

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AGUDAS CHASIDEI CHABAD)	
OF UNITED STATES,)	
)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:05-cv-01548-RCL
)	
RUSSIAN FEDERATION, <i>et al.</i>,)	
)	
Defendants.)	
)	

STATEMENT OF INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517,¹ the United States submits this Statement of Interest to provide the Court with the United States’ views regarding Plaintiff’s Proposed Protective Order, ECF No. 146. The United States greatly appreciates the Court’s consideration of its views in this matter.

In September 2015, Plaintiff Agudas Chasidei Chabad of United States (“Chabad”) filed a Proposed Protective Order purporting to govern the handling and dissemination of information deemed confidential by third parties from whom Chabad is seeking information in connection with this case. The United States objects to the Proposed Protective Order on several grounds. As an initial matter, the proposed order is unclear about which parties and entities are bound by its terms, including whether the proposed order would purport to bind the United States or purport to govern the marking and dissemination of U.S. Government information. In addition, the proposed order

¹ Section 517 provides that “[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district 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.”

purports to be the product of deliberations between Chabad and certain third parties, but at no point does it identify who such third parties are, making it impossible for the United States to assess the nature of Chabad's contact with these entities and whether any type of informal agreement has been reached between them, and how such an agreement would potentially impact the Government's interests. The United States, moreover, objects to the proposed order to the extent it would interfere with any effort the United States might take in response to steps by Chabad to seek to enforce the Court's orders in this case. As this Court is aware, should Chabad take additional enforcement steps that would seek to interfere with Russian property, such steps could cause significant harms to the United States' foreign policy interests. *See* Statement of Interest of the United States, ECF No. 134, at 6-9. The United States therefore respectfully requests that the Court consider these objections when ruling on Chabad's request for entry of the proposed order.

BACKGROUND

This case concerns Chabad's efforts to obtain certain books and manuscripts ("the Collection") from the defendants, the Russian Federation, the Russian Ministry of Culture and Mass Communication, the Russian State Library, and the Russian State Military Archive (collectively "Russia"). The Collection consists of two sets of materials: (1) a set of books and manuscripts seized at the time of the Bolshevik Revolution and now held by the Russian State Library; and (2) a set of manuscripts of religious teachings seized by Nazi Germany during the 1941 invasion of Poland, which was subsequently taken by the Soviet Red Army, and is now held at the Russian State Military Archive.

After an initial appearance to contest the Court's jurisdiction, Russia withdrew

from further participation in this litigation. *See* ECF No. 72. The Court then entered a default judgment against Russia and directed it to transfer the Collection to Chabad (the “specific performance order”), ECF No. 80. In an effort to compel Russia’s compliance, Chabad asked the Court to find Russia in contempt and impose monetary contempt sanctions against it in the form of a daily “fine payable to the Plaintiff” until the Collection is transferred to Chabad. ECF No. 92-2 at 2. At the Court’s invitation, the United States submitted a Statement of Interest opposing the entry of a sanctions order against Russia, noting that the Foreign Sovereign Immunities Act does not authorize the Court to seek to compel Russia’s compliance with an order directing the transfer of property that it holds within its own borders through an award of monetary sanctions. ECF No. 111. The United States also informed the Court of its view that civil contempt sanctions would “risk damage to significant foreign policy interests” while simultaneously undermining the possibility of an amicable diplomatic resolution to the dispute. *Id.* On January 16, 2013, the Court entered an order for civil contempt sanctions, fining Russia \$50,000 per day until it complied with the Court’s order to transfer the Collection to Chabad (the “sanctions order”). ECF No. 116.

One year later, Chabad filed a motion for an interim judgment of accrued sanctions. ECF No. 127. The United States filed a Statement of Interest opposing entry of an interim judgment on grounds similar to those that formed the basis for its opposition to entry of the sanctions order: (1) that entry of an interim judgment is not consistent with the carefully defined, and limited, system of remedies authorized under the FSIA, and (2) that, even if it were consistent with the FSIA, the Court should decline to issue such a judgment in light of the significant foreign policy concerns of the United

States. ECF No. 134. The Court granted Chabad's motion on September 10, 2015, finding that \$43.7 million had accrued since the sanctions order was entered. *See* ECF No. 144. On that date, the Court also entered an order directing Chabad to provide the United States with notice of any discovery, registration of judgment, restraint, attachment, and/or writ of execution in connection with the enforcement of the Court's judgments entered in the action. ECF No. 145.

Chabad has taken several steps in recent months to seek to enforce the Court's sanctions order and judgment. In April 2015, it served a subpoena *duces tecum* and *ad testificandum* on Sberbank CIB USA, Inc. ("Sberbank USA"), ECF No. 140, and later served a subpoena on a public relations agency, Ketchum, Inc., *see* Mots. Hr'g Tr. 12:8-14, Aug. 20, 2015. Furthermore, in response to a request made pursuant to the Freedom of Information Act, Chabad has received documents from the Office of Foreign Assets Control within the Department of Treasury, *see* Hr'g Tr. 12:15-24, presumably to assist its declared efforts to locate and attach Russian property located in the United States.

On September 21, 2015, Chabad filed with the Court a Proposed Protective Order that purports to govern the dissemination of confidential information in connection with this case. *See* ECF No. 146. The proposed order provides a mechanism by which a third party producing information in response to a discovery request may mark that information as "Confidential." *Id.* at 1. Disclosure of this information would be permitted only to a limited category of persons enumerated in the proposed order, including the parties, their counsel, court personnel, and expert witnesses and litigation consultants. *Id.* at 4-5. The proposed order further states that any filings with the Court that contain information marked "Confidential" must be made under seal. *Id.* at 9-10.

The proposed order states that its terms apply to the parties to the action, their counsel, “all third parties providing discovery,” and “all other interested persons with actual or constructive notice of this Order.” *Id.* at 1. The proposed order suggests that it is the product of discussions between Chabad and third parties and states that “the parties [] agreed to the [] terms of confidentiality.” *Id.*

For the reasons that follow, the United States objects to entry of the Proposed Protective Order.

DISCUSSION

Under Federal Rule of Civil Procedure 26(c), a court, “for good cause,” may issue a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Pursuant to this rule, a court has the authority to issue an order “specifying terms . . . for the disclosure,” “limiting the scope of disclosure . . . into certain matters,” or “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specific way.” Fed. R. Civ. P. 26(c)(1)(B), (D), & (G). Even where the parties stipulate to a protective order, a court is not deprived of its Rule 26 authority and must “make a determination of good cause before [it] may enter the order.” *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999); *see also EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1411 (D.C. Cir. 1996) (remanding for further proceedings where district court failed to make good cause determination). A non-party to a case may object to a discovery order, but it may not do so on behalf of another entity where that entity is capable of making its own objection. *See In re Westinghouse Elec. Corp. Uranium Contracts Lit.*, 76 F.R.D. 47, 59 (W.D.

Penn. 1977).

In this case, the United States objects to Chabad's Proposed Protective Order for several reasons. First, the proposed order is unclear as to which parties and entities would be bound by the order. Paragraph 18 of the proposed order states that "[t]he Parties agree to be bound by the terms of this Protective Order," ECF No. 146 at 9, but it is unclear whether Chabad intends that Russia, the third parties who have received discovery requests, and/or the United States be covered by the use of the word "Parties." Similarly, the decretal paragraph on the first page of the proposed order purports to bind to its terms "all third parties providing discovery in this action, and all other interested persons with actual or constructive notice of this Order." *Id.* at 1. To the extent this language is intended by Chabad to cover the United States, which has closely monitored this litigation and participated on certain issues, it may not do so; the proposed order may not impermissibly bind the United States, which is not a party to this litigation. Furthermore, the decretal paragraph's language designed to bind all persons with actual or constructive notice of the order would also improperly apply to the United States and, in any event, is inconsistent with the draft "Agreement to Be Bound by Protective Order" appended to the proposed protective order, which appears to provide an option to be bound by the protective order by signing the agreement.

The United States further objects to the Proposed Protective Order due to the lack of clarity regarding what other entities have consented to the terms of the proposed order. In the first clause of the proposed order, Chabad states that "certain third parties" have informed it that "certain information, documents, and things sought through third-party discovery may contain or disclose confidential or proprietary information." *See* ECF No.

146 at 1. The second and third clauses state further that Chabad has worked with “such third parties” to develop a mechanism whereby information can be deemed confidential and subject to certain restrictions. *Id.* But the identities of the third parties referenced in these clauses are nowhere disclosed, and it is nowhere made clear who they are, including whether any of them are foreign governments, or foreign government agencies and instrumentalities (or for that matter whether Chabad has contacted any other U.S. Government agency without alerting either the Department of Justice or the Department of State). As a result, the United States is unable to assess the nature of Chabad’s contact with these third parties, whether any sort of informal agreement between the parties has been reached, and how such an arrangement might affect the Government’s interests. Moreover, whereas the first two clauses use the phrase “third parties,” the third clause states that “the parties hav[e] agreed to . . . terms of confidentiality.” *See id.* This change in phrasing from “third parties” to “the parties” makes it ambiguous as to whether the reference to “the parties” is intended to signal Russia’s consent to the proposed order² or the consent of the United States, based on its participation in the case thus far (which as noted herein would be improper).

The United States further objects to the proposed protective order to the extent that it otherwise purports to limit the United States’ access to and use of information for purposes of attending to its interests in this case. Because of the significant foreign policy interests of the United States at stake in this case, any protective order entered by the Court should clearly authorize disclosure of any information in the case to the United States for use as it determines is necessary. The proposed order purports to limit the use

² In light of Russia’s withdrawal from the litigation in 2009, it is almost certain that it has not consented to the terms of the Proposed Protective Order.

of information marked as Confidential to “this Action only.” *See* ECF No. at 2. But, as noted above, the United States objects to being bound by this order either within or outside of this action. Moreover, as this Court is aware, there is a related case currently pending that concerns a subpoena Chabad issued to Sberbank USA, *see Chabad v. Russian Federation*, Civil Action No. 1:15-mc-01153-RCL (D.D.C. 2015). Under the terms of the proposed protective order, confidential information obtained in the above-captioned action could not be used in the related subpoena matter, which could potentially undermine the ability of the United States to respond to enforcement efforts by Chabad involving Sberbank USA, should a decision be made to do so. In addition, the proposed order permits disclosure of confidential information only to the “Parties to this Action” and “Counsel for the Parties” and “only to the extent necessary to prosecute this Action,” *see* ECF No. 146, at 4-5, which could also impede the United States’ ability to respond to potential enforcement efforts.

As a final matter, the United States requests that any protective order not use the word “Confidential” in isolation, as Chabad has proposed; instead, the marking for any sensitive information should be “Confidential Under the Terms of this Protective Order” or something similar, so as to avoid confusion with the formal classification of national security information by the United States Government. In addition, the United States requests that any protective order entered specifically exclude from its terms any U.S. Government information.

CONCLUSION

For the foregoing reasons, the United States respectfully urges the Court to make clear the following:

- That the United States, as a non-party, is not bound by the terms of such an order;
- That any such order is not to be used to prevent the United States from accessing information that is relevant to this case or the related action concerning the subpoena served on Sberbank USA;
- That any such order is meant to apply only to those entities and persons who sign the appended Agreement to be Bound by Protective Order;
- That the marking “Confidential” instead be changed to “Confidential Under the Terms of this Protective Order,” if such an order is entered;
- That any such order specifically excludes from its terms U.S. Government information; and
- That Chabad is to disclose to the United States the identities of the third parties with whom it has negotiated the terms of the Proposed Protective Order.

Dated: October 23, 2015

Respectfully submitted,

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