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 *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517,[1] the United States submits this Supplemental Statement of Interest in response to the motion filed by Plaintiff, Aguda Chasidei Chabad of the United States ("Chabad") to strike the Statement of Interest filed by the United States on February 3, 2016 and to rescind the provision in the Court's order of September 10, 2015 requiring Chabad to provide the United States with notice of Chabad's discovery efforts. *See* Pl.'s Mot. to Strike the Statement of Interest of the United States and to Rescind-in-Part the Court's Sept. 10, 2015 Order Requiring Notice to the Government ("Pl.'s Mot. to Strike"), ECF No. 152. The United States greatly appreciates the Court's consideration of its views in this matter.

The United States writes to make three points in response to Chabad's Motion to Strike. First, contrary to Chabad's assertion, the issues raised in the Statement of Interest

[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."

are neither premature in light of prior orders of this Court nor foreclosed by case law. To the contrary, the Court has not previously addressed the issue of whether Chabad's subpoenas seeking information about Russian assets for purposes of enforcing monetary contempt sanctions are improper or inconsistent with the requirement that discovery requests seek only relevant information. Second, the Court should make clear that Chabad is required to comply with the Foreign Sovereign Immunities Act ("FSIA") by seeking prior judicial review of any enforcement steps that would restrain, attach, or execute upon property in connection with enforcing the sanctions. *See* 28 U.S.C. §§ 1609–10. These issues are ripe for the Court's consideration. Third, should the Court be inclined to allow discovery to proceed, the Court should decline Chabad's request to rescind the requirement that Chabad provide the United States with notice of Chabad's discovery efforts, given the weighty foreign policy interests the United States has in this litigation and the importance of that provision to the United States' ability to stay apprised of developments in the case.

BACKGROUND

A complete summary of the relevant background was set forth in the Statement of Interest filed by the United States on February 3, 2016. *See* Statement of Interest of the United States ("Statement of Interest"), ECF No. 151, at 2–6. For the Court's convenience, the United States now summarizes only those events that have transpired since February 3.

The Statement of Interest informed the Court of the United States' view that Chabad's requested discovery is not "relevant" under Federal Rule of Civil Procedure 26(b)(1) because no assets of 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"), are legally available to satisfy the sanctions that have accrued. *Id.* at 6–7. As discussed therein, Chabad cannot execute against any Russian assets located in the United States to satisfy the sanctions order[2] and judgment[3] because the FSIA precludes the enforcement of monetary contempt sanctions against a foreign state. *Id.* at 7–11. Chabad, moreover, cannot collect the sanctions by executing against Russian assets held abroad because the Court's sanctions order cannot be enforced outside of the United States. *Id.* at 11–14. The United States further informed the Court of the Department of State's view that enforcement of the sanctions, including discovery efforts, could cause significant harm to U.S. foreign policy interests. *Id.* at 14–20. The United States accordingly requested that the Court foreclose Chabad's recent efforts to obtain information about Russian assets via subpoena. *Id.* at 20.

Two days later, on February 5, JPMorgan Chase filed a Motion to Stay Compliance with Subpoena in the Southern District of New York ("S.D.N.Y."), arguing that compliance with the subpoena issued by Chabad should be stayed until after the issues raised in the Statement of Interest are resolved. *Agudas Chasidei Chabad v. Russian Federation et al.*, No. 16-mc-00040-P1 (S.D.N.Y. filed Jan. 27, 2016), Mem. in Supp. of Mot. to Stay Compliance with Subpoena, ECF No. 3. The bank filed its motion in the miscellaneous proceeding that was created when Chabad registered the sanctions

[2] The "sanctions order" refers to the order entered by the Court on January 13, 2013, requiring Russia to pay $50,000 per day for its non-compliance with the default judgment entered in this case. *See* Statement of Interest, ECF No. 151, at 3.

[3] The "sanctions judgment" refers to the Interim Judgment entered by the Court on September 10, 2015, following the Court's finding that $43.7 million in daily fines had accrued since the sanctions order was entered. *See* Statement of Interest, ECF No. 151, at 4.

judgment in S.D.N.Y. in January 2016. *See id.* Citigroup joined JPMorgan's motion on February 9. *See id.*, Mem. in Supp. Mot. to Stay Compliance with Subpoena, ECF No. 12. On March 9, Chabad filed an opposition to the banks' Motion to Stay. *See id.*, Opp'n to Mot. to Stay Compliance with Subpoena, ECF No. 16. On March 24, the S.D.N.Y. court entered a stipulation between Chabad, JPMorgan Chase, and Citigroup stating that, in the event this Court determines that Chabad is prohibited from pursuing discovery via the subpoenas, the banks will have no obligation to comply with them. *See id*., Stipulation and Order Regarding Resp. to Non-Party Subpoenas, ECF No. 22. The stipulation further states that, if this Court permits the subpoenas to move forward, the banks will produce responsive material, subject to other objections the banks have made. *Id*.

Also on March 9, Chabad filed in this Court a Motion to Strike the United States' February 3 Statement of Interest. Pl.'s Mot. to Strike. Chabad contends in its motion that the United States lacks standing to seek to preclude Chabad's discovery efforts and that the Court previously has rejected similar arguments as being premature. *Id.* Chabad further requests that the Court rescind the provision of its order from September 2015 requiring Chabad to give the United States same-day notice of its discovery efforts. *Id.*

DISCUSSION

For the reasons that follow, the Court should reject Chabad's request for the two types of relief it seeks in its motion. The issues presented in the Statement of Interest are ripe for the Court's consideration and should not be stricken; moreover, the issues raised in the Statement of Interest provide a basis for foreclosing Chabad's discovery efforts. In addition, the Court should make clear that Chabad must comply with the FSIA by

obtaining prior judicial authorization before it attempts to restrain, attach, or execute on any property in connection with the sanctions order, including by issuing restraining notices as to particular accounts in its effort to enforce the sanctions judgment. Finally, should the Court decide to authorize discovery to proceed, the Court should reject Chabad's motion to rescind its prior order requiring Chabad to give the United States notice of its discovery efforts.

A. The United States' concerns raised in the Statement of Interest are neither foreclosed by the Court's prior orders nor barred by case law

Chabad contends that the issues raised by the United States in its Statement of Interest are foreclosed by this Court's prior rulings. It further claims that the United States' arguments run counter to the Supreme Court's ruling in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). Neither contention is accurate.[4]

To begin, contrary to Chabad's assertion that the Court has already "authorized Chabad to move forward with discovery," this Court's prior rulings did not resolve questions related to discovery. While the Court has noted its intention to "give plaintiff some of the tools to which it is entitled under law," that statement was made in the context of its decision to issue the sanctions judgment. Mem. Op. in Supp. of Order

[4] Chabad's contention that the United States lacks standing to challenge the subpoenas is similarly without merit. Pursuant to 28 U.S.C. § 517, the United States is authorized to participate in pending litigation in either a U.S. district court or state court so as to "attend to the interests of the United States." The United States' interests with respect to Chabad's subpoenas have previously been set forth at length. *See* Statement of Interest, ECF No. 151, at 14-20. More generally, the United States clearly has "standing" to address the foreign policy interests of the United States. Indeed, the Court has recognized the importance of the United States' interest in this litigation, including by soliciting the views of the United States, *see* Order Soliciting Views of United States, ECF No. 107, and by noting that that it "is sensitive to the[] foreign policy interests" of the United States, *see* Mem. Op. in Supp. of Order Granting Mot. For Interim J., ECF No. 143, at 11.

Granting Mot. for Civil Contempt Sanction, ECF No. 116, at 7. That decision did not address questions relating to the propriety of Chabad's discovery efforts; indeed, that same day, the Court decided to solicit the United States' views before ruling on Sberbabnk USA's pending motion for a protective order, recognizing "the serious impact which the outcome of this case could have on the foreign policy interests of the United States." Order Soliciting Views of the United States, Case No. 1:15-mc-1153, ECF No. 27.[5]

Chabad's contention that the subpoenas fall within the purview of permitted discovery under *Argentina v. NML Capital, Ltd.* is inaccurate. In *NML Capital*, a bondholder (NML) obtained a monetary judgment against Argentina after that country defaulted on its external debt. *NML Capital*, 134 S. Ct. at 2253. NML then served subpoenas on two banks in an effort to locate Argentinian assets, including assets held abroad. *Id.* Argentina moved to quash the subpoenas, contending that discovery into a foreign state's extraterritorial assets was not permitted under the FSIA, because such assets do not meet one of the exceptions to execution immunity delineated in § 1610. *Id.* at 2257. The Court rejected this argument, holding that the FSIA does not "specif[y] a different rule" for post-judgment discovery when the judgment debtor is a foreign state.

[5] Contrary to Chabad's assertion, the law-of-the-case doctrine does not confine the Court in any way. For the reasons discussed above, the current posture of this case is sufficiently distinct from the status of the case when the Court made its prior rulings that those prior rulings do not apply in the present circumstances. But even if the Court's prior rulings were somehow to apply to Chabad's subpoenas, the Court is still free to reach a result different from that it reached previously. *See Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009, 1013 (D.C. Cir. 2009) (observing that the law-of-the-case doctrine does not apply to interim rulings made by district courts); *Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014) (en banc) (rejecting argument that "if a district court realizes an earlier ruling was mistaken, it can't correct it, but must instead wait to be reversed on appeal."), *cert. denied*, 135 S. Ct. 946 (2015).

Id. at 2256; *see also id.* n. 6 (noting that "[a]lthough this appeal concerns only the meaning of the [FSIA], we have no reason to doubt that, as NML concedes, 'other sources of law' ordinarily will bear on the propriety of discovery requests of this nature and scope.").

Contrary to Chabad's assertions, *NML Capital* does not control the analysis of the propriety of Chabad's subpoenas. Unlike in the present case, there was no contention that asset discovery was categorically improper; rather, the question was whether the FSIA limits the *scope* of such discovery to assets as to which there is a reasonable basis to believe a statutory exception to immunity applies. *See id*. at 2256. By contrast, in this case it is clear that the sanctions judgment itself is unenforceable against any assets, and the contention is that no discovery is proper. In particular, none of the exceptions to execution immunity applies to the sanctions order Chabad is seeking to enforce, and thus the FSIA does not authorize attachment of any foreign state assets in the United States for purposes of satisfying that judgment. *See* Statement of Interest, ECF No. 151, at 7-11. Nor would enforcement of the sanctions order be permitted in any other country. *Id*. at 11-14. Consequently, because Chabad's subpoenas seek "only information that could not lead to executable assets in the United States or abroad," the subpoenas here concern information that is not relevant to execution and they are not relevant under Federal Rule of Civil Procedure 26(a) as a result. *See NML Capital*, 134 S. Ct. at 2258.

Chabad erroneously claims that even if it were seeking only information that could not lead to executable assets, in that event, the United States should have no foreign policy concerns. Pl.'s Mot. to Strike at 11. To the contrary, a fishing expedition into a foreign state's assets as well as those of its officials and affiliated entities, in and of

itself, can be expected to damage the United States' foreign policy interests, and such concerns are further heightened where the underlying judgment (here, for monetary contempt sanctions) is unenforceable. *See* Statement of Interest at 14 ("Permitting Chabad to proceed with its present discovery efforts . . . would also result in other more specific harms" to U.S. foreign policy.). As between these competing views of the United States' foreign policy interests, it is only those of the United States to which the Court owes deference. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

B. The United States' concerns are not premature and Chabad should be required to seek prior judicial review of any enforcement steps that would restrain, attach, or execute upon property in connection with enforcement of the sanctions order, including issuance of a restraining notice

The Court's prior decisions also do not fully address the United States' immediate concerns that any assets identified by the subpoenas not be restrained or attached without compliance with the advance judicial approval requirements of the FSIA. To be sure, the Court previously has stressed the difference it sees between issuing a sanctions order and enforcing such an order, noting that the latter is "carefully restricted by the FSIA." Mem. Op. in Supp. of Order Granting Mot. for Civil Contempt Sanction, ECF No. 116, at 6. The Court has also drawn a line demarcating where it views the enforcement stage of the case as commencing, stating that "concerns related to [] enforcement are premature until such time as plaintiff has identified property to attach and execute, provided notice to defendants of such attachment and execution, and given defendants 'reasonable time' to respond." Mem. Op. in Supp. of Order Granting Mot. for Interim J., ECF No. 143, at 4 (citing 28 U.S.C. § 1610(c)).

As set forth in the Statement of Interest, however, if Chabad is permitted to obtain

the information it seeks via subpoena, then there is a risk that it could attempt to restrain Russian assets without further judicial consideration, thereby reaching, of its own accord, what the Court has described as the enforcement stage. This issue is properly considered now, before any discovery proceeds, as it may be the last opportunity to address the matter before an actual attempt to restrain assets. Under New York law, a judgment creditor (such as Chabad) is ordinarily able to issue—without a prior court ruling—a restraining notice to a judgment debtor that itself prevents the debtor from transferring funds up to twice the judgment amount for as long as one year. *See* N.Y. Civ. Practice Law and R. § 5222(a)–(b). Thus, if Chabad is able to obtain information about accounts held in the United States by the Russian entities or individuals listed in the subpoenas, it could invoke this provision of New York law in an attempt to freeze Russian accounts—including accounts belonging to Russian government instrumentalities, individuals, and non-governmental entities that have no involvement in this litigation—with no opportunity to challenge the hold until after the restraint is in place. Chabad acknowledges in its Motion to Strike the availability of restraining notices and avers generally that it intends to comply with the FSIA, but it does not specifically represent that it would refrain from availing itself of the restraining notice procedure without first obtaining court approval. This may therefore be the last opportunity for the Court to address the issues raised in the Statement of Interest, including the validity of the subpoenas, before Chabad seeks to place restraints on Russian property or on property that is held by a person or entity associated with the Russian government.

Under the FSIA, the Court is obliged to make a determination—*sua sponte*, if necessary—that foreign state property is not immune before any attachment or

enforcement can take place. *See* 28 U.S.C. §§ 1609, 1610(a), (c) (creating a presumption of immunity for foreign state property and requiring judicial review before permitting an order of attachment or execution); H.R. Rep. No. 94-1487, at 8, 27, 30 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6606, 6626, 6629 (explaining that allowing a judgment creditor to attach or execute on a foreign state's property simply by applying to the clerk or local sheriff "would not afford sufficient protection to a foreign state"); *see also Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785–86 (7th Cir. 2011) ("The presumption of [execution] immunity also requires the court to determine—*sua sponte* if necessary—whether an exception to immunity applies; the court must make this determination regardless of whether the foreign state appears."); *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) ("In light of the special sensitivities implicated by executing against foreign state property, courts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution *sua sponte*.").

In a proceeding to obtain the requisite pre-execution court order under § 1610(c) of the FSIA, the judgment creditor bears the burden of identifying the particular property to be executed against and demonstrating that it falls within a statutory exception to immunity from execution. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011). Consequently, any attachment of property belonging to the Russian government, or to its agencies or instrumentalities, would be improper absent a prior judicial determination that Chabad has met its burden of demonstrating that such assets are not immune. *See, e.g., Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172 RRM MDG, 2011 WL 5245206, at *5 n.8 (E.D.N.Y. Nov. 2, 2011) ("[T]he FSIA requires that

any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor's unilateral delivery of a writ . . . .").

Particularly relevant to the circumstances of this case, courts have extended the prior-determination requirement to cover the issuance of restraining notices under New York law. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000) (vacating restraining notice issued to foreign sovereign where judgment creditor failed first to obtain a § 1610(c) order), *aff'd*, 281 F.3d 48 (2d Cir. 2002); *Ferrostaal Metals Corp. v. S.S. Lash Pacifico*, 652 F. Supp. 420, 423 (S.D.N.Y. 1987) ("The *ex parte* restraining notices served [by the judgment creditor pursuant to N.Y. Civ. Practice Law and R. § 5222] are just the type of restraining notices against which § 1610(c) of the [FSIA] protects foreign states."); *Trans Commodities, Inc. v. Kazakstan Trading House*, No. 96 CIV. 9782 (BSJ), 1997 WL 811474, at *3 (S.D.N.Y. May 28, 1997) (vacating restraining notice for lack of court order "specifically pass[ing] upon the propriety of the New York Restraining Notice," even though a state court had issued an order permitting the judgment creditor to generally undertake attachment or execution against the foreign judgment debtor).

Moreover, this Court previously has insisted that "no attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required . . . ." *See* Mem. Op. Granting Mot. for Interim J. of Accrued Sanctions, ECF No. 143, at 3 (quoting 28 U.S.C. § 1610(c)). Thus, the law is clear that Chabad cannot restrain any assets even temporarily without advance judicial

approval.

While the United States appreciates that Chabad has declared its intent to comply generally with the FSIA, *see* Mot. to Strike at 8-9, Chabad has not expressly indicated that it will seek a pre-enforcement order pursuant to § 1610(c) as to the propriety of issuing a restraining notice under New York law to restrain particular accounts in its effort to enforce the sanctions judgment. As the United States previously has explained, even a short-term freeze of Russian accounts could have serious repercussions for U.S. foreign policy interests, *see* Statement of Interest of the United States at 14–20, and there would be no opportunity to challenge the propriety of a restraining notice until after it is already in place. The Court therefore should now address and make clear that Chabad is required to seek judicial authorization in advance of any enforcement steps that restrain, attach, or execute upon Russian property, including the issuance of a restraining notice as to particular accounts.

C. Chabad should continue to be required to provide the United States with same-day notice of its discovery efforts

Chabad's motion not only seeks to have the United States' Statement of Interest stricken, but further requests that the Court rescind its order from September 10, 2015 requiring Chabad to provide the United States with same-day notice of its discovery efforts in connection with this Court's judgments in this case. *See* Order, ECF No. 145, at 1–2. Should the Court be inclined to allow any discovery to proceed, this request should be denied.

The notice requirement is a crucial component of the United States' ability to stay informed of developments in this case. As the United States previously has informed the Court, discovery into the assets of Russian entities and individuals could significantly

hinder the ability of the United States to facilitate a transfer of the Collection to Chabad. *See* Statement of Interest at 17. In addition, if Chabad were to prevail in its quest for discovery, including by obtaining information about Russian assets in the United States, it would likely prompt Russia to take reciprocal measures against U.S. property held in Russia. *Id.* at 18–19. More broadly, authorizing sweeping discovery such as the subpoenas issued by Chabad here could cause friction with foreign nations other than Russia and could open the door to reciprocal orders being entered against the United States in foreign courts. *Id.* at 19. Notice of Chabad's discovery efforts is a key mechanism by which the United States is able to stay abreast of any developments and take appropriate steps to seek to prevent or mitigate any harms.[6]

The Court previously has stated that it "is sensitive to the[] foreign policy interests" of the United States in this case. *See* Mem. Op. in Supp. of Order Granting Mot. For Interim J., ECF No. 143, at 11. Indeed, even prior to the notice requirement being in place, the Court sought to ensure that the United States was aware of all related proceedings and had the opportunity to assert any interest it may have. *See* Mots. Hr'g Tr., Aug. 20, 2015, ECF No. 151-3, at 11:3–7 (directing Chabad to provide the United States with copies of a subpoena served on Sberbank CIB USA and a motion for a

[6] Chabad notes that counsel for JPMorgan Chase and Citigroup and counsel for the United States have communicated about this case and the recent subpoenas. *See* Pl.'s Mot. to Strike at 5–6. To the extent Chabad is implying that any such communications are inappropriate, such a suggestion is plainly meritless. As noted above, 28 U.S.C. § 517 authorizes the Department of Justice to attend to the interests of the United States not only in any suit pending in a court of the United States or a State, but "to attend to any other interest of the United States," and this section does not limit such participation to any particular course of action. Moreover, the United States has the right to seek information and discuss any matter with any of the parties, as well as any other interested party. In fact, one of the parties with which the United States communicates about this case is Chabad itself. *See* Pl.'s Mot. to Strike at 5 (noting that the United States provided Chabad with notice of the United States' intent to file a Statement of Interest).

protective order filed by Sberbank CIB because the United States "may want to assert their interest in that as well"). If anything, the importance of notice of discovery efforts in this matter has only increased now that Chabad clearly has begun to move into the execution phase of the proceeding. For these reasons, the Court should retain the requirement of notice to the United States.

CONCLUSION

For the foregoing reasons, and for the reasons previously set forth in its Statement of Interest, the United States respectfully requests that the Court preclude Chabad's recent efforts to obtain discovery about Russian assets via subpoena. The Court should make clear that Chabad is required to obtain judicial approval before it takes any steps to restrain, attach, or execute upon Russian property by any means, including the issuance of a restraining notice as to particular accounts. The Court should further deny Chabad's motion to strike the Statement of Interest and to rescind the notice requirement.

Dated: March 28, 2016

Respectfully submitted,

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