UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERYL WULTZ, *et al.*	
Respondents,	
v.	**Miscellaneous No. 13-1282 (RBW)**
THE STATE OF ISRAEL,	
Petitioner.	

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION TO QUASH

BOIES, SCHILLER & FLEXNER LLP

David Boies
Mary Boies
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
Fax: (914) 749-8300

Lee S. Wolosky (Bar No. NY0106)
Marilyn C. Kunstler (Bar No. NY0106)
575 Lexington Avenue
New York, NY 10022
Tel: (212) 446-2300
Fax: (212) 446-2350

Hamish P.M. Hume (Bar No. 449914)
5301 Wisconsin Avenue, N.W.
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

Date: December 17, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Respondents Sheryl Wultz, Yekutiel Wultz, Amanda Wultz, and A.L.W., a minor, Plaintiffs in the underlying action, *Wultz v. Bank of China Ltd*., No. 1:11-cv-1266 (SAS) (GWG) (S.D.N.Y.), through their undersigned counsel, respectfully submit this Memorandum of Law in Opposition to the Motion to Quash filed by Petitioner the State of Israel.

PRELIMINARY STATEMENT

In 2006, Daniel Wultz, a 16-year-old United States citizen, was killed by a suicide bombing in Tel Aviv, Israel. Daniel's father, Yekutiel Wultz, also a United States citizen, witnessed the attack and suffered serious injuries in the blast. A full year before the bombing, the Bank of China Limited ("BOC"), defendant in the underlying action, was warned by the Israeli government that BOC was facilitating financial transactions on behalf of Palestinian Islamic Jihad ("PIJ"), the terrorist group that carried out the attack.

Uzi Shaya was one of the Israeli government officials who delivered that warning. He and others provided information identifying specific BOC accounts through which the transactions were taking place. BOC refused to close the accounts or stop processing the transactions, thus choosing to make itself one of the few channels in the world available to PIJ to finance, and facilitate, terrorism. Daniel's death followed.

A year after the attack, in 2007, the Government of Israel ("GOI"), committed to the fight against terrorism, asked Daniel's family and its representatives to bring to justice those responsible for financing the attack that caused his death: Iran, Syria, and BOC. Israel promised that if the Wultzes would agree to bring a lawsuit in a U.S. court, Israel would provide the evidence they would need to prove their claims. Israel put forward Uzi Shaya, who was by that time a private citizen, as a live witness.

For five years, Israel kept its promise, providing essential information – most now a matter of public record – that allowed a Complaint to be filed against BOC in this Court in 2008, as Israel requested. The information provided by the GOI included specific accounts and transactions as well as details of the bilateral meetings in China by which BOC and its then-sole owner, the People's Republic of China ("PRC") acquired actual knowledge of the BOC accounts used by PIJ and Hamas. In 2009, further to its promise to the Wultzes, the GOI provided a detailed sworn declaration from another Israeli official, Shlomo Matalon, which was submitted to this Court in opposition to BOC's motion to dismiss. *See* Ex. 1[1] (the "Matalon Declaration"). Just last year, the Prime Minister's Office renewed Israel's promise and expressly communicated to the Wultzes that Uzi Shaya, the key witness, was authorized to give complete testimony against BOC.

On the eve of the scheduled deposition of Mr. Shaya, and notwithstanding multiple communications with the Court now overseeing the underlying case,[2] the State of Israel now suddenly reverses course and claims the deposition of Mr. Shaya would threaten its national security. Israel's new position is unsupportable, because Mr. Shaya's testimony includes (a) information that the GOI has already disclosed, including information in the Complaint and/or Matalon Declaration, (b) information the GOI has in recent years directed Mr. Shaya and other GOI officials to provide in support of multiple other terrorist financing litigations in U.S. courts,[3] and (c) information Mr. Shaya acquired after 2007, when he was no longer a government official.

[1] All exhibits cited herein refer to the exhibits to the Declaration of Lee S. Wolosky filed herewith. The Complaint and Amended Complaint are referred to collectively as the "Complaint."

[2] As described further below, in 2011 the claims against BOC were transferred to the U.S. District Court for the Southern District of New York, where they are now pending.

[3] *See, e.g.*, Exs. 2–3 (declarations by Messrs. Shaya and Matalon filed in *Licci v. American Express Bank Ltd., et al.*, No. 08 Civ. 7253 (GBD) (S.D.N.Y.), and *Ungar v. Palestinian Authority, et al.*, No. 1:04-mc-90 (EGS) (D.D.C.), respectively).

Moreover, Israel provides no explanation for its sudden about face, and the facially defective declaration submitted by its former National Security Advisor does not even acknowledge it. That declaration should be disregarded for the further reason that the GOI has refused to make the declarant available for cross examination. However, statements by Mr. Shaya, as well as press reports, do provide an explanation. According to multiple reports, the PRC, which remains the majority owner of defendant BOC, has improperly exerted extreme pressure on the GOI and its current Prime Minister, in particular, to prevent Mr. Shaya's deposition from taking place.

On October 11, 2013, according to press reports (see Ex. 4 at 3), the PRC wrote Prime Minister Netanyahu a letter saying:

> You have committed that no current or former employee shall testify. This commitment made it possible for you to visit China. The Chinese expect you to honor your commitment.

This followed an earlier decision by the PRC and BOC to try to induce the GOI to falsely deny that the 2005 Israeli visit to China by Mr. Shaya and others ever happened.

Independent of the other defects in GOI's request, Israel has long since waived its arguments as to much of the information about which Mr. Shaya is expected to testify, and the essential information Israel seeks to protect is already public as a result of its own prior actions. Moreover, Israel lacks standing to seek immunity for the witness, because he does not seek immunity for himself and has twice stated in writing that he is willing to testify. Not a single authority cited by Israel supports granting the extraordinary relief requested under the circumstances present here. For these and the other reasons set forth below, the State of Israel's Motion to Quash should be denied.

PROCEDURAL HISTORY

This miscellaneous action concerns a nonparty subpoena served on Uzi Shaya by Plaintiffs in the underlying action against BOC. The action against BOC was originally filed in this Court on August 8, 2008. *Wultz v. Islamic Republic of Iran, et al.*, No. 08-01460 (RCL) (D.D.C.). Plaintiffs filed an Amended Complaint on January 13, 2009. Ex. 5 (the "FAC"). On October 20, 2010, in a lengthy, well-reasoned opinion, Chief Judge Lamberth denied BOC's motion to dismiss. 755 F. Supp. 2d 1 (D.D.C. 2010). In 2011, Judge Lamberth severed the claims against BOC and transferred them to the U.S. District Court for the Southern District of New York,[4] where the action remains pending before the Honorable Shira A. Scheindlin. During the almost three years since the case was transferred to the Southern District of New York, BOC has vigorously opposed virtually all discovery efforts, resulting in a series of orders by Judge Scheindlin granting Plaintiffs' motions to compel.[5] The period for fact discovery is scheduled to end on February 7, 2014.

Neither BOC nor the State of Israel opposed Mr. Shaya's deposition when it was first scheduled to occur in October 2011. There was a brief period of reconsideration of the scope of the deposition by the incoming head of the Mossad,[6] causing the deposition to be adjourned, but that was resolved, and in April 2012 the Prime Minister of Israel expressly authorized Shaya's

[4] *See* 762 F. Supp. 2d 18 (D.D.C. 2011). The Wultzes' remaining claims, against Iran and Syria, proceeded to trial on a default judgment before Judge Lamberth, who entered a judgment of over $332 million on May 14, 2012. 864 F. Supp. 2d 24 (D.D.C. 2012).

[5] *See, e.g.*, *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548 (S.D.N.Y. 2012) (compelling BOC to produce Shurafa- and PIJ-related records, among other things, overriding Chinese bank secrecy laws); *Wultz v. Bank of China Ltd.*, 2013 WL 1453258 (S.D.N.Y. Apr. 9, 2013) *reconsideration denied*, 291 F.R.D. 42 (S.D.N.Y. 2013) (compelling BOC to produce documents it claimed were protected by the U.S. bank examiner's privilege); *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452 (S.D.N.Y. 2013) (finding that BOC has "shown bad faith in its interactions with plaintiffs" and "bad faith in its responses to the Court's orders," and ordering the production of additional documents); Ex. 6 (6/14/13 Hr'g Tr. (Scheindlin, J.)) at 5:2–20 (referring the parties to Magistrate Judge Gabriel W. Gorenstein to negotiate and complete a proper search and review of BOC's electronic documents under court supervision).

[6] The Mossad, formally known as the Institute for Intelligence and Special Operations, is Israel's main foreign intelligence agency, and is responsible for, among other things, intelligence gathering and analysis and special operations beyond Israel's borders.

complete testimony. *See* Ex. 7 ("Yekutiel Wultz Decl.") ¶¶ 16–19; Ex. 8 ("Sheryl Cantor Wultz Decl.") ¶¶ 15–18. This time, however, BOC determined to prevent the deposition from going forward, raising roadblocks with the Court and the GOI that had not been raised before.[7]

In July 2013, reports appeared in the Israeli press that the PRC, BOC's majority shareholder, had threatened to cancel the Prime Minister's trip to China in May 2013 if he allowed the deposition of Mr. Shaya to go forward. *See, e.g.*, Ex. 13. On September 18, 2013, Plaintiffs served a nonparty subpoena on Mr. Shaya while he was in Washington, D.C., on business. Ex. 14. The State of Israel filed a motion to quash on November 15, 2013 (Dkt. # 1), over two years after Mr. Shaya's deposition was first scheduled to take place, and this miscellaneous proceeding followed.

FACTUAL BACKGROUND

I. ISRAEL UNCOVERS A PIJ-HAMAS TERROR FINANCING CELL AT THE BANK OF CHINA.

From 2004 through 2007[8] Uzi Shaya was an official in the Office of the Prime Minister of Israel and one of the leaders of the Interagency Task Force for Combating Terrorist Financing and Financing of State Sponsors of Terrorism (the "Terrorist Financing Task Force" or, colloquially, "G—G—"). Ex. 2 ¶ 5. The Terrorist Financing Task Force was an interagency unit within the GOI composed of participants from the Mossad, the Israeli Security Agency,[9] and the

[7] *See, e.g.*, Ex. 9 (10/9/13 Ltr. from M. Berger and L. Wolosky to G. Levertov, Director, Department of International Affairs, Office of the State Attorney, Israel Ministry of Justice) at 2–3 (raising the specter of criminal penalties against Mr. Shaya under Israeli law). Both the GOI and Mr. Shaya remained undaunted, and letters signed by Mr. Shaya were sent to the parties dated March 20, 2013 (Ex. 10), and August 29, 2013 (Ex. 11), reiterating his willingness to testify. In communications to the GOI, BOC challenged the letters and continued to press the issue of criminal sanctions against Mr. Shaya under Israeli law. *See, e.g.*, Ex. 12 at 2.

[8] Mr. Shaya ceased being employed by the State of Israel in 2007, according to the statement of General Yaacov Amidror filed as Exhibit B to Israel's Motion to Quash (the "Amidror Declaration"). *See* Amidror Decl. ¶ 5.

[9] The Israeli Security Agency, also known as *Shabak* or the *Shin Bet*, is Israel's main domestic intelligence agency.

National Security Council in the Office of the Prime Minister,[10] among other agencies. The Task Force reported to senior officials within the GOI, including Meir Dagan (Director-General of the Mossad from 2002–2010) and the Prime Minister. During Mr. Shaya's tenure as a leader of the Terrorist Financing Task Force, the unit's senior members also included Shlomo Matalon and Mr. L—, both of whom, like Mr. Shaya, held positions within the National Security Council of the Office of the Prime Minister. *See* Matalon Decl. ¶ 1. The purpose of the Terrorist Financing Task Force was to prevent terrorism by using all available means to cut off the flow of funds to terrorist organizations.[11]

In or prior to 2004, the Terrorist Financing Task Force, and Messrs. Shaya, Dagan, L—, and Matalon personally, became aware of a terrorist financing cell involving BOC, which was at the time wholly owned by the PRC. The operators of this cell were Said al-Shurafa ("Shurafa") and other members of the Shurafa family in Gaza and the city of Guangzhou, China, including Mohammed Shurafa (collectively, the "Shurafas"), along with senior leaders of the PIJ and Hamas. Matalon Decl. ¶¶ 4–7. In cooperation with the PIJ and Hamas leadership, the Shurafas used BOC bank accounts held in their names at BOC branches in Guangzhou (the "Shurafa Accounts") to launder money from Iranian and Syrian sources to PIJ and Hamas operatives and their related *dawa* structures[12] in Gaza and the West Bank. Matalon Decl. ¶¶ 4–7. The assessment of the Terrorist Financing Task Force was that during the years 2003–2008, BOC processed millions of dollars in transactions through the Shurafa Accounts as part of this scheme to finance PIJ and Hamas terrorism. *Id.* ¶ 4.

[10] As stated in the Amidror Declaration, the National Security Council "is the staff that supports the Prime Minister of Israel on foreign and security affairs." Amidror Declaration ¶ 1.

[11] *See, e.g.*, Ex. 15 (February 18, 2005 U.S. diplomatic cable describing efforts of the Terrorist Financing Task Force, as related by Mr. Shaya and other GOI officials).

[12] As explained in further detail in the section of the expert report of Dr. Matthew Levitt filed herewith (Ex. 16), which was originally submitted in an unrelated criminal proceeding concerning terrorist financing, "*dawa*" refers to nominally non-violent groups, including purported charitable organizations, that are affiliated with terrorist organizations and commonly used by the terrorist organizations to support their violent activities.

II. THE GOI TRIES, UNSUCCESSFULLY, TO SHUT DOWN THE PIJ-HAMAS SHURAFA ACCOUNTS WITHOUT THE HELP OF PLAINTIFFS AND THE UNITED STATES LEGAL SYSTEM.

A. The Abdeen Prosecution and the Container Seizure.

As part of their efforts to stop the flow of funds to PIJ and Hamas operatives in Gaza and the West Bank, GOI officials made various attempts to shut down the terrorist financing cell operated by the Shurafas through their BOC accounts in China. For example, on December 23, 2003, Israel indicted a money changer named Mohammed Abed Mohammed Abdeen for his involvement in sending wire transfers to the Shurafa Accounts for the benefit of Hamas. Ex. 17. On April 17, 2005, as part of his guilty plea to charges of illegal money laundering under Israeli law, Abdeen confessed that he had effectuated at least $400,000 in wire transfers to the bank account of Mohammed Shurafa in China at the instructions of a senior Hamas operative in Syria, despite knowing that upon reaching Shurafa's account the funds would be transferred to Hamas terrorists in Gaza. Ex. 18.

The money spigot to the Shurafa Accounts at BOC remained open after the Abdeen indictment. The GOI attempted, on multiple occasions, to disrupt PIJ's trade-based money laundering scheme by intercepting goods on their way from the Shurafas in China to terrorist operatives in Gaza. In this money laundering scheme, terrorist financing funds originating in Iran and Syria would be wired into the Shurafas' BOC accounts, after which the funds would be used to purchase innocuous goods, which in turn would be shipped to Gaza and sold there, with the proceeds of the sales remitted to terrorist operatives. On September 25, 2007, for instance, the Customs Authority of the GOI seized a sea container at the Port of Ashdod that contained a consignment of clothes and children's school bags that had been purchased by Said al-Shurafa in China and shipped by Shurafa to his father's company in Gaza. *See* Ex. 19 at WULTZ76, WULTZ97. As the Israeli Ministry of Defense explained in public court filings associated with

the seizure, the clothes and school bags were destined for the Riad al-Salihin Association, a "charitable organization" that is in fact an arm of the PIJ.[13] *Id.* at WULTZ109–16, WULTZ125–26.

B. Meetings in China Concerning the Shurafa Accounts.

These efforts did not stop PIJ and Hamas from continuing to use the Shurafa Accounts at BOC. Accordingly, starting in early 2005, the GOI undertook a new initiative to close down the Shurafa Accounts through communications directly with BOC's owner, the PRC. At the direction of then Mossad Director-General Meir Dagan, and upon approval of the Prime Minister, members of the Terrorist Financing Task Force and other senior GOI officials, including Mr. Shaya, Mr. L—, and General Danny Arditi, traveled to Beijing to participate in a series of meetings with PRC officials concerning a variety of matters impacting Israel (the "Meetings"). *See* Matalon Decl. ¶ 8; Yekutiel Wultz Decl. ¶¶ 21–22; Sheryl Cantor Wultz Decl. ¶¶ 13, 22. The Meetings ran from early 2005 through approximately 2007, during which time Mr. Shaya and the other GOI participants met variously and separately with representatives of the People's Bank of China (BOC's chief regulator), the PRC's Ministry of Public Security, the PRC's Ministry of Foreign Affairs, and the PRC's Ministry of State Security ("MSS"), as well as with other Chinese attendees who were not identified to the GOI officials.

Messrs. Dagan, Arditi, L—, and Shaya, and other leaders of the GOI, personally developed the GOI's agenda for the Meetings.[14] One agenda item for the Meetings was the

[13] A member of the Shurafa family reportedly speaking on behalf of the family confirmed to *Reuters* on or around November 1, 2013, that the Shurafas dealt with PIJ and admitted that PIJ wired the Shurafas money to pay for a consignment of school bags. *See* Ex 20.

[14] The Meetings, and the broader activities of the Terrorist Financing Task Force, were generally coordinated with similar efforts to combat illicit finance undertaken by the U.S. Government. *See* Ex 15 (memorializing a February 14, 2005 meeting in Israel between U.S. Treasury Undersecretary Stuart Levey and members of the Terrorist Financing Task Force on the subject of terrorist financing). During approximately the same time period, officials of the United States met separately with both PRC and BOC officials to discuss illicit finance being conducted through the PRC and BOC specifically. *See, e.g.*, Ex 21 (recording a meeting in November

Shurafa Accounts and one of the GOI's objectives in attending the Meetings was to cause BOC to close the Shurafa Accounts. *See* Matalon Decl. ¶ 8; Yekutiel Wultz Decl. ¶¶ 14, 21–22; Sheryl Cantor Wultz Decl. ¶¶ 19, 22. At one of the first Meetings, in or around April 2005, Mr. Shaya and the other GOI attendees informed the Chinese attendees that the Shurafa Accounts at BOC were being used to finance PIJ and Hamas, supplied specific information on the Shurafas and the Shurafa Accounts in support of their assessment, and requested that BOC cease providing financial services to PIJ and Hamas through the Shurafa Accounts. Matalon Decl. ¶ 8.

These diplomatic efforts, however, also failed to bring about the closure of the Shurafa Accounts or the end of the PIJ and Hamas terrorist financing scheme at BOC. At a subsequent Meeting, the Chinese attendees informed Mr. Shaya and his GOI colleagues that BOC would not close the accounts. Yekutiel Wultz Decl. ¶ 21; *accord* Matalon Decl. ¶¶ 8–9. The Shurafa Accounts remained open, BOC continued providing financial services to the Shurafas, and PIJ and Hamas continued using BOC's services to launder money and deliver funds to Gaza and the West Bank. Matalon Decl. ¶¶ 8–9. Approximately one year later, on April 17, 2006, PIJ operatives executed the suicide bombing that killed Daniel Wultz and seriously injured Yekutiel Wultz.

III. THE GOI INDUCES AND SUPPORTS THE FILING OF THIS LAWSUIT IN THE COURTS OF THE UNITED STATES.

Unable to convince the PRC or BOC to close the Shurafa Accounts through the Meetings in Beijing, the GOI turned to yet another strategy to achieve the same result. During Dagan's tenure as Director-General of the Mossad from 2002 to 2010, the Mossad and the Office of the Prime Minster implemented a national policy of combating terrorist financing by providing

---

2007 between Undersecretary Levey, PRC officials, BOC's Chief Compliance Officer Geng Wei, and BOC's CEO Xiao Gang, at which Undersecretary Levey identified "specific transactions involving BOC" related to Iran and Iranian front companies).

information to victims of terrorist attacks or their representatives to enable them to bring civil litigations against entities that supported terrorism (the "National Policy"). As part of the National Policy, Dagan and the National Security Council authorized members of the Terrorist Financing Task Force, including specifically Messrs. L— and Shaya, to disclose confidential information gathered by the GOI to attorneys and courts in the United States and Israel. *See generally* Ex. 22 (August 30, 2007 U.S. diplomatic cable describing multiple instances of GOI providing previously-classified intelligence information to support private litigation). For instance, at the direction of the GOI Mr. Shaya himself signed a declaration in 2009 in a different U.S. lawsuit, which stated explicitly that it was based on information derived from confidential "documents in the possession of the State of Israel." Ex. 2 ¶ 6.[15]

A. The GOI Induces and Supports the Wultzes' Lawsuit by Promising that a Witness Will Be Available to Testify Against BOC.

In or around 2007, as part of the National Policy and as a result of the GOI's inability to close the Shurafa Accounts by other means, Dagan and the Office of the Prime Minister authorized Messrs. L— and Shaya to induce attorneys associated with the Shurat HaDin Israel Law Center ("Shurat HaDin"), including Nitsana Darshan-Leitner, to sue BOC under United States law in courts in the United States, where BOC has multiple branches under federal charter.[16] *See* Yekutiel Wultz Decl ¶¶ 7–15; Sheryl Cantor Wultz Decl. ¶¶ 6–14. In order to avoid falsely raising the hopes of terrorism victims who would be recruited as plaintiffs, and to assure that any lawsuits filed against BOC in the federal courts would not be shams, the Shurat HaDin attorneys specifically requested that, as a condition of proceeding with the lawsuits, the

[15] As explained in further detail below, Mr. Matalon has already submitted a similar declaration in this case. Ex. 1 (Matalon Decl.); *see also* Yekutiel Wultz Decl. at ¶¶ 11–13. Mr. Matalon was also authorized in 2007 to submit yet another declaration for use in U.S. court as part of the National Policy—again disclosing information "in the possession of the State of Israel" that was previously "classified." Ex. 3 ¶ 5 n.1.

[16] These BOC branches include BOC's New York Branch, through which BOC processed numerous U.S. dollar Shurafa Transactions for the benefit of PIJ and Hamas. The U.S. branches of BOC are chartered by the Office of the Comptroller of the Currency (OCC).

GOI commit to provide not only specific information and a sworn declaration but also a witness with knowledge who could testify in the U.S. proceedings about the Meetings and about BOC's provision of financial services to PIJ, Hamas, and the Shurafas. *Id.* As part of the National Policy, and again acting at the direction of Dagan and other senior GOI officials after specifically clearing it with them, Messrs. L— and Shaya promised, on behalf of the Office of the Prime Minister, that the State of Israel would provide a witness to testify on these topics in a case against BOC filed in U.S. courts. *Id.*

On the basis of these and other assurances from the State of Israel, and on behalf of the State of Israel and its National Policy, the Wultzes and their then-counsel agreed to use the courts of the United States to sue BOC under U.S. counterterrorism laws that provide certain remedies only to U.S. citizens such as the Wultzes. Yekutiel Wultz Decl ¶¶ 7–15; Sheryl Cantor Wultz Decl. ¶¶ 6–14. On August 22, 2008, in furtherance of the National Policy, the Wultzes in fact filed a complaint in this Court that relied in its core factual allegations on information supplied by the GOI. Yekutiel Wultz Decl ¶¶ 4, 7–15; Sheryl Cantor Wultz Decl. ¶¶ 3, 6–14.

B. The GOI Induces and Supports the Wultzes' Lawsuit by Disclosing Information It Now Claims Is Secret.

At the instruction of the GOI, the Complaint included and disclosed the following information provided by the GOI: two specific, 16-digit Shurafa Account numbers for accounts at BOC's Guangdong branch, the amounts of specific transactions to those Shurafa Accounts, and the specific content of certain Meetings attended by Mr. Shaya, among other GOI officials. *See* FAC at ¶¶ 69, 77–78. Like the commitment to provide a witness to testify against BOC, the GOI disclosed this information at the direction of Dagan and the Office of the Prime Minister to induce and support litigation in the courts of the United States against BOC as part of the National Policy. Yekutiel Wultz Decl. ¶¶ 7–9; Sheryl Cantor Wultz Decl. ¶¶ 6–8. Prior to the

GOI's disclosure of information appearing in the Complaint about BOC, the Shurafa Accounts, the Shurafa Transactions, and the Meetings, the Wultzes knew nothing about BOC's connection to terrorist attacks such as the one that killed their son, Daniel. Yekutiel Wultz Decl. ¶ 7; Sheryl Cantor Wultz Decl. ¶ 6.

In addition to the detailed information included in the Complaint, in 2009 the GOI directed former National Security Council official Shlomo Matalon to supply Plaintiffs with a sworn declaration in support of their claims against Iran, Syria, and BOC. Matalon Decl. ¶¶ 2–3. Mr. Matalon's 2009 declaration was approved by the Office of the Prime Minister, Mr. Matalon's employer during pertinent periods, and disclosed even more specific Shurafa Accounts, specific transactions in the Shurafa Accounts that were used to fund PIJ and Hamas, and certain contents of the Meetings attended by Mr. Shaya, among other GOI officials. *Id.* at ¶¶ 5, 7–8. At the direction of the Office of the Prime Minister and for the benefit of the State of Israel, Matalon's 2009 declaration was filed with this Court in opposition to BOC's motion to dismiss the Complaint and in furtherance of the National Policy.

IV. THE GOI CONFIRMS THAT SHAYA WILL BE AVAILABLE TO PROVIDE COMPLETE TESTIMONY, AND PARTICIPATES IN PREPARING HIM FOR HIS DEPOSITION.

On January 1, 2011, Dagan ceased being Director-General of the Mossad. In Dagan's absence, in October 2011, prior to the scheduled deposition of Mr. Shaya that month, questions arose within the GOI as to whether Shaya should be allowed to provide complete, unrestricted deposition testimony in the U.S. legal proceedings brought by the Wultzes against BOC as part of the National Policy, including specifically whether and to what extent Mr. Shaya could or should disclose certain information that was not disclosed either in the Complaint or the Matalon Declaration. *See* Yekutiel Wultz Decl. ¶ 16; Sheryl Cantor Wultz Decl. ¶ 15. The deposition

was adjourned pending the consideration of this issue by the new Director-General of the Mossad and other GOI officials.

In response to concerns as to whether Mr. Shaya would be able to provide complete deposition testimony, the Wultzes wrote a letter to Prime Minister Netanyahu dated February 13, 2012, urging the Prime Minster to allow Shaya to provide complete testimony. Ex. 23; *see also* Yekutiel Wultz Decl. ¶ 16; Sheryl Wultz Decl. ¶ 15. In early March 2012, the letter was personally delivered to Prime Minister Netanyahu by United States Congresswoman Ileana Ros-Lehtinen. Yekutiel Wultz Decl. ¶ 17; Sheryl Wultz Decl. ¶ 16.

A. The GOI Confirms that Shaya Will Provide Complete Testimony.

In the weeks following Prime Minister Netanyahu's receipt of the Wultzes' letter, the GOI confirmed multiple times that Mr. Shaya would provide complete testimony, to include information not previously disclosed in either the Complaint or the Matalon Declaration. First, on or around April 1, 2012, Jordana Cutler from the Office of the Prime Minister called the Wultzes at their home in Florida to inform them that Prime Minister Netanyahu had "no problems with their issue" and that the Prime Minister would instruct Shaya to provide complete testimony in the U.S. proceedings as requested in their letter. Ex. 24 (April 1, 2012 email from Yekutiel Wultz to Jordana Cutler confirming substance of their phone call); *see also* Yekutiel Wultz Decl. ¶ 18; Sheryl Cantor Wultz Decl. ¶ 17. Next, on or around May 14, 2012, then-Israeli Ambassador to the United States Michael Oren called Congresswoman Ros-Lehtinen to inform her that Shaya would offer complete testimony in the U.S. proceeding and that Mr. Shaya's deposition should proceed. *See* Yekutiel Wultz Decl. ¶ 19; Sheryl Cantor Wultz Decl. ¶ 18; Ex. 24 (May 14, 2012 email from Yleem Poblete, Chief of Staff, House Committee on Foreign Affairs, to Yekutiel Wulktz and Sheryl Wultz confirming "[j]ust received a call from the Israeli embassy . . . [t]hat the Israeli government has given the authority to both agencies to allow

the deposition."). During the same time period, in Spring 2012, the GOI did, in fact, instruct Mr. Shaya, then a private citizen, to testify in the U.S. proceedings, and in the Summer of 2012, the Office of the Prime Minister instructed the Wultzes and their counsel to meet with Mr. Shaya to arrange and prepare for his deposition. *See* Yekutiel Wultz Decl. ¶¶ 20–21.

B. The GOI Assists in Preparing Shaya to Be Deposed and in Settling the Logistics for the Deposition.

Consistent with its renewed commitments to the Wultzes, beginning in early 2012 the GOI actively participated in preparing Mr. Shaya to provide complete deposition testimony in the U.S. proceeding. Mr. Shaya was given access to confidential government files to refresh his recollection for purposes of being deposed. Yekutiel Wultz Decl. ¶ 24. On or around August 6, 2012, Mr. L— of the Office of the Prime Minister, on a visit to Washington, D.C., informed United States government officials that Mr. Shaya would testify in the U.S. proceeding, assuming the United States had no objection. On or around that same date, Mr. L— instructed the Wultzes and their new legal representatives to meet with Mr. Shaya and GOI attorneys to move forward with Mr. Shaya's deposition. *Id.* at ¶¶ 20–21.[17]

Further to that instruction, both Mr. Wultz and lawyers from Boies, Schiller & Flexner LLP met separately with Mr. Shaya in October 2012. *See* Yekutiel Wultz Decl. ¶¶ 20–21. From December 2012 through March 2013, officials of the GOI, including GOI attorney Ms. B— and her boss, "E," met to consider the ground rules of Mr. Shaya's deposition. *Id.* ¶ 24. On or around March 20, 2013, the same day Barack Obama landed in Jerusalem for his first visit to Israel as President of the United States, a letter was sent to counsel for the parties in the U.S. proceedings (the "March 20 Letter"). Ex. 10. The March 20 Letter set forth the ground rules to govern Shaya's deposition that had been "identified and designated by the relevant authorities in

[17] In July 2012, the Wultzes retained the law firm of Boies, Schiller & Flexner LLP as their counsel.

Israel." *Id.* at 1. Although the March 20 Letter bore Shaya's signature, it was actually prepared in pertinent part by GOI lawyers and other officials, including Ms. B—. Yekutiel Wultz Decl. ¶¶ 24–25.

From August 2012 through Spring 2013, in continued reliance on the GOI's commitment that Shaya would be permitted to provide complete testimony, the Wultzes and their counsel used the U.S. legal process to develop aspects of the case against BOC that the GOI's Terrorist Financing Task Force would not have accomplished by itself. The Wultzes won a series of court orders in the U.S. proceedings[18] that resulted in the disclosure of BOC documents that confirm that the Meetings about which Mr. Shaya was to testify, and which BOC had long denied, in fact took place.[19]

The documents that BOC was ordered to produce also foreshadowed a coordinated effort by BOC and the PRC to obstruct evidence of BOC's wrongdoing, including a plan to pressure the GOI to "maintain[] a consistent front" to "formally and publicly deny the meetings." Ex. 27 (7/16/13 Hr'g Tr. (Scheindlin, J.)) at 16:8–12. At a meeting between BOC and PRC officials in November 2010, according to BOC's own notes, BOC and the PRC had agreed that "*[a]s it stands now*, it should not be necessary to communicate, in any way, with Israel," on the basis of a "mutual trust" that "the Israeli government would not provide the content of meetings between the countries to courts." *Id*. at 16:14–20 (emphasis added). As explained below, that position

[18] BOC was ordered to provide the Wultzes copies of thousands of account records for the Shurafa Accounts that memorialized the money flows through those accounts. *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548 (S.D.N.Y. 2012). BOC was also ordered to produce to the Wultzes broad categories of communications with the government of the PRC concerning the Shurafa Accounts, transactions processed by BOC to and from the Shurafa Accounts, and the Meetings. *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452 (S.D.N.Y. 2013). In addition to these rulings on document discovery, BOC was ordered to fly two of its most senior employees in New York City to be questioned under oath about BOC's involvement in terrorist financing. Ex. 26 (5/30/13 Hr'g Tr. (Scheindlin, J.)) at 51:9–52:12.

[19] *See* Ex. 27 (7/16/13 Hr'g Tr. (Scheindlin, J.)) at 11:22–12:15 ("[I]n 2005 there was a meeting between Chinese and Israeli anti-terrorist authorities . . . the Chinese and Israeli anti-terrorist authorities met again in 2007.").

changed following Mr. Shaya's March 20, 2013 Letter setting forth the GOI's ground rules to govern his deposition.

V. THE PRC PRESSURES NETANYAHU; NETANYAHU WAVERS AND MAKES A SECRET DEAL.

A. Prime Minister Netanyahu Makes a Secret Deal with the PRC to Permit His May 2013 Trip to China.

Within days of Mr. Shaya's March 20 Letter, officials of the PRC, acting out of fear that Mr. Shaya would reveal BOC's complicity in terrorist financing, contacted the Israeli Embassy in Beijing to complain about the Letter. *See* Ex. 13 at 4. The PRC officials threatened that a previously issued invitation by the PRC to Prime Minister Netanyahu to visit China in May 2013 would be cancelled unless the GOI reconsidered its decision to allow Mr. Shaya to testify in the U.S. proceeding. *Id.*

In April and/or May 2013, Matan Vilnai, the Israeli Ambassador to the PRC, informed Prime Minister Netanyahu of the Chinese demand that the GOI reverse its decision concerning Mr. Shaya's deposition. Ex. 13 at 4. In order to proceed with his visit to China, Prime Minister Netanyahu secretly decided to tell the Chinese that he would not allow Mr. Shaya or any other current or former GOI official to testify in the U.S. proceedings. *Id.* On May 6, 2013, Prime Minister Netanyahu, his wife, and their children flew to China, where they and a large entourage stayed for five days of sightseeing and meetings. *See* Ex. 29.

B. The GOI Retreats from Its Commitments to Make Mr. Shaya Available to Be Deposed.

After months of participating in the preparations for Mr. Shaya's deposition, the GOI informed Mr. Shaya that it was reconsidering its prior decision as to whether to allow his testimony. Mr. Shaya's access to the GOI's files on the Shurafa PIJ-Hamas Accounts was cut off. *See* Sheryl Cantor Wultz Decl. ¶ 24. As Mr. Shaya himself explained to Mr. Wultz at an in-

person meeting in May 2013, "there was tremendous and mounting pressure from the Chinese government on the GOI to prevent [Mr. Shaya] from testifying against BOC." Yekutiel Wultz Decl. ¶ 26; *see also* Sheryl Cantor Wultz Decl. ¶¶ 22–23.

In June 2013, General Yaacov Amidror, who was at the time Israel's National Security Advisor, accepted a call from Mr. Wultz on an unsecured cellphone and freely engaged Mr. Wultz in conversation concerning Mr. Shaya's deposition and the facts of this litigation. Yekutiel Wultz Decl. ¶ 27; *see also* Ex. 28 ("Yekutiel Wultz Dep. Tr.") at 28:25–36:7. On that call, General Amidror conceded that BOC had engaged in improper conduct but said that it had promised to stop. Yekutiel Wultz Decl. ¶ 27. Notwithstanding that concession, General Amidror told Mr. Wultz that, contrary to months of prior communications and instructions from the Office of the Prime Minister, and contrary to information provided to the United States Government, Mr. Shaya might not be permitted to testify in the U.S. legal proceeding. *Id.* Mr. Wultz expressed his surprise and disappointment that the GOI had changed its position on Mr. Shaya's deposition as a direct result of pressure from the Chinese government. *Id.*; *see also* Yekutiel Wultz Dep. Tr. at 34:17–22. General Amidror did not deny that Prime Minister Netanyahu had reversed course as a result of Chinese pressure. Yekutiel Wultz Dep. Tr. at 34:17–35:8. Instead, General Amidror told Mr. Wultz that Mr. Wultz should recognize that the National Policy objective of the U.S. legal proceedings had already been achieved by filing the lawsuit, since BOC had since promised to "change its behavior." Yekutiel Wultz Decl. ¶ 27; *see also* Yekutiel Wultz Dep. Tr. at 35:18–36:2.

When Mr. Wultz explained to General Amidror that BOC should face some consequences for its wrongdoing and for its complicity in the murder of Daniel Wultz, General Amidror responded in English that Mr. Wultz was "preaching to the choir." Yekutiel Wultz

Decl. ¶ 27; *see also* Yekutiel Wultz Dep. Tr. at 185:4–20. When Mr. Wultz explained to General Amidror that if BOC was not punished for what it had done, that would give a green light to other banks to follow BOC and start transferring money for terrorists, General Amidror responded for a second time (again in English) that Mr. Wultz was "preaching to the choir." Yekutiel Wultz Dep. Tr. at 191:7–25.

C. The S.D.N.Y and U.S. Government Officials Ask GOI for Information, to No Avail.

In the months following Prime Minister Netanyahu's trip to China and General Amidror's phone conversation with Mr. Wultz, the GOI avoided disclosing its secret deal with the PRC to the court overseeing the Wultzes' case against BOC. In a series of three letters in July and September 2013, Judge Scheindlin sought information directly from the GOI on its position regarding the Shaya deposition. Exs. 30–32. In response, the GOI did not take a position and stated, instead, that it was "reviewing the various procedural aspects with regard to" the Judge's letter (Ex. 33 at 1) and could not even provide a time frame for the completion of its "review" (Ex. 34 at 1). Judge Scheindlin expressed frustration at the GOI's refusal to state its position, noting that the GOI "has not been particularly cooperative with this Court." Ex. 35 (9/26/13 Hr'g Tr.) at 16:6–12.

At the same time, during the Summer and Fall of 2013, multiple United States officials urged the Prime Minister and the GOI to honor their commitments—and to avoid abandonment of a lawsuit in the federal courts that had been commenced at its request. *See, e.g.*, Ex. 36 (10/3/13 Ltr. from Rep. Ileana Ros-Lehtinen, Chairman, House Committee on Foreign Affairs, to Prime Minister Benjamin Netanyahu).

D. The Israeli Press Reveals Prime Minister Netanyahu's Secret Deal with the PRC.

On July 12, 2013, the leading Israeli newspaper *Yedioth Ahronoth* ran a front-page story exposing Prime Minister Netanyahu's secret deal with the PRC to attempt to prevent Mr. Shaya from testifying in this case. Ex. 13. The *Yedioth* article reported that the PRC government had threatened to cancel the Prime Minister's visit to China unless the GOI acted to try to block Mr. Shaya's deposition, and that the Prime Minister had promised to give in to the Chinese demands in order to proceed with his and his family's visit. *Id.* Notably, the GOI did not deny at the time, and has never denied since, the reports that the Prime Minister was trying to reverse course in secret under enormous Chinese pressure. To the contrary, in an August 15, 2013 interview with the newspaper *Ma'ariv*, Ambassador Vilnai admitted that this case presented a "huge dilemma" for the GOI, "causes significant damage to our relations with China," and "has [the Chinese] hanging by a thread." Ex. 37 at 1.

E. Mr. Shaya Remains Willing to Testify and Is Validly Served with a Subpoena.

Despite the increasing pressure, Mr. Shaya, a private citizen since 2007, remained willing to testify, including about matters and controversies post-dating his government service that are now relevant to these proceedings. On August 29, 2013, Shaya wrote to lawyers for the Plaintiffs to advise them he is "inclined to testify" but that he hoped there would be an amicable resolution of the matter.[20] Ex. 11 (8/29/13 Ltr. from U. Shaya to L. Wolosky and N. Darshan-Leitner). On September 18, 2013, while in Washington, D.C. on business, Shaya was served with the subpoena that is the subject of this Motion to Quash, compelling his attendance at a deposition on November 25, 2013 in Washington, D.C. *See* Ex. 14. By letter dated September

[20] According to news reports, the GOI was in fact pursuing a negotiated resolution through Yosef Ciechanover, a former GOI official tasked with negotiating with Plaintiffs and BOC. Ex. 4 at 2.

27, 2013, Judge Scheindlin personally notified the GOI of the subpoena. Ex. 32. She also agreed to supervise the deposition personally in her courtroom in New York City,[21] since the witness was willing to appear there, and Judge Scheindlin had previously recognized that the parameters of the deposition might be shaped in part by, among other things, "Israeli security" interests. *See* Ex. 39 (4/4/13 Hr'g Tr.) at 15:14–16:14.

VI. UNDER PRESSURE FROM THE PRC, THE GOI INTERVENES AT THE LAST MINUTE TO FURTHER NETANYAHU'S SECRET DEAL AND ATTEMPT TO BLOCK THE DEPOSITION OF THE WITNESS IT HAD PREVIOUSLY DESIGNATED.

After Mr. Shaya was served with the subpoena in Washington, D.C., according to a follow-up article published by *Yedioth Ahronoth* on October 11, 2013, the PRC sent Prime Minister Netanyahu a threatening letter reiterating the terms of his secret agreement to prevent Mr. Shaya's testimony. Ex. 4. The *Yedioth* article quoted the letter from the PRC as stating:

> You have committed that no current or former employee shall testify. This commitment made it possible for you to visit China. The Chinese expect you to honor your commitment.

Id. Further to the threatening letter, in early November a "high-level Chinese delegation" reportedly visited Prime Minister Netanyahu to reiterate their demand that the GOI, which had not yet acted on the subpoena, prevent Mr. Shaya from testifying. Ex. 40 at 1. Following that visit, *Yedioth* reported that Prime Minister Netanyahu had surrendered to the PRC government's demands and promised the GOI would "abstain from helping the terror victims' families." *Id.* Consistent with those reports, on November 15, 2013, the State of Israel filed its Motion to Quash.

[21] *See* Ex. 38 (November 6, 2013 email from the court confirming that "Judge Scheindlin will supervise the Uzi Shaya deposition," and that the deposition would take place "in Judge Scheindlin's courtroom").

ARGUMENT

I. THE GOI LACKS STANDING TO ASSERT TESTIMONIAL IMMUNITY ON BEHALF OF A FORMER GOVERNMENT OFFICIAL WHO HAS NOT OBJECTED TO TESTIFYING.

A motion to quash "should generally be made by the person from whom the documents or things are requested." *W. Coast Prods., Inc. v. Does 1-5829*, 275 F.R.D. 9, 16 (D.D.C. 2011). Although the subpoena issued to Mr. Uzi Shaya is not addressed to the GOI, the GOI nonetheless seeks to have it quashed, claiming that (1) Uzi Shaya is entitled to immunity as a foreign government official; and (2) the requested testimony is subject in its entirety to the state-secrets privilege. GOI Mem. at 4–6. The GOI has no standing to make these claims.

First, the GOI provides no basis for its assertion that it has standing to assert immunity for Mr. Shaya when Mr. Shaya, who has been a private citizen for at least six years (see Amidror Declaration ¶ 5), has chosen not to invoke such immunity himself. The GOI asserts that upholding the subpoena could "ensnare" other foreign officials when they travel outside their home countries. GOI Mem. at 5. But this is incorrect: such officials can always avoid having to testify by asserting their immunity, which Mr. Shaya has chosen *not* to do. In addition, at least a portion of Mr. Shaya's anticipated testimony relates to matters that transpired while he was a private citizen.

The GOI identifies no instance in which a court has allowed a foreign government to prevent testimony of a former foreign government official without that official's consent. Instead, it relies on an International Court of Justice ("ICJ") opinion addressing a different situation of a *sitting* foreign official's immunity from *criminal* liability. *See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶¶ 53, 61 (Feb.

14).[22] Moreover, the ICJ opinion undermines the GOI's position by emphasizing that such immunities exist not for officials' "personal benefit, *but to ensure the effective performance of their functions on behalf of their respective States*." *Arrest Warrant*, 2002 I.C.J. 3, ¶ 53 (emphasis added). Whereas subjecting a sitting foreign official to criminal liability in another country could obviously interfere with the performance of the official's duties, the same is not true for a witness who is no longer in government service and who is, in any event, not being accused of any wrongdoing and does not object to giving testimony.[23]

Second, while in some instances a non-subpoenaed party may have standing to challenge a subpoena that "infringes on the moving party's rights," *Fudali v. Pivotal Corp.*, CIV.A. 03-1460 JMF, 2010 WL 4910263, at *2 (D.D.C. Dec. 2, 2010), a non-subpoenaed party cannot simply rely on bald and conclusory assertions that it has such an interest. *Universitas Educ., LLC v. Nova Grp., Inc.*, No. 11 Civ. 1590 (LTS) (HBP), 2013 WL 57892, at *5 (S.D.N.Y. Jan. 4, 2013) (the "bald statement, by itself," that the requested documents contained "private, confidential, and commercially sensitive" information was insufficient to establish standing based on any proprietary or other confidentiality interest in the documents). Here, the GOI does not explain how the subpoena will infringe on its national security interests. Nor is there authority to suggest that the "state secrets privilege" that the U.S. Government may assert in U.S. courts can be asserted by foreign states. And even if this court determines that the "state secrets

[22] The ICJ opinion also addresses international law, not United States law, and is not binding even on questions of international law. *See United States v. Hall*, 419 F. Supp. 2d 279, 291 (E.D.N.Y. 2005). ("The statute of the I.C.J. states that its decision[s] have 'no binding force except between the parties and in respect of that particular case.' Just as I.C.J. decisions are not considered binding precedent by the I.C.J., nor are they considered authoritative statements of international law in domestic courts.") (citing Statute of the International Court of Justice, Article 59).

[23] The two U.S. Government submissions that the GOI cites are not on point. The U.S. Government's August 3, 2012 brief in *Giraldo v. Drummond Co.*, No. 11-7118 ("U.S. *Giraldo* Br."), noted only that testimony of former officials can be of concern to a foreign government. GOI Mem. at 5. Moreover, the requested testimony was designed to challenge the actions of the sovereign and the former official *himself* opposed the subpoena. The submission in *Samantar v. Yousuf* addressed whether a sovereign may *waive* a foreign official's immunity from suit. *See* U.S. *Amicus* Br., *Samantar v. Yousuf*, 2010 WL 342031, at *26. That is the opposite of what Israel seeks to do here.

privilege" enjoyed by the United States may be asserted by a foreign government, Israel's assertion of the privilege is defective both procedurally and substantively.

Third, the GOI has no standing, and it does not even attempt to argue that it has standing, to prevent Mr. Shaya from testifying about information he learned as a private citizen after 2007.

II. MR. SHAYA IS NOT IMMUNE FROM TESTIFYING.

A. Mr. Shaya Cannot Be Immune From Testifying As To Information Acquired After He Was No Longer Employed By The GOI.

While the GOI argues that Mr. Shaya is immune from testifying about information he acquired as an Israeli official, it does not even attempt to justify preventing testimony about information that Mr. Shaya acquired after he left government service in 2007. The GOI's argument solely relates to "acts undertaken and knowledge acquired *as a foreign official*." GOI Mem. at 6. It is therefore undisputed that Plaintiffs should be able to depose Mr. Shaya concerning all after-acquired knowledge, including, among other things, his personal knowledge of the GOI's efforts to commence and support the underlying litigation and the efforts of BOC and its majority shareholder to prevent him from testifying – efforts that would hardly have been necessary if Mr. Shaya does not possess personal knowledge harmful to BOC's interests.

B. Mr. Shaya Is Not Immune From Testifying As To Information That The GOI Has Already Disclosed.

Mr. Shaya is also not immune from testifying as to information that the GOI disclosed as part of its effort to commence and actively support the underlying lawsuit, for at least three reasons.

First, the Wultzes seek this deposition in part for the specific and narrow purpose of securing in testimonial form information that the GOI has already disclosed concerning the actions of BOC; the subpoenaed testimony would not call into question the actions of the GOI or Mr. Shaya. As the Supreme Court has recognized, "the 'immunity of a foreign state . . . extends

to . . . any other public minister, official, or agent of the state with respect to acts performed in his official capacity ***if the effect of exercising jurisdiction would be to enforce a rule of law against the state***.'" *Samantar v. Yousuf*, 560 U.S. 305, 321 (2010) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (the "Restatement") § 66(f) (1965)) (italics and ellipses in original; emphasis added). The commentary to the Restatement further explains that officials who are not heads of state "do not have immunity from personal liability even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state" (or unless they have one of the specialized immunities that have no application here). *Id.* cmt. b.[24] Because the requested testimony in no way calls into question the conduct of either Mr. Shaya or the GOI, Mr. Shaya is not entitled to testimonial immunity.

Second, the subpoena does not interfere with the objective of ensuring that foreign officials can perform their duties without the inconvenience of suit. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) (foreign sovereign immunity is intended "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns"). Mr. Shaya no longer works for the GOI, and he is willing to testify.

Third, the GOI offers no viable support for its claim of immunity. It fails to explain why the common law should protect a foreign state's ability to, effectively, sponsor litigation in a United States court and then years later undermine that same litigation by seeking to prevent the

[24] The GOI's authorities demonstrate that the central purpose of conduct-based immunity – *i.e.*, immunity that derives from an official's acts rather than the official's status at the time of suit – is to prevent courts from sitting in judgment on the actions of a foreign sovereign. Former State Department legal advisor Harold Koh wrote that conduct-based immunities "protect centrally against inappropriate judicial oversight of foreign government conduct." Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1154 (2011). *See also Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (cited by the GOI at page 6 of its motion) ("[C]ourts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

deposition of the very witness it previously designated to testify about information it has already disclosed. These circumstances, and the fact that Mr. Shaya is willing to testify, are so unique that there is no risk whatsoever that rejecting immunity here would somehow have the effect of exposing *U.S.* officials to wide-ranging liability or subpoenas for their official acts, as the GOI suggests (GOI Mem. at 12).[25] In any event, such arguments would be for the United States to make, not Israel – and the United States, as described further below, has remained silent in these proceedings.

The only case that the GOI cites and that involves the immunity of a former government official, *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247 (D.D.C. 2011), does not mandate a different result. In *Giraldo*, plaintiffs sought to depose the former President of Colombia about his involvement with drug smuggling, executions, and other illegal activities while in office in order to challenge the actions *of the government*. 808 F. Supp. 2d at 248–49. But Mr. Shaya is not a former head of state. As the Restatement expressly recognizes, heads of state are entitled to far greater immunity than other officials, such as Mr. Shaya. Restatement § 66, cmt. B. Moreover, unlike in *Giraldo*, Plaintiffs here do not seek to establish that the government or the former official in any way acted illegally or improperly. Indeed, for over five years the GOI directly encouraged this lawsuit, and the suit exists only because of the information that GOI has provided to Plaintiffs. In addition, while in *Giraldo* the former President failed to appear at his deposition and opposed the plaintiff's motion to compel (*Giraldo*, 808 F. Supp. 2d at 249; U.S.

[25] Contrary to the GOI's assertion, there is no blanket rule providing immunity for all actions performed by foreign government officials in their official capacities, much less after they cease being government officials. *See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 311–12 (2010) (recognizing that a two-step process under federal common law applies to determination of whether foreign official immunity applies to Defendant, even though the suit related to Defendant's actions in his official capacity while he was Prime Minister of Somalia). Rather, the immunity inquiry can involve a "number of complexities" besides the issue of whether the government official acted in his official capacity. Brief for the United States as Amicus Curiae Supporting Affirmance at 24–25, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

Giraldo Br. at *4), Mr. Shaya is perfectly willing to testify and has not sought to invoke immunity.[26]

The GOI is wrong that it makes no sense to provide less protection to an official as a third-party witness than as a defendant (GOI Mem. at 12). To the contrary, lawsuits against former officials challenging official conduct implicate core concerns of sovereign immunity; testimony that does not challenge official conduct – and instead merely concerns the conduct of a third party – clearly does not.

C. The GOI Is Not Entitled To Immunity Because It Has Failed To Comply With The Procedures That The State Department Has Asserted Must Be Followed For Asserting Immunity.

The GOI has failed to show it complied with the well-established procedures that the State Department has prescribed for seeking immunity. *First*, there has been no Suggestion of Immunity issued by the State Department. As the State Department has stated, "a foreign state's request for an official's immunity should always be presented to the State Department, not to the court." U.S. *Giraldo* Br. at n.5. The GOI does not assert that it has done so, nor does the GOI even try to explain why the State Department issued no Suggestion of Immunity, which is the first step of the "two-step" procedure for asserting immunity (*Samantar*, 560 U.S. at 311–12).

III. THE GOI CANNOT INVOKE THE STATE SECRETS PRIVILEGE.

The GOI's attempt to assert the state secrets privilege should be rejected for multiple reasons. The state secrets privilege is a common law evidentiary rule that permits the *U.S.* Government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg v. Mitchell,* 709 F.2d 51, 56 (D.C. Cir. 1983); *In re*

[26] None of the GOI's other cases even involve testimonial immunity of a former government official. Moreover, in *Rosenberg v. Lashkar-e-Taiba*, No. 10 Civ. 5381, 2013 WL 5502851 (E.D.N.Y. Sept. 30, 2013), unlike here, the State Department had issued a Suggestion of Immunity. In *Weiming Chen v. Ying-jeou Ma*, No. 12 Civ. 5232, 2013 WL 4437607 (S.D.N.Y. Aug. 19, 2013), the foreign official was named as defendant. *Belhas v. Ya'alon*, 515 F. 3d 1279 (D.C. Cir. 2008) involved an analysis of foreign immunity under the FSIA.

U. S., 872 F.2d 472, 474 (D.C. Cir. 1989). As the GOI acknowledges, no court has ever held that a foreign government can assert the state secrets privilege enjoyed by the United States to prevent testimony concerning information that it claims to implicate its national security where that information is material to litigation pending in the federal courts.

A. The GOI Has Not Satisfied the Procedural Requirements to Assert a State Secrets Privilege.

Even assuming, *arguendo*, that the GOI could assert a state secrets privilege over information relevant to claims in a U.S. litigation, it has failed to meet the procedural requirements for doing so. Nor has it met its substantive burden to show how Israeli national security would be adversely affected if Mr. Shaya were to testify concerning information *previously disclosed* by the GOI for the specific purpose of enabling the Wultzes to prove their claims against BOC in a United States court.

1. The GOI's Claim of Privilege Was Not Lodged by an Authorized Official.

The threshold requirement to invoke the state secrets privilege is a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Halkin v. Helms*, 690 F.2d 977, 991 (D.C. Cir. 1982) ("*Halkin II*"); *In re Sealed Case*, 494 F.3d 139, 142 (D.C. Cir. 2007). The GOI has failed to meet this requirement. Its only factual support is the October 31, 2013 Declaration of Major General Yaacov Amidror (the "Amidror Declaration"). The Amidror Declaration represents that General Amidror "[is] the National Security Advisor and Head of the National Security Council at the Prime Minister's Office," "the Chief Advisor for the Prime Minister of Israel on national security issues," and "responsible for the operation of the National Security Council." Amidror Decl. ¶ 1. When the GOI filed its Motion on November 15, 2013, however, Amidror did not hold any of these positions. In fact,

he had resigned two weeks earlier, on or about November 3, 2013. *See* Ex. 41 (reporting that the event marking General Amidror's departure from office took place on November 3, 2013); Ex. 42 at 1 (confirming that Amidror had "stepped down officially" by November 4). Beginning November 3, 2013, if not earlier, the positions and responsibilities described in the Amidror Declaration were held by Yossi Cohen, who had been appointed by Israeli Prime Minister Benjamin Netanyahu to replace Amidror. *See id.* It is therefore evident that the GOI's claim of privilege was lodged by someone who, at the time of filing, had no official responsibility or position within the GOI at all. The GOI's failure to lodge the privilege claim through a sitting official with proper authority is fatal and obligates the Court to deny the requested relief.[27]

2. The GOI's Claim of Privilege Was Not Lodged by an Authorized GOI Official Who Had Personally Reviewed the Information About Which Mr. Shaya Will Testify.

The GOI's attempt to lodge a privilege claim also fails because the Amidror Declaration does not establish that General Amidror undertook any "actual personal consideration" (*Reynolds*, 345 U.S. at 8) of the information about which Mr. Shaya will testify. Because the state secrets privilege "is not to be lightly invoked," Amidror was required to "make an explicit representation that he . . . has personally seen and considered the material." *Yang*, 157 F.R.D. at 632; *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399-400 (D.C. Cir. 1984). Instead of the required representation, the Amidror Declaration merely indicates that General Amidror "personally consider[ed] the subpoena request." Amidror Decl. ¶ 8. General Amidror is therefore "not competent to assert the state secrets . . . privilege[]." *Yang*, 157 F.R.D. at 632.

[27] *Yang v. Reno*, 157 F.R.D. 625, 633 (M.D. Pa. 1994) (executive secretary of NSC not competent to lodge state secrets claim, as he lacks "political and policy making authority contemplated by the *Reynolds* Court"); *Kinoy v. Mitchell*, 67 F.R.D. 1, 9 (S.D.N.Y. 1975) ("It is of the utmost importance, first, that the Government comply with the formal requisites for assertion of the claim.").

3. The GOI's Claim of Privilege Was Not Lodged By Sworn Affidavit or Declaration Pursuant to 28 U.S.C. § 1746.

Even if both of the above requirements were met, the Amidror Declaration would still fail to establish the GOI's privilege claim because it is neither a sworn affidavit nor a declaration pursuant to 28 U.S.C. § 1746. *Nat'l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 397 n.14 (S.D.N.Y. 1982) (state secrets privilege claim submitted by testimony or affidavit).

a. The Amidror Declaration is not a valid affidavit.

By definition, an affidavit is "a sworn document, declared to be true under the penalties of perjury." *DeMars v. O'Flynn*, 287 F. Supp. 2d 230, 242 (W.D.N.Y. 2003) (quoting 11 Moore's Federal Practice, § 56.14[1][b] (Matthew Bender 3d ed.)). The Amidror Declaration does not purport to be an affidavit and cannot qualify as one because it does not state that Amidror was placed under oath and swore to the truthfulness of the representations contained in it. *Shaw v. United States*, 2006 WL 1041790, at *5 (W.D.N.C. Apr. 18, 2006).[28]

b. The Amidror Declaration is not a valid declaration pursuant to 28 U.S.C. § 1746.

Though an unsworn declaration pursuant to 28 U.S.C. § 1746 substitutes for an affidavit and does not need to be in any specific form, *Cobell v. Norton*, 391 F.3d 251, 260 (D.D.C. 2004), a valid declaration must aver that it is made under the penalty of perjury. *Id.*; *United States v. 8 Gilcrease Lane, Quincy Fla. 32351*, 587 F. Supp. 2d 133, 139 (D.D.C. 2008); Local Civ. R. 5.1(h). Because Amidror executed his declaration in Israel, 28 U.S.C. § 1746(1) obligated him more specifically to aver that his assertions were made "under penalty of perjury under the laws of the United States." *See also* Local Civ. R. 5.1(h)(1). The Amidror Declaration does not

[28] While General Amidror's signature is notarized, merely "notarizing the signature does not transform [the Amidror Declaration] into an affidavit." *Flowers v. Abex Corp.*, 580 F. Supp. 1230, 1233 n.2 (E.D. Ill. 1984). Similarly, the presence of words such as "sworn" in the notary's affirmation also fails to transform the Amidror Declaration into an affidavit, *DeMars*, 287 F. Supp. 2d at 243 n.8; *Shaw*, 2006 WL 1041790, at *5, because such language does not indicate "whether [General Amidror] swore under penalty of perjury or that the contents of the [Amidror Declaration] are true." *Shaw*, 2006 WL 1041790, at *5.

contain such assertions. Consequently, it must be disregarded. *Id.*; *see also Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306–07 (5th Cir. 1988) (because it did not satisfy the requirements of § 1746, unsworn "affidavit" must be disregarded).

B. The GOI Failed to Meet Its Burden to Show Why Any of Mr. Shaya's Testimony Would Adversely Affect Israel's National Security.

The GOI also fails to meet its burden to show that Mr. Shaya's testimony would create "a reasonable danger [of] harm" to Israeli national security. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 402 (D.C. Cir. 1984); *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007); *Jabara v. Kelley*, 75 F.R.D. 475, 492–93, n.47 (E.D. Mich. 1977) (information must be "clearly within the privileged category"). Because the Wultzes have "a strong need for" Mr. Shaya's testimony, the GOI was required to explain in detail "the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information." *Ellsberg*, 709 F.2d 51 at 63–64. That explanation was required to be filed either publicly, or *in camera* accompanied by a detailed public filing explaining "why such an explanation would itself endanger [its] national security," *Id.*[29] The GOI failed to meet this burden.

For multiple reasons, Mr. Shaya's testimony will not involve undisclosed matters of Israeli national security. Mr. Shaya possesses three distinct categories of information relevant to the Wultzes' claims against BOC: (1) information that he acquired while serving as a GOI official, which the GOI has previously disclosed; (2) information that he acquired after he stopped serving as a GOI official; and (3) a limited amount of information that he acquired while serving as a GOI official, but which has not been disclosed. The GOI does not explain how the

[29] Furthermore, the affidavit or declaration supporting its claim was required to (a) describe the "disputed material in sufficient detail," (b) set forth the "reasons for withholding the material" with "reasonable specificity," and (c) explain the "reasons for invoking the privilege." *Nat'l Lawyers Guild*, 96 F.R.D. at 397; *Northrop*, 751 F.2d at 405 n.11.

state secrets privilege could apply to any of Mr. Shaya's testimony, much less information that (1) the GOI itself previously disclosed or (2) information Mr. Shaya acquired after he left government service. Even for the limited amount of undisclosed information that Mr. Shaya learned while a GOI official, the GOI's showing is insufficiently specific to assert a privilege.

1. The GOI Fails to Show Any Facts at All to Explain Why Any of Mr. Shaya's Testimony Would Fall within a State Secret Privilege.

First, the GOI failed to satisfy this Circuit's standard for justifying the state secrets privilege regarding any of Mr. Shaya's testimony.[30] *Ellsberg*, 709 F.2d at 63–64. Instead of the detailed, factual showing required when a requesting party has shown a strong need, the Amidror Declaration is conclusory and unsupported.[31] Because it completely fails to provide the required specific explanations, the GOI cannot invoke the privilege as to any portion of Mr. Shaya's testimony. *Yang*, 157 F.R.D. at 634–35 (state secrets privilege "require[s] specific showings on the part of the government").

2. Mr. Shaya's Testimony About Matters Previously Disclosed for Use in this Lawsuit Cannot Adversely Affect Israeli National Security.

The GOI fails to show how Israeli national security would be adversely affected by Mr. Shaya's testimony concerning information deliberately disclosed by the GOI for the specific purpose of enabling the Wultzes to prove in a U.S. court that BOC was providing material support to the PIJ and Hamas. The Amidror Declaration, in fact, fails to address at all the GOI's frequent and extensive prior disclosures.

[30] Courts in this Circuit do not "unthinkingly ratify the executive's assertion of absolute privilege" or abdicate control over the evidence in a case "to the caprice of executive officers." *In re U. S.*, 872 U.S. at 475; *Reynolds*¸ 345 U.S. at 9–10; *Molerio v. FBI*, 749 F.2d 815, 822–23 (D.C. Cir. 1984) (U.S. government assertion of privilege "must be judicially assessed"); *Kinoy*, 67 F.R.D. at 10 ("The Court, not the executive officer claiming privilege, makes the judgment whether to uphold or overrule the claim.").

[31] Even a cursory comparison with submissions in other cases demonstrates the Amidror Declaration's deficiencies. For example, compare *Halkin II*, 690 F.2d at 992 n.56 (quoting verbatim a factual submission that was held sufficient to invoke the privilege) with *Yang*, 157 F.R.D. at 634–35 (quoting verbatim a factual submission similar to the Amidror Declaration that was held insufficient to invoke the privilege).

The right to assert a state secrets privilege is not unlimited. *Ellsberg*, 709 F.2d at 57. It cannot be used to "shield any material not strictly necessary to prevent injury to national security." *In re U.S.*, 872 F.2d at 46. Nor can it be used to preclude discovery concerning information that has already been disclosed. *Jabara*, 75 F.R.D. at 492–93. Furthermore, "sensitive information must be disentangled from nonsensitive information to allow for the release of the latter," *Ellsberg*, 709 F.2d at 57.

For example, in *Reynolds*, the state secrets privilege shielded an accident investigation report relating to a military aircraft that crashed while testing secret electronic equipment and the written statements of the aircraft's surviving crew members. Nevertheless, the United States Supreme Court permitted depositions of the surviving crew members concerning non-classified matters relating to the crash. 345 U.S. at 11.

Similarly, in *Jabara*, a wiretap damages case, the court held that the means by which the wiretaps were obtained and other information that would reveal foreign intelligence sources and capabilities were shielded by the state secrets privilege. 75 F.R.D. at 492–93. The court ruled, however, that "there was no basis for extending the privilege to matters not clearly within its scope," and permitted discovery into "the 'arrangement' by which the FBI had requested and obtained information about the plaintiff from the unnamed federal agency, [or] the 'general' manner such information was ultimately used by the FBI." *Id.* The court also held that the name of "the unnamed federal agency" was not shielded because its identity had been disclosed in a Senate report. *Id.* at 493 ("In view of that report, it would be a farce to conclude that the name of this other federal agency remains a military or state secret.").

Here, as set forth below, Mr. Shaya will testify about information and events that the GOI previously disclosed for use in the Complaint and the Matalon Declaration. The depth, breadth,

and specificity of the GOI's prior disclosures overcome the GOI's current, unspecified, and unsupported assertions that Mr. Shaya's testimony might implicate Israeli state secrets. *See also Rahman v. Chertoff*, 2008 WL 4534407, at *7 (N.D. Ill. Apr. 16, 2008).

a. The GOI Deliberately Disclosed Information to the Wultzes for Use in a U.S. Court.

During his service as a GOI official, Mr. Shaya was a percipient witness to a number of facts material to the Wultzes' claims that BOC provided material financial support to the PIJ and Hamas. The GOI repeatedly disclosed that information to the Wultzes, their counsel, and the public in furtherance of its National Policy and for the purpose of enabling the Wultzes to commence and prove claims against BOC in court. Consequently, the GOI cannot show that Mr. Shaya's testimony would now create a reasonable danger of harm to Israeli national security.[32]

The GOI previously, and deliberately, disclosed the information about which Mr. Shaya will testify at least four different times. *See* Yekutiel Wultz Decl. (Ex. 7) ¶¶ 7–13; Sheryl Cantor Wultz Decl. (Ex. 8) ¶¶ 6–12; Matalon Decl (Ex. 1). It first disclosed it to the People's Republic of China at the Meetings. Next, it disclosed the information to the Wultzes' legal counsel in 2007 to induce them to use it in a civil lawsuit against BOC in a United States court. At that time, Israel also officially committed to providing a GOI official to testify at trial concerning the information. In 2008, the GOI publicly disclosed the contested information again and

[32] The D.C. Circuit Court has held that the "government is not estopped from concluding in one case that disclosure is permissible while in another case it is not," *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) ("*Halkin I*"), and that "one department's decision to disclose documents it possesses on a given topic should not compel another department's disclosure." *Northrop Corp.*, 751 F.2d 395, 402 n.9 (D.C. Cir. 1984). The disclosures at issue in this case, however, differ from those in *Halkin I* and *Northrup*. Here, the same department of the GOI – the Office of the Prime Minister – disclosed the information about which Mr. Shaya will testify and disclosed it for the specific purpose of enabling it to be used in this lawsuit to prove that BOC was providing material support to the PIJ and Hamas. The GOI disclosed information that it knew was material to proving the Wultzes' claims against BOC with the understanding that a GOI official with personal knowledge would be subject to the U.S. discovery process and would be required to testify under oath at trial. The GOI also made the information a matter of public record when the information was filed with the Court in this case. As a consequence of the GOI's deliberate disclosures, the information about which Mr. Shaya will testify is now easily and publicly discoverable and cannot be subject to a state secrets privilege.

specifically authorized the Wultzes' attorneys to use it in the Complaint filed in this Court. The GOI publicly disclosed the information a fourth time when the Office of the Prime Minister directed Shlomo Matalon, a former counterterrorism official in that office, to prepare the May 16, 2009 Matalon Declaration to be filed in this Court in support of the underlying litigation.[33]

b. The GOI Deliberately Disclosed Information that is Material to Proving the Wultzes' Claims Against BOC at Trial.

It is incontrovertible that the GOI has publicly disclosed material information the Wultzes could not have acquired from any other source and that is material to proving the Wultzes' claims that BOC knowingly provided material support to PIJ and Hamas. This information includes the following:

- BOC's provision of banking services linked to PIJ and Hamas terrorist activities (FAC ¶¶ 69–70);
- the source and routing of fund transfers from Iran and other countries through BOC to PIJ and Hamas for the purpose of committing acts of terrorism (*id*. ¶¶ 69–70, 77–78);
- the identity of at least one member of the Shurafa terrorist finance cell in Guangdong, China, and his affiliation with PIJ and Hamas (*id.* ¶ 69);
- the branch location and account numbers 4750401-0188-150882-6 and 4762307-0188-034456-6 at a BOC branch in Guandong, in the name of "S.Z.R Alshurafa," which were used by PIJ and Hamas to finance terrorist acts in Israel (*id*. ¶¶ 69, 77–78);
- the nature, amounts, patterns, and suspicious activity relating to financial transactions that demonstrate the Shurafa terrorist finance cell was linked to, and involved with, financing terrorist attacks carried out by PIJ and Hamas in Israel (*id*. ¶¶ 77–78);
- BOC's knowledge that PIJ and Hamas were using the Shurafa Accounts and Shurafa Transfers to finance terrorist acts in Israel (*id*. ¶¶ 77–78);
- the fact and content of the Meetings and other communications between Israeli officials and Chinese officials concerning the Shurafas, the Shurafa Accounts, and the Shurafa Transfers (*id*. ¶¶ 77–78);

[33] In addition, Matalon also signed a previous declaration in another case in 2007. Ex. 3. In footnote 1 of that declaration, Mr. Matalon confirms that the information he disclosed was contained in classified documents maintained by the GOI. *Id.* at 2 n.1.

- the GOI's request that BOC stop providing banking services to the Shurafa terrorist finance cell (*id*. ¶¶ 77–78); and
- BOC's rejection of the GOI's request (*id*. ¶ 77).

In addition, the GOI disclosed in the Matalon Declaration specific information regarding "funds transfers carried out by the terrorist organizations the Palestinian Islamic Jihad [] and Hamas, via the Bank of China," Matalon Decl., ¶¶ 3–4, 7; the identity and role of the Shurafa terrorist financing cell in facilitating terrorist attacks in Israel, including specific Shurafa Transfers for the benefit of PIJ and Hamas, *id*. ¶¶ 5–7; meetings between Israeli and Chinese officials to discuss the PIJ's and Hamas' use of the Shurafa terrorist finance cell "to increase their ability to execute terrorist attacks," *id*. ¶ 8; and the fact that, despite the GOI request, the Shurafa Accounts remained open and the Shurafa Transfers continued. *Id*. ¶ 9.

Because the GOI has failed to explain how its national security would be affected by Mr. Shaya's testimony concerning information that the GOI, itself, has already deliberately disclosed on multiple occasions for use in this case, the GOI has failed to satisfy its burden to justify shielding the information under a state secrets privilege.

3. The State Secrets Privilege Does Not Apply to Testimony Concerning Information Mr. Shaya Acquired After Leaving Government Service.

In 2007, Mr. Shaya retired from government service and became a private citizen. Any information he acquired after his retirement by definition is not subject to the state secrets privilege. The GOI assisted Mr. Shaya in preparing for his deposition in this case. After the PRC began obstructing the Wultzes' effort to depose him, Mr. Shaya acquired further relevant information about the PRC's efforts to prevent him from testifying, and BOC's role in connection with those efforts. None of this information was acquired during this government service and therefore is not protected.

4. The GOI Failed to Establish a State Secrets Privilege Over Information that is More Than Seven Years Old.

The GOI's assertion of privilege must be based on circumstances as they currently exist, not as they were when the information was originally gathered. *Ellsberg*, 709 F.2d at 61; *United States v. Ahmad*, 499 F.2d 851, 854-54 (3d Cir. 1974) ("The passage of time has a profound effect upon such matters, and that which is of utmost sensitivity one day may fade into nothing more than interesting history within weeks or months."). Most of Mr. Shaya's testimony will concern events that occurred more than seven years ago and facts that were first disclosed at least five years ago. The passage of time has severely undermined any potential claim that Mr. Shaya's testimony would create a reasonable danger to Israeli national security.

C. Through Its Prior Disclosures, the GOI has Waived Any State Secrets Privilege that It Might Otherwise Have Had Concerning Mr. Shaya's Testimony.

Like all evidentiary privileges, the state secrets privilege can be waived. In fact, the GOI's "prior disclosure of the *specific* information sought to be disclosed waives the privilege." *Nat'l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. at 402 (emphasis in the original). Here, the GOI's disclosures were knowing and intentional, and were made for the specific purpose of furthering this litigation. Accordingly, the GOI has waived the state secrets privilege. *Id.*; *Jabara*, 75 F.R.D. at 493 (after it was disclosed in a Senate report, "it would be a farce to conclude" that the name of the agency "remain[ed] a military or state secret").

D. BOC's Opportunity to Cross-Examine Mr. Shaya Does Not Subject Mr. Shaya's Testimony to the State Secrets Privilege.

The GOI argues that all of Mr. Shaya's testimony should be subject to the state secrets privilege, even if some of the information relevant to the Wultzes' claims is now public, because BOC's cross-examination presents "a grave risk" that protected information will be divulged. GOI Mem. at 18–19. The GOI is wrong.

First, Mr. Shaya will testify concerning information that the GOI disclosed (i) first to the PRC, BOC's majority owner, (ii) next to the Wultzes to enable them to file their Complaint, and (iii) then to the public at large, by authorizing the Matalon Declaration explaining that BOC knowingly provided material financial support to PIJ and Hamas. The information did not come to the Wultzes from unidentified or anonymous sources and the Wultzes' claims were not gleaned from generalized and non-specific, publicly available information. The GOI disclosed the information as part of its National Policy to combat terrorist financing through civil litigation in U.S. courts. The GOI disclosed the information knowing that Mr. Shaya would be subject to cross-examination.

Second, the DC Circuit demands that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57. Accordingly, this Court has allowed the deposition of a former FBI contractor after separating information that fell within the state secrets privilege from information that did not. *Burnett v. Al Baraka Inv. & Dev.*, 323 F. Supp. 2d 82, 83–84 (D.D.C 2004); *Jabara*, 75 F.R.D. at 492–93 (shielding some information under the state secrets privilege, but compelling disclosure of related information that was not "clearly within the privileged category"). Likewise, even if some information about which Mr. Shaya could testify were subject to a state secrets privilege, the deposition must proceed on those topics that are not. *Burnett*, 323 F. Supp. 2d at 83–84.

Third, any concern that BOC's cross-examination could require Mr. Shaya to disclose privileged information is alleviated because Judge Scheindlin will personally preside over the deposition. *See* Ex. 38. In fact, it will take place in her sealed courtroom. *See Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266 (S.D.N.Y. Nov. 15, 2013) (Dkt. # 394) (ordering that "the courtroom will be closed for the entirety of Mr. Shaya's deposition"). In *Burnett*, this Court used

written questions submitted by the plaintiff in advance of the deposition as a tool to separate sensitive and nonsensitive information. *Burnett*, 323 F. Supp. 2d at 83–84. Judge Scheindlin will perform the same function in real time, from the bench.[34]

E. The GOI Is Estopped from Asserting the State Secrets Privilege.

The GOI should be estopped from using the state secrets privilege to prevent disclosure of information it intentionally disclosed more than six years ago in furtherance of its National Policy of combating terrorism through civil litigation. For six years, the GOI assured the Wultzes and their counsel that it would provide a witness to testify from personal knowledge about the Shurafas, the Shurafa Accounts and Shurafa Transactions, and the Meetings. The GOI cannot, now, be permitted to break its promises and deny the very testimony it promised to give.

The fundamental principle of equitable estoppel "applies to government agencies, as well as private parties." *Gen. Accounting Office v. Gen. Accounting Office Pers. Appeals Bd.*, 698 F.2d 516, 526 n.57 (D.C. Cir. 1983). It applies when: (1) there was a definite representation to the party claiming estoppel; (2) the party relied on its adversary's conduct in such a manner as to change his position for the worse; (3) the party's reliance was reasonable; and (4) the government engaged in affirmative misconduct. *Keating v. F.E.R.C.*, 569 F.3d 427, 434 (D.C. Cir. 2009). Under these principles, the GOI should be estopped from relying on the state secrets privilege.

First, the GOI made clear and unequivocal representations to the Wultzes and their counsel. It repeatedly told them that it would permit a GOI official with personal knowledge about the Meetings to testify, in a U.S. court, that BOC knowingly provided material support to

[34] The GOI's reliance on *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), is equally misplaced. *Bareford* did not center on an attempt to obtain discovery from the government. Instead, it involved litigating the design and operational adequacy of a sophisticated weapons system. *Bareford*, 973 F.2d at 1142. The "analysis of the capabilities of an advanced Navy frigate's defensive systems is the type of judicial disclosure of state secrets the doctrine blocks." *Id*. By contrast, the Wultzes' claims concern BOC's knowing provision of material financial support to the PIJ and Hamas. The subject matter of those claims is not an Israeli state secret.

the PIJ and Hamas when it permitted the Shurafas to continue making the Shurafa Transfers. It also authorized the Matalon Declaration to be filed in this Court.

Second, the Wultzes relied on the GOI's representations and conduct. Without the GOI's promise, the Wultzes, and their counsel, never would have filed their lawsuit against BOC. In reliance on the promises, the Wultzes, their counsel, BOC's counsel, the court, and untold other individuals and entities have spent millions of dollars in fees and costs and thousands of hours in time litigating the claims against BOC.

Third, such reliance was reasonable. *See Swedish Am. Hosp. v. Sebelius*, 773 F. Supp. 2d 1, 8 (D.D.C. 2011). Reliance is "reasonable" when a party "did not know nor should it have known that [the government's] conduct was misleading." Here, the Wultzes had no reason to know the GOI would mislead them. In fact, the GOI continued to fulfill its promises for more than six years.

Finally, the GOI has engaged in affirmative misconduct. A government engages in affirmative misconduct either (1) when its "agents engage – by commission or omission – in conduct that can be characterized as misrepresentation or concealment" or (2) it behaves "in ways that have or will cause an egregiously unfair result." *Gen. Accounting Office*, 698 F.2d at 526; *see also Grumman Ohio Corp. v. Dole*, 776 F.2d 338, 347 (D.C. Cir. 1985) (identifying these as two distinct standards). The GOI's conduct qualifies under either standard. In furtherance of the National Policy, its officials misled the Wultzes into believing it would allow Mr. Shaya to testify. Its eleventh-hour decision to renege on that promise will cause an egregiously unfair result.

Accordingly, the GOI should be estopped from claiming that a state secrets privilege shields Mr. Shaya's testimony.

IV. PRINCIPLES OF COMITY SUPPORT ALLOWING MR. SHAYA TO TESTIFY.

Invoking the doctrine of international comity, the GOI asks the Court to quash the subpoena for Mr. Shaya's deposition "out of due respect for Israeli law." GOI Mem. at 19. It asserts that the GOI may choose to criminally prosecute him for the unauthorized disclosure of "information that reached him by virtue of his office," in violation of Israel's Penal Law 5737-1977(a). GOI Mem. at 19.

As a threshold matter, Israel's position ignores the fact that its eleventh-hour reversal concerning a litigation that the government asked be commenced shows disrespect for U.S. law and the judicial resources of this country, including countless hours spent by three federal judges who attended to scores of motions, hearings and pre-trial disputes. Israel's threat to prosecute Mr. Shaya criminally ignores the fact that it designated him as a witness and authorized him and other Israeli officials to disclose their "knowledge pertaining to the subject matter of this case," GOI Mem. at 20, more than six years ago and on several occasions since then, in support of its national interests. This severely undermines any suggestion that Mr. Shaya could be subject to criminal prosecution if he is deposed. Nevertheless, even if Mr. Shaya were somehow exposed to the possibility that his testimony might violate Israeli law, this Court still must deny the Motion.

When evaluating the propriety of an order directing discovery in contravention of foreign law, courts consider five factors drawn from the Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c) (1987):

> [1] the importance to the investigation or litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of alternative means of securing the information; and [5] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

See also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987); *In re Vitamins Antitrust Litig*., 2002 WL 34499542, at *11 (D.D.C. Dec. 18, 2002); *McKesson Corp. v. Islamic Rep. of Iran*, 138 F.R.D. 1, 3 (D.D.C. 1991).

Each of the five factors weighs heavily in the Wultzes' favor.

A. Mr. Shaya's Testimony Is Crucial to the Wultzes' Case against BOC.

Mr. Shaya's testimony is unquestionably important to the Wultzes' litigation against BOC, and their interest in proving that BOC knowingly provided banking services that were used to finance terrorist attacks in Israel. Mr. Shaya, the witness designated by the GOI for this purpose, can testify from personal knowledge about meetings during which Israeli officials informed China that the Shurafa Accounts were being used to finance terrorist attacks in Israel and about BOC's refusal to terminate those banking activities. This factor weighs heavily in the Wultzes' favor.

B. The Information Requested from Mr. Shaya Is Very Specific.

The information sought from Mr. Shaya is very specific. He has personal knowledge of communications with Chinese officials about the Shurafas' ties to terrorist organizations and the use of the Shurafa Accounts at BOC to finance terrorist attacks in Israel. This factor also weighs heavily in the Wultzes' favor.

C. Though Not Originating in the United States, the Information Was Disclosed in Order to Be Used in the United States.

While the information that forms the basis for Mr. Shaya's testimony did not originate in the United States, the GOI purposefully disclosed it to Plaintiffs, who are U.S. citizens, and their representatives so that it could be used in the courts of the United States. Therefore, this factor weighs heavily in the Wultzes' favor.

D. There Are Few Other Means of Obtaining the Evidence.

Mr. Shaya is one of the few people with personal knowledge of meetings and communications with Chinese officials concerning the Shurafas and their use of BOC to finance terrorist attacks in Israel. As a result, the Wultzes have few, if any, other means of securing such testimony. Accordingly, this factor also weighs heavily in the Wultzes' favor.

E. Important U.S. Interests Outweigh the Interests that Israel Has Waived..

It is axiomatic that the United States has "a substantial interest in fully and fairly adjudicating matters before its courts." *Minpeco S.A. v. Conticommodity Serv's, Inc.*, 116 F.R.D. 517, 523-24 (S.D.N.Y. 1987). This is especially true when a matter before its courts has been supported and induced by a foreign power. When that interest "is combined with the United States' goals of combating terrorism, it is elevated to nearly its highest point, and diminishes any competing interests of the foreign state." *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 443 (E.D.N.Y. 2008). Indeed, Israel agrees with the importance of that interest. GOI Mem. at 1 (Israel claims to be "steadfastly committed to doing everything within its power to bring terrorists and their sponsors to justice, to prevent future attacks, and *to support victims of terrorism and their families*.") (emphasis added).

For the reasons described above, including Israel's repeated and deliberate prior disclosures, Israel's blanket assertion of national security is not entitled to great weight. It also utterly fails to explain how its current position can be reconciled with the United States' interest in assuring the integrity of the U.S. judicial system and in combating terrorism directed at its citizens.

Israel has no legitimate interest in resisting the presentation of information that has already been disclosed in a form is admissible in a U.S. courtroom. The GOI cites no law

compelling a different result.[35] Therefore, this factor also weighs in the Wultzes' favor, and this Court should not defer to any purportedly contravening Israeli law.

V. THE 100-MILE PROVISION OF RULE 45 PROVIDES NO BASIS FOR QUASHING THE SUBPOENA

The GOI does not dispute that the subpoena at issue in this motion was validly served on Mr. Shaya while Mr. Shaya was on a business trip in Washington D.C., and thus the subpoena is within this Court's jurisdiction.[36] Instead, the GOI argues that because Mr. Shaya lives in Israel, the subpoena violates the 100-mile rule found in Fed. R. Civ. P. 45 (c)(3)(A)(ii). GOI Mem. at 21-23. This argument misses the mark both because GOI lacks standing to assert it and because the provision otherwise does not provide a basis for quashing the subpoena.

A. The GOI Lacks Standing to Invoke the 100-Mile Requirement.

The purpose of the 100-mile requirement is "to protect [] witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest." *In re Edelman*, 295 F.3d 171, 178 (2d Cir. 2002).[37] No such concern exists here as Mr. Shaya has

---

[35] The GOI's reliance on *Wultz v. Bank of China, Ltd.*, 910 F. Supp. 2d 548 (S.D.N.Y. 2012), and other cases cited in its Motion, is misplaced. Although the *Wultz* court declined to compel the production of certain non-public government documents, other previously-undisclosed documents were required to be produced despite Chinese legal restrictions. *Wultz*, 910 F. Supp. 2d at 556. Similarly, both *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) and *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) concerned subpoenas for documents that had not yet been disclosed to the requesting party. *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987) also concerned a request for documents that had not already been disclosed. Significantly, the court would not hold a bank in contempt for declining to produce documents held in a foreign country in violation of that foreign country's law, but did compel the bank's manager to testify about information relating to the same subject matter. *In re Sealed Case*, 825 F.2d at 499.

[36] The subpoena of Mr. Shaya listed the issuing court, the title and number of this action, and the time, place and method of the scheduled deposition, in accordance with Fed. R. Civ. P. 45(a)(1)(A-B). Mr. Shaya was served within the District of Columbia on September 18, 2013, and a valid affidavit of service was filed with this court on September 19, 2013. GOI Mem. Exhibit A. Despite these uncontested facts, two of the four cases cited by GOI concern Rule 45(b)(2), which governs proper service of subpoenas. *Fleming v. Ford Motor Co.*, CIV.A. 05-1333RWR, 2006 WL 566109 at*3 (D.D.C. Mar. 7, 2006) (inability to serve key witnesses under Rule 45(b)(2) supported transfer of venue); *Gipson v. Wells Fargo Bank, N.A.*, 239 F.R.D. 280, 281 (D.D.C. 2006) (nonparty more than 100 miles from courthouse was beyond court's subpoena power). A third simply excluded nonparties more than 100 miles from District of Columbia from a supervised discovery arrangement. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 46 (D.D.C. 1998). None of the three are relevant here.

[37] Other components of Rule 45 only further confirm that the rule is designed to protect the witness, not those who would prevent the witness' testimony: *e.g.*, (1) subpart (c) is titled "Protecting a Person Subject to a

repeatedly (and in writing) expressed his willingness to testify—to the Plaintiffs, to the Israeli government, and to the Court. *See* Exs. 10–11. Because the rule is designed to protect unwilling witnesses, not third parties who wish to suppress a willing witness' testimony, the GOI lacks standing to invoke the rule to prevent Mr. Shaya's testimony.

As various courts have recognized, a third party has no standing to challenge a subpoena where it does not bear the burden of enforcement. *See Voltage Pictures, LLC v. Does 1-5000,* 818 F. Supp. 2d 28, 36 (D.D.C. 2011) (defendant "lacks standing to quash a subpoena on the ground of undue burden when the subpoena is directed to the ISP rather than to him"); *Fenstermacher v. Moreno,* 1:08-CV-01447-SKO, 2010 WL 5071042, at *3 (E.D. Cal. Dec. 7, 2010) (recognizing third-party standing on question of medical information privilege, but denying standing for an undue burden challenge to same subpoena, as movant "[was] not the party bearing the burden"). There is no authority for the proposition that the GOI may invoke the 100-mile requirement on behalf of a witness who is willing to testify and thus has not invoked the requirement. The GOI fails to cite a single case where a third party was permitted to quash a subpoena based upon the 100-mile requirement or any requirement that, as here, is expressly intended to protect the witness' interests, not the third party's. Far from it, its lone authority on the standing issue, *see* GOI Mem. at 22 n.10, *Malibu Media, LLC v. John Does 1-14,* 287 F.R.D. 513, 518 (N.D. Ind. 2012), specifically recognized that a defendant could not raise an undue burden challenge to a subpoena issued to a third-party ISP precisely because the

---

Subpoena"; (2) subpart (e) expressly references subpart (c)(3)(A)(ii) as a basis for the Court to excuse contempt for a witness' failure to appear; and (3) subpart (c)(3)(A)(ii) cross-references to subpart (c)(3)(C)(ii), as a basis for requiring compensation of witnesses travelling over 100 miles, at the court's discretion. Fed. R. Civ. P. 45. *Cf. Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 60 (D.D.C. 2010) (quashing subpoena of witness outside the 100-mile rule, where witness was "not willing to appear voluntarily during Plaintiffs' case"); *Johnsen, Fretty & Co., LLC v. Lands S., LLC*, 526 F. Supp. 2d 307, 318 (D. Conn. 2007) (denying motion to quash where movants "submitted no affidavits or evidence demonstrating that these witnesses would be unwilling to voluntarily travel" to testify). *See also* Fed. R. Civ. P. 45 advisory committee's note (1991) (Rule 45(c) "states the rights of witnesses"; "[p]aragraph (c)(3) explicitly authorizes the quashing of a subpoena as a means of *protecting a witness.*" None of the cases cited by the GOI involved willing deponents.

subpoena did "not require the defendant to produce anything."[38] The GOI's own authority thus confirms that the GOI lacks standing to quash a subpoena based on a requirement that is designed to protect the witness' interests.

B. The 100-Mile Requirement Provides No Basis for Quashing the Subpoena.

The GOI also has failed to satisfy its burden to demonstrate that it meets the substantive requirements for quashing a subpoena under Fed. R. Civ. P. 45(c)(3)(A)(ii). *See Regents of Univ. of California v. Kohne*, 166 F.R.D. 463, 465 (S.D. Cal. 1996) (movants must provide "proof of a negative: that [the witness] does *not* transact business within 100 miles of the courthouse").

Rather than attempt to meet its burden, the GOI relies solely on the inaccurate and conclusory assertion that it "is undisputed that" Mr. Shaya "is a citizen and resident of Israel and that he does not reside, work, or regularly transact business in person within 100 miles of the District of Columbia." GOI Mem. at 22. To the contrary, by all appearances, Mr. Shaya does regularly transact business in the District of Columbia, and indeed, he was served while on a business trip there. It is the burden of GOI to prove otherwise by something other than ipse dixit. *See Kohne*, 166 F.R.D. at 465. Because it has not attempted to meet this burden, it cannot invoke the 100-mile requirement as a basis for quashing the subpoena.

Furthermore, even if applicable, the 100-mile rule could not provide a basis for quashing

[38] The GOI vaguely asserts that *Malibu* assessed "all" of the defendant's "objections to a third-party subpoena," GOI Mem. at 22 n.10. It thus fails to acknowledge that the undue burden objection was resolved on standing grounds and that all of the other objections (which were all rejected by the Court as a basis for quashing the subpoena) were based on the defendant's interests. None involved requirements that were designed to protect the witness, rather than the movant. The GOI also suggests that an undue burden objection is somehow distinguishable from the 100-mile requirement because it involves a "subjective assessment of the effect of compliance," but offers nothing that supports this distinction. *Id*. Instead, *Malibu* and the cases that it cites (including the *Voltage* case from this Court that is cited in the text) recognize that a defendant lacks standing to assert an undue burden objection for a subpoena to a third-party witness for the simple reason that the defendant is not subject to the burden. Similarly, the GOI lacks standing to enforce the 100-mile requirement because Mr. Shaya, not the GOI, is the recipient of the subpoena and because he is willing to testify.

the subpoena under the circumstances of this case. GOI Mem. at 23. Rule 45 specifies that the issuing court "must quash *or modify*" a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles" from where the person lives, works or regularly transacts business. Fed. R. Civ. P. 45(c)(3)(A) (emphasis added). Although Mr. Shaya is willing to testify and Plaintiffs have already agreed to pay his expenses incurred in doing so, Plaintiffs would, if required, also be amenable to any modifications of Mr. Shaya's deposition that the Court considers reasonable and that would permit Mr. Shaya's testimony to be taken.[39]

VI. THE GOI'S MOTION TO QUASH IS UNTIMELY.

The GOI's Motion to Quash the subpoena issued to Mr. Shaya must be denied because it is untimely. Mr. Shaya was served with the subpoena on September 18, 2013, but the GOI waited almost two months before moving to quash. Although Rule 45(d)(3)[40] does not define "timely," courts considering the timeliness of a motion to quash have held that failure to act within the fourteen-day limit prescribed by Rule 45(d)(2)(B) results in waiver.[41] Because the GOI has known that Mr. Shaya would testify in a United States court since 2007, its decision to wait almost two months after he was served to move to quash the subpoena cannot be characterized as "timely." The intentional delay has prejudiced, and will continue to prejudice, the Wultzes' effort to prove that BOC wrongfully facilitated the terrorist attack that took Daniel's life. Under the circumstances of this case, the Court should follow those courts that

[39] *See Flanagan v. Wyndham Int'l Inc*., 231 F.R.D. 98, 102 (D.D.C. 2005) ("A court should be loathe to quash a subpoena if other protection of less absolute character is possible."). Courts have recognized numerous modifications to receive testimony from willing witnesses beyond process, any of which could be applied here. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 426 (D.P.R. 1989) (satellite testimony); *In re Charles Schwab & Co. Sec. Litig.*, 69 F. Supp. 2d 734, 737 (D.V.I. 1999) (teleconferencing); *Comm-Tract Corp. v. N. Telecom, Inc.*, 168 F.R.D. 4, 7 (D. Mass. 1996) (videotaped deposition) *Johnsen, Fretty & Co., LLC v. Lands S., LLC*, 526 F. Supp. 2d 307, 314 (D. Conn. 2007) (same); *Lyman v. St. Jude Med. S.C., Inc.*, 580 F. Supp. 2d 719, 734 (E.D. Wis. 2008) (same).

[40] Formerly, Rule 45(c)(3). All citations to Federal Rule of Civil Procedure 45 are to the updated Rule 45, amended Apr. 13, 2013, effective Dec. 1, 2013.

[41] *See Brogren v. Pohlad*, 1994 WL 654917, at *1 (N.D. Ill. Nov. 14, 1994); *In re Ecam Publications, Inc.*, 131 B.R. 556, 558 (Bankr. S.D.N.Y. 1991).

have construed "timely" in Rule 45(d)(3) to incorporate the fourteen-day time limit in Rule 45(d)(2)(B) and deny the GOI's Motion.

CONCLUSION

For the above reasons, Respondents respectfully request that the Motion to Quash be denied.

Dated: December 17, 2013

Respectfully submitted,

BOIES, SCHILLER & FLEXNER LLP

/s/ David Boies
David Boies
Mary Boies
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
Fax: (914) 749-8300

/s/ Lee S. Wolosky
Lee S. Wolosky (Bar No. NY0106)
Marilyn C. Kunstler (Bar No. NY0106)
575 Lexington Avenue
New York, NY 10022
Tel: (212) 446-2300
Fax: (212) 446-2350

/s/ Hamish P.M. Hume
Hamish P.M. Hume (Bar No. 449914)
5301 Wisconsin Avenue, N.W.
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

Counsel for Respondents