

11-4065-cv(L)
NML Capital, Ltd. v. Republic of Argentina

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2011

(Argued: April 23, 2012 Decided: August 20, 2012)

Docket Nos. 11-4065-cv(L), 11-4077-cv(CON), 11-4082-cv(CON),
10-4100-cv(CON), 11-4102-cv(CON), 11-4117-cv(CON), 11-4118-cv(CON),
11-4133-cv(CON), 11-4153-cv(CON), 11-4165-cv(CON), 11-4182-cv(CON)

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EM LTD.,

Plaintiff,

NML CAPITAL, LTD.,

Plaintiff-Appellee,

-- v. --

REPUBLIC OF ARGENTINA,

Defendant-Appellant,

ADMINISTRACION NACIONAL DE SEGURIDAD SOCIAL, UNION DE
ADMINISTRADORAS DE FONDOS DE JUBILACIONES Y PENSIONES,
ARAUCA BIT AFJP S.A. CONSOLIDAR AFJP S.A., FUTURA AFJP
S.A., MAXIMA AFJP S.A., MET AFJP S.A., ORIGENES AFJP
S.A., PROFESION AUGE AFJP S.A.,

Defendants,

BANK OF AMERICA, N.A.,

Intervenor.

-----X

B e f o r e : WALKER, McLAUGHLIN and CABRANES, Circuit Judges.

Defendant-Appellant the Republic of Argentina appeals from the
September 2, 2011 order of the District Court for the Southern
District of New York (Thomas P. Griesa, Judge) granting Plaintiff-

1 Appellee NML Capital, Ltd.'s motion to compel non-parties Bank of
2 America and Banco de la Nación Argentina to comply with subpoenas
3 duces tecum, and denying Argentina's motion to quash the subpoena
4 issued to Bank of America. We hold that the district court's order
5 compelling compliance with the subpoenas does not infringe on
6 Argentina's sovereign immunity. AFFIRMED.

7 THEODORE B. OLSON, Gibson, Dunn &
8 Crutcher LLP, Washington, DC (Robert
9 A. Cohen, Dennis H. Hranitzky, Eric
10 C. Kirsch, Dechert LLP, New York,
11 NY, Matthew D. McGill, Gibson, Dunn
12 & Crutcher LLP, Washington, DC, on
13 the brief), for Plaintiff-Appellee.
14

15 JONATHAN I. BLACKMAN (Carmin D.
16 Boccuzzi, Christopher P. Moore, on
17 the brief), Clearly Gottlieb Steen &
18 Hamilton LLP, New York, NY, for
19 Defendant-Appellant.
20
21

22 JOHN M. WALKER, JR., Circuit Judge:

23 In these consolidated appeals, we consider the scope of
24 discovery available to a plaintiff in possession of a valid money
25 judgment against a foreign sovereign. Specifically, we review an
26 order of the District Court for the Southern District of New York
27 (Thomas P. Griesa, Judge) compelling two non-party banks to comply
28 with subpoenas duces tecum seeking information about Argentina's
29 assets located outside the United States. Argentina argues that
30 the banks' compliance with the subpoenas would infringe on its
31 sovereign immunity. We conclude, however, that because the
32 district court ordered only discovery, not the attachment of

1 sovereign property, and because that discovery is directed at
2 third-party banks, Argentina's sovereign immunity is not affected.

3 BACKGROUND

4 In December 2001, Defendant-Appellant the Republic of
5 Argentina defaulted on payment of its external debt. While most of
6 Argentina's bondholders agreed to voluntary restructurings in 2005
7 and 2010, others, including Plaintiff-Appellee NML Capital, Ltd.
8 ("NML"), did not. Beginning in 2003, NML filed eleven actions in
9 the Southern District of New York to collect on its defaulted
10 Argentinian bonds. Jurisdiction in the district court was premised
11 on Argentina's broad waiver of sovereign immunity in the bond
12 indenture agreements.¹ The district court has entered five money
13 judgments in NML's favor totaling (with interest) approximately
14 \$1.6 billion. It has also granted summary judgment to NML in the
15 remaining six actions, in which NML's claims total (with interest)
16 more than \$900 million. Argentina has not satisfied these
17 judgments and NML has thus attempted to execute them against

¹ The waiver states, in part,

To the extent the Republic [of Argentina] or any of
its revenues, assets or properties shall be entitled
. . . to any immunity from suit, . . . from attachment
prior to judgment, . . . from execution of a judgment or
from any other legal or judicial process or remedy, . . .
the Republic has irrevocably agreed not to claim and has
irrevocably waived such immunity to the fullest extent
permitted by the laws of such jurisdiction (and consents
generally for the purposes of the Foreign Sovereign
Immunities Act to the giving of any relief or the issue
of any process in connection with any Related Proceeding
or Related Judgment)

Joint Appendix 1127.

1 Argentina's property. This litigation has involved lengthy
2 attachment proceedings before the district court and multiple
3 appeals to this court.² Here we will recite only the facts relevant
4 to the instant appeals.

5 NML has pursued discovery concerning Argentina's property
6 located in the United States since 2003. In 2010, "[i]n order to
7 locate Argentina's assets and accounts, learn how Argentina moves
8 its assets through New York and around the world, and accurately
9 identify the places and times when those assets might be subject to
10 attachment and execution (whether under [U.S. law] or the law of
11 foreign jurisdictions)," NML served the subpoenas at issue in these
12 appeals on two non-party banks, Bank of America ("BOA") and Banco
13 de la Nación Argentina ("BNA"). NML Br. at 9. From the materials
14 sought in these subpoenas, NML hoped to gain an understanding of
15 Argentina's "financial circulatory system." Joint Appendix ("JA")
16 1021.

17 NML served the first subpoena, directed at BOA, on March 10,
18 2010. The subpoena seeks documents relating to all BOA accounts
19 maintained by or on behalf of Argentina without territorial
20 limitation. JA 672. In particular, it requests documents
21 sufficient to identify the opening and closing dates of Argentina's

² For additional background on Argentina's default and the resulting litigation, see, for example, NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254, 256 & n.4 (2d Cir. 2012); NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172, 175-76 (2d Cir. 2011); Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 124-27 (2d Cir. 2009); EM Ltd. v. Republic of Argentina, 473 F.3d 463, 466 & n.2 (2d Cir. 2007).

1 accounts, current balances, and transaction histories from 2009
2 through the production date. JA 667, 672. It also requests from
3 BOA documents relating to electronic fund transfers sent through
4 the SWIFT system.³ JA 672-73. The BOA subpoena defines "Argentina"
5 broadly to include Argentina's "agencies, ministries,
6 instrumentalities, political subdivisions [and] employees," as well
7 as Argentina's current president, Cristina Fernández de Kirchner,
8 and her late husband, former president Néstor Carlos Kirchner. JA
9 666, 674.

10 NML served the second subpoena on BNA, an Argentinian bank
11 with a branch in New York City, on June 14, 2010. JA 900-09. The
12 BNA subpoena requests documents relating to any assets or accounts
13 maintained at BNA by Argentina or for Argentina's benefit, any
14 debts owed by BNA to Argentina, and transfers into or out of
15 Argentina's accounts, including documents identifying the transfer
16 counterparties. JA 908-09. Again, "Argentina" is broadly defined
17 to include "its agencies, instrumentalities, ministries, political
18 subdivisions, representatives, State Controlled Entities . . . ,
19 and all other Persons acting or purporting to act for or on behalf
20 of Argentina." A "State Controlled Entity" is defined to include
21 any entity controlled or more than 25% owned by Argentina. JA 903-
22 04.

³ SWIFT (which stands for Society for Worldwide Interbank Financial Telecommunication) is an electronic messaging system that provides instructions to banks, brokerages, and other financial institutions for money transfers. Most transactions denominated in dollars are routed through banks in New York. JA 667, 1874-76.

1 After the subpoenas were served, Argentina, later joined by
2 BOA, moved to quash the BOA subpoena. Both banks then set forth
3 objections to the subpoenas, and NML moved to compel their
4 compliance. Before the district court ruled on the objections and
5 motions, NML agreed to modify its subpoenas, including by allowing
6 BOA to exclude lower-level Argentinian officials from searches of
7 SWIFT messages. NML also agreed to enter into a protective order
8 that would permit the banks to designate documents as confidential
9 and require that those documents receive confidential treatment by
10 all parties. At an August 30, 2011 hearing, and in a subsequent
11 September 2, 2011 order (the "Discovery Order"), the district court
12 denied the motion to quash and granted the motions to compel. JA
13 1881, 1900-01, 1915-16. At the hearing, the district court
14 approved the subpoenas in principle, indicating that it had made
15 its final determination that extraterritorial asset discovery did
16 not infringe on Argentina's sovereign immunity, and reaffirmed that
17 it intended to serve as a "clearinghouse for information" in NML's
18 efforts to find and attach Argentina's assets. JA 1868, 1881. The
19 district court stated, however, that it expected the parties to
20 negotiate further on the specific production requests contained in
21 the subpoenas, saying that the subpoenas must include "some
22 reasonable definition of the information being sought." JA 1868.
23 For example, the district court noted that "there is no use getting
24 information about something that might lead to attachment in
25 Argentina because that would be useless information" as no

1 Argentinian court would allow sovereign property to be attached
2 within the country. JA 1868. Thus, the district court, while open
3 to discovery of assets abroad, sought to limit the subpoenas to
4 discovery that was reasonably calculated to lead to attachable
5 property.

6 Following the district court's ruling, NML and BOA negotiated
7 further modifications to the subpoenas, including by designating
8 search keywords.⁴ BOA has begun producing documents pursuant to the
9 subpoena. With respect to the BNA subpoena, NML agreed to limit
10 the requested individuals to the current and most recent former
11 president, and to exclude all documents relating to assets or
12 transfers exclusively within Argentina. JA 1932, 1940. According
13 to NML, BNA neither engaged in negotiations nor complied with the
14 subpoena. On December 14, 2011, the district court ordered BNA's
15 compliance with the modified subpoena by January 6, 2012. See
16 Order, NML Capital, Ltd. v. Republic of Argentina, No. 03-cv-8845
17 (S.D.N.Y. Dec. 14, 2011), ECF No. 452.

⁴ On December 2, 2011, NML moved this court to supplement the record on appeal with communications among it, the banks, and the district court reflecting negotiations that occurred after September 2, 2011, the date the district court entered the Discovery Order. See Mot. to Supplement the Record, No. 11-4065-cv(L) (2d Cir. Dec. 2, 2011), ECF No. 112. Because we have sufficient information to decide these appeals based on the materials in the record and the district court dockets, of which we take judicial notice, the motion to supplement the record is DENIED. See Fed. R. App. P. 10(e); Jeffreys v. United Techs. Corp., 357 F. App'x 370, 372-73 (2d Cir. 2009); Salinger v. Random House, Inc., 818 F.2d 252, 253 (2d Cir. 1987).

1 Argentina, but not the banks, appealed the district court's
2 September 2, 2011 Discovery Order.

3 DISCUSSION

4 Argentina challenges the Discovery Order's legal premise that
5 compliance with the subpoenas does not infringe on Argentina's
6 sovereign immunity. It argues that the Discovery Order, by
7 compelling disclosure about Argentinian assets abroad, violates the
8 Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et
9 seq., which provides the sole source of federal court jurisdiction
10 over foreign nations, see Argentine Republic v. Amerada Hess
11 Shipping Corp., 488 U.S. 428, 434-35 (1989). We hold that because
12 the Discovery Order involves discovery, not attachment of sovereign
13 property, and because it is directed at third-party banks, not at
14 Argentina itself, Argentina's sovereign immunity is not infringed.
15 The district court therefore did not abuse its discretion in
16 ordering BOA and BNA to comply with NML's subpoenas.

17 I. Jurisdiction

18 Before turning to the merits, we first address NML's
19 contention that we lack subject matter jurisdiction to consider
20 these appeals because the Discovery Order is not a "final decision"
21 under 28 U.S.C. § 1291. The issue arises here in the context of
22 supplemental post-judgment proceedings instituted by NML to
23 facilitate the execution of its judgments against Argentina. See
24 Fed. R. Civ. P. 69(a). In post-judgment litigation, the "final

1 decision" is not the underlying judgment that the plaintiff is
2 attempting to enforce, but the subsequent judgment that concludes
3 the collection proceedings. See In re Joint E. & S. Dists.
4 Asbestos Litig., 22 F.3d 755, 760 (7th Cir. 1994). The Discovery
5 Order is not a "final decision" in this sense because it does not
6 terminate NML's collection proceedings against Argentina. Under
7 the collateral order doctrine, however, a decision is "final" if it
8 (1) conclusively determines a disputed question; (2) resolves an
9 important issue completely separate from the merits of the action;
10 and (3) is effectively unreviewable on appeal from final judgment.
11 Lora v. O'Heaney, 602 F.3d 106, 111 (2d Cir. 2010); see Cohen v.
12 Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)
13 (enumerating same three requirements). Most orders granting
14 discovery are not final decisions because they are effectively
15 reviewable on appeal from a final judgment, see Mohawk Indus., Inc.
16 v. Carpenter, 130 S. Ct. 599, 606 (2009), or by an appeal from a
17 contempt citation after the target of a subpoena resists the
18 challenged order, see Church of Scientology of Cal. v. United
19 States, 506 U.S. 9, 18 n.11 (1992); In re Air Crash at Belle
20 Harbor, N.Y. on Nov. 12, 2001, 490 F.3d 99, 106-07 (2d Cir. 2007).

21 Under the particular circumstances of this appeal, however,
22 the district court's decision granting discovery is a collateral
23 order that is immediately appealable. Cohen's first two
24 requirements are easily met. First, the district court indicated
25 that the Discovery Order represented its final determination that

1 extraterritorial asset discovery did not infringe on Argentina's
2 sovereign immunity.⁵ Second, the scope of discovery available to
3 NML is separate from the merits issue of whether NML can execute
4 against a particular asset to satisfy its judgments.

5 Cohen's third factor is satisfied because Argentina will be
6 unable to obtain effective review in a United States court of the
7 Discovery Order through a later appeal of a final judgment.

8 Because the Discovery Order grants NML discovery respecting foreign
9 assets, any future attachment or collection proceeding would be
10 conducted in a foreign court.⁶ Argentina would have no further
11 opportunity to challenge the Discovery Order in this or any other
12 United States court. Moreover, depending on the laws of the
13 jurisdictions where any attachable property is located, NML may be
14 able to levy Argentina's foreign assets directly, without

⁵ We consider the Discovery Order to be district court's final word despite its direction that NML and the banks continue to negotiate the details of the subpoenas. See JA 1907, 1946-47. Argentina's appeal concerns only the central legal issue of whether obtaining discovery from a third party of a foreign sovereign's assets outside the United States infringes on sovereign immunity, and not the parameters of the document requests. See Trans. of Oral Argument on Mot. to Stay at 4, NML Capital, Ltd. v. Republic of Argentina, No. 11-4065-cv(L) (2d Cir. Nov. 1, 2011), in JA 1943, 1946 (counsel for Argentina stating that the subpoenas were subject to modification on the details and that its appeal did not concern "the details").

⁶ NML argues that the subpoenas may allow it to discover the location of Argentinian assets in the United States, as well as assets held abroad. However, NML has already obtained discovery on Argentina's assets in the United States, and so the new information it will receive pursuant to the Discovery Order relates only to Argentina's assets abroad. NML's speculation that it might uncover assets in the United States that were somehow missed by its earlier discovery requests is too remote to alter our jurisdictional analysis.

1 instituting a separate proceeding, rendering the Discovery Order
2 unreviewable by any court. See Resolution Trust Corp. v. Ruggiero,
3 994 F.2d 1221, 1225 (7th Cir. 1993) (recognizing that an order
4 granting discovery may be a final, appealable order where the “sole
5 object of [a post-judgment] proceeding is discovery of the judgment
6 debtor’s assets” and the assets discovered may then be levied
7 without a court order). Finally, because the Discovery Order does
8 not direct compliance from Argentina itself, Argentina cannot
9 obtain review through disobedience and contempt. See Church of
10 Scientology, 506 U.S. at 18 n.11; Arista Records, LLC v. Doe 3, 604
11 F.3d 110, 116 (2d Cir. 2010). Although the record before us is
12 silent on BNA’s compliance (or lack thereof), that BOA has begun
13 production suggests that it would rather comply than risk being
14 held in contempt of court.

15 In sum, because the Discovery Order conclusively resolves the
16 discovery issue, is separate from the merits, and will be
17 unreviewable through a later appeal in the United States, we have
18 jurisdiction to consider Argentina’s appeal.

19 **II. Merits**

20 Turning to the merits, Argentina argues that the Discovery
21 Order violates the FSIA by requiring disclosure about assets
22 Argentina claims are immune from attachment.

23 We review the district court’s order for abuse of discretion.
24 See Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 79
25 (2d Cir. 2012); United States v. Rigas, 583 F.3d 108, 125 (2d Cir.

2009). “A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions.” In re Sims, 534 F.3d 117, 132 (2d Cir. 2008) (citations, alterations, and internal quotation marks omitted). A district court has broad latitude to determine the scope of discovery and to manage the discovery process. See, e.g., In re Agent Orange Prod. Liab. Litig., 517 F.3d 76, 103 (2d Cir. 2008).

At the outset, we note that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts. Post-judgment discovery is governed by Federal Rule of Civil Procedure 69, which provides that “[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located.” Fed. R. Civ. P. 69(a)(2). The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment. See id.; Fed. R. Civ. P. 26(b)(1) (allowing a court to “order discovery of any matter relevant to the subject matter involved in the action”); First City, Texas-Houston, N.A. v. Rafidain Bank, 281 F.3d 48, 54 & n.3 (2d Cir. 2002) (“Rafidain II”); Libaire v. Kaplan, 760 F. Supp. 2d 288, 293 (E.D.N.Y. 2011). New York state’s post-judgment discovery procedures, made applicable to proceedings in aid of execution by

1 Federal Rule 69(a)(1), have a similarly broad sweep. The New York
2 Civil Practice Law and Rules provides that a "judgment creditor may
3 compel disclosure of all matter relevant to the satisfaction of the
4 judgment." N.Y. C.P.L.R. § 5223; see David D. Siegel, New York
5 Practice § 509 (5th ed. 2011) (describing § 5223 as "a broad
6 criterion authorizing investigation through any person shown to
7 have any light to shed on the subject of the judgment debtor's
8 assets or their whereabouts"). Of course, as in all matters
9 relating to discovery, the district court has broad discretion to
10 limit discovery in a prudential and proportionate way. See Fed. R.
11 Civ. P. 26(b)(2); see, e.g., Crawford-El v. Britton, 523 U.S. 574,
12 598-99 (1998).

13 It is not uncommon to seek asset discovery from third parties,
14 including banks, that possess information pertaining to the
15 judgment debtor's assets. See Fed. R. Civ. P. 69(a)(2) (permitting
16 discovery "from any person"); see, e.g., G-Fours, Inc. v. Miele,
17 496 F.2d 809, 810-12 (2d Cir. 1974) (upholding contempt citation
18 against judgment debtor's wife and debtor's wholly-owned
19 corporation for failing to respond to a discovery request pursuant
20 to Rule 69); Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D.
21 559, 561 (S.D.N.Y. 1977) (permitting discovery against the judgment
22 debtor's bank "insofar as it relates to the existence or transfer
23 of [the judgment debtor's] assets"); ICD Grp., Inc. v. Israel
24 Foreign Trade Co. (USA) Inc., 638 N.Y.S.2d 430, 430 (1st Dep't
25 1996) (permitting discovery from debtor's accountant, citing the

1 rule allowing discovery from “any third person with knowledge of
2 the debtor’s property”); see also 12 Charles A. Wright & Arthur R.
3 Miller, Federal Practice and Procedure § 3014 (2d ed. 2012) (third
4 persons may be examined about the assets of the judgment debtor so
5 long as the motive is not to harass the third party).

6 Nor is it unusual for the judgment creditor to seek disclosure
7 related to assets held outside the jurisdiction of the court where
8 the discovery request is made. See Rafidain II, 281 F.3d at 54 (“A
9 judgment creditor is entitled to discover the identity and location
10 of any of the judgment debtor’s assets, wherever located.”)
11 (quoting Nat’l Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 250
12 (11th Cir. 1982)); Eitzen Bulk A/S v. Bank of India, 827
13 F. Supp. 2d 234, 238-39 (S.D.N.Y. 2011) (subpoena on New York
14 branch of Indian bank “reaches all responsive materials within the
15 corporation’s control, even if those materials are located outside
16 New York”); Raji v. Bank Sepah-Iran, 529 N.Y.S.2d 420, 423-24 (Sup.
17 Ct. 1988) (allowing discovery into judgment debtor’s foreign
18 assets). Thus, in a run-of-the-mill execution proceeding, we have
19 no doubt that the district court would have been within its
20 discretion to order the discovery from third-party banks about the
21 judgment debtor’s assets located outside the United States.

22 Argentina argues, however, that the normally broad scope of
23 discovery in aid of execution is limited in this case by principles
24 of sovereign immunity. Argentina maintains that its property
25 abroad is categorically immune from attachment, and that the

1 district court cannot order discovery into those assets. Without
2 reaching the unanswered question of whether the FSIA extends
3 immunity to property held outside the United States, we reject
4 Argentina's argument for two reasons.

5 First, the Discovery Order does not implicate Argentina's
6 immunity from attachment under the FSIA. It does not allow NML to
7 attach Argentina's property, or indeed have any legal effect on
8 Argentina's property at all; it simply mandates BOA and BNA's
9 compliance with subpoenas duces tecum. We recognize that a
10 district court sitting in Manhattan does not have the power to
11 attach Argentinian property in foreign countries. However, the
12 district court's power to order discovery to enforce its judgment
13 does not derive from its ultimate ability to attach the property in
14 question but from its power to conduct supplementary proceedings,
15 involving persons indisputably within its jurisdiction, to enforce
16 valid judgments. Rafidain II, 281 F.3d at 53-54; cf. Riggs v.
17 Johnson Cnty., 73 U.S. 166, 187 (1867) ("Process subsequent to
18 judgment is as essential to jurisdiction as process antecedent to
19 judgment, else the judicial power would be incomplete and entirely
20 inadequate to the purposes for which it was conferred by the
21 Constitution."). Thus in Rafidain II we held that a "waiver by a
22 foreign state [of sovereign immunity], rendering it a party to an
23 action, is broad enough to sustain the court's jurisdiction through
24 proceedings to aid collection of a money judgment rendered in the
25 case, including discovery pertaining to the judgment debtor's

assets.” 281 F.3d at 53-54; Walters v. Indus. & Commercial Bank of China, Ltd., 651 F.3d 280, 297 (2d Cir. 2011); see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, 637 F.3d 373, 380 (D.C. Cir. 2011) (upholding contempt sanctions against foreign sovereign for failing to comply with general asset discovery order); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1477-78 (9th Cir. 1992) (holding that an instrumentality of a foreign nation must respond to discovery about its worldwide assets and that it could not use the FSIA to conceal its assets from the district court). Whether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this determination does not affect discovery. Whatever hurdles NML will face before ultimately attaching Argentina’s property abroad (and we have no doubt there will be some), it need not satisfy the stringent requirements for attachment in order to simply receive information about Argentina’s assets.

The Seventh Circuit came to a different conclusion in Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), holding that the FSIA requires a judgment creditor to identify specific non-immune assets before it is entitled to further discovery about those assets. Id. at 796. We respectfully disagree with the Seventh Circuit to the extent it concluded that the district court’s subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court’s jurisdiction that is relevant to enforcing a

1 judgment against the sovereign. Such a result is not required by
2 the FSIA and is in conflict with our holding in Rafidain II that a
3 district court's jurisdiction over a foreign sovereign extends to
4 proceedings to enforce a valid judgment. Nor does our holding in
5 EM, 473 F.3d 463, cited by the Seventh Circuit, support the result
6 in Rubin. In EM, a case primarily about attachment, the district
7 court denied a discovery request after determining that the
8 judgment creditor made no showing of a reasonable basis to assume
9 jurisdiction over the entity against whose funds it wished to
10 execute a judgment. Id. at 486. That ruling was well within the
11 district court's discretion to limit discovery where the plaintiff
12 had not demonstrated any likelihood that the discovery it sought
13 related to attachable assets. But EM did not hold that the
14 discovery request would violate the FSIA.

15 The Discovery Order, moreover, does not infringe on any
16 immunity from the district court's jurisdiction that Argentina
17 otherwise might enjoy. Argentina does not (and could not) argue
18 that the district court lacked subject matter or personal
19 jurisdiction over it because Argentina expressly waived any claim
20 to immunity in the bond agreements. See, e.g., NML Capital, Ltd.
21 v. Republic of Argentina, 680 F.3d 254, 257 (2d Cir. 2012); EM Ltd.
22 v. Republic of Argentina, 473 F.3d 463, 481 & n.18 (2d Cir. 2007).
23 Once the district court had subject matter and personal
24 jurisdiction over Argentina, it could exercise its judicial power
25 over Argentina as over any other party, including ordering third-

1 party compliance with the disclosure requirements of the Federal
2 Rules. First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d
3 172, 177 (2d Cir. 1998) ("Rafidain I"). Argentina does not dispute
4 that the district court had jurisdiction over it or that the
5 judgments against it are valid and enforceable; it therefore cannot
6 dispute that the district court has jurisdiction to order discovery
7 designed to aid in enforcing those judgments.

8 In this vein, it is important to distinguish discovery
9 requests made before a court conclusively has jurisdiction over a
10 foreign sovereign from those made after such jurisdiction has been
11 ascertained. Where a plaintiff seeks to initially establish that
12 the court has subject matter jurisdiction over a sovereign,
13 discovery and immunity are almost invariably intertwined. See
14 Rafidain I, 150 F.3d at 174-76 (noting that the district court must
15 engage in a "delicate balancing 'between permitting discovery to
16 substantiate exceptions to statutory foreign sovereign immunity and
17 protecting a sovereign's or sovereign agency's legitimate claim to
18 immunity from discovery'" where it was unclear if the defendant had
19 a claim to jurisdictional immunity) (quoting Arriba Ltd. v.
20 Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992)). Because
21 sovereign immunity protects a sovereign from the expense,
22 intrusiveness, and hassle of litigation, a court must be
23 "circumspect" in allowing discovery before the plaintiff has
24 established that the court has jurisdiction over a foreign
25 sovereign defendant under the FSIA. Id. at 176-77. But NML seeks

1 discovery from a defendant over which the district court
2 indisputably had jurisdiction. Thus, the concerns voiced in
3 Rafidain I are not present and our precedents relating to
4 jurisdictional discovery are inapplicable.

5 The second principal reason for holding that the Discovery
6 Order does not infringe on Argentina's sovereign immunity is that
7 the subpoenas at issue were directed at BOA and BNA--commercial
8 banks that have no claim to sovereign immunity, or to any other
9 sort of immunity or privilege. Thus, the banks' compliance with
10 subpoenas will cause Argentina no burden and no expense. See id.
11 at 177 (holding that discovery requests directed at non-immune
12 party did not infringe on the sovereign immunity of a third party,
13 even if the third party retained a colorable claim of immunity).
14 To the extent Argentina expresses concern that the subpoenas will
15 reveal sensitive information, it is asserting a claim of privilege
16 and not a claim of immunity. The FSIA says nothing about
17 privilege. Indeed it appears that Congress intended for courts to
18 handle claims of privilege using the existing procedures under the
19 Federal Rules. See H.R. Rep. No. 94-1487, at 23 (1976) ("The
20 [FSIA] does not attempt to deal with questions of discovery.
21 Existing law appears to be adequate in this area. . . . [If] a
22 private plaintiff sought the production of sensitive governmental
23 documents of a foreign state, concepts of governmental privilege
24 would apply."). NML has agreed to enter into a protective order
25 with the banks, see NML Br. at 21 n.6, and Argentina and the banks

1 can avail themselves of the other protections contained in the
2 Federal Rules and our precedents as necessary to protect any
3 confidential information.⁷ We are confident that these mechanisms
4 will provide Argentina all the protection to which it is entitled.
5 And, if and when NML moves past the discovery stage and attempts to
6 execute against Argentina's property, Argentina will be protected
7 by principles of sovereign immunity in this country or in others,
8 to the extent that immunity has not been waived. The Discovery
9 Order at issue here, however, does nothing to endanger Argentina's
10 sovereign immunity.

11 **CONCLUSION**

12 For the foregoing reasons, the district court's order is
13 AFFIRMED.

⁷ To the extent Argentina is attempting to keep sensitive data about its finances away from NML--i.e., to prevent NML from collecting on its judgments--its concerns are entitled to no weight.