UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re ex parte Application of RTI LIMITED to Take Discovery for Use in Actions Pending in the District Court of Nicosia, Cyprus, and Anticipated in the Court Of Moscow, Russia

Case No. 12-misc-119

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MEMORANDUM IN SUPPORT OF MOTION TO REOPEN CASE, VACATE THE ORDER PERMITTING DISCOVERY AND TO QUASH THE SUBPOEANAS

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INTRODUCTION

COME NOW, Movants, DIMITRY OSIPOV ("Osipov"), ALDI MARINE LTD. ("Aldi"), NATICA SHIPPING LTD. ("Natica"), MERCURY SHIPPING & TRADING LTD. ("Mercury"), RANS CHARTERING LTD ("RANS Chartering"), and MAGUIRE INTERNATIONAL LTD. ("Maguire") (hereinafter collectively referred to as "Movants"), by and through undersigned counsel, and respectfully submit this Memorandum of Law, along with the accompanying Declarations of Dmitry Kharitonov, Katia Kakoulli, and Dmitry Osipov, in support of their motion to reopen this matter and to vacate the Order granting discovery (the "Discovery Order"), and/or to quash the subpoenas issued in connection with this matter pursuant to Fed. R. Civ. P. 45. Specifically, as set forth in detail below, Petitioner has not satisfied the requirements of 28 U.S.C. § 1782 ("Section 1782" or the "Statute"), and the Discovery Order must be vacated immediately and the subpoenas issued to the banks quashed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This matter is nothing more than a well-calculated effort by U.C. Rusal and its related entities (collectively referred to as "Rusal") to disregard applicable rules of procedure. Rusal previously sought the disclosure of the private banking information relating to Andrei Raykov ("Raykov") and the freezing of the Cyprus Defendants'[1] accounts in Cyprus, and was denied this relief by the Cypriot Court.[2] Rusal nonetheless presented a deceptively worded

[1] Aldi, Osipov, and Natica will hereinafter be referred to as "Cyprus Defendants."

[2] The Cypriot action was commenced in complete disregard of a Settlement Agreement executed between Rusal and three (3) of the Movants – Osipov, Natica, and Mercury. Specifically, in 2007, a dispute arose regarding four (4) Contracts of Affreighment (COAs) between Rusal, Alumina Bauxite Company Ltd., Oldendorff Carriers GmbH & Co. KG, Egon Oldendorff oHG, and Movants Mercury, Natica, and Osipov. *See* Osipov Declaration, ¶ 6. The parties executed a Settlement Agreement, wherein they agreed to dismiss a matter commenced by Alumina Bauxite Company Ltd. in the Southern District of New York Court with prejudice. Moreover, the Settlement Agreement provides as follows:

> (5) Alumina Bauxite Company Ltd. and Rusal on behalf of themselves and Rual Trade Ltd. (BVI) agreed to release Respondent Mercury, and (b) Oldendorff, Mercury, Osipov and Natica hereby release Alumina Bauxite Company Ltd., Rusal and their parent, subsidiaries and affiliates from all claims

Order to the bank in Cyprus, inducing the Cypriot bank to reveal the requested banking information, without notice to the Cyprus Defendants.[3] The Petitioner now comes before this Court seeking extensive documents and information relating to the Movants from several banks located in the District.

Further, the Petitioner asserted in its request for discovery that an application has been made to Russian authorities requesting the commencement of a criminal action. See Docket #2. In fact, as set forth in the Kharitonov declaration and below, there is no proceeding pending Russia and no formal criminal investigation is underway. Simply put, Petitioner should not be entitled to discovery in aid of a proceeding which does not exist.[4]

The Movants summarize the relevant factual background of both the Cyprus action and the "anticipated" Russian proceeding below.

Cyprus Action:

In May 2011, non-parties Alumina & Bauxite Company Ltd., Rual Trade Ltd., Calibre Properties Worldwide Ltd., and Mont Cervin – Consultadoria e Servicos Sociedade

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arising out of or relating to the following COAs save as relate to the performance of such COAs, as amended hereby and taking into account the substitution of parties set forth in paragraph 1.

(6) Alumina Bauxite Company Ltd. and Rusal, on behalf of themselves and each Rusal controlled entity, release Osipov and Natica in respect of all claims including fraud arising out of or in connection with the COAs referred to in clause 5 as well as any other past or present agreements entered into by a Rusal controlled entity and any third party which he controls or controlled, directly or indirectly, or of which he is or was a director (an "Osipov agreement") upon satisfaction of the following conditions:

a. Full disclosure within seven (7) days by Osipov of all current Osipov agreements.

b. Arrangements are made by Osipov to cause any third party entity which he controls directly or indirectly to transfer its contractual rights to Rusal or a Rusal controlled entity so as to enable it to have a direct contract with the real party in interest and performing party, if such relates to an Osipov agreement.

See Osipov Declaration, ¶ 7. Osipov has fully complied with his obligations under the Settlement Agreement. *See* Osipov Declaration, ¶ 8, Exhibit 2. Notwithstanding this Settlement Agreement, Alumina Bauxite Company Ltd. and Rusal-controlled entities have improperly commenced an action in Cyprus against Osipov and Natica, among others. *See* Kakoulli Declaration, ¶ 5. Further, Rusal has filed an application with Russian authorities seeking the commencement of a criminal investigation as to Osipov and the other Movants. *See* Docket #2, pg 8 – 10.

[3] Aldi has appealed the freezing Order issued by the Cyprus Court in reliance on the Cyprus Bank affidavit, and this appeal is presently pending. See Kakoulli Declaration, ¶ 18.

[4] Even assuming that a proceeding was presently pending in Russia, the Russian courts would not consider any information that may be produced by the subpoenas issued by the Petitioner.

Unipessoal, LDA[5] (hereinafter collectively referred to as "Cyprus Claimants"), commenced an action in the District Court of Nicosia Cyprus against the following entities: Andrei Raykov (hereinafter "Raykov"); Aldi Marine Ltd. (hereinafter "Aldi"), Dmitry Osipov (Dmitri Evgenievich Osipov)(hereinafter "Osipov"), Natica Shipping Ltd. (hereinafter "Natica"), Natica Shipping & Trading Ltd. (hereinafter "Natica Trading"); and Hellenic Bank Public Company Ltd. ("Hellenic Bank"). *See* Kakoulli Declaration, ¶ 5.

In their Statement of Claim, the Cyprus Claimants alleged, *inter alia*, that Raykov and Cyprus Defendants conspired so that Aldi, Natica, and Natica Trading would be exclusive brokers of Cyprus Claimants for charter agreements, and further, that Raykov accepted illegal commissions from the Cyprus Defendants in 2007.[6] *See* Kakoulli Declaration, ¶ 6. In their Defense submission, Cyprus Defendants categorically denied Cyprus Claimants' allegations, specifically asserting that the charter contracts at issue were entered into only after competitive bids were made and respective tenders held; that Aldi never made any kickback payments to Raykov or for "commissions"; and that the Cyprus Claimants commenced the Cyprus action in violation of the above referenced Settlement Agreement. *See* Kakoulli Declaration, ¶ 7.

Notably, a significant issue arose in the Cyprus proceeding relating to the improper methods applied by the Cyprus Claimants to obtain private banking information of the Cyprus Defendants. *See* Kakoulli Declaration, ¶ 8. Specifically, on May 23, 2011, Cyprus Claimants, acting *ex parte*, sought an Order from the District Court of Nicosia requiring, *inter*

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[5] Rual Trade Ltd., Calibre Properties Worldwide Ltd., and Mont Cervin – Consultadoria e Servicos Sociedade Unipessoal, LDA hold themselves out to be "some of the subsidiary companies of the Group of Companies of UC Rusal Group." See Kakoulli Declaration, ¶ 5. Accordingly, the commencement of the Cyprus action is a clear violation of the Settlement Agreement. The Cyprus Defendants have raised this point to the Cyprus Court, however, this argument has not yet been considered. *See* Kakoulli Declaration, ¶ 7.

[6] Notably, in Point II of its application to this Court, RTI Limited claims that Raykov arranged shipments for Bauxtrade Company of Guyana, Inc. (a member of the Rusal Group), however, does not allege that Aldi or Natica were involved in these shipments. See Docket #2. This contradicts Point I of RTI Limited's application wherein RTI Limited alleges that Natica eventually became the "sole and exclusive shipping broker for the Rusal Group." *Id.*

alia, Hellenic Bank: (i) to produce bank information relating to the Raykov; ("disclosure Order") (ii) to freeze any accounts belonging to Raykov and the Cyprus Defendants; ("freezing Order") and (iii) refrain from notifying Raykov and the Cyprus Defendants of the Cyprus action ("gagging Order"). *See* Kakoulli Declaration, ¶ 9. The same date, the Cyprus Court issued an Order prohibiting Hellenic Bank from informing Raykov and the Cyprus Defendants of the action, but denying to grant the other relief requested. *See* Kakoulli Declaration, ¶ 10. The Cyprus Claimants served Hellenic Bank with a deceptively worded Order including improper language which made it appear as though Hellenic Bank was required to disclose banking information of Raykov.[7] *See* Kakoulli Declaration, ¶ 11. This was a clear violation of the Cypriot Law which prohibits the disclosure of information with respect to bank accounts unless expressly authorized and directed by Court Order. *See* Kakoulli Declaration, ¶ 12. The Cyprus Court Order of May 23, 2011 did not authorize disclosure of account information, and providing the information without a Court Order allowing same was an evasion of the appropriate procedural requirements and laws of Cyprus. *See* Kakoulli Declaration, ¶ 12.

Hellenic Bank subsequently filed an affidavit with the Cyprus Court on June 8, 2011 improperly revealing all Raykov's accounts with the bank, and other bank information including copies of incoming and outgoing remittances, referring to the Cyprus Defendants.[8] *See* Kakoulli Declaration, ¶ 13. The Cyprus Court then issued a freezing Order as to the bank accounts of Raykov and the Cyprus Defendants, in an amount up to USD 669,022, in any bank including at the Hellenic Bank. *See* Kakoulli Declaration, ¶ 14. On July 6, 2011 the Cyprus Plaintiffs served on Raykov and the Cyprus Defendants the *ex parte* application made

[7] While Hellenic Bank represented that it was not misled and that it was aware that the Order did not require it to disclose the bank information, it is clear that Hellenic Bank acted without a Court Order, as required by relevant Cyprus laws. *See* Kakoulli Declaration, ¶ 11.
[8] Cyprus Claimants did not serve the Hellenic Bank affidavit upon Cyprus Defendants. *See* Kakoulli Declaration, ¶ 13.

to the Cyprus Court (dated May 23, 2011) and the freezing order only. *See* Kakoulli Declaration, ¶ 15. Neither the gagging order dated May 23, 2011, or the Hellenic Bank disclosure affidavit were ever served on the Cyprus Defendants, leaving them "completely in the dark" as to the evidence before the Cyprus Court and violating their right to a fair trial. *See* Kakoulli Declaration, ¶ 15.

The Cyprus Defendants (and Raykov) subsequently opposed the issuance of the freezing Order by the Cyprus Court on the basis that, *inter alia*, it was based on improperly disclosed private banking information.[9] *See* Kakoulli Declaration, ¶ 16. The Court, in an Order dated April 11, 2012, held that it would maintain the freezing Order as to Raykov and Aldi, basing its decision on the information obtained from Hellenic Bank on June 8, 2011 with respect to Raykov's bank accounts. *See* Kakoulli Declaration, ¶ 17. The freezing Order was cancelled as to Osipov, Natica, and Natica Trading. *See* Kakoulli Declaration, ¶ 17. Specifically, the Court reasoned as follows:

> *It should at this point be stated that there is no tangible evidence, which connects defendants 3 [Osipov], 4 [Natica], and 5 [Natica Trading] with the above referred to bank transactions or even with defendant 2 [Aldi]. The affiant [a representative of the Cyprus Claimants]* [10] *simply supposes that [Aldi] belongs and is controlled by [Osipov]. However, he does not set out any positive evidence, which tends to prove this, even to the degree required for the purposes of the present proceedings.*

See Kakoulli Declaration, ¶ 17. The Court's freezing Order has been appealed by Aldi, amongst other grounds, on the basis that the Court relied on improperly obtained evidence (*i.e.* – the Hellenic Bank affidavit which was obtained without a Court Order), and that Cyprus Plaintiffs had failed to serve the Hellenic Bank affidavit on Cyprus Defendants,

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[9] Further, the Cyprus Defendants argued that, in their *ex parte* application, the Cyprus Claimants failed to disclose relevant information (including the relationship and disputes between Raykov and Rusal), and largely relied on an anonymous letter, alleging that Raykov and the Cyprus Defendants conspired against Cyprus Claimants. *See* Kakoulli Declaration, ¶ 16.

[10] The basis of Cyprus Claimants' application was the Declaration of Aleksander Nekrasov ("Nekrasov Declaration"), which contained allegations based largely on an anonymous letter. Nekrasov claimed to be the Adviser of the International Projects Protection Department of the Directorate of Resource Protections, Rusal Global Management, the managing company of UC Rusal Group ("UCR"), and a "representative" of the Cyprus Claimants. *See* Kakoulli Declaration, ¶ 17.

depriving them of a fair trial. *See* Kakoulli Declaration, ¶ 18. This appeal is presently pending. *See* Kakoulli Declaration, ¶ 18.

The Cyprus Claimants' actions are indicative of a total disregard for the terms of the parties' Settlement Agreement, and demonstrate a willingness to obtain information in violation of the applicable Cypriot laws, and Cyprus Court's Order. *See* Kakoulli Declaration, ¶ 21, 22. The Petitioner nevertheless now requests that this Court allow it to obtain banking information of the Movants.

"Anticipated" Russian Proceeding:

RTI Limited claims that in February 2012, it applied, along with the Rusal Group (specifically, Rusal Global Management B.V.), to the Russian authorities requesting that an investigation be conducted into alleged criminal acts. *See* Docket #1-3, RUS00115 – RUS000116). Specifically, in the application to the Russian authorities, Rusal's counsel asserts that Raykov, Osipov, Natica, Mercury, RANS Chartering, and Maguire, among others, were involved in a "scheme" by which these entities conspired with respect to a freight services contract with members of the Rusal Group. *See* Docket #2. In fact, no action has been commenced in Russia, and as set forth in the Kharitonov Declaration and below, discovery in connection with the "reasonably anticipated" Russian proceeding is not warranted.

Request for Discovery:

Petitioner has sought discovery assistance from this Court, pursuant to 28 U.S.C. § 1782, purportedly in aid of the proceedings before the District Court of Nicosia, Cyprus and an "anticipated" action before a Russian Court. Specifically, Petitioner requested the issuance an Order of this Court permitting service of subpoenas on several banks located in the District (The Bank of New York Mellon Corporation; Deutsche Bank Trust Company; JPMorgan Chase Bank N.A.; and Citibank N.A.). On April 30, 2012, without Movants ever

having been served with the Petitioner's request for discovery, this Court issued an Order granting Petitioner the requested discovery (hereinafter "discovery Order") and administratively closing this matter from the Court's docket. Movants now move this Honorable Court to reopen this matter, to vacate the Order granting discovery and/or to quash the subpoenas issued in connection with this matter, for the reasons set forth below.[11]

ARGUMENT

POINT I

THE MOVANTS HAVE STANDING TO BRING THE INSTANT APPLICATION

The Movants have standing to challenge the issuance of the subpoenas by the Petitioner because the information improperly sought has been requested for use against the Movants in the Cyprus action and the "anticipated" Russian action.[12] With respect to a 28 U.S.C. § 1782 application, "a party against whom the requested information is to be used has standing to challenge the validity of such a subpoena on the grounds that it is in excess of the terms of the applicable statute, here 28 U.S.C. § 1782." *In re Request for Judicial Assistance from Seoul Dist. Criminal Court*, 555 F.2d 720, 723 (9th Cir. Cal. 1977)("The party against whom requested bank records are to be used has standing to challenge the validity of the order to the bank to produce the records."). Since the Petitioner intends to use the information sought in connection with the Cyprus and "anticipated" Russian proceedings against Movants, the Movants clearly have standing to challenge the issuance of subpoenas on the basis that they do not conform with the statutory requirements of 28 U.S.C. § 1782.

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[11] Following the Movants' request for a stay or, alternatively, issuance of a protective Order, the Court directed the parties to execute a protective Order prohibiting the dissemination of the responses to the subpoenas until this motion has been fully briefed, argued and decided.

[12] While Petitioner claims that it has submitted an application to commence an action in Russia, under Russian law, Petitioner cannot properly bring a claim against the Movants. *See* Kharitonov Declaration.

POINT II

PETITIONER FAILS TO SATISFY THE STATUTORY REQUIREMENTS OF 28 U.S.C. § 1782

28 U.S.C. § 1782 grants United States District Courts the authority to facilitate discovery in support of foreign legal proceedings against persons or entities residing or found in the court's district, providing that the statutory requirements are met. *See* 28 U.S.C. § 1782. Specifically, Section 1782 provides, in pertinent part:

> The district court of the district in which a person resides or is found *may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal* . . . The order may be made . . . *upon the application of any interested person* and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. 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. (*emphasis added*)

Accordingly, § 1782 assistance in the form of compelled document production is authorized against (1) any "person" that resides or is "found" in the district where the application is being made; (2) where the petition is made by "any interested person"; and (3) the information is sought for use "in a proceeding in a foreign or international tribunal." *See id.* *See In re Application of Metallgesellschaft*, 121 F.3d 77 at 79 (2d Cir. 1997) ("The district courts must exercise their discretion under § 1782 in light of the twin aims of the statute: 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts…'") (quoting *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100-01 (2d Cir. 1992)).

A. **RTI Limited is not an "Interested Person" within the meaning of 28 U.S.C. § 1782.**

In its petition seeking discovery, RTI Limited indicated that it is a 100% owned subsidiary of United Company Rusal PLC, which carries out a large portion of the Rusal Group's aluminum trading. See Docket #1, pg. 2. RTI Limited further claims that it is closely related to the members of the Rusal Group and "is a victim of Raykov's crimes." See Docket #1, pg. 13. However, RTI Limited is not a party to either "proceeding" for which it seeks discovery. The Petitioner admits that it is not a party to the Cyprus action. See Docket #1, pg. 3. While claiming to have applied to the Russian authorities to commence a criminal proceeding against Osipov, among others, the Russian counsel who filed the petition with the Russian authorities indicated that he was only acting on behalf of Rusal Global Management B.V. See Docket #1-3, RUS000115 – RUS000116.

More telling are the glaring omissions of RTI Limited in describing how it is an "interested person." RTI Limited does not claim to have been a party to any exclusive brokerage agreement, charter agreement, or any other agreement at issue in the Cyprus proceedings. *See* Kakoulli Declaration, ¶ 23. Similarly, RTI Limited does not claim to have been involved in any of the freight services agreements referenced in the application to the Russian authorities for the commencement of a criminal investigation. See Docket #1-3, RUS000115 – RUS000116. The Petitioner does not provide any evidence which demonstrates its relationship to the Rusal Group or the Cyprus Claimants. Furthermore, RTI Limited does not explain how it was a victim of the purported crimes which are the subject to the Cyprus and "anticipated" Russian actions. An "interested person" must possess a "reasonable interest in obtaining the assistance." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256-257 (U.S. 2004). RTI Limited has wholly failed to demonstrate what its connection is to any foreign proceeding (and the disputes therein), and how it has been purportedly harmed by the Movants. Accordingly, it is not an "interested person," and is not

entitled to the discovery sought from this Court, for either the Cyprus matter or the "anticipated" Russian proceeding.

B. **There is No Action Pending in Russia for which the Discovery Sought May be Used.**

In looking to the third element of the test applied by the Second Circuit when deciding 28 U.S.C. § 1782 applications, the Second Circuit has "focused on two questions: (1) whether a foreign proceeding is adjudicative in nature; and (2) when there is actually a foreign proceeding." *Euromepa v. R. Esmerian*, 154 F.3d 24, 27 (2d Cir. N.Y. 1998). Specifically, the Supreme Court held that § 1782(a) requires "that a dispositive ruling by [an adjudicative proceeding], reviewable by . . . courts, be within reasonable contemplation." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004). In order to determine whether the discovery sought is "for use" in a foreign proceeding, "a court may properly look to foreign law." *Euromepa v. R. Esmerian*, 154 F.3d 24, 28 (2d Cir. N.Y. 1998).

Here, Petitioner has asserted that it, along with Rusal, submitted an application to Russian authorities requesting that a criminal proceeding be commenced involving Movants, among others, in Russia.[13] However, Aldi, Natica, Mercury, RANS Chartering, and Maguire did not and do not conduct business in Russia, have no offices in Russia, and are not taxed in Russia. *See* Kharitonov Declaration, ¶ 6. Pursuant to Russian law, these companies are not subject to the jurisdiction of Russian Courts, and cannot be served with any criminal or civil application in Russia. *See* Kharitonov Declaration, ¶ 5 – 6. Since no action in Russia may be brought (let alone reasonably contemplated) against Movants Aldi, Natica, Mercury, RANS, and Maguire, no discovery in aid of this "anticipated" foreign proceeding is warranted.

[13] As set forth in Point II A above, RTI Limited was not involved in the application made to Russian authorities. *See* Docket #1-3, RUS000115 – RUS000116. Parenthetically, the disclosure of the filing of the petition requesting a criminal investigation with the Russian authorities to this Court is a serious violation of the Criminal Law of Russia (Articles 108,161, 215 and 310, the latter providing for up to two (2) years in prison). *See* Kharitonov Declaration, ¶ 11.

With respect to Osipov, any application to the Russian authorities for the commencement of criminal proceedings is wholly improper. Specifically, in February 2008, Rusal filed a nearly identical petition and application to the Russian authorities regarding Osipov. *See* Kharitonov Declaration, ¶ 10. Following a preliminary investigation, Rusal's petition was rejected by the Russian authorities ("rejection Decision"). *See* Decision of Russian Investigator, dated April 4, 2008; Kharitonov Declaration, ¶ 10, Ex. 1. Rusal was entitled to object to the investigator's Decision pursuant to Articles 124/125 of Criminal Code of Russia; however, Rusal did not object. *See* Kharitonov Declaration, ¶ 10. Accordingly, under Russian law, the rejection Decision came into force on May 4, 2008. *Id.* There is no explanation offered as to why the Russian authorities would renew any pre-investigation or commence a criminal action against Osipov based on the same groundless allegations which were already rejected. *Id.* Notably, the rejection Decision was omitted from RTI Limited's application to this Court.

Notwithstanding, the filing of a petition to Russian authorities does not constitute the commencement of criminal proceedings in a Russian Court. *See* Kharitonov Declaration, ¶ 8. Once a petition is filed with Russian authorities, a preliminary investigation is undertaken by Russian authorities, which includes gathering evidence and interviewing witnesses. *Id.* Following the completion of the preliminary investigation, an investigation committee determines whether or not criminal proceedings will be commenced.[14] *Id.* A party may object to the decision of the investigation committee, however, the decision is not reviewed by any Russian court or court agency. *See* Kharitonov Declaration, ¶ 8, 10. Accordingly, this application to Russian authorities does not constitute a proceeding reviewable by courts, as contemplated by § 1782(a), and discovery in aid of same should not be permitted.

[14] At this time, the Russian authorities have not taken any action to contact Osipov with respect to Rusal's petition. *See* Kharitonov Declaration, ¶ 9.

POINT III

THE COURT SHOULD EXERCISE ITS DISCRETION TO VACATE THE ORDER BECAUSE THE 28 U.S.C. § 1782 APPLICATION WAS BROUGHT FOR AN IMPROPER PURPOSE

Even when a Petitioner has satisfied the statutory requirements of 28 U.S.C. § 1782, the grant of judicial assistance remains a discretionary matter. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004)(The United States Supreme Court held that "§ 1782(a) *authorizes, but does not require*, a federal district court to provide judicial assistance to foreign or international tribunals or to "interested person[s]" in proceedings abroad.")(*emphasis added*). In *Intel*, the Supreme Court identified four (4) factors "that bear consideration in ruling on a § 1782 request." *Intel*, 542U.S. at 265. While emphasizing that these four (4) factors were not exhaustive, the Supreme Court stated that a court ruling on a § 1782 request should consider: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance; (3) whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States; and (4) whether the discovery requests are unduly intrusive or burdensome. *See Id.* at 264-265.

When exercising discretion, courts consider whether the § 1782 request is a "fishing expedition" or a "vehicle for harassment." *In re 28 U.S.C. § 1782*, 249 F.R.D. 96, 106 (S.D.N.Y. 2008); *Ahmad Hamad Algosaibi & Bros. Co. v. Std. Chtd. Intl. (USA) Ltd.*, 785 F. Supp. 2d 434, 438 (S.D.N.Y. 2011)("...as with discovery requests in domestic litigation, if a court "suspects that the § 1782 [discovery] request is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request.")(*internal citations omitted*). Further, courts may consider the "nature and attitudes of the government of the country from which

the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it." *In re Application of Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993); *In re OOO Promnefstroy*, 2009 U.S. Dist. LEXIS 98610, *19 (S.D.N.Y. Oct. 15, 2009)("The second discretionary factor requires district courts to inquire into the nature of foreign proceedings and the 'receptiveness' of the foreign tribunal to United States court assistance.").

A. The Petitioner Should Not be Entitled to Discovery in Aid of the Cyprus Proceeding.

Through its application to the Court for discovery, the Petitioner is seeking an end-run around the proof-gathering laws of Cyprus.[15] In short, the Cyprus Claimants submitted an *ex parte* application to the Cyprus Court seeking, *inter alia*, production of bank information relating to Raykov and the freezing of accounts belonging to Raykov and the Cyprus Defendants. *See* Kakoulli Declaration, ¶ 9. The Cyprus Court did not grant this request. *See* Kakoulli Declaration, ¶ 10. In spite of the Cyprus Court's decision, the Cyprus Claimants provided Hellenic Bank with a deceptively drafted Order (improperly including language which made it appear as though Hellenic Bank was required to disclose banking information of Raykov). *See* Kakoulli Declaration, ¶¶ 11, 12. Based on this misleading Order provided by Cyprus Claimants, Hellenic Bank submitted an affidavit to the Cyprus Court wrongfully disclosing the requested information.[16] *See* Kakoulli Declaration, ¶ 13. The Cyprus Court improperly relied on this affidavit in issuing a freezing Order. *See* Kakoulli Declaration, ¶ 14 – 16. Notably, the Cyprus Court cancelled the freezing Order as to Osipov and Natica (as well as non-movant Natica Trading), as the Cyprus Court determined that there was a lack of

[15] Parenthetically, and as set forth above, the Cyprus action was illegally commenced in violation of the above referenced Settlement Agreement, and despite Osipov's full compliance with same (through disclosure of the agreed information and documentation). *See* Osipov Declaration, ¶¶ 7, 8.

[16] The Cyprus Claimants again (disingenuously) failed to serve this affidavit on the Cyprus Defendants, and the Cyprus Defendants remained unaware that this information has been disclosed. *See* Kakoulli Declaration, ¶ 13.

evidence linking these entities with the bank transactions at issue or with Aldi.[17] *See* Kakoulli Declaration, ¶ 17.

Despite the Cyprus Court's denial of the Cyprus Claimants' request for disclosure of banking information and its cancellation of the freezing Order as to Osipov and Natica, RTI Limited now comes before this Court seeking banking information related to the Movants. Pursuant to Cyprus law, the disclosure of information with respect to bank accounts is prohibited unless a Court Order is issued, and notice to the relevant parties provided. *See* Kakoulli Declaration, ¶ 20. The Cyprus Claimants, in violation of the Cyprus Court's Order, induced Hellenic Bank to reveal private bank information. Now, Petitioner similarly seeks to circumvent Cypriot laws and policies[18], as well as the decision of the Cyprus Court denying the requested disclosure of information (irrespective of Cyprus Claimants' subsequent actions to improperly obtain the requested information). *See In re Microsoft* Corp., 428 F. Supp. 2d 188, 195 (S.D.N.Y. 2006)(The Court determined that the petitioner's application "constitutes a blatant end-run around 'foreign proof-gathering restrictions or other policies of a foreign country,'" where the petitioner sought information beyond the scope of what was permitted by the European Commission). It is clear under principles of comity, that Cyprus is the proper forum for determining what documents and information are subject to discovery in that proceeding. See *In re Microsoft* Corp., 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006)("...a decision by this Court upholding [petitioner]'s discovery request would contravene the purpose of § 1782 by pitting this Court against the Commission, rather than fostering cooperation between them, and would violate established principles of comity, under which 'United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries.'").

[17] The freezing Order with respect to Aldi is presently being appealed, as its issuance was based on the improperly obtained bank information. *See* Kakoulli Declaration, ¶18.
[18] Cyprus law prohibits evidence that is improperly obtained from being used in any manner in a Court proceeding. *See* Kakoulli Declaration, ¶ 20.

The Petitioner should not be permitted to continue to harass Movants to obtain sensitive financial information, in complete disregard of the parties' Settlement Agreement and applicable Cypriot laws and Court Orders. Accordingly, this Court should vacate the Order granting discovery in aid of the Cyprus proceeding and quash the subpoenas issued by the Petitioner.

B. Russian Courts would not Consider Discovery Obtained as a result of RTI Limited's Petition.

Assuming, *arguendo*, that an action could be brought against the Movants in a Russian Court, the Russian Court would not consider the discovery sought by the Petitioner as evidence. See *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79 (2d Cir. N.Y. 2004)(The Second Circuit found it relevant that "the German government had made plain its 'unreceptive[ness]' to judicial assistance from an American court" in denying the application for discovery). Pursuant to Russian law, a foreign company (*i.e.* – RTI Limited) which is not a party to a criminal or civil proceeding, cannot submit documents to a Russian court. *See* Kharitonov Declaration, ¶ 12. Russian law further provides that documents containing private bank information of Russian citizens can only be produced to the investigating committee upon Order of the Russian Court. *See* Kharitonov Declaration, ¶ 13. No such Order has been issued by a Russian Court permitting Osipov's private bank information to be produced. *See* Kharitonov Declaration, ¶ 13. Accordingly, the discovery sought by RTI Limited could not be used in connection with any investigation which would be conducted by Russian authorities.

Further, this application to the Russian authorities is yet another effort to harass the Movants. As set forth above, Aldi, Natica, Mercury, RANS Chartering, and Maguire are not subject to the jurisdiction of Russian courts and cannot be served with any application in Russia. *See* Kharitonov Declaration, ¶ 6. Additionally, Rusal previously made an

application (on nearly identical grounds) to the Russian authorities for a criminal investigation to be commenced as to Osipov, which was declined. *See* Kharitonov Declaration, ¶ 10. RTI Limited failed to mention this previous application in its application, and provides no reason why the Russian authorities would renew any pre-investigation or commence a criminal action against Osipov. Under the circumstances, this pattern of harassment to acquire information from the Movants should not be tolerated, and the Order granting discovery should be vacated as to the Movants.

C. The Petitioner's Discovery Requests are Unduly Intrusive.

The information and documentation sought by the Petitioner is extremely expansive and unduly instrusive. *See In re Microsoft Corp.*, 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006)(The court determined that the subpoena contained unduly burdensome requests). Petitioner has sought private bank information from 2003 to the present, as well as extensive information regarding assets held by the Movants, including all documents and correspondence relating to any account held by Movants. In short, the Petitioner cast a wide net in its subpoenas, requesting sensitive bank information relating to over fifteen (15) entities for a period of almost ten (10) years. However, the Petitioner fails to provide substantial evidence demonstrating how each of the Movants are allegedly connected with the banks to which the subpoenas were issued. The Movants submit that this is yet another effort to harass, and to obtain private financial information of the Movants. Accordingly, Movants respectfully request that the Court vacate the discovery Order and quash the subpoenas issued by the Petitioner.

CONCLUSION

WHEREFORE, Movants respectfully submit that the Court should reopen this motion and vacate the Order granting discovery assistance under 28 U.S.C. § 1782, and/or that each of the subpoenas be quashed pursuant to Fed. R. Civ. P. 45, as well as such other and further relief as it deems just and proper under the circumstances.

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Oyster Bay, New York

Respectfully submitted,

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