UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STATE STREET CORPORATION,
Petitioner,

V. CIVIL ACTION NO. 20-12101-LTS

ANATOLIE STATI et al.,
Respondents.

ANATOLIE STATI et al.,
Petitioners,

V. CIVIL ACTION NO. 20-12052-LTS

STATE STREET CORPORATION,
Respondent.

REPORT AND RECOMMENDATION RE: STATE STREET CORPORATION'S MOTION FOR LIMITED CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION OF THE NOVEMBER 16, 2020 REPORT AND RECOMMENDATION (DOCKET ENTRY # 49, CIVIL ACTION NO. 20-12052-LTS) (DOCKET ENTRY # 85, CIVIL ACTION NO. 20-12101-LTS)

MEMORANDUM AND ORDER RE: STATE STREET CORPORATION'S MOTION FOR ENTRY OF A PROTECTIVE ORDER (DOCKET ENTRY # 48, C.A. NO. 20-12052-LTS) (DOCKET ENTRY # 84, C.A. NO. 20-12101-LTS)

February 9, 2021

BOWLER, U.S.M.J.

In two related proceedings, one involving a deposition subpoena[1] and the other involving a subpoena duces tecum regarding similar subjects,[2] petitioner State Street Corporation

[1] State Street Corp. v. Stati et al., Civil Action No. 20-12101-LTS ("C.A. 20-12101-LTS"), which corresponds to State Street Corp. v. Stati et al., MBD No. 1:19-mc-91107-LTS ("MBD No. 19-mc-91107-LTS).

[2] Stati et al. v. State Street Corp., Civil Action No. 20-12052-LTS ("C.A. 20-12052-LTS"), which corresponds to Stati et

("State Street") seeks clarification or, in the alternative, reconsideration of this court's recommendation regarding document requests four, six, and 11 in a November 2020 Report and Recommendation (Docket Entry # 42, C.A. No. 20-12052-LTS) (Docket Entry # 78, C.A. No. 20-12101-LTS).[3] (Docket Entry # 49, C.A. No. 20-12052-LTS) (Docket Entry # 85, C.A. No. 20-12101-LTS).[4] Respondents Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. ("the Statis") oppose any such clarification or reconsideration. (Docket Entry # 56). In a separate motion, State Street moves for a protective order (Docket Entry # 48), which the Statis oppose (Docket Entry # 55). Familiarity with the record is presumed, and neither party requests oral argument.

I. Motion for Clarification or Reconsideration

As noted, State Street's motion to clarify or reconsider 9Docket Entry # 49) involves document requests four, six, and 11.

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al. v. State Street Corp., MBD No. 1:19-mc-91214-LTS ("MBD No. 19-mc-91214-LTS").

[3] Shortly after this court issued the Report and Recommendation in MBD Nos. 19-mc-91107-LTS and 19-mc-91214-LTS, the clerk's office redesignated and transferred these proceedings to the civil dockets of C.A. 20-12101-LTS and 20-12052-LTS, respectively, and instructed that future filings be made in these corresponding 2020 actions.

[4] In lieu of repetitively referring to duplicate docket entries in each case, citations to docket entries going forward are to the docket entry number in the civil action that seeks production of documents, C.A. No. 20-12052-LTS, unless otherwise noted.

As narrowed to a restricted time period detailed below, document requests four, six, and 11 at present read as follows:

> [4.] All documents (not including CHIPS, Fedwire or SWIFT messages) evidencing or *concerning* any and all *accounts* maintained by State Street in the name, or on behalf, of the National Bank, including accounts held by the National Bank in its capacity as manager of National Fund assets, and limited to those accounts in which ROK has a beneficial or other ownership interest in whole or in part.
>
> [6.] All documents and communications (not including CHIPS, Fedwire or SWIFT messages) concerning or *related to* any *asset* of the ROK, whether that asset is owned by the ROK directly, or indirectly, in whole or in part, as sole owner or jointly with others, either of record or beneficially.
>
> [11.] All documents concerning or comprising SWIFT messages to, from or through any account of any type with State Street associated with the ROK. The request is limited to those accounts in which ROK has a beneficial or other ownership interest in whole or in part.

(Docket Entry # 42, pp. 59, 61, 65) (emphasis added).[5] Regarding document requests four and six:

> State Street seeks clarification that [this] Court does not require production of every document and communication that in any way "concern[s]" or is "related to" accounts in the name of the National Bank of Kazakhstan ("NBK"), per Request Nos. 4 and 6, as opposed to documents and communications that, per the Court's analysis, concern the location of National Fund of Kazakhstan ("National Fund") or other assets in which the Republic of Kazakhstan ("ROK") has an ownership interest, or the identity of the global custodian of such assets.

(Docket Entry # 49, p. 1) (bold font and underlining omitted).

Regarding document request 11:

> State Street seeks clarification as to whether the Court

[5] Page numbers in docket entries refer to the docketed page number in the upper, right-hand corner of the filing.

> intended to require production of every SWIFT message associated with any account in which the ROK has a beneficial or other ownership interest, per Request No. 11, or SWIFT messages that expressly "identify[] the ROK as the beneficiary or originator to a transaction," per the Court's narrowing of parallel Request No. 9.

(Docket Entry # 49, p. 2). As an alternative to clarification, State Street moves for reconsideration of the rulings (Docket Entry # 42) on these three requests. (Docket Entry ## 49, 60).

BACKGROUND[6]

In December 2013, the Statis obtained an award of approximately $500 million from an arbitral tribunal of the Stockholm Chamber of Commerce against the Republic of Kazakhstan ("ROK"). (Docket Entry # 42, p. 2). On March 23, 2018, the United States District Court for the District of Columbia issued a judgment ("the D.C. Judgment") confirming the arbitral award ("the D.C. Proceeding"). (Docket Entry # 42, pp. 2-3); Stati v. Republic of Kazakhstan, Civil Action No. 14-01638-ABJ-ZMF (D.D.C. May 18, 2020) (Docket Entry # 133, p. 2, C.A. No. 14-01638-ABJ-ZMF) (describing March 23, 2018 decision as a judgment and noting entry of final judgment on July 16, 2019); Stati v. Republic of Kazakhstan, 302 F. Supp. 3d 187 (D.D.C. 2018) (March 23, 2018 decision confirming arbitral award), *aff'd*, 773 Fed. App'x 627, *cert. denied*, 140 S.Ct. 381 (Oct. 15, 2019). In July 2019, the

[6] The following is a truncated version of the relevant facts, which are more fully set out in the Report and Recommendation. (Docket Entry # 42, pp. 2-24).

District Judge in the D.C. Proceeding entered a final judgment in the Statis' favor "'in the amount of US$ 506,660,597.40'" together with interest. (Docket Entry # 42, p. 3); Stati v. Republic of Kazakhstan, Civil Action No. 14-01638-ABJ-ZMF (D.D.C. July 16, 2019) (Docket Entry # 112, C.A. No. 14-01638-ABJ-ZMF). Post-judgment discovery is ongoing in the D.C. Proceeding. (Docket Entry # 42, p. 22).

In order to aid in the execution of the D.C. Judgment and pursuant to Fed. R. Civ. P. 69(a)(2) ("Rule 69(a)"), the Statis served State Street with the Fed. R. Civ. P. 30(b)(6) ("Rule 30(b)(6)") deposition subpoena and the document subpoena. (Docket Entry # 42, p. 3). Previously, the Statis obtained a Rule 30(b)(6) deposition of a Managing Director of State Street Global Advisors, Inc. in connection with a petition they filed under 28 U.S.C. § 1782 ("section 1782 Proceeding") for assistance to aid in the English Proceedings[7] and other foreign proceedings to enforce the foreign arbitral award. In re Application of Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. for an Order Directing Discovery from State Street Corporation Pursuant to 28 U.S.C. § 1782, Civil Action No.

[7] The English Proceedings refers to proceedings ROK and the National Bank of Kazakhstan ("NBK") initiated in June 2018 "in the English Court 'to obtain a declaration that [a] Belgian Attachment did not give the Statis authority to freeze NBK assets held by'" the Bank of New York Mellon ("BNYM"), the custodian, in London. (Docket Entry # 42, pp. 7-8).

15-mc-91059-LTS (D. Mass. Feb. 25, 2015) ("Section 1782 Proceeding"). Although covering an earlier time period, the first area of designation in the Rule 30(b)(6) deposition in the Section 1792 Proceeding, i.e., "'information concerning State Street's management role with respect to the National Fund'" (Docket Entry # 22-13, pp. 5, 32, C.A. No. 20-12101), is "the same as topic one in the deposition subpoena before this court." (Docket Entry # 42, p. 15, n.14) (Docket Entry # 72-3, p. 16, C.A. No. 20-12101). This subject also parallels information sought in document request one in the document subpoena, i.e., "All documents and communications (not including CHIPS, Fedwire or SWIFT messages) evidencing or concerning State Street's management role with respect to the National Fund." (Docket Entry # 72-3, p. 9, C.A. No. 20-12101) (emphasis omitted). As a result, the Report and Recommendation determined that document request one was not only unduly burdensome and not proportional but also, to a degree, cumulative of information obtained during the Rule 30(b)(6) deposition in the section 1792 proceeding.[8] (Docket Entry # 42, pp. 55-56).

[8] State Street argues that document requests four and six are overbroad because they encompass the same documents sought in document request one. (Docket Entry # 60, p. 2). Further, because this court denied document request one (Docket Entry # 42, p. 57), "[t]he enforcement of such broad requests" in document requests four and six "would effectively undo the Court's rejection of Request 1" and "be inconsistent with the Court's reasoning as to relevancy, burden, and proportionality," according to State Street. (Docket Entry # 49, p. 4).

In July 2020, the parties reached an impasse regarding production of documents in the 12 document requests as well as the related topics in the deposition subpoena. The Statis sought the discovery to uncover information regarding "the location of executable ROK assets (whether cash or securities)," i.e., asset location, "and the location of offices of a new custodian in order to enforce the D.C. [J]udgment," i.e., custodial identification.[9] (Docket Entry # 42, pp. 4, 29-30) (Docket Entry # 50, p. 2, C.A. No. 20-12101) (Docket Entry # 55, pp. 1-2, C.A. No. 12101-LTS) (Docket Entry # 57, pp. 5-7, C.A. No. 20-12101-LTS) (Docket Entry # 57-1, p. 10, C.A. No. 12101-LTS) (Docket Entry # 61, p. 3, C.A. No. 20-12101) (Docket Entry # 72, p. 4, C.A. No. 20-12101). The existence and location of currently executable ROK assets to enforce the D.C. Judgment and the identity of the new global custodian of such assets provided a primary basis for the discovery ordered by this court in the Report and Recommendation. (Docket Entry # 42, pp. 24-25, 30, 32, 37, 39-42, 44, 48, 52, 54, 57, 59, 65).

In addition to asset location and custodial information, the Statis sought discovery to show "ROK officials communicating with State Street officials concerning the National Fund and directing the investment of the portfolio" as a means to "substantiate that

[9] They also sought the information to use in foreign courts in their global enforcement efforts. (Docket Entry # 72, p. 4, C.A. No. 20-12101).

'NBK does not act independently from [ROK]' and that ROK's 'structuring of its assets to avoid enforcement of the [arbitral] [a]ward constitutes an abuse of law.'" (Docket Entry # 42, pp. 11-12, n.11) (Docket Entry # 57, pp. 6-7, C.A. No. 20-12101) (Docket Entry # 57-1, p. 10, ¶¶ 30-31, C.A. No. 20-12101) (Docket Entry # 72, p. 4, C.A. No. 20-12101). To a lesser degree than asset location and custodial identification, discovery targeted to information of such oversight and control by ROK of NBK and NBK's accounts at State Street also provided a basis for the discovery ordered by this court in the Report and Recommendation. (Docket Entry # 42, pp. 56-58). In this regard, this court left intact document request three (Docket Entry # 42, p. 58), which requires State Street to produce "[a]ll documents evidencing or concerning any communications between (a) State Street and (b) any official or employee of the ROK" (Docket Entry # 72-3, p. 9, C.A. No. 20-12101-LTS).

Significant facts found by this court in the Report and Recommendation include the following: State Street "does not hold the assets of the National Fund that it manages"; "BNYM, as the custodian, holds [or held] 'all the assets' (such as the cash funds, 'portfolios of securities,' and/or 'equity portfolios') that State Street manages on behalf of NBK"; and "ROK retain[s] a

'beneficial interest in the assets' of the National Fund."[10] (Docket Entry # 42, pp. 10, 17). Although not material for present purposes, it is the assets (rather than the State Street accounts per se) in which ROK has a beneficial or other ownership interest.

Overall, the Report and Recommendation eliminated or narrowed each of the document requests. (Docket Entry # 42, pp. 52-65). As to all of the requests and based on relevancy and undue burden, this court shortened a then-existing time period of "January 1, 2017 to the present" to a time period of "April 15 to June 15, 2018, and October 1, 2019 to the present." (Docket Entry # 42, pp. 51-52). The premise for limiting the time period was the above-noted concerns of uncovering information regarding the new global custodian (the April 15 to June 15, 2018 time period) and the location of existing ROK assets to aid in the execution of the D.C. Judgment (the October 1, 2019 to the present time period).[11] As explained in the Report and

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[10] Relatedly, the Report and Recommendation determined that: "NBK manages the National Fund as a trustee on behalf of ROK under [a Trust Management Agreement]"; "ROK 'remains the owner of the transferred property' under Kazakh law"; with respect to cash assets in a bank account, "the account holder (NBK) [has] the contractual right to claim the cash . . . as a debt owed to NBK . . . from the bank"; and ROK "remains 'beneficially entitled' to the National Fund cash assets managed by NBK under the [Trust Management Agreement]." (Docket Entry # 42, pp. 8, 10, 20-22).

[11] The Report and Recommendation issued on November 16, 2020. (Docket Entry # 42). Hence, "the October 1, 2019 to the

Recommendation:

> Documents in and around the May 2018 time period will likely uncover information related to the new global custodian.[12] More recent documents are more likely to inform the Statis about the location of existing ROK assets that will aid in the execution of the D.C. judgment. Adhering to a more targeted approach calculated to provide information regarding the new custodian and the location of *existing* assets, the document requests are limited to a time period of April 15 to June 15, 2018, and October 1, 2019 to the present.

(Docket Entry # 42, p. 52) (emphasis added).

Summarizing the parties' arguments, State Street seeks to further limit document requests four and six "to documents identifying the 'location of assets' or 'new custodians.'" (Docket Entry # 60, p. 2); (Docket Entry # 49, p. 4) (requesting to limit requests four and six to documents "that concern the location of National Fund assets (or any other asset in which the ROK has a beneficial or other ownership interest) and/or the identity of the new global custodian of such assets"). State Street submits, correctly, that this court determined that post-judgment discovery was relevant to enforce the D.C. Judgment for documents "'regarding the location, possession, and/or custody of

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present" time period corresponded to slightly more than the year preceding the Report and Recommendation.

[12] In seeking the discovery, the Statis represented in a July 13, 2020 filing that "[i]t is undisputed that the NBK moved the National Fund assets from Bank of New York Mellon, S.A. to a new custodian *in or about May 2018*; however, neither the ROK nor State Street has ever disclosed the identity of the new custodian to the Stati Group." (Docket Entry # 72, p. 4, 20-12101-LTS) (emphasis added).

ROK executable assets'"[13] and/or "'the name of the new global custodian'" of the assets. (Docket Entry # 49, p. 3) (quoting Report and Recommendation, Docket Entry # 42). Because document requests four and six do not reflect the intention or reasoning of this court to limit requests to the location of ROK executable assets and/or the name of the new global custodian, the requests are overbroad, and they undo this court's rejection of document request one encompassing the same documents, according to State Street.[14] (Docket Entry ## 49, 60). The Statis argue that State Street is relitigating the issues of relevance, burden, and proportionality, which the Report and Recommendation adjudicated, and State Street fails to satisfy the standard for reconsideration. (Docket Entry # 56). The Statis additionally submit that the adjudication of these two requests falls within the broad scope of permissible post-judgment discovery under Rule 69(a). (Docket Entry # 56).

Regarding document request 11, State Street maintains that the request is overly broad and inconsistent with limitations this court placed on document requests seven, eight, and nine. (Docket Entry ## 49, 60). State Street therefore seeks "clarification" that document request 11, like document request nine, only applies to information that "'identif[ies] the ROK as

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[13] See footnote 18.

[14] See also footnote eight.

the beneficiary or originator to a transaction.'"[15] (Docket Entry # 49, p. 6) (quoting Report and Recommendation, Docket Entry # 42). The Statis again assert that this request for clarification is actually a request for reconsideration. (Docket Entry # 56, p. 7). They additionally argue that State Street fails to satisfy the standard for reconsideration, Rule 69(a) provides for broad post-judgment discovery, State Street is relitigating the issues of relevance, burden, and proportionality, and document request 11 is not inconsistent with document requests seven, eight, and nine. (Docket Entry # 56, pp. 1-3, 7-8).

By way of background, document request 11 as of July 2020 sought "[a]ll documents concerning or comprising SWIFT messages[16]

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[15] At present, document request number nine reads as follows:

> All documents evidencing or concerning any and all CHIPS, Fedwire, or SWIFT messages received or transmitted by one of State Street's offices or branches relating to transactions identifying the ROK as the beneficiary or originator to a transaction.

(Docket Entry # 72-3, p. 10, C.A. 20-12101-LTS).

[16] The Report and Recommendation explains that "SWIFT messages are generated for any transaction . . . at State Street Global Advisors Limited" (Docket Entry # 42, p. 61) and that "[a]sset managers at State Street Global Advisors, Limited communicate with custodians regarding transactions and trades done on behalf of NBK using 'the SWIFT network.'" (Docket Entry # 42, p. 16, n.16) (quoting Rule 30(b)(6) deposition); (Docket Entry # 22-13, p. 33, C.A. No. 20-12101) (describing SWIFT network as generating a message for "any transaction[]" on the part of "the investment manager" communicated "with the

to, from or through any account of any type with State Street associated with the ROK." (Docket Entry # 72-3, p. 11, C.A. 20-12101-LTS). Based on State Street's argument that the request was "'not proportionate to the needs of the case because the burden'" to State Street "'outweighs the likely benefit,'" the Report and Recommendation limited the request to apply only "'to those accounts in which ROK has a beneficial or other ownership interest in whole or in part.'" (Docket Entry # 42, pp. 64-65). This court also narrowed the request to the above-noted time frame. (Docket Entry # 42, p. 52). In light of the narrowed time frame, SWIFT messages provide an additional source of information relative to recent incoming and outgoing transactions and trades in State Street account(s) associated with ROK with custodially-held assets in which ROK has a beneficial or other ownership interest. Such transactional information may lead to the identity of newly-acquired assets and/or the location of ROK executable assets.

As to document requests seven and eight, this court narrowed these requests to exclude SWIFT messages. (Docket Entry # 42, pp. 61-62). On the basis of proportionality and undue burden, this court limited document request nine by striking the language "'any other related party'" to ROK. (Docket Entry # 42, pp. 62-63).

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custodian").

DISCUSSION

State Street moves for both clarification and, alternatively, reconsideration of the rulings regarding document requests four, six, and 11. Adhering to this bifurcation, this court addresses clarification and thereafter reconsideration.

I. Clarification

When a court "order is clear and unambiguous" on its face, a reviewing court, including a court reviewing its own order, must adopt and enforce the order in accordance with the order's plain meaning. Negrón-Almeda v. Santiago, 528 F.3d 15, 23 (1st Cir. 2008) ("when a court's order is clear and unambiguous, neither a party nor a reviewing court can disregard its plain language") (internal citations omitted); id. at 23, 25 (vacating district court's intervention ruling as based on district court's incorrect reading of its prior, "clear and unambiguous" order). Indeed, even if the clear and unambiguous language does not reflect "the court's recollection of its actual intent," the "court must carry out and enforce the order" absent an "amendment or vacation" of the order. Id. at 23 (citing United States v. Spallone, 399 F.3d 415, 421 (2d Cir. 2005)). A party faced with clear and unambiguous phraseology cannot "disregard [an order's] plain language" on the basis that the court "'must' have meant" or intended "something different." Id. (internal citation omitted); see Alstom Caribe, Inc. v. Geo. P. Reintjes Co., Inc.,

484 F.3d 106, 115 (1st Cir. 2007) (citing Lefkowitz v. Fair, 816 F.2d 17, 22 (1st Cir. 1987), as "enforcing court order that 'contained not the slightest ambiguity' over claim that authoring judge 'must' have meant something different").

Conversely, where the phraseology of an order "is imprecise, there may be some play in the joints" such that "a reviewing court can comb relevant parts of the record to discern the authoring court's intention." Negrón-Almeda, 528 F.3d at 23. To the extent the phraseology is imprecise and there is "room for doubt," the party challenging the order may ask the issuing court "to *clarify* the scope of the order." Id. at 24 (emphasis added).[17] Thus, "where an order or judgment is unclear, a court retains inherent authority to interpret ambiguities." United States v. Spallone, 399 F.3d at 421. Case law also "makes pellucid that the dispositive consideration in interpreting a self-contradictory order—at least where neither construction of the order does more violence to its language than the other—is the issuing judge's intent." Subsalve USA Corp. v. Watson Mfg., Inc., 462 F.3d 41, 46 (1st Cir. 2006).

The First Circuit in Subsalve clarified an "internally inconsistent" order which purported to both terminate the action

[17] Although State Street cites three district court cases regarding clarification (Docket Entry # 49, p. 2) (Docket Entry # 60, p. 2, n.2), these cases do not cite any law specific to clarification, and the decisions carry less weight than the appellate court decision by the First Circuit in Negrón-Almeda.

while also transferring the action to another district court. Id. at 43, 45. Specifically, the First Circuit resolved the inconsistency based on the unmistakable and clear intent of the district judge "[i]n his memorandum decision," which twice emphasized "adopting the magistrate judge's recommendation to transfer the action" without "any mention of the recommendation to grant the motion to dismiss." Id. at 45. The First Circuit also deemed significant the fact that the district judge vacated a judgment dismissing the case less than one month after issuing the order thereby leaving "no doubt but that his intent, all along, was to effectuate a transfer." Id. In comparison, the First Circuit in Negrón-Almeda decided that the order at issue did not require clarification. The "clear" wording of that order "dismissed" the official capacity claims brought under 42 U.S.C. § 1983 ("section 1983"), all of which consisted of *injunctive relief* against an individual defendant, even though the case law cited for the order uniformly pertained to the principle of dismissing section 1983 claims for *damages* against individual defendants in their official capacities. Negrón-Almeda, 528 F.3d at 23-24.

More generally, "court orders, like statutes," are "read as a whole." Subsalve, 462 F.3d at 45. Interpretations of a court order that render a "portion of the order nugatory" are eschewed. Negrón-Almeda, 528 F.3d at 23.

Examining whether the orders on each of the three document requests were clear and unambiguous, the rulings set out the language of each request as narrowed. (Docket Entry # 42, p. 59) (document request four); (Docket Entry # 42, p. 61) (document request six); (Docket Entry # 42, p. 65) (document request 11). The language of the orders on each request, as narrowed, is not internally inconsistent, contradictory, or otherwise ambiguous. Cf. Alstom Caribe, 484 F.3d at 110-11, 117 (order denying intervention to insurance company coupled with approving settlement between all remaining parties but then transferring Fed. R. Civ. P. 67 funds to another court was internally inconsistent). Rather, the language of the recommended rulings on each request is clear and unambiguous. State Street's arguments to the contrary, to which this court now turns, do not convince this court otherwise.

State Street initially contends that the orders on document requests four and six do not reflect the intent and the reasoning of the Report and Recommendation to limit discovery to the location of executable assets and the identity of the global custodian. As to all three document requests, State Street submits the rulings are inconsistent with rulings on other document requests. (Docket Entry ## 49, 60).

Undeniably, a primary basis for the rulings was to target discovery toward information designed to locate current,

executable assets of ROK and to identify the new global custodian. (Docket Entry # 42, pp. 25, 30, 32, 37, 39-42, 44, 48, 52, 54, 57, 59, 65). In setting out the "[f]ramework" for post-judgment discovery, however, the Report and Recommendation sets out a somewhat broader reach beyond custodial identification and "location" of National Fund assets. In this respect, the Report and Recommendation reads that "'[I]nformation that could not *possibly* [emphasis added] lead to executable assets is simply not '*relevant*' [emphasis in original] to execution in the first place.' Republic of Argentina, 573 U.S. at 144-145."[18] (Docket

[18] In greater detail, the Report and Recommendation articulates that:

> [T]he principle constraint on [Rule 69(a)] discovery is "that it must be calculated to assist in collecting on a judgment." EM Ltd. v. Republic of Argentina, 695 F.3d 201, 207 (2d Cir. 2012), *aff'd sub nom.*, Republic of Argentina, 573 U.S. 134 (2014). "[I]nformation that could not possibly lead to executable assets is simply not '*relevant*' to execution in the first place." Republic of Argentina, 573 U.S. at 144-145 (citing Fed. R. Civ. P. 26(b)(1)) (emphasis added); Voit Techs., LLC v. Del-Ton, Inc., No. 5:17-CV-259-BO, 2019 WL 3423468, at *1 (E.D.N.C. July 29, 2019) (judgment creditor's use of Fed. R. Civ. P. 45 subpoena for post-judgment discovery under Rule 69(a)(2) is "subject to Rule 26's standards for discoverability," namely, that "parties may obtain discovery . . . 'that is relevant'"). Adhering to these principles, discovery seeking documents or information from State Street regarding the location, possession, and/or custody of ROK executable assets to enforce the [D.C. Judgment] is appropriate even if State Street does not hold or have custody of the NBK assets it manages or does not service accounts on behalf of ROK, the National Fund, or [the National Investment Corporation of the National Bank of Kazakhstan].

(Docket Entry # 42, pp. 24-25).

Entry # 42, p. 24). Stated conversely, information that could possibly lead to the existence of executable assets is relevant. The Report and Recommendation also cites the principle that "Rule 69(a)(2) discovery . . . encompasses '"information relevant to the existence or transfer of the defendants' assets."'"[19] (Docket Entry # 42, p. 39) (quoting Owens v. Republic of Sudan, Civil Action No. 01-2244 (JDB), 2020 WL 4039302, at *5 (D.D.C. July 17, 2020)).

Here, as in Negrón-Almeda, 528 F.3d at 19, 24, the focus of the analysis in the Report and Recommendation on asset location and custodial identification leading to the orders on document requests four and six does not override the clear and unambiguous language of the orders. With respect to document six, the ruling states: "As narrowed, the request is acceptable" and then quotes the language of document request six. (Docket Entry # 42, p. 61). The request's language applies to "'documents and

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[19] Elsewhere, the Report and Recommendation explains that:

> At this juncture, the Statis do not need to "satisfy the stringent requirements for attachment in order to simply receive information about [ROK's] assets." EM Ltd. v. Republic of Argentina, 695 F.3d at 209; Amduso, 288 F. Supp. 3d at 96 n.4 ("plaintiffs can seek discovery wider than the scope of what is ultimately attachable, since they 'do[] not yet know what property [Sudan] has and where it is, let alone whether it is executable under the relevant jurisdiction's law'") (quoting Republic of Argentina, 573 U.S. at 144) (brackets in original).

(Docket Entry # 42, p. 33).

communications,'" not including SWIFT messages, "'relat[ing] to any asset of the ROK'" for the narrowed time period. (Docket Entry # 42, p. 61). With respect to document request four, the ruling narrows the request to apply to "accounts in which ROK has a beneficial or other ownership interest" and then quotes the language of the document request as narrowed. (Docket Entry # 42, p. 59). There is neither "play in the joints" nor imprecision to justify clarifying the clear and unambiguous terms of the orders on these document requests. Id. at 23-24 ("party faced with a clear and unambiguous order has no duty to look behind it"). Accordingly, State Street's inconsistency argument is not convincing, and the rulings do not warrant clarification.

State Street's related argument that numerous emails and internal documents discuss the NBK account and therefore "appear" to mandate production of every document concerning the State Street "accounts" under document requests four and six (Docket Entry # 49, p. 4) (Docket Entry # 60, p. 3) is unavailing for the same reason. See id. In addition, the argument overstates the breadth of the responsive documents. The time period spans a relatively short period dating back to October 1, 2019, and an additional two-month period in 2018. Furthermore, the implicit tenor of the argument, couched in terms of inconsistency, is that the broad requests capture a large number of irrelevant, responsive documents. (Docket Entry # 49, p. 4) (Docket Entry #

6, p. 3). This aspect of the clarification argument therefore seeks reconsideration of the burden and relevancy adjudications this court made vis-à-vis the Fed. R. Civ. P. 26(b)(1) and 45(d)(3)(A)(iv) calculus (Docket Entry # 42) under the guise of requesting clarification. See In re Nieves Guzman, 567 B.R. 854, 863 (B.A.P. 1st Cir. 2017) ("substance of the motion, not the nomenclature used or labels placed on motions, is controlling"); Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281, 283 (1st Cir. 1993) ("[o]ur inquiry into the character of the motion is a functional one: 'nomenclature should not be exalted over substance'"). The substance of a reconsideration motion "'aim[s] at *re* consideration, not initial consideration.'" Perrier-Bilbo v. United States, 954 F.3d 413, 435 (1st Cir. 2020) (discussing motion filed under Rule 59(e) and Rule 52(b)). Likewise, the substance of State Street's argument that the rulings allowing these "two broad requests" require State Street to review and produce "every document related to [the] accounts" (Docket Entry # 49, p. 4) (Docket Entry # 60, p. 3) is aimed at reconsideration, not initial clarification.

State Street next argues that this court's allowance of document requests four and six is inconsistent with the rejection of document request one as "overbroad, irrelevant, and not proportional" because document requests four and six encompass the same documents about State Street's management role of the

National Fund sought in document request one.[20] (Docket Entry # 60, p. 2) (Docket Entry # 49, p. 4). First, because document request six applies to documents related to ROK assets, it is not likely to reach and encompass all of the same documents as document request one, which applies to State Street's "management role." (Docket Entry # 72-3, p. 9, 20-12101-LTS). Document request four targets documents "concerning" NBK account(s) maintained by State Street and therefore likely captures responsive documents identifying the new global custodian(s) connected to the accounts as well as recent account documents containing information relative to the custodian(s) or recent transactions. The fact that documents responsive to document request four may duplicate or overlap documents responsive to document request one does not render the clear language of the ruling on document request four imprecise and subject to clarification for the aforementioned reason that a "party faced with a clear and unambiguous court order has no duty to look behind it." Negrón-Almeda, 528 F.3d at 24.

Second, this court allowed document request six because it seeks information leading to executable *assets* of ROK (Docket Entry # 42, pp. 24, 60-61), a well-established focus of post-

[20] Document request one seeks the following: "All documents and communications (not including CHIPS, Fedwire or SWIFT messages) evidencing or concerning State Street's *management role* with respect to the National Fund." (Docket Entry # 72-3, p. 9, C.A. No. 20-12101) (emphasis added).

judgment discovery even for assets located outside the United States. See EM Ltd., 695 F.3d at 208. Similarly, document request four targets documents with information about account(s) connected to those *assets*, which are held by custodian(s). As indicated in the Report and Recommendation, the needs of the case pertain to the enforcement of the D.C. Judgment via assets in which ROK has a beneficial or other ownership interest. (Docket Entry # 42, p. 59). Information sought in document requests six and four was therefore substantially more important and relevant to the central issue of aiding the execution of the D.C. Judgment than information regarding NBK's more amorphous management role sought in document request one. Relatedly, this court rejected document request one partly because it was cumulative of certain information obtained in the Rule 30(b)(6) deposition in the Section 1782 Proceeding. (Docket Entry # 42, p. 56, n. 39, and related text). This court also reasoned that documents responsive to requests two and nine lessened the Statis' need for documents responsive to document request one thus further impacting the proportionality calculus. (Docket Entry # 42, pp. 56-57). Although the undue burden of the large number of responsive documents applied to document requests one, four, and six (Docket Entry # 33, ¶ 8, C.A. No. 20-12101-LTS), the above-noted other factors regarding document request one weighed more heavily in the decision to reject that request than they did in

the adjudication to allow document requests six and four given their focus, respectively, on assets and accounts connected with those assets.

In sum, given these principled bases to resolve the purported conflict or inconsistency, cf. Subsalve, 462 F.3d at 45 (rejecting plaintiff's argument as not "provid[ing] a principled basis for resolving the inconsistency"), *if any*, State Street's argument based on the rejection of document request one does not warrant clarifying the ruling on document requests six and four to limit them to the requested asset location and custodial parameters.

Turning to document request 11, State Street submits that the request's inclusion of SWIFT messages is inconsistent with document requests seven and eight, which this court approved after narrowing them to exclude SWIFT messages to reduce the burden imposed on State Street. (Docket Entry # 49, pp. 5-6) (Docket Entry # 60, p. 4). Noting that document request nine includes SWIFT messages but limits production to documents identifying ROK as the beneficiary or originator to a transaction, State Street seeks to clarify document request 11 by also limiting it to identifying "'ROK as the beneficiary or originator to a transaction.'"[21] (Docket Entry # 49, p. 6).

[21] The Statis inserted the beneficiary/originator language into document request nine when they first served the document subpoena on State Street in February 2019. (Docket Entry # 3, p.

The argument is not convincing. First and foremost, the language of the ruling on document request 11 (Docket Entry # 42, p. 65) is clear and unambiguous and therefore precludes clarification. Negrón-Almeda, 528 F.3d at 23-24. Moreover, document request 11 applies to accounts in which ROK has a beneficial or ownership interest or, more precisely, National Fund assets in which ROK has a beneficial or ownership interest. In contrast to document request 11, document request eight does not directly concern ROK assets. Rather, it applies to debts owed by ROK, albeit also implicating the existence of collateral to secure the debt. (Docket Entry # 72-3, p. 10, C.A. No. 20-12101-LTS).

Furthermore, SWIFT messages are relevant because "asset manager[s] . . . communicate with *custodians* over the SWIFT network" and trades or transactions on behalf of NBK generate SWIFT messages.[22] (Docket Entry # 22-13, p. 33, C.A. No. 20-12101) (emphasis added). SWIFT messages may therefore include

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5, ¶ 13).

[22] The fact that SWIFT messages include information showing trades and transactions does not preclude similar information in documents responsive to document request four, which excludes SWIFT messages. Document request four seeks "all documents" "concerning" NBK accounts maintained by State Street subject to the narrowed time period, and it is therefore reasonable to conclude that responsive documents contain information regarding trades or client instructions contained in, for example, letters of direction (Docket Entry # 22-13, p. 15, C.A. No. 20-12101-LTS).

the highly relevant information of recent transfers or transactions of assets in which ROK retains a beneficial interest going out of the State Street account or coming into the account. See Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 95, n.3 (D.D.C. 2017) ("Federal Rules also allow plaintiffs to request discovery from Sudan regarding recent and planned transactions," consisting of "monetary transfers" in United States); GFL Advantage Fund, Ltd. v. Colkitt, 216 F.R.D. 189, 194 (D.D.C. 2003) (agreeing with plaintiff's argument that "wire transfers . . . are relevant because they will 'provide evidence concerning the existence of assets'" of judgment debtor); see also SAS Inst., Inc. v. World Programming Ltd., NO. 5:10-CV-25-FL, 2018 WL 1144585, at *3 (E.D.N.C. Mar. 2, 2018) (recognizing "purpose of postjudgment discovery to identify the whereabouts of a defendant[']s assets, to trace their movement, and to discover hidden or concealed assets"). Accordingly, although the number of documents consisting of SWIFT messages is likely "large" and thus burdensome to produce, which this court used as a reason to exclude SWIFT messages from document requests seven and eight (Docket Entry # 42, p. 61), the messages remain relevant as a means to locate and trace ROK executable assets as well as to identify the current custodian(s).

In addition, documents responsive to document requests seven and eight do not necessarily include documents containing

information about recent transactions of assets into and out of the State Street account, as does document request 11 with respect to assets in which ROK retains a beneficial or other ownership interest. The relevancy and importance of such information bolstered "the needs of the case" assessment, Fed. R. Civ. P. 26(b)(1), for the discovery regarding the SWIFT messages in document request 11 and the communications by the custodian in these messages. (Docket Entry # 42, pp. 17-18, 24, 44, 64-65) (Docket Entry # 42, p. 16, n. 16).

As to document request nine, this court's decision to narrow the request to eliminate "the any other party" language as overbroad had little to do with the limitation of the request "to transactions identifying the ROK as the beneficiary or originator" to a transaction, which the Statis inserted and this court left intact because it was relevant to show ROK's oversight and control of NBK. (Docket Entry # 42, pp. 62-63). State Street's contention that this court narrowed request nine to identify ROK as the beneficiary or originator of a transaction is not entirely accurate and does not justify narrowing document request 11 to identify ROK in the same manner.

In sum, given these principled bases to resolve the inconsistency, cf. Subsalve, 462 F.3d at 45, *if any*, in the rulings regarding document requests seven, eight, nine, and 11, clarification to limit document request 11 to identify ROK as the

beneficiary or originator to a transaction is not appropriate. In conclusion, the rulings on document requests four, six, and 11 are not subject to clarification. The language of the requests is clear and unambiguous regarding the clarifications sought by State Street.

II. Reconsideration

In lieu of clarification, State Street seeks reconsideration. The Statis maintain that State Street does not satisfy the standard for reconsideration.

The standard to merit reconsideration is difficult to meet. See Mulero-Abreu v. P.R. Police Dept., 675 F.3d 88, 95 (1st Cir. 2012). To succeed, "'the movant must demonstrate either that newly discovered evidence (not previously available) has come to light or that the rendering court committed a manifest error of law.'" Id. at 94-95 (internal citation omitted); accord Ellis v. United States, 313 F.3d 636, 648 (1st Cir. 2002) (reconsideration "warranted if there has been a material change in controlling law" or "newly discovered evidence bears on the question"). Reconsideration is also appropriate "if the court 'has patently misunderstood a party or has made an error not of reasoning but apprehension.'" Ruiz Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 82 (1st Cir. 2008) (ellipses and internal citations omitted). The existence of a manifest injustice also provides a basis for reconsideration. Ellis, 313 F.3d at 648. The manifest injustice

exception "requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong." Id. Ordinarily, "the district judge is in the best position to assess whether or not 'justice requires' [reconsideration]." Greene v. Union Mut. Life Ins. Co. of Am., 764 F.2d 19, 22-23 (1st Cir. 1985) (Breyer, J.).

In seeking reconsideration to limit document requests four and six to asset location and custodial identification, State Street argues that these requests require "production of every document related to" the State Street accounts "through which it managed National Fund assets." (Docket Entry # 49, p. 4). The breadth of the requests exceeds what the case law cited by the Statis permits, according to State Street. (Docket Entry # 60, p. 4). State Street also alleges that production entails "numerous" documents such as "documents [which] relate to the day-to-day management of a large account, such as proxy voting for stocks held in the NBK account"; documents which "mention NBK as part of discussions of all of State Street's clients in a particular sector or region"; "Bloomberg chat[s]"; "wire message[s]"; "trade confirmation[s]"; and "account statement[s]." (Docket Entry # 49, p. 4) (Docket Entry # 60, p. 3).

State Street's overbreadth and relevancy arguments are attempts to relitigate this court's prior adjudications relative to document requests four and six. As aptly reasoned by the

court in Port Auth. of N.Y. and N.J. v. Am. Stevedoring, Inc., Civil Action No. 09-4299 (SRC)(MAS), 2011 WL 1399079 (D.N.J. April 12, 2011):

> Plaintiff's relevancy argument appears to be nothing more than an attempt to obtain a second bite of the apple. Plaintiff's renewed relevancy argument is not appropriate on reconsideration and, furthermore, under this Court's liberal policy in favor of discovery, Defendant continues to demonstrate the relevancy of [the documents at issue].

Id. at *4.

With respect to document requests four, six, and 11, the narrowed time period for each request tailors the discovery to target relevant information possibly leading to ROK executable assets to enforce the D.C. Judgment. For example and with regard to document request 11, SWIFT messages likely include recent transactions of custodially-held assets in the NBK account maintained by State Street.[23] Such information may reveal whether the custodian continues to hold and possess an asset in which ROK has a beneficial or other ownership interest. Trade instructions in SWIFT messages may indicate the future disposition of assets in which ROK has a beneficial or other ownership interest. With respect to document request four, responsive documents in the form of "account statement[s]" are largely limited to statements in the past year and may uncover the relevant information of recent account activity and custodial

[23] See footnote 16.

information for assets in which ROK retains a beneficial or other ownership interest. As to document request six, it expressly pertains to "assets" of ROK, the judgment debtor. As such, the document request focuses on relevant information designed to lead to executable assets of ROK given the sharply narrowed time frame. Accordingly, the reconsideration State Street seeks to limit document requests four and six to asset location and custodial identification and document request 11 to ROK as the beneficiary or originator of a transaction is not necessary and fails to warrant reconsideration.

Broadly speaking with respect to all three document requests, the high bar to merit reconsideration, the breadth of post-judgment discovery under Rule 69(a), see Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 138 (2014) ("rules governing discovery in postjudgment execution proceedings are quite permissive"), and the narrowed time period all counsel against reconsideration of these requests. As a result, reconsideration is not appropriate.

II. Motion for Protective Order

State Street moves for a protective order under Fed. R. Civ. P. 45(d)(3) ("Rule 45(d)(3)"), Fed. R. Civ. P. 26(c) ("Rule 26(c)"), and the inherent power of this court in order to limit the use of any discovery it produces to the D.C. Proceeding, this action, "or any other action commenced by the Statis in the

United States" to enforce the arbitral award. (Docket Entry # 48, p. 3). In so doing, they identify the specific provisions in an attached proposed protective order containing these limitations and request this court to enter it. (Docket Entry # 48, pp. 3, 7) (Docket Entry # 48-1, ¶¶ 1(f), 3, 4) (Docket Entry # 61-1, ¶¶ 1(f), 3, 4). The Statis concur with State Street that they "would agree to a standard protective order," but do "not agree to a protective order containing a special provision limiting the use of the documents produced by State Street to execution proceedings in the United States." (Docket Entry # 55, p. 3) (Docket Entry # 48, pp. 1-2).

In seeking a protective order limited to United States enforcement proceedings, State Street relies on reasoning in the Report and Recommendation recognizing the Rule 69(a) discovery as relevant to aid in the enforcement of the D.C. Judgment and not relevant to enforce foreign judgments issued by foreign tribunals. (Docket Entry # 48, p. 2) (citing Report and Recommendation (Docket Entry # 42, pp. 4 n.3, 18 n.18, 31-32, 39, 59)).[24] State Street maintains that limiting the documents' use to United States enforcement proceedings "is necessary to give effect to" this "holding" in the Report and Recommendation (Docket Entry # 42, p. 4 n.3) and that the Statis are improperly

[24] The cited pages pertain to footnote three in the Report and Recommendation. (Docket Entry # 42, pp. 4 n.3, 18 n.18, 31-32, 39, 59).

seeking reconsideration without "try[ing] to establish the 'manifest error of law'" standard they previously articulated. (Docket Entry # 61, pp. 2-3) (Docket Entry # 48, p. 5).

State Street also points out that Rule 69(a) allows discovery to aid in the execution of a "'judgment' entered by a U.S. court," and that courts in the United States lack the "'authority to execute against property in other countries.'" (Docket Entry # 48, p. 5) (quoting Report and Recommendation (Docket Entry # 42, p. 39)). Although State Street acknowledges "the Statis are correct that the Federal Rules of Civil Procedure do not *automatically* bar the use of discovery from one litigation in another litigation" (Docket Entry # 61, pp. 3-4) (emphasis in original), State Street submits that allowing the Statis to use the documents obtained under Rule 69(a) in foreign tribunals without satisfying the requirements of section 1782 rewards the Statis "for using Rule 69 as a guise" to garner "the relief they sought, but concluded they could not obtain, in the 1782 [Proceeding]" (Docket Entry # 48, p. 5). (Docket Entry # 61, p. 4). According to State Street, limiting the use to enforcement proceedings in the United States under the inherent power of this court is appropriate to "'prevent abuses'" in circumventing section 1782, especially in light of State Street's nonparty status. (Docket Entry # 48, p. 5) (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984)); (Docket Entry # 61, p. 5).

Citing and relying on In re POSCO, 794 F.3d 1372, 1376-77 (Fed. Cir. 2015), State Street additionally argues that the Statis "must satisfy" the standard for relief under section 1782, which entails consideration of the relevant factors under Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), in order to use the documents in foreign proceedings. (Docket Entry # 61, p. 5) (Docket Entry # 48, pp. 5-6).

The Statis assert that Rule 26(c) governs the issuance of protective orders, as distinct from quashing or modifying a subpoena under Rule 45(d)(3), and it weighs heavily against issuing State Street's protective order because State Street fails to establish any potential harm to justify preventing the use of documents in foreign tribunals. (Docket Entry # 55). They point out and emphasize their "willingness to agree to a standard protective order" regarding the confidentiality of documents that State Street produces. (Docket Entry # 55). The Statis also argue that State Street's approach runs counter to the purpose of discovery to secure just and speedy determinations and, consistent with this purpose, courts reject limiting the use of discovery to the initial litigation. (Docket Entry # 55, p. 5) (citing Cipollone v. Liggett Grp., Inc., 113 F.R.D. 86, 91 (D.N.J. 1986)). The court in the frequently-cited Cipollone decision overturned a magistrate judge's finding that defendant showed good cause to issue a protective order limiting use of

discovery material "to the litigation in which it is initially obtained." Cipollone, 113 F.R.D. at 90-91 (rejecting premise that "defendant will suffer significant injury if discovery is not confined to this litigation," finding defendant fails to make "particularized showing" of good cause, and quoting Fed. R. Civ. P. 1 that discovery rules "'be construed to secure the just, speedy, and inexpensive determination of every action'"); accord Baker v. Liggett Grp., Inc., 132 F.R.D. 123, 126 (D. Mass. 1990). As indicated, the parties disagree regarding the sufficiency of State Street's showing of harm. (Docket Entry # 55, pp. 3-4) (Docket Entry # 61, pp. 6-8).

Turning to State Street's argument regarding the import of this court's "holding" in footnote three, the Report and Recommendation did not adjudicate that discovery, once produced, could or could not be used in a foreign proceeding. Rather, this court recognized that the Statis served the deposition and document subpoenas "[i]n order to aid in the execution of the D.C. judgment." (Docket Entry # 42, p. 3); see Iacobucci v. Boulter, 193 F.3d 14, 19 (1st Cir. 1999) (espousing that "trial court ordinarily is the best expositor of its own orders"). In this vein, footnote three in the Report and Recommendation explains that: "Discovery is therefore relevant to the extent it seeks to aid in the enforcement of the D.C. judgment. Discovery is not relevant to the extent it seeks to enforce foreign

judgments." (Docket Entry # 42, p. 4 n.3). The relevancy of discovery to enforce the D.C. Judgment in this action presents a separate issue from the use of such discovery by a party in a proceeding before a foreign tribunal. Contrary to State Street's argument, the reasoning in footnote three is therefore not a "holding" and the Statis' objection to State Street's motion does not "seek reconsideration" (Docket Entry # 61, p. 3).

State Street's position that the Statis must satisfy the Intel factors relevant to section 1782 proceedings to use the documents in foreign proceedings based on the majority opinion in POSCO, 794 F.3d at 1376-77, is also misplaced. The majority opinion ascribes to the view that the Intel factors "*must* be considered together with other considerations under [Rule 26]" when modifying a protective order to allow use of discovery in foreign proceedings even though section 1782 does not directly govern a request to modify a protective order. POSCO, 794 F.3d at 1375-77 (emphasis added). The reasoning of the concurring opinion in POSCO, 794 F.3d at 1377-1381 (Hughes, J., concurring), which rejects "that § 1782 must be applied outside of the narrow context of [a section 1782] action for the production of evidence for use abroad," id. at 1380, is more persuasive.

In pertinent part, Judge Hughes aptly explains, while citing to the statutory language of section 1782, that:

> The plain language of § 1782(a) speaks only to requests for an order to produce documents or testimony, not to voluntary

> dissemination of legally obtained documents. Section 1782(a) describes "order[ing] [a person] to give his testimony or statement or to produce a document." § 1782(a); . . . *id.* ("To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure."); *id.* ("A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."). Moreover, while § 1782(a) focuses on compelling testimony or document production, § 1782(b) focuses on the voluntary production of documents, expressly providing that § 1782(a) "does not preclude a person . . . from voluntarily . . . producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him." § 1782(b).
>
> The legislative history confirms that § 1782 was enacted—and further refined—to create a cause of action for enforcing letters rogatory or other international requests for documents or testimony found in the United States. *See Intel Corp.*, 542 U.S. at 247–49, 124 S.Ct. 2466 (recounting legislative history of § 1782). But it was not intended to reach the voluntary production of documents. For example, the Senate Report accompanying Congress's 1964 revitalization of § 1782 makes clear that Congress was only concerned with the district court's power to compel discovery in response to foreign requests: "Subsection (a) of proposed revised section 1782 makes clear that U.S. judicial assistance may be sought not only to *compel* testimony and statements but also to *require the production of* documents and other tangible evidence." S.Rep. No. 881580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 (emphasis added).

Id. at 1378 (Hughes, J., concurring) (emphasis in original).

Here, having ordered the discovery at issue and denied reconsideration, the Statis will likely receive and have possession of legally obtained documents.[25]

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[25] This court expresses no opinion with respect to whether at some point in the future if and when the Statis seek to use the documents in a foreign execution proceeding, such use is

Notably, as Judge Hughes astutely points out, modifying the protective order "to permit the use of previously discovered material in foreign proceedings—like all domestic court orders potentially impinging on a foreign court's sovereignty—may raise some of the *same comity concerns* identified by the Supreme Court in *Intel*." Id. at 1380-81 (Hughes, J., concurring) (emphasis added). His approach, unlike the majority's approach which mandates application of the Intel factors, id. at 1380 (noting "majority's holding that § 1782 *must* apply to the protective-order inquiry") (emphasis added), maintains flexibility while allowing and acknowledging the relevance of comity to any modification of a protective order or, in fact, "any time a court imposes restrictions on a foreign court." Id. at 1381 (Hughes, J., concurring). Indeed, this court recognized the concerns of comity as relevant and applicable to the discovery analysis in footnote three of the Report and Recommendation. (Docket Entry # 42, p. 4 n.3) (citing Republic of Argentina, 573 U.S. at 146 n.6). In sum, for reasons espoused by Judge Hughes, including the plain language and legislative history of section 1792, State Street's argument that the Statis *must* satisfy the Intel factors to use the documents obtained here at a future foreign proceeding or, more precisely, must satisfy such factors to modify a

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appropriate or warranted. The issue is not ripe for review and may raise concerns of comity.

protective order containing the definition of "Proceedings" State Street seeks, lacks merit.

Next, State Street relies on the inherent power of this court to limit the documents' use to United States enforcement proceedings to "'prevent abuses' of this Court's processes." (Docket Entry # 48, pp. 3-5) (Docket Entry # 61, p. 5). Citing Seattle Times, 467 U.S. at 35, State Street maintains this court should not reward the Statis for garnering the relief they sought but concluded they could not obtain in the section 1782 Proceeding in this Rule 69(a) proceeding. (Docket Entry # 48, p. 5) (Docket Entry # 61, p. 5).

For present purposes, this court accepts arguendo State's Street's contention (Docket Entry # 48, p. 5) that this court has the inherent power to craft a protective order to include the provisions State Street requests. See New York v. Grand River Enters. Six Nations, Ltd., 14-CV-910A(F), 2020 WL 3989337, at *1 (W.D.N.Y. July 15, 2020) ("'[W]e have no question as to the court's jurisdiction to [enter a protective order pursuant to Rule 26(c)] under the inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.'") (quoting Seattle Times, 467 U.S. at 35) (brackets and text in brackets inserted by court in Grand River, 2020 WL 3989337, at *1). "Because of their very potency, inherent powers must be exercised with restraint and discretion." Chambers v.

NASCO, Inc., 501 U.S. 32, 44 (1991).

The Statis' conduct does not warrant resorting to this court's inherent power to enter a protective order that restricts the definition of "Proceeding" to United State enforcement proceedings, absent a modification of the order. First, this court, in its discretion and in light of its familiarity with the section 1782 Proceeding and this Rule 69(a) proceeding, finds no abuse of this court's processes that would warrant resort to this court's inherent power. This reason is sufficient by itself to preclude entering the provisions based on this court's inherent power. Second, entry of a standard protective order with a provision similar to the one in a default protective order used by the district judge, see https://www.mad.uscourts.gov/boston/sorokin.htm (last visited Feb. 9, 2021), will limit the Statis' dissemination of documents subject to this category as accessible only to the parties' outside counsel and to this court. Such limits on the Statis will protect the confidentiality of documents in this category from a more widespread disclosure and reduce the risk and the harm to State Street of a dissemination of highly sensitive, proprietary information and confidential, private bank information.

Turning to the provisions of Rule 26(c), it requires a showing of good cause. Fed. R. Civ. P. 26(c). "The party seeking a protective order has the burden of demonstrating good

cause." Sec. and Exch. Comm'n v. Lemelson, 334 F.R.D. 359, 361 (D. Mass. 2020). The "good cause" standard in Rule 26(c) "'is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case.'" Heagney v. Wong, Civil Action No. 15-40024-TSH, 2016 WL 2901731, at *3 (D. Mass. May 18, 2016) (internal citations omitted)). One such interest, which this court considers and balances against other interests, is comity. A finding of good cause is "based on a particular factual demonstration of potential harm, not on conclusory statements." Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986).

State Street argues that "[a] protective order is essential to ensure the confidentiality of [highly sensitive commercial and proprietary] information." (Docket Entry # 48, p. 4). Undeniably, State Street has a legitimate interest in maintaining the privacy and confidentiality of its banking and financial records and guarding against their disclosure in foreign tribunals. See Gill v. Gulfstream Park Racing Ass'n, Inc., 399 F.3d 391, 402 (1st Cir. 2005) (noting that "need for confidentiality" and privacy concerns "are relevant factors" to balance in entering a protective order). Such concerns are nevertheless sufficiently protected by including an attorneys' eyes-only category for information categorized (based on an objectively reasonable belief) as highly confidential in a

protective order. State Street's proposed protective order contains such a provision (Docket Entry # 48-1, ¶ 1(b)), and the Statis do not proffer a specific objection to this provision. See Curet-Velázquez v. ACEMLA de P.R., Inc., 656 F.3d 47, 54 (1st Cir. 2011). This attorneys' eyes-only category includes "information the disclosure of which is highly likely to cause significant harm to an individual or to the business or competitive position" of the producing party, State Street. (Docket Entry # 48-1, ¶ 1(b)) (Docket Entry # 61-1, ¶ 1(b)). Separately, this court remains unconvinced that not limiting the use of produced documents to United States enforcement proceedings will turn the bank "into a clearinghouse for requests for discovery," as State Street suggests. (Docket Entry # 61, p. 8). Balancing other relevant concerns, including State Street's status as a nonparty and the Statis' ability to freely use the produced documents, as well as considering concerns of comity and avoiding restrictions on a foreign tribunal's exercise of its discretion, see generally POSCO, 794 F.3d at 1381 (Hughes, J., concurring), this court declines to impose the provisions State Street requests (Docket Entry # 48-1, ¶¶ 1(f), 3, 4) (Docket Entry # 61-1, ¶¶ 1(f), 3, 4) under Rule 26(c).

To the extent State Street relies on Rule 45(d)(3) to impose the restrictions, such reliance is inapt. This court has taken into account State Street's nonparty status in the balance of

interests under Rule 26(c)(1). The language of Rule 26(c)(1) applies to entry of a protective order whereas the language of Rule 45(d)(3) applies to quashing or modifying a subpoena. The more specific provisions of Rule 26(c)(1) control. See Cerqueira v. Am. Airlines, Inc., 520 F.3d 1, 13 (1st Cir. 2008) ("[i]t is clear that § 44902(b), being the more specific statute, applies to this case").

As a final matter, the Statis indicate a willingness to enter into a standard protective order although they do not set out its terms.[26] (Docket Entry # 55). They also fail to identify any specific provisions of State Street's proposed protective order (Docket Entry # 48-1) to which they object and therefore waive their ability to object to provisions other than the ones State Street seeks (Docket Entry # 48-1, ¶¶ 1(f), 3, 4) and identifies in its motion (Docket Entry # 48, p. 3). See Curet-Velázquez, 656 F.3d at 54 ("[a]rguments alluded to but not properly developed before a magistrate judge are deemed waived"); Coons v. Indus. Knife Co., Inc., 620 F.3d 38, 44 (1st Cir. 2010). The parties are therefore ordered to meet and confer and thereafter file a protective order for this court's signature consistent with this opinion that: includes the attorneys' eyes-only category (Docket Entry # 48-1, ¶ 1(b)) and related attorneys' eyes-only provisions; excludes the above-noted

[26] To state the obvious, this court relied on their willingness in denying the motion for a protective order.

provisions which restrict the protective order to United States enforcement proceedings, this action, and the D.C. Proceeding and, if necessary, includes replacement language; and is by and large otherwise similar to State Street's proposed protective order (Docket Entry # 48-1). During the meet and confer, the parties should discuss the additions State Street adds to the revised proposed protective order (Docket Entry # 61-1, ¶¶ 1(e), 6) and whether to include them in the protective order.

CONCLUSION

In light of the foregoing, this court **RECOMMENDS**[27] that State Street's motion for limited clarification or, in the alternative, reconsideration (Docket Entry # 49, C.A. No. 20-12052-LTS) (Docket Entry # 85, C.A. No. 20-12101-LTS) be **DENIED**. State Street's motion for a protective order (Docket Entry # 48, C.A. No. 20-12052-LTS) (Docket Entry # 84, C.A. No. 20-12101-LTS) is **DENIED** to the extent it seeks to include the aforementioned provisions (Docket Entry # 48-1, ¶¶ 1(f), 3, 4). The parties shall conduct a meet and confer and thereafter file a proposed protective order consistent with this opinion and in accordance

[27] Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of receipt of the Report and Recommendation to which objection is made and the basis for such objection should be included. See Fed. R. Civ. P. 72(b). Any party may respond to another party's objections within 14 days after being served with a copy of the objections. Failure to file objections within the specified time waives the right to appeal the order.

with the preceding paragraph on or before February 17, 2021.

/s/ Marianne B. Bowler

MARIANNE B. BOWLER
United States Magistrate Judge