UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell

NOTICE

Notice is hereby provided that this Notice and the redacted copies of the six Memoranda and Orders and Memorandum Opinions issued to date in this matter, attached hereto, will be made publicly available on the Court's website:

Attachment 1: September 19, 2018 Memorandum Opinion, ECF No. 42;

Attachment 2: October 5, 2018 Memorandum and Order, ECF No. 30;

Attachment 3: January 10, 2019 Memorandum and Order, ECF No. 48;

Attachment 4: January 15, 2019 Memorandum and Order, ECF No. 57;

Attachment 5: January 24, 2019 Memorandum Opinion, ECF No. 65; and

Attachment 6: January 30, 2019 Memorandum and Order, ECF No. 72.

Both the September 19, 2018 Order, ECF No. 19, accompanying the September 19, 2018 Memorandum Opinion, and the January 15, 2019 Memorandum and Order, instructed the government to submit a report advising the Court which portions of the September 19, 2018 Memorandum Opinion may be unsealed. The government submitted that report on January 22, 2019, *see* Gov't's Report on Unsealing, ECF No. 60, which was amended the following day, *see* Gov't's Report on Unsealing, ECF No. 61. A copy of that Memorandum Opinion, which adopts some of the government's proposed redactions and makes additional redactions that the Court finds are necessary, is Attachment 1 to this Notice.

Additionally, on January 31, 2019, the Court ordered the parties to file a joint status report advising the Court whether the other five memoranda issued in this matter could be unsealed with redactions, and, if so, to propose redactions. Min. Order (Jan. 31, 2019). Each party filed a timely status report on February 15, 2019. *See* Witness's Status Report, ECF No. 90; Gov't's Status Report, ECF No. 91.

The parties agree on the appropriate redactions for the October 5, 2018 Memorandum and Order, the January 10, 2019 Memorandum and Order, and the January 24, 2019 Memorandum Opinion. Copies of these memoranda are included with this Notice as Attachments 2, 3, and 5, respectively. The parties disagree, however, about the redactions to be applied to the January 15, 2019 Memorandum and Order and the January 30, 2019 Memorandum and Order. Redactions to these two memoranda, with limited exception, have been made consistent with the government's proposal, over the witness's objections. Copies of these memoranda are included with this Notice as Attachments 4 and 6, respectively.

Date: February 28, 2019

BERYL A. HOWELL
Chief Judge

ATTACHMENT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL**

MEMORANDUM OPINION

A federal grand jury sitting in the District of Columbia has issued a subpoena to [REDACTED] to produce certain records in connection with an ongoing investigation conducted by the United States, through the Special Counsel's Office ("SCO"). Pending before the Court is [REDACTED] Motion to Quash Grand Jury Subpoena ("Mov.'s Mot."), ECF No. 3, on grounds that (1) [REDACTED] is immune, under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, from compliance with the subpoena, and (2) compliance would require [REDACTED] to violate foreign law, and thus be "unreasonable or oppressive" under Federal Rule of Criminal Procedure 17(c)(2). For the reasons explained in further detail below, neither argument persuades. [REDACTED] motion therefore is denied, and [REDACTED] is ordered to complete production of records responsive to the grand jury subpoena by October 1, 2018.

I. BACKGROUND

The SCO is investigating foreign interference in the 2016 presidential election and potential collusion in those efforts by American citizens. The SCO has identified certain [REDACTED] as relevant to the investigation and, on July 11, 2018, the grand jury issued a subpoena to [REDACTED], which is [REDACTED] by Country A, to produce by, July 27,

2018, any such records held [REDACTED], in the United States or abroad. *See* Subpoena, ECF No. 3-1.[1]

On July 26, 2018, [REDACTED], through counsel, expressed to the SCO "concerns that pertain to the potential waiver of its sovereign immunity, as well as with respect to the reach of the subpoena beyond [REDACTED]." Mov.'s Ltr., dated July 26, 2018 ("Mov.'s July 26 Ltr.") at 1, ECF No. 3-2. [REDACTED] counsel asserted that [REDACTED] "[REDACTED] under the FSIA" as "[REDACTED] by [Country A]," and therefore "is immune from the jurisdiction of U.S. courts as well as the reach of U.S. subpoenas." *Id.* at 1–2. "While [REDACTED] wishes to cooperate with the Special Counsel's investigation," [REDACTED] counsel wrote, "it cannot do so at the cost of potentially waiving or undermining its legal position with respect to the applicability of the FSIA and the protections that the FSIA affords [REDACTED]." *Id.* at 2. [REDACTED] counsel also expressed doubt that any exception to the FSIA applied, noting specifically that the FSIA's exception for cases in which "the action is based upon a commercial activity carried on in the United States by [a] foreign state," 28 U.S.C. § 1605(a)(2), likely did not apply because [REDACTED]. *Id.*[2]

In response, the SCO disagreed "with your suggestion that sovereign immunity or any other legal doctrine relieves your client from the obligation to produce the documents responsive

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[1] [REDACTED].

[2] [REDACTED] counsel questioned whether this Court has personal jurisdiction [REDACTED], *see* Mov.'s July 26 Ltr. at 2, to which the SCO responded that "[t]he subpoena was served on [REDACTED]" which "is not an independent entity." SCO's Ltr., dated July 30, 2018 at 2, ECF No. 3-3. The SCO argued that "[b]ecause the subpoena was served on [REDACTED], it is immaterial whether [REDACTED] has access to or visibility into documents in the possession [REDACTED]," as [REDACTED] itself "unquestionably does have such access and visibility." *Id.* (internal quotation marks omitted). The next letter [REDACTED] counsel sent the SCO made no reference to personal jurisdiction, *see* Mov.'s Ltr., dated Aug. 2, 2018, ECF No. 4-1, and [REDACTED] has not disputed this Court's personal jurisdiction over [REDACTED] in either subsequent correspondence with the SCO or its briefs supporting its motion to quash, thus waiving any objection on that ground. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 344 (D.C. Cir. 2018) ("Unlike subject matter jurisdiction, personal jurisdiction is a personal defense that can be waived or forfeited" by "cho[osing] not to brief or argue the question of personal jurisdiction.").

to the subpoena in [REDACTED] possession, custody, or control—wherever the documents are located." SCO's Ltr., dated July 30, 2018 ("SCO's July 30 Ltr.") at 1, ECF No. 3-3. The SCO asserted that the FSIA neither "applies in criminal cases [n]or divests the district court of power to enforce the subpoena," and that even if the FSIA applies, the FSIA's commercial activity exception would apply due to [REDACTED] activities in the United States." *Id.* at 1–2.

On August 2, 2018, [REDACTED] counsel sought from the SCO "written confirmation . . . that it is permissible . . . to share the grand jury subpoena with other personnel [REDACTED] who would be involved in collecting the documents requested, including personnel at [REDACTED] in [City A] and at [REDACTED] that may have responsive information." Mov.'s Ltr., dated Aug. 2, 2018 ("Mov.'s Aug. 2 Ltr.") at 1, ECF No. 4-1.[3] While reiterating [REDACTED] desire "to cooperate with the grand jury's investigation" and to find "a resolution that would provide the [SCO] with the documents requested," [REDACTED] emphasized its continuing "concerns on how its protections under the [FSIA] [REDACTED] could be impacted—or waived entirely—by producing documents responsive to the grand jury subpoena," as well as concern that compliance would violate "applicable law in [Country A] [REDACTED]." *Id.* at 1–2.[4] As to the latter concern, [REDACTED] proposed that it produce responsive documents "consistent with, and as permitted by, the applicable laws of the jurisdictions in which the information may [be] located," subject to three conditions: the SCO's (1) agreement that [REDACTED] production "is not intended to be either an express or implied waiver of [REDACTED] protections under the FSIA," (2) representation "that [the SCO] has a compelling need for the records requested," and (3) agreement "to a 30-day extension of the

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3 [REDACTED].
4 [REDACTED].

subpoena's return date, up to and including September 3, 2018, to give [REDACTED] adequate time to collect and process [REDACTED]." *Id.* at 2.

The SCO responded the same day, informing [REDACTED] that the SCO "cannot agree to all of the representations made in your letter," but "offer[ing] the following assurances regarding your client's production of materials responsive to the subpoena." SCO's Ltr., dated Aug. 2, 2018 ("SCO's Aug. 2 Ltr.") at 1, ECF No. 4-2. The SCO "agree[d] that in the event the [FSIA] were deemed" to apply, [REDACTED] "production of documents responsive to the instant grand jury subpoena is not intended to constitute either an express or implied waiver of any protections [REDACTED] might be entitled to pursuant to the FSIA." *Id.* The SCO further represented that it had "a compelling need for records that are responsive to the grand jury subpoena," while maintaining nonetheless that the government need not "demonstrate such a compelling need in order to compel compliance with the subpoena." *Id.* Finally, the SCO agreed to extend the subpoena's return date by one week, to August 10, 2018. *Id.*

On August 6, 2018, [REDACTED] counsel communicated to the SCO his belief that [REDACTED]." [REDACTED] and that compliance with the subpoena thus "could constitute [REDACTED]." [REDACTED] and requested that the SCO "share any thoughts your office has on this issue." *Id.* The SCO responded that "[w]e will take a look at this." SCO's Email, dated Aug. 7, 2018, ECF No. 4-3.

[REDACTED] counsel then shared "a little more color on the situation and what I've learned since" sending the prior email. Mov.'s Email, dated Aug. 7, 2018, ECF No. 4-3. Although [REDACTED] "has already begun pulling together the documents responsive to the subpoena," [REDACTED] counsel said, "before producing these to your office," [REDACTED]. [REDACTED]. At the same time, [REDACTED] counsel assured the SCO that [REDACTED].

Acknowledging that "we're not privy to the exact nature of your investigation and the specific need for [REDACTED]." [REDACTED]. *Id.*

On August 14, 2018, the SCO responded that [REDACTED]. In an accompanying email, dated one day later, the SCO stated that "[w]e will extend the return date on the subpoena to [August 16, 2018], but do not anticipate granting any further extensions." SCO's Email, dated Aug. 15, 2018 ("SCO's Aug. 15 Email"), ECF No. 4-4.

In response to the SCO's letter, [REDACTED] counsel asked whether (1) the SCO would [REDACTED] and (2) [REDACTED]. Mov.'s Email, dated Aug. 14, 2018 ("Mov.'s Aug. 14 Email"), ECF No. 4-4. The SCO objected, cautioning [REDACTED].

[REDACTED] counsel subsequently "requested a further extension of the deadline for compliance with the subpoena until early September." Mov.'s Email, dated Aug. 15, 2018, ECF No. 4-4. The SCO denied this request, stating that (1) "[t]he subpoena was served on [REDACTED] over one month ago," (2) "[f]rom the very inception of our discussions about [REDACTED] concerns and how those concerns could be allayed, we have made clear to you that in light of our investigative exigencies we were not able to agree to a lengthy extension of the return date," (3) "[i]n an attempt to allow [REDACTED] to fully consider the issue, we nonetheless granted extensions of that deadline totaling almost 3 weeks," and (4) "we told you when we agreed to your last extension request that it would likely be our final grant of an extension." SCO's Email, dated Aug. 16, 2018, ECF No. 4-4.

On August 16, 2018, [REDACTED] filed a motion to quash the grand jury subpoena. *See* Mov.'s Mot.[5] The SCO's opposition, *see* SCO's Opp'n Mov.'s Mot. ("SCO's Opp'n"), ECF No. 4, was accompanied by a motion for leave to file an *ex parte*, *in camera* supplement, *see* SCO's

[5] [REDACTED] also filed a motion to seal case, *see* Mov.'s Mot. Seal Case, ECF No. 1, which the Court granted, *see* Order Granting Mov.'s Mot. Seal Case, ECF No. 2.

Mot. Leave File *Ex Parte* Suppl. ("SCO's Mot. *Ex Parte* Suppl."), ECF No. 5, which the Court granted, *see* Order Granting SCO's Mot. *Ex Parte* Suppl., ECF No. 6. [REDACTED] filed a reply on August 31, 2018. *See* Mov.'s Reply SCO's Opp'n ("Mov.'s Reply"), ECF No. 8. Following a hearing on September 11, 2108, at which the SCO confirmed that the instant subpoena's issuance to an instrumentality of a foreign government was "approved in the normal matter . . . within the ranks of the Department of Justice," Hr'g Tr. (Sept. 11, 2018) at 39:16–23, ECF No. 16, and the SCO's filing of two *ex parte*, *in camera* submissions, *see* Order Granting SCO's Mot. *Ex Parte* Suppl.; Minute Order, dated Sept. 14, 2018, [REDACTED] motion to quash now is ripe for review.

II. LEGAL STANDARD

"On motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2). "[O]ne who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987); *accord SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000). "Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source." FED. R. CRIM. P. 26.1.

III. DISCUSSION

[REDACTED] seeks to quash the grand jury subpoena on grounds that (1) the FSIA grants [REDACTED] immunity from compliance with the subpoena and the jurisdiction of this Court to enforce the subpoena, and (2) compliance would be unreasonable or oppressive, as [REDACTED] would violate foreign law. As explained below, neither argument persuades.

A. The FSIA Does Not Immunize [REDACTED] From Compliance With the Grand Jury Subpoena

[REDACTED] contends that as an agency or instrumentality of Country A, it "is immune from [the] jurisdiction of U.S. courts, as well as the reach of U.S. subpoenas." Mov.'s Mem. Supp. Mot. ("Mov.'s Mem.") at 4, ECF No. 3.[6] Foreign states and their agencies and instrumentalities generally are immune from the jurisdiction of American courts, but the FSIA recognizes an exception to immunity for certain actions relating to foreign states' commercial activities. 28 U.S.C. §§ 1603(a), 1604, 1605(a)(2). Assuming the FSIA's grant of immunity applies outside civil cases, the exceptions do as well. The SCO, through an *ex parte*, *in camera* submission, has demonstrated that the commercial activity exception applies here. The FSIA thus does not immunize [REDACTED] from compliance with the grand jury subpoena.

1. Assuming the FSIA Applies Outside Civil Cases, the FSIA's Exceptions to Immunity Apply Outside Civil Cases As Well

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain exceptions. 28 U.S.C. § 1604. The FSIA thus "renders a foreign government 'presumptively immune from the jurisdiction of United States courts unless one of the Act's express exceptions to sovereign immunity applies.'" *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017) (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016)). [REDACTED] argues that these exceptions, set out in 28 U.S.C. §§ 1605–07, apply only to civil cases and, consequently, that the FSIA grants foreign states unqualified immunity outside the civil context. *See* Mov.'s Reply at 4. The SCO disputes that the FSIA applies outside the civil context, but contends that, if the statute applies here, the exceptions must apply as well. *See* SCO's Opp'n at 6–11. The Court assumes, without deciding, that the FSIA applies to grand jury investigative matters and concludes, contrary to

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6 [REDACTED].

[REDACTED] position, that the FSIA's exceptions to immunity, which are not by their plain terms limited to civil cases, apply outside the civil context as well.

The FSIA's commercial activity exception, for example, provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). This language is not textually limited to civil matters. To the contrary, Section 1605(a)(2)'s unqualified language provides that the exception applies "in any case." *Id.*; *see SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("[T]the word 'any' naturally carries an expansive meaning.' . . . When used (as here) with a singular noun in affirmative contexts, the word 'any' ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies *every* member of the class or group." (quoting OXFORD ENGLISH DICTIONARY (3d ed. Mar. 2016) (alterations and internal quotation marks omitted))). The FSIA's other exceptions to immunity likewise apply "in any case" or "in any action" without any express limitation to civil matters. *See* 28 U.S.C. § 1605(a), (b) (enumerating six exceptions to sovereign immunity that apply "in any case"); *id.* § 1605(d) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage."); *id.* § 1607 (enumerating counterclaim-based exceptions to immunity that apply "[i]n any action").

Even though the FSIA's commercial activity exception is not facially limited to civil cases, [REDACTED] argues nonetheless that courts cannot exercise jurisdiction over non-plaintiff foreign states in non-civil matters because 28 U.S.C. §1330(a), the FSIA's jurisdictional statute, confers jurisdiction only over "civil action[s] against a foreign state." Mov.'s Reply at 4

(citing 28 U.S.C. § 1330(a)). Section 1330(a) does not facially purport to be the exclusive basis for exercising jurisdiction over a non-plaintiff foreign state, however.[7] Jurisdiction here is proper under 28 U.S.C. § 3231, as the grand jury is investigating "offenses against the laws of the United States." 28 U.S.C. § 3231.

[REDACTED] posits that jurisdiction can lie only under Section 1330(a), not under Section 3231, because "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). "[O]btaining jurisdiction over a foreign state" under the FSIA, *id.*, however, requires merely that one of the FSIA's substantive exceptions to immunity apply, not also, as [REDACTED] argues, that jurisdiction lie under Section 1330(a) itself. Indeed, *Amerada Hess* expressly recognizes that jurisdiction over a foreign state may lie under a statute other than Section 1330(a), so long as one of the FSIA's exceptions to immunity applies. *See id.* at 438–39 ("Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner."). The Supreme Court elsewhere has explained that "subject matter jurisdiction in any [action against a foreign state] depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). *Amerada Hess* thus best is read merely to reject a litigant's ability to make an end-run around the FSIA's substantive immunity provisions by invoking a separate jurisdictional statute, such as the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as the plaintiff there attempted, *see*

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[7] The general diversity jurisdiction statute confers jurisdiction, subject to a greater-than-$75,000 amount in controversy requirement, over civil actions between "a foreign state . . . as plaintiff and citizens of a State or of different States," 28 U.S.C. §1332(a)(4), but does not confer jurisdiction over actions against foreign states.

488 U.S. at 432. A litigant who demonstrates that one of the FSIA's exceptions to immunity applies thus may rely on a jurisdictional statute other than Section 1330(a), such as Section 3231.

This reading of *Amerada Hess* best accords with the FSIA's language. Section 1604 provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States . . . *except* as provided in sections 1605 to 1607." 28 U.S.C. § 1604 (emphasis added). This mandatory phrasing naturally implies that *if* an exception to immunity in Sections 1605 through 1607 applies, a foreign state *shall not* have immunity. Sections 1605 through 1607 do not distinguish between civil and non-civil matters. *See id.* §§ 1605–07. To conclude that a foreign state is entitled to immunity in a non-civil matter despite that an exception to immunity applies "as provided in sections 1605 to 1607," *id.* § 1604, does not square with Section 1604.

Language in another section of the statute supports this reading of the FSIA. Section 1602 instructs courts to resolve "[c]laims of foreign states to immunity . . . in conformity with the principles *set forth in this chapter*." *Id.* § 1602 (emphasis added). The FSIA's exceptions to immunity, *see id.* §§ 1605–07, and Section 1602 are located in the same chapter, *see id.* ch. 97, while Section 1330(a) is located in a separate chapter, *see id.* ch. 85. To conclude that a foreign state has immunity because an action falls outside Section 1330(a)'s scope, notwithstanding that an exception to immunity otherwise would apply, would be to resolve a claim of immunity "in conformity with" "principles" other than those "set forth in this chapter," *id.* § 1602, in violation of Section 1602.

Nor would allowing litigants to invoke a district court's jurisdiction over a foreign state by relying on statutes other than Section 1330(a) render Section 1330(a) superfluous, as Section 1330(a)'s enactment allowed district courts to hear actions over which jurisdiction otherwise did not exist. Section 1330(a) grants the district courts "original jurisdiction without regard to

amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). At the time the FSIA was enacted, the general federal question jurisdiction statute, 28 U.S.C. § 1331, granted jurisdiction over "civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976), *amended by* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369.[8] Section 1330(a) thus allowed district courts to hear two categories of actions that Section 1331, as then written, did not. First, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of the amount in controversy. Second, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of whether the litigant had satisfied the well-pleaded complaint rule, which requires "that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Verlinden B.V.*, 461 U.S. at 494 (recognizing that the well-pleaded complaint rule does not apply to actions under Section 1330(a)).

Other specialized jurisdictional statutes in existence when the FSIA was enacted, such as the ATS, 28 U.S.C. § 1333 (admiralty, maritime, and prize), 28 U.S.C. § 1335 (interpleader), 28 U.S.C. § 1337 (commerce and antitrust), and 28 U.S.C. § 1338 (intellectual property), likewise did not grant the full scope of jurisdiction Section 1330(a) provides. *Cf. Amerada Hess*, 488 U.S. at 437 (observing that these jurisdictional statutes predated the FSIA). The FSIA's omission of any statute specifically conferring jurisdiction over non-civil matters against foreign states thus

[8] Section 1331(a)'s amount-in-controversy requirement did not apply to actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U.S.C. § 1331(a) (1976), but this exception rarely if ever would apply in an action against a foreign state.

simply may reflect Congress's judgment that the existing scope of federal jurisdiction over non-civil actions against foreign states required no expansion.

For these reasons, the FSIA's exceptions to immunity are co-extensive with the FSIA's scope of potential immunity, such that if FSIA immunity extends outside the civil context, so too do the exceptions.

2. The Commercial Activities Exception

The FSIA's commercial activities exception sets, out in three separate clauses, the circumstances under which a foreign state is not "immune from the jurisdiction of courts of the United States"—when "the action is based upon" (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "[C]ommercial activity" is "a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). An activity's "commercial character" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than . . . to its purpose." *Id.* A foreign state's acts are "commercial" within the FSIA's meaning "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Moreover, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "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." *Id.* (internal quotation marks omitted).

As to the exception's first clause, "commercial activity carried on in the United States by a foreign state" is "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). "Thus, to invoke the district court's jurisdiction under clause one, the plaintiff's claim must be based upon some commercial activity by the foreign state that had substantial contact with the United States." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014) (internal quotation marks omitted). As to the third clause, "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity," but such effect need not be "substantial" or "foreseeable." *Weltover, Inc.*, 504 U.S. at 618 (alteration and internal quotation marks omitted); *see also Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) ("A direct effect is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." (alterations and internal quotation marks omitted)).

The Supreme Court has explained that "an action is 'based upon' the particular conduct that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("[A] court's jurisdiction under the Foreign Sovereign Immunities Act turns on the 'gravamen,' or 'essentials,' of the plaintiff's suit." (quoting *Sachs*, 136 S. Ct. at 395–97)).[9] "[T]he particular conduct that constitutes the 'gravamen,'" *Sachs*, 136 S. Ct. at 396, of an action to compel enforcement of or quash a grand jury subpoena most sensibly is said to be such conduct (1) that is part of "the general subject of the grand jury's investigation" and (2) as to which there exists a "reasonable

[9] In *Nelson v. Saudi Arabia*, the Supreme Court said that "the phrase 'based upon,'" as used in Section 1605(a)(2), "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. 349, 357 (1993). The D.C. Circuit, relying on *Nelson*'s language, explained that "a claim is 'based upon' commercial activity if the activity establishes one of the elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Odhiambo*, 764 F.3d at 36. More recently, however, *Sachs* rejected a "one-element approach" to Section 1605(a)(2), holding that a court instead must "zero[] in on the core of [a plaintiff's] suit." 136 S. Ct. at 396.

possibility that the category of materials the Government seeks will produce information" that is "relevant." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). This yields the following rule: a grand jury subpoena matter fits within the commercial activity exception if an activity or act of the kind Section 1605(a)(2) describes is part of the general subject of the grand jury's investigation, and there exists a reasonable possibility that the category of materials the subpoena identifies will produce information relevant to such activity or act.[10]

3. Analysis

The SCO argues that the commercial activity exception applies here. SCO's Opp'n at 10. Through an *ex parte*, *in camera* submission, the SCO has elaborated on the relationship between [REDACTED] Section 1605(a)(2) activities or acts and the materials sought to be produced. Having thoroughly reviewed this *ex parte*, *in camera* submission, the Court is satisfied that the SCO has met its burden to show that (1) a Section 1605(a)(2) activity or act is part of the general subject of the grand jury's investigation and (2) a reasonable possibility exists that the instant subpoena will produce information relevant to such activity or act. *Cf. United States v. Nixon*, 418 U.S. 683, 700 (1974) ("Our conclusion is based on the record before us, much of which is under seal.").[11] The contents of the SCO's *ex parte*, *in camera* submission overcome any

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[10] The SCO argues that the relevant standard here is not *R. Enterprises, Inc.*'s standard to determine a grand jury subpoena's relevancy, but rather the standard to determine whether a court has personal jurisdiction to enforce a subpoena compelling production of [REDACTED]. *See* SCO's Opp'n at 10–11. The commercial activity exception applies only where a Section 1605(a)(2) activity or act "constitutes the 'gravamen' of the suit," however. *Sachs*, 136 S. Ct. at 396 (2015). Although establishing personal jurisdiction over an entity is necessary to obtain relief in the sense that a court lacks authority to grant relief against an entity not within the court's personal jurisdiction, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1779 (2017), personal jurisdiction alone cannot ordinarily be said to be the "gravamen" of a matter as *Sachs* uses that term, 136 S. Ct. at 396. A Section 1605(a)(2) activity or act thus may establish a court's personal jurisdiction over an entity without establishing a court's subject-matter jurisdiction under the FSIA.

[11] On September 14, 2018, the Court directed the government to submit an *ex parte*, *in camera* submission "addressing the following question: whether an act or activity of the kind described in 28 U.S.C. § 1605(a)(2) establishes a reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Minute Order, dated Sept. 14, 2018. On September 17, 2018, the SCO filed a submission responsive to the Court's order.

inference one otherwise might draw from [REDACTED]." Mov.'s Mem. at 6 (parentheses omitted).

[REDACTED] argues that the commercial activity exception does not apply because the SCO "argues generically that the exception applies because [REDACTED]" without specifying any "jurisdictional nexus" between a Section 1605(a)(2) activity or act and the subpoenaed materials. Mov.'s Reply at 4. Obviously, [REDACTED] cannot address the contents of the SCO's *ex parte*, *in camera* submission, which persuades the Court that a nexus exists between [REDACTED] Section 1605(a)(2) activities or acts and the materials sought to be produced, and thus that the instant matter is "based upon" such activities or acts. The Court recognizes [REDACTED] difficult position in not being privy to the information reviewed and relied upon in resolving the pending motion. *See In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) ("[A]ppellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case."). The law is well-settled, however, that courts may "use *in camera*, *ex parte* proceedings to determine the propriety of a grand jury subpoena" when "necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998); *see also In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006); *In re Grand Jury Investigation*, No. MC 17-2336 (BAH), 2017 WL 4898143, at *7 (D.D.C. Oct. 2, 2017). "The alternatives" to *ex parte*, *in camera* review here would "sacrific[e] the secrecy of the grand jury." *John Doe Corp.*, 675 F.2d at 490; *see also R. Enters.*, 498 U.S. at 299 ("Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings.'" (internal quotation marks omitted)).

For these reasons, the FSIA does not immunize [REDACTED] from complying with the subpoena.

B. Compliance With the Subpoena Would Not Be Unreasonable or Oppressive

[REDACTED] further argues that compliance with the grand jury subpoena would require violating [REDACTED], and thus be unreasonable and oppressive. [REDACTED] fails to show, however, that the subpoena and foreign law impose conflicting obligations and, in any event, the grand jury's strong need for the materials sought and [REDACTED] warrant the subpoena's enforcement notwithstanding any foreign [REDACTED]. Foreign law thus does not excuse [REDACTED] from complying with the subpoena.

1. Compliance With the Instant Subpoena Would Not Violate Foreign Law

[REDACTED] argues that complying with the subpoena would require violating [REDACTED].. For the reasons that follow, [REDACTED] fails to show that the grand jury subpoena and foreign law impose conflicting legal obligations.

[REDACTED].[12] [REDACTED].

[REDACTED].

[REDACTED] cites no contrary authority [REDACTED], relying instead on conclusory declarations by [REDACTED] retained counsel, which themselves cite no legal authority on this question of [REDACTED]. The Court gives these declarations little weight. *See Doak v. Johnson*, 798 F.3d 1096, 1107 (D.C. Cir. 2015) (declining, in the summary judgment context, to credit "bare, conclusory statement[s] . . . in [a] declaration").

[REDACTED]. As an initial matter, the Court teased this argument from the declaration, as [REDACTED] failed to raise this argument in its briefs. This argument is therefore waived.

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12 [REDACTED].

See Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1142 (D.C. Cir. 1999) ("We routinely and for good reason refuse to consider contentions not raised in a party's brief."). The argument fares no better on the merits, [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED]. [REDACTED] identifies no contrary authority other than assertions by [REDACTED] neither of whom cite or analyze Country A legal authorities. The Court simply need not credit such conclusory opinions. *See Doak*, 798 F.3d at 1107. [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

Finally, [REDACTED] argued at the September 11 hearing and via declarations of [REDACTED], though not through its briefs, [REDACTED]. [REDACTED] has waived this argument in two ways. First, [REDACTED] failure to raise this argument in any briefs constitutes waiver. *See Berger*, 170 F.3d at 1142. Second, [REDACTED] are entirely conclusory, offering no substantive analysis and failing even to identify [REDACTED]; *see also Doak*, 798 F.3d at 1107; *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (internal quotation marks omitted)).

For these reasons, compliance with the subpoena at issue would not require [REDACTED] to violate foreign law.

2. Enforcement of the Grand Jury Subpoena is Required Even If Disclosure Violates Foreign Law

Even if complying with the grand jury subpoena would require [REDACTED] to violate foreign law, the government's important interest in obtaining the materials sought [REDACTED] justify compelling compliance with this subpoena nonetheless. "[A]lthough courts recognize comity as an important objective, there is little doubt that a United States Court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary." *In re Sealed Case*, 832 F.2d 1268, 1283 (D.C. Cir. 1987) (alterations and internal quotation marks omitted); *see also In re Sealed Case*, 825 F.2d at 497–98 ("[A] court's ability to order a person to produce documents in contravention of foreign law [] is thought to be acceptable.").[13] In the grand jury context, courts regularly have concluded that government law enforcement interests outweigh [REDACTED].[14]

Section 442(1)(c) of the *Restatement (Third) of the Foreign Relations Law of the United States* directs that "[i]n deciding whether to issue an order directing production of information located abroad," a court "should take into account" (1) "the importance to the investigation . . . of the documents or other information requested," (2) "the degree of specificity of the request," (3) "whether the information originated in the United States," (4) "the availability of alternative

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[13] *Braswell v. United States* held that a "custodian of corporate records" cannot "resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment," 487 U.S. 99, 100 (1988), abrogating that aspect of *In re Sealed Case* holding otherwise, *see* 832 F.2d at 1274–82; *see also In re Sealed Case (Gov't Records)*, 950 F.2d 736, 739 n.5 (D.C. Cir. 1991) ("*Braswell* effectively rejects the portion of this court's opinion in *In re Sealed Case* . . . that recognizes a corporate custodian's right to resist a grand jury subpoena on the ground that the act of production itself might incriminate him."). *Braswell* did not purport to abrogate the aspect of *In re Sealed Case* recognizing district courts' power to enforce grand jury subpoenas compelling disclosure prohibited by foreign law, however, and *In re Sealed Case* remains good law in this respect.

[14] [REDACTED].

means of securing the information," and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987). The Supreme Court, citing a draft version of Section 442(1)(c), identified these factors as "relevant to any comity analysis." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).[15]

The subpoena at issue cannot be faulted for insufficient specificity, and the SCO does not argue that the information sought originated in the United States. The SCO's *ex parte*, *in camera* submission, meanwhile, persuades the Court that the materials sought are important to the grand jury's investigation and that failure to secure the materials would undermine important interests of the United States. [REDACTED]. For these reasons, under the circumstances presented, the Court concludes that the subpoena should be enforced.

Section 442(2) of the *Restatement (Third)* further provides that "[i]f disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national," an American court "*may* require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available," and "*should not ordinarily* impose sanctions of contempt . . . on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a)." *Restatement (Third)* § 442(2)(a)–(b) (emphases

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15 [REDACTED].

added). As the emphasized terms indicate, however, these provisions are not absolute, and their application may be inappropriate under particular circumstances. [REDACTED].[16] [REDACTED].

In re Sealed Case, which voiced "considerable discomfort" with the idea "that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question," 825 F.2d at 498, involved circumstances materially different than those presented here. The consideration that was "[m]ost important to [the *Sealed Case* panel's] decision [wa]s the fact that" contempt "sanctions represent[ed] an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory." *Id.* That consideration is absent here, as [REDACTED] only substantive arguments assert that compliance with the subpoena would require [REDACTED]. *See* Mov.'s Mem. at 7–8. Moreover, in *Sealed Case* "the government concede[d] that it would be impossible for the bank to comply with the contempt order without violating the laws of Country Y on Country Y's soil," 825 F.2d at 498. Here, in contrast, the SCO asserts that compliance with the subpoena would not require [REDACTED] to violate foreign law, and the record before the Court supports this conclusion, for the reasons discussed above. [REDACTED]. As already discussed, [REDACTED]. The *Sealed Case* panel "emphasize[d] [] the limited nature of our holding on this issue," and explained that "[i]f any of the facts we rest on here were different, our holding could well be different." *Id.* Given the significant factual dissimilarity between that and the instant matter, enforcing the instant grand jury subpoena does not cause the "considerable discomfort," *id.* at 498, the *Sealed Case* panel expressed.

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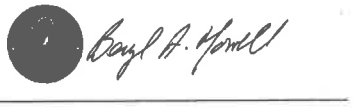
[16] [REDACTED]

IV. CONCLUSION

For the foregoing reasons, [REDACTED] Motion to Quash Grand Jury Subpoena is denied. [REDACTED] shall complete production of the subpoenaed records by October 1, 2018.

An appropriate Order accompanies this Memorandum Opinion.

Date: September 19, 2018



BERYL A. HOWELL
Chief Judge

ATTACHMENT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **Filed Under Seal**

MEMORANDUM AND ORDER

On September 19, 2018, the Court denied [REDACTED] to Quash Grand Jury Subpoena, ECF No. 3, and ordered [REDACTED] to complete production of the subpoenaed records by October 1, 2018. Order, ECF No. 19. Prior to the October 1, 2018 deadline, [REDACTED] appealed the denial of its motion to quash, *see* Notice of Appeal, ECF No. 22, and sought a stay of the September 19 Order, [REDACTED] Opp'n Gov.'s Mot. ("Opp'n"), Ex. A, Emergency Mot. Stay District Ct.'s Order Compelling [REDACTED] Respond Grand Jury Subpoena No. 7409 at 12, ECF No. 29. On October 3, 2018, the D.C. Circuit dismissed that appeal for lack of appellate jurisdiction as [REDACTED] had not yet been held in contempt, and dismissed [REDACTED] motion for a stay as moot. *See In re Grand Jury Subpoena*, No. 18-3068 (Oct. 3, 2018) (citing *United States v. Ryan*, 402 U.S. 530, 532 (1971) and *In re Sealed Case*, 827 F.2d 776, 777 (D.C. Cir. 1987) (per curiam)).

The next day, on October 4, 2018, the government filed the pending Motion to Hold the Witness in Contempt for Failure to Comply with the Court's September 19, 2018 Order ("Contempt Mot."), ECF No. 27, even though the Court of Appeals has not yet issued its mandate. In accordance with the Court's scheduling order, see Min. Order (Oct. 4, 2018), [REDACTED] filed its opposition, Opp'n, ECF No. 29, and the government filed its reply, *see*

Gov.'s Reply Supp. Contempt Mot. ("Reply"), ECF No. 28. A hearing was held on October 5, 2018, *see* Min. Entry (Oct. 5, 2018), and the motion is now ripe.

The parties dispute this Court's jurisdiction to entertain the government's contempt motion prior to receiving the mandate from the Court of Appeals. In the government's view, a district court maintains authority to enforce properly issued judgments if no stay pending appeal has been issued. *See* Contempt Mot. at 5 (citing *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987); *SEC v. Diversified Growth Corp.*, 595 F. Supp. 1159, 1170 (D.D.C. 1984)); *see also* Reply at 1–3 (citing *Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 638 (7th Cir. 2006); *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1222–23 (8th Cir. 2006); *Deering Milliken, Inc. v. FTC*, 647 F. 2d 1124, 1128–29 (D.C. Cir. 1978)).

[REDACTED] cites countervailing authority. *See* Opp'n at 3. In *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993), the D.C. Circuit found that there was no need to stay proceedings in the district court once a party had properly appealed because the appeal divested the district court of its jurisdiction. *Princz*, 998 F. 2d at 1; *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). That divestiture lasts until the appellate court issues the mandate. *See, e.g.*, *Kusay v. United States*, 62 F.3d 192, 195 (7th Cir. 1995); *Zaklama v. Mount Sinai Med. Ctr.*, 906 F.2d 645, 649 (11th Cir. 1990). [REDACTED] sovereign immunity further counsels against the exercise of jurisdiction, it argues, because of comity concerns. *See* Opp'n 5–8. [REDACTED] arguments are not persuasive.

First, [REDACTED] reiterates arguments that its sovereignty confers immunity both from producing documents in response to the grand jury subpoena and from being held in contempt prior to the issuance of a mandate, but this Court has already ruled that [REDACTED] is not entitled to immunity. *See* Mem. Op., ECF No. 20. The forum in which [REDACTED] can continue pressing its sovereignty arguments is a properly taken appeal.

Second, while *Griggs* instructs that this Court does not have jurisdiction over the appealed aspects of a case until the mandate returns, *Griggs* does apply here. The question on appeal is [REDACTED] immunity. The Contempt Motion raises a question separate: has [REDACTED] complied with the Order? Of course, should [REDACTED] prevail on appeal, there will have been no need to comply. That possibility, however, is present in every appeal and is not one that has persuaded any court that, absent a stay, a district court is without jurisdiction to enforce its orders pending appeal. The precedent is voluminous and convincing. *See Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988) (ruling that a district court did not lose jurisdiction once declaratory judgment was appealed because 28 U.S.C. § 2202's authorization of "further relief" "carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective" (quoting Edwin Borchard, DECLARATORY JUDGMENTS 441 (2d ed. 1941)); *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1201–02 (11th Cir. 2016) ("Absent entry of a stay on appeal—which Trident Atlanta failed to obtain here—the District Court retained jurisdiction to enforce its orders. Thus, we reject Trident Atlanta's frivolous jurisdictional argument."); *In re White-Robinson*, 777 F.3d 792, 796 (5th Cir. 2015) (finding that, unless a bankruptcy court's ruling is stayed pending appeal, that court retains jurisdiction to engage in proceedings to enforce its own rulings "through any appropriate means,

including a civil contempt order"); *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006) (upholding district court's order holding corporation in civil contempt and imposing sanctions since "district court retained jurisdiction to enforce its judgment notwithstanding C&A's appeal on the merits"); *Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 638 (7th Cir. 2006) (finding district court retained jurisdiction to hold contempt proceedings following defendant's alleged violation of a consent decree while appeal of that decree was pending, explaining that "one established exception to the rule against simultaneous exercise of jurisdiction is that the district court may enforce its judgment while an appeal to test that judgment's validity proceeds"); *Chao v. Koresko*, Nos. 04-3614, 05-1440, 05-1946, 05-2673, 2005 WL 2521886, at *5 (3d Cir. Oct. 12, 2005) (finding that appeal did not "disturb the District Court's jurisdiction to enforce" its orders with civil contempt citations); *Acevedo-Garcia v. Vera-Monroig*, 368 F.3d 49, 58 (1st Cir. 2004) (affirming holding of defendant in contempt for failure to comply with writ of execution while appeal of underlying judgment was pending); *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 76–77 (5th Cir. 1995) ("[U]ntil the judgment has been properly stayed or superseded, the district court may enforce it through contempt sanctions." (internal quotation marks and alteration omitted)); *United States v. Lawn Builders of New Eng., Inc.*, 856 F.2d 388, 394–95 (1st Cir. 1988) (finding district court properly rejected argument that district court lacked jurisdiction to hold party in contempt because his appeal of the order of enforcement was still pending since party had neither applied for, nor received, a stay of the district court's enforcement order); *Island Creek Coal Sales Co. v. Gainesville*, 764 F.2d 437, 440 (6th Cir. 1985) ("Where, as here, the district court is attempting to supervise its judgment and enforce its order through civil contempt proceedings, pendency of appeal does not deprive it of jurisdiction for these purposes."); *accord Maness v. Meyers*, 419

U.S. 449, 458 (1975) ("If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.").

This principle holds when, as here, the contempt citation is issued for failure to comply with a court order requiring the production of records in response to a subpoena and the contemnor has appealed the merits of the enforcement order. *See, e.g.*, *In re Grand Jury Subpoenas Duces Tecum*, 85 F.3d 372, 375–76 (8th Cir. 1996) (upholding district court's authority to require payment of contempt fines for failing to comply with subpoenas duces tecum after respondents had noticed their appeal and a stay of the imposition of contempt sanctions pending appeal had been denied); *Nat'l Labor Relations Bd. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (finding that, despite general rule that a notice of appeal divests the district court of its jurisdiction, the district court retains jurisdiction to "enforce its judgment so long as the judgment has not been stayed or superseded," and, consequently, district court was authorized to issue contempt citation to President of company that failed to comply with a subpoena to produce certain documents when president's appeal was pending (internal quotation marks omitted) (citing *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128–29 (D.C. Cir. 1978)); *Brown v. Braddick*, 595 F.2d 961, 965 (5th Cir. 1979) (upholding jurisdiction of the district court to hold civil contempt proceedings for failure to comply with subpoena while appeal of the district court's judgment was pending, where defendant failed to ask the district court for a stay pending appeal and to post *supersedeas* bond as required by Federal Rule of Civil Procedure 62(d)); *Morisseau v. DLA Piper*, 707 F. Supp. 2d 460, 462 (S.D.N.Y. 2010) (finding "no inconsistency between this Court enforcing an order that remains in full force and effect

notwithstanding plaintiff's appeal from that [discovery] order," and issuing contempt citation); *United States v. Schulz*, No. 07-cv-0352, 2008 WL 2626567, at *2, *11 (N.D.N.Y. Apr. 28, 2008) (holding defendants in contempt for failure to produce records as required by injunction, and rejecting as "without merit" argument that defendants were not obligated to comply while their motion for rehearing *en banc* before Second Circuit was pending and "no Mandate has been issued by the Clerk at the Second Circuit" (internal quotation marks omitted)). At least two courts have called the very argument that [REDACTED] raises here "frivolous." *See Sergeeva*, 834 F.3d at 1201–02; *In re Gushlak*, No. 11-mc-218, 2012 WL 2564523, at *4 (E.D.N.Y. July 2, 2012).

There is no dispute that [REDACTED] has been in violation of the Order since October 1, 2018. Given that the Court retains jurisdiction to enforce its orders, and upon consideration of the government's motion for civil contempt, the opposition filed by [REDACTED], and the arguments presented at the hearing held on October 5, 2018, it is hereby

ORDERED that [REDACTED] is found in civil contempt of the Court's September 19, 2018 Order; and it is further

ORDERED that [REDACTED] is assessed a fine of $50,000[1] per day, payable to the United States, until such time as [REDACTED] is willing to complete production of the subpoenaed records, provided that such daily fines shall not exceed the life of the term of the

[1] Although the government's contempt motion proposes a fine of $10,000 per day, the government's counsel acknowledged at the hearing that this amount may be low. Indeed, a fine of not more than $10,000 is the amount provided in 28 U.S.C. § 1826(c) to be imposed on individuals who escape, attempt to escape, or aid others in escaping from lawful confinement. In imposing $50,000 per day, the Court balances, on the one hand, a due regard for [REDACTED] status as an entity of a foreign sovereign deserving of international comity and, on the other hand, both the government's need for prosecutorial expedience in a matter of great concern in the United States and in consideration of the sanction needed to coerce [REDACTED] compliance. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947) ("[W]here the purpose is to make the defendant comply ... [the court] must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired."); [REDACTED].

grand jury, including extensions, before which such refusal to comply with the Court's Order occurred; and it is further

ORDERED that the civil contempt sanctions against [REDACTED] shall be stayed pending appeal, shall not accrue during the pendency of the appeal, and shall only begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order, provided the following:

1. That [REDACTED] files a notice of appeal by 5:00 p.m. on October 9, 2018;
2. That [REDACTED] agrees to file a joint motion for an expedited briefing schedule in the court of appeals, pursuant to which [REDACTED] opening brief will be filed by no later than October 23, 2018; the government's responsive brief will be filed by no later than November 7, 2018; and [REDACTED] reply brief (if any) will be filed by no later than November 14, 2018; and
3. That [REDACTED] preserve all information called for by the subpoena in this matter during the pendency of any appeal.

It is further **ORDERED** that if the Court of Appeals were to conclude that this Court lacks jurisdiction to enter this Order at this time because the Court of Appeals has not yet issued its mandate in Case No. 18-3058 (D.C. Cir.), this Order shall be deemed effective on the date that the Court of Appeals issues its mandate in that case.

SO ORDERED.

DATE: October 5, 2018

Beryl A. Howell
Chief Judge

ATTACHMENT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **Filed Under Seal**

MEMORANDUM AND ORDER

On September 19, 2018, this Court denied [REDACTED] Motion to Quash Grand Jury Subpoena No. 7409. *See* Order (Sept. 19, 2018), ECF No. 19. [REDACTED] was given until October 1, 2018 to complete production of the subpoenaed records. *Id.* October 1 passed without [REDACTED] compliance and, on October 4, 2018, the government moved to have [REDACTED] held in contempt for violating the September 19, 2018 Order. *See* Gov.'s Mot. for Contempt, ECF No. 27. On October 5, 2018, the Court granted the government's motion to hold [REDACTED] in contempt, *see* Mem. and Order (Oct. 5, 2018), ECF No. 30, and assessed a daily fine of $50,000 against [REDACTED], *id.* at 6, which fine "shall only begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order," *id.* at 7.

[REDACTED] appealed. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. 2018). After expedited briefing, the D.C. Circuit, on December 18, 2018, issued both an abridged opinion affirming the October 5, 2018 Order and a mandate. *See* Mandate, ECF No. 43; *see also* Judgment, ECF No. 43-1. Four days later, on December 22, 2018, [REDACTED] asked the Supreme Court to stay this Court's October 5, 2018 Order. *See* Application for a Stay, *In re Grand Jury Subpoena*, No. 18A669 (2018). The next day, the Supreme Court stayed this Court's

October 5, 2018 Order, pending a response from the government. Order (Dec. 23, 2018), *In re Grand Jury Subpoena*, No. 18A669. Finally, on January 8, 2019, after briefing on [REDACTED] application for a stay of this Court's October 5, 2018 Order was complete, the Supreme Court vacated the previously entered stay. Order (Jan. 8, 2019), *In re Grand Jury Subpoena*, No. 18A669. That same day, the D.C. Circuit issued a more thorough opinion explaining the rationale for affirming this Court's October 5, 2018 Order. *See generally In re Grand Jury Subpoena*, No. 18-3071, 2019 WL 125891 (D.C. Cir. Jan. 8, 2019).

Now before this Court is [REDACTED] Combined Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [REDACTED] Property is Immune from Execution or Attachment and Motion for a Stay of this Court's Contempt Order Pending the Supreme Court's Disposition of [REDACTED] Petition for a Writ of Certiorari ("[REDACTED] Mot."), ECF No. 45. For the following reasons, [REDACTED] motion is denied in part.[1]

Four factors inform the propriety of staying a court order pending further judicial review: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Together, the four factors create a "stringent requirement" that limits a party's ability to "obtain the extraordinary relief of a stay pending appeal." *Citizens for*

[1] The Court reserves ruling on [REDACTED] Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [REDACTED] Property is Immune from Execution or Attachment, until briefing on that aspect of the motion is complete.

Responsibility and Ethics in Wash. v. Fed. Election Comm'n, 904 F.3d 1014, 1016, 1017 (D.C. Cir. 2018).

Here, [REDACTED] claims to have satisfied all four factors, thus warranting a stay of the October 5, 2018 Order. Yet, [REDACTED] has not satisfied any of the four. As for [REDACTED] likelihood of success on the merits, this Court already has issued a memorandum opinion explaining that this Court has jurisdiction over [REDACTED] under 28 U.S.C. § 3231; that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, does not immunize [REDACTED] from this Court's jurisdiction because, if the FSIA applies to criminal cases, so too do the FSIA's exceptions; that [REDACTED] is excepted from immunity because of the FSIA's commercial-activity exception, *see id.* § 1605(a)(2); and that the grand jury subpoena with which [REDACTED] must comply is neither unreasonable nor oppressive. *See generally* Mem. Op. (Sept. 19, 2018), ECF No. 20. The D.C. Circuit affirmed on each point. *See generally In re Grand Jury Subpoena*, 2019 WL 125891. While [REDACTED] motion repeats the position that the FSIA immunizes [REDACTED] in this matter, *see* [REDACTED] Mot. at 11–17, no part of [REDACTED] motion persuades that both this Court and the D.C. Circuit likely erred in reaching a contrary conclusion. If, as [REDACTED] maintains, the Supreme Court likely will reverse this Court's order, the Supreme Court could have left in place the administrative stay that the Supreme Court entered on December 23, 2018; of course, the Supreme Court, without dissent, lifted that stay on January 8, 2019. *See In re Grand Jury Subpoena*, No. 18A669.

As to the likelihood of irreparable harm, [REDACTED] asserts that each day the October 5, 2018 Order remains in effect is a new blow to the dignity of a sovereign nation. [REDACTED] Mot. at 17. That may be true, but in passing the FSIA, Congress codified the

"careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018). [REDACTED], which is subject to the FSIA's commercial-activity exception, is not suffering any dignitary harm that Congress did not account for and explicitly permit. To the extent that [REDACTED] attributes particular harm to a monetary contempt fine, that argument falls flat because "there is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court's inherent contempt power." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011) (citing *Autotech Techs. v. Integral Research & Dev.*, 499 F.3d 737, 744 (7th Cir. 2007)). Accordingly, "the FSIA does not abrogate a court's inherent power to impose contempt sanctions on a foreign sovereign." *Id.* at 380; *see also Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148, 155 (D.D.C. 2013) (granting a motion to sanction a foreign sovereign $50,000 per day).

Moving to the effect of a stay on the government, [REDACTED] argues that granting a stay will not impede any government interest because the October 5, 2018 Order is, in any event, unenforceable. [REDACTED] Mot. at 18. Yet, [REDACTED] position on the enforceability of the October 5, 2018 remains unresolved. Additionally, although [REDACTED] underscores the speed at which litigation in this case has proceeded, the government issued the grand jury subpoena at the center of this case on July 11, 2018. *See* Mot. to Quash, Ex. A., Grand Jury Subpoena, ECF No. 3-1. Each day that [REDACTED] refuses to comply with a subpoena that now has the imprimatur of both this Court and the D.C. Circuit further delays a nearly six-month process. Staying an order expressly intended to pressure [REDACTED] to comply with that valid subpoena only compounds the delay.

Finally, according to [REDACTED], the public's interest in the sound application of international law militates for a stay. [REDACTED] Mot. at 18–20. On this front, [REDACTED] is right, and the questions of international law raised in this case are concededly delicate. Yet, once again, by enacting the FSIA, Congress established a legal regime that balances respect for a foreign sovereign's dignity, concerns about possible reciprocity, and the need for, in some cases, United States courts to exercise jurisdiction over a foreign sovereign. *See Rubin*, 138 S. Ct. at 822. For reasons already covered, *see* Mem. Op. (Sept. 19, 2018) and *see also In re Grand Jury Subpoena*, No. 18-3071, this case meets Congress' specifications for when concerns about foreign sovereignty yield to the United States' interest in the exercise of jurisdiction, and the powers inherent in that jurisdiction.

For the foregoing reasons, it is hereby

ORDERED that [REDACTED] Combined Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [REDACTED] Property is Immune from Execution or Attachment and Motion for a Stay of this Court's Contempt Order Pending the Supreme Court's Disposition of [REDACTED] Petition for a Writ of Certiorari, ECF No. 45, is **DENIED IN PART**.

SO ORDERED.

DATE: January 10, 2019

Beryl A. Howell
Chief Judge

ATTACHMENT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **Filed Under Seal**

MEMORANDUM AND ORDER

On January 8, 2019, the government requested that a status conference be scheduled, without identifying the specific issues requiring the Court's involvement. *See* Letter (Jan. 8, 2019), ECF No. 44; *see also* Min. Order (Jan. 9, 2019) (granting request). The next day, [REDACTED] filed a Combined Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [REDACTED] Property is Immune from Execution or Attachment and Motion for a Stay of this Court's Contempt Order Pending the Supreme Court's Disposition of [REDACTED] Petition for a Writ of Certiorari ("[REDACTED] Motion"), ECF No. 45.

At the status conference, held on January 10, 2019, the parties raised three issues: (1) [REDACTED]; (2) the briefing schedule for [REDACTED] Motion; and (3) the date that sanctions under the Court's October 5, 2018 Order, ECF No. 30, would begin accruing. Those three issues, as well as two other outstanding issues, are addressed in this Memorandum and Order.

1. Law Firm's Request to Make a Public Statement

As many members of the media have speculated, and as the parties are plainly aware, this case arises from Special Counsel Robert Mueller's investigation into possible interference in the

2016 presidential election. Consequently, this case has attracted and continues to attract inordinate media attention. *See, e.g.*, Josh Gerstein & Darren Samuelsohn, *Mueller Link Seen in Mystery Grand Jury Appeal*, POLITICO (Oct. 24, 2018), https://www.politico.com/story/2018/10/24/mueller-investigation-grand-jury-roger-stone-friend-938572; Katelyn Polantz, *Mystery Mueller Mayhem at a Washington Court*, CNN (Dec. 15, 2018), https://www.cnn.com/2018/12/14/politics/mueller-grand-jury-mysterious-friday/index.html; Robert Barnes, Devlin Barrett, & Carol D. Leonnig, *Supreme Court Rules Against Mystery Corporation from 'Country A' Fighting Subpoena in Mueller Investigation*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-against-mystery-corporation-from-country-a-fighting-subpoena-in-mueller-investigation/2019/01/08/a39b61ac-0d1a-11e9-84fc-d58c33d6c8c7_story.html.

When the D.C. Circuit issued the abridged judgment affirming this Court's October 5, 2018 Order, the judgment disclosed that the subpoena recipient is a foreign-owned corporation. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018) (referring to the subpoena recipient as "a corporation … owned by Country A"). [REDACTED]

At the January 10, 2019 status conference, [REDACTED] counsel informed the Court that attorneys and employees at their law firm have received threatening messages. [REDACTED]

The government objected to [REDACTED] request, arguing that any public comment [REDACTED].

[REDACTED]. Thus, the parties were instructed, by January 11, 2019, to submit a joint status report proposing a written order. Min. Order (Jan. 10, 2019). Rather than submitting

jointly, the parties submitted competing proposals. *See* [REDACTED] 1st Proposed Order, ECF No. 51-1; Gov't's Proposed Order, ECF No. 53-1.

[REDACTED] initial proposed order would broadly preclude either party from making "any statement to the press other than 'No comment.'" *See* [REDACTED] 1st Proposed Order. Conversely, the government proposed that the Court make a finding of "a substantial likelihood that dissemination of the proposed disclosure would materially prejudice the due administration of justice and be adverse to [REDACTED] interests," [REDACTED]. Thereafter, on January 15, 2019, [REDACTED] supplemented its prior proposal, *see* [REDACTED] Supp. Proposed Order, ECF No. 55-1. The new proposed order would restrict [REDACTED] counsel from making any statement [REDACTED]. Although [REDACTED] counsel maintains that any limitation of its public statements violates the First Amendment, the supplemental proposed order, [REDACTED] counsel contends, does the least harm. *See* Supp. to [REDACTED] Status Report at 2–4, ECF No. 55.

Each party's initial proposal is too broad. For example, [REDACTED] proposal is limitless, omitting even any language that, at a minimum, would confine the Court's order to this case. At the same time, the government's proposal would preclude [REDACTED]. Only [REDACTED] supplemental proposal matches the needs of this case. The Court's order must be limited so as to enforce only the limited measure of secrecy needed to ensure the fair administration of justice and the continuing requirement of grand jury secrecy. Therefore, as directed at the status conference, [REDACTED] counsel is ordered not to make any public statement or statement to the press [REDACTED] beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court.

2. Briefing Schedule on [REDACTED] Motion

The second issue raised at the January 10, 2019 status conference and addressed separately in the parties' post-conference submissions is the briefing schedule for [REDACTED] Motion, insofar as [REDACTED] seeks an order declaring the Court's October 5, 2018 Order unenforceable. While the Court promptly issued a briefing schedule, *see* Min. Order (Jan. 11, 2019), that order merits further explanation.

The parties were unable to reach an agreement about a schedule to govern briefing for [REDACTED] Motion. [REDACTED], noting that this matter has been litigated expeditiously at every other juncture and citing the unfairness of the government reserving, on the one hand, the right to request escalation of the contempt fines and, on the other hand, resisting an expedited briefing schedule, asked that the government be ordered to respond to [REDACTED] Motion by January 14, 2019, with [REDACTED] reply due January 16, 2019. *See* [REDACTED] Status Report at 1–2, ECF No. 51. The government, for its part, noting the need to consult with other government components before submitting a response during a period of a partial government shutdown, asked to have until January 23, 2019 to respond to [REDACTED] Motion, in effect applying this Court's default rule that parties in criminal matters have 14 days to respond to a motion. *See* Gov't's Status Report at 2, ECF No. 53 (citing Local Criminal Rule 47(b)).

Neither party's proposed schedule was adopted; instead, the scheduling order provides the government until January 18, 2019 to respond to [REDACTED] Motion and [REDACTED] until January 22, 2019 to reply. *See* Min. Order (Jan. 11, 2019).

To date, the government has, as [REDACTED] underscores, pushed for prompt resolution of legal issues raised in this case, and the need for expeditious resolution of all contested legal issues arising from this grand jury remains pressing, not only because of the

issues at stake but also [REDACTED]. Accordingly, the scheduling order already entered affords the government adequate time for the necessary consultations without permitting needless delay during a time when [REDACTED] is subject to the accrual of significant contempt fines, which the government declined to agree not to enforce during the pendency of [REDACTED] Motion. [REDACTED] Status Report at 2.

3. Accrual of the Contempt Fines

Third, at the January 10, 2019 status conference, the Court inquired of the parties when each side understood [REDACTED] $50,000 daily fine to begin accruing, in accordance with the Court's October 5, 2018 Order. To recap the relevant background, on October 5, 2018, the Court granted the government's motion to hold [REDACTED] in contempt for violating this Court's September 19, 2018 Order, *see* Mem. and Order (Oct. 5, 2018), ECF No. 30, and assessed a daily fine of $50,000 against [REDACTED], *id.* at 6, which fine "shall only begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order," *id.* at 7. [REDACTED] appealed but lost. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018). The D.C. Circuit affirmed the October 5, 2018 Order and issued the mandate on December 18, 2018. *See* Mandate, ECF No. 43. After three business days had elapsed from the issuance of the mandate, the Supreme Court entered an order that stayed "the order of the United States District Court for the District of Columbia holding the applicant in contempt, including the accrual of monetary penalties." Order (Dec. 23, 2018), *In re Grand Jury Subpoena*, No. 18A669. The Supreme Court's stay was then lifted on January 8, 2019. Order (Jan. 8, 2019), *In re Grand Jury Subpoena*, No. 18A669.

At the status conference, the parties agreed that fines started accruing on January 9, 2019, the day after the Supreme Court stay was lifted. Status Conf. Tr. (Jan. 10, 2019) at 19:1–6, 21:8–

11. By that time, more than seven business days had passed from the issuance of the D.C. Circuit's mandate. The parties' understanding of the accrual date differed from the Court's. Thus, the Court asked the parties to put their understanding of the accrual date in writing. *Id.* at 22:9–18; *see also* Min. Order (Jan. 10, 2019). Following the status conference, the government held to the same position, *see* Gov't's Status Report at 3–5, but [REDACTED] took a new stance, *see* [REDACTED] Status Report at 2–3. Led by the Court's understanding, [REDACTED] now contends that fines start accruing today, January 15, 2019. To reach that conclusion, [REDACTED] counts three business days—December 19, 20, and 21, 2018—elapsing between the D.C. Circuit's mandate and the Supreme Court's stay. The Supreme Court lifted the stay on January 8, 2019, meaning the next four business days were January 9, 10, 11, and 14, 2019. Thus, [REDACTED], which still has not complied with this Court's September 19, 2018 Order, started amassing daily $50,000 fines as of today, January 15, 2019.

The Court agrees with [REDACTED]. The Supreme Court's stay expressly references the elements of this Court's October 5, 2018 Order that held [REDACTED] in contempt and that imposed, as a sanction for contempt, monetary fines, but does not allude to the portion of the same order that stayed the effective date until seven business days after the D.C. Circuit issued the mandate. Yet, the Supreme Court's order does not communicate any intention to divvy up the parts of this Court's October 5, 2018 Order to which the Supreme Court's stay applies. Rather, the soundest reading of the Supreme Court's stay is that it delays in all respects the effect of this Court's October 5, 2018, tolling this Court's seven-business day stay. To the extent that the Supreme Court's order is ambiguous as to whether the Supreme Court's stay tolls all aspects of this Court's stay, the ambiguity is construed in favor of [REDACTED] notwithstanding that [REDACTED] is subject only to civil contempt sanctions.

4. Remaining Outstanding Issues

Two issues remain outstanding. First, [REDACTED] seeks to stay accrual of the $50,000 daily contempt fines until resolution of the pending motion for a declaration that the contempt fines are not enforceable. *See* [REDACTED] Motion for a Stay of the Contempt Fines' Accrual Until this Court Rules on [REDACTED] Pending Motion for a Declaration ("[REDACTED] Stay Motion"), ECF No. 56.

[REDACTED] Stay Motion reveals [REDACTED] confusion about the operation of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* No matter how many briefs and motions [REDACTED] files proclaiming immunity from the exercise of this Court's jurisdiction, the Court's authority to impose contempt sanctions on [REDACTED], and thus for the sanctions to accrue, is secure. *See generally* Mem. Op. (Sept. 19, 2018), ECF No. 20; *In re Grand Jury Subpoena*, No. 18-3071, 2019 WL 125891 (D.C. Cir. Jan. 8, 2019). Nonetheless, [REDACTED] seeks to stay accrual of the properly entered contempt sanction because, in [REDACTED] view, the contempt sanction is unenforceable. Yet, as the D.C. Circuit has said, and already repeated once in this case, the power to impose contempt sanctions against a foreign sovereign and the power to enforce any monetary sanctions are distinct. *In re Grand Jury Subpoena*, 2019 WL 125891, at *7 ("We stick to that practice today, meaning the form of the district court's contempt order was proper. Whether and how that order can be enforced by execution is a question for a later day."); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) ("Hemisphere's contention that whether the court can enforce its contempt sanction is irrelevant to the availability of a contempt order is consistent with the statutory scheme."). Thus, even if [REDACTED] ultimately prevails on the argument that the fines are unenforceable, a question which has not yet been resolved in this matter, the fines are properly

accruing. Therefore, for the same reasons articulated in the Court's last opinion denying [REDACTED] request for a stay of the Court's October 5, 2018 Order, *see* Mem. and Order (Jan. 10, 2019), ECF No. 48, [REDACTED] newest motion for a stay also is denied.

Second, the Court's September 19, 2018 Order, which accompanied a Memorandum Opinion explaining the reasons for denying [REDACTED] Motion to Quash, ordered the government to "submit a report advising the Court whether any portions of the accompanying Memorandum Opinion may be unsealed" no later than the earlier of [REDACTED] compliance with the subpoena or three months from that order. *See* Order (Sept. 19, 2018), ECF No. 19. Three months now have passed. Thus, consistent with the September 19, 2018 Order, the government must submit a report advising which portions of the Court's September 19, 2018 Memorandum Opinion may be unsealed, particularly in light of the public versions of the D.C. Circuit's judgment and opinions in this matter.

For the foregoing reasons, it is hereby

ORDERED that, upon consideration of [REDACTED] Proposed Order, ECF No. 51-1, the Government's Proposed Order, ECF No. 53-1, and [REDACTED] Supplemental Proposed Order, ECF No. 55-1, [REDACTED] counsel shall refrain from making any public statement or statement to the press [REDACTED] beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court; and it is further

ORDERED that the $50,000 daily fine ordered by the Court's October 5, 2018 Order begins accruing on January 15, 2019; and it is further

ORDERED that [REDACTED] Motion for a Stay of the Contempt Fines' Accrual Until this Court Rules on [REDACTED] Pending Motion for a Declaration, ECF No. 56, is **DENIED**; and it is further

ORDERED that, consistent with the Court's September 19, 2018 Order, ECF No. 19, the government, by Tuesday, January 22, 2019, shall submit a report advising the Court whether any portions of the September 19, 2018 Memorandum Opinion, ECF No. 20, may be unsealed.

SO ORDERED.

DATE: January 15, 2019

Beryl A. Howell
Chief Judge

ATTACHMENT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **Filed Under Seal**

MEMORANDUM OPINION

[REDACTED] has been in civil contempt for nearly four months for failing to comply with a September 19, 2018 Order of this Court to produce, by October 1, 2018, records responsive to a grand jury subpoena issued on July 11, 2018, with a return date, after extensions, of August 16, 2018. *See* Order (Sept. 19, 2018) ("Production Order"), ECF No. 19; Mem. & Order (Oct. 5, 2018) ("Contempt Order"), ECF No. 30. The Contempt Order imposed a fine of $50,000 per day against [REDACTED], which fine was temporarily stayed while [REDACTED] appealed to the D.C. Circuit, and then for seven business days after the issuance of the mandate. Contempt Order at 6–7. Accrual of the contempt sanctions was further delayed during the span of a Supreme Court administrative stay. Order (Dec. 23, 2018), *In re Grand Jury Subpoena*, Supreme Court No. 18A669.

After losing its appeal, *see In re Grand Jury Subpoena* ("*Grand Jury I*"), No. 18-3071, 2018 WL 6720714 (D.C. Cir. Dec. 18, 2018); *In re Grand Jury Subpoena* ("*Grand Jury II*"), No. 18-3071, 2019 WL 125891 (D.C. Cir. Jan. 8, 2019), and after vacatur of the Supreme Court's administrative stay, *see* Order (Jan. 8, 2019), *In re Grand Jury Subpoena*, Supreme Court No. 18A669, [REDACTED] has been accruing daily $50,000 fines since January 15, 2019, *see* Mem. & Order (Jan. 15, 2019), ECF No. 57 (clarifying date that contempt fines started accruing,

consistent with [REDACTED] view of accrual date). As of January 24, 2019, [REDACTED] fine is $500,000.

Now, pending before the Court is [REDACTED] motion for a judicial declaration that the Contempt Order is unenforceable and that the government cannot attach or execute on any [REDACTED] property. *See* [REDACTED] Mot. Decl. Ct.'s Oct. 5, 2018 Order Unenforceable & [REDACTED] Property Immune ("[REDACTED] Mot."), ECF No. 45.[1] The briefing on this motion was completed on January 22, 2019, with the government opposing the motion as both premature and without merit. *See* Gov't's Opp'n Mot. Decl. Ct.'s Oct. 5, 2018 Order Unenforceable & [REDACTED] Property Immune ("Gov't's Opp'n"), ECF No. 58. For the reasons explained in more detail below, the Court agrees that [REDACTED] motion is premature.

I. [REDACTED] REQUEST FOR ENFORCEABILITY RULING AMOUNTS TO A REQUEST FOR AN IMPERMISSIBLE ADVISORY OPINION

Generally, courts do not issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96–97 (1968); *see also Grand Jury II,* 2019 WL 125891, at *8 ("[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of the litigants in the case before them." (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975))). "[T]he rule against advisory opinions . . . recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation

[1] [REDACTED] motion also sought further stay of the Contempt Order pending the Supreme Court's disposition of [REDACTED] pending petition for a writ of certiorari. That motion was denied orally at a status conference on January 10, 2019, *see* Status Conf. Tr. (Jan. 10, 2019) at 24:20–24, ECF No. 52, with a fuller explanation provided in a Memorandum and Order, *see* Mem. & Order (Jan. 10, 2019), ECF No. 48. [REDACTED] persisted in seeking a stay of any penalty accruing from its contempt. *See* Mot. Stay Contempt Fines' Accrual Until Ct. Rules on Mot. Decl., ECF No. 56. That duplicative motion also was denied. Mem. & Order (Jan. 15, 2019).

embracing conflicting and demanding interests.'" *Flast*, 392 U.S. at 96–97 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)). Indeed, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

The government underscores that it has not yet sought any judgment reducing the contempt sanctions to a sum certain, nor tried to enforce any such judgment. Gov't's Opp'n at 8. Even if [REDACTED] is correct that the government has not initiated enforcement proceeding as "a stall tactic," intended "to postpone this Court's reaching the enforceability question," [REDACTED] Reply Supp. Mot. Decl. Ct.'s Oct. 5, 2018 Order Unenforceable & [REDACTED] Property Immune ("[REDACTED] Reply") at 2, ECF No. 59, that does not make questions of enforceability ripe. Moreover, leveraging the growing fine to increase pressure on [REDACTED] to comply with the subpoena is perfectly lawful, and the very reason for civil contempt sanctions. *See Turner v. Rogers*, 564 U.S. 431, 441 (2011) ("Civil contempt differs from criminal contempt in that it seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do." (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 422 (1911))); *Int'l Union v. Bagwell*, 512 U.S. 821, 827 (1994) (civil contempt sanctions are "penalties designed to compel future compliance with a court order" and "are considered to be coercive"). [REDACTED] vigorous effort to deflate that coercive pressure, including asking the Supreme Court to resolve whether the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, permits "enforc[ing] contempt sanctions (monetary or otherwise) against a foreign state," *see* [REDACTED] Mot., Ex. A, Sealed Petition for a Writ of Certiorari, at ii, is misdirected. Although the Contempt Order imposes fines, the government, as yet, has taken no

steps to execute on, or enforce collection of, the accrued fines. Until such steps are taken, [REDACTED] enforceability challenge is not ripe for resolution.

Despite this legal and factual backdrop, [REDACTED] asks the Court to opine on the legality of hypothetical conduct: the government's non-existent effort to enforce a non-existent judgment reflecting the sum certain of accrued fines. Irrespective of whether the FSIA applies to, and provides blanket immunity from, any criminal matters, as [REDACTED] argues, *see* [REDACTED] Reply at 15–20, or is limited to civil matters, as the government argues, *see* Gov't's Opp'n 17–20, [REDACTED] will have an opportunity to challenge any enforcement effort when that effort transpires.

If the FSIA applies here, as the Court assumes it does, the government must, before attaching or executing against any [REDACTED] property, obtain a judgment for accrued sanctions and then an order permitting attachment or execution, consistent with 28 U.S.C. § 1610(c). Only after the government has that judgment and order will it be able to take the necessary steps to satisfy the judgment with specific property. At the point the government seeks a section 1610(c) order, the enforceability question may be ripe. Sure enough, another judge on this court, while deciding whether to enter a judgment for accrued sanctions, a step at which this case has not yet arrived, ruled that "questions related to enforcement" were "not ripe for adjudication." *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 128 F. Supp. 3d 242, 244 (D.D.C. 2015). As in *Agudas Chasidei*, "concerns related to such enforcement are premature until such time as [the government] has identified property to attach and execute, provided notice to defendants of such attachment and execution, and given defendants 'reasonable time' to respond." *Id.* at 245; *accord Walters v. Indus. & Commer. Bank of China, Ltd.*, 651 F.3d 280, 291, 297 (2d Cir. 2011) ("[Section] 1610(c) not only ensures that no

execution upon sovereign property can take place without notice to the sovereign, but it also requires a prior judicial determination that the execution is warranted under one of the § 1610(a) or (b) exceptions and with respect to specifically identified property," and thus "clearly signals that execution depends on a judicial determination that the property at issue falls within one of the exceptions to immunity set forth in those subsections.").

Thus, granting [REDACTED] requested relief—a declaration that the Contempt Order is unenforceable—would do nothing more than repeat what the FSIA explicitly mandates: no property of a foreign sovereign shall be attached or executed absent a court order so allowing. In this way, [REDACTED] focus on the enforceability of the Contempt Order is misplaced. Absent any such collection effort, [REDACTED] challenge is premature.

Assuming the government is right and the FSIA is inapplicable to criminal matters, this raises whether the FSIA nonetheless applies to a civil action to enforce a judgment against [REDACTED] property. Again, this is a question [REDACTED] would have a chance to present when confronted with a government effort to satisfy any actually issued judgment, a proceeding that remains on the horizon. In any event, the government cannot simply take the Contempt Order to a court or sheriff and demand that a lien be placed on [REDACTED] property. A judge must first enter a judgment for a sum certain and an order authorizing that conduct. At that point, [REDACTED] objection that the FSIA prohibits enforcing a judgment against [REDACTED] may be ripe for review.

[REDACTED], understandably, is trying to exhaust every conceivable method of expressing doubt about its amenability to contempt sanctions. The pending motion adds to that effort, waging a collateral attack on the Contempt Order by raising unrelated doubts about enforceability. "Yet, as the D.C. Circuit has said, and already repeated once in this case, the

power to impose contempt sanctions against a foreign sovereign and the power to enforce any monetary sanctions are distinct." Mem. & Order (Jan. 15, 2019) at 9 (citing *Grand Jury II*, 2019 WL 125891, at *7; *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011)).

[REDACTED] must recognize that, in both this Court and in the D.C. Circuit, this case has progressed beyond the point at which uncertainty about the legality of the Contempt Order exists. Should the government try to collect on the fines accruing from [REDACTED] continuing noncompliance with the Production Order and the Contempt Order, new legal issues might arise. Even if [REDACTED] were able to forecast those precise issues, the Court, at best, would be forced to resolve enforcement questions based on a hypothetical sequence of events that might never actually come to pass. The current posture of this litigation makes resolution of any possible legal issues that may materialize an obvious, and impermissible, advisory opinion.

II. [REDACTED] REQUEST FOR ENFORCEABILITY DECLARATION MUST BE DENIED ON PRUDENTIAL GROUNDS

The closest parallel to what [REDACTED] seeks is relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, "which exists precisely to ensure litigants do not need to wait until Government enforcement before clarifying or vindicating their rights." [REDACTED] Reply at 5. [REDACTED] concedes that declaratory relief may be proper only when, at a minimum, the circumstances "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 4 (quoting *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007)).

Yet, any request for declaratory relief must be justiciable "as a constitutional and prudential matter." *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997); *see also*

Poe v. Ullman, 367 U.S. 497, 508–09 (1961) ("Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought."). Thus, even when a Court may grant declaratory relief, "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Pub. Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (internal quotations omitted); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) ("Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants."); *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 694 (D.C. Cir. 2015) ("Although 'federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred . . . [t]hat principle does not eliminate . . . the federal courts' discretion in determining whether to grant certain types of relief.'" (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358–59 (1989))) (alternations in original).

Discretion to award declaratory relief lies, in the first instance, with district courts "because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *Wilton*, 515 U.S. at 289. The Supreme Court has provided general guidance that "the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Id.* at 287 (internal quotations omitted). Which is to say that the Court's discretion is guided by "considerations of practicality and wise judicial administration." *Id.* at 288.

More particular guidance has been provided by the D.C. Circuit, in *Hanes Corporation v. Millard*, 531 F.2d 585 (D.C. Cir. 1976), which "adopted a non-exclusive list of 'factors relevant to the propriety of granting a declaratory judgment.'" *Morgan Drexen*, 785 F.3d at 696 (quoting *Hanes*, 531 F.2d at 591 n.4)). Those prudential factors informing when granting declaratory relief might be practical and wise are: "whether it would finally settle the controversy between the parties; whether other remedies are available or other proceedings pending; the convenience of the parties; the equity of the conduct of the declaratory judgment plaintiff; prevention of procedural fencing; the state of the record; the degree of adverseness between the parties; and the public importance of the question to be decided." *Id.* (quoting *Hanes*, 531 F.2d at 591 n.4)). The factors do not supply a test, but rather help the analysis "focus on the usefulness of declaratory judgment, the role of such relief in ending the dispute between the parties, and the incentives for parties' behavior." *Id.* at 697.

Here, three reasons, grounded in the *Hanes* factors, counsel against granting [REDACTED] requested declaratory relief: the declaratory relief requested would not "finally settle the controversy between the parties"; "the equity of [REDACTED] conduct" counsels against granting declaratory relief; and "the state of the record" is underdeveloped. *Id.* Those three reasons are addressed *seriatim*.

A. Declaratory Relief Would Not Settle the Enforceability Question

The Court's analysis in Part I, *supra*, for why an opinion about enforceability would, at this juncture, be no more than an advisory opinion also explains why granting the requested declaratory relief would not settle the parties' controversy. The Contempt Order, with or without the requested declaration, is not self-effectuating. For the government to attach or execute any of [REDACTED] property, the government must first convert the sanctions that have accrued under

the Contempt Order into a sum certain judgment and obtain an order permitting action against [REDACTED] property. Thus, to say that the Contempt Order, standing alone, is unenforceable would be no more than a truism.

B. Equity Militates Against Granting Declaratory Relief

As already noted, at this point, both [REDACTED] and the government are maneuvering to gain the more advantageous position. Facing the pressure of mounting fines, [REDACTED] motion asks the Court to declare that no matter how high sanctions grow, [REDACTED] never will be accountable to pay the fines, thereby removing the government's leverage on [REDACTED] to comply with the Production Order. The government, on the other hand, wants to maintain the threat of eventually enforcing the fines that grow every day [REDACTED] flouts the Production Order. The D.C. Circuit has made clear that "prevention of procedural fencing" and "incentives for parties' behavior," as reflected in the parties' positions here, are among the significant considerations for the propriety of declaratory relief. *Morgan Drexen*, 785 F.3d at 696–97 (citing *Hanes*, 531 F.2d at 591 n.4). While [REDACTED] desire to expedite a judicial decision on the enforceability of any judgment for accrued fines is understandable, the justiciability of this question at this juncture is not legally supportable under D.C. Circuit precedent.

The D.C. Circuit has held that "[a] credible threat of imminent prosecution" can provide "the foundation for justiciability as a constitutional and prudential matter, and the Declaratory Judgment Act . . . , provides the mechanism for seeking preenforcement review." *Navegar*, 103 F.3d at 998. [REDACTED] echoes this language, arguing that "[t]he threat of enforcement here is actual and imminent," [REDACTED] Reply at 6 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 153–54 (1967)), such that [REDACTED] meets the Article III standing requirements needed to seek declaratory relief. Despite [REDACTED] arguments about Article III standing,

the problem here is not constitutional, but rather prudential. *Navegar*, 103 F.3d at 998 (recognizing that awarding declaratory relief depends on constitutional and prudential limits); *see also Morgan Drexen*, 785 F.3d at 694 (same).[2]

Prudentially, declaratory relief is a proper remedy when "absent the availability of preenforcement review, [a party] must either forgo possibly lawful activity because of her well-founded fear of prosecution, or willfully violate the [law]." *Navegar*, 103 F.3d at 998; *see also Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973))); *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005) (for challenges to agency regulation "an affected party may generally secure review before enforcement so long as the issues are fit for judicial review without further factual development and denial of immediate review would inflict a hardship on the challenger—typically in the form of its being forced either to expend non-recoverable resources in complying with a potentially invalid regulation or to risk subjection to costly enforcement processes"). A party's choice between costly compliance and possibly violating a valid law has justified declaratory relief when, for example, a "challenged statute threatened a taking for which the plaintiffs would never be compensated," *Navegar*, 103 F.3d at 999 (citing *Reg'l Rail Reorg. Act*

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[2] Since the D.C. Circuit decided *Navegar*, which supplies this jurisdiction's standard for the degree of imminence needed for a party to have constitutional standing to seek preenforcement declaratory relief, the decision has been questioned for setting too high a bar. *See, e.g., Ord v. District of Columbia*, 587 F.3d 1136, 1146 (D.C. Cir. 2009) (Brown, J., dissenting) ("[W]hile I agree Ord has standing to bring his claim for damages under 42 U.S.C. § 1983, and agree his claims are not so insubstantial as to deprive the federal courts of jurisdiction over them, I do not think we can or should strain to fit this case within *Navegar*'s standard . . . . I do think the en banc court can and should rehear this appeal *sua sponte* and overrule *Navegar*."); *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005) ("We cannot help noting that *Navegar*'s analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations . . . .").

Cases, 419 U.S. 102, 122–25 (1974)); "where boat owners were effectively required, by a soon to be implemented state law, to install new sewage pumping facilities on their boats," *id.* (citing *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506–08 (1972)); "where the alternative to risking criminal and civil penalties was far-ranging and expensive relabeling of drug products," *id.* (citing *Abbott*, 387 U.S. at 152–53); and when an entity questioned the Department of Transportation's jurisdiction to impose liability under a challenged rule, *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1119–21 (D.C. Cir. 2005). Further, the case for preenforcement review is especially compelling "where plaintiffs seek to engage in activities possibly protected by the First Amendment." *Seegars*, 396 F.3d at 1252; *see also Act Now to Stop War & End Racism Coal. v. District of Columbia*, 589 F.3d 433, 435–36 (D.C. Cir. 2009) (reversing dismissal of plaintiff's preenforcement action seeking declaration that regulation, which limited hanging of noncommercial posters, violated the First Amendment because plaintiff had made a credible allegation regarding the regulation chilling First Amendment rights).

Nothing comparable to these examples is at play here. [REDACTED] is not confronting an uncertain legal landscape that impedes [REDACTED] potentially lawful conduct. To the contrary, the Production Order and the Contempt Order, the latter of which [REDACTED] hopes to render toothless, have been upheld on appeal. *Grand Jury II*, 2019 WL 125891. Thus, [REDACTED] need not forgo possibly lawful conduct, the hardship warranting preenforcement review in every other instance. Rather, [REDACTED] simply wants assurances that continued violation of the lawful Contempt Order may be accomplished with impunity.

At this stage, relieving [REDACTED] from the pressure to comply would be imprudent. Pressure to induce compliance is the very purpose of civil contempt sanctions. As discussed in Section I, *supra*, the Supreme Court has instructed that civil contempt sanctions are "penalties

designed to compel future compliance with a court order" and "are considered to be coercive." *Bagwell*, 512 U.S. at 827; *see also Turner*, 564 U.S. at 441 ("Civil contempt differs from criminal contempt in that it seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do." (quoting *Gompers*, 221 U.S. at 422)). Letting [REDACTED] out from under the prospect of paying a lawfully imposed fine would defeat the reason to have entered the Contempt Order in the first place.

[REDACTED] reiterates the refrain that when a contemnor is a foreign sovereign, the imposition of contempt fines "offends a foreign state's dignity and qualifies as *irreparable* injury." [REDACTED] Reply at 4 (emphasis in original). To repeat: "[I]n passing the FSIA, Congress codified the 'careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions.'" Mem. & Order (Jan. 10, 2019) at 3–4, ECF No. 48 (quoting *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018)). "[REDACTED], which is subject to the FSIA's commercial-activity exception, is not suffering any dignitary harm that Congress did not account for and explicitly permit." *Id.* at 4; *cf. In re Grand Jury Subpoena*, No. 18-3068 (D.C. Cir. Oct. 3, 2018) (ruling that *In re Papanderou*, 139 F.3d 247 (D.C. Cir. 1998) and *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F. 2d 438 (D.C. Cir. 1990), cases referenced by [REDACTED] for its dignitary harm argument, *see* [REDACTED] Reply at 4, did not permit [REDACTED] to skirt the normal burdens of litigation).

Perhaps if doubt remained about the propriety of imposing contempt sanctions or [REDACTED] obligation to pay the growing fines, equity might warrant expediting resolution of enforceability questions. Yet, no matter how often [REDACTED] belabors the point, *see* [REDACTED] Mot. at 6 ("None of the FSIA's exceptions authorizes contempt sanctions against

a foreign state."); *id.* at 7 ("Tracking the FSIA's plain language, the Fifth Circuit held . . . that the FSIA categorically prohibits contempt sanctions against a foreign state."); [REDACTED] Reply at 7 ("[REDACTED] reasonably believes that, under the FSIA and Supreme Court precedent, it is not required to pay any monetary sanctions."); Status Conf. Tr. (Jan. 10, 2019) at 22:21–23, ECF No. 52 ("Our argument was and is, and will remain, that this Court, and every American court, lack subject matter jurisdiction over [REDACTED] in this criminal proceeding."); Mot. Stay Contempt Fines' Accrual at 1, ECF No. 56 ("[T]he FSIA does not authorize contempt sanctions against a foreign state . . . ."), the Contempt Order—and the attendant pressure—is proper, *see generally Grand Jury I*, 2018 WL 6720714; *Grand Jury II*, 2019 WL 125891.

[REDACTED] wants to stave off enforcement of any hypothetical judgment. Of course, [REDACTED] has an easier way out from under the threat of enforcement: comply. At this point, short-circuiting the ordinary legal process just to offer a salve to a party openly defying orders approved by the D.C. Circuit, and which this country's highest court refused to stay, undercuts the Court's tools for ensuring compliance with a lawful order. Nothing about that option is practical or wise.

C. Enforcement Questions Are Not Clearly Presented

Finally, [REDACTED] argues that leaping ahead is justified because the FSIA affords a foreign sovereign blanket immunity from contempt sanctions. [REDACTED] Mot. at 9; [REDACTED] Reply at 9–13. Thus, according to [REDACTED], whether decided now or later, the government cannot attach or execute on [REDACTED] property and waiting to make that decision just prolongs the inevitable. Even assuming that the FSIA applies in this matter, the facts that ultimately will inform enforceability are underdeveloped.

Under the FSIA, "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this

chapter." 28 U.S.C. § 1609. As this text makes clear, a foreign state's property immunity has exceptions. To be sure, those exceptions are more narrowly drawn than the exceptions to jurisdictional immunity, *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007), with the consequence that, in some cases, the FSIA confers rights that have no enforceable remedy, *see FG Hemisphere*, 637 F.3d at 378 ("The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution."); *De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984) ("The Act's history and the contemporaneous passage of similar European legislation strongly support the conclusion that under the circumstances at issue in this case Congress did in fact create a right without a remedy.").

Too much is still uncertain for the Court to determine whether the government's enforcement efforts will satisfy one of section 1610's exceptions. Indeed, at this point, what property the government might target to satisfy any judgment is unknown, and identification of that property is critical to evaluating the propriety of any enforcement effort. *See Walters*, 651 F.3d at 291 (("[Section] 1610(c) . . . requires a prior judicial determination that the execution is warranted under one of the § 1610(a) or (b) exceptions and with respect to specifically identified property."); *Agudas Chasidei*, 128 F. Supp. 3d at 245 ("[C]oncerns related to such enforcement are premature until such time as [the government] has identified property to attach and execute, provided notice to defendants of such attachment and execution, and given defendants 'reasonable time' to respond."). The government speculates about different methods of enforcing the Contempt Order, including [REDACTED], Gov't's Opp'n at 9, or seeking criminal sanctions, *id.* at 9 n.4. While [REDACTED] rejects the viability of the government's

alternatives, [REDACTED] Reply at 7–8, the uncertainty of what is to come exhibits the tenuousness of resolving enforcement questions now. Given that the nature of any government enforcement effort is still unknown, whether an exception provided in section 1610 may apply remains unknowable. Until the government takes affirmative steps to enforce a judgment against [REDACTED] property, the Court's ability to judge any such effort against section 1610's exceptions is hamstrung.

Despite all that hinges on how the government tries to enforce a hypothetical judgment, [REDACTED] posits that this is a case with no enforceable remedy and, further, that the Court already can be certain of this point. As support, [REDACTED] notes that "[n]one of the FSIA's exceptions authorizes contempt sanctions against a foreign state," [REDACTED] Mot. at 6, leading to the conclusion that "foreign states enjoy absolute immunity from enforcement [of contempt sanctions]," *id.* at 9. [REDACTED] argument regarding the lack of any exception in section 1610 specifically authorizing contempt sanctions is unavailing. Section 1610's exceptions are written to depend on the nature of the property that a party seeks to attach and the reason that the foreign sovereign is not immune from jurisdiction. *See* 28 U.S.C. § 1610(a), (b).

Assuming that the government's collection of the accrued fines will turn on application of 28 U.S.C. § 1610(b)(2), as the government asserts as an alternative argument, declaratory relief still is not proper. This FSIA provision creates an exception from immunity for "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States . . . upon a judgment entered by a court of the United States . . . if the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based." 28 U.S.C.

§ 1610(b)(2). [REDACTED] theorizes that section 1610(b)(2) will never be available to the government because "there is no 'claim' in this case—and certainly no claim giving rise to this Court's contempt order," [REDACTED] Mot. at 7.

[REDACTED] categorical argument is unconvincing. At the core of [REDACTED] argument is that a "claim" means "[a] demand for money, property, or a legal remedy to which one asserts a right; especially, the part of a complaint in a civil action specifying what relief the plaintiff asks for." [REDACTED] Mot. at 7; *see also* [REDACTED] Reply at 9–10. In [REDACTED] view, "claim" necessarily requires a "civil claim for relief" and precludes enforcing contempt sanctions. [REDACTED] Reply at 11. The government does not challenge that definition, *see* Gov't's Opp'n at 12, but argues that section 1610(b)(2) would not categorically prohibit enforcing a judgment that reduced the amount that [REDACTED] owes under the Contempt Order to a sum certain.

If the government eventually obtains a judgment and then an order, pursuant to 28 U.S.C. § 1610(c), authorizing the attachment or execution of certain property, the government has a "claim," reflected in the judgment, that [REDACTED] owes, but has not paid, fines under the civil Contempt Order, as well as a "claim" demanding satisfaction of the money judgment through a writ of execution or attachment. The Contempt Order, of course, is derivative of the Production Order, to which [REDACTED] has no immunity because of 28 U.S.C. § 1605(a)(2). *See Grand Jury II*, 2019 WL 125891, at *7. Therefore, at first blush, even accepting the sequence of events that [REDACTED] anticipates, the government would have a "claim," as contemplated under 28 U.S.C. § 1610(b)(2).

Finally, to cut off possible deference to the government's position on enforceability, [REDACTED] cites earlier cases in which the government argued against enforcement of

monetary sanctions. [REDACTED] Mot. at 9–11; [REDACTED] Reply at 13–15. Whether the government has taken inconsistent positions about enforceability is entirely beside the point because "[a]lthough the views of the United States on the meaning of FSIA 'are of considerable interest . . . , they merit no special deference.'" *FG Hemisphere*, 637 F.3d at 379 n.2 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)). Still, because [REDACTED] has levied accusations of inconsistency against the government, the speciousness of this aspect of [REDACTED] argument warrants brief mention.

The government distinguishes the cases cited by [REDACTED] as instances in which the government argued against imposition of sanctions under the FSIA and clarifies that the sanctions in those cases were sought against a foreign state, rather than, as here, against an agent or instrumentality of the foreign state. Gov't's Opp'n at 15–17. The government's distinction accurately captures differences in [REDACTED] cited cases. *See, e.g.*, Brief for the United States of America as Amicus Curiae in Support of Partial Reversal ("Servaas Brief") at 18–19, *Servaas Inc. v. Mills*, 661 F. App'x 7 (2d Cir. 2016) (No. 14-385) (arguing that 28 U.S.C. § 1610(a) did not permit enforcing sanctions against Iraq); Brief of the United States as Amicus Curiae in Support of Appellant ("FG Hemisphere Brief") at 7–14, *FG Hemisphere*, 637 F.3d 373 (No. 10-7046) (arguing that 28 U.S.C. § 1610(a) did not permit enforcing sanctions against Congo); Brief of the United States as Amicus Curiae in Support of Defendant-Appellant ("Af-Cap Brief") at 5–9, *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006) (No. 05-51168) (same).

[REDACTED] continues to press its argument, however, branding the distinction between a foreign state and the agent or instrumentality of a foreign state as "contrived." [REDACTED] Reply at 14. Contrary to [REDACTED] view, that distinction is made in the text

of the FSIA and, thus, is significant. *Compare* 28 U.S.C. § 1610(a) (exceptions to immunity for the property of "a foreign state") *with id.* § 1610(b) (exceptions to immunity for the property of "an agency or instrumentality of a foreign state"). [REDACTED] further contends that, in any event, [REDACTED] amounts to a foreign state, [REDACTED] Reply at 14, but this characterization is contrary to [REDACTED] prior representations. *See* [REDACTED] Ltr., dated July 26, 2018 at 1–2, ECF No. 3-2 [REDACTED]. Finally, [REDACTED] argues that, as to the government's alleged inconsistency in position, any differences between section 1610(a) and section 1610(b) are irrelevant because each paragraph depends on the existence of a "claim." [REDACTED] Reply at 14–15. None of the amicus briefs cited by [REDACTED], however, relied on a textual argument about the meaning of "claim." *See generally* Servaas Brief; FG Hemisphere Brief; Af-Cap Brief. In sum, each basis on which [REDACTED] relies to chastise the government for inconsistency comes up short.

In the end, [REDACTED] might have viable defenses to either the entry of judgment or a section 1610(c) order permitting enforcement of any such judgment. Waiting until the government's actual attachment or execution efforts put those issues into sharper focus is the prudent course.

III. CONCLUSION

For the foregoing reasons, [REDACTED] Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [REDACTED] Property is Immune from Execution or Attachment, ECF No. 45, is denied. An appropriate Order accompanies this Memorandum Opinion.

DATE: January 24, 2019

Beryl A. Howell
Chief Judge

ATTACHMENT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **Filed Under Seal**

MEMORANDUM AND ORDER

This case, which began with a motion to quash a grand jury subpoena, has moved quickly from this Court, to the D.C. Circuit, and to the Supreme Court, attracting public interest along the way. *See* Mem. & Order (Jan. 15, 2019) at 2, ECF No. 57 (citing media coverage). The D.C. Circuit and the Supreme Court have provided limited public access to their respective dockets, while shielding from public view the content of what has been docketed. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir.); *In re Grand Jury Subpoena*, No. 18-948 (U.S.). In light of those courts having made their respective dockets public to some extent, as well as media inquiries directed at this Court, the parties were asked to file a joint status report addressing whether a copy of the docket sheet in this matter may be unsealed to any extent, and, if so, to propose necessary redactions. Min. Order (Jan. 23, 2019).

Although the parties were unable to submit a joint report, each responded to the Court's order. *See* Witness's Status Report, ECF No. 66; Gov't's Status Report, ECF No. 67. The reports demonstrate that neither side objects to limited unsealing to the public of the docket, and the parties' proposed redactions mostly align. *See* Gov't's Status Report at 1 ("[T]he parties agree that the docket sheet can be partially unsealed and that the identity of the witness should remain under seal."). [REDACTED].

[REDACTED].[1] [REDACTED].

At the moment, all three levels of the federal judiciary have been asked to consider, or are considering, some version of this issue. [REDACTED]. This Court, however, already has ruled on what public statements the witness's counsel may make.

The Court ruled about what public comments Alston & Bird—the witness's counsel—may make about this case during an impromptu status conference, held at the government's request, without any advance notice of the issues to be addressed at the conference. *See* Gov't's Ltr. (Jan. 8, 2019), ECF No. 44 (requesting status conference). [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

At Alston & Bird's request, the Court authorized the parties to submit proposed written orders. [REDACTED].

Upon consideration of the competing proposals, and consistent with the oral ruling, the Court's written Order instructed Alston & Bird not to comment on any publicly-unknown facts. *See* Mem. & Order (Jan. 15, 2019) at 5 (refusing to enter the government's proposed order because that order "would preclude [REDACTED] counsel from publicly commenting [REDACTED]. Thus, the written Order read: "[REDACTED] counsel shall refrain from making any public statement or statement to [REDACTED] beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court." *Id.* at 10.

[REDACTED].

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[1] [REDACTED]

[REDACTED].[2] [REDACTED].

[REDACTED].

[REDACTED].

For the foregoing reasons, it is hereby

ORDERED that Alston & Bird may not make any public comment that this case pertains to [REDACTED]; and it is further

ORDERED that this Court's order permitting Alston & Bird to [REDACTED] is **STAYED** pending an order from either the D.C. Circuit or the Supreme Court that [REDACTED]; and it is further

ORDERED that a copy of the docket sheet for Grand Jury Action No. 18-41 will be released with redactions that are agreed upon by the parties and consistent with this Order.

SO ORDERED.

DATE: January 30, 2019

Beryl A. Howell
Chief Judge

[2] [REDACTED]