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# Litigating the Pillage of Cultural Property in American Courts: *Chabad v. Russian Federation* and Lessons Learned

MICHAEL J. BAZYLER\* AND SETH M. GERBER\*\*

Part and parcel of every genocide is looting and theft, including the plunder of cultural property of the particular group that was the victim of the genocide. Until the last century, such cultural plunder was considered a commonplace byproduct of war, with so-called “war booty” regarded, in the aftermath of a genocide or other massive atrocity, as property now rightfully belonging to the plunderer.<sup>1</sup>

The aftermath of the Nazis’ unprecedented theft of Jewish assets<sup>2</sup> and the assets of the conquered states during World War II changed this outlook. After the war, some of the Allied nations made a substantial effort to retrieve and return the cultural

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1. See generally BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* (2007) (discussing looting and theft committed throughout history as part of genocides and other atrocities).

2. See RICHARD Z. CHESNOFF, *PACK OF THIEVES: HOW HITLER AND EUROPE PLUNDERED THE JEWS AND COMMITTED THE GREATEST THEFT IN HISTORY* 21 (1999) (discussing the theft and looting of Jewish assets during World War II).

heritage of European Jews back to their owners, and the cultural patrimony of the looted nations back to their original location.<sup>3</sup>

Such efforts were only partially successful. While the conquered European states were able to recover much of their property, cultural and otherwise, the restitution of Jewish property was minimal. Most of the looted Jewish wealth usually ended up either in the hands of the post-war regimes, the non-Jewish populace who helped themselves to Jewish assets belonging to the six million Jews murdered during the Holocaust, or to those who survived but did not return to their pre-war homes.<sup>4</sup> This latter scenario was particularly the norm in the new communist states of postwar Eastern Europe and in the Soviet Union.

And so it remained that way until the late 1990s.<sup>5</sup> Unexpectedly, states, public and private museums, and scholars worldwide began to call for the return of looted Jewish property and to grapple with the complex questions that arise out of efforts to restore such property.<sup>6</sup> Much of the focus has been on the return of looted cultural property, plundered during both the Holocaust era and at other times.<sup>7</sup> As succinctly noted by one scholar, “the controversy and debate over returning cultural property have reached new heights and intensity.”<sup>8</sup>

Some of these efforts have achieved notable successes through negotiations between the claimants and the current

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3. See ROBERT M. EDSSEL & BRET WITTER, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY* xiv (2009); ROBERT M. EDSSEL, *RESCUING DA VINCI: HITLER AND THE NAZIS STOLE EUROPE'S GREAT ART - AMERICA AND HER ALLIES RECOVERED IT* 227-229 (2006); LYNNE H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 407 (1995) (discussing recent studies of these efforts).

4. See MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S* 38 (2009); STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 23-45 (2003) (describing the author's efforts to recover assets looted during the Holocaust).

5. See MARRUS, *supra* note 4 at 39.

6. See *id.* at 10-30; MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* xi (2003) [hereinafter BAZYLER, *HOLOCAUST JUSTICE*]; EIZENSTAT, *supra* note 4, at 23-45 (discussing the reasons for this unexpected movement to return assets of the Holocaust and assets looted during other genocides and mass atrocities are beyond the scope of this article).

7. MAGNUS T. BERNHARDSSON, *RECLAIMING A PLUNDERED PAST: ARCHAEOLOGY AND NATION BUILDING IN MODERN IRAQ* 204 (2005).

8. *Id.*

possessors, whether they are governments<sup>9</sup> or private entities.<sup>10</sup> Nevertheless, the “Negotiate—Don’t Litigate” approach has not always worked. Too often the recalcitrant possessor has come to the negotiating table only after suit has been filed, most often when the plaintiff has been successful in beating back the efforts by the defendants to dismiss the case on some procedural ground, whether for lack of subject matter or personal jurisdiction, forum non conveniens, sovereign immunity, political question, the act of state doctrine, or the like.<sup>11</sup> The forum for these suits has been almost exclusively courts in the United States, both federal and state.<sup>12</sup>

This article deals with one such suit, thus far successful in staving off the numerous challenges to have it dismissed. The 2008 appellate decision in *Chabad v. Russian Federation*<sup>13</sup> is just the latest round, and surely not the last, of an epic struggle by an orthodox Jewish organization to recover a collection of sacred, irreplaceable religious books and manuscripts taken during the

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9. See, e.g., *Obelisk Returned to Ethiopia After 68 Years*, THE GUARDIAN (London), Apr. 20, 2005, <http://www.guardian.co.uk/world/2005/apr/20/italy.ethiopia> (describing Italy’s return of an 80-foot-high and 1,700-year-old granite obelisk stolen from Ethiopia in 1937 during Mussolini Italy’s conquest of Ethiopia).

10. See, e.g., News Release, State of Cal. Dep’t of Parks and Recreation, *Paintings from Hearst Castle Returned to Family of Holocaust Victims* (Apr. 6, 2009), [http://www.hearstcastle.org/whats\\_new/press\\_releases/paintings.asp](http://www.hearstcastle.org/whats_new/press_releases/paintings.asp) (describing how California’s Hearst Castle returned to a Jewish family three Renaissance-era paintings purchased by magnate William Randolph Hearst after the war. The paintings were sold by the pre-war Jewish owners at a “judenauktionen,” a coerced sale of Jewish assets by the Nazis); *Painting, Sold Under Nazis, Returned to Owner’s Estate*, CNN.COM (Apr. 21, 2009), <http://www.cnn.com/2009/US/04/21/nazi.painting/index.html> (describing a New York private art dealer returning a seventeenth century painting to the estate of a Jewish art dealer after being informed that the Jewish dealer was forced to consign the painting under the Nazis before fleeing the country).

11. One of the most notable examples of litigation as the option that finally led to a successful resolution of an art claim was Austria’s recent return of five paintings by the modernist Gustav Klimt to the heirs of the Bloch-Bauer family from whom the paintings were stolen in Nazi Austria. The case was resolved after the United States Supreme Court declined to dismiss the case. See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The heirs of the pre-war owners subsequently sold one of the Klimt paintings for \$135 million, the highest price paid at the time for any work of art. For a discussion of the *Altmann* litigation and other suits for restitution of cultural objects stolen during the course of armed conflicts, see Symposium, *War and Peace: Art and Cultural Heritage Law in the 21st Century*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 677 (2009).

12. For a discussion of these suits, and why they have been relatively successful when filed in the United States and not successful when filed elsewhere, see generally BAZYLER, HOLOCAUST JUSTICE, *supra* note 6.

13. *Agudas Chasidei Chabad v. Russian Fed’n*, 528 F.3d 934, 938 (D.C. Cir. 2008).

Russian Revolution and World War II. This case is significant not only because of the plaintiff's indefatigable effort to recover religious texts, which has involved appeals by several U.S. Presidents,<sup>14</sup> Congress<sup>15</sup> and the U.S. Helsinki Commission,<sup>16</sup> and legal battles in the Soviet Union (and Russia)<sup>17</sup> and the United States,<sup>18</sup> but also because of its precedent for others who seek to recover plundered cultural property.

This article will discuss the *Chabad v. Russian Federation* litigation. Part I will provide the historical background to the case. Part II will discuss Chabad's legal efforts to obtain restitution from the former Soviet Union. Part III will discuss the legal and non-legal efforts to do the same through the Russian courts. Part IV will discuss the litigation in the United States and analyze the 2006 and 2008 opinions of the American courts hearing the case. Part V will note the precedent that *Chabad v. Russian Federation* sets for other suits seeking the return of looted cultural property against other sovereign states and their institutions, and the lessons to be drawn from such litigation. Part V will also set out a proposal for how suits against foreign sovereigns for the return of cultural property can better be handled by the federal courts of the United States.

## I. HISTORICAL BACKGROUND

The plaintiff, Agudas Chasidei Chabad of United States ("Chabad"), is the world-wide umbrella entity for the orthodox Jewish movement called Chabad-Lubavitch, which has over 2,700 institutions in sixty-five countries.<sup>19</sup> The word "Chabad" is a

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14. Joint Appendix at 1:0820-21, *Agudas Chasidei Chabad v. Russian Fed'n*, No. 07-7006 (D.D.C. July 25, 2005).

15. Konstantin Akinsha & Patricia Kennedy Grimsted, *On the Way Back: The Schneerson Collection and the Return of the "Smolensk Archive,"* in *THE RETURN OF THE "SMOLENSK ARCHIVE"* 232, 236 (Marianna Tax Choldin, Ekateriana Genieva, & Patricia Kennedy Grimsted eds., 2005).

16. See *The Schneerson Collection and Historical Justice: Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong. 59 (2005) [hereinafter Statement of Al Gore] (statement of Al Gore, Former Vice President of the United States).

17. Brief of Appellee and Cross-Appellant at 16-20, *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) (Consol. Case Nos. 07-7002 & 07-7006) [hereinafter Brief of Appellee].

18. *Id.* at 5.

19. *Id.* at 4; see also Joint Appendix, *supra* note 14, at 1:0789.

Hebrew acronym for *chachma* (wisdom), *binah* (comprehension), and *da'at* (knowledge).<sup>20</sup> Chabad, more than two hundred years old, is a Jewish organization:

[W]hich follows and teaches the spiritual tenets and religious directives of Rabbi Israel Baal Shem Tov and seven successive generations of spiritual leaders referred to as Rebbes (or Rabbis). Beginning in 1772, the Rebbes collected and held for the benefit of the organization's members "religious writings [that] consist of a collection of rare and irreplaceable rabbinic books, archives, and manuscripts on Chabad Chassidic philosophy, Jewish religious law, prayer, and tradition." The [Chabad] "Library" consists of more than 12,000 books and 381 manuscripts, and the "Archive" is a collection of handwritten teachings comprised of more than 25,000 pages. The Collection was used by the Rebbes as the textual source for their religious teachings . . .<sup>21</sup>

and was acquired through contributions from all over the world, but mainly from the United States.<sup>22</sup>

In 1915, during World War I, the advancing German army forced the fifth Rebbe, Rabbi Shalom DovBer Schneerson, to flee from the Russian village of Lubavitch to Rostov-on-Don.<sup>23</sup> He placed the Library (thirty-five wooden crates) for "safekeeping" in a privately-owned warehouse in Moscow.<sup>24</sup> During the Russian Revolution of 1917, Bolshevik revolutionaries seized the warehouse containing the Library.<sup>25</sup> The Russian Federation alleges that the Library was nationalized by two decrees issued in 1919 and 1920 by the Soviet People's Commissars (Soviet Government).<sup>26</sup> According to two noted scholars, however, "[t]he law about abandoned property was not applicable to the Schneerson Collection — officials knew very well to whom it really belonged, since Schneerson never purposefully abandoned the

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20. RACHEL ALTEIN, *OUT OF THE INFERNO* 324 (2002).

21. Brief of Appellee, *supra* note 17, at 7.

22. *Id.* at 7-8 (internal citations omitted).

23. *The Schneerson Collection and Historical Justice: Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong. 60 (2005) [hereinafter *Material Submitted for the Record by the Russian Embassy*] (material submitted for the record by the Russian Embassy).

24. Brief of Appellee, *supra* note 17, at 9.

25. *Id.*

26. *Material Submitted for the Record by the Russian Embassy*, *supra* note 23, at 60.

books.”<sup>27</sup>

In 1921, Chabad, then represented by the sixth Rebbe, Rabbi Yosef Yitzchak Schneersohn, lacked the funds demanded for the release of the Library.<sup>28</sup> The Soviet Union was formed the following year. In 1922, the sixth Rebbe again requested the return of the Library. In 1924, the Library was physically transferred to the Rumiantsev Library. Five of thirty-five crates were broken and the upper layers of books in them were damaged. The crates allegedly contained 400 manuscripts, 11,000 books (of which 2,300 volumes were imprints of the sixteenth and seventeenth centuries). In 1925, the Soviet government denied the application for the return of the Library.<sup>29</sup>

Having been denied access to the Chabad Library, the sixth Rebbe began compiling a new collection of sacred books and manuscripts from donations made throughout the world and from funds that came primarily from the United States. This new collection of books, together with part of the collection of manuscripts accumulated by the Rebbes, was brought to the United States after the Second World War. The remainder of the religious manuscripts and handwritten documents comprise the portion seized during World War II that never made it to the United States, and that Chabad seeks to retrieve in its ongoing lawsuit against Russia.<sup>30</sup>

In 1927, the Leningrad secret police arrested the sixth Rebbe and sent him to Spalerno Prison, where he was starved, interrogated harshly, and severely beaten, causing him pain for years. The Soviets sentenced him to death by firing squad for alleged “counter-revolutionary activities,” namely the collecting of funds for the maintenance of Jewish schools (“yeshivas”). Bowing only to intense international pressure, the Soviets commuted the sixth Rebbe’s death sentence to three years exile in Kostroma, a historic city in central Russia. Later that year, after receiving a certificate of freedom issued by the Kostroma Political Bureau, the sixth Rebbe departed for Latvia, then an independent nation, taking the new Library and archival manuscripts with him. While there, he became a Latvian citizen. In 1933, however, the sixth

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27. Akinsha & Grimsted, *supra* note 15, at 235.

28. Brief of Appellee, *supra* note 17, at 10.

29. Akinsha & Grimsted, *supra* note 15, at 234-35.

30. Brief of Appellee, *supra* note 17, at 10-11.

Rebbe moved with the new Chabad Library and manuscripts from Latvia to Poland, where he established a Chabad yeshiva, "Tomchei Temimim," in Otwock, a suburb of Warsaw.<sup>31</sup>

On September 1, 1939, following the Hitler-Stalin "Non-Aggression Pact," Nazi Germany's armed forces invaded Poland from the west, and a few weeks later the Soviet Union's armed forces invaded Poland from the east.<sup>32</sup> After the German blitzkrieg invasion of Poland, the Nazis began hunting and murdering Jews. The Latvian Consul in Warsaw bravely drove the sixth Rebbe and his family from Otwock to Warsaw, where they stayed throughout the Luftwaffe's devastating aerial bombardment of the city.<sup>33</sup> Meanwhile, in the United States, Samuel Kramer, legal counsel for Chabad, urgently contacted a high-powered Washington, D.C. lawyer named Max Rhoades, who helped organize the rescue of the sixth Rebbe. The attorneys reached out to Justice Louis Brandeis of the U.S. Supreme Court, and with his assistance, they prompted Robert T. Pell of the U.S. State Department to convince Dr. Helmuth Wohlthat, a Wehrmacht official in Berlin, to rescue the Rebbe because of his importance to American Jewry.<sup>34</sup>

Dr. Wohlthat approached Admiral Wilhelm Canaris, head of the Abwehr, the German military secret service, and asked him for help.<sup>35</sup> Admiral Canaris agreed and dispatched Ernst Bloch, a Wehrmacht officer with a Jewish father, to locate and save the Rebbe. Bloch found the sixth Rebbe in Warsaw and escorted him and his family (except for his youngest daughter and her husband, who could not escape due to their Polish citizenship) by train to Berlin and then to Riga.<sup>36</sup> The sixth Rebbe and his party then flew to Sweden, and from there took the Swedish-American liner *SS Drottingholm* across the Atlantic to the United States.<sup>37</sup>

On March 19, 1940, the sixth Rebbe arrived in New York where he was greeted by Mayor LaGuardia and a joyous crowd of over a thousand Chabad followers.<sup>38</sup> On July 7, 1940, Agudas

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31. *Id.* at 11.

32. *Id.* at 12.

33. ALTEIN, *supra* note 20, at 303-04.

34. *See id.* at 40-44, 48-49; BRYAN MARK RIGG, RESCUED FROM THE REICH: HOW ONE OF HITLER'S SOLDIERS SAVED THE LUBAVITCHER REBBE 97-104 (2004).

35. ALTEIN, *supra* note 20, at 160-62, 309.

36. RIGG, *supra* note 34, at 73-76, 123.

37. *Id.* at 115-55.

38. ALTEIN, *supra* note 20, at 283.



Chasidei Chabad of the United States was incorporated as a religious corporation under the laws of the state of New York.<sup>39</sup> According to the certificate of incorporation,

Agudas Chasidei Chabad” consists of the union of pious orthodox Jews whose conception of religion is piety, study, knowledge, mutual helpfulness and charity, all of which are practiced in a spirit of sincerity, cheerfulness, humbleness and modesty; with a full appreciation of and adherence to the spirit of Americanism and Democracy.<sup>40</sup>

America was chosen as the new seat for the worldwide headquarters of Chabad due to the destruction of Polish Jewry and the Soviet domination of Latvia and the Baltic states.<sup>41</sup>

When the sixth Rebbe fled Poland, he was unable to take with him most of the archival books and manuscripts collected since 1925.<sup>42</sup> At some point during the Second World War, Nazi Germany’s armed forces seized the manuscripts that comprise the Archive from the Chabad yeshiva in Otwock, Poland and transported them to a castle in Wölfelsdorf (now Polish Wilkanów), a small village located fourteen miles south of Glatz (now Polish Kłodzko) in Lower Silesia, then part of German territory. The castle housed the archival unit of the Seventh Division (*Amt VII*) of the Reich Security Main Office (*Reichssicherheitshauptamt—RSHA*), including the vast archival loot plundered from Jewish, Masonic, and socialist organizations and individuals, among other identified “enemies of the Reich.”<sup>43</sup> Professor Franz Six, who was subsequently convicted of war crimes, oversaw *Amt VII*, the “ideological” branch of the RSHA, which was responsible for collecting, evaluating, and disseminating ideological material, principally about Jews.<sup>44</sup>

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39. *Id.* at 324-25.

40. *Id.* at 324.

41. *Id.* at 315.

42. Joint Appendix, *supra* note 14, at 1:0031; *see RIGG, supra* note 34, at 133-35 (discussing the Rebbe’s agitation at not being able to rescue his library).

43. *See* PATRICIA KENNEDY GRIMSTED, *BACH IS BACK IN BERLIN: THE RETURN OF THE SING-AKADEMIE ARCHIVE FROM UKRAINE IN THE CONTEXT OF DISPLACED CULTURAL TREASURES AND RESTITUTION POLITICS* 16 (2003); PATRICIA KENNEDY GRIMSTED, *TROPHIES OF WAR AND EMPIRE: THE ARCHIVAL HERITAGE OF UKRAINE, WORLD WAR II, AND THE INTERNATIONAL POLITICS OF RESTITUTION* 288-89 (2001) [hereinafter GRIMSTED, *TROPHIES OF WAR AND EMPIRE*].

44. 2 *THE ENCYCLOPEDIA OF THE THIRD REICH* 782-83 (Christian Zentner, Friedemann Bedürftig & Amy Hackett eds., 1991).

After the surrender of Nazi Germany in May 1945, the victorious allies assumed control of Germany and split it into four zones of occupation.<sup>45</sup> At the Potsdam Conference (July 17, 1945 to August 2, 1945), the victorious allies, including the Soviet Union, recognized the Polish Provisional Government of National Unity and changed the de facto borders of Germany and Poland. The former German territories east of the Oder-Neisse line—including Lower Silesia, where the Wölfelsdorf castle was located—became Polish territory and were no longer part of the Soviet zone of occupation in Germany.<sup>46</sup>

The following month, in September 1945, Soviet armed forces discovered the Wölfelsdorf castle, which was then part of Poland. When Stalin's chief of state police and security, Lavrentii Beria, was informed of the Wölfelsdorf archival materials by the head of the Ukrainian Archival Administration, Beria personally ordered a group of NKVD (People's Commissariat of Internal Affairs and the precursor to the KGB) personnel to transport the entire Nazi RSHA Archive by railroad to Moscow.<sup>47</sup> The Archive was placed in a top secret Central State Special Archive—TsGOA, which was formally established in March 1946.<sup>48</sup>

On at least three occasions between 1939 and 1946, the sixth Rebbe explicitly declared that the books and manuscripts in his possession and those left in Poland at the commencement of the war belonged to Chabad. On November 27, 1939, after fleeing Otwock to Warsaw, he wrote to his secretary and librarian Haim Lieberman, who was then in Riga: "I have no apartment, and I find myself living with friends with my entire family in one room; consequently, I have no space for the books which Agudas Chabad loaned me for study. I would be pleased if Agudas Chabad were to take these books back."<sup>49</sup>

One month later, after the sixth Rebbe arrived in Riga, he wrote a letter to New York in which he referred to the books and

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45. BEATE RUHM VON OPPEN, *DOCUMENTS ON GERMANY UNDER OCCUPATION 1945-1954*, at 35-37 (1955).

46. SEBASTIAN SIEBEL-ACHENBACH, *LOWER SILESIA FROM NAZI GERMANY TO COMMUNIST POLAND, 1942-49*, at 8 (map), 83-116 (1994).

47. GRIMSTED, *TROPHIES OF WAR AND EMPIRE*, *supra* note 43, at 293.

48. *Id.* at 299-313; Joint Appendix, *supra* note 14, at 1:0031-32, 3:2263-77, 2316, 4:3097-3101.

49. *Agudas Chasidei Chabad v. Gourary*, 650 F. Supp. 1463, 1469 (E.D.N.Y. 1987).

manuscripts left behind in Otwock and Warsaw.<sup>50</sup> The letter asked that the Chabad members in New York request that the American consul in Warsaw “take over the library of Agudas Chabad (of the U.S.) and of Rabbi Schneersohn—for I have told them that a part of the library is the property of Agudas Chabad of New York and a part is mine . . . .”<sup>51</sup> In the letter, the sixth Rebbe also referred to manuscripts involved in this case that were left behind in Warsaw: “[A]lso three cases of sacred manuscripts which are the property of Agudas Chabad of the U.S. and . . . [should be sent] direct to New York.”<sup>52</sup>

## II. POSTWAR RESTITUTION EFFORTS IN THE SOVIET UNION BY CHABAD FOR THE RETURN OF THE LIBRARY AND ARCHIVE

### A. *Chabad Commences Efforts for Return of the Library and Locates the Archive*

After World War II ended, with portions of the Archive and the Library collected after 1925 still remaining in Europe, the sixth Rebbe requested assistance from Dr. Alexander Marx, the librarian of the Jewish Theological Seminary, in locating the still-missing manuscripts and books and arranged to have them sent to New York.<sup>53</sup> His letter to Dr. Marx referred to “three large boxes of [ancient] manuscripts” that were seized by the Nazis. Rabbi Israel Jacobson and his son-in-law, Rabbi Shlomo Zalman Hecht, both American citizens and members of Agudas Chasidei Chabad, were the official owners of this property.<sup>54</sup> With respect to books that were still missing, the sixth Rebbe, in his letter to Dr. Marx, said, “Books: Several thousand books, among them many ancient books of great value and very rare. These books are the property of Agudas Chasidei Chabad of America and Canada.”<sup>55</sup>

Despite the efforts of Dr. Marx, the sixth Rebbe, and Chabad’s followers, Chabad was not able to locate the Archive for decades because the Soviets kept its whereabouts secret until

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50. *Id.* at 1470.

51. *Id.*

52. *Id.*

53. *Agudas Chasidei Chabad v. Gourary*, 833 F.2d 431, 436 (2d Cir. 1987).

54. *Id.*

55. *Id.*

1992.<sup>56</sup> In June 1992, the Special Archive was renamed the Center for the Preservation of Historico-Documentary Collections—TsKhIDK.<sup>57</sup> In March 1999, the TsGOA/TsKhIDK trophy holdings became part of the neighboring Russian State Military Archive—RGVA.<sup>58</sup> Chabad’s researchers confirmed that the Archive was at the Russian State Military Archive in mid-2004.<sup>59</sup>

Over the years, the Library was hidden away amongst the vast holdings of the V.I. Lenin State Library (now called the Russian State Library) and not catalogued.<sup>60</sup> In the 1980s, Rabbi Yosef B. Friedman, director of the Kehot Publication Society, visited the V.I. Lenin State Library and studied the catalogue of the Hebraic department. Chabad’s senior librarian, Rabbi Shalom Dovber Levine, had provided him with markers by which the Library could be identified. Rabbi Friedman’s examination of books at the Lenin Library revealed they were originals from the Chabad Library seized during the Russian Revolution of 1917.<sup>61</sup>

In response to Rabbi Friedman’s discovery, the seventh Rebbe, Rabbi Menachem Mendel Schneerson, commenced an effort to secure the return of the Library.<sup>62</sup> The seventh Rebbe appointed a five-person delegation in late 1990, headed by Chabad Rabbi Boruch S. Cunin of Los Angeles, to secure the Library’s return to Chabad.<sup>63</sup> Chabad also formed the Jewish Community of Lubavitch Chassidim (“JCLC” or “Community”) as its representative in the Soviet Union, with the aim of securing return of the Library to Chabad’s central library in New York.<sup>64</sup> Rabbi Cunin traveled to Russia and lived there from November 1990 to August 1992 while attempting to secure the return of the Library to Chabad’s central library in New York.<sup>65</sup>

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56. See GRIMSTED, *TROPHIES OF WAR AND EMPIRE*, *supra* note 43, at 309-10.

57. *Id.* at 310.

58. *Id.* at 313.

59. Joint Appendix, *supra* note 14, at 1:0795 (Declaration of Rabbi Boruch S. Cunin).

60. Akinsha & Grimsted, *supra* note 15, at 236-37.

61. *The Schneerson Collection and Historical Justice: Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong. 54-55 (2005) (statement of Rabbi Yehuda Krinsky, Former Assistant Chief-of-Staff to the Lubavitcher Rebbe).

62. *Id.*

63. Joint Appendix, *supra* note 14, at 1:0029 (Agudas Chasidei Chabad of the U.S. Complaint against Russian Federation).

64. *Id.* at 1:0034.

65. *Id.* at 1:0790.

### B. Chabad Goes to Court in the Soviet Union

On September 6, 1991, a major breakthrough occurred when Soviet President Mikhail Gorbachev, the last president of the soon-to-be dissolved Soviet Union, ordered the V.I. Lenin State Library to return the Library to Chabad. The director of the V.I. Lenin State Library, however, refused to comply. The following day, Rabbi Cunin and other members of the Chabad delegation set up a twenty-four-hour information station and a prayer vigil outside the V.I. Lenin State Library, which lasted for approximately nineteen days. During the week of September 9, 1991, a librarian from the V.I. Lenin State Library told Rabbi Cunin that some of the books from the Library had been destroyed. Fragments of the books were handed to Rabbi Cunin as evidence of the destruction.<sup>66</sup>

On September 26, 1991, the JCLC petitioned a Soviet arbitration court of the Russian Soviet Federative Socialist Republic ("RSFSR") (*Case No. 350/13*) for an order directing the return of the Library.<sup>67</sup> The V.I. Lenin State Library opposed the JCLC's claim, arguing that it was "not being legally founded, since CHABAD, the Religious Jewish Hasidic Lubavitch Community is not the owner of the disputed collection of books and manuscripts, in view of its acquisition of a status of National and State property."<sup>68</sup> The Soviet arbitration court held against the V.I. Lenin State Library and in favor of Chabad. In a Decision on October 8, 1991, it first noted:

[T]he Schneerson Library is comprised of the books of theological and liturgical nature, in ancient Hebrew, collected by several generations of Lubavitch Rabbis. Said books and manuscripts were taken to a library in 1921, pursuant to a mandate of the former People's Commissar on Education. The documents provided did not confirm the fact of Schneerson Library acquiring a status of National property. The disputed collection of books and manuscripts also cannot be declared ownerless, as for a number of years, starting from 1922, the owner of books and manuscripts applied to various bodies of

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66. *Id.* at 1:0790-91.

67. *Id.* at 1:0034.

68. *Id.* at 1:0137 (Decision of the State Arbitration Tribunal of the RSFSR, *Chabad, the Religious Jewish Hasidic Lubavitch Community v. V.I. Lenin State Library*, Case No. 350/13 (Oct. 8, 1991)).

the Soviet State, requesting their return.<sup>69</sup>

The Soviet court further noted “that the Seventh Lubavitch Rabbi also confirmed[] that the Schneerson Library belongs to the communal property of the entire Agudas Chassidei Chabad movement.”<sup>70</sup> The Soviet court ordered the V.I. Lenin State Library to return the Library to Chabad within one month.<sup>71</sup> The Decision concluded:

Guided by Article 77 of the Rules of proprietary dispute review, the State Arbitrators decided:

To declare the Claim of CHABAD, the Religious Jewish Hasidic Lubavitch Community, for the return, in kind, of the collection of books and manuscripts, known as the Schneerson Library, valid and granted.

To bind the V.I. Lenin State Library to return within one month the Schneerson Library to CHABAD, the Religious Jewish Hasidic Lubavitch Community.<sup>72</sup>

On October 10, 1991, the staff of the V.I. Lenin Library held a meeting during which it was claimed that the Soviet court’s decision was illegal. The staff refused to comply with the ruling and return the Library to Chabad.<sup>73</sup> The decision of the staff meeting stated:

Dear compatriots! The State Lenin Library of the USSR is threatened with danger of destruction and plunder . . . [sic] The State Arbitration Court of the RSFSR under pressure of R.I. Khasbulatov, acting Chairman of the Supreme Council of RSFSR, decided to transfer to the Jewish Religious Community Chabad, organized in January 1991 . . . a part of the collection of the State Lenin Library (GBL) saved by the library during the 1920s and during the same time nationalized by the state . . . [sic] A precedent is established—the pillage of the collections of the Library is started.<sup>74</sup>

The V.I. Lenin State Library and Attorney General of the RSFSR appealed on the ground that the Library had allegedly

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69. *Id.*

70. *Id.* at 1:0138

71. *Id.*

72. *Id.*

73. Akinsha & Grimsted, *supra* note 15, at 242.

74. *Id.*

been nationalized.<sup>75</sup> On November 18, 1991, the Chief State Arbiter of the RSFSR, V.V. Grebennikov, upon JCLC's request, ordered the V.I. Lenin State Library to transfer the Library immediately to a Jewish institution selected by Chabad, the Jewish National Library.<sup>76</sup> Grebennikov's November 18, 1991 Decree, No. 350/13H, stated:

Argument as to the statutory limitation which may have precluded consideration of the case filed by the Community is hereby denied. The term limit commenced on the date of the letter signed by A.A. Zolotov, Deputy Minister of Culture of the USSR, in response to the petition claiming the disputed collection written by the Rabbis, i.e. on November 29, 1990. At the time of filing the claim with the State Arbitration Court, the one-year statutory term of limitation has not yet expired.<sup>77</sup>

Grebennikov continued:

Thus, the Arbitration Court is not obligated to consider the matter of legal ownership of the Schneerson Library by either the Community or the State (represented by LSL), since evidence on file in this case does not contain any basis upon which assumption can be made that the aforementioned collection belongs to anyone *other than* the Lubavitcher Rebbe.

Furthermore, careful examination of the case file indicates[] that the relationship between the Community and the Lubavitcher Rebbe are of confessional nature and cannot be regulated by general Soviet laws. This conjecture is further reinforced by the assertion made by Community's representatives that they do not insist on the transfer of proprietary rights [to Schneerson Library] to the Community . . . .<sup>78</sup>

The decree of Chief State Arbiter Grebennikov noted that "[t]he Community appealed to the State Arbitration Court, requesting that the Schneerson Library, be transferred to the newly established Jewish National Library."<sup>79</sup>

In consideration of the Community's request, and in accordance with Article 96 of the Code of Regulations on

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75. Joint Appendix, *supra* note 14, at 1:0142.

76. *Id.* at 1:0145.

77. *Id.* at 1:0144.

78. *Id.*

79. *Id.* at 1:0145.

Economic Dispute Resolution by State Arbitration Courts, Grebennikov revoked in part the October 8, 1991 ruling made by the State Arbitration Court of the RSFSR in Case No. 350/13; he ordered the “Lenin State Library to transfer entire collection of books and manuscripts known as the Schneerson Library to the Jewish National Library (third party which was incorporated into the case as Co-Petitioner - see Ruling of 11/15/1991).”<sup>80</sup> The Chief State Arbiter ordered the physical transfer of the Schneerson Library to commence on November 18, 1991, and ordered the Jewish National Museum to accept the disputed collection into its custody for safekeeping.<sup>81</sup> In addition, the decree stated: “[c]onsidering existing complications and various interpretations of the term ‘The Schneerson Library’, the parties are instructed to ensure that experts from both sides partake in the transfer of the aforementioned collection.”<sup>82</sup>

When the Chabad delegation sought to effectuate the transfer, the V.I. Lenin State Library’s staff members refused to comply with the decision of the State Court of Arbitration. On November 20, 1991, Chabad’s representatives began a hunger strike in the hallway of the administrative entrance to the Russian State Library, demanding enforcement of the ruling. Two days later, the Russian State Library closed its doors due to the praying of Chabad’s rabbis.<sup>83</sup> The Chabad delegation was taunted with anti-Semitic slurs and threats of violence and the V.I. Lenin State Library’s police attacked the Chabad representatives and supporters.<sup>84</sup> The ultra-nationalist Moscow newspaper *Zemshchina* wrote: “Hasidic manuscripts from the Schneerson collection . . . kept in GBL (Lenin State Library) belong to the Russian people as incontestable evidence of the ritual crimes of Talmudic Yids.”<sup>85</sup>

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80. *Id.*

81. *Id.*

82. *Id.*

83. Akinsha & Grimsted, *supra* note 15, at 243.

84. Joint Appendix, *supra* note 14, at 1:0792.

85. Akinsha & Grimsted, *supra* note 15, at 244.



### III. LITIGATION AND DIPLOMATIC EFFORTS IN POST-SOVIET RUSSIA

#### A. Russian Court Proceedings

The following month, on December 25, 1991, the Soviet Union dissolved and was replaced by the Russian Federation.<sup>86</sup> In January 1992, the V.I. Lenin State Library was renamed the Russian State Library. On January 29, 1992, Russia's Deputy Chairman ordered the Russian State Library to transfer the Library to Chabad's representatives. But, a Russian State Library director incited an anti-Semitic mob and shouted death threats through a bullhorn to prevent the Chabad delegation from retrieving the Library.<sup>87</sup>

On February 14, 1992, the Deputy Chief State Arbiter of the Russian Federation, B.I. Puginsky, nullified the previous court orders that mandated the Russian State Library's relinquishment of the Library and closed the case. Chabad asserts that it never received notice of any appeal to the Deputy Chief State Arbiter, and that the Deputy State Arbiter lacked authority to revoke the November 18, 1991 Order of his superior, the Chief State Arbiter.<sup>88</sup>

Puginsky's February 14, 1992 decree purportedly relied on "newly discovered evidence in this case" including a:

letter received from the Ministry of Culture of the Russian Federation dated November 25, 1991 (ref. No. 19/22-29), which states that neither the Ministry of Culture of the Russian Federation, nor the Moscow City Cultural Committee, has received an application to register legal entity under the name The Jewish National Library "Maimonides House." [sic]<sup>89</sup>

In addition, Puginsky's decree stated that:

[T]he Government of the Russian Federation has adopted resolution calling for the transfer of Schneerson Library to the Maimonides State Jewish Academy (Decree No.157-p issued by the Government of the Russian Federation on 1/29/1992). The aforementioned Government Resolution must be recognized as

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86. *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 13 (D.D.C. 2006), *aff'd in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008).

87. Joint Appendix, *supra* note 14, at 1:0791-93.

88. *Id.* at 2:1168-69.

89. *Id.* at 1:0152-53.

an independent and in no way associated or based upon the decisions made by the State Arbitration Court of the Russian Federation.<sup>90</sup>

The Deputy Chief State Arbiter's decree concluded:

In accordance with Art. 151 of the Civil Code of the Russian Federation, as well as Art. 30 of the Law on Ownership in the Russian Federation, the right to demand recovery of one's property from third party(ies) maintaining illegal possession of said property, is reserved exclusively for the rightful owner of disputed property or his/her heir apparent.

As is evident from documents on file in this case, the Community has not provided evidentiary proof of having ownership rights to the Schneerson Library. This fact is also supported by the Ruling made on November 18, 1991 by the State Arbitration Court of the Russian Federation, which sought to re-examine the earlier Ruling. Hence, Community has no authority to file suit seeking physical transfer of the property.<sup>91</sup>

*B. Agreement Between Yeltsin and Bush and Subsequent Political Efforts in Russia and the United States*

According to Chabad, Russian President Boris Yeltsin made a commitment to President George H. W. Bush to return the Library to Chabad.<sup>92</sup> On February 19, 1992, however, the Supreme Soviet of the Russian Federation, the federal legislature of the new post-Soviet Russia, abolished the January 29, 1992 "transfer" order and decreed that "the safety, movement and use of the holdings available to the Russian State Library [be effectuated] solely on the basis of the legislation of the Russian Federation and the provisions of international law," and noted that the Supreme Soviet "shall speed up the development of draft laws which ensure the State protection and safety of the national heritage of the Russian Federation."<sup>93</sup> Chabad contends that this 1992 decree divested Russian courts of jurisdiction to hear Chabad's claims.<sup>94</sup>

On April 6, 1992, during the evening,

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90. *Id.* at 1:0153.

91. *Id.*

92. *Id.* at 1:0820.

93. *Id.* at 2:1226.

94. *Id.* at 2:1170.

Chabad's synagogue and office in Moscow where the Chabad delegation studied, prayed, worked, and slept was firebombed. Bottles of gasoline ("Molotov cocktails") were thrown through the windows of the residential portion of the building where the Chabad Delegation slept. Two days earlier, the building was defaced by the painting of a swastika near the front door of the building along with the words "*Smert Jiden*"[] ("Kill the Jews").<sup>95</sup>

On April 15, 1992, in response to the aforementioned anti-Semitic incidents targeting the Chabad delegation in Russia, the Department of State issued a written statement expressing the "U.S. Government's continued strong support for the return of the Schneerson Library, seized from the Lubavitchers in 1918."<sup>96</sup> The statement deplored the April 6 firebombing and vandalism of the synagogue where Chabad delegation member Rabbi Boruch S. Cunin was staying, and added: "[w]e are also disturbed by the attempts of anti-Semitic groups to defame the Lubavitchers by linking their desire for the return of their property to ancient, scurrilous myths about Jewish rituals."<sup>97</sup>

On May 31, 1992, all 100 U.S. Senators sent a letter to President Yeltsin to join in the Department of State's statement. The Senate's letter stated,

We understand that you have personally committed yourself to secure the return of the Lubavitch texts, and we appreciate your having taken a stand on behalf of an act of justice. . . . [I]t is our hope and expectation that you will fulfill your commitment decisively through the quick release of the Schneerson-Agudas Chabad collection.<sup>98</sup>

In October 1992, the same sentiment supported passage of the Gore-Lieberman amendment to the Russian aid bill, which prohibited non-humanitarian U.S. assistance to governmental entities unlawfully withholding historically important books and documents that are the property of American citizens. Acting Secretary of State Lawrence S. Eagleburger concluded on December 2, 1992 that the Russian State Library holding the Chabad Library would be denied financial assistance pursuant to

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95. *Id.* at 1:0794-95; Akinsha & Grimsted, *supra* note 15, at 245.

96. Joint Appendix, *supra* note 14, at 4:3455.

97. *Id.*

98. *Id.* at 4:3448.

the amendment.<sup>99</sup> In 1992, Senator Al Gore also led an effort, which was ultimately blocked, to use a Senate resolution to hold up the return to Russia of the U.S.-held “Smolensk Archive” until the Chabad Library was returned from the Russian State Library.<sup>100</sup>

On March 16, 1993, several prominent U.S. Senators sent another letter to President Yeltsin to “again request that [he] do everything possible to ensure the release of the Schneerson-Agudas Chabad Library collection.”<sup>101</sup> On December 16, 1993, Leon Fuerth, then Assistant to Vice President Al Gore for National Security Affairs, and Evgeny Sidorov, then Minister of Culture of Russia, entered into an interim agreement titled Memorandum of Understanding (“MOU”), to which Chabad was not a party. The MOU was agreed to be non-prejudicial to any future resolution of the Library’s fate, and required Russia to catalogue the Library and move it into a new open facility by March 31, 1994. The MOU also stated that “[t]he collection will be maintained, preserved, operated and cataloged” and “microfilmed” as soon as possible.<sup>102</sup> Russia, however, did not comply with its terms.<sup>103</sup>

### *C. Chabad’s Discovery of the Existence of the Chabad Archive and Efforts in Russia for the Return of the Archive*

In mid-2004, Chabad confirmed the existence of the Archive at the Russian State Military Archive. Chabad delegation members promptly sent a letter to the Russian government dated June 10, 2004, requesting return of the Archive to Chabad in New York.<sup>104</sup> Upon inquiry from the Russian government, the Director of the Russian State Military Archive, V. N. Kouzelenkov, prepared a certificate for the Head of the Federal Archive Agency, V. P. Kozlov, on July 15, 2004. The certificate confirms that

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99. Statement of Al Gore, *supra* note 16, at 59.

100. *Id.* Patricia Grimsted, *Captured Archives and Restitution Problems on the Eastern Front: Beyond the Bard Graduate Center Symposium*, in *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 244, 246 (Elizabeth Simpson ed., 1997) [hereinafter Grimsted, *Captured Archives*].

101. Joint Appendix, *supra* note 14, at 4:3456-57.

102. *Id.* at 1:0235-36.

103. *See id.* at 1:0822-23.

104. *Id.* at 1:0795.

Chabad's Archive was received in 1945 as "trophy documents," and that the Russian State Military Archive "houses Fund No. 706/k 'Schneerson Iossel Itzka - Ancient Jewish Philosophy Researcher, Chief Rabbi of Riga, 1928-1932.'"<sup>105</sup> It also states that "[t]he Fund contains 98 units dating back to 1907-1935, all totaling 10530 pages," and that a "[s]ignificant part of the Fund (40 units containing total of 5757 pages) are manuscripts, including printed, that have been written by Schneerson on various religious subjects: creation of Chasidism, Chasidic traditions, rituals and religious practices, Jewish religious and spiritual values, biblical scenes, religious education, etc.; religious text, recitals, memoirs."<sup>106</sup> A similar certificate was sent by the Acting Director of the Russian State Military Archive, V. I. Korotaev, to the Acting Director of the Armed Forces of the Russian Federation's Archive Service, Col. S. Kamenichenko.<sup>107</sup> Portions of the Archive are also reportedly intermixed in other fonds at the Russian State Military Archive.<sup>108</sup>

#### IV. CHABAD GOES TO COURT IN THE UNITED STATES

##### A. *Proceedings in the U.S. District Courts*

Faced with the inability to receive justice in Russia, either through courts or through diplomacy, Chabad filed suit on November 9, 2004 in the United States.<sup>109</sup> The suit was filed in Los Angeles, in the U.S. District Court for the Central District of California, and sought recovery of the entire collection of the Rebbes found in Russia.<sup>110</sup> Named in the complaint as defendants were the Russian Federation, the Russian Ministry of Culture and Mass Communication, the Russian State Library, and the Russian State Military Archive (hereinafter collectively "Russia").<sup>111</sup>

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105. *Id.* at 4:3093-94.

106. *Id.*

107. *Id.* at 4:3097.

108. *See generally* Grimsted, *Captured Archives*, *supra* note 100.

109. *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 10 (D.D.C. 2006), *aff'd in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008).

110. *Id.*

111. *Id.* at 10 n.2. Chabad is currently represented by attorneys Marshall B. Grossman and Seth M. Gerber of Bingham McCutchen LLP, Nathan Lewin and Alyza Lewin of Lewin & Lewin LLP, and Wm. Bradford Reynolds of Howrey, LLP. Jonathan Stern also assisted on the case prior to the appeals.

Chabad brought its claims under the “takings” exception to the Foreign Sovereign Immunity Act (“FSIA”), 28 U.S.C. § 1605(a)(3), which provides that a foreign state, including its political subdivisions, agencies, and instrumentalities, shall not be immune from the jurisdiction of courts of the United States in any case in which:

[A] rights in property taken in violation of international law are in issue and [B][1] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [2] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.<sup>112</sup>

Three months after the lawsuit was filed by Chabad, the entire U.S. Senate sent a letter to Russian President Vladimir Putin to “respectfully request [his] assistance in returning the Schneerson collection from the Russian State Library and the Russian State Military Archive, to its rightful owners in the United States: Agudas Chasidei Chabad of United States . . . .”<sup>113</sup> The Senate’s letter concluded: “[w]e urge you to return these sacred religious texts, archives, and manuscripts to Chabad, which would be a significant example of your government’s commitment to justice, human rights, and religious freedom.”<sup>114</sup> On April 6, 2005, the United States Helsinki Commission, an independent government agency created by Congress to monitor and encourage compliance with commitments on human rights, democracy, and the rule of law, held a hearing on “The Schneerson Collection and Historical Justice.”<sup>115</sup> Following on the heels of the U.S. Helsinki Commission, more than 310 members of the House of Representatives sent a letter to President Putin asking him to

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112. 28 U.S.C. § 1605(a)(3) (2006).

113. Joint Appendix, *supra* note 14, at 4:3458-65.

114. *Id.* at 4:3458.

115. Press Release, U.S. Comm’n on Sec. and Cooperation in Eur., Schneerson Collection Focus of Helsinki Comm’n Hearing (Mar. 28, 2005), *available at* [http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord\\_id=411&Region\\_id=0&Issue\\_id=0&ContentType=P&ContentRecordType=P&CFID=5045213&CFTOKEN=12854284&IsPrint=1](http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=411&Region_id=0&Issue_id=0&ContentType=P&ContentRecordType=P&CFID=5045213&CFTOKEN=12854284&IsPrint=1).

facilitate the return of the collection to Chabad;<sup>116</sup> but Russia did not budge.

Instead, on May 2, 2005, Russia moved to dismiss the lawsuit on procedural grounds.<sup>117</sup> Russia argued that American courts lacked jurisdiction to hear the case, citing sovereign immunity protection under the FSIA, further arguing that even if jurisdiction existed under the FSIA, the act of state doctrine barred the suit.<sup>118</sup> Russia also argued that Russian courts provided an adequate forum to hear this dispute, and so the case should be dismissed under the doctrine of *forum non conveniens*<sup>119</sup> in favor of having the dispute resolved in Russia.<sup>120</sup>

Under its sovereign immunity argument, Russia conceded that under Section 1605(a)(3) of the FSIA, “for purposes of this motion only, the first prong (rights in property at issue) is not disputed, inasmuch as Plaintiff’s claims of right to the Library and the Archive are placed in issue by Plaintiff’s complaint.”<sup>121</sup> Rather than challenge Chabad’s ownership rights, Russia argued that Chabad could not establish that the property was: (1) “taken in violation of international law,” or (2) was “owned or operated by

116. Joint Appendix, *supra* note 14, at 4:3470-85.

117. See *Agudas Chasidei Chabad v. Russian Fed’n*, 466 F. Supp. 2d 6, 10 (D.D.C. 2006), *aff’d in part, rev’d in part*, 528 F.3d 934 (D.C. Cir. 2008) [hereinafter *Russian Fed’n*]. Russia and its fellow sovereign defendants retained the multinational law firm Squire, Sanders and Dempsey to represent them. Long-time litigator James H. Broderick, Jr. and long-time Russia legal expert Sarah C. Carey handled the matter.

118. *Id.* The act of state doctrine is a judge-made doctrine by which American courts, even though they might possess jurisdiction over a case, will decline to hear the case on grounds of judicial prudence, since their hearing of the case might negatively impact the foreign relations of the United States. The United States Supreme Court in 1897 set out the so-called classic formulation of the doctrine as follows:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

*Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). For further discussion and explanation of the act of state doctrine, see Michael J. Bazzyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986).

119. *Russian Fed’n*, 466 F. Supp. 2d at 10. Like the act of state doctrine, *forum non conveniens* is also a judge-made doctrine under which the trial judge has the discretion to dismiss a case in favor of a more adequate and convenient foreign forum. For further discussion, see Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT’L L. 41 (1998).

120. *Russian Fed’n*, 466 F. Supp. 2d at 27.

121. Joint Appendix, *supra* note 14, at 1:0071.

an agency engaged in commercial activity in the United States<sup>122</sup>—both of which were required to defeat Russia’s presumptive sovereign immunity to the suit under Section 1605(a)(3).<sup>123</sup> Russia first argued that “under the facts alleged by Chabad, the ‘taking’ of the Library occurred when the Rebbes were Russian citizens and was, by definition, not in violation of international law.”<sup>124</sup> In support of its lack of commercial activity argument, the Russian State Library (“RSL”) and Russian State Military Archive (“RSMA”) submitted declarations stating, respectively, that (1) the “RSL does not engage in any commercial activity in the United States” and (2) the “RSMA does not engage in any commercial activities in the United States.”<sup>125</sup>

On July 11, 2005, Ronald Bettauer, Deputy Legal Advisor for the U.S. Department of State, wrote to Chabad’s counsel stating,

[f]or over ten years, the White House and State Department have requested the Russian government to agree to a satisfactory resolution. Our Embassy in Moscow has engaged repeatedly with its Russian interlocutors on behalf of Chabad. We will continue to support the Chabad community in our discussions with Russian authorities and will hope for a breakthrough.<sup>126</sup>

The State Department refused, however, to intercede in the litigation on the grounds that “[t]he Foreign Sovereign Immunities Act was enacted in significant part to eliminate the need for the executive to be involved in suits against foreign sovereigns.”<sup>127</sup>

The lawsuit proceeded into jurisdictional discovery.<sup>128</sup> Chabad’s counsel was able to locate catalogs on the Internet which indicated that the RSL and American companies were offering microfilm of holdings at the RSL and RSMA for sale in America. Chabad then issued subpoenas to numerous American publishing companies and obtained copies of the contracts and royalty records reflecting payments to the RSL and RSMA for sales of

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122. *Id.*

123. 28 U.S.C. § 1605(a)(3) (2006).

124. Joint Appendix, *supra* note 14, at 1:0073.

125. *Id.* at 1:0097, 1:0177.

126. *Id.* at 4:3445.

127. *Id.*

128. *See id.* at 1:0482.2-82.3.



microfilm worldwide, including in the United States.<sup>129</sup> One of the contracts between the RSMA and Primary Source Media expressly acknowledged in its “Sovereign Immunity” provision that “the activities contemplated by this Agreement are commercial in nature rather than governmental or public . . . .”<sup>130</sup> The Director of the Russian State Military Archive, Vladimir Kouzelenkov, testified at his June 20, 2005 deposition (which was taken in the late night by video-link from Moscow to California) that he reviewed this contract in 2005. When Chabad’s counsel showed Vladimir N. Kouzelenkov, the Director of the RSMA, the “Sovereign Immunity” provision in the contract and asked, “Article one-four on this contract. It is titled ‘Sovereign Immunity.’ Do you see it in front of you?” Kouzelenkov responded, “Unfortunately, yes.”<sup>131</sup>

Chabad also served written discovery on the defendants. In response to an interrogatory asking the RSMA to state all facts to support any contention that the Archive was nationalized, the Russian State Military Archive responded, “[d]ue to the passage of time and the change in government, RSMA is presently unable to determine the circumstances under which the Archive was acquired and consequently whether the Archive has been nationalized.”<sup>132</sup> The Russian State Military Archive verified its interrogatory responses on June 8, 2005 under penalty of perjury.<sup>133</sup> Notably, the Deputy Director of the RSMA prepared a certificate the prior year stating that Fund No. 706/k at the RSMA contains documents from Rabbi Schneerson that “were received . . . in 1945 as part of German trophy documents.”<sup>134</sup> Chabad’s deposition of Vladimir Kouzelenkov also revealed that the RSMA has a “book of incoming materials into the archive, the act of transmission.”<sup>135</sup> Chabad promptly demanded the production of this book, which stated that the Archive was received in September 1945 from “Germany (a small settlement called *Welfelsdorf*).”<sup>136</sup>

On July 14, 2005, the federal court in Los Angeles transferred

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129. *See id.* at 1:0255-79.

130. *Id.* at 1:0881.

131. *Id.* at 3:2185-86.

132. *Id.* at 1:0526.

133. *Id.* at 1:0529.

134. *Id.* at 4:3097.

135. *Id.* at 3:2266.

136. *Id.* at 4:3099.

the case to the U.S. District Court for the District of Columbia, where it was assigned to Chief Judge Royce C. Lamberth.<sup>137</sup> Upon receiving the case, Judge Lamberth, in the interest of justice, ordered the parties to re-brief the motion to dismiss under the case law of the D.C. Circuit.<sup>138</sup>

In its supplemental brief, Russia argued, for the first time, that Chabad has no vested rights in the subject property on the grounds that Chabad was incorporated in 1940, and has never had physical possession of either the Library or the Archive.<sup>139</sup> Chabad responded by arguing that, prior to the Soviet Union's and Nazi Germany's unlawful seizures, the collection was always held by the Rebbe for the benefit of Chabad's worldwide followers, and the sixth Rebbe's correspondence from 1939 through 1946 states that the Archive belongs to Chabad.<sup>140</sup>

Russia also argued that the case should be dismissed because Russian courts provide Chabad with an adequate alternative forum. Russia asserted that the defendants are "amenable to process in Russia. . . . [T]he Russian Federation permits litigation of the subject matter of this dispute; Plaintiff previously prosecuted a similar action in Russia from 1991-1992;" and that the dismissal of that action was simply because Chabad brought its claims in the wrong Russian court.<sup>141</sup> Russia also argued that the "true remedy Chabad seeks is delivery of the Library and Archive" and "[t]his Court's ability to provide that remedy is doubtful."<sup>142</sup>

Chabad responded by arguing that the FSIA provided the Court with "the power to attach 'any property' in aid of execution of a judgment against a foreign state."<sup>143</sup> Chabad argued that Russia had failed to satisfy its burden to show that Russia is an adequate alternative forum because "[t]he fact that Chabad filed a claim in the Soviet arbitration court nearly 15 years ago [was] not evidence that a Russian court today is an adequate alternative forum."<sup>144</sup> Chabad further argued that the Deputy Chief State

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137. *Id.* at 4:3324.

138. *Id.* at 4:3326.

139. *Id.* at 4:3336-37.

140. *Id.* at 4:3394-95.

141. *Id.* at 4:3361-62.

142. *Id.* at 4:3358.

143. *Id.* at 4:3419.

144. *Id.* at 4:3415 (footnote omitted).

Arbiter's February 1992 decree barred any litigation in the Russian Federation to recover the collection.<sup>145</sup>

Judge Lamberth issued his ruling on December 4, 2006, in which he first granted Russia's motion to dismiss Chabad's Library claim because he found the "violation of international law" element of Section 1605(a)(3) to be missing.<sup>146</sup> Notwithstanding Chabad's allegations that the Rebbes always held the Library in charitable trust on behalf of Chabad (even prior to Chabad's formal incorporation in 1940), Judge Lamberth concluded that the taking of the Library by the Soviets in 1917-1921 did not violate international law because property taken by a State from one of its own citizens ordinarily did not amount to a violation of international law.<sup>147</sup> According to Judge Lamberth, because the "owner" of the Library was the fifth Rebbe, who was a Russian (and then Soviet) citizen until his death in 1920, and the sixth Rebbe, who was a Soviet citizen until at least 1927, the taking of the Library did not amount to an international law violation.<sup>148</sup> Judge Lamberth also concluded that the "orders and rulings issued in 1991 and 1992 cannot be read as giving Chabad ownership of the Library and Chabad should not be able to predicate its taking claim on them."<sup>149</sup>

Judge Lamberth reached an entirely different conclusion, however, with respect to the Archive. He concluded that "the Nazis' taking of the Archive clearly violated international law," and "the Soviet Army's 1945 seizure and appropriation of the Archive from its Nazi captors as spoils of war was also a taking in violation of international law."<sup>150</sup> Judge Lamberth also concluded that the sixth Rebbe's correspondence from 1939-1946 established that "even before he was forced to leave the Archive behind in Poland, the Sixth Rebbe did not consider it to be his personal property, but had rather held it 'in trust for the benefit of the religious community of Chabad Chasidism.'"<sup>151</sup>

Judge Lamberth also concluded that the RSMA had engaged

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145. *Id.* at 4:3415-3416.

146. *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 16-19 (D.D.C. 2006), *aff'd in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008).

147. *Id.* at 19.

148. *Id.* at 16.

149. *Id.* at 18.

150. *Id.* at 20.

151. *Id.* at 23.

in commercial activity in the United States,<sup>152</sup> that Chabad was not required to exhaust remedies in Russia before bringing its Archive claims in U.S. federal court,<sup>153</sup> and Chabad's Archive claims were not barred by the act of state doctrine because the Nazis and Soviets took the Archive outside of their respective territories.<sup>154</sup> The judge also rejected Russia's argument that the case should be dismissed on the grounds that Russia was a more adequate forum.<sup>155</sup> The court commented, "[h]aving conducted jurisdictional discovery and presented their oral arguments, the defendants had ample opportunity to make a showing of the existence of an adequate alternate forum. However, the defendants' conclusory statements about adequacy of a Russian forum fall short of the required showing for *forum non conveniens*."<sup>156</sup> The court also noted that

[t]he defendants appear to be suggesting that this Court should divest itself of jurisdiction because if it rules against the defendants, they may refuse to abide by its judgment. Such an argument is an affront to this Court and does not militate in favor of dismissal on the grounds of *forum non conveniens*.<sup>157</sup>

#### *B. Chabad's Legal Victory Before the U.S. Court of Appeals*

Since Judge Lamberth handed each side only a partial victory, both Chabad and Russia appealed his decision. On June 13, 2008, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit handed Chabad a complete victory. The three judges reversed Judge Lamberth's decision dismissing the part of Chabad's action seeking to recover the Library and upheld the part of his ruling allowing Chabad to continue litigation in American courts for the Archive's return. The appellate court instead found that Chabad could pursue both claims to the Library and the Archive in American courts. The appellate judges also clarified the standards by which future plaintiffs could seek the return of cultural valuables under Section 1605 (a)(3), the

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152. *Id.* at 25.

153. *Id.* at 20-21.

154. *Id.* at 26.

155. *Id.* at 28.

156. *Id.*

157. *Id.* at 29.

“takings” exception to the FSIA.<sup>158</sup>

The D.C. Circuit first examined how much evidence Chabad must present at the jurisdictional stage of the litigation in order to proceed under the “takings” exception of the FSIA. The appellate court rejected the notion that Chabad must prove each and every element of the “takings” exception by a preponderance of the evidence in order to satisfy their burden at the jurisdictional phase.<sup>159</sup> Instead of requiring a mini-trial to establish subject matter jurisdiction, the D.C. Circuit held that the plaintiff need only place “in issue” a substantial and non-frivolous claim that the defendant (or its predecessor) had taken the plaintiff’s rights in property (or those of its predecessor in title) in violation of international law.<sup>160</sup> In order to satisfy the commercial activity nexus of the second prong of the “takings” exception, however, the plaintiff must establish by a preponderance of the evidence<sup>161</sup> that the agency or instrumentality that owns or operates the property at issue – here the RSL and the RSMA – is engaged in a commercial activity in the United States.<sup>162</sup> The appellate court found that Chabad had presented adequate evidence that both the RSL and the RSMA engaged in sufficient commercial activity in the United States to satisfy the commercial activity requirement of the “takings” exception.<sup>163</sup> As the court explained:

Both the RSMA and the RSL have entered transactions for joint publishing and sales in the United States easily satisfying these standards. At the time of the filing of the suit in November 2004, the RSMA had entered contracts with two American corporations for the reproduction and worldwide sale of RSMA materials, including in the United States. One set of contracts was with Primary Source Media and allowed the American firm to publish, among other items; papers of Leon Trotsky and other documents relating to the Russian Civil War. The contracts include provisions waiving sovereign immunity,

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158. *Agudas Chasidei Chabad v. Russian Fed’n*, 528 F.3d 934, 939 (D.C. Cir. 2008).

159. *Id.* at 940.

160. *Id.* at 941.

161. One of the three judges in the case disagreed with the other two judges as to the burden of proof that plaintiffs filing suit against agencies and instrumentalities of a foreign state must meet when showing existence of the different elements of the “takings” exception. Nevertheless, the judge agreed that Chabad has met the burden of proof that she would have imposed in this case. *See id.* at 955-57 (Henderson, J., concurring).

162. *Id.* at 946-47.

163. *Id.* at 946-48.

specifying that the activities described in the contract are “commercial in nature.” By the year 2000 the RSMA had received \$60,000 in advance royalties. Another contract with Yale University Press provides for the “joint preparation and publication of a volume of documents entitled *The Spanish Civil War*” and garnered RSMA a \$10,000 royalty advance in the year of the contract.

The RSL has also contracted for cooperative commercial activities in the United States. For example, it entered into agreements with Norman Ross Publishing (later succeeded by ProQuest), arranging for that firm to sell an encyclopedia and to produce and distribute “microcopies” of various RSL materials (in exchange for a 10% royalty payment to the RSL). One such contract has already yielded RSL over \$20,000 and another over \$5000.<sup>164</sup>

Thus, the court found that Section 1605(a)(3)’s commercial activity requirement was “plainly satisfied.”<sup>165</sup>

The D.C. Circuit also concluded that the “takings” exception’s second prong—that the agency or instrumentality owns or operates the property at issue and is engaged in “a commercial activity” in the United States—does not require “substantial” contact with the United States. More critical, under the plain language of the “takings” exception as applied to agencies and instrumentalities of the foreign state, the court found that the second prong did not require that the property at issue be present in the United States in connection with a commercial activity carried on in the United States. The plaintiff need only prove by a preponderance of evidence that the commercial activity engaged in by the agency or instrumentality involved a particular commercial transaction or act in the United States.<sup>166</sup>

The D.C. Circuit also held that Chabad’s claim that the Library was taken by the Soviet Union in 1917-1925, and then re-taken by the Russian Federation in 1992, was not insubstantial or frivolous.<sup>167</sup> The D.C. Circuit noted that after Chabad obtained favorable rulings in the Soviet court system in 1991, Chabad’s efforts were frustrated shortly after the collapse of the Soviet

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164. *Id.* at 948 (internal citations omitted).

165. *Id.*

166. *Id.* at 947-48.

167. *Id.* at 943.

Union because of Russian officials' physical action (i.e., inciting anti-Semitic mobs at the steps of the RSL), governmental decrees, and a ruling by the *Deputy* Chief State Arbiter purporting to overrule the rulings of the *Chief* State Arbiter.<sup>168</sup> The D.C. Circuit's opinion also provided that a successor State can "renew" an earlier taking in violation of international law through extra-judicial and dubious conduct.<sup>169</sup>

The D.C. Circuit rejected Russia's argument that Chabad's claim to recover the Archive should be dismissed for failure to exhaust remedies in the Russian Federation. The D.C. Circuit noted that nothing in Section 1605(a)(3) suggests that a plaintiff must exhaust foreign remedies before bringing suit in the United States. The D.C. Circuit also noted that the Restatement (Third) of Foreign Relations Law of the United States § 713, cmt. *f*, only requires exhaustion of remedies before a nation sues another nation on behalf of a citizen (i.e., nation v. nation litigation). Additionally, the D.C. Circuit rejected Russia's argument that the FSIA's "takings" exception's language, "taking in violation of international law," subsumes a requirement that a plaintiff exhaust foreign remedies before bringing suit in the United States.<sup>170</sup> Moreover, the appellate court concluded that even if Chabad was required to exhaust its legal remedies in Russia with regard to the Archive (Russia having already conceded that Chabad exhausted its legal remedies in Russia with regard to the Library), the remedy provided by the 1998 Cultural Valuables Law was not adequate. Under Article 19(2) of the 1998 Cultural Valuables Law, the disputed cultural property may only be returned "on the claimant's 'payment of its value as well as reimbursement of the costs of its identification, expert examination, storage, restoration, and transfer (transportation, etc.),' without specifying rules for calculating value."<sup>171</sup> The D.C. Circuit noted "Russia's mere willingness to *sell* the plaintiff's property back to it could not remedy the alleged wrong."<sup>172</sup>

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168. *Id.* at 945.

169. *See id.* at 944.

170. *Id.* at 948-49.

171. *Id.* at 949 (citing Russian Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation, N 64-FZ, art.19(2) (1998) (English translation available at <http://docproj.loyola.edu/rlaw/r2.html>).

172. *Id.* at 949-50.

The D.C. Circuit also examined whether the act of state doctrine prevented American courts from examining Chabad's claims against Russia and concluded, contrary to Judge Lamberth, that the act of state doctrine presents no bar to Chabad's claims to recover the Archive and the Library. The act of state doctrine requires that the act of the foreign state be done on its own territory.<sup>173</sup> The appellate court noted, however, that Nazi Germany took the Archive from the Yeshiva in Otwock, Poland, and the Soviet military took the Archive from a castle in Lower Silesia (then part of Poland).<sup>174</sup> As a result, the court found that the act of state doctrine did not apply to the Archive claims because the acts of taking were not done on Soviet territory.<sup>175</sup> With respect to Chabad's claim that the Library was "retaken" in 1992, the three judges relied on another U.S. federal law, the Second Hickenlooper Amendment, which bars application of the act of state doctrine to seizures occurring after January 1, 1959.<sup>176</sup>

Finally, the D.C. Circuit rejected Russia's argument that the district court would likely be unable to afford Chabad the relief it sought, namely possession of the Library and Archive. The district court characterized this argument as an "affront." Chabad cited the FSIA provisions that allow attachment of certain Russian government property in the United States, 28 U.S.C. § 1610(a)(3), (b)(2), and argued they would give it leverage over the defendants, enhancing the likelihood that Russia or its courts will respect a judgment of the U.S. courts. In response, the D.C. Circuit found this argument to be "plausible."<sup>177</sup>

### *C. The Proceedings on Remand*

After prevailing before the court of appeals, the case was remanded back to Judge Lamberth.<sup>178</sup> In mid-December 2008, Chabad learned that a few manuscripts from the collection were apparently being offered for sale in Israel.<sup>179</sup> Chabad promptly

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173. *Id.* at 951-53 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

174. *Id.* at 938.

175. *Id.* at 952.

176. *Id.* at 953 (citing 22 U.S.C. § 2370(e)(2) (2006)).

177. *Id.* at 951.

178. *Id.* at 935.

179. Preliminary Injunction Order at 2, *Agudas Chasidei Chabad v. Russian Fed'n*, No. 1:05-CV-01548-RCL (D.D.C. 2009).



sought and obtained a preliminary injunction from Judge Lamberth requiring the Russian defendants to secure, protect, and preserve the entire collection until entry of a final judgment in the case.<sup>180</sup>

On March 13, 2009, over four years after the filing of the lawsuit, Russia filed an answer to Chabad's original complaint. In the answer, Russia alleged that

[b]ecause Plaintiff fails to identify the specific materials it alleges to constitute the "Library", "Schneersohn Library" or "Lubavitch Library", the Defendants are without knowledge or information sufficient to form a belief as to whether the materials alleged by Plaintiff to be the "Library" are coincident with the materials at the RSL.<sup>181</sup>

Russia also admitted that the RSMA is in "physical possession of certain materials that may constitute a portion of documents allegedly maintained by Rabbi Joseph Isaac Schneersohn," but also alleged that Chabad "fail[ed] to identify the specific materials allegedly constituting the 'Archive' or the portions of that alleged 'Archive' that are in the possession of the RSMA."<sup>182</sup> Russia likewise admitted "materials Plaintiff alleges to be part of what Plaintiff defines as the Archive were included with materials transported by the Soviet Union after World War II and were and remain stored at the RSMA."<sup>183</sup>

After Russia filed its answer, it pulled another surprise. On June 26, 2009, Russia and its fellow sovereign defendants filed a statement with the district court indicating that they will no longer participate in the action.<sup>184</sup> According to the filing, "[t]he Russian Federation views any continued defense before this Court and, indeed, any participation in this litigation as fundamentally

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180. *Id.* at 3.

181. Amended Answer at 4, *Agudas Chasidei Chabad v. Russian Fed'n*, No. 1:05-CV-01548-RCL (D.D.C. filed Mar. 13, 2009).

182. *Id.*

183. *Id.* at 6.

184. Earlier, in January 2009, Russia's counsel Squire, Sanders & Dempsey filed a motion with Judge Lamberth to withdraw as counsel in the case, citing a breakdown of communication with their clients and a failure to be paid. *See* Motion to Withdraw as Counsel, at 1-3 *Agudas Chasidei Chabad v. Russian Fed'n*, No. 1:05-CV-01548-RCL (D.D.C. Jan. 16, 2009). In March 2009, the firm withdrew its request, noting that it had "reached an accommodation" with their client. Jordan Weissmann, *Battle for the Books: Chabad Jews Keep on Pushing for Library Left in Russia*, THE NAT'L L.J., July 6, 2009, at 24.

incompatible with its rights as a sovereign nation.”<sup>185</sup> Having lost on appeal and forced to litigate the case in the United States, it appears that Russia has now decided to play the “sore loser” and withdraw from the proceedings.

#### V. THE CASE PRECEDENT AND A PROPOSAL FOR HANDLING FSIA CASES IN FEDERAL COURTS

In *Chabad v. Russian Federation*, the Court of Appeals for the District of Columbia Circuit clarified the standard for ruling on a motion to dismiss for lack of subject matter jurisdiction under the “takings” exception to the FSIA, 28 U.S.C. § 1605(a)(3). Under that immunity exception, a foreign State (including its agencies, instrumentalities, and political subdivisions) is not immune from suit in U.S. federal courts in cases in which:

(a) rights in property taken in violation of international law are in issue and (b)(1) that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or (2) that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.<sup>186</sup>

With respect to the element “A” of the “takings” exception, the Court of Appeals held that this element

does not involve jurisdictional facts, but rather concerns what the plaintiff has put “in issue,” effectively requiring that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff’s rights in property (or those of its predecessor in title) in violation of international law.<sup>187</sup>

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185. Statement of Defendants the Russian Federation, Russian Ministry of Culture & Mass Communication, Russian State Library & Russian State Military Archive with Respect to Future Participation at 2, *Agudas Chasidei Chabad v. Russian Fed’n*, No. 1:05-CV-01548-RCL (D.D.C. June 26, 2009) [hereinafter Statement of Defendants]; see also Weissmann, *supra* note 184, at 24 (discussing the probable political motivations behind Russia’s litigation tactics).

186. 28 U.S.C. § 1605(a)(3) (2006).

187. *Agudas Chasidei Chabad v. Russian Fed’n*, 528 F.3d 934, 941 (D.C. Cir. 2008) (footnote omitted).

If the plaintiff alleges such a claim, there is “typically” jurisdiction “unless the claim is ‘immaterial and made solely for the purpose of obtaining jurisdiction or . . . [is] wholly insubstantial and frivolous,’ i.e., the general test for federal-question jurisdiction.”<sup>188</sup> Thus, by asserting a substantial and non-frivolous claim, the plaintiff can satisfy this jurisdictional element at the pleading stage without the need for discovery and factual findings.

The Court of Appeals, however, set a different standard with respect to the “B” element of Section 1605(a)(3) concerning the “commercial activity” of the defendant at the time of filing of suit. The Court of Appeals held that “[t]he alternative ‘commercial activity’ requirements (‘B’) are purely factual predicates independent of the plaintiff’s claim, and must (unless waived []) be resolved in the plaintiff’s favor before the suit can proceed.”<sup>189</sup> Because the “commercial activity” element is a factual predicate, should there be a challenge to the court’s subject matter jurisdiction, the parties are likely to skirmish on jurisdictional discovery issues pertaining to whether the defendants have in fact engaged in “commercial activity” within the meaning of the FSIA. Procedural disputes between the parties could include whether the defendants must provide any initial disclosures under Federal Rule of Civil Procedure (“FRCP”) Rule 26 prior to the resolution of the motion to dismiss, as well as the necessity for, scope, and timing of any jurisdictional discovery.<sup>190</sup>

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188. *Id.* at 940.

189. *Id.* at 941.

190. *See, e.g.,* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992) (holding that where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed); *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 918 (6th Cir. 1986) (stating that a party must be given “ample opportunity to secure and present evidence relevant to the existence of jurisdiction”); *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977) (explaining that discovery should ordinarily be granted “where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary”); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) (“A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat jurisdiction of a federal court by withholding information on its contacts with the forum.”); *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 448-49 (D.C. Cir. 1990) (remanding for further fact-finding and discovery because the dismissal of the action for lack of subject matter and personal jurisdiction was premature); *Greenpeace, Inc. v. France*, 946 F. Supp. 773, 789 (C.D. Cal. 1996) (“It is an abuse of discretion to dismiss for lack of subject matter jurisdiction without giving plaintiff reasonable opportunity, if requested, to conduct discovery for this purpose.”).

On the other hand, the practical problems of conducting discovery involving depositions of foreign citizens who may not care about our laws (i.e., perjury), the expense of translating documents, and the unfortunate “hide-and-seek” discovery tactics that have been known to occur in litigation exist as well. For example, in *Chabad v. Russian Federation*, the RSMA and RSL provided declarations in support of their motion to dismiss which *unequivocally* stated that each of these foreign state agencies were not engaged in *any* commercial activities in the United States.<sup>191</sup> To show that the truth was otherwise, Chabad was forced to conduct jurisdictional discovery, which included serving numerous subpoenas on third parties, requests for production, interrogatories, and other written discovery on each of the defendants, and taking depositions of Russian officials by video-link from Los Angeles to Moscow.<sup>192</sup> Although Chabad ultimately prevailed in proving that the defendants were indeed engaged in commercial activities in the United States, in stark contradiction to the sworn declarations by defendants’ representatives stating otherwise, it took *four years* for the truth to come out and for the overworked federal district and appellate courts to resolve the defendants’ motion to dismiss. Russia’s gamesmanship imposed unnecessary attorney’s fees and costs on the plaintiff, a non-profit religious organization seeking to recover its sacred manuscripts and books.

Where a plaintiff sues a foreign state there is a likelihood that the foreign state defendants will have vast monetary resources to engage in protracted, hard-fought litigation in the U.S. courts, not unlike what the tobacco companies did in the 1980s and 1990s.<sup>193</sup> Although our courts must be careful not to burden foreign states with litigation costs if they are immune from suit, the court system must also consider that a plaintiff bringing claims under Section 1605(a)(3) could be a victim of genocide or other mass atrocities, deprived of life savings and family. Or, as is the case here, the

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191. The General Director of the RSL, Victor V. Fedorov, filed a declaration stating that “[t]he RSL does not engage in any commercial activities in the United States.” Joint Appendix, *supra* note 14, at 1:0097. Similarly, the Director of the RSMA, Vladimir N. Kouzelenkov, filed a declaration stating that “[t]he RSMA does not engage in any commercial activities in the United States.” *Id.* at 1:0177.

192. *Id.* at 1:0243.

193. See Suzanne Thorpe, *Litigation Against U.S. Tobacco Companies*, 28 REF. SERV. REV. 24-30 (2000), available at [www.emeraldinsight.com/10.1108/00907320010313759](http://www.emeraldinsight.com/10.1108/00907320010313759).

plaintiff happens to be a non-profit religious entity that depends on donations to provide religious and other services to local communities throughout the world. Such a disparity in resources coupled with the high cost of litigation could allow foreign state defendants to avoid lawsuits altogether (lawyers may be unwilling to take these difficult cases on contingency fee), or force distraught plaintiffs to abandon claims or enter into unfavorable settlements due to the time and high expense of pursuing the action.

Federal courts can address this situation at the outset of the litigation by using their authority under the FRCP to order foreign state defendants who assert challenges for lack of subject matter jurisdiction to immediately provide initial disclosures as to whether they are engaged in commercial activities within the meaning of the FSIA. Specifically, this article proposes that where a plaintiff brings a claim under the “takings” exception to the FSIA, and the foreign state defendants indicate that they intend to assert immunity from suit for lack of subject matter jurisdiction, the federal district court should exercise its authority under FRCP 16 and 26(a) to order that each of the defendants must, without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that evidence, reflect, or relate to the “commercial activity” of any defendants within the meaning of 28 U.S.C. § 1605(a)(3);

(2) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that any of the defendants have in their possession, custody, or control that evidence, reflect, or relate to the “commercial activity” of any defendants within the meaning of 28 U.S.C. § 1605(a)(3).<sup>194</sup>

This mandatory disclosure would simplify the issues and eliminate frivolous motions to dismiss challenging the court’s subject matter jurisdiction.

Should a defendant fail to comply with the court-ordered modified initial disclosure requirement by providing incomplete or incorrect disclosures (forcing the plaintiff to incur unnecessary attorney’s fees to prove the truth of the matter), the district court would have the power to sanction the defendant pursuant to

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194. See FED. R. CIV. P. 16, 26(a)(1)(A)(i)-(ii).

FRCP 26(g)(3) and FRCP 37(a)(3)(A).<sup>195</sup>

By crafting a Scheduling Order under FRCP 16 and 26(a) that requires the foreign state defendants to provide “complete and correct” initial disclosures as to their commercial activities within the meaning of the FSIA, which are backed by sanctions and the threat of contempt, federal courts would be interpreting and construing the FRCP in a manner which secures “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>196</sup>

Foreign sovereign defendants who cavalierly assert that they do not engage in commercial activities in the United States in order to defeat a motion to dismiss under the FSIA—and are then proven otherwise—will then bear the costs of the delays imposed by their less than truthful statements. The threat of such sanctions, moreover, will provide an incentive for such defendants to diligently search for any U.S.-based commercial activities they may be engaged in, and to reveal such activities, lest they be punished for their failure to do so.

## VI. CONCLUSION

As of this writing, the suit of *Chabad v. Russian Federation* is back with Judge Lamberth, awaiting the entry of a default judgment.<sup>197</sup> The appellate ruling awarded the Chabad community a significant legal victory in its almost century-long fight to recover missing parts of its sacred collection by giving the “green light” for the dispute to be heard and resolved by an American judge.

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195. *Id.* at 26(g)(3) (“If a certification [of an initial disclosure] violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.”); 37(a)(3)(A) (“If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.”).

196. FED. R. CIV. P. 1. This proposed procedure is similar to CAL. CIV. PROC. CODE § 2033.420(a) (2009), which provides:

[i]f a party fails to admit [to] . . . the truth of any matter . . . [in response to a request for admission], and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the [responding] party . . . to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees.

CAL. CIV. PROC. CODE § 2033.420(a) (West 2009).

197. *See* Statement of Defendants, *supra* note 185.

Should Chabad obtain a default judgment, it must then proceed to enforce the judgment so as to secure the return of the sacred books and manuscripts at issue. This begins another stage in the litigation process, since enforcement of American judgments against a foreign state (the Russian Federation), its political subdivisions (the Ministry of Culture), and its agencies and instrumentalities (the RSL and the RSMA) is governed, as noted above, by another set of provisions of the FSIA.<sup>198</sup> A judgment that allows Chabad to seize defendants' *other* property in the United States may conclusively convince Russia to give Chabad what it ultimately seeks: the return to Chabad of the Library and the Archive.

For Chabad, the appellate ruling in *Chabad v. Russian Federation* moves it a bit closer to reaching its ultimate goal of retrieval of the Library and Archive. For victims of genocide and other massive human rights abuses, the *Chabad* decision provides an important signal that American courts are indeed able, through the mechanism of civil litigation, to provide a measure of justice to such victims and their heirs, at least with regard to material losses suffered from such atrocities.

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198. See 28 U.S.C. §§ 1609-10 (2006). These provisions set out the conditions by which Chabad can attach Russian assets found in the United States to aid in the execution of a judgment rendered pursuant to the "takings" exception of the FSIA.