם להוראות חוק האכיפה, יש לבחון האם ניתן להגדיר את ההחלטה שאכיפתה מתבקשת כ"פסק-חוץ" כהגדרתו בחוק האכיפה, היינו שפסק החוץ ניתן בעניין אזרחי (ס' 1). בנוסף, יש גם לבחון האם לפי הדין האמריקאי, בתי המשפט בארה"ב היו מוסמכים לתת את פסק החוץ (ס' 3(1)); האם הפסק אינו ניתן עוד לערעור (ס' 3(2)); האם החיוב שבפסק ניתן לאכיפה על פי הדינים של אכיפת פסקי דין בישראל, ותכנו של הפסק אינו סותר את תקנת הציבור (ס' 3(3)); והאם הפסק הוא בר-ביצוע בארה"ב (ס' 3(4)).

57. אשר להגדרת "פסק-חוץ", אין חולק כי בענייננו עסקינן בעניין אזרחי, מעצם הגדרתו והווייתו בבית המשפט בארה"ב. למען הסר ספק יוזכר כי ב**ע"א 1268/07 שלמה גרינברג נ' ד"ר יוסף במירה** (נבו, 9.3.2009) נקבע במפורש כי פיצוי עונשי זר יהא אף הוא אכיף במסגרת פסק חוץ בישראל:

> **"אכן, הפיצוי העונשי נועד... להגשים תכליות בעלות אופי גמולי, הרתעתי וחינוכי, אך בכך אין כדי להוציאם מגדרי הפיצוי המשולם לצד שנפגע בהליך אזרחי; מה עוד שעצם האפיון "העונשי" של הפיצוי מעבר לנזק במובן הצר, בדיני הנזיקין ומחוץ להם, התמתן לפי חלק מהגישות... משכך, פסק הדין הזר בעניינו נופל בגדר פסקי הדין הטיפוסיים הנחשבים "פסק-חוץ" לצורך חוק אכיפת פסקי-חוץ. ניתן להוסיף ולהזכיר כי הגדרת "פסק-חוץ" כוללת גם פסק דין "לתשלום פיצויים או נזקים לצד שנפגע, אף כשלא ניתן בעניין אזרחי", ולכן יתכן שאף פסק דין המטיל חיוב כספי שנובע מהוראה שאינה אזרחית יחשב "פסק-חוץ"... מכל מקום ברור הדבר שלא ניתן לומר כי חיובו של המערער שלפנינו, שהוטל עליו בעקבות תביעה אזרחית בגין הפרת חוזה והפרת חובות האמון וההגינות שהוא חב כלפי המשיב, ניתן בעניין פלילי. לאור האמור, אין ספק שפסק הדין הזר עונה על דרישת סעיף 1 לחוק אכיפת פסקי-חוץ."**

58. ואכן, בעניין גרינברג אמנם היה מדובר בפיצויים עונשיים-חוזיים, אך בענייננו הקנס שהושת על הנתבעת בשל אי-ציות לפסק הדין בארה"ב מהווה אף הוא סוג של פיצוי עונשי בנסיבות העניין, ומשכך יש להקיש מפסק הדין שם גם לענייננו.

59. אשר לתנאי האכיפה הקבועים בס' 3 לחוק האכיפה, מפסק הדין וההחלטות שקיבל בית המשפט בארה"ב, הן בעניין סמכותו לדון בתביעה והן בעניין ביצוע פסק הדין והדיון בבקשת הביזיון, עולה בבירור כי כלל התנאים הנוגעים לדין האמריקאי מתקיימים בענייננו. יתרה מכך, במסגרת ההליך העיקרי ניתנה ביום 13.6.2008 החלטה פוזיטיבית של בית המשפט בארה"ב (נספח ב' לעיל) בה נקבע כי לבתי המשפט בארה"ב יש סמכות שיפוט על ההליך, וזאת אף בהתחשב ב-("FSIA"), המקביל לחוק החסינות הישראלי. יובהר כי במסגרת שלב הראיות תספק התובעת חוות דעת מומחה לדין הזר וכן כל תצהיר רלוונטי הנדרשים להוכחת קיומם של תנאי האכיפה הנוגעים לדין הזר.

60. יודגש: בית המשפט בארה"ב נדרש לבחון ולהכריע בטענת חוסר סמכות עקב בקשה לסילוק על הסף שהגישה רוסיה בתביעה בארה"ב. על החלטת הערכאה הדיונית (בית המשפט במחוז קולומביה) הוגש ערעור שנדון בבית המשפט לערעורים של מחוז קולומביה, תוך שהוראות FSIA

יושמו בכללותן על המקרה דנן. לבסוף, סבר בית המשפט בארה"ב שנתונה לו הסמכות לדון ולהכריע בתובענה. לכן, גם בית המשפט הנכבד נדרש להכיר בסמכות זו, ולו רק מטעם עיקרון הכיבוד ההדדי שבין ערכאות משפט זרות, כללי הנימוס הבינלאומי, ומחמת היותו של בית המשפט בארה"ב הפורום הנאות לדון בסמכותו שלו עצמו.

61. פסק החוץ אף בר-אכיפה בישראל. במהותו מהווה פסק החוץ בעניינו חיוב כספי נגד מדינה זרה. כפי שצוין בפרק ו.1 לעיל, חוק החסינות מאפשר לאכוף פסקי דין נגד מדינות זרות בישראל, לרבות נקיטה בהליכי הוצאה לפעול למימוש רכוש של המדינה הזרה המצוי בשטח השיפוט של מדינת ישראל, לצורך ביצועו של פסק דין כספי.

62. אשר לעמידת פסק החוץ בתקנת הציבור: הבסיס עליו מושתת פסק החוץ ראוי והולם, שתקנת הציבור עומדת לצידו, קל וחומר כשעסקינן ב"אוסף שניאורסון", שהוא כאמור אוצר היסטורי בלום עבור העם היהודי כולו. הפסיקה התייחסה למונח "תקנת הציבור" בהקשרי אכיפת פסקי-חוץ ככזה המיועד לוודא שבמסגרת אכיפת פסק-החוץ לא ייאכף דין זר שאינו הולם את ערכי היסוד של מדינת ישראל ושיטתה המשפטית (ר' למשל: ע"א 1137/93 **אשכר נ' היימס**, פ"ד מח(3) 641, 651 (1994); ה"פ (מחוזי י-ם) 4052/05 **Wells Fargo Bank Of Minnesota National Association נ' צימרינג**, פס' 21 (נבו, 31.12.2007) (להלן: "**עניין צימרינג**")). ברי כי בענייננו המצב הוא ההפוך – דווקא אכיפת פסק הדין בישראל הולמת היטב את ערכי היסוד של משפטנו ומשטרנו, ומתכתבת עם היותה של מדינת ישראל יהודית ודמוקרטית.

63. ההלכה הפסוקה אף קשרה את הסייג לאכיפה הקבוע בס' 7 לחוק האכיפה, העוסק בפגיעה בריבונות או בביטחון המדינה, עם תנאי "תקנת הציבור" הקבוע בס' 3(3) לחוק האכיפה. בתי המשפט בישראל, וכן הספרות המחקרית בנושא אכיפת פסקי חוץ, כינו את ס' 7 כ"מקרה פרטי" של תקנת הציבור (ר' למשל: ***עניין גרינברג***, בפס' 14; ***עניין צימרינג***, בפס' 21).

64. פסק דין מנחה לעניין זה הוא פסק הדין בה"פ (י-ם) 4318/05 **פלוני (קטין) נ' הרשות הפלשתינית** (נבו, 31.8.2008), שעסק באכיפת פסק חוץ מארה"ב לחיוב כספי בסך כ-116.5 מיליון דולר ארה"ב נגד הרשות הפלשתינית (להלן: "**עניין פלוני**"). בדומה להליך בענייננו, גם בעניין פלוני מדובר היה בבקשה לאכיפת פסק-חוץ שניתן בארה"ב, ביחס לסכום כספי גבוה במיוחד, הכולל פיצויים עונשיים, ואשר נפסק נגד יישות מדינית זרה. חרף כל האמור, קבע בית המשפט בעניין פלוני כי אין כל קושי באכיפת פסק החוץ מטעמי תקנת הציבור ו/או ריבונות או ביטחון המדינה, ואף הוסיף וציין כי "***...אין באכיפת פסק החוץ כל "אמירה מדינית", כי אם אמירה משפטית, כי פסק החוץ אכיף, והתוצאות המשתמעות מכך***" (פס' 87 לפסק הדין). בהתאם, אושרה אכיפת פסק הדין בעניין פלוני.

65. לכן, יש לקבוע כי פסק הדין שאכיפתו מתבקשת בהליך דנן הוא "פסק חוץ" כהגדרתו בחוק האכיפה, ומתקיימים לגביו כלל התנאים לאכיפה הקבועים בפס' 3 לפסק הדין. הפסק תקין, ניתן בסמכות, הוא בר ביצוע וניתן לאכיפה.

1.2.ב. <u>קיימת הדדיות באכיפה ופסק החוץ לא התיישן (ס' 4-5 לחוק האכיפה)</u>

66. חוק האכיפה דורש עוד כי תתקיים הדדיות באכיפת פסקי חוץ בין ישראל לארה"ב (ס' 4(א)); וכי

הבקשה לאכיפת פסק החוץ תוגש לא יאוחר מ-5 שנים מיום מתן הפסק בארה"ב (ס' 5).

67. אשר לדרישת ההדדיות, ב***עניין גריינברג*** שצוטט לעיל נקבע כי הנטל לסתור את דרישת ההדדיות מוטל על המתנגד לאכיפת פסק החוץ, בעוד שברירת מחדל היא שיש הדדיות באכיפת פסקי חוץ. בע"א 3081/12 **דאבל קיי מוצרי דלק (1996) בע"מ נ' גזפרום טרנסגז אוכטה בע"מ** (נבו, 9.9.2014) נקבע כי די בקיומו של פוטנציאל סביר לאכיפתו של פסק דין ישראלי על ידי בתי המשפט של מדינה זרה (גם אם לא הוכחה אכיפה דה-פקטו של פסק דין ישראלי במדינה הזרה), על מנת לעמוד בדרישת ההדדיות. ר' גם ע"א 7884/15 **רייטמן נ' Jiangsu Overseas Group Co Ltd** (נבו, 14.8.2017).

68. למעלה מן הצורך יובהר כי בענייננו עסקינן בפסק דין של מחוז קולומביה בארה"ב, כאשר במאגרי הפסיקה הישראליים קיימת פסיקה רבה האוכפת פסקי דין מארה"ב. בפרט, כבר צוין בפסיקה בהקשר אחר, ביחס לאכיפתו בישראל של פסק חוץ שניתן בארה"ב, כי "***דאוי כי ביחסים בין מדינות ידידותיות יתקיים כיבוד הדדי של החלטות של בתי משפט מוסמכים***" (ה"פ (מחוזי ת"א) 408/00 **tower air inc נ' רשם החברות**, בפס' 14 (נבו, 28.05.2000)). לכן, דרישת ההדדיות מתקיימת ביחס לפסק החוץ המבוקש בהליך דנן.

69. אשר למועד הגשת הבקשה דנן, כפי שצוין לעיל פסק הדין שאכיפתו מתבקשת הוא מיום 20.12.2019, ומכאן שהוא עומד במסגרת הזמן הקבועה בס' 5 לחוק האכיפה. למעלה מן הצורך יובהר שהאכיפה מתבקשת בהליך דנן בנוגע לפסק דין העוסק בקנס כספי, ולא באכיפת פסק הדין ה"עיקרי" בו ניתן צו עשה להשבת "אוסף שניאורסון". ברור הוא שבענייננו אין רלוונטיות לאכיפת פסק הדין בהליך העיקרי בארה"ב בבתי המשפט בישראל, שהרי אין חולק כי המיטלטלין המהווים את "אוסף שניאורסון" מצויים ברוסיה, מחוץ לשטח השיפוט של מדינת ישראל. על כן, לצורך בחינת ההתיישנות אין רלוונטיות למועד פסק הדין בהליך העיקרי, אלא לפסק הדין הכספי מיום 20.12.2019 בלבד.

1.2.ג. <u>ההליך בארה"ב התנהל באופן הוגן ולנתבעת ניתן יומה, לא קיימים הליכים נוספים</u>

70. נדבך נוסף של חוק האכיפה הוא שאלת קיומם של סייגים לאכיפה, בעיקר בנוגע לאופן ניהול ההליך בארה"ב. כך, חוק האכיפה מסייג את היכולת לאכוף בישראל פסק-חוץ במידה והפסק הושג במרמה (ס' 6(א)(1)); במידה ולא ניתנה לנתבע אפשרות סבירה לטעון טענות ולהביא ראיות (ס' 6(א)(2)); במידה וכללי המשפט הבינלאומי הפרטי החלים בישראל שוללים את סמכות בית המשפט שנתן את הפסק (ס' 6(א)(3)); במידה וקיים פסק דין מקביל נוגד בתוקף (ס' 6(א)(4)); ובמידה ומתנהל הליך מקביל בישראל (ס' 6(א)(5)).

71. ביחס לסייג המרמה, במסגרת ההליך בארה"ב לא הועלו כלל טענות כלשהן למרמה; ואף אין חולק על כך שהקנס הכספי מושא ההליך דנן נקבע לאחר שרוסיה סירבה לקיים את פסק הדין בהליך העיקרי בארה"ב. לכן, אין כל בסיס לטעון שמדובר בחיוב שהושת במרמה.

72. ביחס לזכות הטיעון והבאת הראיות, רוסיה שכרה עורכי דין בהליך בארה"ב, והגישה שני כתבי הגנה – כתב הגנה מקורי וכתב הגנה מתוקן בשלב מאוחר יותר בהליך. במסגרת כתבי ההגנה הועלו, לצד טענות סף, גם טיעונים לגופם של דברים. רוסיה אף הגישה ערעור על דחיית בקשה

לסילוק התובענה על הסף בהליך העיקרי בארה״ב, כך שבהחלט יש לראות בה כמי שהתנהלה במשך תקופה ארוכה באופן מודע ומכוון בהליך המשפטי בארה״ב.

73. למעשה, רק לאחר שטענות הסף שלה נדחו, החליטה רוסיה כאות מחאה להפסיק ולהשתתף בהליכים המשפטיים בעניינו בארה״ב. לצד זאת, תאגידים בבעלות רוסיה הפועלים בארה״ב עודם נאבקים בבתי המשפט בארה״ב בימים אלה ממש נגד התובעת (בהליכים למימוש נכסים לצורך אכיפת פסק הדין הכספי נגד רוסיה), כשהם מיוצגים על ידי אותם עורכי דין שמייצגים את רוסיה עצמה בהליכים אחרים בארה״ב. עוד יודגש כי מפסק הדין בהליך העיקרי בארה״ב (נספח ג׳ לעיל) עולה במפורש שבית המשפט בארה״ב דן בטענות שהעלתה רוסיה בכתבי ההגנה מטעמה לגופם של דברים.

74. אם לא די בכל האמור לעיל, נבקש אף להזכיר כי חב״ד עתרה כבר בשנת 2011 להטלת סנקציות כספיות על רוסיה בשל אי-ציותה לפסק הדין משנת 2010 בתביעה בארה״ב. ואולם, בקשתה הראשונה של חב״ד נדחתה בהחלטה מיום 26.7.2011, תוך שניתנה שהות נוספת לרוסיה ותוך שבית המשפט בארה״ב הורה לחב״ד להמציא פעם נוספת את הצווים וההחלטות לרוסיה טרם יושתו עליה קנסות בפועל (נספח ד׳ לעיל). היינו, בית המשפט בארה״ב, מבחינתו, נתן למשיבים את האפשרות הסבירה להתייצב לפניו ולהשתתף בצורה נאותה בדיון המשפטי – התנהלות שהוכרה בפסיקה ככזו המספיקה לצורך שלילת סייג זכות הטיעון הקבוע בס׳ 6(א)(2) לחוק האכיפה (ר׳ למשל ***עניין פלוני***, בפס׳ 77). בנסיבות אלה, ברי כי פסק הדין לא הושג במרמה, ולנתבעת הייתה אפשרות סבירה לטעון טענות ולהביא ראיות.

75. ביחס להליך מקביל, בישראל לא מתקיימים הליכים מקבילים תלויים ועומדים לאכיפת הקנסות שהושתו על רוסיה. הליכים מקבילים כאלה מתקיימים אך ורק בארה״ב, והתובעת עומלת על תיאום וסנכרון מתמיד בין באי כוחה בארה״ב לבין באי-כוחה החי״מ בישראל, על מנת להבטיח שלא ייווצר מצב של כפל-גבייה לסכומים שנדרשת רוסיה לשלם לתובעת. בהקשר זה אף יוזכר כי רוסיה ממשיכה להתעלם מפסק הדין בארה״ב, ומשכך בכל יום מתווספים עוד 50,000 $ (דולר ארה״ב) לקנס שהושת על רוסיה לטובת חב״ד. גם בכך יש כדי להפיג את החשש מכפל-גבייה, כאשר הסכומים לגבייה מצטברים בסך משמעותי מדי יום ביומו.

76. אשר לקיומו של פסק דין נוגד, ועל מנת למנוע העלאת טענות מטעות מצד הנתבעת, תבקש התובעת ליידע את בית המשפט הנכבד כי לפני מספר שנים ניתן בבתי המשפט ברוסיה פסק דין נגד ממשלת ארה״ב, בו הושת על ממשלת ארה״ב קנס ״מקביל״ של 50,000 $ (דולר ארה״ב) ליום, עד אשר ארה״ב תשיב לרוסיה 7 ספרים מתוך ״אוסף שניאורסון״ שהושאלו לשיטת רוסיה למר אל גור בעת ביקורו ברוסיה לפני כעשור (להלן: ״**ההליך הרוסי**״). יודגש כי חב״ד אינה צד להליך הרוסי, והקנס שהושת בהליך הרוסי הוא כלפי ממשלת ארה״ב. לכן, גם סייג זה אינו חל בענייננו.

77. אשר לדרישת הסמכות בהתאם למשפט הבינלאומי הפרטי, המלומד עמוס שפירא מסביר בספרו כי כללי הסמכות הבינלאומית לעניין הכרתם ואכיפתם של פסקי-חוץ בישראל שאובים מהמשפט המקובל ומהמשפט האנגלי. על פי המשפט המקובל, סמכות בינלאומית נרכשת אם נתקיימה בין הפורום הדן בפסק-החוץ לבין הנתבע אחת משתי זיקות: מגורים או הסכמה (עמוס

שפירא, "הכרה ואכיפה של פסקי חוץ (חלק שני)", **עיוני משפט** ה' (תשל"ו-תשל"ז) (להלן: "**שפירא**"), בעמ' 46-47).

78. לענייננו, די בבחינת זיקת המגורים כדי להיווכח שלבית המשפט בארה"ב (כמו גם לבית המשפט הנכבד) נתונה הסמכות הבינלאומית לדון בתובענה דנן, ובהתאם לא חל סייג המשפט הבינלאומי הפרטי. כך, לפי זיקת המגורים, במקרה שהנתבע הוא אישיות משפטית (ולא אדם בשר ודם), המבחן הקובע לקיום זיקת המגורים הוא ניהול עסקים במדינה (ר' למשל: ***עניין פלוני***, בפס' 81; ***עניין גרינברג***, בפס' 15; **שפירא**, בעמ' 47). בענייננו, לרוסיה נוכחות קבועה הן בישראל והן בארה"ב (קיימת נציגות דיפלומטית קבועה) וכן בעלות בנכסים, קשרי סחר וקשרים כלכליים.

79. עובדות אלה מספיקות לצורך רכישת סמכות בינלאומית לבית המשפט הנכבד. גם בית המשפט בארה"ב סבר כך, והכריע כי הוא בעל סמכות לדון בתביעה בהליך העיקרי בארה"ב (ר' נספח ב' לעיל). ברי כי גם להכרעה "ישירה" זו של בית המשפט בארה"ב בנושא הסמכות הבינלאומית, יש משקל בבואו של בית המשפט הנכבד לבחון את סייג המשפט הבינלאומי הקבוע בחוק האכיפה. משכך, לא חל כאמור בענייננו סייג זה.

80. עוד יוזכר כי בית המשפט העליון כבר קבע בעבר כי במסגרת סעיף 6 לחוק האכיפה, שאלת הסמכות המקומית (היינו, המדינה בארה"ב בה נדון הפסק) איננה רלוואנטית, אלא נבחנת סמכות בתי המשפט של ארצות-הברית ולא של מדינה ממדינותיה (ר ע"א 4721/95 **רימון נ' a.e.l leasing co**, פ"ד נ(5) 99, 103 (1997)).

81. למעלה מן הצורך, נבקש להתייחס בקצרה לזיקת ההסכמה ולסייגים הקבועים ביחס אליה בס' 6(ב)-6(ג) לחוק האכיפה. בסעיפים אלה נקבע, בין היתר, כי במידה והנתבע התייצב בפני בית המשפט הזר וכפר בסמכותו (או טען לצורך הגנה על נכסיו), לא יראוהו כמי שמסכים לסמכות, גם אם העלה לצד הכפירה טענות לגופם של דברים. לשיטת חב"ד, אין בסעיפים אלה כדי להקים סייג לאכיפת פסק החוץ בענייננו, וזאת מכמה טעמים שיפורטו להלן.

82. ***ראשית***, סעיפים אלה מבוססים כולם על כלל הסמכות הבינלאומית הנובע מס' 6(א)(3) לחוק האכיפה (ר' למשל רישא ס' 6(ב) "***לעניין סעיף קטן (א)(3)...***" וכן ר' התייחסות בס' 6(ג) המפנה לסעיף 6(ב) "***...לטענות כאמור בסעיף קטן (ב)...***"). כפי שצוין לעיל, זיקת ההסכמה היא זיקה חלופית לזיקת המגורים, וכאשר אחת הזיקות מתקיימת אין עוד צורך לבחון את רעותה (ר' למשל ב***עניין גרינברג***). לאור זאת, אין צורך להכריע האם בקשתה של רוסיה בבית המשפט בארה"ב לסילוק התובענה על הסף מהווה כפירה בסמכות לצורך ס' 6 לחוק האכיפה.

83. ***שנית***, ס' 6(ג) קובע כי העלאת טענות לגופם של דברים לא תשמש כאינדיקציה למתן הסכמה להתדיין בבית משפט, כל עוד הטענות יועלו טרם ניתנה החלטה סופית בעניין הסמכות. ואולם, בענייננו פסק הדין הסופי בעניין הסמכות ניתן בחודש יוני 2008, ורק לאחריו הוגשו שני כתבי ההגנה מטעם רוסיה בשלהי 2008 ובתחילת שנת 2009. רק לאחר הגשת שני כתבי ההגנה, בחודש יוני 2009, הודיעה רוסיה לבית המשפט בהליך העיקרי בארה"ב על הפסקת התייצבותה בהליך (המועדים מפורטים בפסקי הדין מיום 30.7.2010 ו-16.1.2013, נספחים ג' ו ה' בהתאמה לעיל).

84. לא למותר לציין בהקשר זה כי עד ל"זניחת" ההליך בקיץ 2009, הייתה רוסיה מיוצגת על ידי

עורכי דין בארה"ב ולקחה חלק פעילה בדיונים בהליכים שהתנהלו נגדה במשך כ-5 שנים תמימות, לרבות הגשת ערעור בנושא הסמכות. הדבר מעיד אף הוא על הסכמתה להתדיין בארה"ב.

85. ***שלישית***, כאן המקום לציין כי התביעה בארה"ב הוגשה במקור בשנת 2004 לבית משפט מחוזי במדינת קליפורניה בארה"ב, ובעקבות District court for the central District of California הבקשה שהגישה רוסיה לסילוק על הסף בשנת 2005, הועבר לבית המשפט המחוזי במחוז קולומביה. בית המשפט העליון הכיר בהעברת דיון בין ערכאות בארה"ב, לבקשת נתבע שם, כאינדיקציה להכרה של הנתבע בסמכות בתי המשפט בארה"ב (ר' ע"א 10854/07 **שירה ברכה פיקהולץ (בדנר) נ' JAIME SOHACHESKI**, פס' 51 (נבו, 17.3.2010). גם בכך יש כדי ללמד על כך שפעולות רוסיה בתביעה בארה"ב אינן מקימות סייג לאכיפת פסק החוץ בענייננו.

86. לסיכום, ההליך בארה"ב התנהל באופן הוגן. לנתבעת ניתן יומה בבית המשפט, ובהתנהגותה היא הסכימה להתדיין בבית המשפט בארה"ב. פסק החוץ שאכיפתו מתבקשת כאן ניתן בהתאם לכללי המשפט הבינלאומי הפרטי הנוהגים בישראל. לא קיימים סייגים כלשהם מכוחם מוצדק שלא לאכוף את פסק הדין בנסיבות דנן.

87. הנה כי כן, כלל התנאים הקבועים בחוק האכיפה מתקיימים בענייננו. ישנו בסיס עובדתי ומשפטי איתן להורות על אכיפת פסק החוץ המבוקש בישראל.

ז. <u>סוף דבר</u>

88. במסגרת כתב התביעה דנן הוכיחה התובעת שבקשתה לאכוף את פסק החוץ בענייננו עומדת בכלל הדרישות והתנאים הקבועים בדין הישראלי לאכיפת פסק החוץ בישראל. כפי שהוסבר לעיל, הצורך לאכוף את פסק הדין דווקא בישראל נובע, בין היתר, מהיותה של מדינת ישראל מדינת העם היהודי, ובשים לב לחשיבות ההיסטורית, המסורתית, הקהילתית והתרבותית של אוסף שניאורסון לחסידות חב"ד ולעם היהודי כולו.

89. אשר על כן, לאור כל האמור לעיל, מתבקש בית המשפט הנכבד לקבל את התביעה ולהכריז על פסק החוץ בענייננו כאכיף בישראל, תוך חיוב הנתבעים בהוצאות התובעים.

אורי קידר, עו"ד **אבי בלום, עו"ד**

נבו קידר בלום, עורכי דין ונוטריון

ב"כ התובעת

תוכן עניינים

נספח א'

העתק פסק החוץ מיום
20.12.2019 במחוז קולומביה
בארה"ב שאכיפתו מתבקשת
בהליך זה, מאושר על ידי רשות
מוסמכת בארה"ב

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUDAS CHASIDEI CHABAD OF UNITED STATES, *Plaintiff*, v. RUSSIAN FEDERATION; RUSSIAN MINISTRY OF CULTURE AND MASS COMMUNICATION; RUSSIAN STATE LIBRARY; and RUSSIAN STATE MILITARY ARCHIVE, *Defendants.*	)	Case No. 1:05-cv-01548-RCL

~~[PROPOSED]~~ ORDER AND JUDGMENT

Having considered the Plaintiff's November 27, 2019 Updated Motion for Additional Interim Judgment of Accrued Sanctions, and the arguments therein, the Court herby:

ORDERS AND ADJUDGES that Plaintiff recover from Defendants, jointly and severally, an additional $78,300,000, which is the amount of all sanctions accrued since the Court's September 10, 2015 interim judgment of $43,700,000; and

ORDERS AND ADJUDGES that until Defendants comply with this Court's July 30, 2010 Order (ECF No. 80), monetary sanctions will continue to accrue pursuant to this Court's January 16, 2013 Order (ECF No. 115), which remains in full force and effect.

SO ORDERED this 20th day of December, 2019.

Royce C. Lamberth

The Honorable Royce C. Lamberth
United States District Court

נספח ב'

העתק החלטת בית המשפט
לערעורים של מחוז קולומביה
בארה"ב מיום 13.6.2008

to solicit soft money authorized under state law for their state or local campaign); *id.* § 441(e)(4)(A) (authorizing federal candidates to solicit soft money for certain nonprofit groups); *id.* § 441i(e)(4)(B) (authorizing candidates to solicit up to $20,000 per individual to fund state party GOTV and voter registration activities). Given these express exceptions, we have no basis for reading section 441i(e)(3) as creating an implied fourth exception. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent," none of which is present here. *TRW Inc. v. Andrews,* 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (citation omitted). Moreover, these exceptions expressly allow "solicitation" of soft money, yet section 441i(e)(3) says only that federal candidates may "attend, speak, or be a featured guest" at state party fundraisers. The difference in terminology matters, for "Congress' choice of different verbs to characterize the two situations is a choice which we properly take as evidence of an intentional differentiation." *Nat'l Insulation Transp. Comm. v. ICC,* 683 F.2d 533, 537 (D.C.Cir.1982) (citation omitted). This is especially true because Congress repeatedly used the term "solicit" and "solicitation" in section 441i—over a dozen times—yet chose not to do so in section 441i(e)(3). Reading section 441i(e)(3) as allowing solicitation in light of the clear differences between it and other sections of the statute that expressly allow solicitation "inverts the usual canon that when Congress uses different language in different sections of a statute, it does so intentionally." *Fla. Pub. Telecomms. Ass'n v. FCC,* 54 F.3d 857, 860 (D.C.Cir.1995).

V.

For the foregoing reasons, we affirm the district court with respect to the content standard for coordinated expenditures, the rule for when former employees/vendors may share material information, and the definitions of GOTV activity and voter registration activity. With respect to the firewall safe harbor provision and the rule allowing soft-money solicitations at state party events, we reverse and remand for further proceedings consistent with this opinion.

So ordered

AGUDAS CHASIDEI CHABAD OF UNITED STATES, Appellee/Cross–Appellant

v.

RUSSIAN FEDERATION, Russian Ministry of Culture and Mass Communication, Russian State Library, and Russian State Military Archive, Appellants/Cross–Appellees.

Nos. 07–7002, 07–7006.

United States Court of Appeals, District of Columbia Circuit.

Argued March 17, 2008.

Decided June 13, 2008.

Background: Jewish religious corporation brought action under Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents. The United States District Court for the District of Columbia, Royce C. Lamberth, J., 466 F.Supp.2d 6, dismissed action in part. Parties appealed.

Holdings: The Court of Appeals, Williams, Senior Circuit Judge, held that:

(1) district court that expressly determined that there was "no just reason for delay" of appellate review of dismissed claim entered final appealable judgment as to that dismissed claim;

(2) collateral order doctrine applied to appeal of assertion of jurisdiction by district court over Russian Federation with regard to claim under FSIA that had not been dismissed;

(3) property rights of corporation in library of Jewish religious books and manuscripts were not wholly insubstantial or frivolous;

(4) Russian State Military Archive (RSMA) and Russian State Library (RSL) engaged in sufficient commercial activity in United States;

(5) corporation did not have to exhaust foreign remedies before bringing suit in United States under FSIA;

(6) Russia's Valuables Law, that required payment from petitioner to recover property, did not provide adequate remedy with reference to any hypothetical exhaustion requirement under FSIA;

(7) District of Columbia, rather than Russian Federation, was more appropriate forum for action; and

(8) act of state doctrine did not apply to Soviet Union's expropriation of archive of handwritten teachings, correspondence, and records of Jewish rabbi at end of World War II in Poland.

Affirmed in part, reversed in part, vacated in part, and remanded.

Karen LeCraft Henderson, Circuit Judge, filed opinion concurring in the judgment.

1. Federal Courts ⇨660.20

District court that expressly determined that there was "no just reason for delay" of appellate review of dismissed claim entered final appealable judgment as to that dismissed claim, although other claim had not been dismissed. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

2. Federal Courts ⇨576.1

Collateral order doctrine applied to appeal of assertion of jurisdiction by district court over Russian Federation with regard to one claim under Foreign Sovereign Immunities Act (FSIA) that had not been dismissed where district court had dismissed other FSIA claim and expressly determined that there was "no just reason for delay" of appellate review of that dismissed claim. 28 U.S.C.A. §§ 1330(a), 1605(a)(3); Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

3. International Law ⇨10.38

Under the Foreign Sovereign Immunities Act (FSIA), the burden of persuasion as to jurisdiction rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence. 28 U.S.C.A. § 1605(a)(3).

4. Federal Courts ⇨241

To the extent that jurisdiction depends on the plaintiff's asserting a particular type of claim, and it has made such a claim, there typically is jurisdiction unless the claim is immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous.

5. International Law ⇨10.31

Where a plaintiff makes concessions logically inconsistent with a substantial claim to rights in property of which he was deprived in derogation of international law, a court will not find jurisdiction under the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C.A. §§ 1330(a), 1605(a)(3).

6. International Law ⚿10.33

Property rights of Jewish religious corporation in library of Jewish religious books and manuscripts were not wholly insubstantial or frivolous, in claim under expropriation exception to Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents because worldwide organization, not any Soviet citizen, owned library. 28 U.S.C.A. § 1605(a)(3); N.Y.McKinney's Religious Corporations Law § 4.

7. Judgment ⚿713(1), 724

Issue preclusion can be applied only as to an issue resolved against the party sought to be estopped and necessary to the judgment.

8. International Law ⚿10.33

Property rights of Jewish religious corporation in library of Jewish religious books and manuscripts were not wholly insubstantial or frivolous, in claim under expropriation exception to Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by retaking collection of Jewish religious books, manuscripts, and other documents; although parts of government of Russian Federation appeared to have addressed issue and awarded possession to corporation, corporation had not been able to recover that property due to conduct of other parts of that government. 28 U.S.C.A. §§ 1330(a), 1605(a)(3); N.Y.McKinney's Religious Corporations Law § 4.

9. International Law ⚿10.33

Russian State Military Archive (RSMA) and Russian State Library (RSL) engaged in sufficient commercial activity in United States, as required for claim under expropriation exception to Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents, where both RSMA and RSL had entered transactions for joint publishing and sales of those materials in United States. 28 U.S.C.A. § 1605(a)(3), (d).

10. International Law ⚿10.37

Religious corporation did not have to exhaust foreign remedies before bringing suit in United States under Foreign Sovereign Immunities Act (FSIA). 28 U.S.C.A. § 1605(a)(3).

11. International Law ⚿10.37

Inference that omission of exhaustion-requiring provision from one section of Foreign Sovereign Immunities Act (FSIA) must have been intentional, after inclusion of provision in closely related section, was not any weaker just because Congress subsequently removed entire exhaustion-requiring provision for independent reasons. 28 U.S.C.A. § 1605(a)(3).

12. International Law ⚿10.37

Russia's Valuables Law, that required payment from petitioner to recover property, did not provide adequate remedy with reference to any hypothetical exhaustion requirement under expropriation exception to Foreign Sovereign Immunities Act (FSIA) for claim of Jewish religious corporation to recover archive of handwritten teachings, correspondence, and records of Jewish rabbi from Russian Federation; Russia's mere willingness to sell corporation's property back to it could not remedy alleged wrong, regardless of valuation method and even assuming that Russia's payment of compensation would have satisfied requirements of international law. 28 U.S.C.A. § 1605(a)(3).

13. Federal Courts ⇐45

District of Columbia, rather than Russian Federation, was more appropriate forum, under forum non conveniens analysis, for action under expropriation exception to Foreign Sovereign Immunities Act (FSIA) alleging that Soviet Union violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents; private interest factors, including ease of access to sources of proof, travel costs, and translation costs militated slightly in favor of Russia as alternate forum, whereas public interest factors, including general public interest in case, along with strong presumption in favor of plaintiffs' choice of forum, favored United States forum. 28 U.S.C.A. § 1605(a)(3).

14. Federal Courts ⇐45

When deciding forum non conveniens claims, a court must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal.

15. Federal Courts ⇐44

There is a substantial presumption in favor of a plaintiff's choice of forum.

16. Federal Courts ⇐813

A district court's forum non conveniens determination is reviewed to see if it was a clear abuse of discretion.

17. Federal Courts ⇐45

A foreign forum is not inadequate, for purposes of forum non conveniens analysis, merely because it has less favorable substantive law.

18. International Law ⇐10.31

Act of state doctrine did not apply to Soviet Union's expropriation of archive of handwritten teachings, correspondence, and records of Jewish rabbi at end of World War II in Poland, and thus district court could assert jurisdiction over Russian Federation in action under Foreign Sovereign Immunities Act (FSIA), since Soviet forces' act of taking archive from German forces did not occur in Soviet territory.

19. International Law ⇐10.12

Under the act of state doctrine, the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

20. International Law ⇐10.9

Under the act of state doctrine, the burden of proving an act of state rests on the party asserting the defense.

21. International Law ⇐10.12

The act of state doctrine applies only when a seizure occurs within the expropriator's sovereign territory.

22. International Law ⇐10.12

Act of state doctrine could not be applied to claim that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents in seizures that occurred after January 1, 1959 due to Second Hickenlooper Amendment. Foreign Assistance Act of 1961, § 620(e)(2), 22 U.S.C.A. § 2370(e)(2).

Appeals from the United States District Court for the District of Columbia (No. 05cv01548).

James H. Broderick, Jr. argued the cause for appellants/cross-appellees. With him on the briefs was Donald T. Bucklin.

Nathan Lewin argued the cause for appellee/crossappellant. With him on the briefs were Marshall B. Grossman, Seth M. Gerber, Alyza D. Lewin, and William B. Reynolds.

Before: HENDERSON, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

Opinion concurring in the judgment filed by Circuit Judge HENDERSON.

WILLIAMS, Senior Circuit Judge:

Agudas Chasidei Chabad of United States is a non-profit Jewish organization incorporated in New York. It serves as the policy-making and umbrella organization for Chabad–Lubavitch—generally known as "Chabad"—a worldwide Chasidic spiritual movement, philosophy, and organization founded in Russia in the late 18th century. (Chabad's name is a Hebrew acronym standing for three kinds of intellectual faculties: *Chachmah*, *Binah*, and *Da'at*, meaning wisdom, comprehension, and knowledge.) In every generation since the organization's founding, it has been led by a Rebbe—a rabbi recognized by the community for exceptional spiritual qualities. Agudas Chasidei Chabad stakes claim to thousands of religious books, manuscripts, and documents (the "Collection") that were assembled by the Rebbes over the course of Chabad's history and comprise the textual basis for the group's core teachings and traditions. The religious and historical importance of the Collection to Chabad, which is extensively reviewed in the district court opinion, can hardly be overstated. See *Agudas Chasidei Chabad v. Russian Federation* ("District Court Decision"), 466 F.Supp.2d 6, 10–14 (D.D.C.2006). Agudas Chasidei Chabad says that the Collection was taken by the Soviet Union—or its successor, the Russian Federation—in violation of international law.

According to the plaintiff's allegations (as amplified in some cases by later submissions), Russia's Bolshevik government seized one portion of the Collection (known as the "Library") during the October Revolution of 1917, taking it from a private warehouse in Moscow, where the Fifth Rebbe had sent it for safekeeping as he fled the German forces invading Russia. Although the Soviet government initially acted with some hesitancy, by 1925 it appears to have finally rejected pleas for return of the Library by the Fifth Rebbe and the Sixth (who succeeded the Fifth in 1920). The regime stored the materials at its Lenin Library, which later became the Russian State Library ("RSL," a term we use to include its predecessor).

After arresting the Sixth Rebbe for "counter revolutionary activities" (namely establishing Jewish schools), the Soviets beat him and sentenced him to death by firing squad, but then commuted the sentence to exile. The Sixth Rebbe resettled in Latvia in 1927 and became a citizen there, bringing with him another set of religious manuscripts and books known as the "Archive." In 1933 he moved to Poland, bringing the Archive along. On September 1, 1939, Nazi German forces invaded Poland, forcing the Rebbe to flee yet again. Nazi forces seized the Archive and transferred it to a Gestapo-controlled castle at Wölfelsdorf, a village about fourteen miles south of Glatz (now Klodzko) in Lower Silesia. Soviet military forces commandeered the Archive in September 1945, calling its contents "trophy documents" and carrying them away to Moscow. The Archive is now held by the Russian State Military Archive ("RSMA," again a term we use to include its predecessors).

With the assistance of the U.S. government, the Sixth Rebbe escaped Nazi Eu-

rope and came to New York, where Agudas Chasidei Chabad was incorporated in 1940. The plaintiff and its predecessor made various efforts to recover the Collection for nearly 70 years. It enjoyed brief successes regarding the Library in 1991–1992, amid a flurry of Soviet and then Russian judicial, executive, and legislative pronouncements, but various governmental actions ultimately thwarted the group's efforts to secure possession of the Library, actions that it describes as a further expropriation.

To regain possession of both the Library and the Archive, the plaintiff brought suit against the Russian Federation as well as its Ministry of Culture and Mass Communication, the RSL, and the RSMA (all collectively referred to as "Russia" except as needed to distinguish among them). Russia moved to dismiss the claims on grounds of foreign sovereign immunity, forum non conveniens, and the act of state doctrine. Before the district court,[1] Russia scored a partial victory; the court dismissed all claims as to the Library, finding for them no exception to Russia's sovereign immunity, but it denied Russia's motion as to the Archive. District Court Decision, 466 F.Supp.2d at 31. Both sides appeal.

We affirm the district court's order in part and reverse it in part. First, on our reading of the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3), plaintiffs must demonstrate certain jurisdictional prerequisites by a preponderance of the evidence before the case goes forward, whereas they can satisfy others simply by presenting substantial and non-frivolous claims. On this reading, we hold that Agudas Chasidei Chabad satisfied the FSIA's jurisdictional requirements as to both the Library and the Archive. Second, we conclude that the district court did not abuse its discretion in rejecting the application of forum non conveniens. Finally, we affirm the district court's rejection of Russia's motion to dismiss as to the Archive on act of state grounds, and we vacate its apparent ruling that the act of state doctrine operates as an alternative ground for dismissal of Chabad's claims as to the Library.

I. FSIA: Immunity and Jurisdiction

[1, 2] The district court held that Russia was immune under the FSIA with respect to the Library claims, but not with respect to the Archive. 466 F.Supp.2d at 31. Agudas Chasidei Chabad's appeal as to the Library is properly before us because the district court entered final judgment as to those claims under Fed. R.Civ.P. 54(b), expressly determining that there is "no just reason for delay" of appellate review. Under the collateral order doctrine, we also have jurisdiction over Russia's appeal of the district court's assertion of jurisdiction over the Archive claim. See *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C.Cir.2004).

A. Background and General Principles

Section 1330(a) of Title 28 gives the district courts subject matter jurisdiction over cases against foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title [parts of the FSIA] or under any applicable international agreement." In its suit against Russia, Agudas Chasidei Chabad argues that the FSIA's expropriation exception, § 1605(a)(3), precludes the

1. The plaintiff initially filed suit in the Central District of California, but that court, in response to a Russian motion for change of venue, ordered the case transferred to the district court here.

defendants' immunity. It states in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (3) in which [A] rights in property taken in violation of international law are in issue and [B][1] 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 [2] 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. . . .

28 U.S.C. § 1605(a)(3).

The provision appears to rest jurisdiction in part on the character of a plaintiff's claim (designated "A") and in part on the existence of one or the other of two possible "commercial activity" nexi between the United States and the defendants (designated "B"). Before exploring the statute's particular requirements, we pause to note the standards by which courts are to resolve questions of federal jurisdiction.

[3] First, to the extent that jurisdiction depends on particular factual propositions (at least those *independent* of the merits), the plaintiff must, on a challenge by the defendant, present adequate supporting evidence. Thus, a plaintiff must establish the facts of diversity for purposes of jurisdiction under 28 U.S.C. § 1332. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936). For purely factual matters under the FSIA, however, this is only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence. See, e.g., *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.* 179 F.3d 1279, 1290 (11th Cir.1999); *Cargill Int'l v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir.1993); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 255–56 (7th Cir.1983).

[4] Second, to the extent that jurisdiction depends on the plaintiff's asserting a particular type of claim,[2] and it has made such a claim, there typically is jurisdiction unless the claim is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous," i.e., the general test for federal-question jurisdiction under *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 90 L.Ed. 939 (1946), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 & n. 10, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). (Other circuit courts have applied this same standard when jurisdiction depends on factual propositions intertwined with the merits of the claim, but we need not express any opinion on this point. See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir.2004); cf. *Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir.2003) (finding no need for the independent ascertainment, for jurisdictional purposes, of merits-intertwined facts).) The *Bell v. Hood* standard to be applied is obviously far less demanding than what would be required for the plaintiff's case to survive a summary judgment motion under Fed. R.Civ.P. 56. Thus, for example, in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), the court upheld jurisdiction on a finding that the plaintiffs' position on the

2. We do not understand our concurring colleague's gerrymandering of this phrase to suggest that it refers to jurisdictional facts. See Henderson Op. at 956.

disputed element of their claim "cannot be said [to be] wholly frivolous," *id.* at 742, saying expressly that it did "not intimate whether" the plaintiffs in fact established the necessary element, *id.* at 743. See generally Harry T. Edwards & Linda A. Elliott, Federal Standards of Review ch. III.A (2007).

Section 1605(a)(3) presents both types of jurisdictional questions. The alternative "commercial activity" requirements ("B") are purely factual predicates independent of the plaintiff's claim, and must (unless waived—see below) be resolved in the plaintiff's favor before the suit can proceed. The remainder ("A") does not involve jurisdictional facts, but rather concerns what the plaintiff has put "in issue," effectively requiring that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law.[3] It is undisputed that Agudas Chasidei Chabad has made such claims as to both parts of the Collection. The defendants assert various legal and factual inadequacies in the claims. It is rather unclear what standard the district court applied to those contentions, but *Bell* requires only that such potential inadequacies do not render the claims "wholly insubstantial" or "frivolous." See 327 U.S. at 682–83, 66 S.Ct. 773. As we shall show below, the claims plainly survive that test.

[5] Russia has seemed to draw a distinction between the "rights in property" element of the plaintiff's claim and the "taken in violation of international law" element. In a motion to dismiss Russia conceded that "[h]ere, for the purposes of this motion only, the first prong [of the expropriation exception] (rights in property at issue) is not disputed, inasmuch as Plaintiff's claims of right to the Library and the Archive are placed in issue by Plaintiff's complaint." Def. Mot. Dismiss 10. The motion then stated, "Obviously, the Defendants vigorously deny that Plaintiff has any right of ownership or possession of either the Library or the Archive." *Id.* at 10 n. 7. On that issue, therefore, Russia recognized that Agudas Chasidei Chabad's burden was only to put its rights in property in issue in a non-frivolous way. Where a plaintiff has failed to do so, such as by making concessions logically inconsistent with a substantial claim to " 'rights in property' of which he was deprived in derogation of international law," a court will not find jurisdiction. *Peterson v. Kingdom of Saudi Arabia,* 416 F.3d 83, 88 (D.C.Cir.2005).

When it came to whether rights had been "taken in violation of international law," however, Russia vigorously disputed the matter, seeming to regard this element as a jurisdictional fact that—like "commercial activity"—must be resolved definitively before the court could proceed to the merits. On the contrary, for jurisdiction, non-frivolous contentions suffice under *Bell.* Thus in *West v. Multibanco Comermex, S.A.,* 807 F.2d 820 (9th Cir.1987), the Ninth Circuit found jurisdiction proper under § 1605(a)(3) when the plaintiff's claim of conversion was "substantial and non-frivolous" and "provide[d] a sufficient basis for the exercise of our jurisdiction, even though we ultimately rule against the plaintiffs on the merits"; indeed, the court found on the merits that the defendant's acts were not actually "takings in violation of international law." *Id.* at 826, 831–33; see also *Siderman de Blake v. Republic of*

3. The District Court stated that under § 1605(a)(3) a plaintiff can put property "in issue" without making any claim of its own to rights in the property. 466 F.Supp.2d at 21–22. This is incorrect; and, in any case, a plaintiff relying on § 1605(a)(3) would have an independent obligation to assert a basis for its own standing.

Argentina, 965 F.2d 699, 712–13 (9th Cir. 1992) (finding "no difficulty [in] concluding that the ... complaint contains 'substantial and non-frivolous' allegations that [the disputed property] was taken in violation of international law," subject to further fact finding on remand).

B. Specific Application

We address first the "rights in property" element of the plaintiff's claim, then the "taken in violation of international law" element, and then the commercial activity nexus. Finally, we address Russia's related argument that the plaintiff failed to exhaust its remedies in Russia before proceeding in the United States.

[6] 1. *Agudas Chasidei Chabad's property rights.* The plaintiff maintains that the international Chabad organization held a property interest in the Collection as it accumulated, with a succession of Rebbes acting as custodians for the benefit of Chabad and its followers, and that on incorporation it automatically became vested under New York law with the property rights of its predecessor entity. See N.Y. Relig. Corp. Law § 4. As mentioned, Russia initially conceded that "[h]ere, for purposes of this motion only, the first prong [of the expropriation exception] (rights in property at issue) is not disputed, inasmuch as Plaintiff's claims of right to the Library and the Archive are placed in issue by Plaintiff's complaint." Def. Mot. Dismiss 10. Before us, however, in its reply brief, Russia claims that it somehow rendered its waiver inoperative.[4]

Whether it did so or not is of no moment, however, as the concession was obviously correct; the plaintiff's complaint indeed put in issue its property rights, if any, in the Collection. Russia's sole basis for attacking the plaintiff's assertion of property rights rests on a notion that the Collection's ownership has been conclusively resolved against Agudas Chasidei Chabad in a prior litigation: *Agudas Chasidei Chabad of United States v. Gourary*, 650 F.Supp. 1463 (E.D.N.Y.1987), *aff'd*, 833 F.2d 431 (2d Cir.1987). As Russia was not a party to that litigation, any preclusive effect could only take the form of nonmutual collateral estoppel. And while the effectiveness of such an estoppel argument to render a claim "frivolous" is unclear, in any event the *Gourary* judgment affords Russia no basis for precluding the plaintiff here.

In *Gourary*, Agudas Chasidei Chabad sued the Sixth Rebbe's heirs over the ownership of certain religious books and manuscripts that the Sixth Rebbe possessed in New York at the time of his death (obviously *not* the Library or the Archive, which were in Russia). The plaintiff claimed that the Rebbe held them on behalf of the Chabad community and that they therefore belonged to Agudas Chasidei Chabad; the Rebbe's heirs claimed them to be his personally and therefore part of his estate. The books and papers at issue were ones collected after 1925 that had made their way from Poland to America during World War II and thereafter.

[7] The reasons not to apply non-mutual collateral estoppel here seem to be le-

4. An FSIA defendant's waiver of immunity is effective to meet the FSIA's jurisdictional requirements because Congress, in deploying the FSIA to implement Article III's grant of subject matter jurisdiction over suits between citizens of a state and foreign states, limited that jurisdiction to cases in which a foreign state (or its agency or instrumentality) is not immune under the FSIA. Those immunities are entirely personal, as is shown by Congress's specification in § 1605(a)(1) that there is no immunity in any case in which the foreign state has waived immunity. See generally Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction,* 115 Harv. L.Rev. 1559 (2002).

gion, but let us simply address one fatal problem. Issue preclusion can be applied only as to an issue resolved against the party sought to be estopped and necessary to the judgment. *Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1258 (D.C.Cir.2006) (citing Restatement (Second) of Judgments § 27). In *Gourary,* Agudas Chasidei Chabad had pressed two alternative theories. The broad one was that it (or its predecessor) had owned the materials from the start of the collection, the successive Rebbes acting at all times on behalf of the religious community. The narrow one was that the Sixth Rebbe had owned them and then subsequently transferred them to Agudas Chasidei Chabad. In ruling *in favor of* Agudas Chasidei Chabad, the *Gourary* court appeared to rely on the narrow theory, 650 F.Supp. at 1474 & n. 9, 1476, but to the extent that it rejected the broad theory, that rejection was completely unnecessary to the court's unqualified judgment in Agudas Chasidei Chabad's favor.

At oral argument Russia tried to save its theory by a claim that the *Gourary* court decided in part against Agudas Chasidei Chabad, because on the narrow theory Agudas Chasidei Chabad would be holding the documents for the benefit of the worldwide religious community, of which the Sixth Rebbe's heirs were members. Tr. of Oral Arg. at 12–13. Even assuming *arguendo* that some difference in community members' rights might turn on whether the community's ownership rested on one historical theory as opposed to another, the Rebbe's heirs were not seeking access to the materials as members of the community; they were seeking outright ownership. They lost. Completely.

2. *A taking in violation of international law.* Under this prong, Russia challenges both Agudas Chasidei Chabad's Library claims—the taking in 1917–1925 and the taking (or retaking) in 1991–1992. (It does not challenge the district court's holding on the Archive claim under this prong except with respect to exhaustion, as discussed below.) As to the Library's taking in 1917–1925, Russia's sole challenge rests on its contention that at the relevant times, the Library and the Archive were the personal property of the Fifth or the Sixth Rebbe (who were Soviet citizens in the 1917–1925 period), not of Chabad, so that any taking by the Soviet government could not have violated international law. But again Russia rests entirely on its proposed misapplication of the *Gourary* case, and thus fails to show the plaintiff's claim to be insubstantial or frivolous. (Apparently relying only on *Gourary,* the district court adopted Russia's view as to the ownership of the Library and its proposed conclusion as to the absence of any violation of international law. But the plaintiff's contention is that the worldwide Chabad organization, not any Soviet citizen, owned the Library, creating at least a substantial and non-frivolous claim of a taking in violation of international law. Cf. *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396–97 & n. 17 (5th Cir.1985); Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987).)

[8] This leaves the alleged taking of the Library in 1991–1992. To the extent that Russia again relies on *Gourary,* its reliance is no better grounded than before. But here the defendants have a stronger theory, namely that the events of 1991–1992 were not a taking at all. In view of the plaintiff's contention that the Library had been taken in 1917–1925, this obviously has some traction. We emphasize yet again, however, that the jurisdictional question is only whether the plaintiff's claim is wholly insubstantial or frivolous. It is not.

To simplify matters, we look first at Agudas Chasidei Chabad's theory. It casts the events of 1991–1992 as a "renewal" of the earlier illegal takings. Chabad Br. 41. The facts of *Altmann v. Republic of Austria,* 142 F.Supp.2d 1187, 1203 (C.D.Cal.2001), *aff'd,* 317 F.3d 954, 968 n. 4 (9th Cir.2002), *aff'd* 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004), provide a possible template. There a plaintiff's predecessors in title *recovered* Klimt paintings that the Nazis had seized, but then, in exchange for export licenses, "donated" them to a government art gallery. They claimed that the forced donation was a taking. Here, Agudas Chasidei Chabad never recovered *possession* of the Library, but we should think that a final court decree in its favor, subject to no *lawful* appeal, might be considered a recovery, such that government frustration of the decree's enforcement could qualify as a renewal of the earlier taking. In this country, certainly, if a property owner secured a judgment invalidating a prior taking, affirmed by the highest court having jurisdiction, we would likely see executive officials' later assertion of ownership, and their frustration of the owner's efforts at physical recovery, as very much like a retaking of the property.

The procedural history surrounding the Library, however, is far more complex. In 1990, as *perestroika* unfolded, the Seventh Rebbe dispatched a delegation to the Soviet Union to undertake further efforts to obtain the Library. Various institutions, first of the Soviet Union and then of the Russian Federation, proceeded to issue a welter of confusing orders and decrees. On September 6, 1991 Alexander Yakovlev, a special adviser to General Secretary Mikhail Gorbachev, assured the Chabad delegation that Gorbachev would that day issue an order to the RSL to return the Library to Chabad. The delegation followed this up with a petition to a Soviet court, the State Arbitration Tribunal, to direct the RSL to return the Library. That court issued such a direction on October 8, 1991, giving the RSL one month to comply and placing a lien on the Library. State Arbitration Tribunal, Russian Socialist Federative Soviet Republic, Case # 350/13 (Oct. 8, 1991). The court also found that the Library was "the communal property of the entire Agudas Chasidei Chabad movement" and that the Soviet government had failed to prove that the Library "acquir[ed] a status of National property." *Id.*; see also District Court Decision, 466 F.Supp.2d at 13.

On November 18, 1991, the Chief State Arbiter affirmed in part and reversed in part. Chief State Arbiter, State Arbitration Court of the Russian Soviet Federative Socialist Republic, Decree Regarding Reconsideration of Ruling, No. 350/13H (Nov. 18.1991) ("11/18/91 Decree"). He stated that "the Arbitration Court is not obligated to consider the matter of legal ownership of the . . . Library by either the Community or the State (represented by [the RSL]), since evidence on file in this case does not contain any basis upon which assumption can be made that the aforementioned collection belongs to anyone *other than* the Lubavitcher Rebbe." *Id.* The district court characterized this as a finding that "the Rebbe, *rather than Chabad,* was the rightful owner of the Library," 466 F.Supp.2d at 18 (emphasis added), and thus as a rejection of the lower tribunal's conclusion that the Library was the "communal property of the entire Agudas Chasidei Chabad movement." That characterization is questionable, however.

The higher court's *action* was to grant the Chabad community precisely the relief it sought. After noting that the "Community [had] appealed to the State Arbitration Court, requesting that the . . . Library be transferred to the newly es-

tablished Jewish National Library," 11/18/91 Decree at 4, the Chief State Arbiter ordered the transfer of the Library—starting the day of the decision's issuance—to precisely that institution. *Id.* The Jewish National Library was Chabad's co-petitioner in the lawsuit, and the plaintiff's expert, Professor Veronika R. Irina–Kogan, declared under oath that the Jewish National Library participated in the suit "on behalf of the Chabad Community." Declaration of Veronika R. Irina–Kogan ¶ 11.

Thus there appears a substantial and non-frivolous factual basis for the view that the November 18, 1991 decision of the Chief State Arbiter represented a legal recovery of the property by Agudas Chasidei Chabad, possibly subject to limitations on its removal from Russia. See 11/18/91 Decree at 3 (stating that the materials were "part of Russia's national treasure").

But the delegation's efforts to have the order carried out were frustrated—a frustration that arguably constituted a new taking. According to a declaration submitted by the plaintiff, RSL staff members responded to their efforts to take possession by taunting them with anti-Semitic slurs and threats of violence. "[A]pproximately 30 baton-wielding" RSL police officers allegedly attacked the delegation and its supporters. Declaration of Rabbi Boruch Shlomo Eliyahu Cunin ¶ 10.

In December 1991 the Soviet Union dissolved, to be replaced by various successor states, including the Russian Federation. On January 29, 1992, Deputy Chairman of the Russian Federation Aleksandr Shokhin ordered the RSL to relinquish the Library. The executive order stated that the Russian government "accept[s] a request from officials of the movement of Lubavich Chassids (Agudas Chasidei Chabad) for the delivery of [Library] holdings available to the [RSL] to the [Maimonides] State Jewish Academy," which houses the Jewish National Library. By directing the latter to duplicate the documents and deliver the copies to the RSL "before the end of 1992," the order by implication required delivery of the originals *to* the Jewish National Library well before that date. Government of the Russian Federation Regulation No. 157–r (Jan. 29, 1992), Declaration of Tatiana K. Kovaleva, Ex. D. An affidavit submitted by the plaintiff characterizes the resolution as "ordering the RSL to return the Library to Chabad's representatives." Cunin Decl. ¶ 11. That reading appears plausible, given that the resolution is framed as the executive's "accept[ing]" a request from Agudas Chasidei Chabad officials.

Thus, while the November 11, 1991 Decree may have represented a *judicial* judgment transferring the Library into the hands of Chabad's allies, the Shokhin decree of January 1992 appears to have constituted parallel relief from the *executive* branch.

But this executive relief was no more easily realized than that provided by the Chief State Arbiter. The Chabad delegation approached the RSL, but the plaintiff reports that once again it was confronted by an anti-Semitic mob, which thwarted its efforts to secure the Library, this time incited by the director of the manuscript department at the RSL, who "shout[ed] death threats through a bullhorn." Cunin Decl. ¶ 11.

Further, Chabad's original success before State Arbitration Tribunal and the Chief State Arbiter encountered not only practical but also juridical frustration. On February 14, 1992, the Deputy Chief State Arbiter of the Russian Federation purported to reverse the prior court orders that had required that the RSL transfer the Library, and ordered that "all further action" in the case "cease." Agudas Chasidei Chabad's expert maintains that the deputy

made the ruling "unilaterally and secretly" and says that the deputy lacked authority under Russian law to nullify the order of the Chief State Arbiter, and that his ruling "lacked any legal or binding effect under Russian law." Irina–Kogan Decl. ¶¶ 12–14. Given the decider's title as *"Deputy* Chief State Arbiter," the assertion is hardly implausible.

Finally, a legislative action purported to reverse Shokhin's January 29, 1992 decree ordering transfer of the Library to Chabad's representative. On February 19, 1992, the Russian Federation's Supreme Soviet (despite its title, a body vested with legislative authority only between sessions of the Congress of Soviets, a/k/a Congress of People's Deputies) issued an order purporting to nullify that decree and stating that "the safety, movement and use of the holdings available to the Russian State Library [be effectuated] solely on the basis of the legislation of the Russian Federation and the provisions of international law." Supreme Soviet of the Russian Federation, Decree No. 2377–1 (Feb. 19, 1992). Agudas Chasidei Chabad's later attempts to secure the return of the Library have all failed.

To the extent that Shokhin's decree or the Chief State Arbiter's order effected a recovery of the Library (within the meaning of *Altmann*), the actions of the Deputy Chief State Arbiter and the Supreme Soviet, coupled with RSL action on the ground, would appear to have effected a retaking. To return to our earlier variation on the facts of *Altmann*: if the victim of a property seizure secured a judgment from the highest available judicial authority that papers seized by the government should be turned over to its ally, and a *lower* court then abruptly "reversed" that decision, authorizing the government to keep the papers, we would have little difficulty viewing the latter order as a purported retaking of the property. It would enhance the retaking case if high executive officials issued orders paralleling those of the highest court, followed by countermanding legislative action and accompanied by government officials' physical action. We cannot say that the analogy is perfect. Here, the lines of authority among the various judicial, executive, and legislative bodies appear to defy comprehension by outsiders (indeed, they may be inconsistent with the concept of lines of authority altogether). But neither can we declare insubstantial or frivolous the plaintiff's claim that the 1991–1992 actions of Russia and the Russian State Library constituted a retaking of the property; thus we reverse the district court's decision on the point.

[9] 3. *Commercial activity.* Contrary to Russia's claims, we find that both the RSMA and the RSL engaged in sufficient commercial activity in the United States to satisfy that element of 28 U.S.C. § 1605(a)(3). (The district court so found for the RSMA, but did not reach the issue as to the RSL because, focusing exclusively on the events of 1991–1992, it concluded that the plaintiff had failed to show a taking of the Library in violation of international law. 466 F.Supp.2d at 23, 24 & n. 22.)

The argument over the RSL's and RSMA's commercial activities rests on the relationship between the two clauses specifying alternative commercial activity requirements, which bear repeating here:

> (3) in which [A] rights in property taken in violation of international law are in issue and [B][1] 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 [2] 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. . . .

§ 1605(a)(3) (emphasis added).

Section 1603(d) offers a rather broad definition of commercial activity for purposes of the FSIA:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

§ 1603(d). The phrase "commercial activity *carried on* in the United States," by contrast, is defined as "commercial activity carried on by such state and having substantial contact with the United States." § 1603(e) (emphasis added).

In the face of § 1603(d)'s hospitable language, Russia offers a rather subtle argument for a more demanding test. It suggests that since the first nexus clause in § 1605(a)(3) requires that the property be present in the United States in connection with a commercial activity carried on in the United States, it would be quite anomalous if the second clause, requiring neither physical presence in the United States nor such a link (between property physically present and the commercial activity), could be satisfied unless the level of commercial activity was at least "a level of activity equal to the standard established by the phrase 'carried on' of the first prong and, accordingly, require 'substantial contact' with the United States." Russia Br. 42.

To support this conclusion Russia stresses the language in § 1603(e) quoted above, which requires that for commercial activity to qualify as "*carried on* in the United States" it must have "*substantial contact* with the United States." Then, noting that among Webster's Third International's examples of "engaged" is to "begin and carry on an enterprise," Russia sprints to the conclusion that "engage in" in the second prong must mean "carry on"; thus, abracadabra, the second prong includes the first prong's cross-referenced substantiality requirement.

We need not decide whether Agudas Chasidei Chabad can satisfy this more demanding standard, for Russia's argument plainly cannot work. Congress took the trouble to use different verbs in the separate prongs, and to define the phrase in the first prong. Russia wants us to turn that upside down and obliterate the distinction Congress drew. Moreover, we see no anomaly in applying the "commercial activity" definition set forth in § 1603(d). While the first clause of § 1605(a)(3) and the definition in § 1603(e) are quite demanding in some respects, the clause applies to activities "carried on *by the foreign state,*" whereas the second clause involves the commercial activities of the foreign state's agencies and instrumentalities. Congress might well have thought such entities' greater detachment from the state itself justified application of § 1603(d)'s broad definition. (Russia concedes that both the RSL and the RSMA are "agencies or instrumentalities" of the Russian Federation for this purpose. Russia Reply Br. 38 n. 8.) The substantiality requirement of § 1603(e) is thus inapplicable.

Section 1603(d)'s first sentence seems to set a low quantitative threshold and its second sentence a low qualitative one. As the Court said in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), the qualitative criterion asks "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce,' " for "when a foreign govern-

ment acts ... in the manner of a private player within [a market], the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.* at 614, 112 S.Ct. 2160. Thus "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party." *Id.*

Both the RSMA and the RSL have entered transactions for joint publishing and sales in the United States easily satisfying these standards. At the time of the filing of the suit in November 2004, the RSMA had entered contracts with two American corporations for the reproduction and worldwide sale of RSMA materials, including in the United States. District Court Decision, 466 F.Supp.2d at 21. One set of contracts was with Primary Source Media and allowed the American firm to publish, among other items, papers of Leon Trotsky and other documents relating to the Russian Civil War. The contracts include provisions waiving sovereign immunity, specifying that the activities described in the contract are "commercial in nature." Agreement on the Granting of Rights to Publish Archival Documents art. 14. By the year 2000 the RSMA had received $60,000 in advance royalties. See Declaration of Joseph Bucci ¶ 8; see also Royalty Advance Statements, Primary Source Microfilm. Another contract with Yale University Press provides for the "joint preparation and publication of a volume of documents entitled *The Spanish Civil War*" and garnered RSMA a $10,000 royalty advance in the year of the contract.

The RSL has also contracted for cooperative commercial activities in the United States. For example, it entered into agreements with Norman Ross Publishing (later succeeded by ProQuest), arranging for that firm to sell an encyclopedia and to produce and distribute "microcopies" of various RSL materials (in exchange for a 10% royalty payment to the RSL). One such contract has already yielded RSL over $20,000 and another over $5000.

Thus § 1605(a)(3)'s second alternative commercial activity requirement is plainly satisfied.

[10] 4. *Exhaustion.* Russia contends that Agudas Chasidei Chabad's "taking claim as to the Archive must [ ] fail for the reason that Chabad has failed to pursue and exhaust remedies it has in the Russian Federation to recover the Archive." Russia Br. 34. (No such claim is made as to the Library, presumably in view of Agudas Chasidei Chabad's heroic—but ultimately frustrated—legal efforts with respect to those materials.) The district court held that Agudas Chasidei Chabad was not required to exhaust Russian remedies before litigating in the United States. 466 F.Supp.2d at 21. We believe this is likely correct, but that in any event the remedy Russia identifies is plainly inadequate.

[11] As a preliminary matter, nothing in § 1605(a)(3) suggests that plaintiff must exhaust foreign remedies before bringing suit in the United States. Indeed, the FSIA previously contained one exception with a local exhaustion requirement, § 1605(a)(7), which for certain suits required that the foreign state be granted "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration." Congress repealed that exception this year. See National Defense Authorization Act for Fiscal Year 2008, Pub.L. No. 110–181, div. A, § 1083(b)(1)(A)(iii), 122 Stat. 3, 341 (2008) (repealing 28 U.S.C. § 1605(a)(7)). Obviously before deletion of subsection (7) it would have been quite plausible to apply the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been in-

tentional, see *United Mine Workers v. Mine Safety & Health Admin.*, 823 F.2d 608, 618 (D.C.Cir.1987); we do not see that the inference is any weaker just because Congress has, for independent reasons, removed the entire exhaustion-requiring provision.

Russia invokes *Restatement (Third) of Foreign Relations Law of the United States*, which notes:

> *Exhaustion of remedies.* Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.

Restatement § 713, cmt. *f.*

But this provision addresses claims of one state against another. Its logic appears to be that before a country moves to a procedure as full of potential tension as nation vs. nation litigation, the person on whose behalf the plaintiff country seeks relief should first attempt to resolve his dispute in the domestic courts of the putative defendant country (if they provide an adequate remedy). But § 1605(a)(3) involves a suit that necessarily pits an individual of one state against another state, in a court that by definition cannot be in *both* the interested states. Here there is no apparent reason for systematically preferring the courts of the defendant state.

Russia advances a more compelling theory based upon Justice Breyer's concurrence in *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004), which noted that a plaintiff seeking relief under § 1605(a)(3) "may have to show an absence of remedies in the foreign country sufficient to compensate for any taking" and that a "plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the 'expropriating' state may have trouble showing a 'tak[ing] in violation of international law.' " *Id.* at 714, 124 S.Ct. 2240 (alteration in original). Thus Justice Breyer draws on a substantive constitutional theory—that there simply is no unlawful taking if a state's courts provide adequate postdeprivation remedies. *Id.* (citing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 721, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), and alluding to cases applying that doctrine).

The substantive theory would seem to moot the argument from the language of the FSIA and is independent of Restatement § 713. Nonetheless, one may question whether it makes sense to extend such a requirement from the domestic context, in which state courts are already bound by the U.S. Constitution, to the foreign context, in which the courts that a plaintiff would be required to try may observe no such limit.

[12] Assuming that an exhaustion requirement exists, however, the only remedy Russia has identified is on its face inadequate. Russia points to a law entitled "Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation," Federal Law N 64–FZ of April 15, 1998 ("Valuables Law"), *available at* http://docproj.loyola.edu/rlaw/r2.html, particularly Articles 12 and 16. But, even assuming the other prerequisites of relief were met, Article 19(2) of the statute authorizes return of property only on the claimant's "payment of its value as well as reimbursement of the costs of its identification, expert examination, storage, restoration, and transfer (transportation, etc.)," without specifying rules for calculating value. Whatever the valuation method, and assuming *arguendo* that Russia's *payment* of compensation would satisfy the requirements of international law, obviously Russia's mere willing-

ness to *sell* the plaintiff's property back to it could not remedy the alleged wrong.

II. Russia's Defenses of Forum Non Conveniens and Act of State

Russia moved to dismiss the claims as to the Library and Archive on grounds of forum non conveniens, which the district court denied. Russia also moved to dismiss on the act of state doctrine, which the district court denied as to the Archive but accepted as an alternative grounds for dismissal as to the Library. The parties appeal the judgments adverse to them. As above, we have jurisdiction over Agudas Chasidei Chabad's appeal because the district court entered final judgment on the Library claims under Fed.R.Civ.P. 54(b). Russia properly asserts pendent appellate jurisdiction as to the Archive under *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679–80 (D.C.Cir. 1996), which allows a court with jurisdiction over one appeal also to exercise jurisdiction over issues "inextricably intertwined" with those raised by that appeal. We (and the plaintiff) agree that there is such intertwining here.

A. Forum Non Conveniens

[13] Russia claims that the district court abused its discretion in denying its motion to dismiss the claims to the Library and Archive on grounds of forum non conveniens. We disagree and uphold the district court's decision, which applies to the entire Collection.

[14–16] In deciding forum non conveniens claims, a court must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). There is a substantial presumption in favor of a plaintiff's choice of forum. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303 (D.C.Cir.2005). We review the district court's determination to see if it was a "clear abuse of discretion." *TMR Energy Ltd.*, 411 F.3d at 303.

[17] The district court found that Russia had failed to meet its burden of demonstrating the adequacy of the Russian forum. 466 F.Supp.2d at 28; see also *El–Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677 (D.C.Cir.1996). Our conclusion above that Russia's Valuables Law did not provide an adequate remedy with reference to any hypothetical exhaustion requirement for the Archive might seem to compel automatic affirmance of the forum non conveniens ruling solely on that ground. But in this context a foreign forum "is not inadequate merely because it has less favorable substantive law," *El–Fadl*, 75 F.3d at 678, so that the adequacy issue would be more complicated. In any event, the district court went on to resolve the balance of conveniences in favor of the plaintiff, and we find no abuse of discretion in that balance; we can affirm on that basis without addressing the adequacy of the Russian forum in this context.

We need not rehearse the factors considered. We do note two areas where Russia particularly finds fault with the district court's reasoning. First, it says that while the court relied on the plaintiff's agreement to pay the airfare and hotel expenses of Russian witnesses needed for depositions here, 466 F.Supp.2d at 29, in fact that agreement related solely to the jurisdictional discovery process. Russia's reading of the stipulation appears correct, see Parties' Stipulation Extending Time to Respond to the Complaint, Setting a Briefing Schedule, and Providing for Expedited Discovery of Elderly Witnesses, Apr. 13,

2005, and the plaintiff does not answer the objection. But the district court in the preceding sentence referred to practical cooperation on other aspects of jurisdictional discovery, and, when mentioning the witness agreement, referred to it as contained in an "earlier stipulation," *id.*; thus the context of the court's reference suggests its full awareness of the agreement's limits. Accordingly, it seems reasonable to suppose that the court simply regarded the witness agreement as a fact portending similar cooperation in the future.

Second, Russia argues that the district court "will likely be unable to afford Chabad the relief it seeks, possession of the Archive (and the Library)." Russia Br. 53. The district court saw the argument as a contention that a Russian court would not heed an American court's judgment in the plaintiff's favor, and called it an "affront" to the court. 466 F.Supp.2d at 29. Some district courts have treated a United States forum's inability to provide relief directly as an argument for granting a defendant's forum non conveniens motion, see *McDonald's Corp. v. Bukele*, 960 F.Supp. 1311, 1319 (N.D.Ill.1997); *Fluoroware, Inc. v. Dainichi Shoji K.K.*, 999 F.Supp. 1265, 1271–73 (D.Minn.1997), though one might have thought that was simply the plaintiff's problem. In any event, Agudas Chasidei Chabad points to the FSIA provisions that allow attachment of certain Russian government property in the United States, 28 U.S.C. § 1610(a)(3), (b)(2), evidently believing that attachment of such property would give it significant leverage over the defendants, enhancing the likelihood that Russia or its courts would respect the judgment of a U.S. court. Russia does not reply to the point, and it seems plausible.

In short, we find no abuse of discretion.

B. Act of State

[18–20] Russia invokes the act of state doctrine, under which "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). The doctrine rests on a view that such judgments might hinder the conduct of foreign relations by the branches of government empowered to make and execute foreign policy. *Id.* at 423–25, 84 S.Ct. 923; see also *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 404–05, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). The burden of proving an act of state rests on the party asserting the defense. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976).

1. *The Archive.* Russia invoked the act of state doctrine by a motion under Fed.R.Civ.P. 12(b)(6), as the defendant had in *W.S. Kirkpatrick*, a procedure that would be correct if its absence is part of the plaintiff's case but wrong if it is a defense. In any event, the district court reviewed the parties' extensive factual presentations before it ruled that "that the act of state doctrine does not apply to the taking of the Archive." 466 F.Supp.2d at 26. The district court did not expressly convert Russia's Rule 12(b)(6) motion into a motion for summary judgment, see Fed. R.Civ.P. 12(d), but because Russia initially raised the matter and the disposition was to deny its motion, it seems appropriate to treat the ruling as the denial of a Russian motion for summary judgment. We affirm

the district court's order; Russia has failed to show that it was entitled to judgment as a matter of law.

[21] The act of state doctrine applies only when a seizure occurs within the expropriator's sovereign territory. *Sabbatino,* 376 U.S. at 428, 84 S.Ct. 923; *Riggs Nat'l Corp. & Subsidiaries v. Comm'r,* 163 F.3d 1363, 1367 (D.C.Cir.1999). As to the Archive, Russia's theory is that it seized the Archive in German territory occupied by the Soviet Union, and that such occupation would be sovereignty enough. We need not consider the substantive validity of that theory, however, because Russia fails to demonstrate that it seized the Archive in occupied Germany rather than in Poland.

Far from placing the factual issue beyond dispute, Russia merely asserts that there is uncertainty as to the exact location of the Russian seizure. But even that claimed uncertainty appears trivial to nonexistent. Records of the RSMA submitted in the course of discovery state that the Archive was received by the RSMA in September 1945 at "Welfelsdorf," in "Germany." [5] Russia does not deny that "Welfelsdorf" is at most a misspelling of Wölfelsdorf,[6] nor does it claim that the scribe's reference to "Germany" undermines the fact that by September 1945 Wölfelsdorf was part of Poland as defined by the Potsdam Protocol. Jointly issued on August 1, 1945 by the United States, United Kingdom, and Soviet Union, that Protocol announced a tentative western border for Poland at the Oder–Neisse line, a border which has never since been disturbed. It is undisputed that Wölfelsdorf lies within Poland, as so defined.

Russia points to two items of evidence that it claims raise doubt. First, it refers to a statement in the district court's recitation of facts to the effect that the Archive had been taken to a "Gestapo-controlled castle in Germany." 466 F.Supp.2d at 13 (quoting Pl.'s Opp'n to Defs.' Mot. to Dismiss at 7). Given that Wölfelsdorf was part of pre-World-War-II Germany, the statement is altogether consistent with RSMA records showing that the Russian acquisition occurred in postwar Poland.

Second, Russia points to a letter from the plaintiff to President Vladimir Putin, stating that the Archive was "seized by the Nazis and subsequently loaded on boxcars as they were losing the war, to be taken deep into Germany and evade the oncoming Russian liberators." As with the contention that the Nazis removed the Archive to a "Gestapo-controlled castle in Germany," the statement is not inconsistent with its later capture by the Russians at Wölfelsdorf. Moreover, the letter precedes the delivery to Agudas Chasidei Chabad of documents showing the RSMA's receipt of the materials at Wölfelsdorf in September 1945.

In any event, the burden of providing a factual basis for acts of state rests on Russia, see *Riggs,* 163 F.3d at 1367 n. 5, and it has not met its burden with respect to the Archive.

[22] 2. *The Library.* We have two taking scenarios regarding the Library: the events of 1917–1925 and those of 1991–1992. Having mistakenly found itself

5. See Joint Appendix 4:3086 (referring to a July 6, 2005 delivery of documents bearing Bates Nos. DEF00168–218); *id.* at 4:3099–3103 (listing origins of certain RSMA materials and bearing Bates numbers encompassed in the prior reference); *id.* at 3:2253,:2255,:2265–67 (deposition testimony of Vladimir N. Kouzelenkov, director of the RSMA, referring to RSMA's book listing incoming materials).

6. In fact, the Russian ''e'' is in many contexts pronounced ''yo,'' so it is far from clear that there is even a misspelling.

without jurisdiction over the Library claim (a mistake in which it focused entirely on the 1991–1992 events), the district court said in a throwaway line that "even were [the court] to have jurisdiction [over the Library claims], these claims would be barred by the act of state doctrine." 466 F.Supp.2d at 27.

The district court seemed to suggest that the 1991–1992 claims were barred because they challenged the decision of the Deputy Chief State Arbiter and the decree of the Supreme Soviet. *Id.* at 26–27. But the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), normally bars application of the act of state doctrine to seizures occurring after January 1, 1959. Thus the doctrine poses no apparent barrier to the plaintiff's claim that the 1991–1992 events effected an unlawful taking.

As to the district court's apparent ruling that the doctrine bars any recovery of the Library based on the 1917–1925 events, we vacate the district court's order. The plaintiff argues that *Sabbatino* itself would except the 1917–1925 seizure from the doctrine. As we shall explain, the argument poses both sensitive foreign policy and jurisprudential issues. If on remand the court finds that the 1991–1992 actions of Russia and the RSL constituted an actionable retaking of the property, it will be unnecessary to resolve those issues, which in any event have not yet been the subject of either factual development or thorough briefing. While of course the court might (as a matter of insurance) resolve the plaintiff's claimed exception even if it accepts the latter's theory as to 1991–1992, and is free to address non-jurisdictional issues in any order it chooses, we refrain from any final ruling and discuss the complications of the claimed exception merely to highlight the questions that the parties must address.

As the district court recognized, the events of 1917–1925 all occurred within Russia, and thus were official acts of a sovereign nation regarding property within its borders. We could not grant the requested relief without invalidating those acts. See 466 F.Supp.2d at 27; see also *W.S. Kirkpatrick*, 493 U.S. at 405, 110 S.Ct. 701.

Agudas Chasidei Chabad contends that the *Sabbatino* decision allows relaxation of the doctrine in response to certain countervailing factors. It points to the following passage:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, . . . for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges

> that the taking violates customary international law.

376 U.S. at 428, 84 S.Ct. 923. The passage mentions a number of factors that might militate against application of the doctrine here. Most significant are the phrase requiring that the taking have been by a "sovereign government, extant and recognized by this country at the time of suit," and the earlier sentence saying that the relevant considerations may shift when the perpetrating government is no longer in existence. These suggest that whatever flexibility *Sabbatino* preserves is at its apex where the taking government has been succeeded by a radically different regime.

Other circuits have on occasion declined to apply the doctrine, or have directed consideration of countervailing factors, in reliance on a change in regime. Two decisions involve suits *by* the government of the Philippines against its former President Ferdinand Marcos, seeking to recover property acquired by him in office. *Republic of the Philippines v. Marcos,* 862 F.2d 1355, 1361 (9th Cir.1988) (en banc) (declining to apply the act of state doctrine); *Republic of the Philippines v. Marcos,* 806 F.2d 344, 359 (2d Cir.1986) (ordering the district court to weigh *Sabbatino*'s qualifying considerations). In a third, *Bigio v. Coca–Cola Co.,* 239 F.3d 440 (2d Cir.2000), the court found the doctrine inapplicable to a suit by former Egyptian nationals against a foreign corporation for its possession of property nationalized by the defunct Nasser government; the sole expression of the current Egyptian government on the matter was a letter from the Minister of Finance *directing* the holder of the property to return it to the plaintiffs. *Id.* at 452–53; cf. *Bodner v. Banque Paribas,* 114 F.Supp.2d 117, 130 (E.D.N.Y.2000) (holding the doctrine inapplicable to claims against banks that had taken assets in the accounts of Jewish victims and survivors of the Holocaust under the laws of Vichy France).

Here, of course, Russia and its agencies or instrumentalities are the defendants, not private corporations or defenestrated rulers. Plaintiff has pointed to statements in its favor by Russian officials as high as former President Boris Yeltsin; but the current Russian government, by its energetic defense of this lawsuit, appears unwilling to relinquish the Collection to Chabad. Thus, while no one doubts that the collapse of the Soviet Union has entailed radical political and economic changes in the territory of what is now the Russian Federation, application of *Sabbatino*'s invitation to flexibility would here embroil the court in a seemingly rather political evaluation of the character of the regime change itself—in comparison, for example, to de-Nazification and other aspects of Germany's postwar history. It is hard to imagine that we are qualified to make such judgments. Moreover, our plunging into the process would seem likely, at least in the absence of an authoritative lead from the political branches, to entail just the implications for foreign affairs that the doctrine is designed to avert.

Agudas Chasidei Chabad also points to *Sabbatino*'s suggestion that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." 376 U.S. at 428, 84 S.Ct. 923. It asserts that the seizure of the Library occurred "in a campaign to suppress the practice of Judaism, not for any *bona fide* economic, academic, or other recognized governmental purpose. Hence the takings were plainly violations of *jus cogens* norms, just as is racial discrimination, and no less the subject of 'consensus' condemnation in the international community." Chabad Br. 63.

The argument is intuitively appealing. But it would require us to embark on a path of ranking violations of international law on a spectrum, dispensing with the act of state doctrine for the vilest. Further, as the *Sabbatino* Court refused to countenance an exception for violations of international law simpliciter, *id.* at 429–31, 84 S.Ct. 923, we are unsure what it intended in its references to different degrees of "consensus." While it would be heartening to believe that there is a nearly universal consensus against religious prejudice in general or anti-Semitism in particular, a glance around the world exposes glaring examples to the contrary in areas containing a large fraction of the human population.

Not only are the purely legal questions posed by Agudas Chasidei Chabad's argument difficult, but there are factual issues that might bear on the ultimate outcome. Agudas Chasidei Chabad argues that the 1917–1925 confiscation was driven by hostility to Judaism, and it maintained at oral argument that discovery would yield further evidence. Indeed, it is widely recognized that the Soviet government suppressed Jewish religious practice and persecuted Jews for their religious beliefs. But to the extent that the Soviet Union had embarked on a course of eradicating private property, religion, and civil society generally, the role of *selective* persecution in the Library's seizure in 1917–1925 is unclear on the current record. (On the other hand, perhaps there is a stronger consensus against non-selective than selective crushing of private property and civil society.) Without suggesting that plaintiff's proposed exception is necessarily valid in any circumstances, we defer ultimate resolution and simply vacate the ruling.

* * *

We therefore affirm the judgment of the district court finding jurisdiction over Agudas Chasidei Chabad's claims concerning the Archive; we reverse its finding of Russia's immunity as to the Library claims based on the events of 1917–1925 and 1991–1992; we affirm the court's rejection of Russia's forum non conveniens defense; we affirm its rejection of Russia's act of state defense to the Archive claims; and we vacate its application of the act of state doctrine to the Library claims.

So ordered.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring in the judgment:

Although I concur in the judgment, I do not agree with the analysis of the jurisdictional issue contained in Part I.A of the majority opinion. The majority analyzes section 1605(a)(3),[1] the provision of the FSIA that allows the plaintiff's claims to survive dismissal, by dividing the section into two parts that, in its view, impose different burdens on the plaintiff. The portion of section 1605(a)(3) involving "rights in property taken in violation of international law" (labeled "A" by the majority) requires only that the plaintiff "assert a certain type of claim: that the defendant . . . has taken the plaintiff's rights in property . . . in violation of international law," which claim—to suffice—must not be " 'wholly insubstantial' or 'frivolous.' " Maj.

1. Section 1605(a)(3) provides:
> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—. . . (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 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. . . .

28 U.S.C. § 1605(a)(3).

Op. 941 (citing *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). On the other hand, the majority posits, the remainder of section 1605(a)(3) (labeled "B" by the majority) requires the plaintiff to "present adequate supporting evidence," which "[f]or purely factual matters under the FSIA . . . is only a burden of production;" *id.* at 940.[2] The majority differentiates the burdens based on whether the jurisdictional facts track "the plaintiff's . . . claim," *id.* at 940, that is, "A," or are instead "particular factual propositions . . . *independent* of the merits[ ]," *id.* at 940 (emphasis in original), that is, "B."

While all of this may be only dicta—after all, we all agree the plaintiff's claims to both the Library and the Archive survive dismissal-our court has yet to recognize such a construct (as is manifested by the majority's reliance on other circuits' precedent, Maj. Op. 940–42) [3] and I do not join in its adoption today. *Any* jurisdictional fact, once challenged, may require the district court to satisfy itself of its jurisdiction. How it does so should not be the subject of an elaborate proof scheme imposed on appellate review. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1131 (D.C.Cir.2004) (district court "retains considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction" (quotations omitted)); *cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995). In my view, the plaintiff survives a Rule 12(b)(1) dismissal because it alleges that (1) it owns the Library and the Archive, (2) both of which were taken by the defendants or their predecessors in office based on the latters' intent " 'to suppress the practice of Judaism, not for any *bona fide* economic, academic, or other recognized governmental purpose,' " Maj. Op. 954 (quoting Chabad Br. 63); and, further, (3) each defendant asserts ownership of either the Library or the Archive and they both engage in commercial activity in the United States. While all of these jurisdictional facts were traversed by the defendants, the district court correctly, and without distinguishing between those jurisdictional facts "*independent* of the merits" of the plaintiff's claim and those "intertwined with the merits of the claim," Maj. Op. 940–41 (emphasis in original), assured itself of their existence—with the exceptions of the ownership of the Library and defendant RSL's commercial activity in the U.S. *vel non*, jurisdictional facts that it either did not reach and/or we today reverse—primarily *via* both parties' submissions supporting/opposing dismissal. *Agudas*

2. ''B'' sets forth two alternatives of the ''commercial activity'' tie between the United States and the defendants also needed to establish jurisdiction, the second of which the plaintiff relies on. *See* note 1 *supra*.

3. I reject the majority's reliance on *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 90 L.Ed. 939 (1946), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 & n. 10, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), insofar as it suggests the High Court has embraced any similar bifurcation of subject-matter jurisdiction in those cases. *See* Maj. Op. 940. The focus of the cited discussion in *Bell v. Hood* is on the difference between a dismissal for ''want of jurisdiction''—a Rule 12(b)(1) dismissal-and a dismissal ''on the merits''—a Rule 12(b)(6) dismissal. 327 U.S. at 683, 66 S.Ct. 773; *see also Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947). Indeed, the ''immaterial,'' ''wholly insubstantial'' and ''frivolous'' exceptions the majority opinion takes from *Bell v. Hood* as the template for ''A'' jurisdictional facts were themselves problematic to the Court. *Id.* (''The accuracy of calling these dismissals jurisdictional has been questioned.''). As for *Arbaugh*, in concluding that Title VII's 15–employee ''prerequisite'' is non-jurisdictional, the Court differentiated between jurisdictional and *non*-jurisdictional facts, not two types of jurisdictional facts as the majority opinion maintains with its ''A'' and ''B'' split.

Chasidei Chabad of United States v. Russian Federation, 466 F.Supp.2d 6, 24–25 (D.D.C.2006). "There is no need or justification, then, for imposing an additional . . . hurdle in the name of jurisdiction." *Grubart*, 513 U.S. at 538, 115 S.Ct. 1043.

UNITED STATES of America, Appellee

v.

David H. SAFAVIAN, Appellant.

Nos. 06–3139, 06–3169.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 8, 2008.

Decided June 17, 2008.

Background: Defendant, the General Services Administration's (GSA) deputy chief of staff, was convicted in the United States District Court for the District of Columbia of concealing material facts and making false statements, and obstructing justice in obtaining an ethical opinion regarding an international golf trip and in the subsequent investigation of the trip. After defendant's motions for judgment of acquittal and for a new trial were denied, 451 F.Supp.2d 232, and a sentencing hearing was held, 461 F.Supp.2d 76, defendant appealed.

Holdings: The Court of Appeals, Randolph, Circuit Judge, held that:

(1) defendant had no duty to disclose, and therefore could not be convicted for any concealment offenses;

(2) district court abused its discretion in excluding testimony of defendant's expert;

(3) district court's err in excluding testimony was not harmless;

(4) sufficient evidence supported jury's verdict that defendant obstructed justice; and

(5) sufficient evidence supported jury's conclusion, on obstruction of justice charge, that defendant knew the cost of his share of trip was greater than $3,100.

Reversed in part, vacated in part, and remanded.

1. Fraud ⚿68.10(1)

Defendant, the General Services Administration's (GSA) deputy chief of staff, had no duty to disclose assistance he provided a former colleague relating to government property in obtaining an ethics opinion as to whether he could accept air travel as a gift from former colleague, or during GSA inspector general's investigation of the trip, and therefore defendant could not be convicted for any concealment offenses; ethical principles of conduct for government employees were vague and gave no indication of particular facts or information an executive employee was required to disclose, nor did they suggest that they had any bearing on conduct during a GSA investigation or a request for an ethics opinion. 18 U.S.C.A. § 1001(a)(1).

2. Constitutional Law ⚿4505

To comply with Fifth Amendment due process, a defendant must have fair notice of what conduct is forbidden; this prohibits application of a criminal statute to a defendant unless it was reasonably clear at the time of the alleged action that defendant's actions were criminal. U.S.C.A. Const. Amend. 5.

3. Criminal Law ⚿469.3

District court abused its discretion in excluding testimony of expert of defendant, the General Services Administration (GSA) deputy chief of staff, who would

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search at issue here. *See Bull*, 595 F.3d at 977 (decided in 2010); *Powell*, 541 F.3d at 1300 (decided in 2008). In 2003, the First Circuit observed that the relevant precedent "would not permit a reasonable prison official to conclude that minor offense arrestees could be strip searched without reasonable suspicion simply because the prison officials decide to mix the arrestees with other prisoners." *Savard*, 338 F.3d at 37.

Further, it is well-established that whether a searching party has taken reasonable efforts to protect the privacy of the party being searched is an important factor in determining the reasonableness and constitutionality of a strip search. *See, e.g., Campbell*, 499 F.3d at 719; *United States v. Williams*, 477 F.3d at 977; *Amaechi*, 237 F.3d at 364; *Ashley*, 37 F.3d at 682; *Hill*, 735 F.2d at 394; *Iskander*, 690 F.2d at 129. As the Fourth Circuit observed in 1981, "no [official] could reasonably believe that conducting a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search [would be] a constitutionally valid governmental invasion of [the] personal rights that [such a] search entails." *Logan*, 660 F.2d at 1013–14 (internal quotation marks omitted).

Therefore, at the time of the search at issue, the law was clearly established that strip searches of arrestees charged with minor offenses would, absent individualized suspicion, be held unreasonable under *Bell* even where the arrestee was to be intermingled with the general prison population and especially where the official conducting the search did not take reasonable efforts to protect the privacy of the party being searched. Thus, it should have been "clear to a reasonable [official]" that a partial strip search of Ms. Brown, a detainee charged only with civil contempt, without individualized suspicion, and without regard to her privacy, would be considered unreasonable under *Bell*. *See Saucier*, 533 U.S. at 202, 121 S.Ct. 2151.

IV. CONCLUSION

For the reasons explained above, DSO Short's Motion to Dismiss [Dkt. # 25] will be granted in part and denied in part as follows: The Section 1983 claim will be dismissed, but Plaintiff will be permitted to proceed on her constitutional claim under *Bivens*, 403 U.S. 388, 91 S.Ct. 1999. Further, DSO Short's motion to dismiss based on qualified immunity will be denied. A memorializing Order accompanies this Memorandum Opinion.

AGUDAS CHASIDEI CHABAD OF UNITED STATES, Plaintiff,

v.

RUSSIAN FEDERATION, et al., Defendants.

Civil Action No. 05–1548(RCL).

United States District Court,
District of Columbia.

July 30, 2010.

Background: Jewish religious corporation brought action under Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents. Corporation moved for entry of default judgment.

Holding: The District Court, Royce C. Lamberth, Chief Judge, held that expropriations exception to foreign sovereign immunity under FSIA applied, and thus default judgment was warranted.

Motion granted.

1. International Law ⚿10.42

To prevail in a Foreign Sovereign Immunities Act (FSIA) default proceeding, a plaintiff must present a legally sufficient prima facie case. 28 U.S.C.A. § 1608(e).

2. International Law ⚿10.42

In Foreign Sovereign Immunities Act (FSIA) default judgment proceedings, a plaintiff may establish proof by affidavit, and, upon evaluation, the court may accept plaintiff's uncontroverted evidence as true. 28 U.S.C.A. § 1608(e).

3. International Law ⚿10.31

Foreign Sovereign Immunities Act (FSIA) provides the sole basis for jurisdiction over foreign sovereigns by courts of the United States. 28 U.S.C.A. § 1330(a).

4. International Law ⚿10.38

A plaintiff seeking relief has the burden of bringing forth evidence to prove that an exception to the Foreign Sovereign Immunities Act (FSIA) applies. 28 U.S.C.A. §§ 1605, 1607.

5. International Law ⚿10.33

Expropriations exception to foreign sovereign immunity under Foreign Sovereign Immunities Act (FSIA) applied, as required to grant default judgment to Jewish religious corporation seeking return from Russian Federation of collection of invaluable religious books and manuscripts of which corporation was and always had been the rightful owner; corporation demonstrated its right to collection, Russian Federation took corporation's property in violation of international law, collection was owned by agencies or instrumentalities of foreign state, and such agencies or instrumentalities of foreign state were engaged in commercial activity in the United States. 28 U.S.C.A. §§ 1603(d), 1605(a)(3).

6. International Law ⚿10.12

An expropriation is a violation of international law if the taking is not for a public purpose, is discriminatory, or does not provide for just compensation.

7. International Law ⚿10.38

Whether parties are agencies or instrumentalities under the "expropriation" exception to Foreign Sovereign Immunities Act (FSIA) is a question of law. 28 U.S.C.A. § 1605(a)(3).

8. International Law ⚿10.34

The determining factor in deciding whether a party is an agency or instrumentality under the "expropriation" exception to Foreign Sovereign Immunities Act (FSIA) is whether the core function of the entity is governmental or commercial: if the core function is commercial rather than governmental, the entity is an agency or instrumentality of the foreign state. 28 U.S.C.A. § 1605(a)(3).

William Bradford Reynolds, Howrey Simon Arnold & White, LLP, Alyza Doba Lewin, Nathan Lewin, Lewin and Lewin LLP, Washington, DC, Jonathan E. Stern, Dreier Stein & Kahan, LLP, Marshall B. Grossman, Seth M. Gerber, Alschuler Grossman LLP, Santa Monica, CA, for Plaintiff.

MEMORANDUM OPINION

ROYCE C. LAMBERTH, Chief Judge.

Before the Court is plaintiff Agudas Chasidei Chabad of United States' Motion

for Entry of Default Judgment Against All Defendants [79–1]. Upon consideration of the motion, the default posture of the case, the entire record, and applicable law, the Court will grant the motion for the reasons set forth below.

I. Procedural History

The complete factual history of this case is set forth in the Court's prior opinion in *Agudas Chasidei Chabad of United States v. Russian Federation,* 466 F.Supp.2d 6, 10–14 (D.D.C.2006) (Lamberth, J.). Plaintiff Agudas Chasidei Chabad of United States is a New York non-profit religious corporation that commenced this action on November 9, 2004, in the United States District Court for the Central District of California against defendants the Russian Federation, the Russian Ministry of Culture and Mass Communication ("Ministry"), the Russian State Library ("RSL"), and the Russian State Military Archive ("RSMA"). (Plaintiff's Brief in Support of Motion for Entry of Default Against All Defendants ("Pl.'s Brief") [79–2] at 4.) Plaintiff's Complaint alleged that defendants possessed and obtained, in violation of international law, a collection of invaluable religious books and manuscripts ("Collection") of which plaintiff is and always has been the rightful owner. (*Id.*) Plaintiff sought return of the Collection under the "expropriation" exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3), and asked for both declaratory and injunctive relief. (*Id.*) This Collection held by defendants consists of two separate groups of religious writings: 12,000 books and manuscripts seized during the Bolshevik Revolution and Russian Civil War between 1917 and 1925 (the "Library"), and 25,000 pages of handwritten teachings and other writings of the Rebbes (the Chabad religious leaders) which were seized by Nazi Germany during the 1941 invasion of Poland and subsequently transferred by the Soviet Red Army to defendant RSMA as "trophy documents" and "war booty" and are still held in Russia (the "Archive"). *See Agudas Chasidei Chabad,* 466 F.Supp.2d at 13.

On May 2, 2005, defendants filed a motion in the United States District Court for the Central District of California to dismiss plaintiff's claims as to both the Library and Archive on grounds of lack of jurisdiction under the FSIA, improper venue, failure to state a claim under the act of state doctrine, and *forum non conveniens.* (Case No. 2:04–cv–09233–PA–PLA ("CA") [13].) Before a resolution on the merits occurred, the case was transferred on July 14, 2005, pursuant to 28 U.S.C. § 1406(a), to the United States District Court for the District of Columbia. (CA [56].) Regarding defendants' motions to dismiss for lack of jurisdiction, after full briefing and oral argument, this Court on December 4, 2006, granted defendants' dismissal motion as to the Library but denied the motion as to the Archive. *Agudas Chasidei Chabad,* 466 F.Supp.2d at 31. Both sides appealed to the U.S. Court of Appeals for the District of Columbia Circuit. (*See* Notice of Appeal [57]; Order Granting Entry of Final Judgment [58].) On June 13, 2008, following briefing and oral argument, the Court of Appeals found that this Court properly possessed jurisdiction over plaintiff's claims concerning both the Library and Archive and found that these claims were not barred by sovereign immunity under the FSIA or by defendants' *forum non conveniens* or act of state defenses. *Agudas Chasidei Chabad of United States v. Russian Fed'n,* 528 F.3d 934 (D.C.Cir.2008). Defendants' petition for rehearing *en banc* was denied on October 6, 2008, and no petition for *writ of certiorari* was filed with the United States Supreme Court. (Pl.'s Brief [79–2] at 9.)

On remand to this Court, defendants filed an Answer on December 11, 2008 ("Defs.' Answer" [37]) and subsequently filed an Amended Answer on March 13, 2009 ("Defs.' Amended Answer" [63]). Soon thereafter, rather than respond to plaintiff's discovery requests, defendants on June 26, 2009, filed a Statement with Respect to Further Participation [71] which informed this Court that defendants "decline[d] to participate further in this litigation" and "believe[d] this Court has no authority to enter Orders with respect to the property owned by the Russian Federation and in its possession, and the Russian Federation will not consider any such Orders to be binding on it." On the same day, per defendants' previous instructions, defendants' counsel Squire, Sanders & Dempsey, LLP, filed a Motion to Withdraw Appearance as Counsel of Record [72] which this Court granted by an Order [76] dated October 26, 2009. On October 27, 2009, in response to plaintiff's Motion for Entry of Default Against All Named Defendants [73] filed on July 28, 2009, this Court ordered entry of default against the defendants due to their refusal to continue in the litigation. (Order [77].) This Court also ordered that plaintiff should "move for judgment on the default with proof satisfactory to the Court," pursuant to the FSIA. (*Id.*; Order [78] (stating that plaintiff must file the motion within 30 days of April 7, 2010, or the case will be dismissed for failure to prosecute).) Plaintiff so moved on May 5, 2010, in its Motion for Entry of Default Judgment Against All Defendants [79–1], which is now before the Court.

II. Legal Standard for FSIA Default Judgment

[1, 2] Under the Foreign Sovereign Immunities Act (FSIA), no judgment by default shall be entered by a court unless the claimant establishes his right to relief or claim by evidence satisfactory to the court. 28 U.S.C. § 1608(e); *see also Roeder v. Islamic Republic of Iran,* 333 F.3d 228, 232 (D.C.Cir.2003). To prevail in a FSIA default proceeding, a plaintiff "must present a legally sufficient *prima facie* case, *i.e.,* a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff." *Gates v. Syrian Arab Republic,* 580 F.Supp.2d 53, 63 (D.D.C.2008). In FSIA default judgment proceedings, a plaintiff may establish proof by affidavit. *Campuzano v. Islamic Republic of Iran,* 281 F.Supp.2d 258, 268 (D.D.C.2003). Upon evaluation, the court may accept plaintiff's uncontroverted evidence as true. *Heiser v. Islamic Republic of Iran,* 466 F.Supp.2d 229, 255 (D.D.C.2006) (Lamberth, J.) (citing *Campuzano,* 281 F.Supp.2d at 268).

III. Discussion

[3, 4] The FSIA provides the sole basis for jurisdiction over foreign sovereigns by courts of the United States. *See Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434–35, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The general rule is that, under the FSIA, a district court has jurisdiction over a civil action against a foreign sovereign when the sovereign is not entitled to immunity. 28 U.S.C. § 1330(a); *World Wide Minerals, Ltd. v. Republic of Kazakhstan,* 296 F.3d 1154, 1161 (D.C.Cir.2002). However, this general immunity is abrogated under the FSIA if one of its statutory exceptions applies. 28 U.S.C. §§ 1605, 1607; *Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). Plaintiff maintains that the FSIA's "expropriation" exception supplies the necessary jurisdiction. (Pl.'s Brief [79–2] at 31.) Under this exception, a foreign sovereign is not entitled to immunity in any case:

> [(1)] in which [at issue are] rights in property [(2)] taken in violation of international law ... and ... [(3)] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and [(4)] that agency or instrumentality is engaged in a commercial activity in the United States[.]

28 U.S.C. § 1605(a)(3). The plaintiff seeking relief has the burden of bringing forth evidence to prove that an exception to the FSIA applies. *Crist v. Republic of Turkey,* 995 F.Supp. 5, 10 (D.D.C.1998) (Lamberth, J.). As set forth below, this Court finds that plaintiff has met its evidentiary burden in this case, and thus entry of default on the judgment is appropriate.

1. Plaintiff Has Shown that Rights in Property Are at Issue.

[5] In order for the FSIA's "expropriations" exception to apply, plaintiff must bring forth evidence that rights in property are at issue. 28 U.S.C. § 1605(a)(3). Defendants initially conceded this issue in their motion to dismiss when they said that the rights in property were "not disputed inasmuch as Plaintiff's claim of right to the Library and the Archive are placed in issue by Plaintiff's complaint." (CA [13].)

Even absent this concession, plaintiff has demonstrated its right to the property at issue in this case, which was held in trust by plaintiff for the benefit of the worldwide Agudas Chabad religious organization. (CA [1]; Levine Aff. ¶ 8, Ex. D; *Agudas Chasidei Chabad of United States v. Gourary,* 833 F.2d 431, 434 (2d Cir. 1987); Lewin Aff., Ex. E (Gourary Trial Tr. at 2515–16, 2439) (stating that the religious leaders of Chabad do not approve of the accumulation of wealth or personal property).) In fact, the Soviet Union's own Arbitration Tribunal determined that the Library was "the communal property of the entire Agudas Chasidei Chabad movement." (CA [40].) In addition, even though the taking of the Library and Archive occurred before plaintiff was incorporated in 1940, New York Corporations law allows for the automatic transfer to the new corporation of interests in property that were possessed by the predecessor unincorporated religious society. NY Relig. Corp. § 4. This is the case regardless of the physical location of the property at the time of incorporation. *Id.* Thus, plaintiff has sufficiently established its claim to the Library and Archive that defendants unlawfully possess and refuse to relinquish.

2. Defendant Took Plaintiff's Property in Violation of International Law.

[6] Second, for FSIA's expropriation exception to apply, plaintiff must prove that defendant took plaintiff's property in violation of international law. 28 U.S.C. § 1605(a)(3). An expropriation is a violation of international law if the taking is not for a public purpose, is discriminatory, or does not provide for just compensation. *Crist,* 995 F.Supp. at 10. Plaintiff has demonstrated that the takings of the Library and the Archive by defendants and their predecessor regimes were not for a public purpose, were discriminatory, and occurred without just compensation to plaintiff. This Court already found that the seizure of the Archive "was discriminatory, not for a public purpose and did not result in payment of just compensation," and this finding was not challenged or disturbed on appeal. *Agudas Chasidei Chabad,* 466 F.Supp.2d at 19, *aff'd, Agudas Chasidei Chabad of United States v. Russian Fed'n,* 528 F.3d 934 (D.C.Cir.2008).

In addition, it is evident that the taking of the Library was discriminatory. (Lewin Aff. Ex. G (stating that the Soviet government arrested and sentenced the Chabad

religious leader the Sixth Rebbe to death for practicing and spreading Jewish teachings).) Also, no compensation for the Library was provided or offered to plaintiff. (CA [34] (defendant RSL's response to plaintiff's interrogatory: "[RSL] does not contend that monetary compensation was paid.").

Regarding the Library, there are three distinct "takings" at issue. First, the Court of Appeals noted that defendants did not substantively refute plaintiff's assertions of the illegality of the initial seizure of the Library during the Bolshevik Revolution and Russian Civil War between 1917 and 1925. *Agudas Chasidei Chabad*, 528 F.3d at 943. Second, the Court of Appeals found that the unfulfilled promises by the newly constituted Soviet government to return the Library to plaintiff could properly constitute a separate "taking" in violation of international law. *Id.* at 945–46. A third "taking" of the Library occurred in 1992 when the Russian Federation was faced with an order transferring the Library back to plaintiff, and it decided by official decree to close to plaintiff all executive and judicial avenues of possible retrieval of the Library, thus ensuring no viable prospect of recover whatsoever. (CA [35] ¶ 11; CA [40] ¶ 15, Ex. J.) Defendants acted in contradiction to an explicit assurance from newly named Russian President Boris Yeltsin to President George H.W. Bush's emissary, Secretary of State Baker, that defendants would return the Library to plaintiff. (Pl.'s Brief [79–2] at 45.) In short, plaintiff has satisfactorily shown that defendants expropriated both the Archive and Library from plaintiff in violation of international law.

3. Plaintiff's Property Is Owned or Operated by Agencies or Instrumentalities of the Russian Federation, a Foreign State.

[7, 8] Third, for FSIA's "expropriation" exception to apply, plaintiff must prove that agencies or instrumentalities of the Russian Federation are in possession of plaintiff's unlawfully expropriated property. 28 U.S.C. § 1605(a)(3). Whether the RSL or RSMA are agencies or instrumentalities under the "expropriation" exception to FSIA is a question of law. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 152–53 (D.C.Cir.1994). The determining factor is whether the core function of the entity is governmental or commercial: if the core function is commercial rather than governmental, the entity is an agency or instrumentality of the foreign state. *Id.* at 153; *Jacobsen v. Oliver*, 451 F.Supp.2d 181, 196 (D.D.C. 2006). The Court finds that plaintiff has met its burden of showing that the Archive and Library are possessed by the RSMA and RSL, which are agencies or instrumentalities of the Russian Federation.

To start, defendants in their motion to dismiss did not dispute that the RSMA and the RSL were agencies and instrumentalities of a foreign state, and they openly conceded the issue in their argument on appeal. *See Agudas Chasidei Chabad*, 528 F.3d at 947, (Russia Reply Br. at 38 n. 8). Defendants never raised this issue during the five years of litigation in this Court and in the Court of Appeals. (Pl.'s Brief [79–2] at 48.) It was only after the Court of Appeals found that this Court properly possessed jurisdiction over both of plaintiff's claims that defendants first asserted that the RSL and RSMA were not agencies or instrumentalities of the Russian Federation. (*See* Amended Answer [63] ¶¶ 4–5.)

In the Amended Answer, defendants claimed that the RSMA and RSL were not agencies or instrumentalities of the Russian Federation and that their core functions were governmental. (*Id.*) However,

plaintiff offered adequate evidence to refute this claim and to meet its *prima facie* burden. First, plaintiff has offered sworn declarations of both the Director of the RSMA and the Deputy Minister of the Russian Ministry of Culture and Mass Communication indicating that the RSMA is a "federal state institution" that is subject to the oversight and jurisdiction of the Russian Federation, and that federal agencies of the Russian Federation directly oversee the RSMA's administration of any property in the RSMA's possession. (Kouzelenkov Decl. (CA [17]) ¶ 2; Nadirov Decl. (CA [16]) ¶ 3.) Second, the General Director of the RSL submitted a sworn declaration that the RSL is a "federal state institution," was created under and is subject to the laws of the Russian Federation, is a public library owned by the government, and is overseen by a Russian federal agency, as is the RSMA. (Federov Decl. (CA [14]) ¶¶ 2–3.) The Deputy Minister of the Russian Ministry of Culture and Mass Communication confirmed that federal agencies oversee the RSL's administration of any property it possesses. (Nadirov Decl. (CA [16]) ¶ 3.) Third, the commercial functions of the RSMA and the RSL are well-documented in the record. *See infra* Section III. 4. Accordingly, plaintiff has successfully demonstrated that the RSMA and RSL are agencies or instrumentalities of the Russian Federation.

In addition, there is not any real dispute that the Archive is possessed by the RSMA or that the Library has long been possessed by the RSL. Defendants acknowledged in their Supplemental Brief that the RSL and RSMA "own or operate" the Collection for FSIA purposes. (Pl.'s Suppl. Br. at 15 n. 2; Defs.' Suppl. Br. at 20.) Furthermore, possession is sufficient to satisfy the "owned or operated" requirement of 28 U.S.C. § 1605(a)(3). *See Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 480–81 (D.C.Cir. 2007) (to "own" is to "have or hold as property or appurtenance"). Defendants conceded in their Amended Answer that the Archive has been possessed by the RSMA since after World War II. (Amended Answer [63] ¶ 19.) Also, the General Director of the RSL stated in his sworn declaration that the Library "has been continuously housed in the RSL (or its predecessors) since its seizure and expropriation by the Bolshevik government of the USSR during the years 1919–1920." (Federov Decl. (CA [14]) ¶ 4; *see also* Defs.' Answer [37] ¶ 11(a) (admitting that the Library is "presently in [the] physical possession of the RSL").) Thus, plaintiff has shown that the property at issue is owned or operated by agencies or instrumentalities of a foreign state, namely the Russian Federation.

4. Defendants Are Engaged in a Commercial Activity in the United States.

Lastly, for FSIA's "expropriation" exception to apply, the agency or instrumentality in possession of the illegally expropriated property must be "engaged in commercial activity in the United States." 28 U.S.C. § 1605(a)(3). FSIA's definition of "commercial activity" asks whether the agency or instrumentality was engaged "in either a regular course of commercial activity or a particular commercial transaction or act." 28 U.S.C. § 1603(d). This Court and the Court of Appeals both found that the RSMA and RSL met this definition.

Regarding the RSMA, its Executive Director specifically acknowledged that the RSMA sometimes "execute[s] jobs for money." (Lewin Aff. ¶ 7, Ex. J (Kouzenlenkov Depo. 70:7–14).) In addition, the Court of Appeals found that as of the time that this suit was initially filed in November 2004, the RSMA had entered into con-

tracts with two American corporations for the reproduction and worldwide sale of RSMA materials, including sale in the United States. *Agudas Chasidei Chabad*, 528 F.3d at 948. One set of these contracts included provisions waiving sovereign immunity and specified that the activities described in the contract were "commercial in nature." *Id.* This same set of contracts allowed the RSMA to receive $60,000 in advance royalties by the year 2000, while another contract with Yale University Press allowed the RSMA to receive a $10,000 royalty advance in one year. *Id.*

Similarly, the Court of Appeals determined that the RSL was engaged in commercial contracts for profit in the United States. Some of these contracts were with Norman Ross Publishing (now ProQuest) to produce and distribute copies of RSL materials in exchange for a 10% royalty payment to the RSL. *Id.* One of these contracts "has already yielded RSL over $20,000 and another over $5,000." *Id.* Thus, plaintiff has shown that the RSMA and RSL are both engaged in a commercial activity in the United States.

IV. Conclusion

Plaintiff has met its burden of proving a *prima facie* case against defendants and has established its right to relief by evidence satisfactory to the court. For the foregoing reasons, plaintiff Agudas Chasidei Chabad of United States' Motion for Entry of Default Judgment Against All Defendants [79–1] shall be GRANTED.

A separate order shall issue this date.

Cornell SANDERS, Plaintiff,

v.

Barack OBAMA, et al., Defendants.

Civil Action No. 09–912 (RMC).

United States District Court,
District of Columbia.

Aug. 2, 2010.

Background: Requestor brought pro se action, pursuant to Freedom of Information Act (FOIA) and Privacy Act, against Executive Office for United States Attorneys (EOUSA), a component of the Department of Justice (DOJ), seeking records held by U.S. Attorney's Office pertaining to his criminal prosecution. EOUSA moved for summary judgment.

Holdings: The District Court, Rosemary M. Collyer, J., held that:

(1) EOUSA conducted search reasonably calculated to uncover all relevant documents in response to FOIA request;

(2) grand jury testimony from requestor's prior criminal prosecution was exempt from disclosure; and

(3) requestor's challenge to authenticity of documents and process underlying his criminal prosecution was beyond jurisdiction of District Court sitting as arbiter of FOIA request.

Motion granted.

1. Federal Civil Procedure ⚿2509.8

Freedom of Information Act (FOIA) cases are typically and appropriately decided on motions for summary judgment; in such a case, summary judgment can be awarded solely on the basis of information provided by the agency in declarations when the declarations describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
Plaintiff,

v.

RUSSIAN FEDERATION, *et al.*,
Defendants.

Civil Action No. 05-1548 (RCL)

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST ALL DEFENDANTS

On October 27, 2009, this Court granted Plaintiffs request for an entry of default (Document 77) against Defendants Russian Federation, Russian Ministry of Culture and Mass Communication, Russian State Library, and Russian State Military Archive (collectively, "Defendants") following the withdrawal of Defendants' counsel of record (Document 76) and Defendants' announced intention to withdraw from the litigation and disregard any and all Orders entered by this Court (Document 71).

Defendants thereafter moved for a Default Judgment against all Defendants and filed in support thereof a Memorandum of Points and Authorities together with Declarations of Nathan Lewin, Rabbi Yehuda Krinsky and Rabbi Shalom Dovber Levine, and extensive record materials compiled during the course of this proceeding.

Having carefully reviewed the briefing and evidentiary materials supporting Plaintiffs Default Judgment Motion, considered the various arguments made by the Parties during the course of these proceedings, and taken into account the earlier decision of the U.S. Court of

Appeals for the District of Columbia Circuit affirming this Court's jurisdiction over the Defendants under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3),

IT IS HEREBY ORDERED AND ADJUDGED, FOR THE REASONS SET FORTH IN AN ACCOMPANYING MEMORANDUM OPINION, AS FOLLOWS:

1. Plaintiff Agudas Chasidei Chabad of United States' Motion for Entry of a Default Judgment against all Defendants is hereby GRANTED.
2. Defendants are Ordered to surrender to the United States Embassy in Moscow or to the duly appointed representatives of Plaintiff Agudas Chasidei Chabad of United States the complete collection of religious books, manuscripts, documents and things that comprise the "Library" and the "Archive" presently being held by the Defendants at the Russian State Library and the Russian State Military Archive or elsewhere, and Defendants are further directed to assist and authorize the transfer of the "Library" and the "Archive" to the United States Embassy in Moscow or to Plaintiffs appointed representatives and to provide whatever security and authorization is needed to insure prompt and safe transportation of the "Library" and "Archive" to a destination of Plaintiff's choosing.[1]

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[1] The "Library" includes those books, manuscripts, and other publications constituting the 5,619 titles in Chabad's copy of the surviving pre-Revolutionary catalogue of the "Library" enumerated in Attachment I to this Order, which is Levine Supp. Decl. ¶ 6, Ex. N, DC Document 69. The "Library" also includes the 4354 books being held by the Russian Federation at the RSL main library or at its storage facility in Chimki, Russia, which were identified by Rabbi Levine in July 2000 and marked with a sticker stating "Lubavitch collection" enumerated in Attachment II to this Order, which is Levine Decl. ¶ 2, DC Document 67. The "Library" further includes the 87 books at the RSL's "rare books" department which Rabbi Levine was able to identify in 1988, enumerated in Attachment III of this Order, which is Levine Supp. Decl. ¶ 7, Ex. O, DC Document 69. The "Library" also includes the 281 volumes of bound manuscripts which are located in the RSL's manuscript department's *Polyakov* collection, as identified by the card files of the RSL and by the photocopies made by the National Library of Israel. (Levine Supp. Decl. ¶ 8, Ex. P, DC Document 69.) The "Library" also includes the seven books provided to President William J. Clinton and Vice President Al Gore.

The "Archive" includes the books, manuscripts, and other things that are referenced in the certificate prepared by the Director of the RSMA, Vladimir N. Kouzelenkov, which describes the contents of the "Archive" and states they can be located in Fond 706/k at the RSMA, as stated in Attachment IV to this Order, which is Gerber Decl. ¶ 6, Ex. E, DC Document 67. The "Archive" also

3. Plaintiff shall report back to this Court within thirty (30) calendar days of the date of this Order, and advise the Court on the progress of securing a return of the "Library" and the "Archive," including the condition of the Collection and the extent to which either the "Library" or the "Archive" have been compromised, if at all.
4. The Parties shall each bear their own costs of litigation, but all fees and costs associated with return of the "Library" and the "Archive" shall be born by Defendants alone.

SO ORDERED this 30th day of July, 2010.

Royce C. Lamberth

ROYCE C. LAMBERTH
U.S. DISTRICT COURT

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includes the books, manuscripts, and things which may be located in RSMA Fonds 707, 709, 717, 1325, and 1326, as confirmed by a guide of Jewish holdings of the RSMA titled *Dokumenty po istorii i kul'ture Evreev v trofeinyklh kollektsiiakh Rossiiskogo gosudarstvennogo voennogoo arkhiva Putevoditel'* (*Jewish Documentary Sources Among the Trophy Collections of the Russia Militmy Archives: A Guide*) / ed. V. N. Kuzelenkov, M.S. Kupovetskii, and David E. Fishman (Moscow, 2005, RSMA, Project Judaica), which states that the manuscripts and texts of the Sixth Rebbe can be found in RSMA Fonds 706k, 707k, and 1326k. (Levine Supp. Decl. ¶ 3, Ex. K, Document 69.)

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בארה"ב מיום 26.7.2011

terms of the contract. Any remedy Intervenor may have lies with the plaintiff. The motion for declaratory relief is denied.

IV. CONCLUSION

In the wake of a subprime mortgage crisis characterized by predatory lending and indiscriminate, obfuscated mortgage trading, plaintiff was concerned about the validity of Capital One's claim to the Note on her house. And though this Court would not hesitate to permit a suit where the ownership, location, or transference of the Note was in question, here there is a straight line from B.F. Saul to Chevy Chase to Capital One. Capital One's actions have been aboveboard from the outset; mere failure to record the assignment of a Note is not sufficient to invalidate an otherwise proper foreclosure, nor does the HAMP provide plaintiff with a private cause of action. Though the Court empathizes with Intervenor's unenviable position, the clear terms of the contract and near-equal balance of equities counsel against granting declaratory relief. Defendants' motions to dismiss are granted and plaintiff's claims dismissed, while Intervenor's motion for declaratory relief is denied.

A separate Order and Judgment consistent with these findings shall issue this date.

AGUDAS CHASIDEI CHABAD OF UNITED STATES, Plaintiff,

v.

RUSSIAN FEDERATION, et al., Defendants.

No. 05–cv–1548 (RCL).

United States District Court, District of Columbia.

July 26, 2011.

Background: Jewish non-profit religious corporation brought action under Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collections of Jewish religious books, manuscripts, and other documents. The District Court, Royce C. Lamberth, Chief Judge, 729 F.Supp.2d 141, granted corporation default judgment. Corporation then moved for execution of its judgment, and to impose sanctions on all defendants for failure to returning collections.

Holdings: The District Court, Royce C. Lamberth, Chief Judge, held that:

(1) Russian state agencies received adequate notice of default judgment, as required under FSIA;

(2) there was adequate passage of time between judgment, service of judgment, and present time, as required for proper service under FSIA;

(3) defendants failed to comply with default judgment "to a reasonable certainty," as required to warrant entry of civil contempt sanctions; but

(4) entry of sanctions was premature, and it was instead appropriate for defendants to show cause why they should not be held in civil contempt for failure to comply with judgment.

Motions granted in part and denied in part.

1. International Law ⚿10.42

Provision of Foreign Sovereign Immunities Act (FSIA), which only permits attachment or execution of default judgment after court has determined a reasonable period of time has elapsed following entry of judgment and giving of required notice, imposes two basic requirements on a plaintiff seeking to enforce a judgment against foreign state or its agencies and instrumentalities: (1) each defendant must receive notice that judgment has been entered against it, and (2) each defendant must be given adequate opportunity to respond. 28 U.S.C.A. § 1610(c).

2. International Law ⚿10.42

The provision of mailing addresses by former counsel for Russian Federation and several Russian state agencies to court and Jewish non-profit religious corporation did not constitute "special arrangement" by which corporation could effect proper service under Foreign Sovereign Immunities Act (FSIA) of actual notice to defendants of default judgment in action in which it sought return of collections of Jewish religious books, manuscripts, and other documents; defendants determined not to participate in action at least a month before their former counsel submitted addresses, and subsequent admission was merely counsel's attempt to comply with local rules, which required that attorney withdrawing without his or her client's consent was required to submit such information to the court. 28 U.S.C.A. § 1608(a, b).

3. International Law ⚿10.42
Treaties ⚿8

Jewish non-profit religious corporation did not have method to serve default judgment upon Russian State Library (RSL) and Russian State Military Archive (RSMA) "in accordance with an applicable international convention on service of judicial documents," as required under notice provisions of Foreign Sovereign Immunities Act (FSIA); though Russia was member of Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, approximately seven years prior to entry of judgment, it unilaterally suspended all judicial cooperation with the United States in civil and commercial matters. 28 U.S.C.A. § 1608(a, b).

4. International Law ⚿10.42

Jewish non-profit religious corporation's failure to submit signed receipts of service, its choice to send the mailing itself rather than through clerk of court, and its decision to send mailings to individual Russian entities rather than head of ministry of foreign affairs precluded effective service, as required under Foreign Sovereign Immunities Act (FSIA), of its default judgment against Russian Federation and several Russian state agencies in action in which it sought return of collections of Jewish religious books, manuscripts, and other documents. 28 U.S.C.A. § 1608(a).

5. International Law ⚿10.42

Russian State Library (RSL) and Russian State Military Archive (RSMA) received adequate notice of default judgment, through State Department and its diplomatic channels, entered in favor of Jewish non-profit religious corporation, and thus, received proper service in accordance with Foreign Sovereign Immunities Act (FSIA) in action against Russian Federation, RSL, RSMA and related entities in which corporation sought return of collections of Jewish religious books, manuscripts, and other documents; State Department informed court that service through diplomatic channels had been completed, and actions by Russian defen-

dants, in returning all documents served by mail on every defendant to United States Embassy in Moscow and later submitting a letter, after diplomatic service, indicating none of defendants would accept service, demonstrated defendants were well-aware of import of papers served upon them. 28 U.S.C.A. § 1608(a)(4).

6. International Law ⚿10.42

There was adequate passage of time between final judgment, subsequent service of default judgment upon Russian State Library (RSL) and Russian State Military Archive (RSMA) and present, as required for proper service of judgment under Foreign Sovereign Immunities Act (FSIA) in action brought by Jewish non-profit religious corporation against Russian Federation, RSL, RSMA and related entities in which it sought return of collections of Jewish religious books, manuscripts, and other documents; almost a year had passed since entry of default judgment, and almost eight months had passed since notice of judgment was provided by diplomatic note, defendants had informed Ministry of Justice of Russian Federation of default judgment, and that agency, which was not otherwise a party to action, transmitted a letter to court stating it returned documents to court "without judicial review," which meant it had sufficient time to evaluate and consider responses to court's entry of default judgment. 28 U.S.C.A. § 1610(c).

7. Contempt ⚿33
International Law ⚿10.42

Federal courts enjoy inherent contempt power, including in the context of the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C.A. §§ 1330, 1602 et seq.

8. Contempt ⚿70, 74

Under District of Columbia law, civil contempt, unlike the punitive remedy of criminal contempt, is designed to coerce compliance with a court order or to compensate a complainant for losses sustained.

9. Contempt ⚿20, 60(3)

Under District of Columbia law, to determine whether civil contempt is appropriate in particular case, court must evaluate whether putative contemnor has violated an order that is clear and unambiguous, and whether such a violation has been proved by clear and convincing evidence.

10. Contempt ⚿26, 60(3)

Jewish non-profit religious corporation proved Russian Federation and several Russian state agencies failed to comply with default judgment, requiring them to return collections of Jewish religious books, manuscripts, and other documents, "to a reasonable certainty," as required to warrant entry of civil contempt sanctions; documents remained in defendants' possession, they had taken no steps necessary towards compliance with court order and in fact had made it clear they had no intention of complying with order, and United States did not object to imposition of sanctions or otherwise suggest that negotiations for return of documents had made any progress or were even ongoing.

11. Contempt ⚿23, 55, 61(4)

While entry of sanctions upon Russian Federation and several Russian state agencies for their failure to comply with default judgment, requiring them to return collections of Jewish religious books, manuscripts, and other documents to Jewish non-profit religious corporation, was premature, it was appropriate for defendants to show cause why they should not be held in civil contempt for failing to comply with judgment; although defendants had certainly received notice directing them to return documents to corporation, they had received no notice that

failure to comply with order could subject them to additional monetary penalties.

12. Contempt ⚖55, 61(4)

In contemplating entry of sanctions, the court must remain cognizant that fundamental requirement of civil contempt proceedings is that accused party has notice and opportunity to be heard.

13. Contempt ⚖23

A contemnor cannot be expected to purge civil contempt through reduction or avoidance without having clear and unambiguous notice of proscribed conduct.

Alyza Doba Lewin, Nathan Lewin, Lewin and Lewin LLP, Washington, DC, Jonathan E. Stern, Dreier Stein & Kahan, LLP, Marshall B. Grossman, Alschuler Grossman LLP, Santa Monica, CA Seth M. Gerber, Bingham McCutchen, LLP, Los Angeles, CA, for Plaintiff.

MEMORANDUM OPINION

ROYCE C. LAMBERTH, Chief Judge.

I. INTRODUCTION

Plaintiff Agudas Chasidei Chabad of the United States is a New York-based, nonprofit religious corporation holding a default judgment under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, against the Russian Federation, a foreign state, the Russian Ministry of Culture and Mass Communication (the "Ministry"), the Russian State Library ("RSL"), and the Russian State Military Archive ("RSMA"). The default judgment entitles plaintiff to a collection of religious books and artifacts concerning the cultural heritage of its forebearers. These items fell into defendants' hands in the early 20th century, and Russia has, to date, declined to return them. Further complicating matters, upon learning of the default judgment after withdrawing from this litigation, Russia announced that it will refuse to loan cultural artifacts and art to institutions in the United States for fear that plaintiff will attach such items in satisfaction of the default judgment. Before the Court are plaintiff's motions seeking permission to pursue execution of its judgment and imposition of sanctions on all defendants for failure to return the collections. The Court will grant the former and deny the latter at this time.

II. PROCEDURAL HISTORY

The full background underlying this action is set forth in this Court's prior opinion in *Agudas Chasidei Chabad v. Russian Fed'n,* 466 F.Supp.2d 6, 10–14 (D.D.C. 2006). In short, plaintiff is the incorporated entity and successor to a worldwide organization of Jewish religious communities having origins in Eastern Europe and Russia. *Id.* at 11. These groups were part of the Chasidim movement and adhere to Chasidism, which teaches of the presence of God in all things, even the most mundane. *Id.* During the tumultuous periods of World War I and World War II, two sets of historical and religious records were lost to the Chasidim movement. In particular, the "Library," which includes books and manuscripts maintained by the leaders of the movement, was taken by the Soviet Department of Scientific Libraries following the Bolshevik Revolution, while the "Archive," which consists of more than 25,000 pages of materials handwritten by the movement's leaders, was left in Poland in 1939 by the leader of the movement when fleeing to America and subsequently seized by the Soviet Army from defeated German troops. *Id.* at 12–13. Though remaining in Soviet possession through much of the 20th century, in the early 1990s a series of

rulings by Soviet tribunals determined that the Library and Archive were not the national property of the Soviet Union and ordered that the collections be returned to plaintiff. *Id.* at 13. Before the return could be accomplished, however, the Soviet Union was dissolved and the new Russian Federation nullified the prior orders. *Id.* As a result, both the Library and the Archive remained in Russian possession.

Plaintiff turned to the U.S. courts in 2004, bringing suit against Russia and various state agencies in the Central District of California. The action is brought under the FSIA, which codifies principles of sovereign immunity by barring the assertion of jurisdiction over foreign states by any state or federal court in the United States. 28 U.S.C. § 1604. At the same time, the Act enumerates several specific exceptions to general principles of sovereign immunity, one of which is applicable here: "A foreign state shall not be immune ... in any case in which rights in property taken in violation of international law are in issue." *Id.* § 1605(a)(3). Plaintiff's action was transferred to this Court in 2005, and shortly thereafter the Court granted in part and denied in part defendants' motion to dismiss on both jurisdiction and *forum non conveniens* grounds. *Agudas Chasidei Chabad*, 466 F.Supp.2d at 31.[1] Following nearly four years of active litigation between the parties, all defendants withdrew from this matter, explaining that "[t]he Russian Federation views any continued defense before this Court and, indeed, any participation in this litigation as fundamentally incompatible with its rights as a sovereign nation." Statement of Defendants with Respect to Further Participation 2, Jun. 26, 2009 [71] ("Ds' Stmt"). A year later, the Court entered default judgment after finding that "[p]laintiff has met its burden of proving a *prima facie* case against defendants and has established its right to relief by evidence satisfactory to the Court." *Agudas Chasidei Chabad v. Russian Fed'n*, 729 F.Supp.2d 141, 148 (D.D.C.2010). The Court simultaneously ordered defendants "to surrender ... the complete collection of religious books, manuscripts, documents and things that comprise the 'Library' and the 'Archive.'" Order & Judgment 2, July 30, 2010 [80].

Following entry of default judgment, plaintiff sent by FedEx copies of the opinion and final judgment, in both English and Russian, to the address and contact for each defendant that was provided by defendants' former counsel at the time Russia and the Russian entities withdrew from this case. *Compare* Certificate of Service, Oct. 20, 2010 [84–1], *with* Ex. A to Reply in Support of Motion to Withdraw, Aug. 6, 2009 [75]. Two months later, the Court received a letter from the U.S. Department of State indicating that the Russian Ministry of Foreign Affairs had returned these documents to the American Embassy in Moscow. Dec. 8th Letter, Dec. 10, 2010 [86]. In the intervening period, plaintiff had also sent copies and translations of these papers to the State Department for service through diplomatic channels. Notice of Service, Nov. 24, 2010 [85]. Not long thereafter, the Court received another letter indicating that service of these documents had been effected through diplomatic channels in late 2010. Affidavit of Service, Jan. 11, 2011 [87]. In January, the Court received yet another

1. In particular, the Court dismissed all claims related to the Library and retained all claims related to the Archive. On appeal, the D.C. Circuit reversed this Court's holdings with respect to the Library and remanded the matter to proceed with claims related to both the Library and Archive. *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 955 (D.C.Cir.2008).

letter—this time from the Russian Ministry of Justice. Jan. 16th Letter, Jan. 21, 2011 [88]. A translation indicates that the Jan. 16th Letter declares as follows:

> The Ministry of Justice of the Russian Federation hereby returns without judicial review all court documents issued by the Columbia District Court along with the petition filed by the Chassidic Community of the United States, seeking return of the Chassidic religious library. The documents are being returned due to nonexistence of an international treaty between the United States and Russia which would regulate legal provisions pertaining to civil, family and trade matters.

Certified Translation, Feb. 24, 2011 [90–1]. A few months after receipt of the Jan. 16th Letter, plaintiff filed motions requesting a determination that notice of the default judgment has been provided to defendants—allowing plaintiff to pursue execution of the default judgment—and seeking imposition of sanctions against defendants. Motion to Enforce Judgment and Permit Attachment, Apr. 4, 2011 [91] ("Enforcement Mtn."); Motion for Sanctions, Apr. 4, 2011 [92] ("Sanctions Mtn.").

Before the Court could address these motions, two events relevant to their disposition occurred. First, Russia announced that it was suspending exchanges of Russian art and cultural artifacts with American institutions, such as museums and universities, until resolution of this case, and directed its State-run museums to cancel scheduled loans to their American counterparts. Carol Vogel & Clifford J. Levy, *Dispute Derails Art Loans from Russia*, N.Y. Times, Feb. 2, 2011. According to one account, Russian officials are seeking legal assurances from the United States that any art and artifacts will be immune from attachment by plaintiff or others. *Id.* Second, in light of these developments, the United States appeared in this action and asked the Court for additional time to review plaintiff's motions before any ruling was issued. Notice of Potential Participation, Apr. 15, 2011 [93]. In an attempt to remedy any concerns, plaintiff sent a letter to the State Department in May promising that it "will not seek to enforce its default judgment by attaching or executing against any art or object of cultural significance loaned by the Russian Federation to American museums that is covered" by federal statutes. May 9th Letter, May 13, 2011 [94–1]. Plaintiff then submitted a copy of that letter to the Court, and separately declared that it "does not seek to disrupt in any manner the non-profit exchange of art and cultural objects between the Russian and American people." Statement of Plaintiff, May 13, 2011 [94]. A few days later, the United States requested another thirty days to respond in light of plaintiff's letter and statement. Second Notice of Potential Participation, May 16, 2011 [95]. Once again attempting to head-off any governmental involvement, plaintiff submitted a stipulation in which it agreed not to seek attachment of any objects from Russia declared by the State Department to be of "cultural significance" that were to be part of an upcoming exhibit. Stipulation Prohibiting Attachment of Certain Cultural Objects, May 18, 2011 [96].

Notwithstanding plaintiff's commendable attempts to minimize any interference with the exchange of art and cultural artifacts between the United States and Russia, the United States eventually submitted a Statement of Interest, June 15, 2011 [97] ("U.S. Stmt."). That statement explains that the United States government has an interest in ensuring proper enforcement of 22 U.S.C. § 2459(a), which immunizes from "any judicial process" art and other objects of "cultural significance" imported into the United States from any foreign

country under an agreement between "cultural or educational institutions" in both countries. U.S. Stmt. at 3. The United States goes on to explain that, if issued, plaintiff's "proposed order would fail to alert other courts or enforcement authorities to the potential immunities applicable to Defendants' property," and thus could risk undermining the effectiveness of § 2459(a). *Id.* at 5. In response, plaintiff submitted a new proposed order that includes the following text:

> (3) Plaintiff may enforce the judgment against defendants ... through attachment and execution of defendants' property which falls within the immunity exceptions under 28 U.S.C. §§ 1610(a)(3), (b)(2) and is not protected by 22 U.S.C. § 2459. Any application by Plaintiff for a Writ of Attachment ... shall identify the specific property that is the subject of application.... Pursuant to its agreement, Plaintiff shall not enforce the default judgment in this action by seeking to attach or execute against any art or object of cultural significance which has been granted protection under 22 U.S.C. § 2459.

Proposed Order 1–2, June 21, 2011 [98–1]. With the entirety of this background in mind, the Court now turns to the merits of plaintiff's motions.

III. ANALYSIS

Plaintiff asserts, based on the above record, that it has fulfilled its obligations to give defendants notice of the default judgment entered against them sufficient to permit plaintiff to attempt to execute its judgment as permitted under the FSIA, and that the extensive delay caused by defendants throughout their participation and non-participation in these proceedings, as well as their refusal to comply with the Court's order directing turnover of the Library and Archive, warrants the imposition of sanctions. The Court discusses each issue in turn.

A. Plaintiff's Motion for a 1610(c) Order

Having obtained a judgment against the Russian entities, plaintiff now pursues the enforcement of that judgment and return of the Library and Archive. In its present motion, plaintiff requests a court order "finding that a reasonable period of time has elapsed following entry of judgment ... and that the notice required ... has been given to defendants." Enforcement Mtn. at 1. This request stems directly from paragraph (c) of § 1610 of the FSIA, which governs attachment of property and execution of judgments. That provision states:

> No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

28 U.S.C. § 1610(c). In response to plaintiff's motion, the United States expresses unease "that a broad, unqualified attachment order in this or any other proceeding could be used in an attempt to seize immune property, including cultural objects protected by § 2459." U.S. Stmt. at 4–5. The Court first discusses whether plaintiff has satisfied the requirements of § 1610(c), and then turns to the government's concern.

1. Plaintiff Has Complied with Section 1610(c)'s Requirements

[1] Section 1610(c) of the FSIA imposes two basic requirements on a plaintiff seeking to enforce a judgment against

a foreign state or its agencies and instrumentalities: first, each defendant must receive notice that judgment has been entered against it; and second, each defendant must be given an adequate opportunity to respond. *Murphy v. Islamic Republic of Iran*, No. 06 Civ. 596, 778 F.Supp.2d 70, 72–73, 2011 WL 1517985, at *2, 2011 U.S. Dist. LEXIS 43363, at *5–6 (D.D.C.2011). The record in this case shows that plaintiff has served defendants using two distinct methods, and that several months have passed since both entry of judgment and transmittal of copies of that default judgment. For the reasons set forth below, the Court finds that plaintiff has satisfied the requisites and a 1610(c) order should issue.

Before permitting enforcement of a FSIA judgment, a court must ensure that all foreign entities involved receive notice of the exposure of their property and other interests to attachment and execution. Where, as here, that foreign state or agency is not participating or has withdrawn from the ligation, the entry of a default judgment will not, in and of itself, give sufficient warning that the defendant's interests and assets are exposed. Accordingly, § 1610(c) requires that "notice required under section 1608(e)" be given. 28 U.S.C. § 1610(c). Section 1608(e), in turn, requires that "[a] copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section." *Id.* § 1608(e). Such service must be made on each and every defendant. *Murphy,* 778 F.Supp.2d at 72–73, 2011 WL 1517985 at *2, 2011 U.S. Dist. LEXIS at *6. Plaintiff is therefore required to have served a copy of the default judgment on Russia and each of the Ministry, RSL and RSMA.

Section 1608 divides the methods for serving foreign entities under FSIA into two sections: procedures governing service "upon a foreign state or political subdivision" and procedures governing service "upon an agency or instrumentality of a foreign state." 28 U.S.C. § 1608(a)-(b). Service on a foreign state or political subdivision is governed by § 1608(a), which "prescribes four methods of service, in descending order of preference. Plaintiffs must attempt service by the first method (or determine that it is unavailable) before proceeding to the second method, and so on." *Ben–Rafael v. Islamic Republic of Iran*, 540 F.Supp.2d 39, 52 (D.D.C.2008). These methods are service (1) "in accordance with any special arrangement . . . between the plaintiff and the foreign state," (2) "by delivery . . . in accordance with an applicable international convention," (3) "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt," and (4) "by sending two copies" to the U.S. Department of State, which "shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted." 28 U.S.C. § 1608(a)(1)-(4). In § 1608(a), Congress intended to "set[ ] forth the exclusive procedures for service on a foreign state." *Transaero v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C.Cir.1994). Thus, plaintiff "must strictly comply with the statutory service of process provisions" when serving Russia and the Ministry. *Magness v. Russian Fed'n*, 247 F.3d 609, 616 (5th Cir.2001).

Service on RSL and RSMA is governed by § 1608(b), *see Agudas Chasidei Chabad*, 729 F.Supp.2d at 146–47 (finding that RSL and RSMA are "agencies or instrumentalities of the Russian Federation"), which permits service (1) "in accordance with any special arrangement", (2) "by de-

livery . . . either to an officer, a managing or general agent, or to any other agency authorized . . . to receive service of process in the United States [or] in accordance with an applicable international convention on service of judicial documents," (3) or, "if reasonably calculated to give actual notice, by delivery . . . as [either (a)] directed by an authority of the foreign state[, or (b)] any form of mailing requiring a signed receipt, to be addressed and dispatched by the clerk of the court[, or (c)] as directed by order of the court consistent with the law of the place where service is to be made." 28 U.S.C. § 1608(b)(1)-(3). In § 1608(b), Congress was "concerned with substance rather than form." *Transaero,* 30 F.3d at 154. Thus, unlike service against a foreign state or political subdivision, "section 1608(b) may be satisfied by technically faulty service that gives adequate notice." *Id.* (concurring with Third, Sixth, Ninth and Eleventh Circuits). Incorporating these observations into a workable framework, the D.C. Circuit has explained that "substantial compliance with the provisions of service upon an agency or instrumentality of a foreign state—that is, service that gives actual notice . . . to the proper individuals within the agency or instrumentality—is sufficient to effectuate service under section 1608(b)." *Magness,* 247 F.3d at 616.

[2, 3] The first two options for service against all defendants under either § 1608(a) or § 1608(b)—by special arrangement or under an international agreement—are unavailable to plaintiff in this case. Plaintiff argues that the provision of mailing addresses for each individual defendant constitutes a "special arrangement" between the parties. Enforcement Mtn. at 1–2. But the record is clear that defendants determined not to participate in this litigation at least a month before their former counsel submitted these addresses, Ds' Stmt. at 1, and that this subsequent submission was merely counsel's attempt to comply with local rules, which require that an attorney withdrawing without his or her client's consent must submit such information to the Court. Local Civ. R. 83.6(c). In these circumstances, the Court will not transform the provision of addresses by counsel upon withdrawing from representation *after* the parties notified the Court of their intention to longer participate into a "special arrangement" between plaintiff and the Russian defendants for the continued service of legal papers. *Cf. G.E. Trans. S.P.A. v. Republic of Alb.,* 693 F.Supp.2d 132, 137 (D.D.C.2010) (finding existence of special arrangement only in contract between parties). Nor can plaintiff have served defendants through any international agreement. Though Russia is a member of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, art. 3, 20 U.S.T. 361, 658 U.N.T.S. 163, Status Table, April 8, 2011, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=17, in 2003 Russia "unilaterally suspended all judicial cooperation with the United States in civil and commercial matters." U.S. Dep't of State, Russia Judicial Assistance, http://travel.state.gov/law/judicial/judicial_3831.html (last visited July 20, 2011). As a result of Russia's unilateral action, no method to deliver the default judgment to defendants "in accordance with an applicable international convention on service of judicial documents" exists. 28 U.S.C. § 1608(a)(2).

[4, 5] Moving on to the remaining options for service on Russia and the Ministry under § 1608(a), plaintiff's attempted mailing also fails to meet the standard for service "by any form of mailing requiring a

signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). In light of the necessity of strict adherence to the form of service, *supra*, plaintiff's (1) failure to submit signed receipts of service, (2) choice to send the mailing itself rather than through the clerk of the court, and (3) decision to send the packages to individual Russian entities rather than the "head of the ministry of foreign affairs," are all fatal. *See Nikbin v. Islamic Republic of Iran,* 471 F.Supp.2d 53, 68 (D.D.C.2007) (rejecting adequacy of service against foreign state under § 1608(a)(3) where package was mailed by plaintiff rather than court clerk and where shipping company did not return signed receipt). That said, plaintiff's decision to turn to the State Department for service upon Russia and the Ministry through diplomatic channels, as contemplated in § 1608(a)(4), was a wise one—in early January, the State Department informed the Court that service through this method had been completed. In light of this evidence, the Court finds that defendants Russia and the Ministry have been properly served with the default judgment as required by § 1608(a).

With respect to RSL and RSMA, § 1608(b) does not specify additional methods for service, but instead permits service by delivery either "as directed by an authority of the foreign state," "by any form of mailing requiring a signed receipt [and] dispatched by the clerk of the court," or "as directed by order ... consistent with the law of the place where service is to be made." 28 U.S.C. § 1608(b)(3). In this instance, plaintiff's two methods of serving RSL and RSMA do not fall cleanly within any of these subcategories. The Court, however, remains mindful that the "substantial compliance" test applicable to § 1608(b) service "is devoted to common sense realism: a party can give 'technically faulty' service under section 1608(b), as long as the intended party for service in fact received actual notice of the lawsuit. The test rejects formalism." *In re English High Court Proceedings,* No. 06 Civ. 2935, 2006 WL 4515304, at *3, 2006 U.S. Dist. LEXIS 96140, at *9 (E.D.La. Nov. 2, 2006). Here, there can be no dispute that both methods relied upon by plaintiff were calculated to provide notice to RSL and RSMA. And more importantly, the subsequent actions by the Russian defendants—which include returning all documents served by mail on every defendant to the U.S. Embassy in Moscow and later submitting a letter, after diplomatic service, indicating that none of the defendants would accept service—demonstrate that those entities are well-aware of the import of the papers served upon them. Thus, based on the record before it, the Court holds that plaintiff has provided adequate notice of the default judgment to both RSL and RSMA. *See Doe v. State of Israel,* 400 F.Supp.2d 86, 102 (D.D.C.2005) ("[The] requirements of § 1608(b) are less stringent than those of § 1608(a), and can be satisfied by 'technically faulty service' as long as the defendants receive adequate notice of the suit and are not prejudiced.") (citing *Transaero,* 30 F.3d at 154).

[6] Having concluded that all defendants were served consistent with the strictures of § 1608(e), the Court now turns to whether sufficient time has passed between final judgment, subsequent service of the default judgment, and the present—as required by § 1610(c)—and concludes that there has in fact been an adequate passage of time. As an initial matter, default judgment was entered almost a year ago, and notice of that judgment was provided by diplomatic note nearly eight months ago. The Court finds no basis in the FSIA to suggest that any

longer period is needed, particularly in comparison to the period of time—60 days, 28 U.S.C. § 1608(d)—that a foreign sovereign is given to respond to service of a complaint and summons. Additionally, a period of a few months—a shorter period than in this case—has been repeatedly found sufficient under the Act. *See Ned Chartering & Trading, Inc. v. Republic of Pak.,* 130 F.Supp.2d 64, 67 (D.D.C.2001) (collecting cases to conclude "that other courts have found periods such as two or three months sufficient to satisfy section 1610(c)'s requirements" and separately determining that six weeks was acceptable). Finally, in the eight months since Russia, the Ministry, RSL and RSMA were provided notice, defendants have informed the Ministry of Justice of the Russian Federation of the default judgment, and that Russian agency—which is not otherwise a party to these proceedings—has transmitted a letter to the Court stating it that it "hereby returns without judicial review all court documents issued by the Columbia District Court along with the petition filed by the Chassidic Community of the United States, seeking return of the Chassidic religious library." Certified Translation. If defendants had sufficient time to undertake these acts, they certainly had sufficient time to evaluate and consider responses to the Court's entry of default judgment. *See Ned Chartering,* 130 F.Supp.2d at 67 (explaining that "a court's determination of 'reasonable time' should be informed by an examination of" several factors, including "evidence that the foreign state is attempting to evade payment of the judgment"). The Court therefore finds that an order announcing that plaintiff has satisfied requirements under § 1610(c) should issue.

2. The Effects of a 1610(c) Order

Turning to the United States' concern with plaintiff's proposed 1610(c) order, any such objection turns on the continuing effectiveness of the federal Mutual Educational and Cultural Exchange Program, which declares, in relevant part:

> Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity or festival ... no court of the United States, any State, the District of Columbia, or any territory or possession of the United States may issue or enforce any judicial process ... for the purpose or having the effect of depriving such institution ... of custody or control of such object.

22 U.S.C. § 2459(a). This provision "fulfills an important role in fostering the exchange of art and cultural works between this country and other nations." *Malewicz v. Amsterdam,* 362 F.Supp.2d 298, 310 (D.D.C.2005). According to the United States, the "proposed order would fail to alert other courts or enforcement authorities to the potential immunities applicable to Defendants' property" and risks undermining the effectiveness of § 2459. U.S. Stmt. at 4–5.

The Court concludes that the government's concerns are based on a misconception about the scope of a 1610(c) order and are therefore unfounded. A 1610(c) order, in the context of this case, *does not* authorize the attachment or execution of particular property—or any property at all. The proposed order is clear on this point, asking the Court to rule *only* that (1) a "reasonable period of time has elapsed following entry of judgment," (2) plaintiff "has

given the proper notice to defendants that is required under 28 U.S.C. § 1608(e)," and (3) plaintiff "may enforce the judgment against defendants." Proposed Order, Apr. 4, 2011 [91–1]. Thus, to the extent the United States is concerned that such an order might authorize the attachment of property potentially immune under other statutes—such as art and cultural artifacts, 22 U.S.C. § 2459—that worry is unfounded. Any court, whether this or another, would be required to evaluate a proposed attachment of specific property in this case by reviewing the jurisdictional provisions of § 1610(a)-(b), as well as any other immunities that might apply. *See, e.g., Magness v. Russian Fed'n,* 84 F.Supp.2d 1357, 1360 (S.D.Ala.2000) (denying attachment of objects included in exhibit related to Russian Tsars under § 2459 without discussion of § 1610(c)).[2]

The purpose of the order sought by plaintiff is a practical one. Section 1610(c) is designed to ensure that a foreign power is always given an opportunity to evaluate and respond to any court judgment entered against it which could subject its property and interests in the United States to attachment or execution. As the legislative history of the FSIA makes clear, Congress was very concerned that the normal procedures for attachment and execution of judgments—which often lack formal legal process—might fail to give foreign defendants adequate notice. H.R.Rep. No. 94–1487, at 30 (1976), 1976 U.S.C.C.A.N. 6604, 6612. Section 1610(c) was therefore written into the statute as a way to ensure, through judicial review, that property and interests of foreign entities are not only *not* immune—which is accomplished by review of a proposed writ's consistency with §§ 1610(a)-(b)—but also that each foreign power has a fair and adequate opportunity to appear and contest any attachment or execution—which is accomplished by § 1610(c)'s notice requirement. The purpose of obtaining an order finding compliance with § 1610(c), then, is to permit a FSIA plaintiff to establish that one of the prerequisites is satisfied so that the plaintiff may pursue specific attachments without worry over any lingering § 1610(c) requirements. In light of the severe hurdles to enforcement of judgments that often face FSIA plaintiffs, a 1610(c) order makes practical sense. But such orders say nothing about the remaining jurisdictional immunities that must be overcome before an order granting the attachment or execution of particular property may issue. *See Rubin v. Islamic Republic of Iran,* 637 F.3d 783, 800 (7th Cir.2011) ("[E]ven when the foreign state fails to appear in the execution proceeding, the court must determine that the property sought to be attached is excepted from immunity under § 1610(a) or (b) before it can order attachment or execution.").

Though the Court ultimately concludes that entry of a 1610(c) order creates no risk to Russian art or artifacts on loan to American institutions that otherwise would not exist, plaintiff, in light of the United States' concerns, has made several concessions in an attempt to resolve imagined problems. Included among these concessions is a new proposed order that adds a

2. The United States also notes that "the proposed order . . . does not specify any particular property that would be subject to attachment and execution," asserting that a "writ of attachment or execution against a foreign sovereign . . . should identify specific property to which it relates." U.S. Stmt. at 5 n. 3 (citing *Rubin v. Islamic Republic of Iran,* 637 F.3d 783, 796 (7th Cir.2011)). This argument misses the mark. The order sought by plaintiff is not a writ of attachment or execution; nor does the order authorize the attachment of, or execution upon, any property—either generally or with respect to specific interests. The order merely—and only—finds that the requirements of § 1610(c) have been satisfied.

specific exemption for property covered by 22 U.S.C. § 2459. While superfluous, the Court sees no prejudice in the inclusion of such text in a 1610(c) order, given the plaintiffs' consent, and will therefore incorporate similar language into the order accompanying today's opinion.

B. Plaintiff's Request for Sanctions

In its second motion, plaintiff asks the Court to sanction the Russian defendants for two basic reasons: first, defendants have failed to return the Library and Archive to plaintiff in accordance with the Court's order accompanying the default judgment, Sanctions Mtn. at 11–13; and second, defendants are also "actively making the return" of the Library and Archive "more difficult," in contravention of this Court's prior order barring any party from any action that would cause unreasonable delay to these proceedings. *Id.* at 12–14. Plaintiff points the Court to sanctions issued in other cases—ranging from $25,000 to $500,000 per-day—and requests that the Court enter similar levies against defendants in this case. *Id.* at 15–16.

[7–9] Federal courts enjoy inherent contempt power, *FG Hemisphere Assocs., LLC v. Dem. Rep. of Congo,* 637 F.3d 373, 377 (D.C.Cir.2011), and the D.C. Circuit recently reaffirmed that this inherent power to sanction persists in the FSIA context. *See id.* at 378 ("[T]here is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court's inherent contempt power."). "Civil contempt, unlike the punitive remedy of criminal contempt, is designed to coerce compliance with a court order or to compensate a complainant for losses sustained." *SEC v. Bilzerian,* 613 F.Supp.2d 66, 70 (D.D.C.2009). To determine whether civil contempt is appropriate in a particular case, the Court must evaluate whether "the putative contemnor has violated an order that is clear and unambiguous," and whether such a violation has been "proved by clear and convincing evidence." *Broderick v. Donaldson,* 437 F.3d 1226, 1234 (D.C.Cir.2006).

[10] Without reaching a conclusion concerning defendants' effect on the pace with which this matter is resolved,[3] the record is clear that defendants have not—to date—complied with the Court's order directing them to return the Library and Archive to plaintiff. That order unequivocally instructs defendants to "surrender to the United States Embassy in Moscow or to the duly appointed representatives of Plaintiff ... the 'Library' and the 'Archive,' " and to "assist and authorize the

3. Though the Court finds that nothing in plaintiff's proposed 1610(c) order puts any Russian art or artifacts in any greater peril from attachment than would otherwise exist, as such an order does not eliminate the immunity provided by 22 U.S.C. § 2459, *supra,* the Court is unwilling to conclude that Russia's concerns about the safety of its own cultural objects is entirely unfounded, given prior—albeit unsuccessful—attempts to attach such objects in at least one other case in satisfaction of a FSIA judgment. *See, e.g., Magness,* 84 F.Supp.2d at 1359–60. While the Court is eager to provide whatever assurances to Moscow are necessary to encourage full future exchanges of art and artifacts between the United States and Russia, as an Article III tribunal the Court is not imbued with the authority to pre-judge any potential attachment that might occur. *Nw. Airlines, Inc. v. FAA,* 795 F.2d 195, 205 (D.C.Cir.1986). What the Court can do at this time, however, is frankly acknowledge that absolutely nothing in today's opinion or accompanying order calls into question the immunity granted to cultural objects by § 2459, and thus—to the extent Russia has been previously satisfied with the protection of its art and artifacts provided by that provision of federal law—no events in this case should give the Russian Federation any additional pause when deciding whether to share cultural objects with U.S. institutions under that provision.

transfer of the 'Library' and the 'Archive.' " Order & Judgment at 2. It is clear that the Library and Archive remain in Russian possession, and the record provides no hint that defendants have taken any steps necessary towards compliance with the Court's order. Indeed, defendants' prior statement that they view "any continued defense before this Court and, indeed, any participation in this litigation as fundamentally incompatible with [their] rights as a sovereign state," Ds' Stmt. at 2, along with their letter—sent after receipt of the default judgment—returning documents "without judicial review," Certified Translation, make clear that they have no intention of complying with the Court's prior order. Moreover, the United States does not, at least in its latest statements, object to the imposition of sanctions or otherwise suggest that negotiations for the return of the Library and Archive have made any progress, or are even ongoing. *See generally* U.S. Stmt. at 6–7. Based on available evidence, the Court finds that plaintiff has demonstrated defendants' non-compliance "to a reasonable certainty," as required to warrant the entry of civil contempt sanctions. *Bilzerian*, 613 F.Supp.2d at 70.

[11–13] In contemplating the entry of sanctions, however, the Court must remain cognizant that a fundamental requirement of civil contempt proceedings "is that the accused party has notice and an opportunity to be heard." *SEC v. Bilzerian*, 729 F.Supp.2d 1, 7 (D.D.C.2010) (citing *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994)). As the D.C. Circuit has cautioned, "a contemnor cannot be expected to purge civil contempt through reduction or avoidance . . . without having clear and unambiguous notice of the proscribed conduct." *Salazar v. Dist. of Columbia*, 602 F.3d 431, 442 (D.C.Cir.2010). Though defendants have certainly received notice directing them to return the Library and Archive to plaintiff, *supra*, they have received no notice that failure to comply with that order may subject them to additional monetary penalties. Entry of a civil contempt order at this time is therefore premature, *see Majhor v. Kempthorne*, 518 F.Supp.2d 221, 257 n. 18 (D.D.C.2007) (denying motion for sanctions absent prior opportunity to respond or correct conduct); but in light of the evidence in the record concerning defendants' non-compliance, the Court will direct defendants to show cause why they should not be held in civil contempt. *Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F.Supp.2d 35, 40 (D.D.C.2010).

The determination that a show cause order should issue prompts the question of how such an order will give defendants sufficient notice. Because defendants are not active participants in this litigation, the Court is not comforted that the mere entry of an order on the docket will alert them of exposure to potentially significant monetary sanctions. And these concerns are only heightened given the involvement of foreign powers and the "coercive" nature of civil contempt. *Ashford v. E. Coast Express Eviction*, 774 F.Supp.2d 329, 331 (D.D.C.2011). At the same time, nothing in the FSIA requires special service to foreign defendants of any documents other than the initial papers and any default judgment, *see generally* 28 U.S.C. § 1608, and thus nothing warrants placing upon plaintiff the often-costly burden of achieving full compliance with 28 U.S.C. § 1608. *See Murphy*, 778 F.Supp.2d at 72–74, 2011 WL 1517985 at *2–3, 2011 U.S. Dist. LEXIS 43363 at *6–7 (describing significant costs of diplomatic service). To resolve these competing concerns, the Court will direct plaintiff to serve a copies of its motion for sanctions and today's order to

show cause on defendants via mail using the addresses defendants' former counsel provided, and will give defendants the same 60 days they are generally entitled in responding to service of papers initiating suit under the FSIA. 28 U.S.C. § 1608(d). Because defendants' earlier copies of the default judgment were received via mail to these same addresses (and later returned), *supra*, the Court is satisfied that such service will provide sufficient notice.

IV. CONCLUSION

The Court is sympathetic to plaintiff, aware of the long road it has traveled and all-too familiar with the difficult trail that lies ahead in attempting to enforce a FSIA judgment. *See FG Hemisphere,* 637 F.3d at 377 (noting that often "a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a [FSIA] judgment"). At the same time, defendants' ongoing failure to comply with the Court's order to turn over the Library and Archive cannot eliminate the requirement that they be given notice and an opportunity to respond before entry of civil contempt. And with respect to any art or artifacts belonging to Russia and currently in the United States, the Court reaffirms what should have been obvious beforehand: absolutely nothing in today's order has the effect of removing or altering any protection for cultural objects subject to immunity under 22 U.S.C. § 2459. The Court hopes that today's opinion will help facilitate a return to business as usual in the sharing of artifacts and history between nations that is crucial to the promotion of cross-cultural understanding in a global world, that the ability to attach and execute property not otherwise subject to immunity under FSIA or any other federal statute may aid plaintiff in its pursuit of the return of the lost Library and Archive containing the cultural heritage and history of the Chasidim movement, and that the show cause order may prompt Russia to rethink its decision to retain items of immense historical and religious significance, seized during times of great crisis and in violation of international law, in warehouses rather than return them to their rightful owners.

Separate Orders consistent with these findings shall issue this date.

Ellen Elisabeth SMITH, Plaintiff,

v.

DEPARTMENT OF LABOR, et al., Defendants.

Civil Action No. 10–1253 (JEB).

United States District Court, District of Columbia.

July 26, 2011.

Background: Requester brought Freedom of Information Act (FOIA) action against the Department of Labor (DOL) seeking documents related to a mining disaster. The parties filed cross-motions for summary judgment.

Holdings: The District Court, James E. Boasberg, J., held that:

(1) DOL's *Vaughn* index was adequate;

(2) redacted portions of report relating to citation related to the mining disaster were exempt from disclosure; and

(3) job performance appraisals of agency employees were exempt from disclosure.

Department of Labor's (DOL) motion granted.

נספח ה'

העתק ההחלטה בעניין ביזיון
בית המשפט בהליך העיקרי
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ployment contract came due. *See id.* On this theory of anticipatory repudiation of the contract, plaintiff argues, the statute of limitations began to run on August 16, 2009, and his original complaint was timely filed. Similarly, plaintiff argues that the date of the last event constituting a violation of FMLA was August 16, 2009, the effective date of the non-renewal of plaintiff's teaching position. *Id.*, Ex. A at 5.

[1, 2] The statute of limitations in "an action for breach of a contract ... runs from the time of the breach." *Bembery v. District of Columbia*, 758 A.2d 518, 519 (D.C.2000). Accepting the allegations of plaintiff's amended complaint as true for purposes of this motion to dismiss, *see Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), it is apparent that plaintiff knew as early as the March 19, 2009 telephone call with Dr. Rashid, and certainly no later than his receipt of Gallaudet's formal notification on March 25, 2009, that his contract would not be renewed for the following year and that his request for a promotion had been denied. *See LoPiccolo v. American Univ.,* 840 F.Supp.2d 71, 77 (D.D.C.2012) (finding that three-year statute of limitations on breach of contract claim began to run when student was notified that athletic scholarship would not be renewed for the following academic year, although aid was to be continued through the end of current semester); *Allison v. Howard Univ.,* 209 F.Supp.2d 55, 60 (D.D.C.2002) (finding that statute of limitations began to run when law school dean notified plaintiff by certified mail of his expulsion); *see also Leftwich v. Gallaudet Univ.,* 878 F.Supp.2d 81, 95–96 (D.D.C.2012). Here, plaintiff's claims accrued no later than March 25, 2009, such that the filing of his complaint on April 24, 2012, is untimely because it was more than three years later.

III. CONCLUSION

The Court concludes that plaintiff's claims are barred by the statute of limitations. Accordingly, defendant's motion to dismiss will be granted. An Order accompanies this Memorandum Opinion.

Agudas Chasidei CHABAD of United States, Plaintiff,

v.

RUSSIAN FEDERATION, et al., Defendants.

Civil No. 05–1548 (RCL).

United States District Court, District of Columbia.

Jan. 16, 2013.

Background: Jewish non-profit religious corporation brought action under Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collections of Jewish religious books, manuscripts, and other documents. The District Court, Royce C. Lamberth, Chief Judge, 729 F.Supp.2d 141, granted corporation default judgment, and then, 798 F.Supp.2d 260, ordered defendants to show cause why they should not be held in civil contempt for failure to comply with judgment. Corporation then moved for civil contempt sanctions.

Holdings: The District Court, Royce C. Lamberth, Chief Judge, held that:

(1) it possessed authority to issue contempt sanctions, and

(2) civil contempt sanctions were appropriate.

Motion granted.

1. Contempt ⚿30

Federal courts enjoy inherent contempt power.

2. Contempt ⚿4, 70

Civil contempt is designed to coerce compliance with a court order.

3. Contempt ⚿20, 60(3)

To determine whether civil contempt is appropriate, the court must evaluate whether the putative contemnor has violated an order that is clear and unambiguous, and whether such a violation has been proved by clear and convincing evidence.

4. Contempt ⚿33

District Court possessed authority, under both its inherent powers and Foreign Sovereign Immunities Act (FSIA), to issue contempt sanctions against Russian Federation and several Russian state agencies due to its failure to comply with default judgment requiring them to return to Jewish non-profit religious corporation collections of Jewish religious books, manuscripts, and other documents, "to a reasonable certainty"; there was no indication in text or legislative history of FSIA that Congress intended to limit court's inherent contempt power. 28 U.S.C.A. § 1610(a).

5. Contempt ⚿26

Civil contempt sanctions were appropriate against Russian Federation and several Russian state agencies due to their failure to comply with default judgment requiring them to return to Jewish non-profit religious corporation collections of Jewish religious books, manuscripts, and other documents, "to a reasonable certainty"; defendants' non-compliance with judgment had been demonstrated to reasonable certainty, sanctions were likely to coerce compliance with judgment, sanctions would not likely damage federal government's efforts to resolve dispute as such efforts had been resisted by Russian Federation for at least two decades, and sanctions would not risk damage to significant foreign policy interests.

6. International Law ⚿10.30

Although courts often give consideration to the government's assertion that a legal action involves sensitive diplomatic considerations, courts only defer to these views if reasonably and specifically explained.

Alyza Doba Lewin, Nathan Lewin, Lewin and Lewin LLP, Washington, DC, Jonathan E. Stern, Dreier Stein & Kahan, LLP, Marshall B. Grossman, Alschuler Grossman LLP, Santa Monica, CA, Seth M. Gerber, Bingham McCutchen, LLP, Los Angeles, CA, for Plaintiff.

MEMORANDUM OPINION

ROYCE C. LAMBERTH, Chief Judge.

Plaintiff Agudas Chasidei Chabad of the United States ("Chabad") has moved for civil contempt sanctions against defendants the Russian Federation ("Russia"), the Russian Ministry of Culture and Mass Communication (the "Ministry"), the Russian State Library ("RSL"), and the Russian State Military Archive ("RSMA") based on their failure to comply with this Court's July 30, 2010 Order, ECF No. 80. *See* Pl.'s Mot., Apr. 4, 2011, ECF No. 92. After considering plaintiff's motion, the United States' Statement of Interest ("U.S. Statement"), ECF No. 111, plaintiff's response, ECF No. 112, applicable

law, and for reasons given below, the Court will GRANT the motion and will hold defendants in contempt of Court. The Court will enter civil contempt sanctions against defendants in the amount of $50,000 per day until defendants comply with this Court's Order.

I. BACKGROUND [1]

Chabad brought this action in 2004 seeking return of religious books, artifacts and other materials concerning the cultural heritage of its forebearers, which fell into defendants' hands in the early 20th century. *See Agudas Chasidel Chabad of U.S. v. Russian Fed'n (Chabad III,)* 798 F.Supp.2d 260, 263 (D.D.C.2011). In 2009, after losing on jurisdictional arguments, defendants' lawyers informed the Court that they would no longer be participating in the case as they believed the Court lacked "authority to adjudicate rights in property that in most cases always has been located in the Russian Federation. . . ." Statement of Defs., June 26, 2009, ECF No. 71. A year later, this Court entered a default judgment in favor of Chabad, *see Agudas Chasidei Chabad of U.S. v. Russian Fed'n (Chabad II,)* 729 F.Supp.2d 141 (D.D.C.2010), and ordered defendants to "surrender to the United States Embassy in Moscow or to the duly appointed representatives of . . . Chabad . . . the complete collection." *See* Order, July 30, 2010, ECF No. 80.

Defendants failed to comply. Nearly a year after the order was issued Chabad moved for civil contempt sanctions, seeking "the entry of a monetary penalty for every day that the defendants continue to disobey this Court's Order." Pl.'s Mot. 3, Apr. 4, 2011, ECF No 92. The Court noted that it possessed the authority to issue the requested sanctions in the FSIA context. *See Chabad III,* 798 F.Supp.2d at 272 (citing *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo,* 637 F.3d 373, 377–78 (D.C.Cir.2011)). Further, because defendants had failed to take "any steps necessary towards compliance with the Court's order," *id.* at 273, and had actually made affirmative statements to the Court that made it "clear that they have no intention of complying with the Court's prior order," *Id.* (citing Statement of Defs.), the Court concluded that "plaintiff has demonstrated defendants' noncompliance 'to a reasonable certainty,' as required to warrant the entry of civil contempt sanctions." *Id.* (quoting *SEC v. Bilzerian,* 613 F.Supp.2d 66, 70 (D.D.C.2009)). However, before issuing such sanctions, the Court directed Chabad to serve copies of its motion along with the Court's Order to Show Cause, July 26, 2012, ECF No. 102, on defendants via mail service and provided that defendants would have 60 days to respond. *Id.* Chabad effectuated service of these documents, *see* Affidavit of Seth M. Gerber, Aug. 19, 2011, ECF No. 103, and defendants failed to respond within 60 days.

Chabad subsequently twice requested temporary stays of its motion in order "to facilitate [its] attempts to commence negotiations with the Russian Government, and to encourage the Russian Government to rethink its position of refusing to comply with the Court's judgment." Pl.'s Request, Oct. 19, 2011, ECF No. 104; *see also* Pl.'s Second Request, Dec. 16, 2011, ECF No. 105. But despite "multiple meetings at the Russian Embassy in Washington, D.C.," the parties were un-

1. As the history of this case is set out elsewhere in detail, this opinion provides only a brief summary of the relevant background. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n (Chabad I,)* 466 F.Supp.2d 6, 10–14 (D.D.C.2006) (providing full factual history) *rev'd in part on other grounds,* 528 F.3d 934 (D.C.Cir.2008).

able to reach a settlement, and Chabad renewed its motion for sanctions in early 2012. Pl.'s Statement, Mar. 5, 2012, ECF No. 106.

Noting "the serious impact such an order could have on the foreign policy interests of the United States," the Court solicited the views of the United States, *See* Order Soliciting the Views of the United States, May 23, 2012, ECF No. 107, who submitted a statement urging the Court not to enter sanctions. U.S. Statement, ECF No. 111. Chabad responded, Pl.'s Response, Sept. 28, 2012, ECF No. 112, and a hearing was conducted before the undersigned judge on January 9, 2013.

II. ANALYSIS

The United States objects to the requested sanctions on both legal and pragmatic grounds. First, the United States argues that civil contempt sanctions are unavailable to enforce judgments issued against foreign states under the FSIA. U.S. Statement 4–10. Second, the United States argues sanctions would damage the United States' foreign policy interests, including its diplomatic efforts to reach a settlement with defendants on Chabad's behalf. U.S. Statement 10–13. As discussed below, the Court rejects both arguments and will issue civil contempt sanctions against defendants.

A. The Court Has Authority to Issue Sanctions

[1–3] As this Court noted in *Chabad III,* "[f]ederal courts enjoy inherent contempt power . . . ." 798 F.Supp.2d at 272 (citing *FG Hemisphere,* 637 F.3d at 377–78). "Civil contempt . . . is designed to coerce compliance with a court order . . . ." *Id.* (quoting *SEC v. Bilzerian,* 613 F.Supp.2d 66, 70 (D.D.C.2009) (citing *In re Fannie Mae Sec. Litig.,* 552 F.3d 814, 823 (D.C.Cir.2009))). To determine whether civil contempt is appropriate, the Court must evaluate whether "the putative contemnor has violated an order that is clear and unambiguous," and whether such a violation has been "proved by clear and convincing evidence." *Id.* (quoting *Broderick v. Donaldson,* 437 F.3d 1226, 1234 (D.C.Cir.2006)).

The Court already concluded that defendants' non-compliance with this Court's July 30, 2010 Order has been "demonstrated . . . 'to a reasonable certainty,' as required to warrant the entry of civil contempt sanctions." *Id.* (quoting *Bilzerian,* 613 F.Supp.2d at 70). And, it already concluded that these sanctions were available in this case based on *FG Hemisphere Associates, LLC v. Democratic Republic of Congo,* in which the D.C. Circuit affirmed a district court's issuance of sanctions against a foreign state for refusing to comply with a Court's discovery orders. *Id.* (citing *FG Hemisphere,* 637 F.3d at 377–78).

[4] While the United States concedes that "Russia has not complied with the Court's order," it now insists that the FSIA "does not authorize the Court to award relief" in the form of contempt sanctions for this non-compliance—notwithstanding this Court's earlier statement to the contrary. U.S. Statement 3–4; *cf. Chabad III,* 798 F.Supp.2d at 272. Because the Court did not have the U.S. Statement when it issued its opinion in *Chabad III,* it will now inquire as to whether anything in that Statement requires it to reconsider any of the conclusions it reached in that earlier opinion.

As this Court noted in *Chabad III,* the authority of district courts to issue civil contempt sanctions against foreign states under the FSIA was recently confirmed by the D.C. Circuit. *Id.* In *FG Hemisphere,* the circuit affirmed a district court's order

imposing civil contempt sanctions against defendant, the Democratic Republic of Congo (DRC), for failing to comply with discovery orders. 637 F.3d 373. The court squarely rejected the argument advanced by the United States in that case as Amicus Curiae that FSIA's "carefully crafted execution scheme" precluded these sanctions, finding "not a smidgen of indication in the text [or legislative history] of the FSIA that Congress intended to limit a federal court's inherent contempt power." *Id.* at 378 (citing *Autotech Techs. v. Integral Research & Dev.,* 499 F.3d 737, 744 (7th Cir.2007)); *cf.* Brief of the United States as Amicus Curiae in Support of Appellant, *FG Hemisphere,* 2010 WL 4569107 (D.C.Cir.2011).

The United States now attempts to distinguish *FG Hemisphere,* which involved a foreign state's non-compliance with a *discovery* order, from the present case, which involves a foreign state's non-compliance with a final order compelling defendants to return the collection of expropriated materials to Chabad's representatives. U.S. Statement 9–10. The distinction based on the subject of the underlying order matters, the United States insists, because of the FSIA's distinct treatment of "jurisdictional immunity, on the one hand, and execution immunity, on the other." *Id.* at 4–5 (quoting *Walters v. Indus. & Comm'l Bank of China,* 651 F.3d 280, 288 (2d Cir.2011)). The United States points out that "[t]he FSIA affords execution immunity for property held by a sovereign that sweeps more broadly than the jurisdictional immunity that the Act affords to the sovereign on the underlying claim itself." *Id.* at 5 (citing cases). And, FSIA's exceptions from execution immunity apply only to a foreign state's "property in the United States," and "even that property is subject to execution only in carefully circumscribed and extremely limited circumstances." *Id.* at 6 (citing 28 U.S.C. § 1610(a)). Accordingly, the United States concludes, contempt sanctions may be available for non-compliance with a *discovery* order (as in *FG Hemisphere*) pursuant to FSIA's broader waiver of jurisdictional immunity, but such sanctions are not available for non-compliance with an order compelling transfer of property held in a foreign state (as in the present case), because the latter would, in effect, unlawfully expand FSIA's restricted waiver of execution immunity. *Id.* at 7–10. In the United States' words: "Chabad asks the Court not simply to utilize its contempt power, but to create an alternative enforcement scheme that conflicts with the carefully defined, and limited, system of remedies authorized under the FSIA." *Id.* at 10.

This argument fails because it mistakenly conflates the *entering* of a sanction with its *enforcement.* "The government's position is quite confusing, conflating a contempt order imposing monetary sanctions with an order enforcing such an award through execution." *FG Hemisphere,* 637 F.3d at 377. But though the latter is carefully restricted by the FSIA, this restriction is irrelevant here because present matter concerns only the former. As the Court of Appeals explained in *FG Hemisphere,* where the United States had similarly argued that "the FSIA does not permit a court to *enforce* a contempt sanction," this was simply "not the issue" before the court, which concerned only the district court's authority to *issue* a contempt sanction. 637 F.3d at 379 n. 2; *see also id.* at 375 (noting "there has been as yet no attempt to *enforce* the sanction" (emphasis added)). Because the present matter concerns only the court's authority to *issue* sanctions, not *enforce* them, the United States' argument fails and *FG*

Hemisphere governs.[2]

Accordingly, the Court reaffirms its prior holding that it possesses authority to issue contempt sanctions in this context. *See Chabad III,* 798 F.Supp.2d at 272–73.

B. Sanctions Are Appropriate

The Court next returns to the general principles, outlined above, governing the issuance of civil contempt sanctions in order to determine whether such sanctions are appropriate in the present case.

[5] As to the requirement that "the putative contemnor [must have] violated an order that is clear and unambiguous," *see Broderick,* 437 F.3d at 1234, the Court previously concluded that defendants' noncompliance with this Court's 2010 Order has been "demonstrated ... 'to a reasonable certainty,' as required to warrant the entry of civil contempt sanctions." *Chabad III,* 798 F.Supp.2d at 272 (quoting *Bilzerian,* 613 F.Supp.2d at 70). Because the United States conceded this point, noting that "Russia has not complied with the Court's order," *see* U.S. Statement 3, the Court now reconfirms its earlier finding.

As to whether sanctions would be likely to "coerce compliance" with this Court's 2010 order, *see Bilzerian,* 613 F.Supp.2d at 70, the Court notes that the initial threat of contempt sanctions apparently prompted defendants' lawyers to meet face-to-face with Chabad's lawyers to negotiate for the first time since dropping out of the case. *See* Pl.'s Response 8.

The United States protests that any such award would not only fail to "achiev[e] its intended purpose," but would also "damage" its efforts towards "promoting resolution of the dispute between Chabad and Russia over the Collection." U.S. Statement 10. Noting that "the United States has engaged in high-level diplomatic efforts with Russia to secure the transfer of the Collection," and insisting that it is "committed to continuing these efforts which ... require perseverance and consistency," the United States complains that sanctions would be "counter-productive." U.S. Statement 13.

[6] The Court is not convinced. "Although [courts] often give consideration to the government's assertion that a legal action involves sensitive diplomatic considerations, [courts] only defer to these views if reasonably and specifically explained." *FG Hemisphere,* 637 F.3d at 380 (citing *Republic of Austria v. Altmann,* 541 U.S. 677, 702, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004)). The United States fails to meet this standard. Defendants have steadily resisted all legal and diplomatic efforts to compel them to return the collection for at least two decades, *see Chabad I,* 466 F.Supp.2d at 13–14 (detailing a history of diplomatic and legal efforts dating to 1991), and though the United States may indeed be "committed to continuing these efforts," it provides neither any information regarding its future plans, nor any other reason to believe that its new efforts will be more likely to succeed than past failures.

The United States' claim that sanctions would "risk damage to significant foreign policy interests" is similarly unconvincing. It states that an order "that purports to dispose of tangible property held by anoth-

2. As the Court rejects defendants' attempt to distinguish *FG Hemisphere* because it is based on an erroneous conflation of *issuing* a sanction and *enforcing* it, it need not consider Chabad's further arguments on this point. *See, e.g.,* Pl.'s Response 7 ("[I]t would be curious indeed if the [FSIA] were held to authorize courts to threaten monetary civil contempt sanctions for refusal to comply with their discovery orders but disabled courts from enforcing their final judgments with similar sanctions.").

er state in the latter state's territory" constitutes "a departure from accepted rules of public international law," and therefore "would risk significant criticism from the international community," as well as "undermine the United States' own interests in avoiding similar measures being imposed against it." U.S. Statement 11–12. But, here again, the United States has conflated a court's *issuing* of contempt sanctions with *execution* or *enforcement* of an award by, for instance, attaching tangible property. *See FG Hemisphere,* 637 F.3d at 377. In issuing contempt sanctions against a foreign sovereign in favor of a plaintiff, this Court does not "purport[ ] to dispose of tangible property held by [that] state in the latter state's territory" and so such an award cannot damage the United States' asserted interest in adhering to "accepted rules of public international law."

The United States also alludes to its interest in reversing Russia's moratorium on "all loans of Russian cultural treasures to exhibitors in the United States" which, it states, was begun "in response to what Russia perceived to be threats from Chabad to seek attachment of the loaned items." U.S. Statement 13 n. 9. But, as the Court explained previously, the fears purportedly motivating Russia's moratorium were legally unfounded, as such items would be immune under federal law from attachment. *Chabad III,* 798 F.Supp.2d at 270–71 (citing 22 U.S.C. § 2459). Moreover, any lingering Russian anxieties about Chabad's ability to attach these items should have been put to rest by this Court's July 26, 2011 Order which, at Chabad's request, incorporated an express prohibition on the attachment of such cultural treasures. ECF No. 101. That the moratorium on art loans remained in effect even after this order was issued undermines the United States' characterization and suggests that other motives are at play. The Court finds that the United States fails to "reasonably and specifically explain[ ]" the connection between the proposed sanctions and its ability to negotiate a resolution to the moratorium. *FG Hemisphere,* 637 F.3d at 380.

Accordingly, the Court concludes that contempt sanctions are appropriate.

C. Amount

It remains to be decided what size award would be best calibrated to "coerce compliance" with the 2010 Order. *See Bilzerian,* 613 F.Supp.2d at 70. Defendant Russia is one of the world's largest economies.[3] The sanction imposed on the Democratic Republic of Congo, a much smaller and weaker economy,[4] and upheld in *FG Hemisphere* was "$5,000 per week, doubling every four weeks until reaching a maximum of $80,000 per week." *FG Hemisphere,* 637 F.3d at 376. In *United States v. Philip Morris USA Inc.,* the court found that civil contempt sanctions in the amount of $25,000 per day against a tobacco company with annual profits of approximately $190,000,000 were warranted. 287 F.Supp.2d 5, 15 (D.D.C.2003).

Guided by these precedents, the Court will issue civil contempt sanctions in the

3. The CIA World Factbook lists Russia as having the seventh largest gross domestic product in the world, calculated at purchasing power parity, after only the European Union, the United States, China, Japan, India and Germany. *See* Central Intelligence Agency, The World Factbook, *Country Comparison: GDP (Purchasing Power Parity,)* https://www.cia.gov/library/publications/the-worldfactbook/rankorder/2001rank.html?countryName=Russia&countryCode=rs&regionCode=cas&rank=7#rs (last visited Jan. 10, 2013).

4. Ranked number 116, according to the Factbook. *Id.*

amount of $50,000 per day until defendants comply with this Court's July 30, 2010 Order. ECF No. 80.

III. CONCLUSION

Chabad's motion for civil contempt sanctions will be GRANTED, and the Court will issue an Order with this Opinion, entering contempt sanctions against all defendants in the amount of $50,000 per day until defendant complies with the July 30, 2010 Order.

Kevin HAIRSTON, Plaintiff,

v.

William J. BOARDMAN, Defendant.

Civil Action No. 08–1531 (RWR).

United States District Court,
District of Columbia.

Jan. 16, 2013.

Background: Black employee brought action against Public Printer of United States Government Printing Office (GPO) alleging failure to promote and denial of training based on race and as retaliation, in violation of Title VII. GPO moved for summary judgment.

Holdings: The District Court, Richard W. Roberts, J., held that:

(1) District Court would deem as conceded GPO argument that it had legitimate, nondiscriminatory reasons for not promoting black employee;

(2) there was no evidence that proffered reasons by GPO for not promoting employee were pretextual; and

(3) there was no evidence that GPO denying employee training opportunity was adverse employment action.

Motion granted.

1. Federal Civil Procedure ⚿2554

A party opposing a summary judgment motion who does not address an argument advanced in the motion is deemed to have conceded the argument. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Civil Procedure ⚿2497.1

District court would deem as conceded, at summary judgment stage of Title VII race discrimination action, argument by United States Government Printing Office (GPO) that it had legitimate, nondiscriminatory reasons for not promoting black employee, where black employee did not respond to assertions by GPO that it hired white candidate due to candidate's superior qualifications, or that black employee untimely pursued counseling regarding his non-promotion. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⚿1138

A Title VII plaintiff alleging disparate treatment for a promotion must present evidence of stark superiority of credentials over those of the successful candidates. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

4. Civil Rights ⚿1135

A discriminatory failure to promote an employee constitutes an adverse employment action reached by Title VII. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

5. Civil Rights ⚿1536

In a Title VII action, once an employer has proffered a legitimate, nondiscriminatory reason for the employment actions

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public access to judicial records."); *U.S. v. Haller,* 837 F.2d 84, 85–89 (2d Cir.1988) (redaction of cooperation language in the plea agreement to protect safety of a defendant was appropriate).

Accordingly, the Court concludes that defendants and the United States have made a sufficient showing of overriding interests that outweigh the public's right of access to a limited number of documents or portions thereof and proceedings. The continued sealing of the limited filings is narrowly tailored and necessary to protect these overriding interests. No alternatives exist to protect these interests.[2]

CONCLUSION

For the foregoing reasons the Application for Unsealing is granted to the extent that the Court has unsealed numerous filings in *U.S. v. Salvatore Mancuso–Gomez, et al.* and denied to the extent that the remaining documents shall remain under seal. The Motion to Clarify is also granted in part and denied in part. A separate Order accompanies this Memorandum Opinion.

AGUDAS CHASIDEI CHABAD OF UNITED STATES, Plaintiff,

v.

RUSSIAN FEDERATION, et al., Defendants.

Case No 1:05–cv–01548–RCL

United States District Court, District of Columbia.

Signed September 10, 2015

Background: Jewish religious corporation brought action under Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and several Russian state agencies violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents. The District Court, Royce C. Lamberth, J. , 915 F.Supp.2d 141, entered default judgment in favor of corporation. Following Russian Federation's failure to comply with order, the District Court, Lamberth, J., 915 F.Supp.2d 148, granted corporation's motion for civil contempt sanctions. Following Russian Federation's continued disregard of order, corporation sought entry of interim monetary judgment in amount accrued under sanctions order.

Holdings: The District Court, Lamberth, J., held that:

(1) District Court did not lack authority to issue sanctions against Russian Federation, and

(2) entry of money judgment for accrued sanctions was appropriate.

Motion granted.

1. International Law ⚿10.42

District court had authority to issue sanctions against Russian Federation and Russian state agencies for continued disregard of default judgment order entered by district court in Jewish religious corporation's favor, in corporation's action under the Foreign Sovereign Immunities Act (FSIA) alleging that Russian Federation and state agencies violated international law by taking and continuing to hold collection of Jewish religious books, manuscripts, and other documents. 28 U.S.C.A. § 1602 et seq.

2. Documents that contain only brief references to information that would implicate these interests have been redacted and filed on the public docket.

2. International Law ⇐10.31

The Foreign Sovereign Immunities Act's (FSIA) provisions governing jurisdictional immunity and execution immunity operate independently. 28 U.S.C.A. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611.

3. Contempt ⇐2

Entry of interim monetary judgments in amount accrued under district court's sanction order against Russian Federation and several Russian state agencies, for failure to comply with default judgment, in action brought under Foreign Sovereign Immunities Act (FSIA), requiring them to return to Jewish non-profit religious corporation collections of Jewish religious books, manuscripts, and other documents, was appropriate remedy, despite concerns raised by Department of State that litigation would cause significant harm to foreign policy interest of United States and would discourage resolution of dispute; case had no impact on relationship between United States and Russia, particularly in light of Russia's willful withdrawal from litigation. 28 U.S.C.A. § 1602 et seq.

4. International Law ⇐10.33

Judicial review of an action in which a foreign state is a defendant is not prevented by implications of foreign affairs, especially to a court reviewing an action falling under specific legislation such as the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C.A. § 1602 et seq.

Alyza Doba Lewin, Nathan Lewin, Lewin & Lewin, LLP, Robert P. Parker, Steven Lieberman, Rothwell, Figg, Ernst & Manbeck, PC, Washington, DC, Jonathan E. Stern, Dreier Stein & Kahan, LLP, Santa Monica, CA, Seth M. Gerber, Bingham McCutchen, LLP, Los Angeles, CA, for Plaintiff.

MEMORANDUM OPINION

Royce C. Lamberth, United States District Judge

Plaintiff Agudas Chasidei Chabad of the United States ("plaintiff") moves for interim judgment of accrued sanctions in the amount of $43,700,000 [1] against defendants the Russian Federation ("Russia"), the Russian Ministry of Culture and Mass Communication (the "Ministry"), the Russian State Library ("RSL"), and the Russian State Military Archive ("RSMA") (collectively, "defendants") reflecting sanctions that have accrued under the Court's January 16, 2013 Order, ECF No. 115. *See* Plaintiff's Motion for Interim Judgment of Accrued Sanctions, January 28, 2014, ECF No. 127. After considering plaintiff's motion, the United States' second Statement of Interest ("U.S. Statement") in this matter, ECF No. 134; plaintiff's response, ECF No. 135; oral argument held on August 20, 2015; Statement of Defendants with Respect to Further Participation [2], ECF No. 71; and applicable law, and for reasons given below, the Court will GRANT the motion and award plaintiff interim judgment of accrued sanctions. The Court will further ORDER plaintiff to provide notice of certain actions to the

1. Plaintiff's Motion for Interim Judgment of Accrued Sanctions request the court to enter judgment in the amount of $14, 750, 000, which amount reflects fines accrued over 365 days (from January 16, 2013 until January 16, 2014) less a 70–day hiatus. *See* Plaintiff's Motion for Interim Judgment of Accrued Sanctions, January 28, 2014, ECF No. 127 at 2. This amount was amended by plaintiff during the August 20, 2015 hearing to $43, 700, 000, which amount was reduced to writing in plaintiff's proposed order and interim judgment. ECF No. 141–1.

2. Including defendant's subsequent refusal to accept service of the Court's Default Judgment through diplomatic channels. *See* ECF No. 87 and ECF No. 90–1.

United States as described in separate order.

I. BACKGROUND [3]

Plaintiff brought this action in 2004 seeking return of religious books, artifacts and other materials concerning the cultural heritage of its forbearers, which fell into defendants' hands in the early 20th century. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n* (*Chabad III*), 798 F.Supp.2d 260, 263 (D.D.C.2011). In 2009, after losing on jurisdictional arguments, defendants' lawyers informed the Court that they would no longer be participating in the case as defendants believed the Court lacked "authority to adjudicate rights in property that in most cases always has been located in the Russian Federation ..." Statement of Defendants, June 26, 2009, ECF No. 71. A year later, this Court entered default judgment in favor of Chabad, *see Agudas Chasidei Chabad of U.S. v. Russian Fed'n* (*Chabad II*), 729 F.Supp.2d 141 (D.D.C.2010), and ordered defendants to "surrender to the United States Embassy in Moscow or to the duly appointed representatives of ... Chabad ... the complete collection." *Id.* Defendants failed to comply with this order and on January 16, 2013, the Court granted plaintiff's motion for civil contempt sanctions, ordering monetary sanctions of $50,000 per day, payable to plaintiff. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n (Chabad IV),* 915 F.Supp.2d 148 (D.D.C.2013).

Defendants continue to disregard the Court's Order and have entered no further appearance since declaring their unwillingness to participate further. Plaintiff requests "entry of an interim monetary judgment in the amount accrued under" the Court's Sanctions Order of January 16, 2013. *See Chabad IV*.

II. ANALYSIS

The Court remains deprived of defendants' participation and can only consider the statement of interest of the United States and plaintiff s motion. *See* ECF Nos. 87 and 90–1. The United States objects to the requested interim judgment of accrued sanctions on two grounds. First, the United States restates its legal argument against imposition of sanctions that the Court previously rejected. *See Chabad IV* (finding the United States' argument unpersuasive and sanctions appropriate) and ECF No. 134. Second, the United States argues that interim judgment of accrued sanctions would further damage the United States' foreign policy interests, including its diplomatic efforts to reach a settlement with defendants on plaintiff s behalf. ECF No. 134 at 6–9. The Court agrees with plaintiff's analysis that this is not an enforcement action, and questions related to enforcement are not ripe for adjudication. ECF No 135 at 6. Nonetheless, the Court notes that the mechanism that bridges the action requested by plaintiff today and enforcement remains uncomplicated. Under the provisions of 28 U.S.C. § 1610(c), "no attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter." As the Court noted in its July 26, 2011 opinion, there are two requirements therein required for a plaintiff

3. As the history of this case is set out elsewhere in detail, this opinion provides only a brief summary of the relevant background. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n* (*Chabad I*), 466 F.Supp.2d 6, 10–14 (D.D.C.2006) (providing full factual history) *rev'd in part on other grounds,* 528 F.3d 934 (D.C.Cir.2008).

seeking to enforce judgment against a foreign state. *Chabad III,* 798 F.Supp.2d at 266. Specifically, notice that judgment has been entered and adequate opportunity to respond. *Id.* That analysis dealt with default judgment ordering specific performance requested by plaintiff. The enforcement question implicated in this instance is attachment and execution of defendants' property that may be identified within the United States. Therefore, the Court notes that as stipulated by plaintiff, concerns related to such enforcement are premature until such time as plaintiff has identified property to attach and execute, provided notice to defendants of such attachment and execution, and given defendants "reasonable time" to respond. *Id.* Given that defendants have had notice of plaintiff's efforts to liquidate monetary sanctions for more than a year, it is likely that plaintiff will be able to pursue attachment and execution [4].

A. The Court's Authority to Issue Interim Judgment of Accrued Sanctions

[1, 2] The Court has authority to issue sanctions. *See Chabad III,* 798 F.Supp.2d at 272–3, and again in *Chabad IV.* The Court has been asked to issue interim judgment, reducing accrued sanctions to a sum certain as of a specific date. Recalling that the Foreign Sovereign Immunities Act of 1976's ("FISA"), Pub.L. No. 94–583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602–1611) "provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently," *Walters v. Industrial and Commercial Bank of China, Ltd.,* 651 F.3d 280 (2d Cir.2011), the Court here examines a predicate to execution immunity analysis [5]. The Court is not persuaded that the law should be applied differently now than when it ordered sanctions under the authority of the FSIA, as applied in *FG Hemisphere Associates, LLC v. Democratic Republic of Congo,* 637 F.3d 373 (D.C.Cir.2011).

The United States argues that the Court has reached the limit of the Court's authority under the FSIA. The United States offers no additional persuasive law, facts, or argument to show that the issue of enforcement is specifically ripe. ECF No. 134 at 7. The Court may be more proximal to the question of enforcement than when it ordered sanctions, and while it has not yet reached the question of enforcement, the Court notes the implications of this decision with regard to such.

The United States argues further that plaintiff intends to pursue enforcement action and suggests that the Court should consider such intentions in ruling on this matter. The United States further admonishes "[t]he Court should be aware that these further enforcement actions would cause even greater harm to the United States' foreign policy interests, including the United States' interest in promoting a resolution of [this] dispute." ECF No. 134 at 7. The Court takes notice of the United States' concerns of foreign policy interests and discusses them more fully below.

It is noteworthy that the United States does not address defendants' willful withdrawal from this matter and continued failure to either appear or comply with the Court's orders. Conversely, in every case cited by the United States in its statement

4. Such attachment and execution being subject to the provisions of 22 U.S.C. § 2459, granting immunity from attachment or execution to property or interest that constitutes art, artifacts, or other cultural objects. *See* also ECF No. 101.

5. The predicate being interim judgment of accrued sanctions.

of interest, defendants (or the party invoking protections under the FSIA) participated in litigation. *See Argentine Republic v. Amerada Hess Shipping Corp,* 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *FG Hemisphere Associates, LLCv. Democratic Republic of Congo,* 637 F.3d 373 (D.C.Cir.2011); *Autotech Technologies LP v. Integral Research and Development Corp.,* 499 F.3d 737 (7th Cir.2007); *Connecticut Bank of Commerce v. Republic of Congo,* 309 F.3d 240 (5th Cir.2002) (The Democratic Republic of the Congo did not appear in an initial action, but then subsequently appeared and took part in litigation); *S & S Machinery Co., v. Masinexportimport,* 706 F.2d 411 (2d Cir.1983); *Republic of Philippines v. Pimentel,* 553 U.S. 851, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008); *Pere v. Nuovo Pignone, Inc.,* 150 F.3d 477 (5th Cir.1998).

B. Foreign Policy Interests of the United States

Next, the United States urges that the Court consider certain foreign policy interests. In fact, the United States offers similar and slightly more specific concerns as in *FG Hemisphere Associates, LLC v. Democratic Republic of Congo,* 637 F.3d 373 (D.C.Cir.2011). As in *FG Hemisphere,* the United States suggests the threat of vague foreign policy interests and of reciprocal treatment of the United States in Russian courts. 637 F.3d 373 at 379. In examining this issue, the Court first examines defendant's history of participation in and reaction to litigation herein, then turns to concerns raised by the United States in a letter submitted from the Department of States, and finally turns to specific foreign policy concerns enumerated in the statement of interest. ECF No. 134.

i. Defendant's Participation in and Reaction to Litigation

The original complaint in this case was filed nearly eleven years ago [6]. It was transferred to this Court several months later and has been pending in this Court for nearly ten years [7]. Defendants participated in litigation for four and a half years, filing numerous documents and pleadings until filing a Statement With Respect to Further Participation on June 26, 2009. ECF No. 71. Accordingly, the Court ordered default judgment generally on October 27, 2009, and upon motion by plaintiff, ordered specific performance as default judgment on July 30, 2010. ECF Nos. 77 and 80. The Clerk entered default judgment on August 30, 2010. ECF No. 82. Plaintiff endeavored to serve defendant notice of the default judgment through diplomatic channels, but was rebuffed. ECF No. 87. The Court then granted plaintiff's motion to Enforce Judgment and Permit Attachment, while holding in abeyance plaintiff's motion for Sanctions on July 26, 2011 and still, defendants did not respond. ECF No. 101. After soliciting and considering views of the United States, and considering plaintiff s motion for sanctions, the Court granted such motion and ordered sanctions on January 16, 2013. ECF Nos. 107, 111, and 115. Still, defendants did not respond in or to the Court, however, defendants did respond more publicly. Plaintiff notes that its representatives were invited to a meeting in Moscow with a former Ambassador of the Russian Federation to the United States in February 2013 [8]. ECF No. 135 at 9. Rus-

6. Plaintiff filed in the Central District of California on November 9, 2004. ECF No. 1 at 3.

7. *See* Order from United States District Court for the Central District of California, July 14, 2005. ECF No. 1 at 8.

8. The occurrence of this meeting further underscores plaintiff's argument that the Court's

sian President Vladimir Putin then clearly decided not to accept the proposed resolution the next day, instead transferring the Library portion of the collections involved in this case to "a special department of the Russian State Library at the Jewish Museum and Tolerance Center in Moscow." *Id.* Finally, plaintiff filed this motion for Interim Judgment of Accrued Sanctions on January 28, 2014, more than three years after the Clerk entered default judgment and more than four years after defendants absconded from litigation. The only additional responses of which the Court is aware are the bellicose statements of the Russian President, Vladimir Putin, and tit-for-tat litigation instituted in Russian courts. Defendants have given clear indication that they do not intend to comply with this Court's orders. The time has come to give plaintiff some of the tools to which it is entitled under law.

ii. Concerns raised by United States Department of State

In Exhibit A to its Statement of Interest, the United States submits a letter from Principal Deputy Legal Adviser Mary E. McLeod from the United States Department of State. Ms. McLeod raises several concerns that merit the Court's analysis. While conceding that defendants have not participated in litigation, the letter urges the Court that "an out-of-court dialogue presents the best means towards an ultimate resolution." ECF No. 134–1 at 2. The record does not reflect this point of view, and the Court rejects this argument.

The Department of State contends that litigation in this case has both had an adverse impact on relations between the United States and Russia and discouraged resolution of this dispute. ECF No. 134–1. Specifically, the Department of State contends that "[i]f Chabad pursues the additional steps it has outlined in its recent motion, those measures will cause significant harm to the foreign policy interests of the United States." ECF No. 134–1 at 2. There is simply no evidence on the record that this case has any impact on relations between the United States and Russia outside of this case, particularly in light of defendants' reaction and participation as discussed above.

The Department further suggests that this court cannot enforce sanctions against a foreign state. Unfortunately, the Department does not provide any analysis of the provisions of the FSIA that it invokes. The Court underwent such analysis when it originally ordered default judgment and again when it ordered sanctions. *See Chabad III* and *Chabad IV*. The Court is satisfied that its analysis is sound on this point.

Finally, the Department suggests "that entry of a money judgment for accrued sanctions in this case would set another troubling precedent for foreign governments, which could threaten the United States' own position in litigation in foreign courts." ECF No. 134–1 at 3. To the contrary, such a judgment is entirely consistent with the FSIA. As discussed below, the Court is not persuaded that retaliatory or "tit-for-tat" litigation against the United States should be the basis for shirking its responsibility to make rulings consistent with law. It would be a troubling precedent, indeed, to disregard the law and rule as the Department prays.

iii. Specific Foreign Policy Concerns

The Court examines three such concerns starting with the vague and moving to the specific and concludes, in agreement with plaintiffs, that the United States "does not say that entry of interim judgment Chabad seeks will interfere with negotiations on

sanctions order at least brought defendants to the bargaining table in some form.

subjects more pressing than the return of Chabad's property. Nor is there any mention of any realistic threat by Russia on a matter of political, economic, or strategic concern to the United States." ECF No. 135 at 7–8. Rather than a vague assertion of foreign policy interests, the Executive (by and through its representatives appearing before the Court from the Departments of Justice and State) has taken no action on this matter contrary to plaintiff's position.

[3] First, the United States argues that interim judgment implicates vague, but serious foreign policy interests. Given the United States' current sanctions against Russia and Russian interests based upon various geopolitical events, the Court is unpersuaded by such a vague concern in this case. Additionally, the Court notes that the Russian minister of culture has reportedly indicated, "[t]he problem does not lie in relations between Russia and the United States. It lies in relations between Russia and a Jewish community registered in the United States,[9]" further undercutting the United States' warning of grave foreign policy concerns. The Court notes that the United States expresses no opinion on the foreign policy interests of simply allowing a foreign litigant to withdraw from litigation when convenient to its interests, as defendants have done in this case [10]. In asking the court to exercise its "equitable and remedial authority and discretion," the United States mischaracterizes this motion as "another order seeking to compel disposition of property possessed by a foreign state within its own borders." ECF No. 134 at 6–7. The United States again asks the court to consider a question not yet ripe. The Court again declines to do so. *See Licea v. Curacao Drydock Co., Inc.*, 794 F.Supp.2d 1299 (S.D.Fla.2011) for additional analysis of the threshold between FSIA's jurisdictional immunity (which the Court has already considered) and FSIA's execution immunity (not yet before the Court).

Second, the United States argues that such an order would further impede the "ongoing diplomatic efforts to resolve the dispute." ECF No. 134 at 7. In fact, the only evidence that the United States has provided in support is the letter of the Principal Deputy Legal Adviser, United States Department of State. ECF No. 134 at Exhibit A. In this letter, she reiterates the United States' position without additional specific facts or argument. The Court is persuaded by plaintiff s argument that "those views are contrary to experience." Plaintiff's Response to the Statement of Interest of the United States, ECF No. 135 (citation omitted). The Court reached this conclusion previously, noting in the January 16, 2013 Order that, "though the United States may indeed be 'committed to continuing these efforts,' it provides neither any information regarding its future plans, nor any other reason to believe that its new efforts will be more likely to succeed than past failures." *Chabad IV,* 915 F.Supp.2d at 153.

Lastly, the United States notes ongoing litigation in Russian courts involving seven books from the same collection here at issue. ECF No. 134–1 at 2. The United States explained during oral argument that this litigation "appears to be tit for tat

9. "Schneerson Library display at Jewish center will depoliticize problem," February 25, 2013, http://www.interfaxreligion.com/?act=news&div=10292

10. It is not lost on the Court that the United States simultaneously urges the Court (and the plaintiff) to allow for diplomatic resolution, while implying that diplomatic relations with the Russian Federation are fraught so as to make progress on this matter unlikely. This demonstrates relative diplomatic apathy to this specific matter.

retaliatory measures taken in response to what happens in this case," to include the Russian court apparently issuing a sanctions order of $50,000 per day against the United States. The Court is not persuaded this Russian litigation should have any bearing on the Court's decision today.

C. The Court is Not in Conflict with the Executive's Foreign Relations Powers

[4] Judicial review is not prevented by implications of foreign affairs, especially to a Court reviewing an action falling under specific legislation, as here with the FSIA. See generally *Baker v. Carr,* 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("... it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance ...") and *Zweibon v. Mitchell,* 516 F.2d 594, 623 (D.C.Cir.1975) ("Similarly, we see no reason to take the Waterman dicta as a Supreme Court statement that any issue that touches foreign affairs is to be immunized from judicial review ..." citing *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948)).

Having resolved the Court's authority to issues sanctions in this matter, the court is satisfied that its decision grants required and appropriate deference to the Executive's, "delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936) and acknowledges the Executive's " 'vast share of responsibility for the conduct of our foreign relations.' " *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 610, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). The Court grants some measure of deference to the "considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann,* 541 U.S. 677, 702, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). As such, under 28 U.S.C. § 517 and consistent with the application of FSIA, the Court solicited and has considered the United States' position that granting this motion will have possible, if not vague, consequences on foreign policy interests. The Court is sensitive to these foreign policy interests. Nonetheless, the Court reaffirms its position that the current posture of this case places is squarely under the FSIA, not yet an enforcement action, and without Executive action to the contrary. The Court is satisfied that this decision is consistent with the Court's authority and the role of the Judiciary herein.

D. Amount

The Court issued civil contempt sanctions in the amount of $50,000 per day until defendants comply with its July 30, 2010 Order. ECF No. 80. As of August 20, 2015, and less 70 days as stipulated by plaintiff, the amount accrued is $43,700,000. ECF No. 127. Such amount will increase by $4,500,000 every 90 days starting on August 21, 2015.

III. CONCLUSION

Plaintiff's motion for interim judgment of accrued sanctions will be GRANTED, and the Court will issue an Order with this Opinion, entering judgment against all defendants in the amount of $43,700,000 for monetary sanctions accrued through August 20, 2015. The plaintiff may petition the clerk for additional judgment every 90 days until defendants comply with this Court's July 30, 2010 Order. The Court further orders plaintiff to provide the United States with notice of certain actions as described in an additional Order issued with this Opinion.