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1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 DEPOSIT INSURANCE AGENCY,

4 Petitioner,

5 v.

17 MC 414 (GBD) (SN)

6 SERGEY LEONTIEV,

Oral Argument

7 Movant.

8 -----x

New York, N.Y.  
January 31, 2019  
2:10 p.m.

11 Before:

12 HON. SARAH NETBURN,

Magistrate Judge

14 APPEARANCES

15 MORRISON COHEN, LLP  
Attorneys for Petitioner  
16 BY: JEFFREY D. BROOKS

17 GIBSON, DUNN & CRUTCHER, LLP  
Attorneys for Movant  
18 BY: ROBERT L. WEIGEL  
ALISON LEIGH WOLLIN  
19 BRAD SCHOENFELDT

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, would you please state  
3 your appearance for the record.

4 MR. BROOKS: Jeffrey Brooks from Morrison Cohen,  
5 counsel for petitioner, Deposit Insurance Agency.

6 THE COURT: Thank you.

7 MR. WEIGEL: Robert Weigel, Alison Wollin, and Brad  
8 Schoenfeldt, for respondent Mr. Leontiev.

9 THE COURT: Thank you.

10 I've read the parties' submissions and am prepared to  
11 rule today. Mr. Weigel, why don't I give you an opportunity,  
12 since this is your motion, if there's anything you'd like to  
13 add to what you've provided here. The one question I have for  
14 you is if you're aware of any case that has permitted the type  
15 of action that you're requesting, a plenary action arising out  
16 of a 1782 motion?

17 MR. WEIGEL: Your Honor, we have scoured the  
18 landscape, and it is true that there is no specific case  
19 dealing exactly with 1782 and in this context. I would suggest  
20 that the Zidenberg case out of the Ninth Circuit is --  
21 *Siderman*, is actually quite close. It relates to letters  
22 rogatory that were brought in California by the Argentine  
23 government, and in that case, the Ninth Circuit held that the  
24 Argentine government expected that a U.S. court would get  
25 involved in the very substance of what was at issue in that

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1 case and therefore that they had agreed, essentially an  
2 implicit waiver of their sovereign immunity.

3 It is clear that there's no exception under 1367 for  
4 false affidavits or false statements to a court. The same  
5 obligations that a litigant has in any other action, the  
6 litigant has those same obligations here. Judge Kaplan in the  
7 *Chevron* case, for example, we cite it in our papers, but there  
8 was also subsequent trial, Judge Kaplan found that submitting a  
9 false affidavit in a 1367 petition in that case was obstruction  
10 of justice and was indeed a predicate act for the RICO  
11 violations that he found. The Second Circuit affirmed on that  
12 point. They don't get --

13 THE COURT: That seemed far afield from where we are  
14 here. Can we just focus on the *Siderman* case for a moment?

15 MR. WEIGEL: Yes, your Honor.

16 THE COURT: A couple of questions for you as to  
17 whether or not you think it matters. The biggest one is the  
18 Second Circuit, which I think has at least, if not explicitly,  
19 implicitly rejected the reach of the *Siderman* case. But even  
20 *Siderman* itself, I think, is narrow such that your case would  
21 not fall within its confines. To begin with, the case was  
22 remanded to the district court, so there wasn't a specific  
23 finding, I don't think, that, in fact, Argentina had implicitly  
24 waived its immunity, but rather that it looked like it did and  
25 remanded to the trial court for further findings.

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1           But secondly, the Ninth Circuit makes quite clear that  
2 its holding is not to permit open jurisdiction whenever a  
3 sovereign uses the U.S. courts to litigate an issues and makes  
4 clear that there needs to be a "direct," that's a quote,  
5 connection between the initiating litigation brought by the  
6 sovereign and the subsequent litigation brought against the  
7 sovereign. Here, I guess I'd be curious to hear how you would  
8 define the initiating litigation and the subsequent litigation  
9 in order to say that they are directly connected, as *Siderman*  
10 suggests needs to happen.

11           MR. WEIGEL: Sure. The *Cabiri* case, *Cabiri* case, I  
12 don't know how you pronounce it, *Cabiri*, in the Second Circuit  
13 which I think --

14           THE COURT: It's C-a-b-i-r-i, for the court reporter's  
15 assistance.

16           MR. WEIGEL: -- is the case that you say distinguishes  
17 *Siderman*, and it does question and makes a couple of sort of  
18 almost snide comments about the adventuresome panel in the  
19 Ninth Circuit. But in that case itself, they did hold that the  
20 sovereign had waived sovereign immunity as to a claim that was  
21 related. In that case it was a breach of contract claim, and  
22 they held that the sovereign had waived it because it was  
23 related to, what was there, an eviction. The Ghanaian diplomat  
24 had resided in Ghanaian state-owned housing out in Long Island.  
25 I guess the state owned a house. His family lived there. They

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1 were trying to evict the family, and the Second Circuit held  
2 that the claim as to whether they had breached his employment  
3 contract was sufficiently related to the claim of eviction that  
4 they had jurisdiction; that there had been an implicit waiver.

5 The Ninth Circuit in *Siderman* references the House  
6 Report, the underlying legislative history of the Foreign  
7 Sovereign Immunities Act, which is also referenced in the  
8 Second Circuit cases as well. That sets forth three elements  
9 as examples. It's not limiting, but examples of the kind of  
10 connection that is necessary in order to have an implicit  
11 waiver. First would be that the foreign state has agreed to  
12 arbitrate in another country where a foreign state has -- or  
13 where a foreign state has agreed that the law of a particular  
14 country should govern a contract, and then they also include a  
15 situation where a foreign state appears but doesn't raise  
16 sovereign immunity.

17 Now, here I have a situation where we contend, and we  
18 believe we can prove -- and, your Honor, we're just seeking at  
19 this point in time permission to file a complaint. They'll be  
20 able to move to dismiss it. Perhaps we'll get some discovery.  
21 We could do this on a fuller record -- but what we have here is  
22 that they submitted affidavits to this Court, two affidavits, I  
23 think three. All of those affidavits contained the language  
24 that has an implicit waiver. They say at the very last bit:  
25 "I affirm under penalty of perjury under the laws of the United

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1 States that the foregoing is true and correct." These  
2 affidavits were submitted in this Court by agents, the law  
3 firms that represented these folks, in behalf of their argument  
4 that your Honor should issue 1367 discovery. So they came to  
5 this Court. They said we're submitting --

6 THE COURT: You keep saying 1367. Do you mean 1782?

7 MR. WEIGEL: Yes, I certainly do, your Honor.

8 THE COURT: Good.

9 MR. WEIGEL: I don't know why I have 13 --

10 THE COURT: I thought maybe I went to the wrong  
11 courtroom.

12 MR. WEIGEL: No, maybe I just -- I was out skiing last  
13 week, and maybe my mind got a little jumbled. But 1782 is  
14 exactly what I'm talking about. I apologize.

15 THE COURT: That's all right.

16 MR. WEIGEL: But they came to this Court and submitted  
17 affidavits and said we're willing to be judged by the laws of  
18 the United States, and that's really all we're asking your  
19 Honor to let us do. We want to be able to adjudicate --

20 THE COURT: What would be the limits of that holding  
21 if I concluded that the submission of an affidavit under the  
22 penalty of perjury in the United States would subject such  
23 affiant to jurisdiction here? Would there be any limitation to  
24 that? How would we control that? It seems like we would  
25 become the final arbiter of all disputes.

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1           MR. WEIGEL: Your Honor, I don't think there's any  
2 doubt that by signing that, they are indeed agreeing that they  
3 could be subject to perjury in the United States. The limit is  
4 what's contained in the affidavit. I mean, I couldn't sue them  
5 on some unrelated tort because they did that. But what we're  
6 asking for is that they took the position in this Court in the  
7 papers they filed and in the affidavits they filed, that my  
8 client had embezzled hundreds of millions of dollars. They  
9 don't say there is a lawsuit pending in Russia in which it is  
10 alleged that my client embezzled hundreds of millions of  
11 dollars. If that lawsuit existed, that could be a factually  
12 true statement, and your Honor would not necessarily be in a  
13 position to decide anything other than whether it was true, in  
14 fact, that there was such a lawsuit.

15           But they don't say that, and your Honor in your  
16 decision expressly noted in denying us discovery that  
17 Mr. Leontiev isn't party to that lawsuit. They haven't named  
18 him there. But they come into this courtroom and they make  
19 assertions against Mr. Leontiev that he embezzled hundreds of  
20 millions of dollars, and then your Honor granted their  
21 discovery. Now, I know and you know and everybody in this  
22 courtroom knows that you didn't make any adjudication as to  
23 whether or not that allegation was truthful or not, but they  
24 made that allegation to persuade your Honor, and then your  
25 Honor did grant the discovery, and it leaves a cloud over my

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1 client's head.

2           They came to this courtroom. They didn't have to  
3 bring this issue into this courtroom. They came here, and this  
4 is an implicit waiver. They submitted themselves to the  
5 jurisdiction of this Court. They took the position here that  
6 we're making factual statements to you, and we're making those  
7 statements under penalty of perjury of the laws of the United  
8 States, which I would say is virtually identical to agreeing in  
9 a contract, as the House Report says, that the laws of New York  
10 would govern a contract.

11           The limit that -- you asked me what the limit was.  
12 The limit is what's in the affidavit. It's not a general  
13 waiver of all purposes for jurisdiction, but as in *Siderman*,  
14 what we're seeking is directly related to what they said in  
15 this courtroom. The first sentence of their preliminary  
16 statement in, I think it is, their opposition to our motion to  
17 quash says Mr. Leontiev embezzled hundreds of millions of  
18 dollars. We're trying to ask -- what we want is a fair forum  
19 in which we can prove that what they said to this Court in an  
20 attempt to persuade this Court to do something is false.

21           THE COURT: How much overlap would a proceeding in the  
22 nature that you're discussing in order to prove that that  
23 allegation was false, how much overlap would that have with any  
24 of the underlying litigation and proceedings going on in  
25 Russia?



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1           MR. WEIGEL: Well, my client is not a defendant in the  
2 Russian bankruptcy proceeding. There is currently no  
3 proceeding against him in the Russian bankruptcy, which is what  
4 the 13 -- 1782 was filed for. So there isn't overlap because  
5 there isn't a proceeding currently against Mr. Leontiev in  
6 which it is charged that he, in fact, embezzled hundreds of  
7 millions of dollars. So currently this would be the first  
8 place where that is being adjudicated, and we would submit that  
9 there's nothing wrong with that. They came from Russia. They  
10 came here. They said there's evidence here. They said there's  
11 evidence here that's relevant to our charge that he embezzled  
12 hundreds of millions of dollars, and so we're saying, Fine, you  
13 came here. You asserted it. You didn't qualify it. You  
14 didn't say it's alleged here or something like that. They said  
15 it as a fact. Affiants came and said based on personal  
16 knowledge or what I've been told, this is what happened, and  
17 they've made those assertions for the purpose of persuading  
18 your Honor to issue a ruling that allowed them to take  
19 discovery here. And we're asking that they be held to the same  
20 standard any other litigant has and that we be entitled to  
21 evaluate under a fair forum whether or not that statement is  
22 true.

23           THE COURT: If I were to permit the action to proceed  
24 here, where would the discovery be located?

25           MR. WEIGEL: Well, presumably there would -- they took

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1 the position that they don't --

2 THE COURT: They came here looking for some discovery  
3 in furtherance of their bankruptcy proceeding. That they  
4 believe Mr. Leontiev had either documents or his own personal  
5 testimony in furtherance of a foreign proceeding as is  
6 permitted under Section 1782.

7 MR. WEIGEL: Sure.

8 THE COURT: So it sounds to me that the goal of your  
9 proceeding, which I take it is to prove that it is false, that  
10 Mr. Leontiev engaged in malfeasance.

11 MR. WEIGEL: Not just general malfeasance, but the  
12 specific malfeasance they alleged.

13 THE COURT: The specific embezzlement?

14 MR. WEIGEL: Yes.

15 THE COURT: My question is if I were to permit you to  
16 pursue that litigation, where would the discovery be?

17 MR. WEIGEL: Well, I suspect it would be -- there  
18 would certainly be discovery here because Mr. Leontiev is not  
19 going to Russia anytime soon unless somebody forced him under  
20 gunpoint to do so, because he's confident what would happen to  
21 him if he went there. They took the position -- your Honor may  
22 remember that we said they've got all the documents. They've  
23 got the bank records. They're claiming that my client, who  
24 basically fled the country very quickly, they said, he's got  
25 all the records. Well, we said they're the receiver. They've

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1 got all the bank records. You know what they said? They came  
2 back and they said, well, we don't have those records, your  
3 Honor. So they took the position that they don't have a lot of  
4 discovery in Russia. Whether that's true or not, we'll find  
5 out.

6 But, your Honor, it's fairly common in these  
7 circumstances, your Honor chose in this case not to award us  
8 reciprocal discovery because there wasn't, in fact, a  
9 proceeding against Mr. Leontiev yet, but they can't really  
10 complain too loudly if they have to produce some documents here  
11 that they have in Russia if, in fact -- they took the position  
12 that they can prove this stuff. They said it in affidavits.  
13 So some of the discovery would be here, some of the discovery  
14 would be in Russia, or in perhaps, probably more likely,  
15 Helsinki, which is where one tends to take depositions because  
16 Russia doesn't seem to even allow even consensual depositions.  
17 But, you know, it would be a lawsuit. Somebody's going to be  
18 inconvenienced no matter where this lawsuit is brought, and  
19 Leontiev is here; they're in Russia. They came to this Court.  
20 They asked this Court for relief. They made statements that we  
21 contend were false, knowingly false, and they knew when they  
22 made those statements that your Honor could have said, as other  
23 judges have in the context of 1782, let's have a hearing, and  
24 they could have been -- we could have put somebody in the box  
25 and asked them questions, and your Honor could have made

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1 factual findings. Your Honor decided you didn't need to do  
2 that, but that was certainly a risk that they had when they  
3 made these filings. So presumably they're prepared to prove it  
4 up, and all we're saying is let's go.

5 THE COURT: Do you want to address your, I think it is  
6 the secondary argument, that the commercial activity exception  
7 in the Foreign Sovereign Immunity Act would also waive the  
8 DIA's immunity?

9 MR. WEIGEL: Certainly, your Honor. It is sort of  
10 counterintuitive, but the laws are pretty clear on this that  
11 you look at the objective nature of the conduct not the  
12 subjective intent. So even purchasing bullets and military  
13 uniforms or machine guns is a commercial activity in the United  
14 States. It's not the subjective intent. The question is, is  
15 this something that a commercial actor could do, or is this  
16 something only a state can do? Operating an embassy is clearly  
17 not commercial activity, but I would submit that in this  
18 courtroom and in the one next to it on a daily basis creditors  
19 come in all the time and they say, I want to find the assets of  
20 this person. I need discovery. I've got a fairly decent  
21 practice of my own trying to collect large judgments from  
22 miscreants, and I am not a state actor. We take discovery all  
23 the time. We try to find out where people have put their  
24 assets.

25 THE COURT: But the DIA is not a creditor. It's like

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1 a trustee. It's a receiver.

2 MR. WEIGEL: Well, I think if they're not a creditor,  
3 then they don't -- the question is not are they or are they not  
4 a creditor, but the question is are they acting like a  
5 creditor? Are they doing something that objectively a  
6 non-state actor could be doing, would do regularly? And the  
7 answer is yes, that is exactly what they're doing. Certainly,  
8 you have bankruptcy receivers all the time, but all sorts of  
9 receivers, your standard real estate foreclosure case you get a  
10 receiver appointed. They go out and find the assets. It's not  
11 a state act. It is something that creditors do all the time  
12 who are looking to collect money that they contend they are  
13 owed. That's exactly what they are trying to do. They're  
14 saying Mr. Leontiev stole hundreds of millions of dollars is  
15 basically what they say.

16 THE COURT: So they're acting as like a commercial --

17 MR. WEIGEL: We want to find out where it is.

18 THE COURT: It's like a commercial debt collector?

19 MR. WEIGEL: Yes, exactly. That's exactly what  
20 they're trying to do, and it is objectively something that  
21 people do every day that are not sovereigns. They're not  
22 amassing a military. They're not operating a diplomatic  
23 mission. They have come here in a commercial capacity to  
24 collect money, just like any other person who claims they're  
25 owed money. So my position is I think it's quite clear that

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1 this is a commercial activity, that that's what they're doing.

2 THE COURT: OK. Understood.

3 MR. WEIGEL: Thank you.

4 THE COURT: Mr. Brooks.

5 MR. BROOKS: Thanks, your Honor.

6 The first point I'd like to make about the *Siderman*  
7 case, which I think is radically different from this case and  
8 has been somewhat misrepresented by the respondent, in  
9 *Siderman*, they were letters rogatory that were sent, but  
10 Argentina was not seeking discovery from Mr. Siderman. They  
11 had instituted criminal proceedings against him in Argentina,  
12 and they were serving process in those criminal proceedings via  
13 letters rogatory. So they were trying to coerce him, order him  
14 to come back to Argentina so they could torture him.

15 Then the suit that the Ninth Circuit was deciding  
16 whether it should proceed or not was a tort action based on the  
17 fact that he had, in fact, been kidnapped by Argentina and  
18 tortured. They weren't deciding whether Argentina had opened  
19 themselves up to litigate the underlying criminal action  
20 against Mr. Siderman in the Ninth Circuit, and that's what the  
21 respondent is asking here. He's saying let's come here and  
22 litigate whether Mr. Leontiev actually embezzled any money or  
23 not. But the Ninth Circuit, that's way beyond what the Ninth  
24 Circuit was doing. The Ninth Circuit was deciding a tort case  
25 about torture that part of it involved coming to California

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1 courts to try to coerce him to come back to be tortured.

2 This action has nothing -- the question of whether  
3 Mr. Leontiev embezzled funds, as your Honor suggested, would be  
4 answered by looking at the Russian bank records, looking at the  
5 wire transfers that aren't here, talking to Russian witnesses,  
6 all of his coconspirators, everyone, the thousands of employees  
7 that worked -- hundreds of employees who worked at  
8 Probusinessbank in Russia. This is all stuff that happened in  
9 Russia. It's not here. It's not related to the fact that the  
10 DIA came here and sought discovery in a 1782 action.

11 I think that that's also the key point on the  
12 commercial activity exception as well is that their action --  
13 in the commercial activity cases, the case itself has to be  
14 about the commercial activity. It has to be connected. It has  
15 to be the same thing. Here, there's no connection. They  
16 try -- they're not suing us --

17 THE COURT: Could you speak a little bit more slowly  
18 so we can get everything recorded.

19 MR. BROOKS: Sorry. We're not asking for -- they're  
20 not bringing a suit claiming that we defamed them in this case.  
21 They're not saying that we did something wrong in New York.  
22 They're asking for a declaration that what we said was wrong,  
23 which was really a substantive determination that Mr. Leontiev  
24 didn't embezzle funds in Russia. So there's no connection  
25 between whether Mr. Leontiev embezzled funds in Russia and any

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1 commercial thing that the DIA might have done as a receiver.  
2 It's totally unrelated.

3 THE COURT: What do you say, I was asking counsel  
4 about sort of what the discovery would look like and how much  
5 overlap there would be between any potential litigation that I  
6 might permit here in New York and the ongoing proceedings in  
7 Russia, and Mr. Weigel said because the proceedings in Russia  
8 don't directly involve Mr. Leontiev as an individual, as I  
9 recognized in my decision on the subpoena, that there wouldn't  
10 be that much overlap. Do you want to speak to that point?

11 MR. BROOKS: Sure. I think that it's not true there  
12 wouldn't be overlap. It's essentially the exact same issue,  
13 right? Mr. Leontiev is not a party to the Russian bankruptcy  
14 proceeding because of the way that Russian bankruptcy law  
15 works. He fraudulently conveyed money, but he doesn't have to  
16 become a party to that action. He is a party to the criminal  
17 proceedings, and some of his coconspirators have already been  
18 convicted for activities involving him. And then there are  
19 actions that the DIA has taken in other countries where some of  
20 these fraudulent transfers were made, and he is a party to  
21 those actions.

22 THE COURT: OK.

23 MR. BROOKS: So I think, to answer the broader  
24 question, even in the bankruptcy proceeding what they're trying  
25 to decide is were these transfers, were these loans, were they



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1 legitimate or were they fraudulent conveyances? And the  
2 question of whether they were legitimate or not is the same  
3 question as whether Mr. Leontiev embezzled the money or whether  
4 these transactions that he authorized and supervised, whether  
5 they were legitimate. It's the same question.

6 THE COURT: Thank you.

7 Mr. Weigel, anything you'd like to add? Let me ask  
8 you a question.

9 MR. WEIGEL: Yes, your Honor.

10 THE COURT: In a hypothetical world in which I permit  
11 you to proceed and conclude that it was, in fact, false, the  
12 statements that your client embezzled the funds, and I  
13 essentially exonerate your client, and then in Russia the court  
14 does the opposite and concludes that the transfers were all  
15 fraudulent and that all of the assets of the bank should be  
16 seized, what sort of crisis does that create as far as  
17 international relations?

18 MR. WEIGEL: Your Honor, we don't have high  
19 expectations that we are going to get a fair shake in Russia.  
20 Mr. Pavlov, who was the head of Quorum, then he was not the  
21 head of Quorum when we suggested that he was sanctioned, and  
22 then when we went to negotiate the scope of the protective  
23 order --

24 THE COURT: Protective order.

25 MR. WEIGEL: -- suddenly he's back at Quorum. It was

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1 just a little interlude. He's on the Magnitsky Act because he  
2 orchestrated a false judgment against one of Mr. Browder's  
3 companies that Mr. Magnitsky investigated, found out about, and  
4 then died in prison because of it.

5 We don't think we're going to get a terribly fair  
6 shake in Russia, but what they would do eventually, we believe,  
7 is they would -- they would know better than us, but our  
8 concern, and I don't think I'm giving away any great state  
9 secrets here, is that they're going to get some sort of corrupt  
10 judgment out of Russia and then try and come at Mr. Leontiev in  
11 the United States. And if your Honor has fairly determined by  
12 the court or the jury or however we -- I think it's a bench  
13 trial, that there was no embezzlement, then when they try to  
14 bring that corrupt Russian judgment to the United States, we  
15 will say that shouldn't be enforced because that is contrary --

16 THE COURT: Why couldn't you at that time raise these  
17 arguments? If it comes to pass that Russia gets a judgment  
18 against your client and then they want to come to the United  
19 States to enforce it, why couldn't you at that time bring an  
20 action to prevent the enforcement in the United States against  
21 his assets here and raise those concerns at that time?

22 MR. WEIGEL: Because, your Honor, the grounds for  
23 opposing the domestication of a foreign judgment are somewhat  
24 limited because there has been a forum, so we would be forced  
25 to challenge -- now, there isn't such a proceeding now, as you

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1 just heard. We would like this to be decided in the first  
2 instance by a fair forum. We would like to get a fair shot  
3 rather than have to try and prove up that the Russian  
4 proceeding, that doesn't exist yet, was corrupt. We think  
5 we're entitled to it. They've come here, they've raised it,  
6 and we want to have a fair forum decide whether or not my  
7 client embezzled hundreds of millions of dollars.

8 He shouldn't live under this cloud. They've made  
9 these accusations. They should be prepared to stand up and  
10 prove them. They made them in this Court and they made them  
11 subject to the penalty of perjury and the laws of the United  
12 States, and all we're asking is for a fair shot in front of a  
13 fair court, fair judge, to prove up that my guy didn't do it.

14 Thank you.

15 THE COURT: Thank you.

16 All right. Thank you, everybody, for your arguments  
17 and your excellent briefs. I appreciate all of that.

18 As I said, I'm prepared to rule today. I think I'll  
19 dispense with the background of this case because I think  
20 everybody is familiar with what gets us here. I'll certainly  
21 note for the record that discovery, I understand, is ongoing  
22 right now in connection with the subpoena that I authorized,  
23 and that while that discovery is proceeding, that Mr. Leontiev  
24 has moved for leave to file a complaint and to commence a  
25 plenary action against the DIA.

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1           As we've been discussing, Mr. Leontiev seeks a  
2 declaration from the court that the actions that support the  
3 DIA's discovery under the 1782 action are false, and he argues  
4 that the jurisdiction over these claims arise under  
5 Section 1330 and the Foreign Sovereign Immunities Act because  
6 DIA qualifies as a foreign state under the Foreign Sovereign  
7 Immunities Act. I understand that the DIA opposes the motion,  
8 and I conclude that the Court does not have jurisdiction to  
9 hear this claim and that even if it did, that the DIA would be  
10 immune from litigation, so I'm denying Leontiev's motion.

11           Leontiev first argues that by bringing the 1782  
12 motion, that DIA has created a case or controversy in this  
13 court. For example, he argues that the DIA's allegation that  
14 Leontiev has embezzled hundreds of millions of dollars of  
15 assets from Probusinessbank is false and that this court is the  
16 proper forum to adjudicate that issue because it is the basis  
17 on which the discovery was granted.

18           Leontiev argues that the discovery sought by the DIA  
19 arises from a common nucleus of operative facts, and therefore,  
20 exercising jurisdiction would promote judicial economy,  
21 convenience, and fairness. I think the opposite is true.  
22 Allowing a plenary action which essentially would serve as a  
23 check on the underlying bankruptcy proceeding, as counsel has  
24 noted, an effort to try to get a more fair proceeding here,  
25 would multiply the judicial resources. This Court has already

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1 issued a ruling in the 1782 motion, and expanding the scope of  
2 this case to a plenary action would require substantially more  
3 judicial involvement, much of which is already being supervised  
4 by the Russian courts. Second, most of the records and the  
5 witnesses that would be sought in any plenary action are  
6 located in Russia. Third, the Court is not prepared to rule on  
7 the record here that Mr. Leontiev is not unable to protect his  
8 rights and promote his interests in the Russian courts.

9 I appreciate Mr. Weigel's arguments and concerns, but  
10 I don't think on the record that I have here I'm prepared to  
11 make a sort of broad statement about the state of the judicial  
12 system in Russia.

13 Leontiev claims that the declaratory judgment will  
14 clarify and settle the legal claims between the parties,  
15 including whether Leontiev is actually guilty of the conduct  
16 about which he is accused in Russia, but as I've suggested, the  
17 Southern District of New York cannot serve as the Supreme Court  
18 of Russia. I find that the 1782 twin goals of efficient  
19 assistance to a foreign proceeding and the promotion of mutual  
20 respect between the U.S. and foreign judicial systems would be  
21 undermined here if this Court were to weigh in on whether the  
22 bankruptcy proceeding and receivership were brought in good  
23 faith.

24 As we've been discussing, Leontiev relies on *Siderman*  
25 *de Blake v. Republic of Argentina*, that's the 1992 case out of

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1 the Ninth Circuit, arguing that the DIA has implicitly waived  
2 its immunity in connection with these claims by commencing the  
3 1782 case. In *Siderman*, which was not a 1782 case and as we've  
4 discussed, I think no one is aware of any case where a plenary  
5 action was brought out of a 1782 motion. In *Siderman*, the  
6 plaintiff brought claims for torture and persecution against  
7 Argentina. He alleged that as part of a scheme, Argentina had  
8 initiated a pretextual criminal proceeding against him and that  
9 it had used the United States courts to serve him with process  
10 in California. The Ninth Circuit concluded that having  
11 allegedly enlisted the U.S. courts in its scheme to persecute  
12 *Siderman*, that Argentina had implicitly waived its immunity  
13 from all suits over claims related to that persecution. The  
14 Ninth Circuit then remanded for the district court to engage in  
15 fact-finding.

16 As I mentioned, the Ninth Circuit emphasized its  
17 limited ruling in that case. Specifically, that in order to  
18 imply a waiver because of the use of the U.S. courts, there had  
19 to be a direct connection between the initial court proceeding  
20 and the subsequent action.

21 I decline to rely on an out-of-circuit decision to  
22 vastly expand the scope of this Court's jurisdiction. I think  
23 a ruling from this Court that a governmental entity waives its  
24 immunity and subjects itself to the Court's jurisdiction in a  
25 plenary action by acting on a statute that expressly permits

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1 targeted discovery in the United States would do great damage  
2 to international relations. It would also add an exception, an  
3 additional exception, to the act which already enumerates  
4 specific exemptions, the Foreign Sovereign Immunities Act, that  
5 is, which allows for exceptions to immunity, including for  
6 counterclaims that arise out of a transaction or occurrences of  
7 the subject matter of the initial claim. As we've been  
8 discussing as well, the Court of Appeals in this circuit has  
9 already concluded that the reach in *Siderman* was -- I believe  
10 "dubious" was the word in that decision and was disinclined to  
11 follow that expansive reach.

12 In any event, as we've also been discussing, the facts  
13 of *Siderman* are not the same. Leontiev cannot establish that  
14 the DIA's use of the American courts was part and parcel of its  
15 allegedly corrupt bankruptcy proceeding. Argentina needed the  
16 U.S. courts to persecute *Siderman*, and here, Russia does not  
17 need the U.S. courts to continue its bankruptcy proceeding.

18 Secondly, Leontiev argues that the Foreign Sovereign  
19 Immunities Act's commercial activity exception applies here,  
20 and for the reasons largely stated in the DIA's brief, I find  
21 that the commercial activity exception does not apply. In  
22 relevant part, the foreign sovereign immunity does not apply  
23 where a sovereign performs an act in the United States in  
24 connection with a commercial activity. The act Leontiev wants  
25 to sue about is his conduct in Russia, namely, whether he

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1 committed the misconduct that he's accused of committing. The  
2 act that the DIA performed in the United States is the filing  
3 of the 1782 motion. Thus any waiver of immunity would be  
4 limited to the DIA's act of bringing that motion. But more  
5 fundamentally, there's no connection with commercial activity.  
6 The DIA's efforts to obtain information for use in the  
7 bankruptcy proceeding are not commercial in nature, and I'm  
8 relying on the *Granville Gold Trust-Switzerland* case out of the  
9 Eastern District of New York (1996) for that proposition.

10 Finally, I'll note that I agree with an argument  
11 that's raised only in a footnote by the DIA that the  
12 Declaratory Judgment Act is not the proper basis to obtain the  
13 relief that Leontiev seeks. As the DIA presents, the  
14 Declaratory Judgment Act is designed to obtain a judicial  
15 declaration of a party's rights. It's not intended to make a  
16 factual declaration about who did what and when.

17 In conclusion, I find that permitting Leontiev to  
18 proceed in the fashion that he requests would be a gross  
19 overreach of the Court's jurisdiction, and the motion for leave  
20 to file the complaint is denied.

21 As I referenced, I understand that the parties are  
22 continuing in their discovery. I issued my ruling last week  
23 with respect to Mr. Leontiev's deposition. I understand that  
24 that deposition is going to take place, I believe, in the next  
25 week or two. What I thought I would do was to set a deadline,



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1 maybe 60 days out, to ask for the parties to report back to the  
2 Court on where things stand with respect to discovery.

3 Obviously, if there's disputes that arise before then, the  
4 parties are directed to engage in the meet-and-confer process,  
5 and if you can't resolve it, you can bring that motion to me.  
6 But as a stopgap, I would set a deadline 60 days out for status  
7 letter.

8 All right. Anything further from either side?

9 MR. WEIGEL: Just one minor matter which hopefully  
10 won't ever percolate to your Honor, but we had set a date for  
11 Mr. Leontiev's deposition. I believe the 7th of February.  
12 Unfortunately, about a month ago the First Department in  
13 another case had asked me for my available dates, and I gave  
14 them. And apparently, while I was at lunch today, they decided  
15 that 2 o'clock --

16 THE COURT: That was the date?

17 MR. WEIGEL: -- 2 o'clock on the day that we're  
18 scheduled to do Mr. Leontiev's deposition is when they would  
19 like me to come to Madison Square. So we're going to try and  
20 work out another date.

21 THE COURT: I assume you can do that.

22 MR. WEIGEL: We should be able to do that. If there's  
23 an issue, we will get back to you, but I'm sure we can work  
24 something out.

25 MR. BROOKS: We'll try to work it out. My client has

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1 people several from Russia, so they don't have all that much  
2 flexibility, but we'll work with them.

3 THE COURT: Good. Stay warm, everybody.

4 MR. WEIGEL: Thanks, your Honor.

5 (Adjourned)

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