UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAKAB SAUDI HOLDING COMPANY,

Plaintiff,

v.

SAAD KHALID S AL JABRI,
KHALID SAAD KHALID AL JABRI,
MOHAMMED SAAD KH AL JABRI,
NEW EAST (US) INC.,
NEW EAST 804 805 LLC,
NEW EAST BACK BAY LLC,

Defendants.

Case No. 1:21-cv-10529-NMG

PLAINTIFF SAKAB SAUDI HOLDING COMPANY'S OPPOSITION TO UNITED STATES' MOTION TO INTERVENE

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Statutes and Rules

Plaintiff Sakab Saudi Holding Company ("Sakab") respectfully opposes the United States' Motion to Intervene and Motion for Stay of Briefing on Motion to Remand (ECF No. 40) (hereinafter "Mot. to Intervene").[1] Intervention is not necessary or appropriate here, as the United States has not met its burden of showing that the disposition of this action threatens to impair or impede its ability to protect its interest in preventing the disclosure of alleged sensitive national security information.

PRELIMINARY STATEMENT

The potential concerns that the United States has expressed in its Motion to Intervene are not present in this case. Sakab does not seek to resolve in the Massachusetts Superior Court (or in this Court if the case is not remanded) any of the issues Defendants raised in their Notice of Removal or in Defendant Saad Khalid S Al Jabri's ("Al Jabri") recently (and prematurely) filed Answer and Counterclaim. Sakab has no desire or intent to inject into this action any issue conceivably having national security implications. Rather, Defendants are creating a problem where none exists by threatening to put purportedly sensitive—and irrelevant—national security matters at issue. There is no need for them to do so to oppose Sakab's Motion to Remand or to defend themselves in this action.

As Sakab stated unambiguously in its very first filings, it brought this action seeking limited relief in the Massachusetts Superior Court for Suffolk County (and, if this case is not remanded, it will seek the same limited relief in this Court). Specifically, Sakab seeks to secure prejudgment attachments and record memoranda of *lis pendens* on eight luxury condominiums in

1. The United States' request to stay briefing on Sakab's motion to remand is moot as a result of the Court's Order dated August 9, 2021, allowing Defendants' Assented to Motion to Extend Deadlines for Briefing on Remand Motion (ECF No. 44) and directing that: (i) Defendant's opposition to Sakab's Motion to Remand shall be filed no later than ten (10) days after the Court's ruling on the United States' Motion to Intervene, and (ii) Sakab's reply memorandum shall be filed no later than twenty-one (21) days after the filing of Defendants' opposition to Sakab's Motion to Remand.

Boston. (Verified Complaint ¶ 5, ECF No. 1-1 (hereinafter "Verified Compl.").) Once such preliminary relief is obtained, Sakab seeks to stay this action pending resolution of the principal, comprehensive asset-recovery lawsuit already well underway in Canada entitled *Sakab Saudi Holding Co., et al. v. Saad Khalid S Al Jabri, et al.*, No. CV-21-00655418-00CL (Ontario Superior Court of Justice (Commercial List)) (hereinafter the "Ontario Action").[2] (Verified Compl. ¶ 5.)

Sakab bases its request for interim relief on orders issued by the court in the Ontario Action (the "Ontario Orders"), including a "*Mareva*" injunction restraining Al Jabri from dissipating his assets worldwide, specifically including the eight Boston condominiums at issue, and an order placing those properties into receivership. (*Id.* ¶ 1, 9.) Sakab asked the Massachusetts Superior Court (and will renew the request to this Court if the case is not remanded) to give partial and limited effect to the Ontario Orders as a matter of comity. (Memorandum of Law in Support of Motion to Remand 9, ECF No. 18.) Sakab demonstrated that the Ontario Superior Court had issued those orders based on a massive evidentiary record, and on its findings that the plaintiffs in that case (which include Sakab) presented "overwhelming evidence of fraud" and that the Boston properties were fruits of that fraud. (Verified Compl. ¶ 14 & Ex. 4.) The Ontario Superior Court found that "Al Jabri is adept at moving money around the world including establishing corporations (such as the New East [Defendants]) to permit him to hold property indirectly" and concluded that "the risk of removal or dissipation [of assets] may be established by inference given Al Jabri's sophisticated, international, and multilayered means of moving money and assets." (Verified Compl. ¶ 11 & Ex. 3.) The Ontario Superior Court twice rejected Al Jabri's attempts to overturn those orders,

2. Sakab filed in Massachusetts Superior Court a motion for attachment, a motion for issuance of memoranda of *lis pendens,* and a motion for a stay on the same day that it filed the Verified Complaint.

again finding—after receiving more evidence (including evidence submitted by Al Jabri), providing parties the opportunity to cross-examine each other's witnesses, and holding a day-long hearing—"substantial evidence of fraud."[3] (Verified Compl. ¶¶ 13-16 & Ex. 5.)

Most recently, on August 9, 2021, Ontario Superior Court Justice Markus Koehnen extended the *Mareva* injunction to Al Jabri's son, Defendant Mohammed Saad Kh Al Jabri ("Mohammed"). (Declaration of Samuel W. Salyer in Support of Plaintiff's Opposition to United States' Motion to Intervene (hereinafter "Salyer Decl.") Ex. A (Ontario Superior Court Order)). Justice Koehnen issued that Order based on (i) Al Jabri's testimony during cross-examination in the Ontario Action that he purportedly gifted all of his assets (including the New East Defendants and the eight Boston properties at issue) to Mohammed; (ii) Mohammed's testimony during cross-examination in the Ontario Action claiming to be the beneficial owner of the New East Defendants; and (iii) evidence that Mohammed has regularly re-gifted to his father and other family members large sums from the assets he received from his father, including "to pay for all of his father's legal fees." (Salyer Decl. Ex. B (Ontario Superior Court Endorsement) ¶¶ 4-11, 16-17.)

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3. *See* Verified Compl. Ex. 3 (Ontario Superior Court Reasons on Ex Parte Orders) ¶¶ 7-31 (discussing the Plaintiffs' factual allegations and evidence, including the Deloitte Report (defined in the Verified Complaint) and finding that the Plaintiffs (including Sakab) met their burden of "establish[ing] a strong *prima facie* case of fraud, a genuine risk that the Defendant [*i.e.*, Al Jabri] will put his assets beyond his creditors or out of the reach of the court and, that if not granted, [Plaintiffs (including Sakab)] will suffer irreparable harm"); Verified Compl. Ex. 4 (Ontario Superior Court Endorsement) at 1-2 (finding that "[t]here is overwhelming evidence of fraud that has been presented to court" and extending the Ontario Orders); Verified Compl. Ex. 5 (Ontario Superior Court Ruling) ¶¶ 7-124 (denying Al Jabri's motion to set aside the Ontario Orders, describing in detail the evidence and arguments presented by the parties, the applicable legal standards, and the court's findings, and rejecting Al Jabri's contention that the Ontario Action purportedly is not a commercial dispute, but rather a political attack). As the Verified Complaint indicates, the substantial evidentiary record before the Ontario Court included, among other evidence: (i) the Deloitte Report (defined in the Verified Complaint); (ii) a detailed Affidavit of Abdulaziz Alnowaiser, the current General Manager of Sakab and General Manager or board chairman of the other Group companies, who is overseeing the forensic investigations, each of which appended hundreds of exhibits; and (iii) an expert report on Saudi law prepared by a Saudi lawyer. (Verified Compl. ¶ 7.) Sakab submitted much of this evidence to the Massachusetts Superior Court.

Justice Koehnen reaffirmed Ontario Superior Court Justice Corey A. Gilmore's prior finding in the Ontario Orders of "a strong prima facie case to the effect that Saad misappropriated significant sums from the Plaintiffs," and found that Saad's previously undisclosed purported "gift" of "all his worldwide assets to Mohammed for no consideration" has "sufficient badges of fraud associated with it so as to justify a Mareva injunction against Mohammed."[4] (*Id.* ¶¶ 15-16.) Like the previous Ontario Orders, the *Mareva* Order concerning Mohammed requests the aid and recognition of courts in the United States (and other courts around the world) and requests courts in the United States (and around the world) "to make such orders and to provide such assistance to the Plaintiffs as may be necessary or desirable to give effect to this Order." (Salyer Decl. Ex. A ¶ 15.)

As the Verified Complaint and Sakab's motions indicate, Sakab's sole purpose in this action is to obtain prejudgment relief based on comity to the Ontario court's Orders, and then stay the Massachusetts action. If the Massachusetts action is stayed as Sakab has requested (in whichever court the case is pending),[5] Sakab will, if it prevails in Canada, come back to Boston to enforce the judgment and execute on the eight Boston properties; and if Sakab loses in Canada, it will come back to Boston to seek to dissolve the attachments and *lis pendens*, and dismiss the Massachusetts action. Thus, the only issue before this Court (or the Massachusetts Superior Court if the case is remanded) is whether to grant comity to the Ontario Superior

4. *See also* Salyer Decl. Ex. B (Ontario Superior Court Endorsement) ¶ 17 ("Mohammed clearly continues to use the assets for the benefit of his father by giving him money or paying expenses on his behalf. One might question whether [a 28]-year-old without any work experience is the person one would select to manage $480 million in assets. Mohammed's apparent lack of knowledge about the assets and the continuing payments to his father indicate to me that there is a strong print prima facie case to the effect that there was no valid transfer of assets from Saad to Mohammed."); Salyer Decl. Ex. C (Ontario Superior Court Corrigendum) ¶ 3.

5. There is precedent for a U.S. court to impose a stay after granting an attachment in support of a foreign proceeding. For example, in *Barclays Bank, S.A. v. Tsakos*, 543 A.2d 802 (D.C. 1988), the District of Columbia Court of Appeals held that the D.C. Superior Court had discretion to maintain a prejudgment attachment of defendants' property in the District of Columbia and then stay proceedings there pending the outcome of litigation in Europe.

Court's orders. There will be no occasion, nor any reason, to litigate the merits of the substantive fraud and other claims against Defendants, as those claims are being fully and comprehensively adjudicated in the Ontario Action.[6]

The Ontario Action is the true center of the dispute between Sakab and its affiliated companies and Defendants. The Ontario Action is more comprehensive, involving a larger number of defrauded companies as plaintiffs, and a broader range of claims. (Verified Compl. ¶¶ 7-16; *see also* ECF No. 1-3 at 159 (Stay Memorandum), 8-10.) It seeks to recover assets all over the world and has been actively litigated since January 2021. (Verified Compl. ¶¶ 7-9.) The Ontario Superior Court has granted substantial prejudgment relief, which has been the subject of vigorous litigation in that proceeding. There has been extensive briefing, preliminary discovery, and numerous arguments and hearings. (*Id*. ¶¶ 7-16.) The Ontario Superior Court has issued multiple substantive orders. (*Id*. ¶¶ 9, 14, 16.)

Defendants are the sole source of the "problem" they raise. It is a time-wasting distraction that caused the United States government to have unnecessary concerns and serves only to complicate and delay this action for Defendants' own strategic purposes.

ARGUMENT

Intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2) is granted only where the moving party demonstrates *each* of four criteria: (1) the motion to intervene is timely; (2) an interest relating to the property or transaction that forms the foundation of the ongoing action; (3) resolution of the suit in its absence somehow threatens to prejudice its

6. To be sure, the Verified Complaint fully pled Sakab's substantive claims, and Sakab presented to the Massachusetts Superior Court some of the evidence that was before the Ontario Superior Court. It did so, however, for the purpose of showing the court in Boston that it would be justified in making the findings necessary to support prejudgment attachments and memoranda of *lis pendens* on the basis of comity to the Ontario Superior Court's findings because, among other reasons, the Ontario court issued those orders based upon well-pleaded claims and a substantial evidentiary record.

interests; and (4) no other party can be expected adequately to protect its interests. *See Negrón-Almeda v. Santiago*, 528 F.3d 15, 22 (1st Cir. 2008); *see also Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998) (failure to satisfy any one of them "dooms intervention"). Here, the United States does not meet this burden.[7]

I. THE UNITED STATES CANNOT DEMONSTRATE THAT IT HAS AN INTEREST IN THE PROPERTY OR TRANSACTION THAT FORMS THE FOUNDATION OF THE ACTION

Sakab does not dispute that the United States has an interest in protecting national security and national security information. (*See* Mot. to Intervene at 6.) Here, however, national security and national security information have no relevance. Rather, as explained above, Sakab is simply seeking to have the Massachusetts Superior Court (or this Court), grant limited prejudgment relief by issuing *in rem* orders against eight Boston properties. It is asking for this relief on the basis of comity to orders issued by the Ontario Superior Court upon a substantial evidentiary record and with full due process. Should this limited relief be granted, Sakab then asks the Massachusetts Superior Court (or this Court) to stay the action pending the resolution of the principal litigation in Canada, where it is well-underway. (*See* ECF No. 1-3 at 66 (Attachment Memorandum); ECF No. 1-3 at 137 (Lis Pendens Memorandum); Stay Memorandum.) Sakab is not trying to litigate the underlying fact issues in this action. It does not seek to resolve in U.S. courts any of the issues raised by Defendants in their Notice of Removal, and it has no desire or intent to inject into this action any issues relating to alleged national security activities. It simply asks the Court, based on an extension of comity to an Ontario court, to maintain the status quo with respect to eight Boston properties pending resolution of the Ontario Action. The United States does not and cannot argue that it has a

7. Sakab does not dispute the timeliness of the United States' motion.

"sufficient stake" in the question of whether the Court will grant prejudgment attachment based on comity against eight Boston condominiums. Nothing about that process can possibly affect national security or call for the disclosure of sensitive national security information. Nor do we understand the United States to make such an absurd assertion.

Instead, the United States claims an interest in this case based on Defendants' threats to put purportedly sensitive national security matters at issue. But the issues Defendants are threatening to present are entirely irrelevant here, and there is no need for Defendants to raise them before this Court. To the extent those matters are relevant to the underlying dispute, they are already being litigated in the Ontario Action, and there is a process for the United States to seek to protect its interests in that court.

The sole issue in this case is whether to give effect to the Canadian court orders as a matter of comity. But instead of addressing the issue of comity—the only issue that Plaintiff is raising in this action—Defendants are tactically and unnecessarily threatening to disclose purportedly sensitive information to complicate and delay this action, and to attempt to involve the U.S. Department of Justice in this matter, for their own strategic purposes.

Further, even if the Court were to look at the merits of Defendants' contentions (which, to be clear, there is no need for the Court to do), Defendants' specific assertions about Al Jabri's intelligence background and cooperation with the United States have no relevance to Sakab's fraud claims. The Ontario Court found that Al Jabri was given authority to establish and control a number of businesses, including Sakab, financed by the Saudi Ministry of Interior; while these companies may have played some role in Saudi security operations, they also conducted legitimate business. No information about any sensitive operations conducted by those companies is necessary to address the question of how hundreds of millions, or even billions, of

dollars made their way from the company's accounts to accounts held by Al Jabri and his friends and family members. Even if Al Jabri assisted in U.S. counter-terrorism operations at some point in the past, there is no conceivable reason that an examination of those activities is needed to explain how or why Sakab's funds were used to purchase the Boston luxury real estate now held by Al Jabri, Mohammed and the New East Defendants. As the Ontario Court held, "there is substantial evidence of fraud before the court. The political *backdrop* to this litigation is just that." (ECF No. 1-3 at 100 (Ruling on Set Aside Motions), ¶ 71) (emphasis added).

Having no interest in the prejudgment relief requested by Sakab, the United States asserts that its interest in this case is preventing the disclosure of national security information. Yet in its Motion to Intervene, the United States acknowledges that it has not yet determined "what further actions it may take in this litigation to protect its interests, including potentially asserting the state secrets privilege." (Mot. to Intervene at 2, 7 n.1.) While it asserts a generalized interest in preventing the disclosure of purportedly sensitive information, it has not actually made any determination that any action is necessary to prevent such disclosure in this litigation. The United States cites several cases in support of its assertion that its interest is sufficient to support intervention; however, in each of those cases the United States intervened *for the purpose* of asserting the state secrets privilege. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1076 (9th Cir. 2010) ("the United States moved to intervene and to dismiss plaintiff's complaint under the state secrets doctrine . . . ."); *Fitzgerald v. Penthouse Int'l Ltd.*, 776 F.2d 1236, 1238 (4th Cir. 1985) ("counsel for the Navy informed the district court that the Navy intended to file a motion to intervene in the case on the basis that the government had a national security interest at stake . . . [and] the Navy intended to file a motion to dismiss the case on the basis that the trial would lead to the disclosure of privileged state secrets."); *Restis v. Am. Coal.*

Against Nuclear Iran, Inc., No. 13 Civ. 5032(ER), 2015 WL 1344479 at *2 (S.D.N.Y. Mar. 23, 2015) ("the Government filed a motion, *inter alia*, to intervene in the instant action on the basis of the state secrets privilege."). Here, the United States fails to explain how, without invoking the state secrets privilege, its mere intervention will serve to "prevent[ ] harm to national security." (Mot. to Intervene at 7 n.1.) If the Government cannot even decide whether there is any national security information that requires protection at stake, let alone state secrets subject to the privilege, it has no business intervening in this case.

Oddly, the United States represents that it expects to decide by August 27, 2021, whether it will take any further substantive action to protect its interests, including potentially asserting the state secrets privilege. (Mot. to Intervene at 10.) Thus, it seems that this Motion to Intervene is premature. The United States should have waited until it knew for sure that it has an interest to protect before seeking to intervene. Conversely, should the United States determine that there is no reason to invoke the state secrets privilege, it would have no interest justifying its intervention in the case.

In moving to intervene, the United States appears to be responding to the Defendants' "threatened disclosure" of information which, as described above, is unnecessary and irrelevant to the sole issue raised by Sakab—the extension of comity to orders of the Ontario Court. Defendants' strategic attempt to induce the United States' involvement in this action is further illustrated by Al Jabri's August 9, 2021 filing of his Answer and Affirmative Defenses to Verified Complaint and Counterclaims (ECF No. 42). Al Jabri made that filing in violation of the parties' agreement in the Stipulation and Agreement Relating to Certain Real Property, filed with the Court on June 30, 2021 (ECF No. 39 (hereinafter "Stipulation")), not to take further action in the proceedings unrelated either to Sakab's Motion to Remand or to any motion by the

United States to intervene until disposition of the Motion to Remand.[8] Al Jabri's inappropriate filing illustrates Defendants' strategy to attempt to insert, or to threaten to insert, materials into the public record that are entirely extraneous to the matter in question. The Court should not endorse Al Jabri's apparent goal of causing the United States to intervene or assert the state secrets privilege in this matter, preventing the otherwise proper remand of this matter to the Massachusetts Superior Court, and frustrating Sakab's efforts to obtain the limited relief it seeks.

II. THE UNITED STATES CANNOT DEMONSTRATE THAT RESOLUTION OF THIS ACTION IN ITS ABSENCE THREATENS TO PREJUDICE ITS INTERESTS OR THAT ITS INTERESTS CANNOT BE PROTECTED BY ANOTHER PARTY

Because it has not adequately demonstrated that it has an interest in this action, the United States necessarily cannot demonstrate that resolution of this action in its absence threatens to prejudice its interests. The cases the United States cites do not support its position. In *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 545 (1st Cir. 2006), the First Circuit found that the intervenor had clearly shown how its interest could be impaired by the litigation, since a party had sought an injunction that, if issued, would directly bind the intervenor. The United States has made no such direct showing of interest in the outcome of this action. The ruling in *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) *aff'd on reh'g*, 614 F.3d 1070, 1076 (9th Cir. 2010), is closer. There, the court found that the United States had shown that its interest in preventing disclosure of national security information could be harmed if it were not allowed to intervene. *Id*. at 1133. Critically, however, in *Mohamed*, the United States sought to assert the state secrets privilege over the entire subject of the action—activities allegedly overseen by the CIA. That holding does not

8. Paragraph 9 of the Stipulation states that the parties agree "they will take no further action in the proceedings in the District Court unrelated to either (i) the Motion to Remand or (ii) any motion by the United States to intervene or otherwise participate in this action until disposition of the Motion to Remand." (Stipulation at 6.)

apply where, as here, the United States (i) has not asserted the state secrets privilege with respect to anything, let alone the entire subject of the litigation, (ii) has represented that it does not know whether it will assert the privilege or even whether it has a basis to do so, and, accordingly, (iii) has not adequately explained its interest in the action.

The United States asserts that none of the existing parties can adequately represent its interests in this case since it alone is able to assert the state secrets privilege. (Mot. to Intervene at 8.) The Government fails to acknowledge, however, that it has not, at present, made any determination or claim that the state secrets privilege applies in this action. The United States argues that its burden on this factor "should be treated as minimal." *Id*. (quoting *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 807 F.3d 472, 476 (1st Cir. 2015)). However, the United States omits the First Circuit's further statement in *Students* that: "On the other hand, we require putative intervenors to produce 'something more than speculation as to the purported inadequacy' of representation." *Id*. (citing *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979)). Here, the United States has offered only "speculation" that it may determine it to be necessary to assert the state secrets privilege. Without showing an actual need to invoke the state secrets privilege, the United States has not met its burden of showing that its interests are inadequately represented.

CONCLUSION

For the foregoing reasons, Sakab respectfully requests that the Court deny the United States' motion to intervene in this action.

Dated: August 17, 2021

Respectfully submitted,

SAKAB SAUDI HOLDING COMPANY,

By its attorneys,

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CERTIFICATE OF SERVICE

I certify that this document, filed through the CM/ECF system, will be sent electronically to the registered participants who have appeared in this case as identified on the Notice of Electronic Filing (NEF), with a courtesy copy sent by electronic mail, on August 17, 2021.

/s/ Samuel W. Salyer
Samuel W. Salyer