United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7160 **September Term, 2020**
FILED ON: JUNE 18, 2021

ALEXANDER KHOCHINSKY,
APPELLANT

v.

REPUBLIC OF POLAND, A FOREIGN STATE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-01532)

Before: SRINIVASAN, *Chief Judge*, RAO, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's grant of Poland's motion to dismiss for lack of jurisdiction be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: June 18, 2021

Opinion for the court filed by Chief Judge Srinivasan.

App. 3

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 9, 2020 Decided June 18, 2021

No. 19-7160

ALEXANDER KHOCHINSKY,
APPELLANT

v.

REPUBLIC OF POLAND, A FOREIGN STATE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-01532)

Nicholas M. O'Donnell argued the cause and filed the briefs for appellant.

Desiree F. Moore argued the cause for appellee. With her on the brief was *George C. Summerfield*. *Jonathan M. Cohen* entered an appearance.

Before: SRINIVASAN, *Chief Judge*, RAO, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the court filed by *Chief Judge* SRINIVASAN.

SRINIVASAN, *Chief Judge*: In 2010, Alexander-Khochinsky, then a Russian foreign national living

in the United States, contacted the Republic of Poland seeking restitution for the loss of his family's land during the Nazi invasion. In an effort to negotiate with Poland for the payment of restitution, Khochinsky offered a painting in his possession that he believed resembled one reported missing by Poland. Poland did not respond to the offer as Khochinsky anticipated. Instead, it sought Khochinsky's extradition from the United States on the ground that he was knowingly in possession of a stolen painting. Poland's extradition attempt ultimately failed.

Khochinsky then brought an action against Poland, alleging that the effort to extradite him was tortious and infringed his rights. The district court dismissed the suit, holding that the Foreign Sovereign Immunities Act gives Poland immunity from Khochinsky's action. We affirm.

I.

On appeal from a dismissal in favor of a foreign sovereign on grounds of sovereign immunity, we assume the unchallenged factual allegations in the complaint to be true. *Simon v. Republic of Hungary*, 812 F.3d 127, 135 (D.C. Cir. 2016).

A.

The story behind Khochinsky's suit traces back to a small town in Poland at the outset of World War II. At the time, Khochinsky's mother, Maria Khochinskaya,

a Polish Jew, lived in the town of Przemysl, Poland, where her family owned property. In 1939, Nazi Germany invaded Poland, prompting the Soviet Union to respond by annexing a portion of Przemysl. The annexation cut the city in half, with Maria's residence falling within the annexed portion.

A few years later, on June 20, 1941, Maria and her grandmother took a trip that saved their lives. That day, a Friday, they traveled east to Lviv (then part of the Soviet Union) to observe the Sabbath with Maria's mother. The next day, Nazi Germany invaded the Soviet half of Przemysl, murdering Maria's relatives who had remained behind. Maria became heir to the family property in Przemysl, and that inheritance passed to Khochinsky upon his mother's death in 1989.

In the 1990s, Khochinsky returned to Przemysl to find that his mother's house had been replaced by a Catholic church. That was a surprise to Khochinsky because his family had never been compensated for the conversion of the property. He initially did not seek restitution from Poland, though, due to his perception that Poland was unreceptive to Holocaust-related restitution claims.

Khochinsky's calculus changed in 2010, when he learned that a painting reported missing from Poland resembled one that he had inherited from his father. When Khochinsky's father died in 1991, Khochinsky inherited *Girl with Dove*, a painting by French rococo master Antoine Pesne. According to Khochinsky's father, the painting had been in Germany before he

acquired it following World War II. As for the painting reported missing by Poland, it had been looted from the Wielkopolskie Museum in Poland by Nazi forces and never recovered.

Khochinsky did not know whether the two paintings were one and the same. Regardless, Khochinsky believed that *Girl with Dove* might serve as a useful bargaining chip in his efforts to obtain restitution from Poland for his family's land. To that end, in 2010, he contacted Poland and offered *Girl with Dove*. A Polish official, indicating an interest in negotiating with Khochinsky, sent an expert to Khochinsky's gallery to examine the painting. The expert determined that *Girl with Dove* was the missing painting but did not share his conclusion with Khochinsky.

Rather than negotiating with Khochinsky, Poland opted to pursue criminal charges against him. In January 2013, a Polish court accused Khochinsky of knowingly and unlawfully purchasing *Girl with Dove*, and Poland issued a "Wanted Person Notice" for his arrest. Later that year, Poland submitted a request to the United States for Khochinsky's extradition. In early 2015, an Assistant United States Attorney filed a petition for a certificate of extraditability in the United States District Court for the Southern District of New York. The next day, Khochinsky was arrested and imprisoned for more than one week. Upon release, Khochinsky was subject to continued house arrest and electric monitoring.

In August 2015, the district court denied the Government's petition for a certificate of extraditability and dismissed the extradition complaint. *In re Extradition of Khochinsky*, 116 F. Supp. 3d 412, 422 (S.D.N.Y. 2015). The court found that "the Government failed to adduce any evidence" that Khochinsky knew *Girl with Dove* was "stolen at the time he acquired it." *Id.* The court thus held that "the Government ha[d] failed to establish probable cause to believe that Khochinsky committed the crime with which he [was] charged." *Id.*

B.

In June 2018, Khochinsky filed suit against Poland in the United States District Court for the District of Columbia. Khochinsky claimed that Poland's unsuccessful—and, in his view, retaliatory—extradition request had caused him "substantial damage." Compl. ¶ 115, J.A. 17. Khochinsky's complaint set out five counts against Poland: (i) a violation of his First Amendment rights by instigating a retaliatory extradition process; (ii) quiet title as to his ownership of *Girl with Dove*; (iii) tortious interference with his business stemming from his imprisonment and house arrest; (iv) aiding and abetting a trespass of his family land; and (v) abuse of process in connection with Poland's conduct in the extradition proceeding.

Poland did not timely answer Khochinsky's complaint or enter any appearance. As a result, on March 12, 2019, the Clerk of the Court entered a default

against Poland. A few weeks later, however, on April 23, 2019, Poland moved to vacate the Clerk's entry of default and to dismiss Khochinsky's claims for lack of jurisdiction based on sovereign immunity. Two days after that, on April 25, Khochinsky moved for entry of default judgment.

The district court took up all three motions at once, granting Poland's two motions and denying Khochinsky's. First, the court found good cause for vacatur of the default, placing particular emphasis on the meritorious nature of Poland's jurisdictional defense. *Khochinsky v. Republic of Poland*, No. 18-cv-1532, 2019 WL 5789740, at *4 (D.D.C. Nov. 6, 2019). Second, and relatedly, the court determined that, under the Foreign Sovereign Immunities Act (FSIA) it lacked jurisdiction over Khochinsky's claims. *Id.* at *4–7. Third, in light of its jurisdictional ruling, the court denied Khochinsky's motion for default judgment as moot. *Id.* at *3 n.1.

II.

On appeal, Khochinsky challenges the district court's dismissal under the FSIA as well as the court's vacatur of the default. We reject those challenges.

A.

We first consider the district court's vacatur of the default, which we review for abuse of discretion. *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 965 (D.C. Cir. 2016). Under Federal Rule of Civil

Procedure 55(a), "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Here, Poland initially failed to respond to Khochinsky's complaint, and the Clerk of Court entered default against Poland. A few weeks later, however, Poland moved to vacate the Clerk's entry of default pursuant to Rule 55(c), which permits a court to "set aside an entry of default for good cause." Fed. R. Civ. P. 55(c).

In exercising its discretion under Rule 55(c), a "district court is supposed to consider 'whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.'" *Mohamad v. Rajoub*, 634 F.3d 604, 606 (D.C. Cir. 2011), *aff'd sub nom. Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012) (quoting *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373 (D.C. Cir. 1980). There is an interest favoring "the resolution of genuine disputes on their merits," such that "all doubts are resolved in favor of the party seeking relief." *Jackson v. Beech*, 636 F.2d 831, 835–36 (D.C. Cir. 1980). And that interest is pronounced in the context of a foreign state desiring to assert defenses based on its sovereign status. *See FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006).

Here, the district court addressed the three primary considerations, finding that Poland's default was the result of confusion rather than willfulness, that Poland's defense of sovereign immunity was meritorious,

and that Khochinsky suffered no prejudice from vacatur of the default. Khochinsky primarily attacks the district court's finding as to a lack of willfulness. But "[e]ven when a default is willful, a district court does not necessarily abuse its discretion by vacating a default when the asserted defense is meritorious and the district court took steps to mitigate any prejudice to the non-defaulting party." *Gilmore*, 843 F.3d at 966. That is the case here.

Khochinsky has no colorable argument as to meritoriousness or prejudice. "[A]llegations are meritorious if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense." *Mohamad*, 634 F.3d at 606 (quoting *Keegel*, 627 F.2d at 374). Poland's defense readily meets that standard, and in fact is ultimately meritorious, as discussed below. As for prejudice, there is no indication of any cognizable prejudice to Khochinsky from the vacatur of a default that had been entered a few weeks beforehand. When given an opportunity to address the point at oral argument, Khochinsky's counsel acknowledged the absence of prejudice. *See* Oral Argument at 23:30-24:00.

We thus find no basis to set aside the vacatur of the default, especially given that the defaulting party is a foreign nation seeking to assert the defense of sovereign immunity. As we have previously noted, "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with nations and undermine the State Department's continuing efforts to encourage foreign sovereigns to resolve disputes within the United States' legal

framework." *FG Hemisphere Associates*, 447 F.3d at 838–39 (quoting *Practical Concepts Inc. v. Republic of Bolivia*, 811 F2d 1543, 1551 n.19 (D.C. Cir. 1987)).

In an effort to bolster his argument that the district court erred in vacating the entry of default, Khochinsky seeks to supplement the record on appeal with evidence of a French court's October 2019 denial of Poland's further efforts to extradite Khochinsky, this time from Paris. That evidence, in Khochinsky's view, bears on whether Poland acted willfully in failing to respond to his complaint in this case. As explained, however, we sustain the district court's vacatur of default regardless of any willfulness on Poland's part. And at any rate, the evidence was not before the district court at the time of its grant of vacatur and thus does not bear on whether the court abused its discretion. *See Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 24 n.9 (D.C. Cir. 1984).

Khochinsky raises one additional ground for setting aside the district court's vacatur of default: the court's decision not to enforce (or even acknowledge) Poland's failure to comply with local rules pertaining to the process for seeking vacatur of a default and to conferring with an opposing party before filing a non-dispositive motion. Noncompliance with those procedural rules, however, did not prejudice Khochinsky in any material way. We thus find no abuse of discretion in the district court's vacatur of the default.

B.

We now turn to the core of the case: Poland's assertion of sovereign immunity from Khochinsky's claims. We review de novo the district court's dismissal of the claims on grounds of sovereign immunity. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 874 (D.C. Cir. 2014).

The FSIA, 28 U.S.C. §§ 1602 *et seq.*, affords the exclusive basis for a United States court to obtain jurisdiction over claims against a foreign state. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The statute first establishes a baseline grant of immunity, 28 U.S.C. § 1604, and then sets out various defined exceptions to that general grant, *id.* §§ 1605–07. The result is that courts lack jurisdiction over a claim against a foreign state unless it "comes within an express exception." *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 196 (D.C. Cir. 2004).

Khochinsky contends that his claims implicate three FSIA exceptions: the implied waiver exception, 28 U.S.C. § 1605(a)(1); the counterclaim exception, *id.* § 1607; and the noncommercial tort exception, *id.* § 1605(a)(5). We agree with the district court that none of those exceptions extends to Khochinsky's claims.

1.

We first consider the implied waiver exception. Under 28 U.S.C. § 1605(a)(1), a foreign state will not be

"immune from [] jurisdiction" in any case "in which the foreign state has waived its immunity either explicitly or by implication." Khochinsky contends that, by requesting his extradition, Poland implicitly waived its sovereign immunity as to all of his claims in this case. We disagree.

The FSIA does not specifically define what will constitute a waiver "by implication," but our circuit has "followed the virtually unanimous precedent construing the implied waiver provision narrowly." *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999) (internal quotation marks and citation omitted). In particular, we "have held that implicit in § 1605(a)(1) is the requirement that the foreign state have *intended* to waive its sovereign immunity." *Id.* (emphasis added); *see Ivanenko v. Yanukovich*, 995 F.3d 232, 239 (D.C. Cir. 2021). And as we have observed, "courts rarely find that a nation has waived its sovereign immunity . . . without strong evidence that this is what the foreign state intended." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985)).

We have found the requisite evidence of a foreign state's intent to qualify as an implied waiver of sovereign immunity "in only three circumstances": (i) the state's "executing a contract containing a choice-of-law clause designating the laws of the United States as applicable"; (ii) the state's "filing a responsive pleading without asserting sovereign immunity"; or (iii) the state's "agreeing to submit a dispute to arbitration in

the United States." *Ivanenko*, 995 F.3d at 239; *see World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 n. 1 1 (D.C. Cir. 2002). And "courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *World Wide Minerals*, 296 F.3d at 1161 n.11 (internal quotation marks omitted).

A foreign state's extradition request does not fit in that selective company. Extradition operates upon norms of "international comity." *See Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992). Extradition treaties implementing those norms have produced "a global network of bilateral executive cooperation that aims to prevent border crossing from becoming a form of criminal absolution." *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003). Conditioning a foreign state's exercise of treaty rights on submitting to the jurisdiction of United States courts could imperil the spirit of cooperation and comity underpinning that regime. In that context, there is good reason to doubt that a foreign state's effort to exercise its agreed-upon treaty rights exhibits an intent to relinquish its immunity from suit. And were we to find that a foreign state's extradition request implies a waiver of immunity in United States courts, we might expect that, as a reciprocal matter, the United States would subject itself to suit in foreign proceedings whenever it requests extradition assistance. *See id.* at 1208 n.6. We know of no sound basis

for putting the parties to an extradition treaty to that choice as a matter of course.

That is particularly so in view of extradition's fundamentally diplomatic, executive character. "Subject to judicial determination of the applicability of the existing treaty obligation of the United States to the facts of a given case, extradition is ordinarily a matter within the exclusive purview of the Executive." *Shapiro v. Sec'y of State*, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd sub nom. Comm'r v. Shapiro*, 424 U.S. 614 (1976). The Executive generally "conducts the procedure on behalf of the foreign sovereign," such that the foreign state "makes no direct request of our courts" and "its contacts with the Judiciary are mediated by the executive branch." *Blaxland*, 323 F.3d at 1207. Because a foreign sovereign operates at a level of remove from United States courts when it seeks our assistance in extradition, there is all the more reason to doubt that an extradition request connotes an intent to waive the requesting sovereign's immunity in our courts.

For essentially these reasons, the only other court of appeals to address the issue held that an extradition request does not impliedly waive sovereign immunity. *Id.* at 1206–09. In reaching that conclusion, the Ninth Circuit in *Blaxland* distinguished the sole case on which Khochinsky relies here, a previous Ninth Circuit decision, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). That earlier decision involved a letter rogatory, which is a "direct court-to-court request," whereas "extradition is a diplomatic process carried out through the powers of the

executive, not the judicial, branch." *Blaxland*, 323 F.3d at 1207. While we have no occasion here to decide the status of a letter rogatory for purposes of the FSIA's implied waiver exception, we agree with the Ninth Circuit that an extradition request does not effect an implied waiver of sovereign immunity.

The terms of the specific extradition treaty at issue—between the United States and Poland—suggests no ground for drawing any different conclusion in the specific circumstances. The U.S.-Poland Treaty does not directly address the subject of sovereign immunity against actions in either party's courts. Rather, the Treaty generally provides for the signatory countries to "request extradition . . . through the diplomatic channel." Extradition Treaty Between the United States of America and the Republic of Poland, U.S.-Pol., art. 9, July 10, 1996, T.I.A. S. No. 99-917. And by making use of the Treaty's "diplomatic channel" through a request for assistance from the United States's Executive Branch, Poland did not subject itself to the jurisdiction of United States courts.

2.

Khochinsky next argues that two of his claims—the claim for quiet-title related to *Girl with Dove* and the claim for aidingand-abetting-trespass related to his family land in Przemysl—fall within the FSIA's counterclaim exception. Under that exception, "[i]n any action brought by a foreign state, or in which a foreign state intervenes," the "foreign state shall not be

accorded immunity with respect to any counterclaim" fitting within three defined categories. 28 U.S.C. § 1607. Those three categories include, as relevant here, a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." *Id.* § 1607(b). According to Khochinsky, the extradition proceeding amounts to an "action brought by a foreign state" within the meaning of that provision, and his quiet-title and aiding-and-abetting-trespass claims arise out of the same "transaction or occurrence" as the extradition proceeding.

Even assuming that those two claims arise out of the same transaction or occurrence as the original extradition proceeding, Khochinsky's claims simply do not constitute "counterclaims" for purposes of the FSIA's counterclaim exception. Consistent with the ordinary understanding of a counterclaim, *see* Fed. R. Civ. P. 13, the counterclaim exception applies only when there is an "action brought by a foreign state, or in which a foreign state intervenes," and when the ostensible "counterclaim" is brought "in" that same action. *See* 28 U.S.C. § 1607 ("*In* any action brought by a foreign state . . . ") (emphasis added).

Khochinsky's claims against Poland satisfy neither requirement. First, as the district court observed, the extradition proceeding was brought by the *United States*, not Poland, and at no point did Poland "intervene in the extradition proceeding or appear as a party in the proceeding at all." *Khochinsky*, 2019 WL 5789740, at *6. Second, Khochinsky brings his current claims in an entirely distinct action, one that he, not

the foreign state, initiated. Those claims, then, are not counterclaims, much less counterclaims in an action brought by a foreign state. Khochinsky responds that he was unable to assert his claims in the original "action," i.e., the extradition proceeding. But that only confirms that an extradition proceeding is not the sort of action as to which the FSIA's counterclaim exception generally applies.

3.

Third and finally, Khochinsky argues that two of his claims—the claims for First Amendment retaliation and for tortious interference with business relations—fall within the FSIA's noncommercial tort exception. That exception potentially applies in any case:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1605(a)(5). But even if Khochinsky's relevant claims fit within that description, the exception excludes from its coverage "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* § 1605(a)(5)(B).

Poland contends that Khochinsky's pertinent claims are ones "arising out of . . . abuse of process," *id.*, and we agree. Khochinsky's First Amendment retaliation claim asserts that Poland undertook the extradition process to retaliate against his speech. Compl. ¶¶ 120, 122, J.A. 18. And his tortious interference claim contends that Poland's actions caused him to be imprisoned and subjected to house arrest. Compl. ¶ 133, J.A. 19. Both of those claims "arise out of" an alleged "abuse of process"—i.e., an alleged abuse of the extradition process. While Khochinsky observes that the two claims are not themselves actions for abuse of process, the statutory language covers not just claims of abuse of process, but any claims "*arising out of*" an alleged "abuse of process." 28 U.S.C. § 1605(a)(5)(B) (emphasis added). That is true of Khochinsky's two relevant claims here, both of which "derive from the same corpus of allegations concerning his extradition." *Blaxland*, 323 F.3d at 1203; *see Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999).

Khochinsky submits that the term "abuse of process" for purposes of § 1605(a)(5)(B) refers solely to abuse of judicial process, whereas extradition is a diplomatic process. But as the Ninth Circuit observed in *Blaxland*, a claim against a foreign state for wrongfully "invoking the extradition procedures" involves an "abuse of process" within the meaning of § 1605(a)(5)(B). *Blaxland*, 323 F.3d at 1204. Whether the term "abuse of process" is "defined according to a uniform federal standard or according to applicable state law"—here, District of Columbia or New York

law—the term "concern[s] the wrongful use of legal process," including an alleged effort to "misuse[] legal procedures to detain" or "extradite" someone. *Id.* at 1204, 1206; *see* Restatement (Second) of Torts § 682 (1977) (defining tort of abuse of process); *Doe v. District of Columbia*, 796 F.3d 96, 108 (D.C. Cir. 2015) (same under D.C. law); *Curiano v. Suozzi*, 469 N.E.2d 1324, 1326 (N.Y. 1984) (same under N.Y. law). And Khochinsky is wrong, moreover, insofar as he assumes that extradition is an exclusively diplomatic process, to the complete exclusion of any judicial role: while extradition, as we have explained, is fundamentally diplomatic in character, it ultimately involves the courts in some measure in its execution—as evidenced by the termination of the extradition proceedings in this case upon a judicial determination that probable cause was lacking.

For all of those reasons, an alleged abuse of the extradition process counts as an "abuse of process" under § 1605(a)(5)(B). It follows that Khochinsky's claims of First Amendment retaliation and tortious interference fall outside the scope of the FSIA's noncommercial torts exception.

* * * * *

For the foregoing reasons, we affirm the district court's grant of Poland's motion to dismiss for lack of jurisdiction.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEXANDER KHOCHINSKY, *Plaintiff*, v. REPUBLIC OF POLAND, *Defendant.*	No. 18-cv-1532 (DLF)

ORDER

(Filed Nov. 6, 2019)

For the reasons stated in the accompanying memorandum opinion, it is

ORDERED that the defendant's Motion to Vacate the Entry of Default, Dkt. 20, and the defendant's Motion to Dismiss, Dkt. 21, are **GRANTED**. Accordingly, it is

ORDERED that this action is **DISMISSED WITHOUT PREJUDICE**. It is further **ORDERED** that the plaintiff's Motion for Default Judgment, Dkt. 22, is **DENIED** as **MOOT**.

The Clerk of Court shall close this case.

SO ORDERED.

/s/ Dabney L. Freidrich
DABNEY L. FRIEDRICH
United States District Judge

Date: November 6, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEXANDER KHOCHINSKY, *Plaintiff*, v. REPUBLIC OF POLAND, *Defendant.*	No. 18-cv-1532 (DLF)

MEMORANDUM OPINION

(Filed Nov. 6, 2019)

Plaintiff Alexander Khochinsky brought this suit in 2018 against the Republic of Poland. Compl. ¶ 1, Dkt. 1. According to Khochinsky, Poland has retaliated against him by seeking his extradition in response to his attempt to procure restitution for the seizure of his mother's land during World War II. *Id.* ¶ 4–18. Khochinsky's complaint alleges claims against Poland for: (1) First Amendment retaliation, *id.* ¶ 117–25, (2) quiet title over the painting *Girl with Dove*, *id.* ¶ 126–30, (3) tortious interference with advantageous relations, *id.* ¶ 131–35, (4) aiding and abetting trespass, *id.* ¶ 136–43, and (5) abuse of process, *id.* ¶ 144–52. On April 23, 2019, Poland moved to dismiss the complaint for lack of subject matter jurisdiction. Poland's Mot. to Dismiss, Dkt. 21. Because the Foreign Sovereign Immunities Act ("FSIA") precludes this Court from exercising jurisdiction over any of Khochinsky's claims, the

Court will grant Poland's motion and dismiss the case. *See* Fed. R. Civ. P. 12(b)(1), (h)(3).

I. BACKGROUND

In considering Poland's motion to dismiss for lack of subject matter jurisdiction, the Court accepts as true all of the material allegations in Khochinsky's complaint. *See, e.g.*, *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008). The relevant facts are as follows.

A. Factual Background

Alexander Khochinsky recently acquired his American citizenship after living in New York City as a foreign national for many years. *See* Compl. ¶ 118. Khochinsky's mother, Maria Khochinskaya, was a Polish Jew born in the town of Przemysl, where her family owned land and a house. *Id.* ¶ 5. In 1939, Germany invaded Poland, and Maria became a Soviet citizen after the Soviet Union annexed a portion of Przemysl containing her family's land. *Id.* ¶ 30–33. On June 20, 1941, Maria and her grandmother traveled east to Lviv to visit her mother for the Sabbath observance. *Id.* ¶ 34. The very next day, Germany invaded the Soviet Union. *Id.* ¶ 35. All of Maria's family members who remained in Przemysl were murdered by the Nazis, and so Maria became the heir to her family's property there. *Id.* ¶ 67. Maria ultimately died in 1989, when her rights in the property passed to Khochinsky. *Id.* ¶ 68.

Khochinsky returned to Przemysl in the 1990s with his wife and his own son. *Id.* ¶ 69. Yet upon his return, he discovered that his mother's home had been destroyed, and a Catholic church stood on the land instead. *Id.* Neither Maria nor her family were ever compensated for the seized property. *Id.* ¶ 70.

Believing that Poland would exercise a hostile attitude towards a Jewish restitution claim, Khochinsky initially decided not to seek compensation for the seized land. *Id.* ¶ 7 1. But this attitude changed around 2010, when Khochinsky learned that a painting similar to one he had previously inherited had been reported missing from Poland. *Id.* ¶ 74. The missing painting had belonged to Poland's Wielkopolskie Museum, which had acquired the painting in 1931. *Id.* ¶ 75. The painting was allegedly removed from the museum for protection and looted by the Nazis sometime during World War II. *Id.* ¶ 75. The missing painting was similar to Khochinsky's *Girl with Dove*, which he had inherited pursuant to his father's will in 1991. *Id.* ¶ 73. Khochinsky's father told him that he had acquired *Girl with Dove* after World War II, and that the painting had previously been in Germany. *Id.* ¶ 76. Khochinsky claims not to know whether *Girl with Dove* is in fact the missing painting and believes that it is not the missing work. *Id.* ¶ 78–79.

Nevertheless, Khochinsky believed that he could offer the painting to Poland as a "worthy substitute." *Id.* ¶ 79. By doing so, he hoped that his discussions with Poland for Maria's land could be more fruitful. *Id.* ¶ 80. And so he offered *Girl with Dove* to Poland in

exchange for restitution. *Id.* ¶ 81. In 2010, a Polish representative indicated a willingness to negotiate, but sent an expert to Khochinsky's gallery to evaluate the painting first. *Id.* ¶ 82–83. The expert concluded that *Girl with Dove* was indeed the missing artwork, but he did not inform Khochinsky of his conclusion at that time. *Id.* ¶ 84.

B. The Extradition Proceeding

Khochinsky alleges that Poland has pursued a retaliatory extradition proceeding against him because of his ownership of the painting and his attempts to negotiate for restitution. *See id.* ¶ 85–116. A Polish Court initially accused Khochinsky of knowingly and unlawfully purchasing the painting in January 2013. *Id.* ¶ 86. A "Wanted Person Notice" went out for Khochinsky's arrest, *id.* ¶ 93, and then Poland submitted a request to the United States for Khochinsky's extradition in July 2013, *id.* ¶ 94–96. Poland informed the U.S. Department of State that Khochinsky had acquired *Girl with Dove* "despite being aware of the fact that the painting originated from a prohibited act – looting of property in 1943 by the then authorities of the German Third Reich." *Id.* ¶ 96. Khochinsky claims that this "accusation was baseless and purely in bad faith." *Id.* ¶ 97.

In 2015, an Assistant United States Attorney filed a petition for a certificate of extraditability on behalf of Poland in the United States District Court for the Southern District of New York. *Id.* ¶ 98. Khochinsky

was taken from his New York City home in handcuffs and was imprisoned from February 26 to March 9, 2015; he was then subject to house arrest and electronic monitoring for several months thereafter. *Id.* ¶ 100–04. In April 2015, Poland sent a document to the Department of Justice stating that it could not "clearly rule out or confirm" Khochinsky's version of the events related to his acquisition of *Girl with Dove*. *Id.* ¶ 107. Thus, during a June 17, 2015 hearing in the extradition proceeding, "the Assistant United States Attorney representing Poland's interests acknowledged: 'I do not believe there is evidence in the record that goes directly to Khochinsky's knowledge prior to his sending an email to the Polish embassy in Moscow in 2010.'" *Id.* ¶ 110.

The District Court ultimately concluded that the United States lacked probable cause to extradite Khochinsky. *Id.* ¶ 112. *See generally In re Extradition of Khochinsky*, 116 F. Supp. 3d 412 (S.D.N.Y. 2015).

C. The Current Proceeding

On June 27, 2018, Khochinsky filed the instant complaint with this Court claiming that "substantial damage" had been done by the allegedly baseless extradition proceeding. Compl. ¶ 115. Khochinsky's complaint asserts five claims against Poland. First, Khochinsky alleges that Poland infringed his First Amendment rights while he was living as a foreign national in New York. *See id.* ¶ 117–25. In particular, he contends that "the extradition was in retaliation for

Khochinsky's speech about the Holocaust in Poland and Poland's restitution obligations" and that "Poland deliberately . . . used the extradition process and related criminal proceeding to deprive Khochinsky of his rights under the First Amendment." *Id.* ¶ 120, 122. Second, Khochinsky presses a quiet title action for the painting, *Girl with Dove*. *See id.* ¶ 126–30. Third, Khochinsky alleges that, as an owner of an art business that depended on business trips and visits to art galleries, his imprisonment and house arrest from the extradition proceeding tortiously interfered with his business relations. *See id.* ¶ 131–35. Fourth, Khochinsky alleges that Poland's conduct aided and abetted trespass of Maria's land. *See id.* ¶ 136–43. And fifth, Khochinsky alleges that "Poland used legal process in the United States, including by and through the actions of the Assistant United States Attorney who represented Poland during extradition proceedings, to obtain an improper goal." *Id.* ¶ 145. With respect to this abuse-of-process claim, Khochinsky contends that Poland "used the extradition proceedings as a chilling demonstration of state power," that Poland "used the menace of extradition, coupled with actual imprisonment, to punish Khochinsky" for his speech, and that "Poland used this public proceeding to warn other Jews." *Id.* ¶ 146–48. Khochinsky alleges that throughout this process, "Poland fabricated criminal charges and made false statements." *Id.* ¶ 149.

On March 12, 2019, the Clerk of Court entered default against Poland. Entry of Default, Dkt. 14. On April 23, 2019, Poland moved to vacate the clerk's

entry of default, Mot. to Vacate Entry of Default, Dkt. 14, and to dismiss all of Khochinsky's claims for lack of subject matter jurisdiction, Mot. to Dismiss; *see* Fed. R. Civ. P. 12(b)(1).[1]

II. LEGAL STANDARDS

A. Federal Rule of Civil Procedure 55(c)

Federal Rule of Civil Procedure 55(c) permits the court to set aside an entry of default for "good cause shown." Fed. R. Civ. P. 55(c). "Though the decision lies within the discretion of the trial court, exercise of that discretion entails consideration of whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373 (D.C. Cir. 1980) (citations and internal quotation marks omitted). "On a motion for relief from the entry of default . . . , all doubts are resolved in favor of the party seeking relief." *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980).

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[1] On April 25, 2019, Khochinsky also moved for entry of partial default judgment against Poland, Mot. for Partial Default Judgment, Dkt. 22. Because the Court concludes that it lacks subject matter jurisdiction over this lawsuit, it will deny Khochinsky's motion as moot. *See, e.g.*, *Terry v. Dewine*, 75 F. Supp. 3d 512, 530 (D.D.C. 2014) ("Given that the Court lacks jurisdiction over all of the claims in this action . . . a default judgment in this case, against any of the defendants, would be improper.").

B. Federal Rule of Civil Procedure 12

Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss the plaintiff's complaint for lack of subject-matter jurisdiction. In evaluating a motion to dismiss under Rule 12(b)(1), the court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). However, "'the court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions.'" *Disner v. United States*, 888 F. Supp. 2d 83, 87 (D.D.C. 2012) (quoting *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006)). Further, under Rule 12(b)(1), the court "is not limited to the allegations of the complaint," *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987), and "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992)). Under Federal Rule of Civil Procedure 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

C. Subject Matter Jurisdiction under the FSIA

"In the United States, the sole avenue for a court to obtain jurisdiction over claims against a foreign state or its agencies and instrumentalities is through the FSIA." *Simon v. Republic of Hung.*, 812 F.3d 127, 135 (D.C. Cir. 2016). "The FSIA establishes a default rule granting foreign sovereigns immunity from the jurisdiction of United States courts." *Id.*; *see* 28 U.S.C. § 1604. The general rule is subject to a number of exceptions, *see* 28 U.S.C. §§ 1605–07, but "claims against foreign sovereigns that do not fall within the ambit of an FSIA exception are barred," *Simon*, 812 F.3d at 141 (internal quotation marks and alterations omitted).

Khochinsky claims that his lawsuit implicates three exceptions to the default rule of foreign sovereign immunity. First, the implicit waiver exception applies when "the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605. Second, the counterclaim exception applies "[i]n any action brought by a foreign state, or in which a foreign state intervenes," and withdraws sovereign immunity for "any counterclaim . . . arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." 28 U.S.C. § 1607. Finally, the noncommercial tort exception applies to cases "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state." 28 U.S.C. § 1605(a)(5). The noncommercial tort exception does

not apply, however, to "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 1605(a)(5)(B).

III. ANALYSIS

A. Motion to Vacate the Entry of Default

In considering whether to set aside an entry of default for good cause shown, courts must consider whether the default was willful, whether a set-aside would prejudice the plaintiff, and whether the alleged defense is meritorious. *Keegel*, 636 F.2d at 373. These considerations support vacating the entry of default here. The complications with service of process described in the parties' briefs suggest that Poland's failure to respond was the result of confusion rather than a willful refusal to participate in the lawsuit. More importantly, for the reasons described below, the Court finds that Poland's defense – lack of subject matter jurisdiction – was indeed meritorious. Given the absence of jurisdiction, Khochinsky could not have obtained judgment in this case anyway, and therefore suffers no prejudice from the vacatur of Poland's default. Accordingly, the Court finds that Poland has shown good cause to set aside the entry of default.

B. Motion to Dismiss

Below, the Court addresses each of the FSIA exceptions that Khochinsky claims provides it with subject matter jurisdiction over the instant lawsuit.

Because none of these FSIA exceptions apply here, the Court concludes that it lacks subject matter jurisdiction over Khochinsky's lawsuit and will grant Poland's motion to dismiss on that basis.

1. The Implicit Waiver Exception

Khochinsky first contends that "Poland implicitly waived its sovereign immunity" by bringing extradition proceedings against him in the Southern District of New York. Opp'n to Mot. to Dismiss, at 8; *see In re Extradition of Khochinsky*, 116 F. Supp. 3d 412 (S.D.N.Y. 2015). He argues that "by using the U.S. courts to further its wrongful conduct, Poland implicitly waived its sovereign immunity as to *all* the claims against it." Opp'n to Mot. to Dismiss, at 8 (emphasis in original). The Court disagrees.

The D.C. Circuit "follow[s] the virtually unanimous precedents construing the implied waiver provision narrowly." *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999) (internal quotation marks and citation omitted). It "rarely find[s] that a nation has waived its sovereign immunity . . . without strong evidence that this is what the foreign state intended." *Id.* (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990)). Indeed, it has "found an implicit waiver of sovereign immunity in only three situations." *Gutch v. Fed. Republic of Germany*, 255 F. App'x 524, 525 (D.C. Cir. 2007). These include instances where: (1) "a foreign state has filed a responsive pleading without raising

the defense of sovereign immunity," (2) "the state has agreed to arbitrate" in the United States, or (3) the state has agreed "to adopt a particular choice of law." *World Wide Minerals, LTD. v. Republic of Kaz.*, 296 F.3d 1154, 1161 n.11 (D.C. Cir. 2002); *see also* H.R. Rep. No. 1487, at 18 (1976) (listing these three examples of implied waiver). None of these circumstances are at issue here. And the D.C. Circuit "ha[s] been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *World Wide Minerals*, 296 F.3d at 1161 n.1 1 (internal quotation marks omitted).

The Court finds that Poland did not waive its sovereign immunity by seeking to extradite Khochinsky. It merely exercised its rights under the U.S.-Poland Extradition Treaty by "request[ing] for extradition . . . through the diplomatic channel." Extradition Treaty Between the United States of America and the Republic of Poland, U.S.-Pol., art. 9, July 10, 1996, T.I.A.S. No. 99-917; *see Khochinsky*, 116 F. Supp 3d at 414 (noting that Poland requested that the U.S. government petition "for a certification that Alexander Khochinsky is extraditable pursuant to the U.S.-Poland Extradition Treaty"). This diplomatic undertaking is not "strong evidence" that Poland "intended" to relinquish the FSIA's protections. *Creighton*, 181 F.3d at 122 (internal quotation marks omitted). Rather, "extradition is a diplomatic process carried out through the powers of the executive, not the judicial, branch." *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1207 (9th Cir. 2003) (finding that Australia did not

waive sovereign immunity by seeking extradition of the plaintiff); *see also Shapiro v. Sec'y of State*, 499 F.2d 527, 531 (D.C. Cir. 1974) (explaining that "extradition is ordinarily a matter within the exclusive purview of the Executive"). Indeed, it would be "contrary to the concepts of comity and mutual respect between nations to hold that a country that calls upon [the United States] to assist in extradition only does so at the price of losing its sovereign immunity and of submitting to the domestic jurisdiction of [United States] courts in matters connected to the extradition request." *Blaxland*, 323 F.3d at 1209 (quoting *Schreiber v. Canada (Attorney General)*, [2002] S.C.C. 62 (Can.)). Here, Poland made no direct requests of the United States courts; it operated exclusively through the United States government throughout the proceedings, *see Khochinsky*, 116 F. Supp. 3d at 414–15, 421; and nothing in the Extradition Treaty indicates that such actions might waive Poland's sovereign immunity over related matters.

Khochinsky's reliance on *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) is misplaced. That case did not involve extradition proceedings at all. Instead, the Republic of Argentina had "enlist[ed] the aid of our courts, via a letter rogatory, in serving [Siderman] with process." *Id.* at 722. It directly "requested the court's assistance in serving papers on Siderman," and the court "complied with the request." *Id.* Given this direct request, the Ninth Circuit held that Argentina had sufficiently engaged the American courts in the matter such that the district court could

determine on remand whether the letter rogatory implicitly waived sovereign immunity. *See id.* ("To support a finding of implied waiver, there must exist a direct connection between the sovereign's activities in our courts and the plaintiff's claims for relief.").

This case is readily distinguishable from *Siderman*. As the Ninth Circuit itself has made clear, "[u]nlike a letter rogatory, which is a direct court-to-court request, extradition is a diplomatic process." *Blaxland*, 323 F.3d at 1207. A foreign state's "invocation of its extradition treaty rights, unlike Argentina's direct engagement of our courts in *Siderman*, cannot constitute an implied waiver of sovereign immunity." *Id.* at 1206. Just as in *Blaxland*, then, this Court "confront[s] only the invocation by [Poland] of proceedings to secure [Khochinsky]'s extradition *under the auspices of the executive branch of our government*." *Id.* (emphasis in original); *see also Barapind v. Gov't of the Republic of India*, 844 F.3d 824, 831 (9th Cir. 2016). That is not enough to amount to an implied waiver of sovereign immunity for any of Khochinsky's claims. *Cf. Siderman*, 965 F.2d at 722 ("Only because the Sidermans have presented evidence indicating that *Argentina's invocation of United States judicial authority* was part and parcel of its efforts to torture and persecute Jose Siderman have they advanced a sufficient basis for invoking that same authority with respect to their causes of action for torture." (emphasis in original)). The Court therefore rejects Khochinsky's argument that Poland has implicitly waived its sovereign immunity in this case, and it moves to

Khochinsky's other asserted exceptions to sovereign immunity.

2. The Counterclaim Exception

Khochinsky next invokes the counterclaim exception to the FSIA to establish jurisdiction. This exception provides that "[i]in any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State," sovereign immunity shall not apply to "any counterclaim . . . arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." 28 U.S.C. § 1607. Khochinsky argues that this exception subjects Poland to suit for his quiet-title and aiding-and-abetting-trespass claims, because the prior extradition proceeding allegedly involved the same subject matter (the painting *Girl with Dove* and Maria's land). *See* Opp'n to Mot. to Dismiss, at 6–7. Without deciding whether these claims arose out of the same transaction or occurrence, the Court concludes that the counterclaim exception does not provide this Court with a basis for jurisdiction here.

Indeed, Khochinsky's theory is foreclosed by the plain text of the statute. Section 1607 operates only when a judicial "action [is] brought *by* a foreign state, or [when] a foreign state intervenes." *Id.* § 1607 (emphasis added). The extradition proceeding related to Khochinsky was, by contrast, brought *by the United States*. *See Khochinsky*, 116 F. Supp. 3d at 414; *cf. Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36,

39 (D.C. Cir. 2000) (noting that the predicate action must be "brought by the foreign state itself"). Poland did not bring the action against Khochinsky. Nor did it intervene in the extradition proceeding or appear as a party in the proceeding at all. *Cf. Lord Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549, 557 (S.D.N.Y. 2001) (applying the exception where Vietnam "appeared to pursue its claim in interpleader"). Instead, Poland simply used diplomatic channels to exercise its rights under the U.S.-Poland Extradition Treaty. The counterclaim exception is therefore inapposite.

3. The Noncommercial Tort Exception

Finally, Khochinsky contends that the noncommercial tort exception grants this Court jurisdiction to hear his claims for First Amendment retaliation and tortious interference with advantageous relations. *See* Opp'n to Mot. to Dismiss, at 10. The noncommercial tort exception to the FSIA permits federal courts to hear cases "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state." 28 U.S.C. § 1605(a)(5). But the noncommercial tort exception does not confer jurisdiction when the claim "aris[es] out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," *id.* § 1605(a)(5)(B).

Because abuse of the extradition process plainly underlies both claims for which Khochinsky asserts the noncommercial tort exception, the Court lacks jurisdiction to consider Khochinsky's claims. Khochinsky acknowledges that the FSIA "specifically excludes claims for malicious prosecution or abuse of process." Opp'n to Mot. to Dismiss, at 11. But the FSIA further immunizes foreign states from "any claim *arising out of* malicious prosecution [or] abuse of process." 28 U.S.C. § 1605(a)(5)(B) (emphasis added). This language makes clear that if the predicate conduct for the alleged tort is simply a foreign state's abuse of process, then the court lacks jurisdiction to hear the resulting claim. As such, Khochinsky's First Amendment and tortious interference claims are "also barred, since they 'arise from' the core [abuse-of-process] claim[] and derive from the same corpus of allegations concerning his extradition." *Blaxland*, 323 F.3d at 1203 (barring emotional distress and loss of consortium claims); *see also Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999) (barring emotional distress claim).

This conclusion finds support in the nature of the allegations contained in Khochinsky's complaint. As to the First Amendment claim, Khochinsky alleges that "[d]espite Poland's claim that it sought extradition based on (entirely fabricated) criminal charges, the extradition was in retaliation for Khochinsky's speech." Compl. ¶ 120. According to Khochinsky, then, Poland "*used the extradition process* . . . to deprive [him] of his rights under the First Amendment." *Id.* ¶ 122

(emphasis added). But even if these assertions are true, Khochinsky's First Amendment claim "aris[es] out of" an alleged abuse of the extradition process. 28 U.S.C. § 1605(a)(5)(B); *see De Jaray v. AG of Can. for Her Majesty the Queen*, No. 16-cv-571, 2017 WL 3721751, at *19 (W.D. Wash. Jan. 5, 2017) (granting immunity where "all of Plaintiff's claims ar[ose] from the same alleged misrepresentation/malicious prosecution/abuse of process acts of Defendants"). Describing Poland's conduct as "retaliation" does nothing more than recharacterize the abuse of process at the center of Khochinsky's complaint. *See Blaxland*, 323 F.3d at 1203. And the FSIA does not countenance such attempts to manufacture jurisdiction.

Khochinsky's tortious interference claim suffers from the same jurisdictional defect. Under the FSIA, a plaintiff cannot repackage a foreign state's abuse of process as another tort when the only tortious conduct alleged is the abuse of process itself. *See* 28 U.S.C. § 1605(a)(5)(B). But that is precisely what Khochinsky has attempted here. He alleges that the extradition proceeding itself "caus[ed] Khochinsky to be imprisoned and then subject to house arrest for over than [sic] five months," and that this "crippled Khochinsky's business." Compl. ¶ 133. But even if these assertions are true, the predicate conduct for Khochinsky's claim against Poland remains the act of "invoking the extradition procedures . . . for a malicious purpose." *Blaxland*, 323 F.3d at 1204. And because any potential tortious interference "ar[ose] from" that very same conduct, section 1605(a)(5)(B) of the FSIA precludes this

Court from exercising jurisdiction. In light of the above analysis, Khochinsky cannot raise either of the claims he asserts under the noncommercial tort exception to the FSIA.

CONCLUSION

For the above reasons, Poland's motions to vacate the entry of default and to dismiss for lack of subject-matter jurisdiction are granted and the case is dismissed without prejudice. A separate order consistent with this decision accompanies this memorandum opinion.

/s/ Dabney L. Freidrich
DABNEY L. FRIEDRICH
United States District Judge

Date: November 6, 2019

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7160 **September Term, 2020**

1:18-cv-01 532-DLF

Filed On: August 9, 2021

Alexander Khochinsky,

Appellant

v.

Republic of Poland, a foreign state,

Appellee

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson, Circuit Judges; and Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk