UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF ESTHER KIOBEL, Petitioner, For an Order Granting Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for Production of Documents Pursuant to 28 U.S.C. § 1782	Civil Action No. 1:16-cv-07992 **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION OF ESTHER KIOBEL, PURSUANT TO 28 U.S.C. § 1782, FOR LEAVE TO ISSUE SUBPOENAS TO CRAVATH, SWAINE & MOORE LLP FOR THE PRODUCTION OF DOCUMENTS FOR USE IN A FOREIGN PROCEEDING

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November 3, 2016

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Parties and Entities

"Petitioner": Petitioner Esther Kiobel

"Respondent" or "Cravath": Cravath, Swaine & Moore LLP

"Shell": Royal Dutch Shell plc and certain predecessors and non-U.S. affiliates of Royal Dutch Shell plc

Pleadings

"Moskowitz Decl.": Declaration of Lauren A. Moskowitz in Opposition to the Petition of Esther Kiobel, Pursuant to 28 U.S.C. § 1782, for Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for the Production of Documents for Use in a Foreign Proceeding, dated November 3, 2016

"Petition": Petition of Esther Kiobel, Pursuant to 28 U.S.C. § 1782, for Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for the Production of Documents for Use in a Foreign Proceeding, dated October 12, 2016 (ECF 3)

"Petitioner's Brief" or "Pet. Br.": Memorandum of Law in Support of the Petition of Esther Kiobel, Pursuant to 28 U.S.C. § 1782, for Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for the Production of Documents for Use in a Foreign Proceeding, dated October 12, 2016 (ECF 4)

"Request for Production of Documents": Petitioner's Request for Production of Documents, dated October 12, 2016 (ECF 4-1)

"Samkalden Decl.": Declaration of Channa Samkalden, Attorney-at-law in the Netherlands, dated October 4, 2016 (ECF 4-4)

"Simons Decl.": Declaration of Marco Simons, dated October 12, 2016 (ECF 4-2)

Terms

"*Kiobel*": *Kiobel v. Royal Dutch Petroleum Co*., Civil Action No. 02-CV-7618 (S.D.N.Y.)

"*Wiwa*": *Wiwa v. Royal Dutch Petroleum Co*., Civil Action No. 96-CV-8386 (S.D.N.Y.), *Wiwa v. Brian Anderson*, Civil Action No. 01-CV-1909 (S.D.N.Y.), and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, Civil Action No. 04-CV-2665 (S.D.N.Y.)

Respondent Cravath, Swaine & Moore LLP ("Cravath" or "Respondent") respectfully submits this Memorandum of Law in Opposition to the Petition of Esther Kiobel ("Petitioner"), pursuant to 28 U.S.C. § 1782, for leave to issue subpoenas to Cravath for the production of documents for use in a foreign proceeding (ECF No. 4).

PRELIMINARY STATEMENT

This Petition is a textbook example of misuse of Section 1782. The Petitioner here previously filed a lawsuit in this District against certain predecessors and non-U.S. affiliates of Royal Dutch Shell plc, a U.K. and Dutch company (collectively, "Shell") in 2002 pursuant to the Alien Tort Statute, alleging that Shell aided and abetted violations of the law of nations committed by the Nigerian government in Nigeria in the early 1990s. *Kiobel v. Royal Dutch Petroleum Co*., Civil Action No. 02-CV-7618 (the "*Kiobel*" case). Three other lawsuits raising substantially identical claims also were filed in this District and were consolidated with the *Kiobel* case for pretrial discovery. *Wiwa v. Royal Dutch Petroleum Co*., Civil Action No. 96-CV-8386; *Wiwa v. Brian Anderson*, Civil Action No. 01-CV-1909; and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, Civil Action No. 04-CV-2665 (collectively, the "*Wiwa*" cases). Petitioner, along with the other plaintiffs in the *Kiobel* and *Wiwa* cases, conducted a significant amount of discovery. Indeed, Petitioner's counsel here represented plaintiffs in the related *Wiwa* cases and thus, also had access to the same discovery.

On April 17, 2013, the Supreme Court of the United States held that there was no jurisdiction under the Alien Tort Statute for Petitioner's claims and dismissed the *Kiobel* case (the *Wiwa* cases previously had settled in 2009). Now, over three and a half years after the Supreme Court's decision, and over 20 years after the alleged facts that form the basis of Petitioner's claims, Petitioner asserts that she plans to bring another

lawsuit against Shell at some indeterminate time in the near future, this time in the Netherlands, for the same alleged conduct.

Petitioner invokes Section 1782 to obtain from Cravath, counsel for Shell in the *Kiobel* and *Wiwa* cases, the entire discovery record from those cases in order to use that discovery to try to state a claim in the proposed litigation in the Netherlands. Petitioner's counsel asserts (in the Petition but not his Declaration, curiously), that due to the confidentiality orders in place in the *Kiobel* and *Wiwa* cases, the *Kiobel* parties were required to return or destroy any material designated confidential after dismissal or final judgment in the litigation, "so that much of the material produced is no longer available to Ms. Kiobel". (Pet. Br. at 3.) Counsel does not, however, specify exactly which documents or deposition transcripts Petitioner or Petitioner's counsel is missing or unable to use and what has been done with the discovery they previously had. For example, Petitioner apparently seeks her own deposition to be reproduced by Cravath even though there was no reason that deposition needed to be destroyed (and it seems unlikely that it was). The same is true for many other witnesses that Petitioner proffered in those cases.

Section 1782 should have nothing to do with this situation. Cravath does not own these documents; they belong to the parties to the underlying litigations, including not only Shell but also the plaintiffs in the *Wiwa* cases, none of whom is a party to this Petition. As for confidential information that belongs to the *Wiwa* plaintiffs, it is unclear why Petitioner has not sought those documents directly from the *Wiwa* plaintiffs, but in any event, Cravath surely is not the proper recipient of a subpoena for those documents. With respect to the confidential information that belongs to Shell, Cravath also cannot turn that over. These documents were produced in reliance on the

Confidentiality Orders, which restricted the use of those documents solely to the *Kiobel* and *Wiwa* cases. If Petitioner intends to sue Shell in the Netherlands, she should seek to obtain discovery from Shell in that forum, not through a subpoena on its U.S. counsel pursuant to Section 1782. Indeed, as explained by Professor Hans Smit, the principal draftsperson of Section 1782, in his declaration submitted in *Schmitz*, a prior case denying a Section 1782 petition issued to Cravath, which was affirmed by the Second Circuit: "The principal purpose of Section 1782 is to make available to a foreign tribunal or litigant testimonial and tangible evidence located in the United States *from persons who are not parties to the foreign proceedings*." (Moskowitz Decl. ¶ 6, Ex. C, Declaration of Hans Smit, ¶ 15 (emphasis added)). That is not the situation here. The Petition should be denied.

First, Petitioner fails to meet the requisite statutory elements under Section 1782. Specifically, Petitioner fails to establish that the discovery she seeks is "for use" in a foreign proceeding. Although Petitioner is correct that a foreign proceeding need not be pending at the time a Section 1782 petition is made, such a proceeding must be "within reasonable contemplation", *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 259 (2004), and cannot simply be "just a twinkle in counsel's eye", *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG LLP*, 798 F.3d 113, 124 (2d Cir. 2015). Here, Petitioner's mere retention of Dutch counsel coupled with the bald statement that she intends to file suit before the end of 2016 is insufficient to meet that standard. Petitioner has not taken any concrete steps toward instituting proceedings in the Netherlands and offers no reason why such a suit is somehow imminent now, three and a half years after the Supreme Court's decision dismissing her

original lawsuit and 20 years after the alleged events that form the basis of her claims. (*See infra* Section I.A.) In addition, the discovery here is really being sought from Shell, not Cravath, and Petitioner has not established that Shell, the "person from whom discovery is sought", is "found" within this District. (*See infra* Section I.B.)

Second, the discretionary factors set forth in the Supreme Court's decision in *Intel* all weigh against granting the Petition, especially the first factor, which looks to whether the person from whom discovery is sought is a participant in the foreign proceeding. As noted, although technically the Petition is directed at Cravath, the Petition is actually seeking discovery from Shell, the proposed defendant in the proposed Dutch litigation. (*See infra* Section II.A; *see also Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004) ("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").) The second and third factors regarding receptivity of the foreign tribunal to this discovery and whether this petition conceals an attempt to circumvent foreign proof-gathering restrictions or other policies also weigh in favor of denying the Petition because (1) the Government of the Netherlands has already expressed concerns about improper interference by U.S. courts resulting from plaintiff-favoring broad discovery rules, and (2) Petitioner is improperly forum shopping by seeking an order from this Court instead of following Dutch procedure. (*See infra* Section II.B.) Finally, the fourth *Intel* factor, which looks to whether the request is unduly intrusive or burdensome, also weighs against the discovery sought here because Petitioner's request is overly broad insofar as it seeks the entire discovery record instead of only the documents that Petitioner was required to destroy

under the Confidentiality Orders entered in those cases, and that even if narrowed, there does not appear to be a way to ensure the confidential treatment in any foreign litigation of the documents requested, which were produced in reliance on the Confidentiality Orders. (*See infra* Section II.C.)

STATEMENT OF FACTS

A. The *Kiobel* and *Wiwa* Cases

Royal Dutch Shell is a corporation organized under the laws of the United Kingdom, and has its principal place of business in The Hague, Netherlands. (Moskowitz Decl. ¶ 2.) On September 30, 2002, the Petitioner and 11 other Nigerian plaintiffs, representing a putative class, filed a complaint against Shell in this District under the caption, *Kiobel v. Royal Dutch Petroleum Co*., Civil Action No. 02-CV-7618. (*Id*.) Plaintiffs asserted claims under the federal Alien Tort Statute. Plaintiffs alleged that Shell aided and abetted violations of the law of nations committed by the Nigerian government in Nigeria in the early 1990s, leading to the death of a number of individuals, including Petitioner's husband, in November 1995. (Pet. Br. at 4-5.)

The three *Wiwa* cases raising substantially identical claims under the Alien Tort Statute were filed in this District in 1996, 2001 and 2004. (Moskowitz Decl. ¶ 2.) On October 21, 2002, the *Wiwa* and *Kiobel* cases were consolidated for pre-trial discovery proceedings. (*Id*. ¶ 3.)

The *Kiobel* case was dismissed in 2010 and then proceeded on interlocutory appeal. Meanwhile, discovery proceeded in the *Kiobel* and *Wiwa* cases. As part of the discovery in those cases, Shell produced over 100,000 pages of documents, the majority of which were designated Confidential pursuant to the Stipulations and Orders Regarding Confidentiality of Discovery Materials that were so-ordered by Judge Kimba

Wood in the *Kiobel* and *Wiwa* cases (the "Confidentiality Orders").[1] (Moskowitz Decl. ¶ 3; Pet. Br. at 6; Simons Decl. ¶ 5, Exs. 3 & 4.) The Confidentiality Orders provide that confidential material shall be used solely for the *Kiobel* and *Wiwa* cases and shall not be disclosed except upon prior written consent of the producing party or upon order of the Court. (Simons Decl. ¶ 5, Exs. 3 & 4 ¶¶ 7-8.)[2]

Shortly before trial in 2009, the *Wiwa* cases ended in a settlement. (Pet. Br. at 5.) On April 17, 2013, the U.S. Supreme Court dismissed the *Kiobel* case. (*Id*.) The Court refused to apply the Alien Tort Statute extraterritorially and held that "mere corporate presence" is not sufficient to overcome the presumption against extraterritorial application. *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659, 1669 (2013) (citation omitted). In other words, U.S. courts had no jurisdiction to hear the *Kiobel* case—or for that matter the *Wiwa* case, which proceeded on exactly the same ground that was overturned by the Court—and thus, all the discovery that was taken in those cases was discovery that never should have been taken in the first place.

[1] The Confidentiality Orders in both cases are identical. (*See* Simons Decl. ¶ 5, Exs. 3 & 4.)

[2] Petitioner argues that the Confidentiality Orders are not protective orders and merely constitute agreements to maintain confidentiality of certain designated materials produced in the *Kiobel* and *Wiwa* cases. (Pet. Br. at 3 n. 2.) Petitioner's attempt to downplay the significance of the Confidentiality Orders is misleading. The Confidentiality Orders were court-ordered, and clearly provide that designated confidential materials are protected and shall not be disclosed except upon prior written consent of the producing party or upon order of the Court. (Simons Decl. ¶ 5, Exs. 3 & 4, ¶¶ 7-8.) Further, the Confidentiality Orders provide that they shall be binding after the conclusion of the litigation, absent written permission of the producing party or further order of the Court, and the Court shall retain jurisdiction for purposes of its enforcement. (*Id*. ¶ 21.)

B. The 28 U.S.C. § 1782 Petition

On October 18, 2016, Petitioner filed the Petition and supporting materials with this Court seeking an order for leave to issue subpoenas to Cravath for the production of documents purportedly for use in a foreign proceeding pursuant to 28 U.S.C. § 1782. The Request for Production of Documents filed with the Petition seeks the entire multi-year discovery record from the *Kiobel* and *Wiwa* cases: "[a]ll deposition transcripts from *Kiobel* and the *Wiwa* cases, including Confidential Material and Non-Confidential Materials", and "[a]ll discovery documents and communications produced to the plaintiffs by Shell and other defendants in *Kiobel* and the *Wiwa* cases, including Confidential Material and Non-Confidential Material". (Request for Production of Documents, at 4.)

All of the documents that Petitioner seeks were in Petitioner's possession—and the possession of Petitioner's current counsel, who also represented plaintiffs in the *Wiwa* cases—throughout the pendency of those cases, including the *Kiobel* appeals. If Petitioner really intended to pursue litigation abroad, she could have sought relief from the Confidentiality Orders during or immediately after the *Kiobel* appeal. Indeed, the day of the Supreme Court's decision in *Kiobel*, Earthrights International, Plaintiff's counsel in the *Wiwa* cases and Petitioner's counsel here, published an article in which it was discussed that the Supreme Court's decision "will not deter the Ogoni plaintiffs from pursuing justice against Shell". (Moskowitz Decl. ¶ 5, Ex. B, "Kiobel v. Shell: Supreme Court Limits Courts' Ability to Hear Claims of Human Rights Abuses Committed Abroad", dated April 17, 2013, at 2.) But no suit was filed, and no relief from the Protective Order ever was sought. Now, three and a half years

later, Petitioner seeks to dig up all of this past under the guise of Section 1782 and yet another threat to sue Shell.

Petitioner alleges that the discovery requested will be relevant to, and for use in, a proceeding that Petitioner intends to file against Shell in the Netherlands. (Pet. Br. at 1.) Petitioner's Dutch counsel submits that she is allegedly "in the process of completing [her] assessment of the available documents and collecting the necessary evidence to file the lawsuit" and "expect[s] to bring the lawsuit by the end of this year". (Samkalden Decl. ¶ 5.) Other than counsel's representation that she "expect[s]" to file the lawsuit, Petitioner provides no support for her assertion that she will file an action in the Netherlands. Further, Petitioner provides no explanation for why that threat is credible now, over three and a half years after the Supreme Court's decision in April 2013, and over 20 years since the alleged acts giving rise to her claims occurred.

LEGAL STANDARD

In order to obtain discovery under 28 U.S.C. § 1782, a petitioner must first establish three basic statutory prerequisites. The statutory prerequisites are: "(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or any interested person." *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2d Cir. 2004) (quotation omitted).[3]

[3] Section 1782 provides that "[t]he 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". 28 U.S.C. § 1782(a).

Even if these prerequisites are satisfied, a court need not order the requested discovery; rather, the court has discretion to decide whether to grant or deny the petition. *Schmitz*, 376 F.3d at 83-84. In exercising that discretion, courts consider the following four factors established in *Intel*: (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 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 "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". 542 U.S. at 264-65.

"[D]istrict courts must exercise their discretion under § 1782 in light of the twin aims of the statute: 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 . . .". *Schmitz*, 376 F.3d at 84 (quotation omitted).

ARGUMENT

I. PETITIONER FAILS TO MEET THE STATUTORY REQUIREMENTS OF SECTION 1782 BECAUSE PETITIONER FAILS TO ESTABLISH BOTH THAT THE DISCOVERY SOUGHT IS FOR USE IN A FOREIGN PROCEEDING AND THAT THE PERSON FROM WHOM DISCOVERY IS SOUGHT IS FOUND IN THE DISTRICT.

Petitioner here fails to meet at least two of the three statutory requirements of Section 1782. Petitioner fails to establish that the discovery sought is for use in a foreign proceeding based on the hypothetical lawsuit that she purportedly intends to file in the Netherlands sometime this year. In addition, the discovery here is really being

sought from Shell, not Cravath, and Petitioner has not established that Shell, the "person from whom discovery is sought" is "found" within this District.

A. Petitioner Fails to Establish that the Discovery Sought Is For Use in a Foreign Proceeding Because the Proposed Lawsuit in the Netherlands in Which Petitioner Plans to Use the Requested Discovery Is Not Within Reasonable Contemplation.

Petitioner fails to meet the requirement that the discovery sought pursuant to the Section 1782 petition is "for use in a proceeding in a foreign or international tribunal". 28 U.S.C. § 1782(a). Petitioner seeks to obtain the discovery at issue based solely on representations by her Dutch counsel that she is "collecting the necessary evidence" and "expect[s] to bring the lawsuit by the end of this year". (Samkalden Decl. ¶ 5.) Petitioner has not commenced litigation in the Netherlands and has not alleged that she has taken any concrete steps towards filing an action. Granting discovery based solely on a petitioner's counsel's representation that she "expects" to file suit sometime in the near future, without the provision of any factual support for that representation, does not satisfy Section 1782.

While the foreign proceeding need not be pending at the time a Section 1782 application is made, the future proceedings must be "within reasonable contemplation". *Intel*, 542 U.S. at 243. A Section 1782 petitioner must present to the court some concrete basis from which it can determine that the contemplated proceeding "is more than just a twinkle in counsel's eye". *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG LLP*, 798 F.3d 113, 124 (2d Cir. 2015). To be "within reasonable contemplation", the future proceedings must be more than speculative. A "district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time". *Application of Consorcio Ecuatoriano de Telecomunicaciones*

S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1270 (11th Cir. 2014) (quoting *In re Letter of Request from the Crown Prosecution Serv. of the U.K*., 870 F.2d 686, 692 (D.C. Cir. 1989)). The petitioner "must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that the action is being contemplated". *Certain Funds*, 798 F.3d at 123.

The Second Circuit decision in *Certain Funds* is instructive. There, creditors of Saudi Arabian companies that collapsed in 2009 and defaulted on their debts to those creditors brought a Section 1782 petition in this District seeking documents relating to the audits of the companies from various accounting firms. 798 F.3d at 115. Petitioners filed their petition in 2014, nearly five years after the default of the Saudi companies, alleging that they intended to initiate two sets of legal proceedings against various defendants, including the companies and the accounting firms themselves. *Id*. at 116. The Second Circuit found it dispositive that petitioners had done little more than retain counsel regarding the "*possibility* of initiating litigation". *Id*. at 124 (emphasis in original). The Second Circuit further held that "[i]n light of the substantial length of time between the Saudi conglomerates' default in 2009 and the filing of the Funds' § 1782 application in 2014, we cannot say that the district court erred in determining that the anticipated proceedings were not within reasonable contemplation at that time". *Id*.

Likewise here, Petitioner's assertion that she intends to file a lawsuit "likely . . . before the end of 2016" (Pet. Br. at 2, 5) does not constitute reasonable contemplation of future proceedings under *Intel* and its progeny. Rather, Petitioner's pleading reflects only a "subjective intent to undertake some legal action" constituting little more "than just a twinkle in counsel's eye". *Certain Funds*, 798 F.3d at 123-24.

That conclusion is further supported by the considerable amount of time Petitioner has taken to raise the possibility of bringing an action in the Netherlands. The Supreme Court's decision in the *Kiobel* appeal was made in April 2013, three and a half years ago, and the facts giving rise to Petitioner's claims occurred in 1995 and earlier, more than 20 years ago. *See id.* at 124 (finding the "substantial length of time" before the Section 1782 petition was made supported the district court's decision to deny the petition).

Courts in this District have held that they "must guard against efforts by parties to engage in fishing expeditions before actually launching litigation". *In re Certain Funds, Accounts and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC*, No. 14-CV-1801 (NRB), 2014 WL 3404955, at *6 (S.D.N.Y. July 9, 2014); *see also In re Harbour Victoria Inv. Holdings Ltd*., No. 15-MC-127, 2015 WL 4040420, at *7-8 (S.D.N.Y. June 29, 2015) (courts should be cautious of "fishing expedition[s]").

Petitioner's memorandum of law in support of her petition does not even address the "reasonable contemplation" requirement under *Intel*, instead citing one case, *Mees v. Buiter*, 793 F.3d 291, 295 (2d Cir. 2015), to assert that it is irrelevant that the intended suit in the Netherlands has not yet been filed. (Pet. Br. at 8.) But that proposition is not in dispute. What is in dispute, and what Petitioner fails to establish, is whether there is any concrete basis for a determination that the discovery here is actually being sought in aid of a reasonably contemplated lawsuit in the Netherlands. Indeed, *Mees* is distinguishable on this ground. In *Mees*, applicant was charged in New York State Court with five misdemeanor counts of stalking, menacing and harassment. 793 F.3d at 295. On March 10, 2014, applicant accepted an Adjournment in Contemplation of Dismissal in her criminal case. *Id*. On March 28, 2014—*18 days*

later—applicant filed a Section 1782 application seeking discovery "as part of her Dutch attorneys' investigation of a defamation claim against [respondent] in the Netherlands". *Id*. Far from waiting over three and a half years, the applicant in *Mees* promptly served a Section 1782 demand for discovery.

B. Petitioner Has Not Established that Shell, the Real "Person from Whom Discovery Is Sought" (Not Cravath), Is "Found" Within This District.

With respect to the statutory requirement that the person from whom discovery is sought must reside in the district of the district court in which the application is made, 28 U.S.C. § 1782(a), Petitioner's argument that this requirement is satisfied because Cravath resides in this District (Pet. Br. at 7) is misplaced and an oversimplification. As discussed herein, the documents Petitioner seeks do not belong to Cravath; the reality is that Petitioner seeks these documents from Shell. Petitioner has not established that Shell is "found" in this District.[4] As such, it is not clear that Petitioner satisfies this statutory element.[5]

[4] Indeed, there does not appear to be a basis to conclude that Shell resides in this district. *See Havlish v. Royal Dutch Shell plc*, No. 13-CV-7074, 2014 WL 4828654, at *1-4 (S.D.N.Y. Sept. 24, 2014) (declining to exercise jurisdiction over Shell because there were insufficient ties to New York such that it could be said that Shell was located or doing business in New York).

[5] Respondent recognizes that the district court in *In re Application of Schmitz*, 259 F. Supp. 2d 294, 296 (S.D.N.Y. 2003), disagreed with a similar argument, but the Court still denied the petition in that case on other grounds. This specific argument regarding the statutory requirement was not addressed by the Second Circuit in its decision affirming the denial of the Petition, but the Second Circuit did focus extensively on the related *Intel* factor that looks to whether the person from whom discovery is sought is a party to the foreign litigation. The Second Circuit recognized that, "[a]lthough 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", and affirmed the denial of the petition. *Schmitz*, 376 F.3d at 85.

Granting the Petition under these circumstances could create a chilling effect on the ability of U.S. counsel to represent international companies if merely allowing U.S. counsel access to documents in connection with legal representation opens up the international company to U.S.-style discovery through a Section 1782 petition filed against its U.S. counsel. Indeed, considering that many international law firms today operate on shared networks or shared servers between offices, such a result could expose even international companies using non-U.S. counsel to such discovery simply because its non-U.S. counsel happens to have an office in the U.S.

Section 1782 simply was not intended to permit a petitioner to obtain documents from a party who does not reside in this district (or any district in the United States) simply because the law firm representing that party resides here. (*See* Moskowitz Decl. ¶ 6, Ex. C, Declaration of Hans Smit, ¶¶ 15-16.

Petitioner's failure to establish the statutory requirements is fatal to the Petition, and it should be denied for this reason alone.

II. EVEN IF ALL OF THE ELEMENTS OF SECTION 1782 WERE SATISFIED, THE COURT SHOULD EXERCISE ITS DISCRETION TO DENY THE PETITION UNDER THE INTEL FACTORS.

Even if Section 1782 allowed for discovery where a petitioner has indicated only a vague proposal to file litigation in a foreign court sometime in the near future and seeks discovery of a foreign company's documents through that company's U.S. counsel, this Court should not exercise its discretion in favor of ordering such discovery here because the balance of the *Intel* discretionary factors weighs against such an order. *First*, Section 1782 is not an appropriate vehicle for seeking discovery for use in a foreign proceeding where the party from whom discovery is sought is a party to that foreign proceeding. Here, Petitioner effectively seeks discovery from Shell, who is a

proposed defendant in the contemplated Dutch litigation. *Second*, the Government of the Netherlands has publicly stated that it would not be receptive to assistance from U.S. courts, and Petitioner's inexplicable failure to use available Dutch procedural mechanisms for filing suit (instead bypassing them altogether in seeking discovery from this Court) constitutes improper forum shopping. *Third*, Petitioner's request is overly broad and unduly burdensome and intrusive in that it overreaches on the documents it seeks, does not provide any means to ensure that the discovery sought will be kept confidential, and any production would be difficult due to significant issues with respect to privilege and data privacy that would be implicated.

A. The Requested Discovery Here Effectively Is Sought from Shell, Who Is the Proposed Defendant in the Unfiled Dutch Proceeding.

The first *Intel* factor looks to whether the party from whom discovery is sought is a party to the foreign proceeding. *Intel*, 542 U.S. at 264. Petitioner attempts to glide past this factor by simply asserting that discovery is sought from Cravath, which will not be a defendant in the proposed foreign action. (Pet. Br. at 9-10.) Petitioner's argument misses the mark. Petitioner, for all intents and purposes, seeks discovery from Shell, not Cravath, who is the proposed defendant in the contemplated Dutch litigation. Every reported case to consider the issue has denied a Section 1782 petition where the petition seeks discovery—through a foreign company's U.S. counsel—of a foreign corporation where that corporation is or will be a party to a foreign proceeding.

In the Second Circuit's decision in *Schmitz*, German plaintiffs in a civil action in Germany had brought a Section 1782 petition in this District seeking discovery from respondent Cravath, who represented the defendant corporation Deutsche Telekom AG ("DT") in litigation in the United States. 376 F.3d at 81. Applicants sought the same

documents already produced in that litigation. *Id*. Applying the first *Intel* factor, the Second Circuit determined that "[a]lthough 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'". 376 F.3d at 85 (quoting *Intel*, 542 U.S. 241); *see also In re Mare Shipping Inc*., 2014 A.M.C. 188, 193 (S.D.N.Y. 2013) ("The first factor (whether the person from whom discovery is sought is a party to the foreign action) does not weigh in favor of granting the application. Although [Squire Sanders LLP and one of its partners] are not a party to a foreign action, Spain, [their] client, is a participant in the foreign proceeding"), *aff'd*, 574 F. App'x 6 (2d Cir. 2014); *In re Application of OOO Promnefstroy*, Misc. No. M 19-99 (RJS), 2009 WL 3335608, at *7 (S.D.N.Y. Oct. 15, 2009) ("Because the Court concludes that nearly all of the documents that the subpoena seeks are also in the possession of parties to the foreign proceeding, the first factor weighs squarely in favor of [respondent]"); *cf. In re Application of Republic of Kazakhstan*, 110 F. Supp. 3d 512, 516 (S.D.N.Y. 2015) (finding that the first *Intel* factor weighed in favor of the petitioner where the clients of Clyde & Co. LLP—from whom discovery was sought—were *not* parties to the foreign action).

Professor Hans Smit, the principal draftsperson of Section 1782, submitted a declaration in support of respondent Cravath's memorandum in opposition in *Schmitz*. (Moskowitz Decl. ¶ 6, Ex C.) In his declaration, Professor Smit urged the court to exercise its discretion to deny the petition because Section 1782 was not intended to

cover circumstances where petitioners sought documents from DT (through Cravath) for use against DT in the foreign proceeding: "The principal purpose of Section 1782 is to make available to a foreign tribunal or litigant testimonial and tangible evidence located in the United States *from persons who are not parties to the foreign proceedings*", because "[t]he authority of a foreign court normally does not extend to third parties in the United States, and the authority of an American court is therefore needed to compel the production of such evidence". (*Id*. ¶¶ 15-16.) By contrast, "if it is a party in the foreign proceeding that seeks the evidence from its opponent in the foreign proceeding, the provision of American assistance becomes more questionable. After all, the foreign court need not extend its authority extraterritorially to obtain the evidence". (*Id.* ¶ 21.) Indeed, where the foreign court does not permit the discovery that is sought under Section 1782, "it would appear that no good argument can be made in favor of an American court's expending its limited resources in order to aid a foreign court in doing what the court can readily do itself, but has chosen not to do. An American court's interposing its authority in such a case may disturb the very structure of the foreign litigation process, which has decided not to make that information available from the parties". (*Id*.)

Petitioner claims that she intends to file suit through Dutch counsel against a Dutch corporation in a Dutch court, thereby asking this Court to do precisely what Professor Smit and the Supreme Court in *Intel* cautioned against: using Section 1782 to "disturb the very structure of the foreign litigation process" in the courts of their *own* country. (*Id*. ¶ 21); *see Intel*, 542 U.S. at 241.[6]

[6] Petitioner's citation of *In re Roz Trading Ltd*., No. 1:06-CV-02305-WSD, 2007 WL 120844, at *2 (N.D. Ga. Jan. 11, 2007), is misplaced. There, the court addressed the straightforward question of whether respondent The Coca-Cola Company was required to

B. Petitioner's Discovery Requests Here Seek to Make an End-Run Around Dutch Law and Constitute Impermissible Forum Shopping.

The second and third *Intel* factors, which look to the receptivity of the foreign tribunal to the discovery that is sought and whether the petition conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of the foreign country, also weigh in favor of denying the Petition.

Under the second *Intel* factor, courts consider how receptive the foreign court would be to assistance from the U.S. Court. *Intel*, 542 U.S. at 264. In applying this factor, courts look to the conduct of the foreign court and generally look for "authoritative proof" that the foreign court would reject assistance provided under Section 1782. *Euromepa S.A. v. R. Esmerian, Inc*., 51 F.3d 1095, 1100 (2d Cir. 1995). Here, Petitioner offers a conclusory statement from her Dutch counsel that the Dutch judiciary would be receptive to the U.S. District Court's help. (Samkalden Decl. ¶¶ 8, 9.) However, in an *amicus* brief submitted to the Supreme Court in the *Kiobel* appeal, the Government of the Netherlands (as well as the United Kingdom) argued that the U.S. courts should not interfere with their right to adjudicate disputes among their own nationals and residents (including corporations). (Moskowitz Decl. ¶ 4, Ex. A, Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, dated June 13, 2012, at 24-30.) In particular, the Netherlands cited the risks of improper interference

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produce documents to petitioner for use in a foreign arbitration. *Id*. at *8. The Court found that the first *Intel* prong weighed in favor of granting the petition because Coca-Cola was not a party to the foreign arbitration—a simple application of the test. *Id*. Unlike the case at hand, *In re Roz* did not concern the question at issue here, namely whether a Section 1782 petition should be used to obtain discovery of a party to a contemplated foreign proceeding through that party's U.S. law firm.

resulting from plaintiff-favoring rules and remedies in the U.S. that other nations do not accept, including "the generally broader discovery available to plaintiffs in the U.S.". (*Id*. at 27); *see also Schmitz*, 376 F.3d at 84 (noting that the German Ministry of Justice and the local German prosecutor explicitly asked the district court judge to deny the discovery request); *In re Microsoft Corp*., 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006) (noting explicit opposition to Microsoft's discovery request by the EU Commission). As a result, this factor does not support the Petition.

The third *Intel* factor asks whether the petition is little more than "an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country". 542 U.S. at 265. While this factor is not intended to impose a foreign discoverability requirement, and the fact that the discovery sought pursuant to the Section 1782 petition would be unavailable in the foreign proceeding is not enough, on its own, to justify denying the Petition, the discoverability under the laws of the foreign jurisdiction remains a "useful tool in the[] exercise of discretion under Section 1782". *Mees*, 793 F.3d at 303. Indeed, "a district court should be vigilant against a petitioner's attempt to 'replace a [foreign] decision with one by [a U.S.] court'". *In re Kreke Immobilien KG*, No. 13 Misc. 110, 2013 WL 5966916, at *6 (S.D.N.Y. Nov. 8, 2013) (citing *Microsoft*, 428 F. Supp. 2d at 195). "[Section] 1782 was not intended 'as a vehicle to avoid . . . an unfavorable discovery decision' from a foreign tribunal." *Id*. (quoting *Microsoft*, 428 F. Supp. 2d at 196); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008) ("While there is no 'exhaustion' requirement for seeking discovery under § 1782, the district court may, in its discretion, properly consider a party's failure first to attempt discovery measures in the foreign jurisdiction");

Promnefstroy, 2009 WL 3335608, at *8 ("Under the third discretionary factor, district courts may consider how the applicant fared or is faring in the foreign jurisdiction in its attempts to procure the same information it now seeks under § 1782").

Petitioner asserts, through her Dutch counsel, that "[c]ontrary to the United States, the judicial system of the Netherlands has no procedure of discovery during the preparatory phase of the case". However, she also concedes that it is "possible to file a so-called exhibition request under the [Dutch Code of Civil Procedure], but this is a time-consuming and intricate procedure". (Samkalden Decl. ¶ 6.) Petitioner argues out of both sides of her mouth, both that Dutch procedure would not allow the discovery, and at the same time, that she does not want to make the effort to obtain the discovery pursuant to the Dutch procedure available to her. This is not the type of situation that Section 1782 was designed to address.

Judge Buchwald of this District recognized as much in *Kreke* when she rejected very similar arguments to those made here by Petitioner. There, petitioner brought a Section 1782 application for discovery from Deutsche Bank in connection with a lawsuit that it intended to file in Germany against Deutsche Bank's wholly owned subsidiary, Oppenheim. *Kreke*, 2013 WL 5966916, at *1. Petitioner claimed that it was entitled to discovery in the U.S. because, under German procedural rules, discovery was limited to gaining access to documents whose contents were already known to the applicant in great detail. *Id.* at *2. Judge Buchwald noted that, "[e]ssentially, the argument seems to be that [petitioner] cannot be faulted for circumventing German rules if it just chooses not to engage with those rules in the first place". *Id.* at *6. Judge Buchwald then held, in denying the petition, that "[i]t would create a perverse system of

incentives—one counter to the efficiency and comity goals of § 1782—to encourage foreign litigants to scurry to U.S. courts to preempt discovery decisions from tribunals with clear jurisdictional authority". *Id*.

In *Kreke*, Judge Buchwald determined that petitioner was seeking to circumvent the German court's procedure "where a German petitioner [was] seeking discovery from a German respondent for use against a German defendant in a German proceeding". 2013 WL 5966916, at *6; *see also In re Godfrey*, 526 F. Supp. 2d 417, 424 (S.D.N.Y. 2007) ("Lastly, even if petitioners could overcome all of the foregoing objections, this would not be a case for exercising discretion to provide the requested assistance, because the connection to the United States is slight at best and the likelihood of interfering with Dutch discovery policy is substantial."). Likewise here, considering that the locus of this proposed action is in the Netherlands and that the documents really belong to, and are being sought from, Shell, who is an anticipated party to the proposed Dutch proceeding (and therefore is within the jurisdictional reach of the Dutch courts), there is a very real concern that Petitioner is seeking to circumvent Dutch discovery procedures. (*See supra* Section II.A.)

In short, this Petition constitutes impermissible forum shopping and, as Judge Buchwald made clear in *Kreke*, courts are "loath to sanction forum shopping under the guise of § 1782". *Kreke*, 2013 WL 5966916, at *6.[7]

[7] The cases Petitioner cites (Pet. Br. at 11-12) either are irrelevant or the proposition for which Petitioner cites them is incorrect. Petitioner asserts that the third *Intel* factor turns on whether applicants are seeking discovery in bad faith, citing *In re Auto-Guadeloupe Investissement S.A.*, No. 12 MC 221 (RPP), 2012 WL 4841945 (S.D.N.Y. Oct. 10, 2012), and *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254 (D. Mass. 2010). While it is true that these cases involved analyses of bad faith, *In re Auto-Guadeloupe Investissement*, 2012 WL 4841945, at *7-8 (providing false information to the judge who

C. Petitioner's Requests Are Overly Intrusive and Burdensome Because They Raise Serious Confidentiality Concerns and Complicated Production Issues.

The fourth *Intel* factor also weighs against the Petition here. Petitioner asserts that there is very little burden because the documents previously have been produced (making no mention of the fact that they never should have been produced in the first place given that the courts here lacked jurisdiction). (Pet. Br. at 13-14.) Petitioner's argument is misplaced for several reasons.

First, Petitioner's request for the entire record in the *Kiobel* and *Wiwa* cases is overly broad. Petitioner has not particularized which documents from those cases it purports to have destroyed and why. In particular, it is unclear why Petitioner needs or expects Cravath to reproduce transcripts of its own witnesses from those cases. If the Court is inclined to grant this Petition, and it should not for the reasons set forth herein, it may order that "the discovery may be had only on specified terms and conditions". *In the Matter of the Application of Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992) (quoting Fed. R. Civ. P. 26(c)(1992)). As the Second Circuit instructed in *Schmitz*, in the event that a court decides to limit, rather than deny, discovery, a "narrowly tailored discovery order" is preferred, where possible. *Schmitz*, 376 F.3d at 85. Respondent respectfully requests that, if the discovery sought is to be

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issued the Section 1782 application); *Chevron*, 754 F. Supp. 2d at 262 (relying on case law outside the Southern District in finding that the request for discovery was a good faith effort to elicit evidence that has probative value in foreign proceedings), the requirement that a respondent demonstrate that a petitioner has acted in bad faith in order to establish circumvention of foreign law is nowhere to be found in the Supreme Court's decision in *Intel* or any decisions by the Second Circuit. None of the other cases cited by Petitioner—which primarily concern general propositions of law that Respondent does not contest—provides that an end-run around foreign procedure like Petitioner proposes here is permissible under Section 1782. (*See* Pet. Br. at 12-13.)

permitted at all, this Court should issue an order requiring Petitioner to identify particular documents that she needs for use in this supposed Dutch proceeding, to state why she no longer possesses those documents and to articulate her reasons for seeking such documents through discovery here from Cravath instead of through the Netherlands from Shell, the proposed defendant in that proceeding.

Second, there does not appear to be a mechanism to ensure the confidential treatment of the documents requested, which were produced in the *Kiobel* and *Wiwa* cases pursuant to and in reliance upon the Confidentiality Orders. Petitioner acknowledges that "[p]ursuant to a stipulated confidentiality agreement entered in [the underlying *Kiobel* and *Wiwa*] case[s], some of the discovery documents and deposition transcripts were designated confidential, and cannot be disclosed—even to a Dutch court". (Pet. Br. at 6.) But that is not a justification for requiring Cravath to turn over those same documents. Cravath does not have the ability to de-designate those documents. Only the parties to the underlying litigations and the Court that so ordered those Confidentiality Orders have that ability. The Confidentiality Orders provide that the materials that were produced in those litigations and designated Confidential shall be used solely for the purposes of those litigations and shall not be disclosed except upon prior written consent of the producing party or upon order of the Court. (Simons Decl. ¶ 5, Exs. 3 & 4, ¶¶ 7-8.)[8] Courts have denied Section 1782 petitions where, as here, there are serious concerns with respect to the disclosure of confidential information governed by a protective order. *In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1044-45 (N.D. Cal.

[8] As noted (*see supra* p. 6 n. 2), the Confidentiality Orders provide that they shall be binding after the conclusion of the litigation, absent written permission of the producing party or further order of the Court, and the Court shall retain jurisdiction for purposes of its enforcement. (Simons Decl. ¶ 5, Exs. 3 & 4, ¶¶ 7-8, 21.)

2016) ("In particular, many of the documents responsive to [petitioner's] requests for documents . . . contain information designated as confidential . . . and [are] subject to protective orders issued by this court . . . Those protective orders bar [respondents] from unilaterally producing many of the documents designated as confidential, and responding to [petitioner's] request would require significantly time-consuming measures to comply with the redaction protocols and protective orders in place"); *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, Case No. CV-12 80 151 MISC, 2012 WL 6878989, *4 (N.D. Cal. Oct. 22, 2012) ("[T]here is no way to anticipate all of the ways in which [respondent's] confidential documents, which are now protected by an order of this court, could become exposed and not protected in [the foreign proceeding], and might become available for public use in business matters.").

Moreover, based on submissions in other cases, there does not appear to exist in the Netherlands the equivalent of a U.S.-style protective order that assures the confidential treatment of documents produced in discovery because there is no U.S.-style document discovery in the Netherlands.[9] *See Cordis Corp. v. SciMed Life Sys.*, No. Civ. 4-96-261, 177 F.R.D. 651, 653 (D. Minn. 1997) (Dutch counsel testified that "[t]here is no mechanism to obtain protective orders in the Netherlands. Nor is there a provision to guarantee that a court will order spectators and other third parties from Dutch courtrooms. Dutch Court Hearings are public and Dutch courts will only be prepared to make proceedings private in particularly delicate matters like child abuse and juvenile

[9] Because of the Second Court's clear guidance that a comparative analysis of foreign law is best avoided under the second *Intel* prong, *Euromepa S.A.,* 51 F.3d at 1099-1100, Respondent will not burden the Court with a foreign law affidavit at this stage. However, if the Court requires additional assistance on any of these questions, Respondent can obtain guidance on Dutch procedures and submit an affidavit for the Court's consideration.

custody cases"). If there is no equivalent of a U.S. protective order under Dutch law, then there is no provision for filing documents under seal. If these documents are ordered to be produced to Petitioner, any of them may be filed in the Dutch court, at which point the documents may be accessed and publicized by persons who are not (and cannot be made) subject to any protective order in this case. The fact that there is no way to assure the confidential treatment of Shell's document production of over 100,000 pages and deposition transcripts taken in the cases if Petitioner's application is granted weighs heavily in favor of its denial. That discovery was premised on precisely the assurance of confidentiality (in the Confidentiality Orders) that cannot be provided if the documents are produced to Petitioner. It would be inequitable to permit Petitioner to bootstrap a production made in reliance on U.S. court-ordered confidentiality protections into a wholesale disclosure of Shell's documents and other discovery in a foreign proceeding.[10]

Third, Petitioner also seeks the production of documents that may be subject to other privileges governed by Dutch law (and possibly other laws), including data protection, privacy and other privileges. Should this Court grant Petitioner's Section 1782 petition, Cravath likely would have to conduct a substantial and complex review of all documents prior to producing them to Petitioner to ensure compliance with those laws. Inevitably, there will be disputes between the parties concerning the application of Dutch law (and other) privileges to certain documents. It is more appropriate and efficient for such disputes to be resolved by a Dutch court familiar with these privileges, rather than a U.S. federal district court in New York. This Court should reject Petitioner's attempt to

[10] In the event that the Court is inclined to grant the Section 1782 petition, Respondent respectfully requests that the Court provide it with the opportunity to brief the question of whether any protective order type provisions would be adequate to protect the confidentiality and privilege of the documents to be produced to Petitioner.

require such a substantial review and production of documents by Cravath given the premature nature of this Petition and because a Dutch court is certainly in a better position to decide disputes over Dutch law privilege issues.

CONCLUSION

Cravath respectfully requests that this Court deny Petitioner's application for discovery pursuant to 28 U.S.C. § 1782 in its entirety and grant such other relief as is just and proper.

November 3, 2016

Respectfully submitted,

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