No. 17-424-cv

In the United States Court of Appeals for the Second Circuit

ESTHER KIOBEL, by her attorney-in-fact CHANNA SAMKALDEN,

Petitioner-Appellee,

VS.

CRAVATH, SWAINE & MOORE, LLP,

Respondents-Appellants,

On Appeal from the United States District Court for the Southern District of New York Case No. 1:16-cv-07992 (AKH) The Honorable Alvin K. Hellerstein

PETITIONER-APPELLEE ESTHER KIOBEL'S PETITION FOR REHEARING AND/OR REHEARING EN BANC

Marco B. Simons
Richard L. Herz
Alison Borochoff-Porte
EarthRights International
1612 K Street NW Suite 401
Washington, DC 20006
Tel: 202-466-5188
Fax: 202-466-5189
Email: marco@earthrights.org
Counsel for Petitioner-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The district court in this case issued a narrow, straightforward ruling: where Esther Kiobel's U.S. lawsuit against Shell was dismissed without addressing the substantive merits, her renewed litigation against Shell in the Netherlands, on the same claims, should benefit from the non-privileged documents already produced in the U.S. litigation. Judge Hellerstein's order allowing discovery under 28 U.S.C. § 1782 followed this Court's clear precedents, concluding that it was of no moment that the previously-produced documents were warehoused in Shell's law firm, Cravath, Swaine & Moore ("Cravath"); there was no claim that the documents were privileged.

In finding that the district court abused its discretion, the panel opinion here not only fails to accord the district court the deference to which it is due, it undermines the basic purpose of section 1782 and conflicts with numerous precedents of this Court. Indeed, the opinion marks the first time this Court – which has repeatedly held that discovery under 28 U.S.C. § 1782 is favored – has *ever* reversed a district court's discretionary decision to grant such discovery.

The panel's decision depends on two holdings: first, that non-privileged documents cannot be obtained from U.S. counsel where they are unreachable from a foreign client; second, that the district court erred in allowing discovery where documents had previously been produced under a stipulated confidentiality order. Both holdings conflict with clear Circuit precedent, and their application here also depends on erroneous factual findings.

The opinion quickly drew criticism from the foremost commentator in this area. Theodore Folkman, who frequently represents corporate clients in section 1782 cases and wrote the book on "International Judicial Assistance,"[1] stated that "the Second Circuit's decision is a big mistake that rests on faulty premises."[2] Folkman himself successfully used section 1782 in analogous circumstances: to obtain – from counsel's files – prior U.S. document production for use in related proceedings abroad.[3]

This case presents a paradigm example of an appropriate use of section 1782: to assist in foreign litigation without imposing any burdens on U.S. parties. Because the panel opinion would rewrite section 1782 law in this Circuit based on a clearly flawed premise, rehearing is warranted.

ARGUMENT

I. The panel, for the first time, denied the district court the broad discretion that the Supreme Court has mandated.

The panel opinion accepts that the jurisdictional prerequisites for discovery

---

[1] Theodore J. Folkman, *International Judicial Assistance: Serving Process, Obtaining Evidence, Enforcing Judgments and Awards* (2016). One of the six chapters in Folkman's book is devoted entirely to section 1782. *See id.* ch. 4, "Taking Evidence in the United States for Use Abroad." Folkman has had no involvement in this case.

[2] Ted Folkman, *Case of the Day: Kiobel v. Cravath, Swaine & Moore* (July 13, 2018), at https://lettersblogatory.com/2018/07/13/case-of-the-day-kiobel-v-cravath-swaine-moore/.

[3] *Id.*

under section 1782 were met. Slip op. at 9. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court held that, once these requirements have been satisfied, a district court may grant discovery in its discretion. The *Intel* Court held that it was inappropriate to impose rules that were not found in the statutory text – "we reject the rules the dissent would inject into the statute" – and instead simply set forth "guides for the exercise of district-court discretion." *Id.* at 263 n.15. Even Justice Breyer, who dissented in *Intel*, agreed that the statute "grant[s] district courts broad authority to order discovery." *Id.* at 269 (Breyer, J., dissenting). And the majority opinion was clear: whenever the statutory requirements are met, a district court, while not "required to grant a § 1782(a) discovery application . . . has the authority to do so." 542 U.S. at 264.

That is why, following *Intel*, this Court has *never* reversed a discretionary grant of discovery once the section 1782 statutory requirements have been met. Indeed, Petitioner has found no published opinions from any Circuit doing so.[4]

---

[4] This denial of the district court's authority is especially glaring in light of the fact that the principal points of the panel opinion were not raised before Judge Hellerstein. Cravath never argued that the documents here are privileged, or that they are undiscoverable abroad and therefore should be undiscoverable from U.S. counsel, and never cited any of the cases relied on by the panel. Cravath also never argued that any "presumption against the modification" of protective orders applied here, Slip op. at 14. Arguments not raised below are typically deemed waived and not considered; although the Court has discretion to consider them, it typically only does so "where

II. The panel's opinion conflicts with clear holdings of this Court and makes several other errors.

Along the way to denying Judge Hellerstein the deference mandated by the Supreme Court, the panel opinion makes numerous errors of law and fact – several in clear conflict with controlling precedent of this Court.

A. The panel's decision directly conflicts with *Optimal Investment*.

The panel opinion attempt to justify the unprecedented decision to overrule Judge Hellerstein's order by asserting that these facts are "extraordinary, possibly unique." Slip op. at 13. Not so. These facts – that documents were being sought from a U.S. law firm, because they were unreachable from its foreign client, where the documents had been produced in prior U.S. litigation where they were subject to a confidentiality order – are indistinguishable from those presented in *Optimal Investment Services S.A. v. Berlamont*, 773 F.3d 456 (2d Cir. 2014), in which this Court approved a section 1782 order granting "leave to subpoena the documents from OIS's counsel in the United States." *Id.* at 459. As here, the documents had been developed in U.S. litigation that had been dismissed, and were sought for use in subsequent litigation re-filed in another country. *Id.* at 458. Judge Cabranes's opinion generally adopts the

---

necessary to avoid a manifest injustice." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008). Yet the panel faulted Judge Hellerstein for not considering these never-raised arguments, without applying the "manifest injustice" standard – or even discussing the waiver issue.

district court's order, *id.* at 459, which concluded that the stipulated confidentiality order there did not present a barrier because the Court was entitled to allow disclosure. *In re Berlamont*, No. 14-mc-00190, 2014 U.S. Dist. LEXIS 111594, *6 (S.D.N.Y. Aug. 1, 2014). That is also the case here; the original confidentiality order here expressly allows disclosure "upon order of the Court." A58.

As Folkman suggests, far from being "unique," section 1782 discovery from law firms is fairly common, and this Court has never before indicated any general concern with it. *E.g.*, *Optimal Investment*, 773 F.3d at 459; *Mare Shipping Inc. v. Squire Sanders (US) LLP*, 574 F. App'x 6 (2d Cir. 2014) (summary order) (concluding that the district court did not abuse its discretion in denying discovery of documents held by law firm for the Kingdom of Spain, but noting that such discovery might be appropriate in the future, and ordering the firm to retain documents); *see also In re Republic of Kazakhstan*, 110 F. Supp. 3d 512, 518 (S.D.N.Y. 2015) (ordering discovery from a law firm in New York of documents concerning its foreign clients). In every such future case, respondents will argue that section 1782 aid is either unnecessary because the documents are discoverable from the client, or prohibited – under the panel opinion – because they are *not* discoverable from the client.

B. The documents here are not privileged.

The panel's discussion glosses over the fact that the only documents at issue here are deposition transcripts and documents previously produced to Petitioner in litigation. They are not privileged, and Cravath has never claimed that they are. But

the panel's discussion seems to suggest that it is creating some sort of new privilege.

Privilege is the foundation of the discussions in the cases the panel relies on, *Fisher v. United States*, 425 U.S. 391 (1976), and *Application of Sarrio, S.A.*, 119 F.3d 143 (2d Cir. 1997). In *Fisher*, the issue was that documents protected by Fifth Amendment privilege in a client's hands could not be compelled from his attorney, if they were "transferred for the purpose of obtaining legal advice." 425 U.S. at 404. Similarly, in *Sarrio*, the documents were sent "to a lawyer in the United States for advice as to whether they were subject to production." 119 F.3d at 146.

But the documents here cannot be protected by the privilege suggested in *Sarrio*, because they were ***not sent to Cravath in order to obtain legal advice***; they were either sent to Cravath ***for production to Ms. Kiobel***, or are deposition transcripts, ***which are not Shell's documents, and were never sent by Shell to Cravath at all.*** No attorney-client privilege could conceivably attach to documents produced to an opponent, let alone to deposition transcripts.

If the panel intended to hold that the documents here are privileged, rehearing is warranted to explain that privilege.

C. The decision to shield unprivileged documents directly conflicts with *Ratliff*.

If the panel did *not* intend to hold that the documents are privileged, its decision cannot be reconciled with *Ratliff v. Davis, Polk & Wardwell*, 354 F.3d 165 (2d Cir. 2003). *Ratliff* could not be clearer: in the absence of privilege, "documents held by

an attorney in the United States on behalf of a foreign client . . . are as susceptible to subpoena as those stored in a warehouse within the district court's jurisdiction." *Id.* at 170. The panel distinguished *Ratliff* by noting that there, privilege had been waived when the documents had been voluntarily disclosed to the SEC. Slip op. at 13. But that presupposes that there is some privilege that might attach.

Indeed, the panel's argument here – that the documents are "undiscoverable from the client abroad," Slip op. at 13 – applies to the facts of *Ratliff* with greater force. There, the plaintiff had sought production of the documents from the client in the Netherlands – but that request was denied by a Dutch court. 354 F.3d at 167 n.1. In coming to the opposite conclusion on indistinguishable facts, the panel's decision effectively overrules *Ratliff*.

D. The conclusion that the documents are "undiscoverable" in the Netherlands is demonstrably false.

Although it was error for the panel to invent a rule that contravened *Ratliff*, that rule cannot apply here in any event. The panel's predicate was that "the documents at issue [are] undiscoverable from Shell in the Netherlands." Slip op. at 13. This was erroneous, as shown by Cravath's own arguments. It conceded that:

- "[A] Dutch court could compel the production of documents from Shell and has done so in other cases."
- Kiobel can "seek '*the same documents*' as part of the foreign litigation."
- "Shell has constructive possession of the documents through Cravath."

- "Kiobel's requested documents are within the Dutch court's jurisdictional reach because they are in Cravath's possession."

Reply 20-21. There is no basis for the conclusion that the documents are "undiscoverable" abroad. Petitioner argued only that "the process for obtaining similar discovery there is more difficult," Pet'r 38 – which is exactly why section 1782 assistance is appropriate. Producing a set of documents that had already been reviewed for relevance and privilege, and already produced to Ms. Kiobel, was obviously the most efficient way of proceeding.

E. The discoverability holding conflicts with *Brandi-Dohrn*.

The panel's discoverability ruling also directly conflicts with the Court's prior holding – based explicitly on *Intel* – that "a district court should not consider the *discoverability* of the evidence in the foreign proceeding." *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 82 (2d Cir. 2012). Judge Hellerstein did not consider the discoverability of the documents in the Netherlands because this Court's "precedents expressly forbid district courts from considering the discoverability of evidence in a foreign proceeding when ruling on a § 1782 application." *O'Keefe v. Adelson (In re O'Keeffe)*, 650 Fed. Appx. 83, 85 (2d Cir. May 26, 2016) (summary order). Now the panel considers it error not to do what this Circuit previously forbade; its decision is irreconcilable with *Brandi-Dohrn* (a case it does not discuss).

F. The analysis of circumvention of proof-gathering restrictions directly conflicts with *Mees*.

The panel opined that, because it was more difficult to obtain the documents in

the Netherlands (usually, of course, the situation in which section 1782 aid is appropriate), "Kiobel is trying to circumvent the Netherlands' more restrictive discovery practices." Slip op. at 11. This characterization directly conflicts with *Mees v. Buiter*, 793 F.3d 291 (2d Cir. 2015), which also involved discovery for use in a Dutch court. This Court explained that the inability to obtain documents abroad does not amount to a discovery restriction:

> "[P]roof-gathering restrictions" are best understood as rules akin to privileges that *prohibit* the acquisition or use of certain materials, rather than as rules that *fail to facilitate* investigation of claims by empowering parties to require their adversarial and non-party witnesses to provide information.

Id. at 303 n.20. The Court went on to find no proof-gathering restrictions where there was no evidence "that Dutch courts reject the use in litigation of materials obtained through § 1782." *Id.*

The panel's characterization of an attempt to "gain access to documents she could not otherwise acquire" as an effort to "bypass Dutch discovery restrictions," Slip op. at 11 n.3, overrules *Mees*. It will lead to section 1782 respondents arguing that a petition presents an attempt at circumventing foreign proof-gathering restrictions wherever the material is more difficult to obtain abroad – exactly what the Court in *Mees* tried to prevent.[5]

---

[5] While the panel cites *Mees* in other contexts, it omits its discussion of this factor.

G. The conclusion that discovery required modifying the confidentiality order is erroneous.

The panel held that it was error for Judge Hellerstein "to alter the confidentiality order without Shell's participation, and without considering the costs of disclosure to Shell." Slip op. at 14. But Judge Hellerstein did not "alter" the confidentiality order, which does not apply here, because it does not prohibit Cravath from producing documents in response to "legal process," such as a section 1782 request. A62 ("Nothing herein shall be construed as requiring the person served with any legal process or other request seeking production of Confidential Material to refuse to comply with its legal obligation regarding such process or request.").

H. The assertion that Shell was not afforded an opportunity to weigh in is flatly wrong.

It is also demonstrably incorrect that Judge Hellerstein failed to account for "Shell's participation" or "the costs of disclosure to Shell." Slip op. at 14.

Cravath notified Shell of these proceedings. Upon service of legal process, Cravath was required by the confidentiality order to give Shell "prompt written notice of the receipt of such request." A62. Indeed, Cravath admits it continues to represent Shell, A216, and Cravath did not dispute Judge Hellerstein's assertion that "Cravath will make every argument that Shell wants it to make," A225.

Even if it were necessary for the court to modify the confidentiality

order and notify Shell of such an effort, the confidentiality order requires such notification to occur through Shell's counsel: Cravath. *See* A256 (notice of modification efforts is to be served on all "signatories," which includes only counsel from Cravath, not Shell). Again, for precisely this reason, Cravath never argued below that Shell needed to be a participant.

As for the "costs" to Shell – what costs? Judge Hellerstein addressed every issue raised by Cravath, but no costs to Shell were asserted. Indeed, as Folkman points out, the appeal of obtaining previously-produced discovery is "that the other side could not plausibly claim any undue burden in time or money, because its lawyers had already done the privilege review, the review for relevance, etc., in the US proceedings and did not need to do the work again."[6]

I. The confidentiality order ruling conflicts with *Agent Orange.*

The panel ruled that the prior, stipulated confidentiality order was entitled to "'a strong presumption against . . . modification,'" and that "'absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need,' we should not countenance such modifications." Slip op. at 14 (quoting *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001) (alteration in *TheStreet.Com*)). Judge Hellerstein never

[6] Folkman, *supra* note 2.

considered whether modification of the confidentiality order was warranted, because Cravath never argued that modification was necessary. *See* A115-17. Even so, this Court's precedents conclusively establish that modification is warranted.

In *In re "Agent Orange" Products Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), this Court found that with respect to an equivalent confidentiality order, the parties "could not have relied on the protective orders and that extraordinary circumstances warrant modification." *Id.* at 147. The confidentiality order there was lifted to allow dissemination of the materials to a third party for potential public disclosure – far more than Judge Hellerstein's order allowing the same litigant to use the materials to litigate the same claims under continuing confidentiality protection.

The *Agent Orange* decision depended on two factors. First, the order "was applicable only to the pretrial stages of the litigation," and thus reliance on it for permanent protection was misplaced. *Id.* The same is true here; the confidentiality order did not offer any protection at trial. A268.[7] Second, rather than a protective order issued upon a showing of good cause, the *Agent Orange*

[7] "Material designated as 'Confidential' may be used in testimony at trial or at any motion hearing, and may be offered into evidence at trial or at any motion hearing, all subject to any further Order regarding confidentiality as this Court may enter."

order was a blanket, stipulated confidentiality order under which parties could unilaterally designate material confidential without court review. Thus, the producing parties were "never . . . required to demonstrate good cause for shielding any document from public view." 821 F.2d at 147. Again, this is true here as well; the original confidentiality order expressly made "no finding as to whether the documents are confidential," and the court specifically refused to approve the parties' proposal to allow filing documents under seal without an additional court order. A256.

Cravath's only basis for distinguishing *Agent Orange* was that the order here required the parties to "destroy or return confidential documents after litigation ends." Reply 27 n.8. But that was no distinction; the same was true in *Agent Orange*. 821 F.2d at 142 ("The documents were to be returned or destroyed at the end of the litigation.").

Agent Orange is controlling law that establishes that a pre-trial confidentiality order, under which parties can unilaterally designate material without a showing of good cause, is subject to modification.

J. Confidentiality is no less assured in Dutch court than in the U.S. litigation.

The panel noted that Petitioner could not "provide the U.S. courts with assurance that Dutch courts will enforce the protective orders that safeguard the confidentiality of Shell's documents." Slip op. at 14. This concern is

misplaced; there are no fewer protections than in the U.S. litigation.

With respect to Ms. Kiobel and her counsel, they are required, under Judge Hellerstein's order, to agree to the order and submit to the jurisdiction of the U.S. court. A238-39. And for court filings, the original confidentiality orders never safeguarded the confidentiality of the documents in U.S. court; Judge Wood specifically refused to endorse any provisions allowing documents to be filed under seal. A65. Indeed, court filings receive *greater* protection in the Netherlands, where they are not ordinarily subject to public disclosure. A197 (while oral hearings are public, court files are not available to third parties).

This Court has never previously ruled that concerns about foreign enforcement of confidentiality protections – which arise frequently in section 1782 litigation – could, as a matter of law, *prohibit* a district court from granting discovery in its discretion. But under this decision, it will no doubt receive many such arguments in the future.

III. The panel's opinion's policy concerns are unwarranted, and do not justify overturning multiple Circuit precedents.

The panel ultimately concluded that allowing discovery here would have negative consequences: "[F]oreign clients [will] have reason to fear disclosing all pertinent documents to U.S. counsel," resulting in "bad legal advice to the client, and harm to our system of litigation." "U.S. law firms with foreign clients may be forced to store documents and servers abroad." "U.S.

law firms may have to return documents to foreign clients (or destroy them) as soon as litigation concludes." "Or foreign entities may simply be less willing to engage with U.S. law firms." Slip op. at 14-15.

Never before has a court been so solicitous of potential future efforts to evade discovery obligations. Even so, these suggestions are nonsense:

- This case has nothing to do with disclosure of documents to U.S. counsel for review, ***because Petitioner does not seek documents that were merely reviewed by counsel. It only concerns documents that were already actually produced to Petitioner in prior litigation, and deposition transcripts that were never sent by Shell.*** Litigants will not decline to turn over pertinent documents for production in litigation because they are worried that maybe sometime in the future the documents could then be discovered in additional litigation. If so the litigant would be violating the Federal Rules of Civil Procedure.

- Storing documents abroad does not shield them from discovery either for U.S. litigation or under section 1782. *E.g.*, *In re Application of Accent Delight Int'l, Ltd.*, No. 16-MC-125, 2018 U.S. Dist. LEXIS 97673, *12 (S.D.N.Y. June 11, 2018).

- U.S. law firms warehousing non-privileged documents for foreign clients already subject them to subpoena for U.S. litigation. *E.g.*, *Ratliff*. So to the extent that subjecting documents to discovery gives an incentive to hide or destroy them, that incentive already exists; subjecting them to section 1782 discovery is no different.

- The suggestion that U.S. law firms would destroy documents because they are worried about use in future litigation is alarming. If evidence "may be relevant to future litigation," the "obligation to preserve evidence" attaches. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). If they are worried about future litigation, they cannot destroy the documents; if they are not, their behavior will not change.

- Foreign entities engage U.S. law firms to litigate in the United States. ***This case is only about documents produced in litigation in the United States.*** Foreign clients cannot decline to engage U.S. law firms when litigating in the United States.

It is hard to fathom what Shell would have done differently if it had known that documents produced for the U.S. *Kiobel* litigation could ultimately be used for the Dutch *Kiobel* litigation. Certainly, no future litigant is going to refuse to produce documents where production is required by U.S. law, or refuse to engage a law firm where one is necessary to litigate in U.S. court, or destroy documents where spoliation is prohibited by U.S. law, based on the possibility of a future section 1782 application.

On the other hand, this decision will wreak havoc on section 1782 practice in this Circuit. In every case involving arguably confidential material, litigants will rely on this decision to argue that discovery should not be had. In every case where it is more difficult to obtain documents abroad, respondents will accuse petitioners of trying to "circumvent" proof-gathering restrictions.

CONCLUSION

This decision conflicts with the Second Circuit's entire approach to section 1782 discovery over more than a decade, and creates confusion over a possible new evidentiary privilege. Rehearing is warranted.

Dated: July 24, 2018

Respectfully submitted,

/s/Marco B. Simons
Marco B. Simons
Richard L. Herz*
Alison Borochoff-Porte
EarthRights International
1612 K Street N.W. Suite 401
Washington, DC 20006
(202) 466-5189
marco@earthrights.org

Counsel for Petitioner-Appellee

*Based in Connecticut; admitted to practice only in New York; does not practice in the District of Columbia's courts.

CERTIFICATE OF SERVICE

I, Marco Simons, hereby certify that on this 24th day of July, 2018, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that the Motion was served electronically to all parties by operation of the Court's electronic filing system.

/*s*/Marco Simons
Marco Simons

CERTIFICATE OF COMPLIANCE

1. This document complies with Fed. R. App. P. 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   This document contains 3886 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 Garamond font.

/s/ Marco Simons
Marco Simons

Dated: July 24, 2018

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2017
No. 17-424-cv

ESTHER KIOBEL, BY HER ATTORNEY-IN-FACT CHANNA SAMKALDEN,

Petitioner-Appellee,

v.

CRAVATH, SWAINE & MOORE LLP

Respondent-Appellant.[1]

ARGUED: SEPTEMBER 12, 2017
DECIDED: JULY 10, 2018

Before: JACOBS, CABRANES, AND WESLEY, Circuit Judges.

Petitioner-Appellee Esther Kiobel seeks documents belonging to Royal Dutch Shell (a foreign company) from Shell's United States counsel, Respondent-Appellant Cravath, Swaine & Moore LLP. The documents were transferred to Cravath for the purpose of responding to discovery requests in a prior case over which the court was ultimately found to lack jurisdiction. The United States

[1] The Clerk of Court is respectfully directed to amend the official caption as set forth above.

District Court for the Southern District of New York (Hellerstein, J.) granted Kiobel's petition seeking leave to subpoena Cravath. We reverse: it is an abuse of discretion for a district court to grant a 28 U.S.C. § 1782 petition where the documents sought from a foreign company's U.S. counsel would be "unreachable in a foreign country," because this threatens to jeopardize "the policy of promoting open communications between lawyers and their clients." Application of Sarrio, S.A., 119 F.3d 143, 146 (2d Cir. 1997).

RICHARD L. HERZ, (Marco Simons, Alison Borochoff-Porte, on the brief) EarthRights International, Washington, D.C., for Appellee Esther Kiobel.

NEAL KUMAR KATYAL, (Jessica L. Ellsworth, Sean Marotta, Eugene A. Sokoloff, Hogan Lovells US LLP, Washington, D.C.; Lauren A. Moskowitz, Cravath, Swaine & Moore LLP., New York, N.Y., on the brief), for Appellant Cravath, Swaine & Moore LLP.

John P. Elwood, Vinson & Elkins LLP, Washington, D.C. (Zachary Howe, Vinson & Elkins, Houston, T.X.; Kathryn Comerford Todd, Sheldon Gilbert, United States Chamber of Commerce National Chamber Litigation Center, Washington, D.C.; Amar Sarwal, Association of Corporate Counsel, Washington, D.C.), for Amicus Curiae the Chamber of Commerce of the United States of America, Association of Corporate Counsel, National Association of Manufacturers.

Joseph E. Neuhaus, Sullivan & Cromwell LLP, New York, N.Y. (Richard L. Mattiaccio, the New York City Bar Association, New York, N.Y.), for Amicus Curiae New York City Bar Association.

JACOBS, Circuit Judge:

Petitioner-Appellee Esther Kiobel filed a petition in the United States District Court for the Southern District of New York to subpoena documents under 28 U.S.C. § 1782 from Respondent-Appellant Cravath, Swaine & Moore LLP ("Cravath"), in aid of her lawsuit against Royal Dutch Shell ("Shell") in the Netherlands. Cravath is holding the documents because it represented Shell in prior litigation brought by Kiobel against Shell in that district. It was ultimately decided that United States courts lacked jurisdiction over that suit. See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013).

On this appeal from the district court's grant of Kiobel's petition, Cravath argues (1) that the district court lacked jurisdiction under Section 1782 to grant the petition, and (2) that in any event, it was an abuse of discretion to do so.

We conclude that while the district court had jurisdiction over Kiobel's petition, it was an abuse of discretion to grant it. As we cautioned in Application of Sarrio, S.A., 119 F.3d 143 (2d Cir. 1997), an order compelling American counsel to deliver documents that would not be discoverable abroad, and that are in counsel's hands solely because they were sent to the United States for the purpose of American litigation, would jeopardize "the policy of promoting open communications between lawyers and their clients." Id. at 146.

I

In 2002, Kiobel and eleven other Nigerian plaintiffs brought suit in the Southern District of New York against four defendants affiliated with Shell. See

Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006), aff'd in part, rev'd in part, 621 F.3d 111 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013). Kiobel invoked the district court's jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350, and alleged that the defendants were complicit in human rights abuses in Nigeria.

For the purpose of pretrial discovery, the district court consolidated Kiobel's case with other Alien Tort Statute cases arising out of the same events in Nigeria, the Wiwa cases. See Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000). The consolidated cases generated a large volume of discovery, including depositions and documents. The discovery materials were subject to a stipulated confidentiality order entered into in the Wiwa cases, and signed by Kiobel. Most of the documents produced by Shell were marked "confidential," meaning that they were to be used "solely for purposes" of the then-pending Kiobel and Wiwa litigations. Joint App'x at 58-59, 74. The parties agreed to destroy or return each other's confidential material not later than thirty days after the respective cases' conclusions, and that the order would survive the end of litigation. Any de-designation of confidential documents or modification of the confidentiality order required agreement by the parties to the confidentiality order, or could be ordered by the district court. Cravath attorneys signed the stipulation in their capacity as Shell's counsel.

After consolidation, the Wiwa cases were settled. In Kiobel, the district court dismissed some of the claims under the Alien Tort Statute for lack of subject-matter jurisdiction, and we dismissed the suit in full for lack of subject-matter jurisdiction. Kiobel, 621 F.3d at 149. The Supreme Court, observing that "all the relevant conduct took place outside the United States," affirmed on the ground "that the presumption against extraterritoriality applies to claims under the" Alien Tort Statute. Kiobel, 569 U.S. at 124.

Years after the Supreme Court's decision, Kiobel prepared to file suit against Shell in the Netherlands, advancing the same allegations made in her Alien Tort Statute suit. Kiobel now wants to deploy the discovery from her American litigation in her Dutch lawsuit, but is impeded by the confidentiality order which limits its use to only the U.S. Kiobel and Wiwa Alien Tort Statute

cases. On October 12, 2016, Kiobel filed the pending Section 1782 petition to subpoeana Cravath and obtain "[a]ll deposition transcripts from the Kiobel and Wiwa cases," as well as "[a]ll discovery documents and communications produced to the plaintiffs by Shell and other defendants in Kiobel and the Wiwa cases." Joint App'x at 10.

Section 1782 "provide[s] federal-court assistance in gathering evidence for use in foreign tribunals." Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004). The pertinent statutory text is as follows:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made . . . upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court . . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

28 U.S.C. § 1782(a). Section 1782 states that a court "*may* order" such discovery; so even if a court has jurisdiction under the statute to grant a petition, the decision to grant it is discretionary. See In re Metallgesellschaft, 121 F.3d 77, 79 (2d Cir. 1997) ("The permissive language of § 1782 vests district courts with discretion to grant, limit, or deny discovery."); see also In re Esses, 101 F.3d 873, 875 (2d Cir. 1996) (per curiam) ("A review of a district court's decision under § 1782, therefore, has two components: the first, as a matter of law, is whether the district court erred in its interpretation of the language of the statute and, if not, the second is whether the district court's decision to grant discovery on the facts before it was in excess of its discretion.").

Kiobel argued that the documents that Cravath holds for Shell are needed to prepare her case because Dutch courts require a higher evidentiary standard at the filing stage than do U.S. courts.[2] Further, rather than starting discovery from scratch after over ten years in U.S. courts, access to the prior discovered materials is said to be the most efficient course of action. Kiobel did not subpoena Shell, only Cravath.

The district court agreed with Kiobel. After oral argument on December 20, 2016, the district court found that the cheapest and easiest thing to do was to grant Kiobel's petition and get the documents from Cravath. In view of the existing confidentiality order, Kiobel was directed to represent that the documents would only be used for drafting court papers in the contemplated Dutch proceedings, not for publicity, and the parties were required to sign a new stipulation. The parties complied with the court's directive, though Cravath advised that, under the terms of the prior stipulation, it lacked authority to de-designate documents because it was not a party to the original Alien Tort Statute suit, and Shell was not before the court.

Under the new stipulation, Shell has no right to enforce a breach of confidentiality. In the event of disputes, Cravath and Kiobel can return to the district court, but because the district court has no authority over proceedings in the foreign forum, the parties may only "request" confidential treatment for the documents in the Netherlands. Joint App'x at 241.

The district court's subsequent opinion first concluded that it had jurisdiction to consider Kiobel's petition. The court rejected Cravath's argument

---

[2] A declaration from Kiobel's Dutch attorney stated that the Dutch court system has no procedure for the preparatory phase of a case, so he "must complete" the collection of evidence prior to filing the writ of summons. Joint App'x at 86. Once a lawsuit is pending, Kiobel can then submit additional evidence, and can file an "exhibition request" to gain discovery, though this is time consuming and, in the view of Kiobel's counsel, unnecessary since the pertinent evidence is already available in the U.S. Id.

that it was not the real party from whom discovery was sought, deeming it irrelevant because Section 1782 asks only whether the respondent resides in the district in which discovery is sought, as Cravath does. Finding that it had jurisdiction to consider Kiobel's petition, the district court granted it because Kiobel required the documents to file suit, and it would not be burdensome for Cravath to provide them.

On appeal, Cravath challenges both the district court's finding that it had jurisdiction and its discretionary grant of the petition. As to jurisdiction, Cravath argues, inter alia, that: the documents Kiobel seeks belong to Shell; Cravath holds them only as counsel; and Shell neither resides nor is found in the Southern District of New York. As to the discretionary grant of the petition, Cravath argues: that Kiobel's petition is an attempted end-run around the more limited discovery procedures of the Netherlands where Shell is found and being sued; and granting discovery of materials Shell produced in reliance on confidentiality orders in prior litigation would undermine confidence in court protective orders.

II

A district court possesses jurisdiction to grant a Section 1782 petition if:

> (1) . . . the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) . . . the discovery [is] for use in a proceeding before a foreign tribunal, and (3). . . the application [is] made by a foreign or international tribunal or any interested person.

Esses, 101 F.3d at 875 (internal quotation marks omitted). We review de novo a district court's ruling that a petition satisfies Section 1782's jurisdictional requirements. See Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 117 (2d Cir. 2015). Cravath's statutory challenge on appeal is only to the first jurisdictional requirement.

The district court observed that Cravath unsuccessfully made the argument that a foreign client (Deutsche Telekom) and not Cravath was the

actual party from which discovery was sought in In re Schmitz, 259 F. Supp. 2d 294 (S.D.N.Y. 2003). Schmitz ruled that "[a]pplication of section 1782 does not involve an analysis of . . . why a respondent has the documents. It is sufficient that respondents reside in this district[.]" Id. at 296.

The district court also relied on Ratliff v. Davis Polk & Wardwell, 354 F.3d 165, 170-71 (2d Cir. 2003), which ruled discoverable under Section 1782 documents that were held by a law firm in the U.S. on behalf of a foreign client and voluntarily produced to a third party. The district court drew an analogy between Shell's previous production of documents to Kiobel and the previous production (to the SEC) in Ratliff. Lastly, the district court relied on Federal Rules of Civil Procedure 34(a)(1) and 45(1)(A)(iii) for the proposition that "relevant documents within the 'possession, custody, or control' of the recipient of a discovery request are generally discoverable, regardless of who owns or created those documents." Joint App'x at 280.

On appeal, Cravath raises two jurisdictional challenges:

- Since jurisdiction under Section 1782 is subject to established limits on federal courts' power to compel production of privileged materials, a district court cannot order a law firm to produce client documents that would fall beyond the statutory reach of a subpoena if the documents had instead been maintained by the client. Since documents here are not discoverable from Shell at this stage under both the protective order and the Netherlands' more restrictive discovery practices, they are similarly not discoverable from Cravath.

- A court cannot compel a law firm to produce a client's documents when (as here) the client is not subject to the court's personal jurisdiction.

We are not persuaded.

The first statutory requirement for jurisdiction is that the "person from whom discovery is sought resides or is found in the district of the district court

to which the application is made." Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 83 (2d Cir. 2004) (alteration and internal quotation marks omitted). There is no express mandate to consider a principal-agent relationship, or whether documents being held by the subpoenaed party belong to a foreign party. See Mees v. Buiter, 793 F.3d 291, 298 (2d Cir. 2015) ("in several other contexts we and the Supreme Court have declined to read into [Section 1782] requirements that are not rooted in its text"). A law firm's representation of a foreign client is a factor worth considering; but it is a discretionary factor, not a jurisdictional requirement. Schmitz, 376 F.3d at 85. The district court correctly determined that it possessed jurisdiction over Kiobel's petition.

III

Once a district court is assured that it has jurisdiction over the petition, it "may grant discovery under § 1782 in its discretion." Mees, 793 F.3d at 297 (internal citation omitted). We review the decision to grant a Section 1782 petition for abuse of discretion. See In re Edelman, 295 F.3d 171, 175 (2d Cir. 2002).

To guide district courts in the decision to grant a Section 1782 petition, the Supreme Court in Intel, 542 U.S. 241, discussed non-exclusive factors (the "Intel factors") to be considered in light of the "twin aims" of Section 1782: "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." Metallgesellschaft, 121 F.3d at 79 (internal quotation marks omitted). The four Intel factors are:

> (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," in which event "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad";

(2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";

(3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and

(4) whether the request is "unduly intrusive or burdensome."

Intel, 542 U.S. at 264-265.

The district court determined that Kiobel's petition should be granted because: Cravath is not a party to the Dutch litigation; not all of the documents Kiobel sought were likely to be still in Shell's possession over a decade after litigation began in the U.S.; the Netherlands does not prohibit or restrict parties from gathering evidence similar to what is sought from Cravath in the U.S., and there was no evidence that the courts of the Netherlands would be unreceptive to U.S. discovery; and the production would be minimally burdensome for Cravath.

Cravath contends on appeal that the district court abused its discretion because: the petition in effect seeks discovery from Shell, which is subject to jurisdiction in the foreign tribunal; use of a Section 1782 petition to discover these documents is opposed by the Netherlands; the petition attempts to circumvent the more limited Dutch rules of discovery; and the petition threatens the confidentiality of the materials sought.

We conclude that the district court erred in its analysis and application of the four Intel factors. As the district court acknowledged in its opinion, under existing precedent in this Circuit, when the real party from whom documents are sought (here, Shell) is involved in foreign proceedings, the first Intel factor counsels against granting a Section 1782 petition seeking documents from U.S. counsel for the foreign company. See Schmitz, 376 F.3d at 85 ("Although technically the respondent in the district court was Cravath, for all intents and

purposes petitioners are seeking discovery from DT, their opponent in the German litigation. Intel suggests that because DT is a participant in the German litigation subject to German court jurisdiction, petitioner's need for § 1782 help 'is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.'" (quoting Intel, 542 U.S. at 264)). Further, under the third Intel factor, statements made by Kiobel's counsel demonstrate that Kiobel is trying to circumvent the Netherlands' more restrictive discovery practices, which is why they are seeking to gather discovery from Cravath in the U.S.[3]

The Intel factors are not to be applied mechanically. A district court should also take into account any other pertinent issues arising from the facts of the particular dispute. See Intel, 542 U.S. at 264-65 ("We note below factors that bear consideration in ruling on a § 1782(a) request . . . . We decline, at this juncture, to adopt supervisory rules. Any such endeavor at least should await further experience with § 1782(a) applications in the lower courts."). Looking at the facts of this dispute reinforces our conclusion that the district court abused its discretion in granting the petition. We consider in particular two cases that analyzed Section 1782 petitions seeking documents from U.S. legal counsel: Sarrio, 119 F.3d 143 and Ratliff, 354 F.3d 165.

Sarrio militates in favor of the right of Cravath to invoke its client's rights under the confidentiality order. In Sarrio, the plaintiff in a foreign lawsuit filed a Section 1782 petition to discover documents of the opposing party from Chase Bank. The Bank, which held the documents in its capacity as a lender to the defendant, had sent the documents to the U.S. for review by its in-house counsel. The district court's denial of the petition was reversed on appeal after Chase withdrew its claim of attorney-client privilege. But Sarrio's discussion of

---

[3] In a declaration, Kiobel's counsel stated that while Kiobel may "request" copies of documents from Shell under section 843a of the Dutch Code of Civil Procedure, "it is hardly possible for a party to obtain evidence from another party pre-trial" in the Netherlands. Joint App'x at 196. So to bypass Dutch discovery restrictions and gain access to documents she could not otherwise acquire, Kiobel is turning to Section 1782.

privilege in the Section 1782 context is instructive. Sarrio followed Fisher v. United States, 425 U.S. 391 (1976), which determined that when a client is privileged from producing documents, so too is the client's counsel. Id. at 404. Building on this, Sarrio explained that while "Fisher was expressed in terms of . . . common law or constitutional privilege," its reasoning also applied to protect a foreign party's documents that are not amenable to a subpoena in the hands of the foreign party, even if the court can subpoena the documents from the foreign party's U.S. counsel under Section 1782. Sarrio, 119 F.3d at 146. This is because the principle articulated in Fisher:

> arose from the policy of promoting open communications between lawyers and their clients. That policy would be jeopardized if documents unreachable in a foreign country became discoverable because the person holding the documents sent them to a lawyer in the United States for advice as to whether they were subject to production.

Id.

Ratliff followed Sarrio. U.S. plaintiffs suing a Dutch company for securities fraud in the U.S. sought documents from the defendant's accounting firm in the Netherlands. Ratliff, 354 F.3d at 167. When the Dutch court denied access, the plaintiffs invoked Section 1782 to obtain the documents from the accounting firm's U.S. counsel, Davis Polk & Wardwell. Id. The documents sought had previously been voluntarily turned over to the Securities and Exchange Commission. Id. In response to the petition, Davis Polk argued that documents cannot be subpoenaed from counsel if the court does not have jurisdiction over the owner. Id. The district court agreed and denied the petition.

When Davis Polk on appeal relinquished its claim of privilege, it was unclear whether the disclaimed privilege was attorney-client privilege or "the protection discussed in Sarrio that would protect documents regardless of their content." Id. at 170. The issue as to which privilege was relinquished was obviated, however, because the accounting firm had voluntarily authorized

Davis Polk to disclose the documents to a third party, making the documents unprotected from discovery and thus amenable to a Section 1782 petition.

Therefore, although our Court in Ratliff held that Davis Polk was subject to appellant's subpoena, Ratliff did not disturb Sarrio's suggestion that a district court should not exercise its discretion to grant a Section 1782 petition for documents held by a U.S. law firm in its role as counsel for a foreign client if the documents are undiscoverable from the client abroad, because this would disturb attorney-client communications and relations. Sarrio, 119 F.3d at 146; Ratliff, 354 F.3d at 170.

Moreover, Ratliff's holding that third-party disclosure vitiated Davis Polk's privilege argument does not apply in this case. Although Shell produced the documents at issue to its adversaries in the Alien Tort Statute litigation, that disclosure was not "public," as the Ratliff court found E&Y's disclosure in that case to have been. See Ratliff, 354 F.3d at 170 ("In light of the strong policy considerations favoring full and complete discovery we are hard pressed to suppress documents that have already seen the bright light of public disclosure."). Rather, Shell disclosed the documents under a confidentiality order that expressly barred Kiobel from using the documents in any other litigation. As a practical matter, the combination of the confidentiality order and the more restrictive Dutch discovery practices makes the documents at issue undiscoverable from Shell in the Netherlands. To now modify the confidentiality order that Shell and Kiobel agreed to, and thereby provide access to the documents, would be perilous for multiple reasons, a feature of this case that makes it extraordinary, and possibly unique.

To begin, the district court's ruling would undermine confidence in protective orders. Protective orders "serve the vital function . . . of secur[ing] the just, speedy, and inexpensive determination of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice." S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 (2d Cir. 2001) (internal quotation marks omitted, alterations in original). Without protective orders, "litigants would be subject to needless annoyance, embarrassment, oppression, or undue burden or

expense." Id. (internal quotation marks omitted). This is why there is "a strong presumption against the modification of a protective order," and why, "absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need," we should not countenance such modifications. Id. at 229 (alteration in original). The decision to alter the confidentiality order without Shell's participation, and without considering the costs of disclosure to Shell, makes this case exceptional, and mandates reversal. See Mees, 793 F.3d at 302 (explaining that under Intel, district courts should apply the standard from Federal Rule of Civil Procedure 26 to assess when a discovery request is unduly burdensome); see also In re Catalyst Managerial Servs., DMCC, 680 Fed. App'x 37, 39 & n.1 (2d Cir. 2017) (discussing a party's argument about the burdens of discovery on a third-party putative foreign defendant in the context of the fourth Intel factor).

Moreover, Kiobel did not (presumably because she cannot) provide the U.S. courts with assurance that Dutch courts will enforce the protective orders that safeguard the confidentiality of Shell's documents. It is perilous to override the confidentiality order; doing so would inhibit foreign companies from producing documents to U.S. law firms, even under a confidentiality order, lest Section 1782 become a workaround to gain discovery. This would entail several unintended consequences.

The Supreme Court has stressed the need for "full and frank communication between attorneys and their clients," which "promote[s] broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see also In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1036–37 (2d Cir. 1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law."). If foreign clients have reason to fear disclosing all pertinent documents to U.S. counsel, the likely results are bad legal advice to the client, and harm to our system of litigation.

In order to avoid potential disclosure issues under Section 1782, U.S. law firms with foreign clients may be forced to store documents and servers abroad, which would result in excessive costs to law firms and clients. Alternatively, U.S. law firms may have to return documents to foreign clients (or destroy them) as soon as litigation concludes. As amicus the New York City Bar Association notes, its Ethics Opinion 780 states that law firms have an interest in retaining documents where needed to protect themselves from accusations of wrongful conduct. So U.S. law firms may be harmed if they must destroy or return a foreign client's documents as soon as possible once a proceeding is completed. Or foreign entities may simply be less willing to engage with U.S. law firms.

Therefore, in light of the Intel factors, the respect owed to confidentiality orders, and the concerns for lawyer-client relations raised in Sarrio, the district court abused its discretion in granting Kiobel's petition.

* * *

The order of the district court is **REVERSED**. We **REMAND** for the district court to revise its order to conform with this opinion.