IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

DEBBIE WALTERS and MAX WALTERS	)	Case No. 93-5118-CV-SW-1 Chief Judge Whipple
Plaintiffs,	)	
v.	)	
THE PEOPLE'S REPUBLIC OF CHINA	)	
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES CONCERNING PLAINTIFFS' MOTION FOR AUTHORITY TO COLLECT JUDGMENT PURSUANT TO FOREIGN SOVEREIGN IMMUNITY ACT, 28 U.S.C. § 1610(c)

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PRELIMINARY STATEMENT

On August 29, 2001, Plaintiffs, Debbie and Max Walters, filed a Motion for Authority to Collect Judgment Pursuant to Foreign Sovereign Immunity [sic] Act, 28 U.S.C. § 1610(c) ("Motion"), with respect to two giant pandas from China–on loan to the National Zoological Park–and related payments to the People's Republic of China or the Chinese Wildlife Conservation Association ("CWCA").[1] The United States respectfully submits this Statement of Interest solely to protect its own interests in this matter and to advise the Court of its legal obligations under federal law.[2] In expressing these interests, the United States neither appears on behalf of the People's Republic of China nor takes any position with respect to the acts that brought about the judgment in this case.

As explained more thoroughly below, the pandas are currently in the custody of the National Zoological Park, a component of the Smithsonian Institution, and some financial assets are in bank accounts of the Smithsonian Institution. The pandas and funds are the subject of a ten-year cooperative research agreement between the National Zoological Park and the CWCA. See Agreement for Cooperative Research and Breeding of Giant Pandas ("Research Agreement") (Tab A of Declaration of James I. Wilson, attached as Exh. 1).

The funds are currently the property of the United States and are immune from attachment or garnishment under the sovereign immunity doctrine. See Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 264 (1999). In addition, the Foreign Sovereign Immunities Act

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[1]On July 16, 2001, Plaintiffs registered their October 22, 1996 default judgment from the United States District Court for the Western District of Missouri with the United States District Court for the District of Columbia.

[2]Under 28 U.S.C. § 517, the United States may appear in any court in the United States "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

("FSIA"), 28 U.S.C. §§ 1602-1611, bars Plaintiffs' Motion on several independent grounds. Plaintiffs' default judgment is against the People's Republic of China, not the CWCA; therefore, under the FSIA, the judgment may only be executed against non-immune property; first, which belongs to the People's Republic of China; second, which is commercial; and third, which has a nexus to the underlying firearms claim. See 28 U.S.C. §§ 1610-1611. Significantly, Plaintiffs have failed to show that the CWCA is not a separate juridical entity from the People's Republic of China, see 28 U.S.C. §§ 1603 (a) & (b), 1610(a); Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277, 1284-85 (11th Cir. 1999), or that the desired property has the requisite nexus to the underlying facts of the dispute between the parties, see 28 U.S.C. § 1610(a)(2). Even if this Court concludes that Plaintiffs have met or need not meet their burden, the pandas and associated funds are non-commercial in nature and are consequently immune from attachment or execution. See 28 U.S.C. §§ 1609, 1610(a) & (b). Because the FSIA does not permit Plaintiffs to attach the pandas or related payments, Plaintiffs also cannot seek to garnish funds not subject to attachment under the statute. Finally, any grant of authority to pursue writs of attachment and the subsequent execution of any such writs on these assets would violate the contractual obligations of the Smithsonian Institution under its research agreement with the CWCA, would likely discourage future joint scientific research and cooperative programs, and would jeopardize important foreign and environmental policy interests of the United States. For these reasons, the United States respectfully urges the Court to deny Plaintiffs' Motion.

FACTUAL BACKGROUND

On November 11, 1990, Plaintiffs' son, Kale Ryan Walters, was tragically killed when his Chinese-made SKS semi-automatic rifle malfunctioned by firing without the trigger being pulled and while the safety was engaged. Final Judgment at ¶ 14 (attached as Exh. 2). After the People's Republic of China failed to appear in Plaintiffs' lawsuit, this Court entered a default judgment for $10 million in actual damages on October 22, 1996. Id. at ¶ 27. The Court determined that it had jurisdiction under 28 U.S.C. § 1605(a)(2) because it found that Defendant "carried on a commercial activity within the United States; performed acts in the United States in connection with its commercial activities elsewhere; and performed acts outside the territory of the United States in connection with its commercial activities elsewhere, which caused a direct effect in the United States, by selling and/or distributing SKS semi-automatic rifles, including serial number 260078044, which The People's Republic of China designed, manufactured, exported, imported, distributed and/or sold within the United States." Id. at ¶ 5. The Court did not, however, award any particular assets to Plaintiffs.

The identified items in Plaintiffs' Motion are the subject of a ten-year cooperative research and conservation agreement between the National Zoological Park and the CWCA, which was signed on June 17, 2000. This agreement operates under and within the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") as well as regulations established by the governments of both the United States and the People's Republic of China. See Research Agreement at Introduction. The CWCA agreed to loan two pre-reproductive giant pandas, male Tian Tian and female Mei Xiang, to the National Zoological Park for ten years, during which time the CWCA maintains ownership of the pandas. See id. at 1.1-1.2, 2.1. One of the obligations of the National Zoological Park under the agreement is to

pay the CWCA $1 million each year, in quarterly installments, "for the purpose of supporting Chinese conservation projects of giant pandas as taken from the Chinese National Project for the Conservation of Giant Pandas and Their Habitat, the National Survey, and the Captive Breeding Plan." Id. at 4.1. Ninety percent of all American payments must be used "to fund giant panda conservation projects"; the remaining funds must be used "for coordination, liaison, training, and conservation education etc." Id. at 4.5.

The Fish and Wildlife Service of the United States Department of the Interior issued the National Zoological Park a permit on November 17, 2000 to import the two giant pandas under CITES, the Endangered Species Act, and the Service's giant panda policy and associated regulations. See Import Permit and Special Conditions (Tab B to Declaration of James I. Wilson, attached as Exh. 1); see also U.S. Fish and Wildlife Service, Policy on Giant Panda Permits (attached as Exh. 3). The permit itself states that the pandas "[m]ay not be used for commercial purposes." Import Permit § 5. All revenue increases at the National Zoological Park due to the presence of the pandas must be "strictly accounted for and used for the conservation of the giant panda." Special Conditions at ¶ 1. Specifically, the National Zoological Park must perform an annual accounting of the funds collected as a result of the panda loan and of the transfer and use of any funds in China. See id. Contrary to Plaintiffs' assertions, see Motion at 2 and Suggestions in Support of Plaintiffs' Motion for Authority to Collect Judgment Pursuant to Foreign Sovereign Immunity [sic] Act, 28 U.S.C. § 1610(c) ("Suggestions in Support of Plaintiffs' Motion"), at 5, no fee is charged to see the giant pandas. See http://pandas.si.edu/facts/gpfaqs.htm.

DISCUSSION

There are four independent and compelling reasons why the giant pandas and associated funds cannot be taken to pay the default judgment. First, the Smithsonian Institution is immune from attachment or garnishment as a trust instrumentality of the United States. Second, Plaintiffs have failed to show that the CWCA is not a separate juridical entity from the People's Republic of China, thereby barring attachment of assets belonging to the CWCA to enforce a judgment against the People's Republic of China. Third, Plaintiffs have failed to show that the property of the CWCA has a nexus to the underlying dispute in this case. Fourth, the identified assets are non-commercial and thus are protected from attachment. Because the FSIA does not permit Plaintiffs to attach the pandas or related payments, Plaintiffs also cannot seek to garnish funds not subject to attachment under the statute.

The assets of foreign states are generally immune from attachment. Under international law, however, "states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. The FSIA creates a series of exceptions to the general immunity of foreign countries. Section 1610 provides in relevant part:

> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if–
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> (2) the property is or was used for the commercial activity upon which the claim is based
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> * * *
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> (b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of

this Act, if–

* * *

> (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

28 U.S.C. §§ 1610 (a) & (b).

By its terms, section 1610(a) permits execution of the firearms judgment against the People's Republic of China only through attachment of property that belongs to the People's Republic of China, has a nexus to the underlying firearms claim, and is commercial. All three requirements must be satisfied. The express text of section 1610(a) would not allow execution against the pandas and the revenues owed to the CWCA under the research agreement between the National Zoological Park and the CWCA because Plaintiffs have not shown that these assets meet even one, much less all three, of the statutory requirements. The pandas belong to the CWCA and the funds located within the United States that are contractually bound to the CWCA belong to the United States; the assets have no alleged connection with the underlying firearms claim and judgment; and, as demonstrated below, the assets are non-commercial. See Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 563 (11th Cir. 1987) ("The critical question for this court is whether the assets of a foreign state's wholly-owned national airline are subject to execution to satisfy a judgment obtained against the foreign state, where the airline was neither a party to the litigation nor was in any way connected with the underlying transaction giving rise to the suit. For the reasons expressed below, we answer this question in the negative.").

Because this attempt to attach the two giant pandas at the National Zoological Park, living creatures that are a symbol of Chinese-American friendship, is legally unauthorized, the Court should deny Plaintiffs' Motion.

A. The doctrine of sovereign immunity bars attachment or garnishment of any funds being held by the Smithsonian Institution for payment to the CWCA.

The sovereign immunity doctrine prevents Plaintiffs from attaching or garnishing funds in the possession of the United States. See, e.g., Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 264 (1999). The doctrine applies even if the United States has "set[] aside money for the payment of specific debts." Arizona v. Bowsher, 935 F.2d 332, 334 (D.C. Cir. 1991); see also Haskins Bros. & Co. v. Morgenthau, 85 F.2d 677, 681 (D.C. Cir. 1936) ("It is not in the hands of the officers but in the treasury, and though earmarked as a special or trust fund, has been mingled with the moneys of the United States."). This jurisdictional requirement also holds equally for attachment and garnishment actions. Blue Fox, 525 U.S. at 264; see also Buchanan v. Alexander, 45 U.S. (4 How.) 20, 21 (1846); Chilean Line Inc. v. Main Ship Repair Corp., 232 F.Supp. 907, 910 (S.D.N.Y. 1964) ("If garnishment or attachment were freely allowed against the United States, the government might soon be involved in all the litigation of those with whom it does business, and would have to be concerned not only with its own rights but also with those of its contracting parties against third persons."), aff'd sub nom. Chilean Line Inc. v. United States, 344 F.2d 757 (2d Cir. 1965). So long as the relevant funds are held by the United States and so long as the United States has "the power of control and disposition", Haskins Bros., 85 F.2d at 681, over such funds, sovereign immunity bars their attachment or garnishment. All money given to or obtained by the National Zoological Park from donors, sponsors, or food and product sales is property of the United States. Thus, this money, which will eventually either be transferred to the CWCA for conservation and research programs involving giant pandas or be used by the National Zoological Park to support its panda research program, cannot be attached

or garnished.[3]

The National Zoological Park is a bureau of the Smithsonian Institution and is consequently an instrumentality of the United States. According to its statutory provision,

> The National Zoological Park is placed under the direction of the Regents of the Smithsonian Institution, who are authorized to transfer to it any living specimens, whether of animals or plants, in their charge, to accept gifts for the park at their discretion, in the name of the United States, to make exchanges of specimens, and to administer and improve the said Zoological Park for the advancement of science and the instruction and recreation of the people.

20 U.S.C. § 81 (emphasis added). The Smithsonian Institution was established by Congress "for the increase and diffusion of knowledge among men." 20 U.S.C. § 41. The Regents of the Smithsonian Institution, comprised of the Vice President, Chief Justice, three members of the Senate, three members of the House of Representatives and nine other persons (who cannot be Members of Congress), conduct the business of the Smithsonian Institution. 20 U.S.C. § 42.

Although the Smithsonian Institution receives considerable private funding, the D.C.

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[3]Various individuals and corporations have contributed or pledged funds to the Smithsonian Institution to support its activities under the research agreement. Some of this money is received directly by the Smithsonian Institution; some is first received by Friends of the National Zoo, a non-profit organization that supports the National Zoological Park, which transfers the funds to the Smithsonian. See Declaration of James I. Wilson at ¶ 3 (attached as Exh. 1). Plaintiffs seek to garnish "the Smithsonian Institution . . . and any benefactors who are also contractually bound to make the lease payments[.]" Suggestions in Support of Plaintiffs' Motion at 7 (emphasis added). But only the Smithsonian Institution has any payment obligation to the CWCA. This payment obligation consists only of the transfer of $10 million over ten years. Neither the Smithsonian nor any of its donors has an obligation to the People's Republic of China. Moreover, only the Smithsonian Institution transfers money from its own accounts, in quarterly payments each year, to the CWCA at the National Bank of China. See Declaration of James I. Wilson at ¶¶ 3-4. Although Plaintiffs seek "to garnish the payments due The People's Republic of China at any point before their receipt", it is important "[w]hether this occurs while the funds are in the donors accounts or those of the Smithsonian[.]" Cf. Suggestions in Support of Plaintiffs' Motion at 7. Funds belonging to donors that have not yet been given to the Smithsonian are not contractually promised to the CWCA (or to the People's Republic of China); funds in the Smithsonian Institution's accounts cannot be garnished because of sovereign immunity.

Circuit concluded that "the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental role in funding and oversight, make the institution an 'independent establishment of the United States,' within the 'federal agency' definition." Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 566 F.2d 289, 296 (D.C. Cir. 1977) (en banc) (finding that the Smithsonian Institution is a federal agency under the Federal Tort Claims Act); see also Johnson v. Smithsonian Institution, 189 F.3d 180, 189 (2d Cir. 1999) (same); Genson v. Ripley, 681 F.2d 1240, 1241-42 (9th Cir. 1982) (same). Cf. Dong v. Smithsonian Institution, 125 F.3d 877, 883 (D.C. Cir. 1997) (holding that the Smithsonian Institution is not subject to the Privacy Act as an "authority of the government of the United States" or as an "executive department"); Cotton v. Heyman, 63 F.3d 1115, 1121 (D.C. Cir. 1995) (determining that the Smithsonian Institution reasonably maintained that it is not subject to the Freedom of Information Act).

The D.C. Circuit recently suggested, albeit in dicta, that the Smithsonian Institution has sovereign immunity from suit:

> Several elements of the Smithsonian's congressional design would appear to suggest that it does have sovereign immunity. First, it operates under a federal charter and its Board of Regents is composed of or selected by federal officials. Second, it is authorized to receive appropriations from Congress. Third, "[a]ll moneys recovered by or accruing to, the institution shall be paid into the Treasury of the United States, to the credit of the Smithsonian bequest, and separately accounted for," and disbursements for payments of debt are submitted to the Treasury. . . . Thus, notwithstanding that the Smithsonian is authorized to receive gifts from private sources, the Smithsonian's structure and federal funding would suggest that Congress's interest in safeguarding the public fisc from money judgments is no less significant with respect to the Smithsonian than any federal agency.

Forman v. Small, 2001 WL 1435532 at *8 (D.C. Cir. 2001) (internal citations omitted) (declining however to decide the issue).

A consideration of the basic principles behind the doctrine of sovereign immunity makes

it clear that Plaintiffs' attempt to attach or garnish funds held by the National Zoological Park is barred. In Land v. Dollar, the Supreme Court articulated a simple test for whether an action is blocked by sovereign immunity: whether the proceeding could result in a judgment that "would expend itself on the public treasury" or that would "interfere with the public administration." 330 U.S. 731, 738 (1947). Both conditions, each independently sufficient, are satisfied here. First, the possibility exists that part of a monetary judgment would be paid by public funds. Second, attachment would interfere with the mission and obligations of the National Zoological Park to study and preserve the giant pandas.

Even if all the funds to be transferred to the CWCA come from private sources, the National Zoological Park still has sovereign immunity. See Misra v. Smithsonian Astrophysical Observatory, 248 F.3d 37, 40 (1st Cir. 2001) ("Misra contends that he is not subject to the exhaustion requirement because he is paid out of the Smithsonian Trust, not from federal funds. In effect, Misra reasons that because he is paid from private monies, the Smithsonian should be treated as a private institution with respect to his claim. This is simply not so. The doctrine of sovereign immunity focuses on the nature of the entity being sued, not on the claimant."); Benima v. Smithsonian Institution, 471 F. Supp. 62, 66-67 (D. Mass. 1979) ("According to plaintiff, '(a)n award of money damages would be derived from private trust or private donations and would not require U.S. government funding. Thus, Benima's suit . . . is in reality not a suit against the United States.' The premise that any award in this case would be derived solely from 'private' trust funds is by no means a certainty. Moreover, even if it were certain, there is authority supporting the proposition, to which I adhere, that even the funds donated to and administered by the Smithsonian bear the characteristics of funds reserved for public use.") (emphasis added).

Finally, Plaintiffs admit that the Smithsonian Institution is protected by the doctrine of sovereign immunity but argue that the Smithsonian Institution has waived its immunity under the Federal Tort Claims Act ("FTCA") because "[t]he proposed garnishment is based on [] a tort judgment." Suggestions in Support of Plaintiffs' Motion at 7. But the FTCA does not govern this case because the FTCA waives sovereign immunity for certain torts committed by federal employees within the scope of their employment. That is obviously not what the underlying lawsuit is about in this case. The Smithsonian Institution has not waived, explicitly or implicitly, its sovereign immunity over the funds at issue.

B. Plaintiffs have failed to meet their burden to show that the CWCA is not a separate juridical entity from the People's Republic of China.

Under the FSIA, courts must presume that a foreign entity that is not an organ of the state is separate juridically from any foreign state. See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 627 (1983) ("Bancec"). To overcome this presumption, plaintiffs bear the burden to show that the owner of assets, which they are trying to attach, is not entitled to separate recognition from the foreign state. See Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277, 1285 (11th Cir. 1999); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 447 (D.C. Cir. 1990); Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 176 (5th Cir. 1989); De Letelier v. Republic of Chile, 748 F.2d 790, 795 (2d Cir. 1984). Moreover, it should not be easy for plaintiffs to meet this burden. See Pravin Banker Associates, Ltd. v. Banco Popular del Peru, 9 F. Supp. 2d 300, 305 (S.D.N.Y. 1998).

Plaintiffs do not carry their mandated burden in this case. Plaintiffs argue that because the People's Republic of China is a socialist country, no entity within the country has a separate legal status. See Suggestions in Support of Plaintiffs' Motion at 6; cf. 28 U.S.C. § 1603(b). But

showing that a foreign state owns a majority or all of an entity is not sufficient; plaintiffs must also show that the foreign country exercises extensive control over the entity. See Bancec, 462 U.S. at 629 (stating that an instrumentality's separate juridical status may be overcome "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created"); McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 352 (D.C. Cir. 1995) ("That relationship was manifested generally through Iran's control over the management of the co-defendants and through a pattern of conduct and policy statements that caused 'the agent[s] to believe that the principal desire[d] [them] so to act on the principal's account.'"); Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 181 (5th Cir. 1989) ("Although these documents demonstrate that the Federal Ministry of Agriculture may have had a general supervisory role over the NGPC, they do not demonstrate that the Federal Government was involved in the day-to-day management of NGPC with regard to the Bansara Rice Farm project . . . .The two factors of 100% ownership and appointment of the Board of Directors cannot by themselves force a court to disregard the separateness of the juridical entities."); Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 565 (11th Cir. 1987) ("The district court was in error in holding that Argentina's 100% ownership of Aerolineas' stock was sufficient to overcome the presumption of separate juridical existence. In the present case there is no showing that Argentina exercises such extensive control over Aerolinas as to warrant a finding of principal and agent."); Edlow Int'l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827, 832 (D.D.C. 1977) ("Two more precise indices of an entity's status as state agency or instrumentality focus on the degree to which the entity discharges a governmental function, and the extent of state control over the entity's operations. . . . The only basis, therefore, for concluding that NEK is an 'organ' of the Yugoslav government, or is at least 50 per cent owned by the government, is that the state

'owns' all forms of property in Yugoslavia. Having determined that this premise, however valid it may be in political theory, is not present to confer jurisdiction under the Foreign Sovereign Immunities Act, we lack subject matter jurisdiction under that Act."). Cf. In re Air Crash Disaster near Roselawn, Indiana on Oct. 31, 1994, 96 F.3d 932, 941 (7th Cir. 1996); Chuidian v. Philippine National Bank, 912 F.2d 1095, 1098 (9th Cir. 1990); Belgrade v. Sidex Int'l Furniture Trading, Inc., 2 F. Supp. 2d 407, 415 (S.D.N.Y. 1998).

Plaintiffs contend, in the alternative, that the People's Republic of China not only owns the CWCA but also effectively controls it. In support, they rely on an internet web page for the CWCA. But they make a surprising and substantial error. Plaintiffs assert that the "person identified as in charge of CWCA is Mr. Wang Fuxing, the Secretary-General of China" and then argue that Mr. Wang Fuxing sits on the "highest organ of state power" in the Chinese government. Suggestions in Support of Plaintiffs' Motion at 6-7 (emphasis added) (internal quotations omitted). It is true that the web page cited by Plaintiffs for the CWCA lists the person in charge as "Mr. WANG Fuxing, Secretary-General." Id. at Exh. C. He is, however, the Secretary-General of the CWCA, not of the People's Republic of China. The Court can take judicial notice that Mr. Jiang Zemin, with whom President George W. Bush recently met and who frequently appears in press accounts of the People's Republic of China, is the Secretary-General of the country. Thus, the web page provides no support that the People's Republic of China in any way controls the CWCA.

Moreover, to be vulnerable as an agency or instrumentality that does not deserve separate legal recognition, an "entity generally must have some connection with the underlying dispute." Flatow v. Islamic Republic of Iran, 67 F. Supp. 2d 535, 542 (D. Md. 1999), aff'd, 225 F.3d 653 (4th Cir. 2000) (unpublished opinion). It would be fundamentally unfair to allow the assets of an

entity that has no involvement with the underlying conflict to be attached. See Hercaire Int'l Inc. v. Argentina, 821 F.2d 559, 565 (11th Cir. 1987) ("Neither can we perceive any 'fraud or injustice' which results from insulating [the instrumentality's] property from attachment in aid of execution of the judgment against Argentina. Having had no connection whatsoever with the underlying transaction which gives rise to Argentina's liability, it would be manifestly unfair to subject [the instrumentality's] assets to such attachment."); see also Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 782 F.2d 377, 378 (2d Cir. 1986). Plaintiffs have made no showing of any such connection.

C. Even if the Court disregards the presumed separate juridical status of the CWCA, Plaintiffs have failed to establish that the property of the CWCA has the required nexus to the underlying firearms claim under the FSIA.

Assuming arguendo that the CWCA does not constitute a separate juridical entity from the People's Republic of China and that its assets may be attached with respect to a judgment against China, the remaining requirements of section 1610(a) of the FSIA still must be satisfied. That is, Plaintiffs may only attach property that has a nexus to the underlying claim and that is commercial. See 28 U.S.C. § 1610(a)(2); Hercaire Int'l Inc. v. Argentina, 821 F.2d 559, 563 (11th Cir. 1987). Plaintiffs make no showing that the property of the CWCA has any connection whatsoever to the underlying firearms tort claim in this case.

Section 1610(b)(2) of the FSIA, which dispenses with the nexus requirement and upon which Plaintiffs rely, does not govern this lawsuit because the section "relates to a claim for which the agency or instrumentality is not immune." 28 U.S.C. § 1610(b) (emphasis added). That is, it relates only to claims against an agency or instrumentality of a foreign state. This case does not involve a claim against the CWCA. Rather, Plaintiffs must satisfy the requirements of 28 U.S.C. § 1610(a)(2) (stating that "property . . . used for the commercial activity upon which

the claim is based" is not immune). Plaintiffs do not allege that the property of the CWCA is connected, even tangentially, to the underlying default judgment.

D. The pandas and associated funds are non-commercial in nature and are consequently immune from attachment or execution under the FSIA.

In its research agreement respecting the two giant pandas at the National Zoological Park, the CWCA is not engaged in commercial activity. The FSIA largely leaves the term "commercial activity" undefined. See Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992); see also Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1002 (D.C. Cir. 1985) ("The statute's most prominent ambiguity is the meaning of the term 'commercial.'"). According to the FSIA, "[a] 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Courts must first define the relevant activity and then determine whether the activity qualifies as commercial. If the activity has both commercial and non-commercial components, "jurisdiction under the FSIA will turn on which element the cause of action is based on." Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879, 885 (D.C. Cir. 1988).

The first step of the analysis is to define the relevant activity to be assessed. In this case, the ten-year cooperative arrangements between the CWCA and the National Zoological Park concerning the two giant pandas comprise the activity. The National Zoological Park makes an annual payment to the CWCA during the life of the cooperative research agreement, which mandates that 90 percent of payments must "fund giant panda conservation projects" and that the remaining 10 percent be used for related administrative expenses. Research Agreement at 4.5. The Fish and Wildlife Service issued the requisite permit for the pandas' import, which requires

that the loan of the pandas be for primarily non-commercial purposes. The Service also requires the National Zoological Park to submit "an annual accounting of funds collected as a result of the panda loan" and "an annual accounting and report of the funds transferred and the use of the donated funds in China." Import Permit and Special Conditions at ¶ 1.

Plaintiffs mistakenly construe the agreements between the National Zoological Park and various donors and corporate sponsors as the relevant activity to be analyzed. But the fact that Fujifilm or any other for-profit company may be a sponsor of the panda program at the National Zoological Park has nothing to do with whether the agreement between the CWCA and the National Zoological Park is commercial.

The second step of the analysis is to determine if the relevant activity is primarily non-commercial. See Liberian Eastern Timber Corp. v. Government of Republic of Liberia, 659 F. Supp. 606, 610 (D.D.C. 1987) (declining to find that "if any portion of a bank account is used for a commercial activity then the entire account loses its immunity"). To perform this task, courts almost always ask if a private person could have undertaken the activity. The Supreme Court, in Saudi Arabia v. Nelson, explained:

> [A] state engages in commercial activity under the restrictive theory where it exercises "only those powers that can also be exercised by private citizens," as distinct from those "powers peculiar to sovereigns." Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts "in the manner of a private player within" the market.

507 U.S. 349, 360 (1993) (internal quotations omitted). See also Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614-15 (1992); General Electric Capital Corp. v. Grossman, 991 F.2d 1376, 1382 (8th Cir. 1993); Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879, 884 (D.C. Cir. 1988); MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1328-29 (9th Cir. 1984); Texas Trading & Milling Corp. v. Federal

Republic of Nigeria, 647 F.2d 300, 309 (2d Cir. 1981).

A private party could not have loaned these two giant pandas to the United States. These black and white endangered wildlife can be found only in a few mountain ranges in the Sichuan, Shaanxi, and Gansu provinces of the People's Republic of China. See http://pandas.si.edu/facts/bearfacts.htm. They are a precious national treasure and are not a commodity traded in a private marketplace for commercial purposes. See 16 U.S.C. § 1538(a)(1)(F). This case is similar to MOL, Inc. v. People's Republic of Bangladesh, where the Ninth Circuit determined that Bangladesh's contract to license research monkeys was non-commercial:

> MOL asserts that the activity here relates to Bangladesh's contracting to sell monkeys. It admits that licensing the exploitation of natural resources is a sovereign activity. It argues, however, that this suit arises not from license revocation but from termination of a contract. In essence, Bangladesh lost its sovereign status when it contracted and then terminated pursuant to contract terms. . . . Bangladesh was terminating an agreement that only a sovereign could have made. This was not just a contract for trade of monkeys. It concerned Bangladesh's right to regulate imports and exports, a sovereign prerogative. It concerned Bangladesh's right to regulate its natural resources, also a uniquely sovereign function. A private party could not have made such an agreement. MOL complains that this conclusion relies on the purpose of the agreement, in contradiction of the FSIA. But consideration of the special elements of export license and natural resource looks only to the nature of the agreement and does not require examination of the government's motives. In short, the licensing agreement was a sovereign act, not just a commercial transaction.

736 F.2d 1326, 1328-29 (9th Cir. 1984) (internal citations omitted). Like the research monkeys of Bangladesh, the giant pandas are a natural resource of the People's Republic of China. Because no private party could have provided these two giant pandas to a zoological park, the making of such an agreement was "peculiarly sovereign." Cf. Janini v. Kuwait University, 43 F.3d 1534, 1537 (D.C. Cir. 1995). See also In re Sedco, Inc., 543 F. Supp. 561, 566 (S.D. Tex. 1982) ("A very basic attribute of sovereignty is the control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are

uniquely governmental in nature."), vacated in part, 610 F. Supp. 306 (S.D. Tex. 1984) (calling for hearing to determine whether oil drilling was for commercial or exploratory purposes), remanded on other grounds, 767 F.2d 1140 (5th Cir. 1985).

Research agreements between national instrumentalities deserve special protection under the FSIA. In Cicippio v. Islamic Republic of Iran, a case cited by Plaintiffs, the D.C. Circuit paid particular deference to agreements between two governments:

> When two governments deal directly with each other as governments, even when the subject matter may relate to the commercial activities of its citizens or governmental entities, or even the commercial activity conducted by government subsidiaries, those dealings are not akin to that of participants in a marketplace. Governments negotiating with each other invariably take into account non-marketplace considerations–most obviously political relations–and so they cannot be thought to be behaving, in that setting, as businessmen.

30 F.3d 164, 168-69 (D.C. Cir. 1994); but see Virtual Defense & Development Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 1, 4 (D.D.C. 1999) (holding that Moldova acted as private party when it contracted with private company regarding sale of planes capable of firing nuclear weapons even though Moldova claimed that only sovereign nations own or sell such planes). Although courts have stated that government contracts to buy military supplies or to lease property are often commercial activities, see, e.g., McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 348 (8th Cir. 1985); De Letelier v. Republic of Chile, 748 F.2d 790, 796 (2d Cir. 1984), such examples almost always involve one governmental and one private party. In contrast, the research agreement concerning the giant pandas is between two national instrumentalities.

The non-commercial nature of the research agreement between the CWCA and the National Zoological Park is further strengthened by the absence of an admission fee to see the giant pandas. In World Wildlife Fund v. Hodel, the district court did determine that an extra fee

levied to see giant pandas in a zoo was "significant to a consideration of the CITES [international treaty] requirement that the import was not primarily for commercial purposes." 1988 WL 66193 at *4 (D.D.C. 1988) (memorandum opinion). But, contrary to Plaintiffs' assertions, no fee is charged to see the two giant pandas at the National Zoological Park. See http://pandas.si.edu/facts/gpfaqs.htm. In addition, the National Zoological Park "must close the giant panda exhibit or must relocate both giant pandas to an off-public display enclosure if there is an indication that the public display of the animals interferes with the research as described in the [National Zoological Park]'s application [to import the pandas]." Special Conditions at ¶ 5.

"The concept of 'commercial activity' should be defined narrowly because sovereign immunity remains the rule rather than the exception, and because courts should be cautious when addressing areas that affect the affairs of foreign governments." Liberian Eastern Timber Corp. v. Government of Republic of Liberia, 659 F. Supp. 606, 610 (D.D.C. 1987) (internal citation omitted). See also City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31, 37 (3d Cir. 1985) (finding that Libya's purchase of a large residence was non-commercial because "[t]he record discloses no activity conducted for profit" at the residence); United States v. County of Arlington, 702 F.2d 485, 488 (4th Cir. 1983) (determining that embassy's efforts to provide housing for its staff and their families "is devoid of profit motive in any ordinary sense").

The primary nature of the agreement between the CWCA and the National Zoological Park is clearly to encourage research and conservation of giant pandas. Even if the standard is that all of the activity must be non-commercial, it is met in this case. All of the funds transferred to the CWCA for the two giant pandas must be used for research and conservation efforts or associated administrative expenses. See Research Agreement at 4.5; see also Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 23 (D.D.C. 1999).

The Court should not interfere with a research agreement between two national instrumentalities that has no connection to the underlying dispute in this case. The ten-year cooperative research agreement between the CWCA and the National Zoological Park is non-commercial. The funds and the pandas are thus immune from attachment or execution under the FSIA.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court deny Plaintiffs' Motion. The United States also respectfully requests oral argument.

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