20-678(L)

20-679(CON), 20-680(CON)

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: APPLICATION OF GORSOAN LIMITED FOR AN ORDER PURSUANT TO 28 U.S.C. 1782 TO CONDUCT DISCOVERY FOR USE IN A FOREIGN PROCEEDING,

Petitioner.

GORSOAN LIMITED,

Petitioner-Appellee,

—against—

STUART SUNDLUN, ZOE BULLOCK REMMEL, EUGENIA BULLOCK, ZOYA KUZNETSOVA,

Respondents-Appellants,

JANNA BULLOCK,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR INTERVENOR-APPELLANT

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INTRODUCTION

This appeal concerns the outer limits of Section 1782 of Title 28, United States Code, which permits federal courts to grant discovery "for use" in a "foreign…tribunal." This Court has held that such discovery must be for use in an "adjudicative" proceeding before a foreign tribunal and may not be employed merely to enforce a judgment. Recognizing that it was a "difficult question," the district court ordered discovery that a §1782 applicant sought to trace assets subject to a preliminary asset freezing and disclosure order. It did so even though the applicant conceded that the information it wanted was immaterial to the merits of the claims being adjudicated in the foreign proceeding. And it did so even though preliminary freezing and disclosure orders are equitable remedies, not adjudicative proceedings. The ruling below, if allowed to stand, would expand the statute far beyond its terms and impose vast new burdens on courts, businesses, and individuals in the U.S. and abroad.

The district court engaged in a series of speculative leaps: Discovery *might* demonstrate non-compliance with the order, which might lead to a contempt motion, which *might* lead to sanctions, which *might* include evidentiary sanctions, which *might* affect the foreign lawsuit's merits. The district court ignored that the §1782 applicant had had years to pursue a contempt motion; failed to mention any

such motion in its §1782 application for discovery or subsequent motion to compel; and never affirmatively represented that it planned to seek contempt in the foreign proceeding.

The use of §1782 for mere asset identification would create significant practical problems and lead to absurd results that Congress plainly did not intend when it enacted a statute to enable evidence gathering for use in foreign tribunals. Although preliminary freezing orders, known as *Mareva* injunctions, are beyond the equitable power of federal courts, they are common in many foreign countries. Under the district court's decision, the holder of a *Mareva* injunction could obtain global asset discovery from a U.S. court simply by suggesting that such discovery could lead to a contempt finding abroad. This would open the door to a flood of §1782 requests trolling for assets held by or referenced in the records of financial institutions subject to U.S. jurisdiction. It will impose substantial burdens on the financial industry, other non-parties and federal courts charged with overseeing such discovery. And all before a litigant had obtained domestic recognition of a foreign judgment. Federalism concerns also counsel against extending §1782 into the traditional state law domain of judgment recognition and enforcement without a clear statement from Congress.

The §1782 applicant here is Gorsoan Limited, a Cypriot shell company with no business purpose other than to pursue litigation on behalf of a state-controlled

Russian bank subject to U.S. sanctions. This §1782 proceeding is part of a decade-long crusade by the Putin regime against Appellant Janna Bullock and her former husband, who held a senior governmental position in Russia before running afoul of the Kremlin. Consistent with its *modus operandi* in other cases involving politically disfavored individuals, the Russian state has pursued trumped-up criminal charges against Bullock and her husband and attempted to expropriate their assets. That Kremlin campaign includes a civil suit in Cyprus, supposedly relating to an alleged municipal bond fraud. Notably, Russia's agents have done little to advance the Cyprus litigation, which has been pending for eight years. Instead, they have principally deployed it to pursue overseas discovery—here, asset discovery to enforce a *Mareva* injunction.

In its §1782 application and a subsequent motion to compel, Gorsoan was unable to articulate *any* legitimate adjudicative purpose for the extraordinarily broad asset discovery it seeks from Bullock's daughters, elderly mother, and an associate. The Cyprus claims concern events between 2005 and 2008. But the subpoenas seek only information that *post-dates* these events by four years. In fact, the subpoenas only seek information post-dating the 2012 *Mareva* injunction. Gorsoan thus eventually had to concede below that the discovery is "unlikely" to "bear on the fraud itself."

After Bullock pointed out that §1782 may not be used for non-adjudicative purposes such as asset identification, Gorsoan changed tack. In papers submitted ten months after its application, it suggested, for the first time, that it needed discovery to monitor Bullock's compliance with the Cyprus asset freeze order so that it could determine the viability of a contempt motion. This *post hoc* rationalization was both too little and too late. *Too little* because the theoretical contempt proceeding—even if one were brought—would be entirely collateral to the adjudicative merits of the Cyprus proceedings, and because Gorsoan's feeble representations gave the district court no basis to find that such a motion was "within reasonable contemplation." *Too late* because this Court has held that the threshold statutory requirements of §1782 must be satisfied in "at the time of the application" itself and not in later submissions.

Even if Gorsoan had satisfied the statutory requirements, the district court abused its discretion in granting discovery. The court rejected Bullock's argument that Cyprus proceedings were pretextual and brought in bad faith by holding that Bullock should raise these concerns in Cyprus. But employing this forum non-conveniens rationale to duck Bullock's argument was legal error, because the doctrine only applies to the choice of forum by a party seeking relief, not an argument opposing relief in an adversary's chosen forum. Moreover, the Supreme Court has directed courts considering §1782 applications to scrutinize whether

foreign proceedings are pretextual, and courts have found that the use of §1782 by unscrupulous foreign governments is a "legitimate fear." The district court also erroneously ignored Bullock's argument that the requested discovery would violate important U.S. legal norms, which generally prohibit asset discovery until after a party has obtained a judgment. And the district court erroneously failed to deny discovery based on the overbroad, intrusive, and harassing nature of the subpoenas.

The district court's order should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331. On January 24, 2020, the district court entered an Opinion and Order granting Gorsoan's motion to compel discovery under §1782 and denying Bullock's motion to quash. *See In re Gorsoan Limited*, __ F. Supp. 3d __, 2020 WL 409729 (S.D.N.Y.). Bullock timely filed a notice of appeal on February 21, 2020. (A-371). This Court has jurisdiction under 28 U.S.C. §1291. *See In re Accent Delight Int'l Ltd.,* 869 F.3d 121, 128 (2d Cir. 2017) ("Orders granting (or denying) applications for discovery under Section 1782 are considered final adjudications and are immediately appealable pursuant to 28 United States Code Section 1291.").

ISSUES PRESENTED

Under §1782 an applicant for discovery in aid of foreign litigation must establish that the discovery is "for use" in an adjudicative "proceeding" before a "foreign…tribunal." *Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24, 27 (2d Cir. 1998). If the adjudicative proceeding is not actually pending, it must be "within reasonable contemplation." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004). And the applicant must satisfy the "for use" requirement "at the time the application was filed." *Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 124 (2d Cir. 2015). If the applicant satisfies this threshold statutory requirement, the district court is authorized but not required to grant §1782 discovery. *Intel*, 542 U.S. at 264-66.

The issues presented are:

1. May §1782 be used to identify assets subject to a prejudgment asset freezing and disclosure order when identification of those assets does not relate to the merits of the matter being adjudicated in the foreign proceeding?

2. Did Gorsoan satisfy §1782's requirement that discovery be "for use" in adjudicative proceedings either pending or "within reasonable contemplation" by describing a hypothetical contempt motion it has had years to advance and did not even hint at until ten months after filing its §1782 application?

3. Did the district court abuse its discretion when it committed multiple errors of law and failed to address arguments the Supreme Court has directed courts to consider in deciding whether to grant discovery under §1782?

STATEMENT OF THE CASE

A. The Russian Federation's Campaign To Smear Bullock And Her Ex-Husband And Seize Their Assets

This case has its origins in a political dispute in Russia. Janna Bullock was formerly married to Alexey Kuznetsov, the Minister of Finance and Vice-Governor of the Moscow Region. (A-109). Before entering politics, Kuznetsov was one of the most prominent bankers in Russia. (*Id.*). But he did not enjoy the support of Vladimir Putin and was forced to resign in 2008 when the Kremlin sought his political office as well has his personal assets. As part of the campaign against him, for example, it was publicly alleged that he was secretly a U.S. national with CIA ties who had seized $20 billion worth of land near Moscow. (A-121-22). Later, state prosecutors began an investigation into both Kuznetsov and Bullock, supposedly arising out of a municipal bond fraud. (A-102, 109). Bullock, a naturalized U.S. citizen, returned to New York and has lived here ever since. (A-109). She was convicted in absentia and sentenced in 2018. (A-102). Kuznetsov is currently serving a 14-year sentence in a Russian prison. (*Id.*). These criminal convictions, and related investigations, have sparked a global effort by the Russian

government to find any remaining assets belonging to Bullock, Kuznetsov, and their alleged associates, to satisfy the judgments. (A-190-97).

Bullock had no role in Russian government affairs or in her husband's responsibilities as a public official. Nonetheless, the Russian Federation has used its criminal case against her to pursue her alleged assets. In France, for example, the Russian government, relying on its criminal case against Bullock and others, has tried to seize two major resort hotels in the ski region of Courchevel. (A-190-91). Together, these hotels are worth well in excess of $70 million. (A-195). A French court rejected the Russian Federation's first attempt to seize these properties. (A-190). Its second seizure request is the subject of ongoing proceedings in France. (A-190-91).

This pattern of criminal charges accompanied by the expropriation of the assets of politically disfavored individuals is common in Russia.[1] These abuses by the Russian Federation led to the passage of the Sergei Magnitsky Rule of Law

[1] *See, e.g.*, Jordan Gans-Morse, *Threats to Property Rights in Russia: From Private Coercion to State Aggression*, 28 Post-Soviet Affairs 263, 278-87 (2012) (describing the rise of the "predatory state" in Russia during the 2000s), available at http: //faculty.wcas. northwestern.edu/~jlg562/documents/GansMorse_ ThreatstoPropertyRights_PSA_000.pdf (last visited on June 10, 2020); Philip P. Pan, *'Raiding' Underlines Russian Legal Dysfunction*, Washington Post, Aug. 13, 2009 ("No crime illustrates the state of the [Russian] legal system better than what is known as 'reiderstvo,' or raiding – the takeover of businesses through court rulings and other ostensibly legal means with the help of crooked judges or police."), available at https://www.washington post.com/wp-dyn/content/article/ 2009/08/12/AR2009081203359.html (last visited on June 10, 2020).

Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496 (2012), which authorizes the U.S. government to sanction Russian human rights offenders, seize their assets, and prevent them from entering the U.S.[2]

B. The Cyprus Proceedings

The Russian Federation cannot readily rely on foreign courts to help it obtain discovery to identify and seize assets. Russia is not a member of the European Union and does not enjoy the reciprocal rights and privileges with respect to judgment recognition and enforcement enjoyed by member states. (A-191). Moreover, foreign courts have been understandably skeptical of whether Russian judgments are based on due process.[3] To overcome these obstacles, the Russian Federation is now using Gazprombank OJSC, a large state-controlled bank, and its Cypriot alter ego, Gorsoan, to lead a global legal campaign against Bullock.

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[2] *See generally* Carl Schreck, *The Danger of Doing Business in Russia*, Time Magazine, Dec. 19, 2009, (discussing Magnitsky's wrongful arrest and death; noting that "[the Russian prison] Butyrka is teeming with entrepreneurs locked up on phony charges brought against them in raider attacks"), available at http:// content.time.com/time/world/article/0,8599,1948140,00.html (last visited June 10, 2020).

[3] *See, e.g.,* "European Court Vindicates Aleksei Navalny, Russian Opposition Leader," N.Y. Times, Nov. 15, 2018, available at https:/ /www.nytimes.com/2018/ 11/15/world/europe/aleksei-navalny-european-court.html (last visited on June 10, 2020).

Gazprombank held a portion of the municipal bonds involved in the alleged fraud. (A-181-82; *see also* Dkt.4 ¶20, in *In re Gorsoan Ltd. and Gazprombank OJSC*, 13 Misc. 397 (S.D.N.Y)). Gorsoan is a Cypriot limited liability company. It was formed in March 2010 for the sole purpose of accepting an assignment of Gazprombank's interest in certain Russian bonds that underly the claims against Bullock and her ex-husband. (A-124, 180). Gorsoan has no business purpose other than to pursue litigation on Gazprombank's behalf in Cyprus—an E.U. member state. Despite the purported assignment to Gorsoan, Gazprombank has at all times remained a plaintiff in the Cyprus proceeding. (A-180).

In August 2012, Gazprombank and Gorsoan commenced an action relating to the alleged Russian bond fraud in the District Court of Limassol, Cyprus. (A-180-82). They immediately sought a *Mareva* injunction for the freezing and disclosure of Bullock's assets. (A-182).[4] The Cyprus court entered a preliminary

[4] The *Mareva* injunction, named after the English Court of Appeal case *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, 2 Lloyd's Rep. 509, made its first appearance in English courts in 1975, and was subsequently confirmed by statute. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 327-28 (1999). The injunction, which is recognized in many jurisdictions that follow English law, was a "dramatic departure" from traditional equity practice and allowed a party without a judgment to prohibit its adversary from using assets in which the party claims no equitable interest. *See id.* at 310, 327-29. Noting that that this "nuclear weapon of the law" was "unknown to traditional equity practice," raises constitutional concerns with respect to the jury trial right, and may be susceptible to abuse, the Supreme Court has held that

order freezing Bullock's worldwide assets, with an effective date of August 24, 2012. (A-157-59, 182). The Cyprus court confirmed this asset freezing order in a judgment issued March 6, 2013, which Bullock has appealed (the "Freezing and Disclosure Order"). (A-163-71, 182). The Freezing and Disclosure Order requires Bullock (among others) to freeze assets anywhere in the world up to the amount of approximately $26 million and directs Bullock to disclose the existence of all assets worth more than 10,000 Euros. (A-164).

On December 19, 2013, after obtaining the Freezing and Disclosure Order, Gazprombank and Gorsoan filed their Statement of Claim, the equivalent of a civil complaint in the United States. (A-183). It alleges that Bullock and her former husband participated in a fraudulent scheme to divert the proceeds of the sale of Russian municipal bonds. (A-181-82). The fraud allegedly occurred between 2005 and 2008. (Dkt.4 ¶¶20, 23 in 13 Misc. 397).

Gorsoan takes great pains to pretend it is actually distinct from Gazprombank (*see, e.g.*, A-12) because Gazprombank is among several Russian entities subject to U.S. sanctions and is likely wary of asking a U.S. court to assist a politically-charged vendetta. (A-126). But these efforts are a transparent charade. Even though Gazprombank is not a party to this application, it is plainly

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Mareva injunctions are outside the otherwise broad equitable powers of the federal courts. *Id.* at 327-33.

calling the shots. For instance, before Gazprombank was subject to sanctions, it joined Gorsoan in filing and litigating the 2013 application under §1782 described below. And although the pleadings in the current matter identify only Gorsoan as the applicant, the subpoenas were issued in the names of both Gorsoan and Gazprombank, and the same attorney is counsel for both entities. (A-128, 135, 143, 150).

The case in Cyprus has now been pending for eight years. The dubiousness of its underlying merits is apparent, because Gazprombank and Gorsoan have done little to advance the case and have primarily used it as a vehicle for asset discovery. For instance, some eight years into the proceedings, Gazprombank and Gorsoan amended their pleadings to add an additional defendant—causing further delay—and then summarily dismissed that defendant from the action. (A-184, A-338). There has been no hearing or adjudication on the merits. (A-185).

C. The 2013 Application

In 2013, Gazprombank and Gorsoan commenced a §1782 proceeding in the Southern District of New York seeking discovery from Bullock and others (the "2013 Application"). Section 1782 was enacted to facilitate gathering evidence for use in foreign tribunals. It authorizes the "district court of the district in which a person resides or is found [to] order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or

international tribunal[.]" 28 U.S.C. §1782(a). This Court has read this language to permit discovery only where: "(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery [is] for use in a foreign proceeding before a foreign tribunal, and (3) the application [is] made by a foreign or international tribunal or any interested person." *Certain Funds*, 798 F.3d at 117. The foreign proceeding must be "adjudicative in nature." *Euromepa*, 154 F.3d at 27. If the adjudicative foreign proceeding is not actually pending, it must be "within reasonable contemplation." *Intel*, 542 U.S. at 259.

Once the statutory requirements are met, a district court may order discovery under §1782 in its discretion, "taking into consideration the 'twin aims' of the statute, namely, 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.'" *Certain Funds*, 798 F.3d at 117; *see Intel*, 542 U.S. at 264-66 (describing factors guiding courts' discretion).

The subpoenas at issue in the 2013 Application, unlike those at issue in this appeal, sought discovery concerning the alleged fraud at issue in the Cyprus litigation. As Gorsoan explained, the subpoenas, which requested information during the time period of the alleged fraud (2005-2008), sought evidence "relevant

to [its] claims in the Cyprus Proceeding," and intended "to assist [Gorsoan] in obtaining relief in the Cyprus Proceeding." (Dkt.2 at 7-8 in 13 Misc. 397). Among other things, they called for evidence "regarding the issuance of the Bonds in Russia, and the various transactions benefitting Bullock and her companies allegedly accomplished through the fraudulent diversion of investments in the Bonds." (*Id.* at 7).

Bullock opposed discovery. Because the 2013 Application sought *merits discovery*, Bullock did not argue that the application failed to satisfy §1782's statutory requirements. Instead, she argued that discovery should be denied as a matter of discretion, generally because Gorsoan sought to circumvent proof-gathering restrictions in Cyprus and because the subpoenas were overbroad and harassing. (Dkt.13 at 4-17 in 13 Misc. 397). The district court rejected Bullock's arguments and ordered discovery. *In re Application of Gorsoan Ltd and Gazprombank OJSC*, 13 Misc. 397, 2014 WL 7232262 (S.D.N.Y. Dec. 10, 2014). This Court affirmed. *Gorsoan Ltd. v. Bullock*, 652 F. App'x 7 (2d Cir. 2016).

Following this Court's decision, Bullock's then-counsel produced nearly 10,000 pages of documents. (A-102). In addition to producing numerous documents, Bullock sat for deposition twice. (*Id.*). Gorsoan terminated the first deposition after several hours, claiming that Bullock's answers were evasive and unacceptable. The Honorable Richard J. Sullivan, then a United States District

Judge, found Bullock in contempt based one of her answers to a deposition question. (*Id.*). However, no such finding has been made with respect to her production of documents, and the matter remains pending. (*Id.*). During her second deposition, represented by new counsel, Bullock invoked her Fifth Amendment right in response to hundreds of detailed questions posed by Gorsoan and Gazprombank's counsel. (*Id.*).

D. The 2018 Application

On September 13, 2018, Gorsoan commenced a new §1782 application in the Southern District of New York (the "2018 Application"), this time seeking subpoenas directed at Bullock's two daughters (Zoe Bullock Remmel and Eugenia Bullock), elderly mother (Zoya Kuznetsova), and an associate (Stuart Sundlun). (A-128-155). The 2018 subpoenas did not seek any information concerning the 2005-2008 events underlying the Cyprus suit. (Bullock's daughters were ages 9 and 17 when the alleged Russia bond fraud began.) Instead of evidence for proving its case, Gorsoan sought only information related to Bullock's alleged assets subject to the Freeze and Disclosure Order, and only information post-dating the Cyprus court's initial freezing order of August 24, 2012.

In its *ex parte* application and the eleven-page memorandum of law submitted in support of that application, Gorsoan made no mention of any contemplated contempt motion. Rather, it asserted that its basis for satisfying the

"for use" requirement was "unchanged from Gorsoan's earlier application" (A-16-17)—in which it had claimed that discovery would be "relevant to [its] claims in the Cyprus Proceeding." (Dkt.2 at 9-10 in 13 Misc. 397). This statement overlooks the critical fact that Gorsoan's 2018 Application sought discovery with respect to a time period that postdated its claims in Cyprus by *four* years and did not include any request for information about even a single claim Gorsoan has made in Cyprus.

The 2018 subpoenas are extraordinarily broad. The subpoena directed to Bullock's elderly mother, for example, requires production of "[a]ll documents concerning your Assets," "[a]ll documents concerning [your] federal and local taxes," "[a]ll documents concerning your expenses and sources of payment(s) for those expenses, including without limitation, costs in connection with any of your Assets," "[a]ll documents concerning any business you have entered into," "[a]ll documents concerning all instances in which you have provided cash or any other Asset to Bullock," "[a]ll documents concerning charitable causes you support," and "[a]ll documents concerning any Assets Transferred from or to Bullock." (A-133).

The subpoenas addressed to Bullock's daughters go even further. In addition to seeking similarly broad categories of documents—"all" documents "concerning your Assets," "federal and local taxes," "expenses and sources of

payment(s) for those expenses, including without limitation, costs in connection with any of your Assets, your Husband's Assets, or your Children's Assets," etc.—one subpoena also seeks "all documents concerning Zaya Food," Ms. Bullock Remmel's private catering business, which has nothing to do with the claims at issue in Cyprus. (A-140). The subpoena directed to Bullock's younger daughter, then a college student in Pennsylvania, demanded that she produce, among other things, all documents concerning expenses related to her "social life." (A-148).

The subpoena addressed to Bullock's associate Stuart Sundlun seeks "[a]ll documents concerning Bullock, including without limitation any communications with Bullock," regardless of subject matter. It also seeks, among other things, information related to the hotels in Courcheval, France, that Gorsoan and the Russian Federation are currently attempting to seize through various proceedings in Europe. (A-155).

On October 16, 2018, Judge Sullivan granted Gorsoan's application on an *ex parte* basis, without any briefing by Bullock's counsel. (SPA-1-2). After Judge Sullivan's elevation to this Court, the matter was transferred to the Honorable Ronnie Abrams.

Gorsoan moved to compel on May 13, 2019. (A-86-89). In its motion, Gorsoan conclusorily asserted that "the statutory factors required by 28 U.S.C. §1782 were satisfied," but cited only its 2018 Application—which, as discussed,

had merely adopted, without any basis, the 2013 Application's assertion that the intended "use" was for the merits of the Cyprus action. (A-16-17, 87).

After receiving leave to intervene, on May 31, 2019 Bullock moved to quash the subpoenas. (A-99; *see also* Dkt.22). Bullock argued that Gorsoan failed to satisfy the statutory "for use" requirement because the subpoenas sought only to identify assets subject to the Cyprus court's Freezing and Disclosure Order. Accordingly, the discovery had no adjudicatory purpose under this Court's controlling precedents. (Dkt.27 at 14-19). Bullock also argued that even if the statute authorized the subpoenas, discovery should be denied as a matter of discretion, because the §1782 application had been brought in bad faith as part an abusive campaign coordinated by the Russian state, was overly broad, harassing, and was an attempt to circumvent proof gathering restrictions in Cyprus and the U.S. (*Id.* at 19-24).

Respondents (co-Appellants here) filed oppositions to Gorsoan's motion to compel in which they raised Fifth Amendment objections and joined Bullock's arguments. (Dkts.28, 29).

It was at this stage, in its reply brief, that Gorsoan first attempted to articulate an argument about how the discovery it sought could possibly be used in relation to the merits of the foreign proceeding. Gorsoan argued that its requested discovery might assist it in monitoring Bullock's compliance with the Cyprus

court's Freezing and Disclosure Order, and might lead to a contempt motion, which might result in evidentiary sanctions, including possibly a sanction that could affect the merits of the Cyprus proceeding. (A-260-61, 264). This was far removed from Gorsoan's original argument that it sought evidence that would substantively support its claims, the traditional purpose of §1782.

This new argument was plainly cooked up at the eleventh hour to deal with the statutory "for use" defect Bullock had identified in her motion to quash. It was conspicuously absent from all of the motion papers and related memoranda that Gorsoan had previously submitted. Moreover, Gorsoan had opted *not* to pursue contempt proceedings in Cyprus even though it could have done so years ago, because her non-compliance with the Cyprus court's Freezing and Disclosure Order has never been in doubt. As early as the 2013 Application, Gorsoan itself asserted that Bullock "has failed to comply" with the Freezing and Disclosure Order. (Dkt.2 at 6 in 2013 Misc. 397; *see also, e.g.,* Dkt.16 in 2013 Misc. 397 at 14 ("It is undisputed that Bullock has refused to comply with discovery in the Cyprus Proceeding")). Then in 2014, Gorsoan actually brought a contempt motion in Cyprus, only to withdraw it. (A-304-05). That same year, the district court handling the 2013 Application expressly found that "Bullock has not complied with her discovery obligations under the Freezing and Disclosure order issued in the Cyprus proceedings." 2014 WL 7232262 at *6. And Gorsoan continued to

assert Bullock's non-compliance through the appeal in the 2013 Application and into the 2018 Application. *See Brief* of Petitioners-Appellees at 4-5, Dkt.69 in *Gorsoan Ltd v. Bullock*, 15-0057 (2d Cir.); A-13). Significantly, however, Gorsoan never argued that it needed any additional evidence to prove Bullock's non-compliance or that it sought proof of such non-compliance "for use" in any adjudicatory proceeding—until its 2019 reply brief, when it was pressed to come up with a rationale for the purely asset-related discovery it was seeking.

Remarkably, even in that reply brief, Gorsoan did not claim to have concrete plans to institute a contempt proceeding in Cyprus. Instead, it purported to link the supposed need to "monitor compliance" with the asset freeze order with the completely distinct *merits* of the Cyprus suit. For instance, Gorsoan reiterated the 2018 Application's conclusory claim that "the discovery relates to the merits of the underlying claims," and then tacked on "including Bullock's non-compliance with the Freezing and Disclosure Order"—even though the latter is obviously unrelated to the merits. (A-260; *accord* A-261).

Nor did Gorsoan's Cypriot counsel, who submitted a declaration in support of the belated reply brief, represent that there was any plan to make a contempt motion. He merely noted that in 2014 a contempt motion had been brought but subsequently withdrawn, and that the discovery sought was "necessary to obtain evidence that [Bullock] failed to fulfill her disclosure obligations and to comply

with the asset disposal prohibitions" arising out of the Freezing and Disclosure Order. (A-304-05, 308). And he explained, briefly, that disobedience to an interim order like the Freezing and Disclosure Order "*may* lead to various legal consequences which mainly include the entry of an order of contempt, as well as *in some cases*, the entry of an order precluding the relevant party from presenting evidence at the hearing and from otherwise promoting its defence as to the merits of the action." (A-309) (emphasis added). Conspicuously absent was any representation that Gorsoan actually planned to move for contempt.

Bullock urged the court not to credit Gorsoan's new argument, which was "absent from all of Gorsoan's prior submissions in this matter." (Dkt.35 at 11 n.2). Bullock also argued that the "contempt motion" argument was "demonstrably pretextual" because it was undisputed that Bullock had "made no asset disclosures in the Cyprus proceeding. (*Id.*).

At oral argument, the district court pressed Gorsoan on whether the information it sought was "going to bear on the fraud itself." (A-332). Gorsoan finally conceded that it was "unlikely that it would bear on the fraud itself." (*Id.*). It claimed that "the reason for the request was to shore up that Ms. Bullock has not complied with the freezing and discovery allegations, or freezing and disclosure obligations in the Cyprus court"—even though that "reason" was entirely absent from the §1782 application Gorsoan had made to the court. (*Id.*). At no point

during the hearing did Gorsoan assert that it had actual concrete plans to move for contempt in Cyprus—let alone plans to do so by a date certain after it obtains U.S. discovery.

Gorsoan did not argue that the discovery it sought substantively related to the claims being adjudicated in Cyprus. And it admitted that the discovery would have no bearing on its claims unless a judge happened to impose sanctions that had consequences beyond the asset freeze order itself and intruded upon the main case being adjudicated—a speculative possibility at best and not one Gorsoan articulated or counted upon in its initial 2018 application for §1782 discovery.

E. The District Court's Decision

The district court granted Gorsoan's motion to compel and denied Bullock's motion to quash. (SPA-29). The court conceded that this was a "difficult question," but rejected Bullock's statutory argument. (SPA-8-9). The court acknowledged that three other district courts in this Circuit have rejected §1782 applications for asset discovery under *Euromepa*. However, it purported to distinguish those cases because they involved discovery that "would have had no effect on the resolution of the merits in the foreign tribunal," whereas Gorsoan "intends to file a motion for contempt against Bullock in the Cyprus court regarding her 'satisfaction of the freezing order abroad'" and that contempt motion "could have consequences on the case's outcome." (SPA-14-15). As explained

below, such a rationale does not satisfy §1782's "for use requirement. But even if it did, the court got the facts wrong because Gorsoan never actually expressed any such intent to file a contempt motion. The court cited a statement by Gorsoan's counsel at oral argument (SPA-14), but counsel made no such representation in the cited passage. Instead, Gorsoan's counsel simply noted that "there's a *possibility* for contempt proceedings." (A-326) (emphasis added).

The district court also rejected Bullock's alternative argument that discovery should be precluded as a matter of discretion under *Intel*. It refused to consider Bullock's allegations that the Russian state was abusing the U.S. judicial system in support of a politically motivated sham and related global asset chase and said these issues should be litigated in Cyprus. (SPA-19-22). The court also failed to address Bullock's argument that pre-judgment asset discovery was inconsistent with the norms of U.S. litigation. (*See* Dkt.27 at 23-24). However, the court concluded that the subpoenas were overly broad and intrusive and referred the application to a magistrate judge for further proceedings to narrow the subpoenas' scope. (SPA-24-26, 28-29).

The court also rejected the co-Appellants' Fifth Amendment arguments. It found that they had to make their Fifth Amendment objections "with regard to a particular document or question[.]" (SPA-26-28).

SUMMARY OF ARGUMENT

I. Gorsoan's §1782 application only sought information relating to Bullock's assets subject to the Freezing and Disclosure Order, or *Mareva* injunction. Gorsoan did not seek information relating to the merits of the underlying fraud claims in Cyprus. But this Court has held that §1782 is only permitted to aid "adjudicative" proceedings. Asset identification in support of *Mareva* injunctions is not an adjudicative purpose. Nor should a party be permitted to circumvent the prohibition on using §1782 for mere asset discovery by claiming that the discovery is necessary for a hypothetical "contempt motion" which *might* lead a foreign judge to issue a merits-affecting contempt sanction based on non-compliance with an ancillary *Mareva* injunction. Such a hypothetical "use" depends upon a series of speculative assumptions that would all have to materialize in order for the evidence sought to have any bearing on the merits of the case. To permit discovery in such circumstances would eviscerate the adjudicative proceeding requirement, upset settled expectations governing judgment enforcement, and lead to a deluge of §1782 applications Congress plainly did not authorize. Using §1782 for pre- or post-judgment asset identification would also raise significant federalism concerns, as judgment recognition and enforcement is an area of traditional and exclusive state law

concern, and Congress has not so much as hinted that it intended §1782 to be used for this purpose.

Even if §1782 could be used to obtain asset discovery in certain circumstances, such as when a contempt motion is actually contemplated, the statute does not authorize discovery here. A §1782 applicant must present "objective indicium that the [legal] action is being contemplated," and must do so "at the time the §1782 application [is] filed." *Certain Funds*, 798 F.3d at 123-24. Gorsoan utterly failed to do so here. First, if it actually intended to pursue a contempt motion in Cyprus, it could have done so years ago. Second, Gorsoan made no allusion to any potential "contempt motion" in its application, but instead merely asserted that the discovery was relevant to its claims in Cyprus—something it later admitted was not true. Even when it introduced its pretextual, *post hoc* rationale for discovery, Gorsoan never asserted that it had concrete plans to make a contempt motion in Cyprus. This theorized contempt motion—the sole basis on which the district court found the "for use" requirement satisfied—was thus not "within reasonable contemplation" "at the time the §1782 application was filed."

II. Even if the requirements of §1782 were satisfied, the district court abused its discretion. The district court made errors of law—necessarily an abuse of discretion—by rejecting Bullock's argument that the Cyprus proceedings were abusive and a mere pretext for asset discovery and harassment on behalf of the

Russian Federation. The Supreme Court has instructed courts to consider arguments regarding the pretextual nature of foreign proceedings when determining whether to allow §1782 discovery. The district court went further wrong by leaning on the forum non-conveniens doctrine—which does not apply to a defense or objection to §1782 discovery—in holding that Bullock's argument was "best raised in another forum…the Cyprus action." The district court also completely ignored Bullock's argument that the pre-judgment asset discovery sought here violated norms embedded in the Federal Rules of Civil Procedure and other U.S. policies, which *Intel* teaches must also be considered when determining whether to grant discovery. And the district court further compounded these errors by failing to consider the extraordinarily overbroad, intrusive and harassing nature of the subpoenas as a ground to deny discovery.

STANDARD OF REVIEW

Whether Gorsoan satisfied the threshold statutory requirements is reviewed *de novo*. *Certain Funds*, 798 F.3d at 117. If those requirements were met, this Court reviews the district court's decision to grant discovery under the *Intel* factors for abuse of discretion. *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 244 (2d Cir. 2018).

ARGUMENT

I. GORSOAN FAILED TO SATISFY §1782's REQUIREMENT THAT DISCOVERY BE "FOR USE" IN A "PROCEEDING IN A FOREIGN…TRIBUNAL"

The application failed to satisfy §1782's threshold requirements and should have been dismissed. Gorsoan has given up any pretense that the application, which purported to be seeking merits discovery, actually had any such purpose, and now concedes that its true purpose is to identify assets to enforce the Freezing and Disclosure Order. This type of draconian pre-judgment asset freeze is unavailable in U.S. courts, and §1782 cannot be used to enforce the foreign injunction in U.S. courts. The district court's sole justification for finding asset identification a proper "use" was its acceptance of Gorsoan's *post hoc* representation that evidence of Bullock's non-compliance with that order *might* provide grounds for a contempt motion, which *might* somehow impact the merits of the Cyprus lawsuit. But the district court's reasoning vitiates the statutory requirement of a "reasonably contemplated" use in an "adjudicative proceeding" in two distinct ways.

First, an effort to enforce an asset freeze order or a judgment is not itself an adjudicative proceeding, even if the underlying order or judgment was the product of such a proceeding. If the district court's ruling is upheld, then any foreign litigant that has obtained a preliminary freezing order or post-judgment attachment

order will be able to satisfy §1782's "for use" requirement and take advantage of compulsory process in the U.S. on a mere assertion that it needs discovery to monitor its adversary's compliance with the foreign order. Such a broad interpretation cannot be reconciled with the statutory text or the Supreme Court and Second Circuit decisions interpreting it.

Second, Bullock's non-compliance with the Freezing and Disclosure Order has never been in doubt. Gorsoan has had years to advance a contempt motion but declined to do so, never mentioned the possibility in its application, and never told the district court that it intended to do so in the future. If its eleventh-hour allusion to the *possibility* of such proceedings could satisfy the "reasonable contemplation" requirement, that requirement would be a nullity.

A. Section 1782 Authorizes Discovery For Use In Adjudicative Foreign Proceedings But Not To Enforce A Judgment Or Asset Freeze

1. The Adjudicative Proceeding Requirement Is Well-Settled And Forecloses Discovery Aimed At Identifying Assets To Enforce A Judgment Or Pre- Or Post-Judgment Asset Freeze.

As the district court recognized, it is well-settled that §1782's "for use" requirement is only satisfied if the foreign proceeding is "adjudicative in nature." (SPA-9 (quoting *Euromepa*, 154 F.3d at 27)). In *In re Letters Rogatory Issued by Director of Inspection of Government of India ("Government of India")*, 385 F.2d 1017, 1020-22 (2d Cir. 1967) (Friendly, J.), the Court held that an Indian tax

assessment proceeding conducted by an assessor who filled a prosecutorial and not merely a neutral function was not "adjudicative." Accordingly, this Court explained, the proceeding was not before a "tribunal." *Id.* Similarly, in *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980), this Court considered whether the Superintendent of Exchange Control of the Republic of Columbia was a "tribunal" within §1782. Reaffirming *Government of India*, the Court found it "evident that Congress intended 'tribunal' to have an adjudicatory connotation." *Id.* at 323. The Court thus held that the Superintendent, who was a law enforcement officer, was not a foreign "tribunal" and could not invoke §1782. *Id.* at 324. The Court subsequently analyzed the adjudicative nature of Chilean competency proceedings, *Foden v. Gianoli Aldunate (In re Gianoli Aldunate)*, 3 F.3d 54, 62 (2d Cir. 1993) (adjudicative), an Italian bankruptcy proceeding, *Lancaster Factoring Co. v. Mangone*, 90 F.3d 38, 42 (2d Cir. 1996) (also adjudicative), and a French bankruptcy proceeding, *Euromepa*, 154 F.3d at 27-28 (not adjudicative).

The requirement that the foreign proceeding be "adjudicative" derives directly from Congress's choice to use the word "tribunal." Black's Law Dictionary (11th ed. 2019), for example, defines "tribunal" as "[a] court of justice or other *adjudicatory* body." (emphasis added). And as Professor Hans Smit, "the dominant drafter of, and commentator on, the 1964 revision of" §1782, *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 689

(D.C. Cir. 1989) (R.B. Ginsburg, J.), observed: "The term 'tribunal' embraces all bodies exercising *adjudicatory* powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as civil, commercial, criminal, and administrative courts." Smit, *Int'l Litig. Under The U.S. Code*, 65 Colum. L. Rev. 1015, 1026 n.71 (1965) (emphasis added).

Adjudicative proceedings are necessarily "proceedings that determine the relative rights and responsibilities as between two or more parties." *Jiangsu Steamship Co. v. Success Superior Ltd.*, 14 Civ. 9997, 2015 WL 518567, at *3 (S.D.N.Y. Feb. 5, 2015); *see also* Smit, *supra*, at 1033 ("[C]ompulsory production of evidence is required only to further *adjudication of a dispute* by a foreign…tribunal[.]") (emphasis added). The Supreme Court has explained that the statute "requires…that a *dispositive ruling*…be within reasonable contemplation," *Intel*, 542 U.S. at 259, language that would make no sense if §1782 could be used for collateral, non-adjudicative purposes like asset identification.

Accordingly, §1782 discovery may not be collected because it has general utility to a foreign litigant. Rather, "[b]y adopting the phrase 'for use,' Congress plainly meant to require that §1782 applicants show that the evidence sought is 'something that will be employed with some advantage or serve some use in the proceeding.'" *Certain Funds*, 798 F.3d at 120 (quoting *Mees v. Buiter*, 793 F.3d

293, 297 (2d Cir. 2015)). The litigant therefore must have a means of "injecting the evidence into the proceeding," *id.*, and using it to "increase [the] chances of success," *Mees*, 793 F.3d at 299 ("seeking discovery to prove one's claims" in a pending proceeding "satisfies the 'for use' requirement").

In *Euromepa*, this Court considered whether §1782 discovery had an adjudicative purpose in connection with a French bankruptcy proceeding. Bankruptcy proceedings may be "adjudicative proceeding[s] within the meaning of the statute." 154 F.3 at 28. But the evidence sought in connection with the French bankruptcy at issue had no adjudicative purpose, because "[t]he merits of the dispute…[had] already been adjudicated and [would] not be considered" in the bankruptcy. *Id.* In short, "nothing is being adjudicated; the already extant judgment is *merely being enforced*[.]" 154 F.3d at 28 (emphasis added).

Several district courts within this Circuit applying *Euromepa* have held that §1782 may not be used to obtain mere asset discovery, whether pre- or post-judgment. *See Jiangsu Steamship*, *supra*; *In re MT Baltic Soul Produktentankschiff-Ahrtsgesellschaft mgH & Co. KG*, 15 Misc. 319 (LTS), 2015 WL 5824505 (S.D.N.Y. Oct. 6, 2015); *see also In re Asia Maritime Pacific, Ltd.*, 253 F. Supp. 3d 701 (S.D.N.Y. 2015) (Caproni, J.).

These decisions follow directly from this Court's precedents holding that §1782 discovery is only available in support of adjudicative proceedings, and not

for collateral purposes. A pre- or post-judgment enforcement order is not an "adjudicative proceeding" that satisfies the statute's "for use" requirement. It is merely a mechanism to enforce a judgment, and courts consistently reject direct attempts to use §1782 to enforce foreign judgments.[5] Moreover, while U.S. courts may recognize and enforce money judgments and other decrees, they generally will not enforce foreign injunctions. *See Medellin v. Texas*, 552 U.S. 491, 522 (2008) ("The general rule…is that judgments of foreign courts awarding injunctive relief…are not generally entitled to enforcement."). Accordingly, when a foreign injunction requires disclosure for its own sake, not for the sake of the adjudicative proceedings, §1782 may not be used to extend enforcement of the foreign injunction into a U.S. courtroom. And the statute cannot be circumvented by

[5] *See Minitti v. Speiser, Krause, Nolan & Granito, P.C.*, 04 Civ. 7976, 2006 WL 3740847, at *8 (S.D.N.Y. Dec. 19, 2006) (observing that a letter rogatory under §1782 cannot be used to enforce a foreign judgment) (Chin, J.); *In re Letter Rogatory Issued by Second Part of the III Civil Regional Court of Jabaquara/Saude Sao Paulo, Brazil*, 13 Misc. 72, 2001 WL 1033611, at *1 (S.D.N.Y. Sept. 7, 2001) ("By its plain language, [§1782] only authorizes the use of letters rogatory for the production of testimony and evidence, *not* for enforcement of a foreign judgment.") (Owen, J.); *Osario v. Harza Engineering Co.*, 890 F. Supp. 750, 754 (N.D. Ill. 1995) (§1782 "is limited to the role of U.S. courts in procuring testimony for use in a foreign court proceeding. Nothing in that section…nor any other federal statute provides for the enforcement of a foreign judgment through the use of letters rogatory."); *In re Letter Rogatory Issued by Tacul, S.A. v. Hartford Nat. Bank & Trust Co.*, 693 F. Supp. 1399, 1400 (D. Conn. 1988) (same); *In re Civil Rogatory Letters Filed by Consulate of the U.S. of Mexico*, 643, 244 F. Supp. 244 (S.D. Tex. 1986) (same).

merely relabeling what amounts to impermissible discovery to enforce a judgment or an injunction as discovery to enforce compliance with an asset freeze order.

The reasoning of these district court decisions helps to illustrate the point. For instance, *Jiangsu Steamship* concerned a §1782 application seeking asset discovery from New York financial institutions in connection with a claim to be brought in a London arbitration. 2015 WL 3439220 at *1-2. The applicant did not "seek this discovery in order to help decide the 'merits of the dispute,'" but instead "so it can easily obtain advance security for…whatever judgment it might obtain in the…arbitration." *Id.* at *4. But "neither pre-judgment attachment nor post-judgment enforcement proceedings are 'adjudicative' in nature; indeed, the latter is the explicit holding of *Euromepa*." *Id.* The district court rejected the application, noting that courts "must be particularly cautious to insure that §1782 is not being invoked as a subterfuge, to mask some extra-statutory purpose." *Id.* at 5. Denying a motion for reconsideration, the court reiterated that "in a pre-judgment attachment proceeding…nothing is 'adjudicated.'" *Jiangsu Steamship Co., Ltd. v. Success Superior Ltd.*, 14 Civ. 9997 (CM), 2015 WL 518567, at *3 (S.D.N.Y. Feb. 5, 2015). "All that happens is that identified property becomes security for the enforcement of a judgment that may be entered somewhere down the pike." *Id.*

Similarly, in *In re MT Baltic Soul*, a §1782 applicant that had obtained a judgment in an English court sought to discover information that for use in actions

for "recognition and enforcement" of the English judgment. 2015 WL 5824505 at *1. The district court rejected the application, holding that "[§1782] discovery is available in aid of 'adjudicative' foreign proceedings, and is inappropriate where the merits of a controversy have already been decided by the foreign panel." *Id.* at 2. Any discovery "would only [have been] in relation to a contemplated post-judgment action, which *Euromepa* holds is not a 'foreign proceeding' within the meaning of [§1782]." *Id.*

And in *In re Asia Maritime Pacific, Ltd.*, the district court rejected an application for asset discovery from New York-based financial institutions, which the application sought so that it could identify assets to attach as security for claims then under arbitration in London. 253 F. Supp. 3d at 702-07. The district court held that the applicant had "failed to establish that the discovery it seeks is 'for use in a foreign proceeding' within the meaning of the statute." *Id.* at 705. This Court's "adjudicative proceeding" requirement is "not satisfied by the requesting party reciting some minimal relation to a pending foreign proceeding"; the discovery must be "relevant to the subject matter of the [foreign] proceeding." *Id.* at 706 (citing *Certain Funds*, 798 F.3d at 118-22). Because the arbitration in London was for breach of contract, and the applicant failed to explain why "the location of [its adversary's] assets would be relevant or would increase [its] chance

of success in that proceeding," the discovery was not "for use" in the London arbitration. *Id.* at 707.[6]

In sum, nothing is being adjudicated in connection with an asset freeze order such as the one here; it merely imposes an obligation that a U.S. court has no authority to enforce. Section 1782 does not permit discovery for the purpose of monitoring compliance with that obligation. Even under Gorsoan's own reasoning, its application has no relation to the merits of the Cyprus dispute unless a Cyprus judge imposes a sanction that affects the merits. But it remains uncertain whether Gorsoan will move for contempt, whether a judge will find contempt and impose sanctions, and whether any sanction will have consequences for the merits. The district court accepted Gorsoan's argument that there was some possibility that the discovery Gorsoan sought *could* have consequences for the merits, and that this suffices to satisfy the "for use" requirement. But a party seeking §1782 discovery must show that the discovery it seeks actually satisfies

[6] The Eleventh Circuit is the only Court of Appeals that has permitted §1782 to be used to identify assets for judgment enforcement. *See In re Clerici*, 481 F.3d 1324 (11th Cir. 2007). But in that decision, the Eleventh Circuit expressly disagreed with this Court's decisions holding that §1782 only permits discovery in aid of proceedings that are "adjudicative in nature." *Id.* at 1333 (finding that "nothing in the plain language of §1782 requires that the proceeding be adjudicative in nature"), and *id.* at 1333 n.10 (finding this Court's analysis "unpersuasive"). The Eleventh Circuit's holding also conflicts with the statutory text and the Supreme Court's instruction that a "dispositive ruling" be "within reasonable contemplation." *Intel*, 542 U.S. at 259.

the "for use" requirement, not merely that there is a contingent possibility that, depending on some hypothetical ruling in the future, it could satisfy that requirement.

2. Permitting Discovery To Enforce An Asset Freeze Would Gut §1782's "For Use" Requirement And Improperly Transform A Statute Enacted To Aid Merits Discovery Into A Sweeping Judgment-Collection Mechanism.

If this Court affirms the decision below, it will open the floodgates to §1782 applications whenever a party to a foreign litigation obtains a judgment or even a pre-judgment asset freezing and disclosure order like the one here—a common device in other legal systems but one specifically prohibited in the federal courts. *Grupo Mexicano*, 527 U.S. at 333. This would enable any foreign litigant possessing a *Mareva* injunction to come to a U.S. court and seek pure asset discovery on the theory that it might plausibly use that discovery to show a foreign court that its adversary was non-compliant. That result conflicts with the plain text of the statute and binding precedents limiting the "for use" requirement to adjudicatory proceedings and would undermine the settled expectations of individuals and businesses subject to U.S. discovery—whether because they are directly subject to U.S. jurisdiction or because their information resides with an entity subject to U.S. jurisdiction.

For instance, this Court recently held that §1782 authorizes the production of evidence located abroad. *In re del Valle Ruiz*, 939 F.3d 520, 524 (2d Cir. 2019). If

the "for use" requirement is satisfied by pre- or post-judgment orders of attachment and similar devices, then New York courts and New York-based financial institutions will be inundated with requests for §1782 discovery seeking information about not only assets located in the United States, but also overseas records relating to overseas assets. This is neither what the statute was intended to achieve, nor what the law permits.

A contrary holding would also create an end-run around well-established state-law rules regulating judgment enforcement. The result would be particularly disruptive in New York, a preeminent "international financial center." *Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 62 (2d Cir. 2009). For example, New York's "separate entity rule" "prevent[s] the postjudgment restraint of assets situated in foreign branch accounts based solely on the service of a foreign bank's New York branch." *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 162 (2014); *see Allied Maritime, Inc. v. Descatrade SA*, 620 F.3d 70, 74 (2d Cir. 2011) (explaining that, under separate entity rule, "the mere fact that a bank may have a branch within New York is insufficient to render accounts outside of New York attachable").[7] But if all a

[7] The "separate entity rule," under which the branches of a bank are treated as a separate entities for purposes of attachment or garnishment, appears to be the general U.S. rule except in Illinois. *See* 12 A.L.R.3d 1088, Attachment and Garnishment of Funds in Branch Bank or Main Office of Bank Having Branches.

party had to show to obtain asset discovery was that it had obtained a *Mareva* injunction or an order of attachment, and required discovery to "monitor" compliance with that order, then banks with New York branches could be compelled to identify assets anywhere in the world. This would upset the settled expectations of financial institutions that have relied on New York's longstanding rules of judgment enforcement in organizing their affairs.

Similarly, if asset discovery in aid of an attachment order is fair game, the holder of a foreign judgment would have no motivation to wait to domesticate that judgment under New York law—a process requiring a plenary action in state or federal court—before pressing ahead with asset discovery under §1782. Congress surely did not intend these absurd results. *See*, *e.g.*, *S.E.C. v. Rosenthal*, 650 F.3d 156, 162 (2d Cir. 2011) ("It is…well-established that '[a] statute should be interpreted in a way that avoids absurd results.").

3. The Extension Of §1782 To Pre- Or Post-Judgment Asset Identification Would Raise Significant Federalism Concerns.

As noted above, recognition of foreign judgments "is governed by state law." *See Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 582 (2d Cir. 1993) (citing Restatement (Third) of the Foreign Relations Law of the United States §481 cmt. a (1987)). Moreover, judgment recognition and enforcement is an area of profoundly local concern, directly affecting property rights at the core of

states' historic police power. *See Commissions Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 333 (D.C. Cir. 2014). It is unthinkable that Congress intended §1782 to impinge on this area but neglected to say so.

As the Supreme Court has repeatedly instructed, federal courts must "be certain of Congress's intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014). Accordingly, a "clear statement" from Congress is required "when legislation affect[s] the federal balance" before courts can interpret a federal statute in a manner that would tread on areas traditionally regulated exclusively by the states. *Id.* (collecting cases). This is especially true when the area speaks to a core concern of state government. *See, e.g.*, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("[T]he general welfare of society is involved in the security of the titles to real estate and the power to ensure that security inheres in the very nature of state government."); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (describing States' "traditional and primary power over land and water use").

Nothing in §1782 remotely hints, much less clearly states, that Congress intended to trump the states' prerogatives in the area of judgment recognition and enforcement. To permit §1782 discovery in federal court in service of a foreign judgment or asset identification order—such as a *Mareva* injunction—would allow

a party to begin enforcing a foreign judgment even before it had domesticated that judgment under state law. Absent a clear statement from Congress, §1782 should not be construed to extend this far into an area of core state concern.

B. Section 1782 Discovery May Not Be Granted For Use In A Hypothetical Adjudicative Proceeding Not Described In The Application And Not Within Reasonable Contemplation

Even if §1782 discovery were permitted to enforce a foreign court's asset freezing and disclosure order when a party represents that it will use the discovery to move for contempt, Gorsoan failed to show in its application or at any other time in this litigation that its hypothetical contempt motion was "within reasonable contemplation."

1. Gorsoan Did Not Establish That Its Hypothetical "Contempt Motion" Was Within Reasonable Contemplation.

This Court has explained that "in the typical §1782 application, the applicant has already initiated a foreign proceeding and seeks discovery entirely to help her prove her claims[.]" *Mees*, 793 F.3d at 299. To be sure, §1782 discovery may also be available when an adjudicative proceeding, although not underway, is "within reasonable contemplation." *Intel*, 542 U.S. at 259. But to show that foreign proceedings are "within reasonable contemplation," "the applicant must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that the action is being contemplated." *Certain Funds*, 798 F.3d at 123. "In this regard… 'a district court must insist on reliable

indications of the likelihood that proceedings will be instituted within a reasonable time.'" *Id.* (quoting *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014); *accord In re Letter of Request*, 870 F.2d at 691 (noting need to "guard against abuse of [§1782]"). The Supreme Court's *Intel* decision expressly imposes this requirement: "The [*Intel*] Court's inclusion of the word 'reasonable' in the 'within reasonable contemplation' formulation indicates that the proceedings cannot be merely speculative." *Certain Funds*, 798 F.3d at 123-24. "At a minimum, a §1782 applicant must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye." *Id.* at 124.

In *Certain Funds*, for instance, this Court held that "at the time the evidence was sought…the [applicant] had done little to make an objective showing that the planned proceedings were within reasonable contemplation." *Id.* The court pointed to the "substantial length of time"—five years—between the commencement of the foreign cause of action and the filing the of §1782 application seeking evidence allegedly needed to initiate proceedings. *Id.* Ultimately, "all the [applicant] alleged" in the application "was that they had retained counsel and were discussing the *possibility* of initiating litigation." *Id.* A

mere "possibility" was not enough, and the court held that the application should have been dismissed. *Id.* at 124-25.

In contrast, cases in which non-pending foreign proceedings were "within reasonable contemplation" have involved affirmative representations, backed by concrete facts, that foreign proceedings will be initiated upon receipt of evidence. In *Consorcio Ecuatoriano*, for example, the applicant had conducted an "internal investigation and audit" that identified "indicia of liability" against two former executives. 747 F.3d at 1270-71. The applicant contemplated a civil action in Ecuador but, under Ecuadorian law it was required to submit its evidence "with the pleading at the time it commenc[ed] the civil action." *Id.* at 1271. The Eleventh Circuit held that this "facially legitimate and detailed explanation" satisfied the "within reasonable contemplation standard." *Id.*

Similarly, in *Bravo Express Corp. v. Total Petrochemicals & Refining U.S.*, the applicant "filed, with its §1782(a) application, a sworn affidavit from…a partner at [its] law firm…aver[ring] that an action…will 'be imminently filed with the High Courts in London…' and proceed[ing] to lay out, in great detail, the facts that give rise to the prospective lawsuit." 613 F. App'x 319, 323 (5th Cir. 2015). In *Application of Furstenberg Finance SAS v. Litai Assets LLC*, the applicant represented that it would "file proceedings in Luxembourg within forty-five days of receiving the discovery sought." 877 F.3d 1031, 1035 (11th Cir. 2017).

Gorsoan made no comparable showing here, and its conduct over the past seven years belies any genuine, good-faith intent to actually institute contempt proceedings in Cyprus. There has never been any dispute that Bullock has not complied with the Cyprus court's Freezing and Disclosure Order. Gorsoan made representations about Bullock's non-compliance in its 2013 Application; the district court handling that discovery application found that Bullock was non-compliant; and Gorsoan has continued to make representations regarding Bullock's non-compliance throughout these proceedings. Nonetheless, apart from a contempt motion brought in 2014 and subsequently withdrawn, Gorsoan has not moved for contempt. Even when it first raised the subject of the contempt motion in this proceeding, *ten months after filing its application*, Gorsoan failed to assert, either in the declaration of its Cypriot counsel, or in its memorandum of law, or at oral argument, that it actually had any concrete plans to make such a motion. Instead, Gorsoan's Cypriot counsel merely explained that Cypriot law permitted a contempt motion, while Gorsoan, in its memorandum of law and at oral argument, merely mentioned the theoretical possibility of a contempt motion, and conspicuously failed to affirm that it actually intended to file one. (A-260-61, 264, 304-05). Gorsoan thus did not come close to satisfying its burden.

2. Gorsoan's Failure To Include Its "Contempt Motion" Argument In Its Application Precludes Discovery For Such A Use.

In determining whether a §1782 application satisfies the statutory "for use" requirement, the court must determine "whether the contemplated proceedings were within reasonable contemplation *at the time the §1782 application was filed*." *Certain Funds*, 798 F.3d at 124 (emphasis added). Stated differently, a §1782 applicant cannot satisfy the "for use" requirement through representations made after it files its application: "the relevant question is whether '*at the time the evidence is sought*… the evidence is eventually to be used' in a foreign proceeding." *Id*. (quoting *Intel*, 542 U.S. at 259) (emphasis in *Certain Funds*); *accord Matter of Wei*, 18 Misc. 117, 2018 WL 5268125, at *2 n.1 (D. Del. Oct. 23, 2018) ("The Court recognizes that Applicant has since articulated his anticipated legal claims with more specificity. However, the relevant question under §1782 is whether 'at the time the evidence is sought… the evidence is eventually to be used' in a foreign proceeding….Therefore, the Court must assess whether proceedings were in 'reasonable contemplation' at the time the application was filed.").

Gorsoan's §1782 application asserted that the basis for satisfying the "for use" requirement was "unchanged from Gorsoan's earlier application" (Dkt.2.at.5-6)—in other words, discovery would be "relevant to [its] claims in the Cyprus Proceeding." (Dkt.2 at 7-8 in 13 Misc. 397). Gorsoan said nothing about a "contempt motion." Nor did Gorsoan say anything about a contempt motion in its

motion to compel. (A-86-89). It was only after Bullock, in her motion to quash, argued that Gorsoan sought only impermissible asset discovery, that Gorsoan, in its combined reply/opposition papers, vaguely alluded to the possibility of a contempt motion in Cyprus. (A-260-61, 264, 304-05).

This *post hoc* justification for a §1782 cannot be credited under *Certain Funds*. Because Gorsoan failed to satisfy the "for use" requirement *in its application*, the application should have been dismissed.

II. EVEN IF THERE WAS A VALID STATUTORY USE, THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING DISCOVERY

If an application satisfies the statutory requirements, the district court is authorized, but not required, to grant discovery. *Intel*, 542 U.S. at 264. The Supreme Court has directed district courts exercising their discretion to consider several factors: (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) whether the "request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the request is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 264-65. The district court's discretion, however, "is not boundless,"

and must be exercised "in light of the twin aims of the statute: 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Schmitz v. Bernstein Liebard and Lifshitz LLP*, 376 F.3d 79, 84 (2d Cir. 2004).

The district court abused its discretion here in at least three ways.

First, the court erroneously applied a version of the forum non-conveniens rule in declining to consider Bullock's argument that the Cyprus proceedings are part of an abusive and politically charged prosecution and asset hunt orchestrated by the Russian state against Bullock and her ex-husband. Gorsoan never even tried to rebut these claims. Nonetheless, the district court gave Bullock's argument the back of its hand, holding that they are "best raised in another forum – here, in the Cyprus action." (SPA-20-22). But the court cited no authority justifying its theory. Bullock's argument, which was a central plank of her motion to quash, was plainly cognizable under the second *Intel* factor, under which a court examines, among other things, the "character of the proceedings underway abroad." *Intel*, 542 U.S. at 264; *see also id.* at 266 (noting that the district court may appropriately consider whether foreign proceedings are "pretextual"); *United States v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor General of the Russian Federation*, 235 F.3d 1200, 1205 (9th Cir.

2000) (noting "legitimate fear" that foreign governments with "fewer protections for targets of criminal investigations than we do" might use §1782 "to conduct fishing expeditions"; explaining that district courts have discretion to decline to provide assistance "where the foreign government…is simply seeking to harass political opponents"). The district court's decision to punt Bullock's argument back to Cyprus despite the *Intel* Court's directive to consider such arguments reflected an error of law, which is by definition an abuse of discretion. *See*, *e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996); *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 98 (2d Cir. 2007).

The district court's refusal to consider this argument also reflected a second reversible error of law: The forum non-conveniens doctrine is not a free-floating device that a court can invoke to refuse to entertain a defense or, as here, an argument raised in opposition to a request for §1782 discovery. It merely "permit[s] a court in rare instances to dismiss a *claim* even if the court is a permissible venue with proper jurisdiction," and requires, at a minimum, that "an adequate alternative forum exists." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) (emphasis added). A party responding to a §1782 application—like a defendant in a civil action—does not pick its forum and has no alternative forum in which to oppose the relief sought in *this* forum. A court may not abdicate its responsibility to consider arguments raised in opposition to an

application for §1782 discovery by asserting that those arguments are most conveniently raised elsewhere.

Second, the district court entirely failed to address Bullock's argument that Gorsoan sought to circumvent policies and norms embodied in the Federal Rules of Civil Procedure. (*See* Dkt.27 at 24). As courts have recognized, §1782 incorporates the Federal Rules by reference and "the discovery process is generally guided" by those rules. *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 192 (3d Cir. 1999). Moreover, *Intel* instructed courts to consider whether a §1782 "request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Intel*, 542 U.S. at 264-65.

Here, Gorsoan sought pre-judgment asset discovery. But the Federal Rules generally limit pre-trial litigants to discovery "relevant to [a] claim or defense." Fed. R. Civ. P. 26(b)(1). "The relevancy requirement [of Rule 26(b)(1)] is not met when a party wants to know the opposing party's assets prejudgment to determine what assets are available for attachment should that party succeed in obtaining a favorable judgment." 6 Moore's Federal Practice - Civil § 26.45 (2020).

The discovery sought would permit foreign litigants to obtain discovery that would ordinarily not be allowed in this country. This, too, counseled against granting discovery, and the district court's refusal to address the argument was another legal error.

Moreover, the asset discovery Gorsoan sought here to enforce a preliminary asset freezing order contravenes not only Rule 26, but also other "policies of…the United States." *Intel*, 542 U.S. at 264-65. As discussed, the Supreme Court has specifically held that such orders were "unknown to traditional equity practice" and therefore outside the equitable powers of the federal courts. *Grupo Mexicano*, 527 U.S. at 327. Such injunctions were previously "thought to be so clearly beyond the powers of the court as to be 'wholly unarguable.'" *Id.* at 329 (quoting Hetherington, *Introduction to the Mareva Injunction*, in *Mareva Injunctions* 1, 3 n.9 (M. Hetherington ed. 1983)). The Supreme Court noted concerns that "[a] rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment…to file a bill to discovery assets, or to impeach transfers…would be manifestly susceptible of the grossest abuse." *Id.* at 330 (quoting Wait, *Fraudulent Conveyances and Creditors' Bills* §73, at 110-111 (1884)). And the *Mareva* injunction is not just a matter of procedure, but "goes to the substantive rights of all property owners." *Id.* at 323. Placing the U.S. rule against pre-judgment asset freezing and disclosure in terms of the balance of federal-state power and constitutional norms, the Court explained that "[t]he requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law—rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim." *Id.* at 330. Yet the relief Gorsoan

seeks here would, in effect, extend the *Mareva* injunction into the federal courts by the backdoor.

Finally, the staggering breadth of Gorsoan's demands and the palpable irrelevance of those demands to any disputed issue in the Cyprus litigation made abundantly clear that Gorsoan brought the §1782 application in bad faith for the purpose of harassment. As this Court has held, if "a party's discovery application under section 1782 is made in bad faith, for the purpose of harassment, or unreasonably seeks cumulative or irrelevant materials, the court is free to deny the application in toto, just as it can if discovery was sought in bad faith in domestic litigation." *In re Application of Euromepa, S.A.*, 51 F.3d 1095, 1101 n.6 (2d Cir. 1995). Here, Gorsoan issued subpoenas to Bullock's mother and daughters that sought nothing less than "all" documents about "assets" and "expenses," their tax returns, documents regarding a small business run by one daughter and the "social life" of the other daughter, then a college student. (A-128-155). None of this had anything to do with an alleged municipal bond fraud in Russia. Scrutiny of the subpoenas reveals the real purpose motivating these proceedings: to harass Bullock and her family into giving in to Russia's pressure tactics.

In short, Gorsoan sought, and the district court permitted, a type of discovery unobtainable to parties litigating in U.S. courts, in service of a vast and draconian equitable power specifically forbidden to the federal courts. And this discovery

was granted to a litigant of the most dubious provenance and on the flimsiest and most nakedly pretextual of threshold "for use" showings. The decision to grant discovery was a manifest abuse of discretion.

CONCLUSION

The district court's order granting Gorsoan's motion to compel and denying Bullock's motion to quash should be reversed and the §1782 application dismissed.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. The undersigned counsel of record for Intervenor-Appellant Janna Bullock certifies pursuant to Federal Rules of Appellate Procedure 32(g) that the foregoing brief contains 11,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016, and is therefore in compliance with Second Circuit Local Rule 32.1(a)(4)(A).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: June 15, 2020

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