

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Chambers of
STEVEN C. MANNION
United States Magistrate Judge

**Martin Luther King Jr. Federal Bldg.
& U.S. Courthouse
50 Walnut Street
Newark, NJ 07102
(973) 645-3827**

March 16, 2020

LETTER ORDER

**Re: D.E. 11
Republic of Turkey
Civil Action No. 2:19-cv-20107 (ES)(SCM)**

Dear Counsel:

The Republic of Turkey petitioned this Court *ex parte* for judicial assistance to serve a subpoena on Mr. Hamit Cicek for documents and testimony to be used in an international arbitration proceeding captioned *Cascade Investments NV v. The Republic of Turkey*, ICSID Case No. ARB/18/4 (the “International Arbitration”).¹ This Court authorized the Republic to serve a subpoena on Mr. Çiçek.² The Court’s order did not address the substance of the subpoena on its merits or preclude a motion to quash. Mr. Çiçek has since moved to quash the subpoena. The Republic has opposed the motion.

According to the Republic, it began investigating Cihan Medya Dagitim A.S. (“CMD”), a Turkish media corporation, in 2014 for links to Fetullahçı Terör Örgütü (“FETÖ”), an alleged

¹ (ECF Docket Entry No. (“D.E.”) (D.E. 1, Mascarenhas Declaration ¶¶ 1- 4). Unless indicated otherwise, the Court will refer to documents by their docket entry number and the page numbers assigned by the Electronic Case Filing System.

² (D.E. 9, Order).

terrorist organization. Mr. Cicek reportedly purchased 99.8% of shares in CMD and then sold 89.8% to Cascade Investments NV (“Cascade”) and 10.13% to the chairman of CMD’s executive board during the Republic’s investigation.³

The Republic seeks to compel Mr. Çiçek to produce documents and testimony regarding his purchase and sale of CMD. The Republic reportedly requested the at-issue discovery from Cascade, but Cascade objected to producing documents on grounds that the requested documents are in Mr. Çiçek’s possession, custody or control.⁴

A December 20, 2019 letter for the Republic to the “Members of the Tribunal” requested an extension of time to file papers in the International Arbitration proceeding because of deficiencies in the production by Cascade.⁵ The letter complained that the Republic will have to search CMD’s records because Cascade has not produced records which “should be in Cascade’s possession ... given that the requested documents concerned documents exchanged between Cascade and CMD....”⁶ The Republic further advised that it could not obtain the records in the Tribunal it was seeking judicial assistance for because Cascade asserted that it did not possess the records, but that Mr. Çiçek did.⁷

District courts are authorized to provide judicial assistance for foreign civil or criminal proceedings if certain statutory requirements are met, but nonetheless retain broad discretion in

³ (D.E. 1, Mascarenhas Declaration ¶¶ 5 - 6).

⁴ (D.E. 1, Mascarenhas Declaration ¶ 10).

⁵ (D.E. 13-2, King & Spalding Letter at ¶ 6).

⁶ (*Id.*).

⁷ (D.E. 13-2, King & Spalding Letter at ¶ 9).

deciding whether to provide assistance.⁸ Stated otherwise, “a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.”⁹

Intel identified four discretionary factors for district courts to consider when reviewing § 1782 discovery requests: (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding;” (2) “the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance;” (3) whether the § 1782 request attempts to “circumvent foreign proof gathering restrictions or other policies;” and (4) whether the documents or testimony sought are “unduly intrusive or burdensome.”¹⁰ The parties’ submissions have not adequately addressed these discretionary factors.

First, the Republic has confirmed by declaration that it has informed the foreign tribunal of its request for judicial assistance.¹¹ The Republic has not, however, provided this Court with the foreign tribunal’s response or any indication of whether it is receptive to receiving the requested information.

Second, neither the Republic nor Mr. Çiçek have discussed whether the § 1782 request attempts to “circumvent foreign proof gathering restrictions or other policies” with regard to the International Arbitration.

Third, the Republic has opined that CMD and Cascade both possess copies of the records it seeks here from Mr. Çiçek, but the Republic has not declared whether it has completed its search

⁸ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 244–45 (2004).

⁹ *Intel Corp.*, 542 U.S. at 264.

¹⁰ *Intel*, 542 U.S. at 264–65.

¹¹ (D.E. 13-1, Mascarenhas Declaration at ¶ 4).

of CMD and located any of the requested records there. The Republic has also not been clear as to whether Cascade may be compelled to produce the records in the International Arbitration.

Likewise, Mr. Çiçek has not stated whether Cascade has copies of the requested records. Although Mr. Çiçek may enjoy a right against self-incrimination, a blanket assertion of privilege against self-crimination is not permitted.¹² His privilege does not prevent him from stating whether Cascade, CMD, or anyone else has copies of the records.

Fourth, the Republic has not stated whether it is amenable to a protective order or other safeguard to limit production of the documents to the International Arbitration to the exclusion of any foreign criminal proceeding in which Mr. Çiçek has been charged.

An appropriate Order follows:

ORDER

IT IS on this Monday, March 16, 2020,

1. **ORDERED**, that the Republic of Turkey shall provide a declaration within 14 days stating whether the International Arbitration tribunal is receptive to the requested federal-court judicial assistance; and it is further
2. **ORDERED**, that the Republic of Turkey shall provide a declaration within 14 days detailing its efforts to obtain the requested discovery from a) Cascade Investments NV, and b) CMD; and it is further

¹² *In re Gorsoan Ltd.*, No. 18-MC-431 (RA), 2020 WL 409729, at *11 (S.D.N.Y. Jan. 24, 2020) (citing *United States v. Clark*, 574 F. Supp. 2d 262, 267 (D. Conn. 2008) (“[A]n individual who wishes to assert his Fifth Amendment right against self-incrimination cannot make a ‘blanket claim of privilege.’”).

3. **ORDERED**, that Mr. Çiçek shall provide a declaration within 14 days stating whether a) Cascade Investments NV or b) CMD have ever had copies of any or all of the requested records; and it is further

4. **ORDERED**, that the Republic of Turkey shall provide a declaration within 14 days identifying what safeguards, if any, it proposes to ensure that the documents and/or testimony be used exclusively in the International Arbitration and not any criminal investigation in which Mr. Çiçek has already been charged.



A handwritten signature in black ink that reads "Steve C. Mannion".

Honorable Steve Mannion, U.S.M.J.
United States District Court,
for the District of New Jersey
phone: 973-645-3827

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Original: Clerk of the Court
Hon. Esther Salas, U.S.D.J.
cc: All parties
File