UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-424

Caption [use short title]: Kiobel v. Cravath, Swaine & Moore, LLP

Motion for: Motion to Expedite Appeal

Set forth below precise, complete statement of relief sought:

Petitioner-Appellee seeks a briefing schedule with opening brief due March 16, opposing brief due March 30, and any reply brief due April 6.

MOVING PARTY: Petitioner-Appellee Esther Kiobel

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☑ Appellee/Respondent

OPPOSING PARTY: Respondent-Appellant Cravath, Swaine & Moore, LLP

MOVING ATTORNEY: Richard L. Herz

OPPOSING ATTORNEY: Neal Kumar Katyal

[name of attorney, with firm, address, phone number and e-mail]

EarthRights International
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Hogan Lovells US LLP
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Court-Judge/Agency appealed from: U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: /s/ Richard Herz **Date:** 3/9/2017

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

17-424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL,

Petitioner-Appellee,

-against-

CRAVATH, SWAINE & MOORE, LLP,

Respondent-Appellant.

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

PETITIONER-APPELLEE'S MOTION TO EXPEDITE APPEAL

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Counsel for Petitioner-Appellee

Petitioner-Appellee Esther Kiobel ("Petitioner") respectfully requests that this Court expedite the proceedings in this matter, as recently requested by the District Court, due to the fact that discovery is stayed pending appeal and the District Court has recognized that delay may prejudice the Petitioner. Petitioner seeks to have the opening brief due March 16 – 51 days after the order being appealed from, 31 days after the notice of appeal, and 14 days after the stay order – with the opposing brief due March 30, and any reply due April 6.

Respondent-Appellant Cravath, Swaine & Moore, LLP ("Cravath") does not oppose expediting the appeal, but seeks a longer calendar. This appeal is a straightforward discovery matter, with well-defined legal issues that have been well-defined for months; the District Court already described many of Cravath's arguments as "specious." Ex. A, Order Granting Stay Pending Appeal, Dkt. No. 29, at 1. More importantly, the District Court found a "plausible" concern that "delay may prejudice" Petitioner. *Id.* at 2. Thus, Petitioner seeks a more expeditious resolution, in line with this Court's practice in prior similar expedited appeals.

1. This is a straightforward discovery matter with well-defined issues.

This is an appeal from an order allowing document discovery pursuant to 28 U.S.C. § 1782. On January 24, 2017, Judge Alvin K. Hellerstein ordered such discovery to assist with litigation in the Netherlands, to be produced by February 27. Cravath appealed, and sought a stay of discovery, which Judge Hellerstein granted on March 2. *See* Ex. A. While a document discovery order under a Rule 45 subpoena or

from a party pursuant to Rule 34 would ordinarily not be immediately appealable, the nature of Section 1782 proceedings allows for immediate appeal. *See Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011).

Nonetheless, this appeal is a straightforward discovery matter, concerning only whether the District Court properly granted discovery of the documents at issue pursuant to Section 1782. In seeking a stay of discovery, Cravath raised the same issues that it had previously briefed in opposing discovery. While he granted the stay, Judge Hellerstein expressly noted that he was doing so "[w]ithout endorsing any of the arguments Cravath has set forth in support of its motion to stay, many of which are specious." Ex. A at 1.

Even if Cravath were to raise substantial issues in this appeal, they are no different from the issues that Cravath has already briefed twice – first in opposing the Section 1782 petition, and second in seeking a stay pending appeal.

2. As Judge Hellerstein found, Petitioner presented plausible concerns of prejudice due to further delay.

Judge Hellerstein granted the discovery stay because, if discovery were produced, Petitioner's "use of the documents during the interim cannot be undone." Ex. A at 1. At the same time, however, he recognized the risk of prejudice to Petitioner:

> . . . Kiobel's concern that further delay may prejudice her ability to bring an action in the Netherlands is plausible and must be addressed. Cravath must therefore pursue its appeal expeditiously. The parties, with assistance of Second Circuit's Staff Counsel, should agree to an

> expedited briefing schedule and request that the Court of Appeals consider the appeal on an expedited basis.

Id. at 1-2. Petitioner had submitted evidence from her Dutch counsel that the documents were needed in a timely fashion in order to assist with the preparation and filing of the case in the Netherlands.

Judge Hellerstein's acceptance that Petitioner has raised a plausible concern that further delay would prejudice her is a finding of fact by the District Court; this Court "will not disturb findings of fact made by the district court unless they are clearly erroneous." *UFCW Local One Pension Fund v. Enivel Props. LLC*, 791 F.3d 369, 372 (2d Cir. 2015).

3. Given the risk of prejudice, a rapid schedule is appropriate.

Unfortunately, the parties have been unable to "agree to an expedited briefing schedule" as Judge Hellerstein ordered. *See* Declaration of Marco Simons ("Simons Decl.") ¶ 7. Cravath's position is that the expedited appeals calendar under Local Rule 31.2(b), which is to be used in merits cases for "appeals from threshold dismissals," is sufficient. That schedule is almost identical to the standard appeals calendar contemplated by the Federal Rules of Appellate Procedure: 70 days for the principal briefs followed by 14 days for a reply. *See* Fed. R. App. P. 31(a)(1).

A calendar designed to be used for much more legally-complex appeals in merits cases, including any appeal from a dismissal for "failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6)," Local R. 31.2(b)(1)(B), is

far more than necessary for an appeal of a single discovery order. The "standard" expedited appeals calendar does not, and is not intended to, account for cases where expediting is necessary to avoid prejudice from delay. Local Rule 31.2(b) does not even include any considerations for expediting in order to avoid prejudice; that is clearly not the purpose of the rule. Instead, that rule is best read as allowing for a quicker schedule when the appeal does not involve a voluminous record, due to a dismissal at the "threshold" stage.

Judge Hellerstein's order that the parties should *agree* to an expedited briefing schedule and discuss the matter with Staff Counsel, coupled with his concern for prejudice from delay, indicates that he did not contemplate simply placing the case on the "standard" expedited appeals calendar. Petitioner has discussed the matter with Court personnel, who indicated that the Court can certainly consider an expedited schedule other than the standard calendar set forth in Local Rule 31.2(b).

4. Petitioner's proposed schedule is sufficient, and mainly compresses Petitioner's time.

Petitioner has proposed a schedule that, starting from the date of Judge Hellerstein's Order, would give 14 days for each principal brief, followed by seven days for a reply. The parties did attempt to come to a compromise, but were unable to do so. *See* Simons Decl. ¶ 7.

This schedule is sufficient to allow sufficient consideration of this appeal, and mainly compresses Petitioner's time to respond to Cravath's opening brief. While

Cravath's brief would be due 14 days from Judge Hellerstein's order to the parties on expediting, it would be due 31 days after the Notice of Appeal was filed – and a full 51 days after the order granting discovery was issued, when Cravath should have begun working on its appeal papers. Indeed, Judge Hellerstein had indicated in open court on December 20, 2016, that he would grant the petition, which is why – on January 18, even before the District Court's order was entered – Cravath indicated in its portion of the parties' joint letter to the District Court that it was "considering whether to appeal the Court's ruling." Ex. B, Joint Letter to the District Court, Dkt. No. 19, at 4. Cravath has had plenty of time to put this appeal together.

Cravath's schedule seeks instead 35 days from the date that expediting is granted. Assuming the Court grants expedited treatment today, this would give Cravath 78 days from the order granting discovery. Petitioner's schedule would compress Cravath's total time by about 35 percent. But Petitioner's time to respond to Cravath's brief would be cut from 35 days to 14 days – a reduction of 60 percent. Petitioner is willing to accommodate this schedule in order to avoid the prejudice that further delay will cause; Cravath can surely do likewise.

This schedule is in line with the Court's prior practice, and even more generous than in some previous cases. For example, in seeking a stay pending appeal, Cravath relied on this Court's treatment of the appeal in *Chevron*. But there, an even more compressed briefing schedule was ordered. The order granted expedited treatment was issued on June 8, 2010, with the appellants' brief due June 14 (six days later), the

appellee's brief June 21 (seven days after that), and the reply June 25 (four days after that). *See In re: Application of Chevron*, No. 10-1918, Order, Dkt. No. 187 (2d Cir. June 8, 2010).

Cravath, which is itself a major law firm, and is now represented by another major law firm, certainly has equivalent resources to Chevron in bringing an appeal forward expeditiously. This Court should give similar expedited treatment as it did in the *Chevron* appeal.

5. Cravath's decision to retain new, busy counsel is no reason for delay.

Counsel for Cravath has suggested that, because new counsel appeared for Cravath on February 27 – and that counsel, Mr. Katyal, is apparently very busy – they should not be compelled to proceed quickly.

But Cravath has contemplated an expedited appeal since even before Judge Hellerstein granted the Section 1782 petition. Cravath sought agreement on a stay pending appeal before the petition was granted, offering to expedite the appeal in the event of such a stay, *see* Simons Decl. ¶ 2, and this is reflected in Cravath's portion of the parties' joint letter to the District Court. If Petitioner agreed to stay production, "Cravath further offered to expedite briefing on any motion to stay discovery *as well as on the appeal itself in the Second Circuit*." Ex. B at 4 (emphasis added). So the need for an expedited appeal in the face of a stay is no surprise to Cravath, and should be no surprise to its new counsel.

While Cravath is certainly entitled to the counsel of its choice, it is not entitled

to use its new counsel's schedule as an excuse to delay this appeal and prejudice Petitioner – especially where the need to expedite was contemplated long before that counsel was retained, and where Cravath's original counsel continues to appear in this appeal. Cravath is now represented here by four accomplished appellate attorneys from two top-notch law firms. They are undoubtedly more than capable of bringing the appeal forward in an expedited manner.

6. The dates should run from Judge Hellerstein's Order.

Finally, Cravath has also suggested that the dates for calculating their briefing schedule should run from the entry of an order expediting the appeal. Petitioners disagree, as this rewards Cravath for delay in presenting this issue to the Court.

Petitioners asked Cravath to expedite the appeal even before Judge Hellerstein issued his Order Granting Stay Pending Appeal, on February 27, 2017 – the same day that Cravath's new counsel appeared. *See* Simons Decl. ¶ 3. At that time, counsel for Cravath refused even to discuss the issue, taking the position that it was "premature." *Id.* ¶ 4. Judge Hellerstein issued his order on March 2, and six minutes later, counsel for Petitioner again requested an expedited appeal. *Id.* ¶ 5. Counsel for Cravath did not respond substantively until March 7. *Id.* ¶ 6.

Cravath should not be permitted to drag out this appeal, to Petitioner's detriment, simply by failing to respond to an order to seek expedited treatment. Any deadlines should be set to run from March 2, when Cravath knew that the appeal must be expedited.

In conclusion, Petitioner respectfully requests that this appeal be set on an expedited schedule for briefing and argument, with the principal brief due March 16, opposing brief due March 30, and any reply due April 6. In the alternative, Petitioner seeks a schedule that adheres as closely to this proposal as possible.

Dated: March 9, 2017

Respectfully submitted,

/s/Richard Herz
Richard Herz
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CERTIFICATE OF SERVICE

I, Richard Herz hereby certify that on this 9th day of March, 2017, a copy of the foregoing Motion to Expedite Appeal was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that the Motion was served electronically to all parties by operation of the Court's electronic filing system.

/*s*/Richard Herz

DECLARATION OF MARCO SIMONS

I, Marco Simons, declare as follows:

1. I am an attorney and a member of the bars of Washington, California and the District of Columbia, and am admitted *pro hac vice* before the Southern District of New York on this matter. I am the General Counsel of EarthRights International (ERI), counsel for Petitioner. The facts stated herein are based on my personal knowledge. If called upon to do so, I could and would competently testify thereto.

2. In January 2017, prior to the January 24th entry of the Opinion and Order Granting Petition, I conferred with counsel for Cravath, Swaine & Moore, LLP, Lauren Moskowitz, concerning the next steps in the case and whether a date should be set for discovery compliance. Ms. Moskowitz indicated that Cravath was considering an appeal, and sought an agreement to stay production of documents pending appeal. Ms. Moskowitz indicated that Cravath would be willing to expedite the appeal if there were a stay.

3. On February 27, 2017, I emailed counsel for Cravath, stating in part "I'd like to discuss an expedited appeal schedule, as we previously discussed," and indicating, "we think it would be best to get the appeal in motion on an expedited basis."

4. On February 28, 2017, counsel for Cravath, Neal Katyal, responded stating in relevant part that "we think it's premature to get into discussions about expediting the appeal when the stay is still being decided by Judge Hellerstein."

5. The District Court's Order Granting Stay Pending Appeal was issued on ECF at 3:36pm, EST, on March 2, 2017. Six minutes later, at 3:42pm, I emailed counsel for Cravath, stating in relevant part: "Please let us know as soon as possible your position as we move forward with a request to expedite."

6. Counsel for Cravath did not make any substantive response on expediting this appeal until March 7, when Mr. Katyal proposed a schedule according to Local Rule 31.2(b).

7. From March 7 to March 8, the parties attempted, through email correspondence, to come to a compromise on an expedited schedule. We were unable to do so. Cravath's last proposal was to trim five days from their proposed schedule by having the appellant's brief due 30 days after the Court granted the motion to expedite, with the appellee's brief due 30 days later and any reply 14 days thereafter. Petitioner's last proposal was to accept Cravath's proposal in principal, but to have the 30 days run from the entry of Judge Hellerstein's Order Granting Stay Pending Appeal, as long as the reply were due 14 days after the appellee's brief was actually submitted.

8. Although Mr. Katyal has not yet responded to Petitioner's last proposed schedule, he previously stated that if Petitioner did not accept Cravath's proposal, they would "proceed with a motion based on [their] original proposal of 35 days for each principal brief."

I declare under penalty of perjury that the foregoing is true and correct.

Signed on this 8th day of March, in Silver Spring, Maryland.

By: 

MARCO SIMONS

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	**ORDER GRANTING STAY PENDING APPEAL** 16 Civ. 7992 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On January 24, 2017, I granted Kiobel's Section 1782 petition and ordered Cravath to produce documents in response to Kiobel's subpoena by February 27, 2017. On February 13, 2017, Cravath appealed that ruling and moved to stay the January 24 order pending resolution of that appeal. On February 14, 2017, I stayed Cravath's obligation to produce documents pending resolution of Cravath's motion to stay. *See* Dkt. Nos. 21–23, 26.

Without endorsing any of the arguments Cravath has set forth in support of its motion to stay, many of which are specious, I nevertheless find that a stay is appropriate. If Cravath produces the documents at issue, and the Court of Appeals subsequently holds that I committed legal error or abused my discretion in granting Kiobel's petition, Kiobel's use of the documents during the interim cannot be undone. Thus, absent a stay, Cravath will be denied a meaningful opportunity to appeal my January 24 order.

That said, Kiobel's concern that further delay may prejudice her ability to bring an action in the Netherlands is plausible and must be addressed. Cravath must therefore pursue its appeal expeditiously. The parties, with the assistance of Second Circuit Staff Counsel, should

agree to an expedited briefing schedule and request that the Court of Appeals consider the appeal on an expedited basis.

Cravath's motion to stay my January 24 order pending appeal is granted. The Clerk shall terminate the motion (Dkt. No. 23).

SO ORDERED.

Dated: March 2, 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

EARTHRIGHTS INTERNATIONAL

January 18, 2017

Re: *In re Petition of Esther Kiobel*, Civ. A. No. 16-cv-07992-AKH

Dear Judge Hellerstein:

The parties in the above-captioned action write jointly on behalf of Petitioner Esther Kiobel ("Petitioner") and Respondent Cravath, Swaine & Moore LLP ("Cravath") regarding entry of a proposed order granting Petitioner's request for leave to serve a subpoena on Cravath to obtain discovery of certain documents sought for use by Petitioner in potential litigation in the Netherlands against one of Cravath's clients.

By letter dated January 13, 2017, the parties submitted to the Court a proposed stipulated protective order for entry by the Court. (*See* Dkt. No. 17.) Upon entry of the protective order, the parties respectfully request that the Court enter an order regarding Petitioner's petition for leave to serve a subpoena on Cravath.[1] While the parties have met and conferred and agree on almost all terms of the proposed order, they have not been able to agree on whether the order should specify a date by which Cravath must comply with Petitioner's yet-to-be-served subpoena. Petitioner believes the Court's order granting its petition should direct Cravath to comply with Petitioner's to-be-served subpoena no later than February 13, 2017. (Petitioner's Proposed Order attached as Exhibit A.) Cravath believes no such provision is appropriate. (Cravath's Proposed Order attached as Exhibit B.)

The parties have met and conferred telephonically on three occasions concerning this dispute. On January 4, 2017, Marco Simons, for Petitioner, and Lauren Moskowitz, for Cravath, conferred for over an hour. On January 11, 2017, Mr. Simons and Ms. Moskowitz conferred further for 45 minutes, and on January 13, 2017, conferred for an additional 30 minutes.

Pursuant to this Court's Individual Rule 2(E), the parties submit this joint letter setting forth the parties' respective positions regarding the proposed order.

PETITIONER'S POSITION

Petitioner is pleased that the parties have been able to agree on the substance of a Confidentiality Order to govern the use of the discovery at issue. The parties are not in agreement on the proposed order granting the Petition and the timing of production.

[1] By submitting this letter and proposing the Court issue an order granting Petitioner leave to issue a subpoena, Cravath does not waive and expressly reserves all of its rights to appeal the order of this Court granting the petition for leave to issue a subpoena.

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First, Petitioner submits that the Court should actually order production of the discovery. Although Cravath continues to reserve its right to appeal, there is no outstanding dispute over the scope of the discovery to be propounded and produced. An order that merely allowed a subpoena to issue would leave the door open to further objections to production, however, and thus would not "constitute[] the final resolution of a petition to take discovery in aid of a foreign proceeding under 28 U.S.C. § 1782."[2] As such, it would not be an appealable order. Because Cravath has suggested that it may appeal from the Court's grant of the Petition, and there are no outstanding disputes regarding the scope, there is no reason to risk further delay by waiting for further motion practice before this Petition is finally resolved.

Second, as to the timing of production, Petitioner's position is that discovery should proceed within 30 days of the parties' agreement as to the Confidentiality Order, which was submitted on January 13. Thus, Petitioner proposed February 13 as the date of production – 31 days after the Confidentiality Order was agreed. As noted, Petitioner's Dutch counsel are finalizing the writ of summons in order to file the lawsuit in the Netherlands, and had hoped to file by the end of 2016. *See* Dkt. 10-2, Reply Decl. of Channa Samkalden, ¶¶ 2, 6. Thus, Petitioner is eager to move forward with this discovery. To the extent that Cravath believes that discovery should be stayed pending a possible appeal, Petitioner believes that Cravath should make a motion to that effect, as soon as possible. It will be Cravath's burden to show entitlement to such a stay.[3] Such stays are not often granted in section 1782 proceedings, especially where the petitioner has a need for timely production of documents.[4]

Cravath has been on notice since the December 20 hearing that the petition would be granted and it would need to produce the documents requested. Because there has been no suggestion that producing the discovery will pose technical burdens, Petitioner's position is that Cravath should be able to do so within 30 days of submission of the proposed Confidentiality Order. (This is longer, of course, than the fourteen days that courts generally find to be "presumptively reasonable" for subpoena compliance.[5]) To the extent unanticipated burdens arise, Petitioner would be happy to meet and confer with Cravath to discuss reasonable extensions.

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[2] *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011).

[3] *See, e.g.*, *McCue v. City of New York (In re World Trade Ctr. Disaster Site Litig.)*, 503 F.3d 167, 170 (2d Cir. 2007) ("The four factors to be considered in issuing a stay pending appeal are well known: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 1Link to the text of the note (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

[4] *See, e.g.*, *In re Procter & Gamble Co.*, 334 F. Supp. 2d 1112, 1117-18 (E.D. Wisc. 2004); *In re Bracha Found.*, No. 2:15-mc-748, 2015 U.S. Dist. LEXIS 150863 (N.D. Ala. Nov. 6, 2015); *see also In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 310 (S.D.N.Y. 2010) (in order issued one day before compliance was due, denying a stay pending appeal, but extending time for compliance by 10 days on condition that the respondent file a motion for a stay with the Court of Appeals the following day).

[5] *Brown v. Hendler*, No. 09 Civ. 4486, 2011 U.S. Dist. LEXIS 9476, at *5 (S.D.N.Y. Jan. 31, 2011); *see also In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, No. MISC 08-347, 2010 U.S. Dist. LEXIS 40653, at *18 (E.D.N.Y. Feb. 5, 2010) (collecting cases).

Petitioner recognizes that Cravath has a right to appeal, and that ordinarily the time to file a Notice of Appeal runs for 30 days from the appealable order. Nonetheless, this does not necessarily mean that no compliance may be required within that period. For example, in the *Chevron* proceedings, Judge Kaplan granted a section 1782 petition on May 6, 2010, that had been filed on April 9. Chevron issued a subpoena with a return date of May 21 – 15 days after the order and only six weeks after the petition had been filed. Prior to May 21, the respondent moved for a stay pending appeal. On May 20, Judge Kaplan denied the stay – but allowed the time for compliance to be extended to May 31, provided that the respondent file a motion for a stay with the Second Circuit "before 10 a.m. on May 21."[6] Judge Kaplan's *extended* period was still only 25 days after his order, less time than Petitioner proposes here.

In another case in the Northern District of Georgia, the court had also ordered production 31 days after its order issued – similar to the schedule proposed by Petitioner.[7] Prior to the compliance date, the respondent sought an emergency stay pending appeal – which was denied. Other courts have ordered production on section 1782 applications in shorter time periods.[8]

As in these cases, if Cravath believes a stay is warranted, it is its burden to seek such a stay with sufficient time to adjudicate it prior to the compliance date. Cravath has not identified any difficulty in actually producing the documents; its Opposition to the Petition only addressed alleged burdensomeness in the context of confidentiality and privileges. *See* Dkt. No. 7 at 22-26. Thus Cravath should be prepared to produce the documents expeditiously.

No caselaw supports the notion that Cravath is entitled to 30 days in which nothing happens in order to consider its appeal rights, especially when the Cravath has been on notice for four weeks that discovery would be ordered. Cravath is free to seek such a stay, but until it does so this proceeding should move forward.

CRAVATH'S POSITION

Cravath respectfully proposes that the Court's order granting Petitioner's petition grant no more relief than Petitioner requested in its Petition: leave to serve a subpoena on Cravath for discovery pursuant to 28 U.S.C. § 1782, consistent in scope with Petitioner's representations made in both its written submissions and at the Court's oral argument held on December 20, 2016. Requiring Cravath at this time to comply with Petitioner's not-yet-served subpoena by February 13, 2017 would be premature and inappropriate.[9]

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[6] *In re Application of Chevron Corp.*, 709 F. Supp. 2d at 310. While the Second Circuit ultimately granted a stay pending appeal – an appeal that the respondent lost – there was no suggestion that the District Court needed to extend the time for compliance to allow the full 30 days to file a notice of appeal. *See Chevron Corp.*, 629 F.3d at 300.

[7] *In re ROZ Trading Ltd.*, 1:06-cv-02305, 2007 U.S. Dist. LEXIS 2112, *2-3 (N.D. Ga. Jan. 11, 2007).

[8] *See, e.g.*, In re Application of Bracha Found. Request for Discovery Pursuant to 28 U.S.C. §1782, 2015 U.S. Dist. LEXIS 141643, *19-21, 2015 WL 6123204 (N.D. Ala. Oct. 19, 2015) (ordering production "within 21 days of service of the revised subpoena").

[9] As a threshold matter, it is unreasonable to ask this Court to set a date certain for Cravath to comply with a subpoena that has not yet been served. Petitioner has not yet revised the proposed

Cravath is currently weighing its options with respect to whether to appeal an eventual order formally granting the Petition. The Federal Rules of Appellate Procedure allow Cravath 30 days from such a final order to appeal the Court's decision. Fed. R. App. P. 4(a)(1)(A). Contrary to Petitioner's assertion above, an order granting leave to serve a subpoena pursuant to 28 U.S.C. § 1782 is immediately appealable. In *Chevron Corp. v. Berlinger*, cited by Petitioner, the Second Circuit held that it had jurisdiction to hear an appeal of an order pursuant to Section 1782 granting leave to serve a subpoena, treating the district court's order to be a final adjudication, immediately appealable under 28 U.S.C. § 1291, even though the district court's order did not require production by any date. 629 F.3d 297, 306 (2d Cir. 2011) (affirming order in *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 299 (S.D.N.Y. 2010), granting "petitioners' applications pursuant to 28 U.S.C. § 1782 to subpoena the [requested discovery]").

Cravath is entitled to those 30 days to make an informed decision about next steps. If Cravath decides to file a notice of appeal, it likely will move this Court, and if necessary, the Second Circuit, for a stay pending appeal. Contrary to Petitioner's assertion, motions to stay discovery pending appeal of grants of petitions pursuant to 28 U.S.C. § 1782 are routinely granted by the Second Circuit. *See, e.g.*, *In re Accent Delight*, No. 16-3655, Dkt. Nos. 37, 65 (2d Cir. 2016) (granting appellants' motion to stay Section 1782 discovery pending appeal); *In re Application of Chevron*, No. 10-1918, Dkt. Nos. 50, 187 (2d Cir. 2010) (same). Indeed, in two of the three cases Petitioner cites, although the district court denied the motion for a stay pending appeal, the Court of Appeals subsequently granted a stay pending appeal. *In re Bracha Found.*, No. 15-14913, Nov. 9, 2015 Order (granting stay pending merits appeal); *In re Application of Chevron*, No. 10-1918, Dkt. Nos. 50, 187 (2d Cir. 2010) (same). The third case Petitioner cites, *In re Procter & Gamble Co.*, 334 F. Supp. 2d 1112, 1117-18 (E. D. Wis. 2004), is distinguishable. There, the district court declined to grant a stay where it found that the petitioner would likely suffer "irreparable harm" if a stay were granted because it needed to use the requested discovery for "fast approaching deadlines" in pending foreign proceedings. Likewise, Petitioner's reliance on *In re ROZ Trading Ltd.*, No. 1:06-cv-02305, 2007 U.S. Dist. LEXIS 2112 (N.D. Ga. Jan. 11, 2007), is also misplaced. There, the district court found that the petitioner would "face substantial potential injury" if a stay were granted because there was a risk that the pending arbitration for which the petitioner sought the requested discovery would reach a decision in the interim. *Id.* at *10. Here, no such risk exists. No foreign proceedings are underway, as Petitioner has not yet filed its Dutch summons. Petitioner likewise makes no claim that any applicable statute of limitations in the Netherlands is set to expire. There simply is no risk of irreparable harm to Petitioner here.

Cravath has made clear to Petitioner that it is considering whether to appeal the Court's ruling. Petitioner acknowledges that under the rules, Cravath will have 30 days from entry of the Court's order to file a notice of appeal. Cravath sought agreement from Petitioner to a stay of production pending appeal, should Cravath appeal. Petitioner refused to agree. Cravath further offered to expedite briefing on any motion to stay discovery as well as on the appeal itself in the Second Circuit. Petitioner still has refused to agree, insisting instead that a proposed order to the Court require Cravath to produce the to-be-subpoenaed documents by February 13, 2017, less than

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subpoena originally attached to its petition, which Petitioner has represented in its briefing and at oral argument would be narrowed in several ways before service. Cravath does not expect there to be any additional issues raised by the subpoena beyond what already has been addressed in the petition itself, but Cravath reserves its rights to object at the appropriate time to the scope of any subpoena served by Petitioner if it deviates from what Petitioner has represented it will be.

30 days from today. Petitioner's insistence on requiring Cravath to respond to Petitioner's unissued subpoena by February 13, 2017 forces Cravath to face a Hobson's choice: make its appeal determination and move for a stay in less than 30 days or risk exposing itself to contempt of Court by not making a production in order to take the full 30 days to decide how to proceed with respect to an appeal.[10]

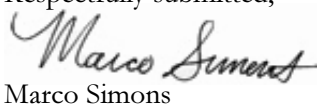
While Cravath's position is that the Court should not require it to comply with Petitioner's anticipated subpoena by a date certain *before* it is even served, Cravath proposed to Petitioner as a compromise that Petitioner put a return date of 45 days from service in the subpoena in order to avoid truncating Cravath's time for assessing a potential appeal and to avoid burdening the Court with unnecessary and inefficient filings concerning an unreasonably early return date. Petitioner refused, but the only reasons Petitioner offers for limiting Cravath's time to potentially notice an appeal is that Petitioner is "eager to move forward" and "had hoped to file [its Dutch lawsuit] by the end of 2016". Neither has any merit. Petitioner waited more than three years after the dismissal of the U.S. litigation to which the requested documents relate and more than 20 years after the underlying alleged events to even raise the possibility of initiating this action. Any urgency Petitioner now claims is of its own making and should not outweigh or curtail Cravath's right to assess a potential appeal of an order to produce documents in its custody that belong to one of its clients, particularly where, as here, there is no risk that the subject documents will be lost or destroyed. Cravath remains willing to expedite briefing of a motion to stay production pending appeal in the event that Cravath files a notice of appeal.

Accordingly, Cravath respectfully requests that the Court issue an order granting Petitioner's petition in the form set forth in Exhibit B. Should the Court find it appropriate to direct Cravath to comply with Petitioner's subpoena by a date certain, Cravath respectfully requests that the Court order compliance no less than 45 days after service of Petitioner's subpoena.

CONCLUSION

Based on their respective positions, the parties respectfully request that the Court enter either Petitioner's proposed order (Exhibit A) or Cravath's proposed order (Exhibit B).

Respectfully submitted,



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[10] Any presumption of reasonableness asserted by Petitioner for 14-day return dates simply does not apply in these circumstances.