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VIA ECF

February 28, 2022

The Honorable Sarah Netburn
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

**Re: *Ukraine v. PAO Tatneft*, No. 1:21-mc-00376-JGK-SN
Application for leave to move for reconsideration of the Court’s Order of July 19, 2021
regarding Tatneft’s wave-one subpoenas**

Dear Judge Netburn:

Pursuant to the Court’s Minute Order of February 17, 2022, Ukraine seeks leave to move for reconsideration of the Court’s Order of July 19, 2021, denying Ukraine’s motion to quash the subpoenas in Case No. 21-mc-376 (the “wave-one subpoenas”). New evidence that became available since the filing of Ukraine’s motion to quash wave-one subpoenas and the dramatically changed circumstances affecting Ukraine warrant reconsideration to prevent manifest injustice.

I. Recent events: the Russian invasion of Ukraine

On February 24, 2022, Russia began a full-scale invasion of Ukraine, and Ukraine has been at war with Russia since. *See* ECF 27 (“Second Markarova Decl.”) ¶¶ 30-32.¹ In the words of President Biden, “The Russian military has begun a brutal assault on the people of Ukraine without provocation, without justification, without necessity. This is a premeditated attack. Vladimir Putin has been planning this for months, as I’ve been — as we’ve been saying all along. He moved more than 175,000 troops, military equipment into positions along the Ukrainian border. . . . We saw a flagrant violation of international law in attempting to unilaterally create two new so-called republics on sovereign Ukrainian territory. And at the very moment that the United Nations Security Council was meeting to stand up for Ukraine’s sovereignty to stave off invasion, Putin declared his war. Within moments — moments, missile strikes began to fall on historic cities across Ukraine. Then came in the air raids, followed by tanks and troops rolling in.”¹

In the words of Ukraine’s Ambassador to the United States, Oksana Markarova, “Ukraine is facing and countering an existential threat to its sovereignty, territorial integrity, statehood and national identity. The world is facing and countering a brutal affront to the very principles of freedom and self-determination on which the democratic order is based. Second Markarova Decl. ¶ 48.

On February 24, 2022, Ukrainian President Volodymyr Zelenskiy and the Verkhovna Rada introduced a 30-day nationwide state of emergency, extendable for another 30 days, which was rapidly transformed into martial law. *Id.*

¹ “DDC Dkt.” citations are to the docket in D.C. District Court case 17-cv-582. “Dkt.” citations are to the docket in Southern District of New York case 21-mc-376. “ECF” citations are to the docket in Southern District of New York case 22-mc-36.

Heated combat is ongoing along Ukraine's Southern, Eastern and Northern borders with Russia and Belarus.ⁱⁱ Ardent fighting is ongoing on the streets of the nation's capital, Kyiv.ⁱⁱⁱ Russian missile strikes target the country's strategic infrastructure, such as a hydropower station and a water reservoir, a fuel reservoir, gas pipelines, etc.^{iv} The Russian military seized the decommissioned Chernobyl nuclear power station and nuclear waste depository 58 miles away from Kyiv, overcoming vigorous resistance.^v After prolonged fighting, the Russian military took over an airport 6 miles away from Kyiv, which can be used to fly in Russian paratroopers to attack the nation's capital.^{vi} Bridges around the nation's capital are being exploded to impede the advance of Russian tanks and armored vehicles onto the capital.^{vii} Residents of Kyiv and other cities have been spending night after night in bomb shelters and the metro, which has stopped transporting passengers and is functioning as a bomb shelter.^{viii}

Cyber-attacks are continuing and intensifying. On February 15, 2022, Ukraine suffered the largest cyber-attack in its history, blocking access to the websites of Ukrainian defense agencies and banks. Second Markarova Decl. ¶ 19. More recently it was reported that cyber-attacks may be used as a larger instrument of warfare, impacting the power grid and telecommunications systems, to paralyze the Ukrainian government and to threaten the ordinary life of Ukrainian citizens. *Id.* ¶ 49. In recent days, various government websites and servers have been hacked and the government's cyber security is impaired. *Id.*

Before the invasion, thousands of Russian informants arrived in Ukraine.^{ix} They enable Russia's aggression by putting fluorescent-paint crosses or other visible marks on strategic infrastructure, bridges, towers, roads, to correct the trajectory of Russia's missiles and to guide the advance of Russia's tanks and armored vehicles.^x The Ukrainian armed forces and citizens are asked to remove and cover up the marks and apprehend Russia's informants.^{xi} A few of them have already been arrested and detained; many others are running loose around the country and facilitating Russian aggression.^{xii}

Two days before the Russian invasion of Ukraine, on February 22, 2022, the United States informed the D.C. District Court in parallel proceedings that it is considering filing a Statement of Interest to address the foreign policy implications of Tatneft's requested discovery. DDC Dkt. 99. Even before the Russian invasion, the United States highlighted Ukraine's concerns that "Tatneft's document requests are overbroad and not reasonably calculated to lead to the discovery of attachable property in the United States to satisfy the judgment of this Court" and that "any information provided to Tatneft would be shared with the Russian Federation government, pointing out that the Chairman of Tatneft's Board is the Head of Tatarstan, a political subdivision of the Russian Federation, and that Tatarstan retains a golden share interest in the company with a veto power over important decisions" and that "sharing such information with the Russian Federation would, according to Ukraine, undermine its national security and economic interests at a particularly sensitive time." DDC Dkt. 99 at 1-2. In the days preceding the Russian invasion, the United States also noted that "events on the ground are moving quickly and look extremely threatening to Ukraine's national security." *Id.* at 2.

Now that Ukraine is at war with Russia, there are even more acute reasons to reconsider the ruling on Ukraine's motion to quash wave-one subpoenas in light of the new evidence and dramatically changed circumstances, and to re-evaluate whether Ukraine's national security interests require that the subpoenas be quashed in their entirety or substantially narrowed.

II. Legal standard

Motions for reconsideration are governed by S.D.N.Y. Local Rule 6.3. “The standards governing a motion for reconsideration under Local Civil Rule 6.3 are the same as those under Rule 59(e) of the Federal Rules of Civil Procedure.” *In re Terrorist Attacks on Sept. 11, 2001*, 2020 WL 8611151, at *1 (S.D.N.Y. Oct. 2, 2020). As this Court has previously held, “[t]he decision to grant a motion for reconsideration is within the sound discretion of the district court.” *In re Terrorist Attacks*, 2020 WL 8611151, at *1 (citing *Aczel v. Labonia*, 584 F.3d 52, 61 (2d Cir. 2009)). Appropriate grounds for reconsideration include “an intervening change of controlling law, ***the availability of new evidence***, or the need to correct a clear error ***or prevent manifest injustice***.” *Id.* (citing *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 108 (2d Cir. 2013)) (emphasis added).

The availability of new evidence, the dramatically changed circumstances and the compelling need to prevent manifest injustice are acutely present here.

A. **New evidence and new circumstances**

New evidence of Ukraine’s interest in nondisclosure of sensitive information is pouring in day by day as the Russian military continues to advance into Ukraine, destroy Ukraine’s strategic infrastructure, diminish Ukraine’s land-to-air missile defense installation, seize Ukraine’s airports, and seize Ukraine’s nuclear and other power plants.

The Second Declaration of Ukraine’s Ambassador to the United States, Oksana Markarova, filed today, discusses the ongoing Russian invasion and its impact on the discovery sought by Tatneft. Ambassador Markarova emphasizes that “[d]isclosure of sensitive information to an entity with close ties to Russia—especially information pertaining to military defense and national infrastructure—poses an even more acute threat to Ukraine’s welfare now that Russia has sent a large invasion force across the territorial borders of Ukraine. Now, even more so than before, it would be unconscionable for sensitive information to end up in the wrong hands.” Second Markarova Decl. ¶ 50.

Four additional declarations have become available since the filing of Ukraine’s motion to quash wave-one subpoenas on March 26, 2021:

Ukraine’s Ambassador to the United States, Oksana Markarova, has explained in her First Declaration why “[d]isclosure of the requested information would be extremely harmful for Ukraine’s national security interests,” especially “when the current geopolitical situation has been aggravating.” Dkt. 36 ¶ 11. She has warned that Tatneft’s discovery appears to be a “mere pretext” motivated by a “far-reaching interstate agenda.” Dkt. 36 ¶ 19.

Ukraine’s Minister of Defense, Oleksii Reznikov, has determined that “[s]hould the requested information in response to PAO Tatneft’s discovery requests and subpoenas fall into the hands of an adversary . . . it will no doubt be used to evaluate Ukraine’s defense capabilities with the view to identify vulnerabilities, to plan offensive measures that account for Ukraine’s defense capabilities and exploit its weaknesses, and to interfere with Ukraine’s peaceful efforts to sustain its interests in the sphere of national defense and territorial integrity, including by identifying, intimidating, and harming companies and individuals, including soldiers, intelligence agents, and informants, with important roles in Ukraine’s national defense.” Dkt. 37 ¶ 10. With regard to the

proof of leakage of sensitive information to Russia, he noted that “it is extraordinarily difficult to identify the source of a leak and frequently it is not possible to identify the source at all. It is difficult to prove forensically how common it is for the Russian Federation to obtain information from a Russian company or a U.S. law firm using positive or negative incentives, or cyber-attacks. In my field, security decisions must be made based on the information that is available. Where significant volumes of highly sensitive information, the disclosure of which, whether inadvertent or intentional, will entail extremely serious consequences for Ukraine's national security and defense, is concentrated in one entity or in the hands of a few persons—especially if they are outside of Ukraine and when such concentration of information is well known to the hostile state or states—the risk of leakage elevates exponentially.” *Id.* ¶ 16. He further noted that, “[b]ased on the evidence and information that is available to me as the Minister of Defense of Ukraine and member of the Military Cabinet of the National Security and Defense Council of Ukraine, there is a very practical and realistic threat that information provided to Tatneft, or even to Tatneft’s outside counsel in the United States, will find its way into the hands of the Russian Federation and where it will be used to undermine Ukraine national security and defense.” ECF ¶ 17. This new evidence should be viewed against the backdrop of the D.C. Circuit’s prior recognition of Tatneft’s “close ties to the Russian government.” *Tatneft v. Ukraine*, 21 F.4th 829, 832 (D.C. Cir. 2021).

The Governor of the National Bank of Ukraine, Kyrylo Shevchenko, has stated that Tatneft’s demands fit into and are part of “a broader strategy of economic, political and military aggression by the Russian Federation against Ukraine.” ECF 5 ¶ 34. He has detailed how the information requested by Tatneft could be used to interfere with access to the capital markets by Ukraine and third parties in “strategic fields” of the economy like energy and infrastructure, to undermine the stability of the Ukrainian hryvna, and to otherwise interfere with Ukraine’s economy. *Id.* ¶¶ 24–34. He also expressed his belief that the discovery sought by Tatneft “may open unlimited possibilities for the Russian Federation to use such information in its recovery process in parallel proceedings against Ukraine, including the *Law Debenture Trust Corporation Plc v. Ukraine*, and give additional leverage to the Russian Federation, and for that matter any other third party, over performance by Ukraine of its sovereign debt obligations.” *Id.* ¶ 38.

The Chief Compliance Officer at JSC State Savings Bank of Ukraine, Iryna Mudra, has pointed out that “Tatneft’s overbroad definition of Ukraine creates an absurd situation where the Ministry of Justice of Ukraine is asked to hand over documents and information about bank accounts and transactional information of the Ukrainian banks themselves, and of various Ukrainian enterprises, without any limit. Essentially, Tatneft wants the responsible Ministry to hand over bank accounts and transactional information for the most strategically important segment of the country’s economy and defense. However, such disclosure is prohibited by Ukrainian secrecy laws[.]” Dkt. 35 ¶ 24.

This Court has previously recognized declarations as new evidence providing ground for reconsideration. *In re Terrorist Attacks*, 2020 WL 8611151, at *2. So too here.

It was not possible for Ukraine to assemble these declarations when it filed its motion to quash wave-one subpoenas on March 26, 2021, *four days* after being notified of the subpoenas on March 22, 2021. Prompt action was required to prevent irreparable harm to Ukraine, which could have resulted from disclosure of sensitive information by the third-party financial institutions in advance of the deadlines imposed by the subpoenas. Back in March 2021, it was not possible to obtain these declarations before the compliance deadlines, as it required an inter-agency consultation process. As Ukraine has previously told an international tribunal in the parallel *Tatarstan v. Ukraine* arbitration, Tatneft strategically timed its subpoenas so as to

interfere with Ukraine’s preparation for a large-scale evidentiary hearing and to overextend its resources. *See* Exs. A, B.

Concerning the leakage of sensitive information from Tatneft and its representatives to Russia, new evidence emerged in parallel proceedings in *Tatarstan v. Ukraine* in late 2021, confirming that the same individual wears multiple hats and is, at the same time, not only advisor to Tatneft’s CEO, a representative of Tatneft and Tatarstan in various legal disputes, and an Advisor on the Council on International Law of the Ministry of Justice of the Russian Federation, but also an advisor to “the client,” meaning a state organ of the Republic of Tatarstan within the Russian Federation. Dkt. 34-1; *see also* Dkt. 34 at 2–3.

In light of this new evidence and dramatically changed circumstances, the Court should reconsider its ruling on Ukraine’s motion to quash wave-one subpoenas and either quash the subpoenas in their entirety or substantially narrow them to information reasonably calculated to aid execution of Tatneft’s judgment, without undermining Ukraine’s national security and the welfare of its people.

B. Manifest injustice

The “need . . . to prevent manifest injustice” is an independent ground for granting a motion for reconsideration. *In re Terrorist Attacks*, 2020 WL 8611151, at *1 (citing *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013)). Manifest injustice would inevitably result should the Court fail to reconsider its order denying Ukraine’s motion to quash the wave-one subpoenas. Given the outbreak of war, the court must determine how much disclosure is reasonably necessary to aid execution of Tatneft’s judgment, and what kind of disclosure would endanger Ukraine’s national security and the welfare of its people. “Broad” or “sweeping” discovery may be the norm at time of peace, but it would be excessive, disproportionate and manifestly unjust at times of war and the aggravating humanitarian crisis.

III. Timing

While Local Rule 6.3 generally requires a motion for reconsideration to be filed within 14 days, this time “may be extended based on ‘newly-discovered evidence.’” *In re Terrorist Attacks*, 2020 WL 8611151, at *1; *see also* *Vicuna v. O.P. Schuman & Sons, Inc.*, 298 F. Supp. 3d 419, 433 (E.D.N.Y. 2017) (reconsidering a year and a half after initial order following the discovery of new evidence). Here, new evidence emerged in late January 2022 with the aggravation of the geopolitical situation, and then further evidence emerged after February 24, 2022 with the Russian invasion of Ukraine.

For these reasons, Ukraine respectfully requests the Court to reconsider its ruling on Ukraine’s motion to quash wave-one subpoenas when it reassures itself of its jurisdiction.

Respectfully submitted,

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cc: (via ECF) all counsel of record

- ⁱ Remarks by President Biden on Russia’s Unprovoked and Unjustified Attack on Ukraine (February 24, 2022), *available at* <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/24/remarks-by-president-biden-on-russias-unprovoked-and-unjustified-attack-on-ukraine/>.
- ⁱⁱ Janet Loehrke *et al.*, “Mapping and Tracking Russia’s Invasion of Ukraine”, USA Today (February 25, 2022) *available at* <https://eu.usatoday.com/in-depth/graphics/2022/02/24/ukraine-invasion-russia-attack-map-guide/6925181001/>; Emma Graham-Harrison *et al.*, “Ukraine Fights for Its Survival as Putin Presses Forward”, The Guardian (February 24, 2022), *available at* <https://www.theguardian.com/world/2022/feb/24/ukraine-fights-for-its-survival-as-putin-presses-forward>; “Street Fighting Reported in Kyiv as Civilians Are Urged to Seek Shelter,” CNBC (February 26, 2022), *available at* <https://www.cnn.com/2022/02/26/street-fighting-begins-in-kyiv-as-civilians-are-urged-to-seek-shelter.html>.
- ⁱⁱⁱ “Street Fighting Reported in Kyiv as Civilians Are Urged to Seek Shelter,” CNBC (February 26, 2022), *available at* <https://www.cnn.com/2022/02/26/street-fighting-begins-in-kyiv-as-civilians-are-urged-to-seek-shelter.html>; Yuras Karmanau *et al.*, “Ukrainians Brace for Another Night of Street Fighting in Kyiv,” The Huffington Post (February 26, 2022), *available at* https://www.huffpost.com/entry/kyiv-street-fighting-russia-ukraine_n_6219b5c3e4b0f800ce219692.
- ^{iv} Ukraine Says Russian Forces Blew up Gas Pipeline In Country’s Second-Largest City,” CBC News (February 26, 2022), *available at* <https://www.cbc.ca/news/world/ukraine-russia-attack-feb26-2022-1.6365758>; Yuras Karmanau *et al.*, “Russia Hits Ukraine Fuel Supplies, Airfields in New Attacks,” The Huffington Post (February 26, 2022), *available at* https://www.huffpost.com/entry/russia-ukraine-invasion-civilians_n_621a2ac9e4b06e1cc58ff766; Ukrainian News Agency, “Air Defense Shoots Down Russian Missile That Flew in Direction of Dam of Kyiv Reservoir - Infrastructure Ministry” (February 26, 2022), *available at* <https://ukranews.com/en/news/837013-air-defense-shoots-down-russian-missile-that-flew-in-direction-of-dam-of-kyiv-reservoir>; Kira Taylor, “Ukraine’s Energy System Coping but Risks Major Damage as War Continues” (February 26, 2022), *available at* <https://www.euractiv.com/section/europe-s-east/news/ukraines-energy-system-coping-but-risks-major-damage-as-war-continues/>.
- ^v Mary Kekatos, “Seizure of Chernobyl by Russian Troops Sparks Health Concerns for People Near the Nuclear Plant”, ABC News (February 26, 2022) (*available at* <https://abcnews.go.com/International/seizure-chernobyl-russian-troops-sparks-health-concerns-people/story?id=83094054>).
- ^{vi} “Ukraine Says Russian Helicopters, Aircraft Dispatch Paratroopers to Hostomel Airport,” Reuters (February 24, 2022), *available at* <https://www.reuters.com/article/ukraine-crisis-russia-paratroopers-hosto/ukraine-says-russian-helicopters-aircraft-dispatch-paratroopers-to-hostomel-airport-idUSR4N2UT04T>; *see also* “Ukraine’s Armed Forces Regain Control of Hostomel Airport – Arestovych,” Ukrinform (February 24, 2022), *available at* <https://www.ukrinform.net/rubric-ato/3412045-ukraines-armed-forces-regain-control-of-hostomel-airport-arestovych.html>; *see also* Abbie Shull, “Ukrainian and Russian Forces Have Been Fighting for Hours over a Critical Airfield Just Outside Kyiv,” Business Insider (February 24, 2022), *available at* <https://www.businessinsider.com/ukraine-russia-fight-over-airfield-outside-kyiv-2022-2?r=US&IR=T>; *see also* “Ukraine conflict: Kyiv braces for Russian assault,” BBC (February 25, 2022), *available at* <https://www.bbc.com/news/world-europe-60513116>.
- ^{vii} “Ukrainian Serviceman Skakun Blows up Henichesk Bridge to Stop Advance of Tank Column,” Ukrinform (February 25, 2022), *available at* <https://www.ukrinform.net/rubric-ato/3412500-ukrainian-serviceman-skakun-blows-up-henichesk-bridge-to-stop-advance-of-tank-column.html>; Brendan Cole, “Ukraine Forces Blow up Bridge near Kyiv to Halt Russian Tank Advance”, Newsweek (February 25, 2022), *available at* <https://www.newsweek.com/russia-ukraine-kyiv-bridge-blown-explosion-invasion-tank-advance-1682560>; Jack Newman *et al.*, “Ukrainian Troops Are Engaged in Fierce Fighting with Putin’s Tanks 20 Miles Outside of Kyiv and Blow up Three Bridges to Halt Their Advance after Russian Jet Was Shot Down over Capital: Zelensky Rages at Biden for Leaving the Country ‘alone,’” Daily Mail (February 25, 2022), *available at* <https://www.dailymail.co.uk/news/article-10549113/Kiev-fall-weekend-troops-encircle-capital-taking-Chernobyl-despite-EU-sanctions.html>.
- ^{viii} Leo Sands, “Ukraine: Kyiv Residents Spend Night Sheltering in Basements and Metro Stations,” BBC (February 26, 2022), *available at* <https://www.bbc.com/news/world-europe-60522450>; *see* The Guardian, “Fear, Darkness and Newborn Babies: Inside Ukraine’s Underground Shelters” (February 26, 2022), *available at* <https://www.theguardian.com/world/2022/feb/26/fear-darkness-and-newborn-babies-inside-ukraine-underground-shelters>; Maya Oppenheim, “‘Everyone Here Is Scared’: Inside the Bomb Shelters Ukrainians Fear Will Collapse,” Independent (February 26, 2022), *available at* <https://www.independent.co.uk/news/world/europe/ukraine-bomb-shelters-ukraine-b2022620.html>.
- ^{ix} Radio Svoboda, “Rada Is Asking Real Estate Agents to Provide the Information on Tenants Who Can Be ‘Sleeping’ Diversionsists” (Feb. 26, 2022) (*available at* <https://www.radiosvoboda.org/a/news-rada-prosyt-rieltoriv-nadavaty-dani-pro-orendariv/31725267.html>); Olena Roschina, “There Were Several Clashes With Diversionsists This Night in Kiev, The Main Battles Are Taking Place Outside the City”, Ukrainska Pravda (Feb. 27, 2022) (*available at* <https://www.pravda.com.ua/news/2022/02/27/7326366/>).
- ^x Radio Svoboda, “Enforcement Officers Are Detaining a Large Number of Diversionsists Who Leave Marks on Houses and Streets” (Feb. 27, 2022) (*available at* <https://www.radiosvoboda.org/a/news-sylovky-masovo-zatrymyut-dyversantiv-shcho-zalyshayut-mitky-nabudynkakh-ta-vulytyakh/31725404.html>); TSN “New Marks of Occupants: Ukrainians are asked to take off fluorescent stripes placed on trees” (Feb. 26, 2022) (*available at* <https://tsn.ua/ukrayina/novi-mitki-okupantiv-ukrayinciv-prosyat-zrivati-strichki-z-derev-scho-svityatsya-1988785.html>).
- ^{xi} Ukrinform, “Emergency Workers Informed How to Detect the Marks of Diversionsists” (Feb. 26, 2022) (*available at* <https://www.ukrinform.ua/rubric-ato/3413716-ratuvalniki-rozpovili-ak-viavlati-mitki-diversantiv.html>).
- ^{xii} Radio Svoboda, “Enforcement Officers Are Detaining a Large Number Of Diversionsists Who Leave Marks on Houses and Streets” (Feb. 27, 2022) (*available at* <https://www.radiosvoboda.org/a/news-sylovky-masovo-zatrymyut-dyversantiv-shcho-zalyshayut-mitky-nabudynkakh-ta-vulytyakh/31725404.html>); TSN “Odessa Region is ‘Stuffed’ With Russian Diversionsists – military men are saying” (Feb. 28, 2022) (*available at* <https://tsn.ua/ukrayina/odeska-oblast-nashpigovana-rosiyskimi-diversantami-viyskovyi-1991788.html>).