

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

IN RE PETITION OF ESTHER KIOBEL,

Applicant,

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF THE APPLICATION 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**

Benjamin Hoffman, Esq.
Columbia Law School Human Rights Clinic
435 West 116th Street
New York, NY 10027
Tel: 212-854-3954
bhoffman@law.columbia.edu

Attorney for Channa Samkalden, as attorney-in-fact for Esther Kiobel

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INTRODUCTION

Respondent Cravath, Swain & Moore LLP (“Cravath”) accuses Petitioner Esther Kiobel of “forum shopping,” of using a Foreign Legal Assistance petition in this Court improperly to seek documents that are *really* in the possession of Royal Dutch Shell, Petitioner’s anticipated defendant in a soon-to-be-filed Dutch lawsuit. But it is not forum shopping to come to the jurisdiction where the documents are most likely to be found. It is not forum shopping to file such an application in Cravath’s hometown.

The object of this Petition is discovery that was *already* provided to Petitioner’s former counsel in the course of litigation in the United States. Under the terms of the Confidentiality Orders in that litigation, Petitioner was not allowed to retain documents that the defendants unilaterally designated as confidential. More than three years after the U.S. litigation concluded – and more than a decade after most of the discovery was produced – Petitioner believed that Cravath, rather than Shell, was most likely to have retained the relevant documents. Moreover, Cravath was most likely to have retained these documents in a system that would allow easy re-production with little to no burden.

Petitioner had crafted her requests in a manner that was designed to entail the least burden on Cravath – simply re-produce what had been produced before. But Petitioner is happy to limit the request to material that was marked confidential, which Petitioner does not have. There is no serious argument about the relevance of these documents, since they were already produced in litigation over substantially the same claims that Petitioner will shortly file in the Netherlands.

Cravath’s other objections are meritless. There is no rule that obtaining documents from a law firm is improper – indeed, this Court rejected such an argument raised by Cravath in a prior proceeding. And simply because Shell was the original source of some of the documents does not make it the target of this Petition. Petitioner has amply demonstrated that the documents are needed

for use in the Dutch lawsuit, which is on the brink of filing – Petitioner has demonstrated her seriousness by sending pre-filing letters to Shell, and has drafted the writ of summons, the Dutch equivalent of a complaint. At the same time, Petitioner has no viable option to obtain these documents in the Netherlands.

Cravath’s remaining objection is that there is no guarantee of confidentiality. Although, as a rule, Dutch court filings are *not* publicly accessible, Petitioner is willing to make whatever guarantees are deemed necessary under the circumstances. Given that these documents relate to incidents over twenty years ago, however, and that the Confidentiality Order at issue reflects “no finding as to whether the documents are confidential,” *see* Stipulation and Order Regarding the Confidentiality of Discovery Materials from both the *Kiobel* and *Wiwa* actions, DE 4-3 (hereinafter “Confidentiality Orders”) at 15 (Ex. 3 at 11), the mere possibility that documents could become public should not serve to defeat this discovery without a particularized showing that meets the “good cause” standard for a protective order.

ARGUMENT

I. Petitioner is happy to narrow the requests to cover only documents that she was not allowed to retain.

Cravath makes much of the supposed overbreadth of the requests at issue – that they cover Petitioner’s “own deposition” as well as the depositions of plaintiffs’ witnesses in the *Wiwa* and *Kiobel* cases, and material designated confidential by the *Wiwa* plaintiffs.¹ DE 7 at 2. In fact, Petitioner only seeks those documents that were previously produced to her, and does not need

¹ Cravath remarks that it is “curious[]” that counsel’s declaration did not assert that “the *Kiobel* parties were required to return or destroy any material designated confidential.” DE 7 at 2. There is nothing curious about that. The requirement is plain from the Confidentiality Orders, so counsel’s declaration would have added nothing; moreover, counsel here did not represent Ms. Kiobel in the *Kiobel* litigation, and cannot speak for her prior counsel.

documents that were never marked confidential, documents produced by any plaintiff, or transcripts of any plaintiffs' witness depositions. The documents that Petitioner requires are only 1) documents produced by Cravath and marked confidential, and 2) deposition transcripts of defense witnesses where some portion of the testimony was designated confidential. Petitioner does not have these documents,² and would be unable to use them in a Dutch court proceeding if she did. *See* Confidentiality Orders, DE 4-3.

Petitioner is happy to narrow the proposed requests to this extent, and did not do so initially only because it appeared that this might require *more* work on Cravath's part. Unless Cravath has already segregated all documents marked confidential, it would presumably be less burdensome to just produce all documents rather than sorting through all the documents. Petitioner believed that her original requests likely could be fulfilled by Cravath with a couple of keystrokes in Cravath's document-management system. But if that belief was mistaken, Petitioner is willing to narrow the requests to seek only documents that she indisputably does not have and cannot use otherwise.

II. There is no forum shopping where Petitioner came to the forum where the documents are most likely to be present, and where Cravath is uniquely available.

Cravath maintains that Petitioner is engaged in "forum shopping" because she could have just as easily sought discovery from Shell through the Dutch court system. To the contrary, Petitioner came here because that is where the documents are most likely to be.

As addressed below, there is no requirement that Petitioner exhaust all theoretical options in the Netherlands before seeking this Court's assistance, and the only available procedure does not work in these circumstances. Aside from whether Petitioner even could have sought these

² With respect to documents marked confidential, it should be obvious to Cravath why Petitioner "no longer possesses those documents," as it demands to know. DE 7 at 23. Under the stipulated Confidentiality Orders, anyone in possession of Confidential Material was required to either return copies to counsel for the Producing Party, or destroy the material. DE 4-3 at 13-14 (Ex. 3 at 9-10).

documents from Shell, however, there is no guarantee that Shell would have had them.

The documents in question are a combination of document discovery from the *Wima* and *Kiobel* cases and deposition transcripts. Cravath was the entity from which these documents were produced, and they originated from multiple Shell offices in at least three countries, as well as from the individual defendant Brian Anderson. *See* Reply Declaration of Marco Simons (“Simons Reply Decl.”) ¶ 2. There is no reason to suspect that all of these documents have been preserved by all of the entities that originally produced them. Indeed, in other litigation in the Netherlands, Shell has stated that it no longer has documents relating to environmental issues in Nigeria a decade ago, *see* Samkalden Reply Decl. ¶ 9, casting serious doubt on whether they would have retained these older documents. Moreover, Cravath was the original possessor of the original deposition transcripts at issue, and Petitioner has no reason to believe that all of these transcripts were ever in Shell’s possession. Petitioner made the logical choice to seek documents from the party most likely to have them, in the place where they are most likely to be located.

The only case Cravath cites in favor of its “forum shopping” argument is *In re Kreke Immobilien KG*, 2013 U.S. Dist. LEXIS 160283 (S.D.N.Y. Nov. 8, 2013), in which Judge Buchwald denied discovery sought from a German bank present in New York. This Court found that the application had an “overwhelmingly German character,” *id.* at *19, because the petitioner was German, the respondent was a German bank, the “physical documents are in Germany,” and the relevant “conduct took place in Germany,” *id.* at *11-12, and the petitioner had “assented to foreign authority” by agreeing to a forum-selection clause naming Germany, *id.* at *19.

This case bears no resemblance to *Kreke*. Here, Petitioner is a Nigerian-American, who was granted asylum in the United States after the execution of her husband in Nigeria, and much of the relevant conduct occurred in Nigeria. *See Kiobel v. Royal Dutch Petroleum Co.*, ___ U.S. ___, 133 S. Ct. 1659, 1662-63 (2013). Respondent is an American law firm with no presence in the Netherlands.

The physical documents at issue, as far as Petitioner knows, are located in the United States; Cravath has not suggested otherwise. The only Dutch components are that the lawsuit will be filed in the Netherlands against a Dutch defendant – facts analogous to those present in *every* section 1782 case. It is not forum shopping to come to the jurisdiction where the documents sought are located.

Pursuing discovery where it is available is not forum shopping. Indeed, courts have rejected the notion that section 1782 petitioners are “forum shopping” even where they choose to use this procedure when a more cumbersome procedure might be available in the foreign litigation. *See, e.g., In re Republic of Ecuador*, No. C 11-80171, 2011 U.S. Dist. LEXIS 108612, *16 (N.D. Cal. Sept. 23, 2011) (“Applicants’ Applications are no doubt the result of strategy (one of pursuing discovery through the permissive standards of § 1782 rather than through an arbitral tribunal whose jurisdiction they do not concede), but that does not mean they are the result of forum-shopping.”). As noted below, there is no effective Dutch procedure to obtain this discovery, so this case has fewer attributes of forum shopping than *Republic of Ecuador*, where that characterization was nonetheless rejected.

III. The Petition plainly meets the statutory requirements.

Cravath argues that the Petition does not meet the statutory requirements of section 1782 because it is not “for use” in a foreign proceeding and the target of the discovery is not “found” in this District. Both objections are meritless. Petitioner’s Dutch counsel has already taken demonstrable concrete steps toward filing suit against Shell in the Netherlands. And no court has accepted the notion that the respondent in a section 1782 action – in this case, Cravath – is not the party that needs to be “found” within the district.

A. The Dutch Kiobel case is within reasonable contemplation.

The Dutch Kiobel case is far “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), as Dutch counsel’s prior

declaration indicates. Nonetheless, if more is required, Petitioner is happy to demonstrate that there is indeed “objective indicium that the action is being contemplated.” *Id.* at 123.

Cravath argues that “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.” DE 7 at 3-4. To the contrary, Petitioner’s Dutch counsel, Ms. Samkalden, has taken such concrete steps. Ms. Samkalden has drafted the writ of summons, the initiating document for Dutch litigation. Reply Declaration of Channa Samkalden (“Samkalden Reply Decl.”) ¶¶ 3, 6. She has acquired legal aid from the Dutch Legal Aid Board for purposes of initiating the Dutch Kiobel case, and its provision was recently extended with a view to the complex character of the case. *Id.* ¶ 5. This required counsel to demonstrate the litigation’s complexity by 1) showing that progress had already been made in the case’s preparation, and 2) substantiating what outstanding tasks remained before the case could be filed. *Id.* Additionally, in 2013, Ms. Samkalden sent liability letters to Shell indicating that Petitioner considers Shell liable for human rights violations committed against the Ogoni people and her late husband, and that she reserves all rights as a prospective litigant. *Id.* ¶ 4 & Ex. 1.

The liability letter also answers Cravath’s disbelief about the timing of the case. The letter was sent in 2013, shortly after the Supreme Court’s decision. Under Dutch law, the liability letter has legal effect, serving to toll the limitations period for bringing an action. *Id.* Thus, Petitioner did not need to immediately proceed to file suit, and has taken this time to prepare her case.

With these facts and those previously presented, Petitioner undeniably meets her burden of demonstrating that the planned Dutch proceeding against Shell is “within reasonable contemplation.” Indeed, courts found Section 1782 applicants with considerably less have satisfied this *Intel* factor. See *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1271 (11th Cir. 2014) (petitioner had a “facially legitimate and detailed explanation of its

ongoing investigation,” a statement of his intent to file a civil action, and “valid reason for [petitioner] to obtain the requested discovery under the instant section 1782 application before commencing suit); *Bravo Express Corp. v. Total Petrochemicals & Ref. U.S.*, 613 F. App’x 319, 323 (5th Cir. 2015) (petitioner’s attorney averred that an action would be filed imminently and laid out the facts that gave rise to the prospective lawsuit); *Goenechea v. Davidoff*, No. 14-20668, 2016 U.S. Dist. LEXIS 17358, *8-9 (D. Md. Feb. 11, 2016) (petitioner explained that respondent violated Spanish law, that he intended to file lawsuit if conciliation efforts failed, and that claims could not proceed in court without first attempting conciliation). Petitioner clearly meets this factor.

B. Cravath, which is found in this District, is “person from whom discovery is sought.”

Cravath does not dispute that it is found in this District, but insists that Petitioner, “for all intents and purposes,” is seeking discovery from Shell. DE 7 at 15. And because *Shell* allegedly is not found here, Cravath insists, Petitioner has failed to meet the statutory requirements of Section 1782. No caselaw supports this position, nor is there any support for Cravath’s argument that obtaining documents from a law firm is improper.

As noted above, Petitioner seeks these documents from Cravath because that is where the documents are most likely to be. Although Cravath argues that “the documents Petitioner seeks do not belong to Cravath,” DE 7 at 13, that is both incomplete and irrelevant. Many of the documents requested are deposition transcripts; neither Cravath nor Shell is the author of those transcripts, but Cravath *possesses* them, which is sufficient to allow discovery. *See* 28 U.S.C. § 1782(a) (providing that documents shall generally be produced “in accordance with the Federal Rules of Civil Procedure”).

Additionally, as noted above, “Shell” is not a monolith. The documents Ms. Kiobel now seeks were originally produced from the files of Netherlands-based Royal Dutch Petroleum Co. and three defendants with no obvious presence in the Netherlands – Shell’s other parent company at the time, U.K.-based Shell Transport & Trading Co. plc; Shell’s Nigerian subsidiary, Shell Petroleum

Development Co. of Nigeria; and the individual defendant Brian Anderson. Simons Reply Decl. ¶ 2. This discovery presumably contained a combination of materials originating in the Netherlands, the United Kingdom, and Nigeria. As Applicant previously stated, there is no reason to believe that any entity retains any more complete collection of this material than Respondent Cravath, who, as counsel for the defendants, had been tasked with the compilation, categorization, and production of these documents. *Id.* And many of these documents were not authored by the party who gave them to Cravath – they include documents authored, for example, by the Nigerian military authorities. *See* Simons Reply Decl. ¶ 3. There is no rule, either in the Federal Rules of Civil Procedure or in section 1782, that a litigant can only obtain documents from their original authors. Indeed, courts have ordered section 1782 discovery from email account providers over the contents of email accounts held by foreigners, without considering that the “real” target of the discovery is the account holder. *See, e.g., Integrity Comm'n of Trinidad & Tobago v. Google Inc.*, No. 14-mc-80229-WHO, 2014 U.S. Dist. LEXIS 113795, at *1 (N.D. Cal. Aug. 14, 2014) (ordering discovery from Google of a number of accounts apparently held by Trinidadians).

While Cravath may insist that Shell ultimately owns and exercises control over the requested documents regardless of their current physical location, this should not preclude their discoverability under 28 U.S.C. § 1782. There is no rule prohibiting discovery from a law firm over documents within its possession. As a general matter, documents, absent privilege, “obtain no special protection because they are housed in a law firm; any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney.” *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170-71 (2d Cir. 2003) (internal quotation marks and citation omitted). This applies to even to documents held by attorneys in the United States on behalf of *foreign* clients, like Shell. *Id.*

Cravath cites only one relevant case, but admits that that case *rejected* its position that

discovery from a law firm is improper. In *In re Schmitz*, 259 F. Supp. 2d 294 (2003), Judge Stein said the following of a similar argument by Cravath: “That argument is creative, but sails far wide of the mark. Application of section 1782 does not involve an analysis of . . . why a respondent has the documents. It is sufficient that respondents reside in this district, as they concededly do.” *Id.* at 296. It is rather bold of Cravath to make the same argument to the same Court that earlier rejected it, but the argument is no more convincing now than it was fourteen years ago.

The court ultimately denied discovery in *Schmitz* based on discretionary factors, and the Second Circuit upheld that denial, largely because “the German government was obviously unreceptive to the judicial assistance of an American federal court.” *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004). In doing so, the Second Circuit expressed no doubt that the statutory requirements had been met, *id.* at 83, implicitly rejecting the argument Cravath makes here. And in *In re Mare Shipping Inc.*, 2014 A.M.C. 188, 193 (S.D.N.Y. 2013), discovery was likewise denied because Spain, the firm’s client, was a party to the foreign proceeding and the court found that “the foreign tribunal [could] compel Spain to order its U.S. lawyers to produce the materials” – not because discovery was sought from a law firm. Thus, in *In re Application of Republic of Kazakhstan*, 110 F. Supp. 3d 512, 516 (S.D.N.Y. 2015), a section 1782 petition was granted against a law firm where clients were *not* parties to the Swedish arbitration proceedings at issue. The caselaw does not support the rule Cravath advances.

IV. The discretionary factors favor granting discovery.

The discretionary factors here favor granting the Petition. Cravath is not a party to the anticipated litigation, and while Shell would be, it is not yet – thus no Dutch court has authority over it. Numerous cases have found that the Dutch courts are receptive to evidence developed in section 1782 proceedings. And Cravath fails to meet its burden to show that there is an affirmative Dutch policy against allowing such discovery. Finally, the burden on Cravath of re-producing documents

already produced is minimal. Documents are not in fact routinely made public in Dutch litigation. Any concerns for confidentiality, more than 20 years after the incidents at issue, are minimal at best, but they can easily be addressed by asking that the Dutch court honor a confidentiality request.

A. Shell is not yet a party to the Dutch Kiobel case, which matters because there is no Dutch court mechanism that would allow this discovery at this phase.

Cravath argues that while it may not be a party to the Dutch Kiobel case, Shell will be, and therefore this factor weighs against discovery. Cravath is mistaken. This factor focuses on whether a foreign court has authority to order the discovery at issue, not simply the identity of the parties. The Dutch courts have no practical ability to order this discovery. Furthermore, there is no guarantee Shell still has all of the documents, if it ever did.

While Cravath is wrong to assert that obtaining documents from a law firm is improper, Cravath is correct that, when documents are sought from a law firm, some courts have considered whether the party who is the ultimate source of the documents is a participant in the foreign litigation. *See, e.g., In re Mare Shipping Inc.*, 2014 A.M.C. at 193; *Schmitz*, 376 F.3d at 85.³ But Cravath overlooks the reason for this rule, which is that this factor does not focus solely on the identity of the parties – the real issue is the ability of the foreign court to order the discovery at issue. The Supreme Court in *Intel* distinguished between situations where a foreign court has the authority to order those appearing before it to produce evidence, and situations where the evidence sought is unobtainable because those possessing it, as “nonparticipants,” lie beyond the court’s jurisdictional reach. 542 U.S. at 246. Thus, “it is the foreign tribunal’s ability to control the evidence and order production, *not the nominal target of the § 1782 application*, on which the district court should focus.” *In*

³ Of course, even with respect to Shell, it is not a current participant – it may be in the future, but the Supreme Court’s language in *Intel* asks whether the respondent “*is* a participant in the foreign proceeding.” 542 U.S. at 264 (emphasis added).

re OOO Promnefstroy, Misc. No M 19-99, 2009 U.S. Dist. LEXIS 98610, *15 (S.D.N.Y. Oct. 15, 2009) (emphasis added). “The issue of whether an entity is a participant . . . is not dispositive; *Intel* puts it in the context of whether the foreign tribunal has the authority to order an entity to produce the disputed evidence.” *In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1039 (N.D. Cal. 2016).

There is no practical ability of any Dutch court to order this discovery. While Dutch law does not provide for a general discovery of evidence, Section 843a of the Dutch Code of Civil Procedure allows a party with a “legitimate interest” to seek from another party copies of “certain documents.” Samkalden Reply Decl. ¶ 7. A Dutch court may grant the party’s request if the party is able to show that he or she is A) aware of the existence and substance of the documents requested and, B) able to show how those documents will allow him or her to discharge his or her burden of proof. *Id.* ¶ 8. But the Dutch courts have rejected the use of this procedure before the legal issues in the case are known, because at that stage, the plaintiffs cannot show what documents are actually needed to meet the burden. *Id.* So – even if Shell did have all the documents at issue – this procedure would not in fact be available to Petitioner.

Even where the target of an application is an actual party to ongoing foreign proceedings, courts have found that this factor weighs in favor of discovery when there is no practical ability of the foreign court to order discovery. For example, the Eleventh Circuit considered a case in which the respondent was a party to a Panamanian proceeding, but had “left Panama,” such that “the Panamanian Court cannot enforce its order against” him. *In re Clerici*, 481 F.3d 1324, 1334-35 (11th Cir. 2007). The court found that this factor did not weigh in the respondent’s favor. *Id.* Similarly, in one recent case where the respondent was “obviously a participant” in a German lawsuit, this Court found that this factor was neutral where it was “subject to debate” whether the German court could order the discovery at issue. *Minatec Fin. S.a.r.l. v. SI Group Inc.*, Civ. No. 1:08-CV-269, 2008 U.S. Dist. LEXIS 63802, *15-16 (S.D.N.Y. Aug. 18, 2008).

Additionally, as noted above, there is no reason to suppose that Shell has all of the documents at issue, or even that it ever did. Cravath has not shown that Shell obtained, or retained, every document produced by every defendant in *Wima* and *Kiobel*, as well as every defense witness deposition transcript. In *OOO Promnefstroy*, on which Cravath relies, the court found that the documents at issue were “also in the possession of parties to the foreign proceeding,” 2009 U.S. Dist LEXIS 98610, *19. No such finding is warranted here, and Cravath has not shown as much.

Cravath’s last maneuver is to use the declaration of the late Prof. Hans Smit to try to argue that the principal drafter of section 1782 would have disapproved of this Petition. But this declaration says nothing about this particular case. Prof. Smit was dealing with the scenario in which the documents at issue were within the ability of the foreign court to compel production; it is quite a stretch to say that Prof. Smit was anticipating the issue in this case. In any event, the Second Circuit has rejected Prof. Smit’s views where his reasoning is “unpersuasive” and he does “not purport to rely upon any special knowledge concerning legislative intent.” *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190 n. 6 (2d Cir. 1999). To the extent that Prof. Smit was suggesting that this factor should weigh against discovery where some of the documents at issue are ultimately derived from a party that is not yet, but will be, a participant in the foreign litigation – and is not currently before any foreign tribunal – that opinion would be unpersuasive.

B. The Petition does not seek an “end-run around Dutch law”: there is no dispute that the Dutch courts are receptive, and there are no foreign proof-gathering restrictions.

Cravath argues that Petitioner is attempting an “end-run around Dutch law,” but its arguments do not establish either that the Dutch courts are not receptive to this evidence, or that there is any Dutch restriction on this form of proof gathering. This simply amounts to the argument, frequently rejected in section 1782 cases, that Petitioner should essentially be limited to the procedures available in the Netherlands.

Even if the Court determines that the target of this Petition effectively is a participant in the foreign proceeding, and thus that the first factor weighs against granting discovery, discovery should still be granted where there is a limited ability to obtain the evidence without this Court's assistance. *See, e.g., In re in re Carsten Rehder Schiffsmakler Und Reederei GmbH & Co.*, No. 6:08-mc-108-Orl-35DAB, 2008 U.S. Dist. LEXIS 88434, at *4-5 (M.D. Fla. Oct. 17, 2008) (granting discovery after noting that “while Siemens is a party to the foreign action (a factor which weighs against granting the petition), the evidence before the Court . . . suggests that China's rules of procedure relating to discovery are not comparable to our own and that obtaining the information without this Court's assistance is by no means assured”). That is the case here.

1. One amicus brief is not authoritative proof that Dutch courts would reject this evidence.

U.S. courts have repeatedly found Dutch courts to be receptive to section 1782 evidence. *See In re Judicial Assistance Pursuant to 28 U.S.C. § 1782 by Macquarie Bank Ltd.*, No. 2:14-cv-00797, 2015 U.S. Dist. LEXIS 72544, *18 (D. Nev. May 28, 2015) (“Historically speaking, courts in the Netherlands have been receptive to United States judicial assistance.”); *In re Qwest Communs. Int'l, Inc.*, No. 3:08mc93, 2008 U.S. Dist. LEXIS 115845, *12-13 (W.D.N.C. July 9, 2008) (same); *In re Geert Duizendstraat*, No. 3:95-MC-150-X, 1997 U.S. Dist. LEXIS 16506, *5-7 (N.D. Tex. Apr. 16, 1997) (noting that the Dutch court had denied an injunction to prevent section 1782 discovery and found that such discovery was not improper).

In order to reject a finding of receptivity, Cravath must provide “authoritative proof,” typically in the form of “explicit pronouncements by courts . . . enjoining discovery in foreign jurisdictions.” *Esses v. Hanania (In re Esses)*, 101 F.3d 873, 877 (2d Cir. 1996). Cravath points to no pronouncements by Dutch courts, explicit or otherwise; it argues that a single amicus brief submitted by the Dutch government, which simply pointed out that U.S. discovery rules were broader than those in the Netherlands, proves that Dutch courts are not receptive to section 1782

discovery. *See* DE 7 at 18-19. This does not remotely meet Cravath’s burden, or rebut the evidence that Dutch courts have, in fact, accepted section 1782 discovery. In *OOO Promnefstroy*, for example, although the court ultimately denied discovery on other grounds, it still found that the Dutch courts would be receptive. Even Dutch court orders denying discovery in that case did not meet the respondent’s burden. 2009 U.S. Dist. LEXIS 98610 at *21-22. Similarly, in *Mees v. Buiter*, the Second Circuit noted that the petitioner’s Dutch counsel “stated that the Dutch courts were receptive to discovery assistance from U.S. courts via § 1782,” and the respondent did “not contend that Dutch courts reject the use in litigation of materials obtained through § 1782.” 793 F.3d 291, 296, 303 n.20 (2d Cir. 2015).

2. Simply because Dutch procedures do not provide for this type of discovery does not amount to a proof-gathering restriction.

Cravath both faults Petitioner for not attempting Dutch discovery procedures before seeking section 1782 assistance, and argues that the restrictive nature of such procedures amount to a proof-gathering restriction that weighs against granting discovery here. But there is no requirement to exhaust foreign discovery procedures – especially where they are inadequate – and the mere lack of ability to discover documents does not amount to a proof-gathering restriction.

The Second Circuit has repeatedly rejected any kind of exhaustion requirement for foreign discovery procedures. *See Mees*, 793 F.3d at 303-04.⁴ Cravath relies heavily on *Kreke Immobilien*, which, as noted above, denied discovery “where a German petitioner [was] seeking discovery from a German respondent for use against a German defendant in a German proceeding.” 2013 U.S. Dist. LEXIS 160283 at *18. Again, that is not the situation here. Nonetheless, *Kreke*’s conclusion that discovery should be denied where the foreign system simply does not *allow* similar discovery does

⁴ Cravath cites *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008), for the proposition that a court may “properly consider a party’s failure first to attempt discovery measures in the foreign jurisdiction.” DE 7 at 19. That is not the law in the Second Circuit.

not survive the Second Circuit's subsequent decision in *Mees*. There, the court explained what is meant by proof-gathering restrictions:

That a country does not enable broad discovery within a litigation does not mean that it has a policy that restricts parties from obtaining evidence through other lawful means. “[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.

793 F.3d at 303 n.20 (emphasis in original). And, as noted above, we know that the Dutch courts do *not* object to parties developing evidence through section 1782.

Other courts have similarly concluded that discovery is available where foreign procedures are inadequate. For example, in *Infineon Technologies AG v. Green Power Technologies Ltd.*, 247 F.R.D. 1 (D.D.C. 2005), the court modified a protective order to provide German counsel access to documents previously discovered in separate U.S. litigation, where the moving party alleged “that it may not be able to get the[] documents in the German litigation because German discovery procedures are much more restrictive than those in the United States, requiring a party to identify the requested documents with specificity.” *Id.* at 3.

Cravath's position, that section 1782 discovery should be denied where the foreign court might deny it, is tantamount to the foreign-discoverability requirement that the Supreme Court rejected in *Intel*. See 542 U.S. at 262.

C. The requests are not overly intrusive and burdensome, and any remaining concerns regarding confidentiality can be easily addressed.

1. The actual burden of producing these documents is extremely low.

Petitioner's requests for *already produced* documents are not unduly intrusive or burdensome, as Cravath accuses. DE 7 at 22-26. Petitioner is simply seeking documents that she previously had access to, and the Court has the discretion to order the re-production of discovery. Petitioner respectfully requests the Court do so to promote the values of fairness and efficiency, as courts have

done in the past. *See, e.g., Infineon Techs.*, 247 F.R.D. at 3-4 (allowing documents from a separate proceeding to be handed over for use in a German proceeding because “it is more efficient to permit discovery to be shared in a forum litigating similar issues”); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131-32 (9th Cir. 2003) (“Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.”). And, as noted above, Petitioner is willing to narrow the requests to the extent that would be helpful to Cravath; the Court likewise has authority to “trim” the requests. *See Intel*, 542 U.S. at 246.

Cravath argues that Petitioner should “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” instead of in the Netherlands. DE 7 at 23. None of this goes to the burden on Cravath, which is minimal regardless of how much of the prior discovery is produced. As to the first point, section 1782 discovery proceeds under the Federal Rules, in which the “typical method” is to identify documents “by category or description,” rather than requiring that documents must be “specifically identified.” *Tansey v. Cochlear Ltd.*, No. 13-CV-4628, 2014 U.S. Dist. LEXIS 132021, *10 (E.D.N.Y. Sept. 18, 2014). Petitioner explained above why she no longer possesses the documents marked confidential. And Petitioner has also already explained her motivations. *See, e.g.*, DE 4 at 13. Dutch civil procedure starkly contrasts with the U.S. system, and requires sufficient evidence to be presented upon the initial filing of a writ of summons, which must already contain adequate evidence to support the legal grounds within. DE 4-4, Samkalden Decl. ¶ 6; Samkalden Reply Decl. ¶ 3.

Cravath relies on *In the Matter of the Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), in which the Second Circuit clarified that courts *may* limit discovery where “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is

more convenient, less burdensome, or less expensive; . . . or (iii) the discovery is unduly burdensome or expensive.” *Id.* at 102. Here, where Petitioner agrees to narrow her request to confidential documents that she no longer has access to, the discovery request is in no way duplicative. Likewise, the discovery is not burdensome or expensive, where it was produced in prior litigation and is now likely and conveniently stored in a document-management system.

2. Actual concerns about confidentiality are minimal, and can be easily addressed.

Rather than any actual burden of production, Cravath’s main concern seems to be that there is “no way to assure” the confidential treatment of the documents. DE 7 at 25. This concern is vastly overstated. While it is true that Dutch oral court hearings are public, and rarely made private, Samkalden Reply Decl. ¶ 11, this is not dissimilar to the United States, where the bar to obtaining a closed proceeding is likewise high. Indeed, despite the fact that documents were marked “confidential” in the *Wiva* and *Kiobel* discovery, counsel are unaware of any times during that litigation when a courtroom was closed to protect confidentiality. Simons Reply Decl. ¶ 4. And although there is “no equivalent of a U.S. protective order under Dutch law,” DE 7 at 25, there are procedures to ensure confidential treatment of the documents if necessary. During oral hearings, the proceedings are not transcribed, and parties have the ability to request closed hearings for “reasons of privacy.” Samkalden Reply Decl. ¶ 11.

a. Despite the stipulated Confidentiality Orders, there are few actual concerns for confidentiality here, and no need to modify a protective order.

Cravath suggests that there are serious concerns for confidentiality here, because the parties to the *Wiva* and *Kiobel* cases agreed that some documents would be treated as confidential. But the actual Confidentiality Orders do not bar this discovery, and there is little reason to believe any strong concerns for confidentiality still remain.

Petitioner is not asking for Cravath to “de-designate” confidential documents, as Cravath

suggests. DE 7 at 23. The Confidentiality Orders served as stipulated voluntary agreements between parties; while they restricted the *Wima* and *Kiobel* plaintiffs' use of the defendants' confidential documents, they have "no effect on upon a Producing Party's use of its own Confidential Material." DE 4-3 at 10 (Ex. 3 ¶ 12). They do not restrict Cravath's use of the documents at issue. In any event, a protective order in a prior lawsuit does not necessarily preclude discovery in a later Section 1782 action, even if there is no protective order in the later lawsuit. *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002). And the Confidentiality Orders at issue give the Court ample authority – to disclose Confidential Material, DE 4-3 at 8 (Ex. 3 ¶ 8), resolve disputes regarding the Orders, *id.* at 13, ¶ 19, lift the provisions of the Orders, *id.* at 14, ¶ 21, and to modify the Orders, *id.* at 15, ¶ 23.

The circumstances are not similar to those in *Qualcomm*, on which Cravath relies. There, the court held that protective orders issued by both the court and the U.S. International Trade Commission – not voluntarily stipulated confidentiality orders without a showing of good cause – actually barred the respondents from unilaterally producing documents, because they had obtained them from other parties in litigation. 162 F. Supp. 3d at 1044-45. But here, Petitioner is merely asking for the re-production of documents that she *already* had access to in the prior litigation – not documents protected under two layers of orders, from cases she was not privy to.

Additionally, even if it were necessary to modify the Confidentiality Orders, that should not be much of a barrier. This Court never made particularized findings of whether the designated documents were, in fact, confidential material. On each Confidentiality Order, the Court indicated: "The Court . . . has not reviewed the documents referenced herein; therefore, by so ordering this stipulation, the Court makes no finding as to whether the documents are confidential." *See, e.g.*, DE 4-3 at 15 (Ex. 3 at 11). Such voluntarily stipulated orders without particularized findings of good cause are "by nature overinclusive and are, therefore, peculiarly subject to later modification." *Public*

Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988). Indeed, even with agreement of the parties, a district court “cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.” *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d, 219, 227 (6th Cir. 1996); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994) (holding that such a stipulated order should not be afforded “presumptive correctness”).

And the concerns that motivated the Confidentiality Orders are stale. The events in question occurred more than twenty years ago, suggesting that the original reasons for confidentiality are likely no longer relevant. Petitioner does not object to Cravath’s right to show that particular documents do require confidential treatment, but Cravath bears the burden to show that it has “good cause” for doing so. *See* Fed. R. Civ. P. 26(c); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

b. Adequate assurances of confidentiality can be given.

Even if the Court were to find it necessary to keep confidential all of the previously-designated material, that is not difficult. To the extent that the Court believes that good cause has been shown, Petitioner and her Dutch counsel can abide by the Confidentiality Orders, modified only to allow use of the documents in the Dutch Kiobel case. Samkalden Reply Decl. ¶ 10. And there is little risk of public disclosure from such use. Unlike in the United States, once a document is filed with a Dutch court, it is almost impossible for third parties (i.e. members of the public) to access that document. *Id.* at ¶¶ 11-12. And while there are no absolute guarantees, Petitioner’s Dutch counsel can ask the Dutch court to maintain the documents as confidential, and submit to the Dutch court a copy of any confidentiality order that this Court issues. *Id.* ¶¶ 10-11. These realities and reassurances should alleviate Cravath’s apparent concern that there is no way to anticipate precisely how documents could be exposed in a foreign proceeding, and whether they will become

publicly available. *See* DE 7 at 24 (citing *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)).

Courts do not typically deny section 1782 discovery simply due to the possibility that documents may be disclosed by a foreign court. In *Infineon Technologies*, for example, in which a protective order was modified to provide documents to a German proceeding, the German court had discretion on whether to keep the documents confidential. Nonetheless, the district court found it sufficient to order the party to “to submit the documents to the German court using any and all available German confidentiality rules[.]” reasoning that while confidentiality concerns in producing documents to be used in a German litigation were legitimate, they could “be allayed by the limited modification, and by putting GPT’s German counsel under the terms of the Protective Order.” 247 F.R.D. at 3-4 (holding further that had the request been made under section 1782, there was a strong basis to furnish materials to the German court). If necessary, a similar procedure would be adequate here.

c. No examination of foreign privilege is necessary.

Cravath’s final argument – that it would “likely” be forced to conduct “a substantial and complex review” of the documents it produces to ensure compliance with Dutch privileges and other laws (DE 7 at 25) – is both puzzling and unsubstantiated. Cravath offers no Dutch or U.S. law to support this claim. As the Second Circuit has held, where a litigant argues that discovery would result in “a violation of [an] alleged privilege,” a court should only “refrain from granting” discovery upon “authoritative proof” of that privilege. *Metallgesellschaft v. Hodapp*, 121 F.3d 77, 80 (2d Cir. 1997) (quoting *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995)). No such proof is present here. *See* Samkalden Reply Decl. ¶ 13 (stating that Dutch counsel is unaware of any relevant restrictions in Dutch law).

The only case Petitioner has located in which discovery was denied on the basis of foreign

privileges is *In re Okean B.V.*, 60 F. Supp. 3d 419 (S.D.N.Y. 2014), which does not support Cravath's position. There, the petitioner was also seeking to use documents in a Dutch proceeding, but that is the only similarity. The documents at issue were "attorney-client communications," and because they related to work by Russian and Ukrainian counsel, the court examined Russian and Ukrainian privileges – *not* Dutch privileges. *Id.* at 428. The court also considered actual evidence of the foreign laws at issue, not the mere intimation that Cravath makes. *Id.* This is no basis to deny discovery.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition and order the discovery requested.

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Respectfully submitted,

/s/ BENJAMIN HOFFMAN, ESQ.

Benjamin Hoffman, Esq.

Bar Code for S.D.N.Y.: BH2543

Columbia Law School Human Rights Clinic

435 West 116th Street New York, NY 10027

Tel: 212-854-3954

bhoffman@law.columbia.edu

Marco Simons

Richard Herz

Upasana Khatri

EarthRights International

1612 K Street NW #401

Washington, DC 20006

Tel: 202-466-5188

Attorneys for Applicant