

# No. 17-424-cv

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## In the United States Court of Appeals for the Second Circuit

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

*Petitioner-Appellee,*

vs.

CRAVATH, SWAINE & MOORE, LLP,

*Respondents-Appellants,*

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

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### BRIEF OF PETITIONER-APPELLEE ESTHER KIOBEL

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Richard L. Herz

Marco B. Simons\*

Alison Borochoff-Porte

**EarthRights International**

1612 K Street NW Suite 401

Washington, DC 20006

Tel: 202-466-5188

Fax: 202-466-5189

Email: [rick@earthrights.org](mailto:rick@earthrights.org)

*\*Application for admission pending*

*Counsel for Petitioner-Appellee*

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## INTRODUCTION

This is a narrow discovery dispute. The district court simply granted Petitioner-Appellee Esther Kiobel (“Petitioner”) renewed access to the same non-privileged documents that Respondent-Appellant Cravath, Swaine & Moore LLP, (“Cravath”) had *already* produced to her in a previous case, in order to litigate the *same* claims in the proper forum. In reaching that common-sense result, the district court did not err or abuse its discretion.

By attempting to shield the previously-produced documents here, Cravath just seeks to throw sand in the gears of Petitioner’s imminent case in the Netherlands. Title 28 U.S.C. § 1782 allows U.S. courts to assist foreign courts by permitting discovery of documents held in the United States. And that is all the district court did. Cravath and its *amici* paint the decision below as having broad consequences, but it applies only to the narrow circumstances presented here: production of non-privileged “documents that Cravath has previously produced” to Petitioner herself. A280. That is manifestly an efficient use of Section 1782, and this Court’s caselaw already provides that non-privileged documents from foreign clients can be subpoenaed from U.S. law firms.

Petitioner, Esther Kiobel, is one of the many victims of widespread human rights abuses committed by the then-existing Nigerian military dictatorship against an ethnic minority, the Ogoni people, for protesting against the operations of Royal Dutch Shell and its affiliates (“Shell”) and the harms it inflicted in their homeland. In

particular, Petitioner's husband, Dr. Barinem Kiobel, was one of nine Ogoni leaders sentenced to death by a kangaroo military tribunal. When she went to deliver food to him in detention, she was whipped, sexually assaulted and imprisoned. Despite worldwide outrage, including objections by the United States, all nine leaders were executed.

Petitioner was the lead plaintiff in one of four civil suits alleging Shell's complicity in this bloody campaign. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006). Her case eventually reached the Supreme Court, where her claims, brought solely under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, were dismissed on extraterritoriality grounds. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

Having essentially been told she chose the wrong forum, Petitioner now turns to an indisputably proper one: the courts of the Netherlands, Shell's home country. She is preparing a lawsuit there against Shell for the same conduct alleged in *Kiobel*. There is no dispute that Cravath has non-privileged documents relevant to that case in this district, documents it previously produced to Petitioner in the U.S. litigation.

The district court carefully crafted its order to be as minimally burdensome as possible, requiring a confidentiality order – to which Cravath stipulated after negotiations – that mirrored the order in the underlying *Kiobel* litigation. Although Cravath and its *amici* argue that confidence in protective orders would be undermined if this discovery were allowed, the district court's order does not undermine any

reasonable expectations. Shell has never shown that the documents are actually confidential. And it originally produced the documents with the understanding that Petitioner would use them to prove her claims against Shell; due to Shell's successful argument in *Kiobel* that U.S. courts cannot hear the claims, that will now occur in the Netherlands, but this in no way prejudices Shell or Cravath. Indeed, Shell can seek further protections in the Dutch court.

The district court's order granting discovery was equivalent to ruling that, following a *forum non conveniens* dismissal, a party could use the evidence developed in U.S. litigation to continue litigating a re-filed case in the appropriate foreign forum. It is remarkable only for the degree of opposition it has generated from Cravath.

Cravath's proposed alternative makes little sense. Instead of simply providing the documents it has already produced, which remain in the United States, Cravath suggests that Petitioner should sue Shell in the Netherlands, without the benefit of this evidence, and then ask the Dutch court to order Shell to order Cravath to return these documents to the Netherlands. At best, that is a recipe for inefficiency and delay; at worst, it is an attempt to prevent Petitioner from fully presenting her claims in Dutch court. The documents are here, and the district court was well within its discretion under Section 1782 to order Cravath to produce them here.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case presents the question of whether a district court, in the sound exercise of its discretion, may determine that the most efficient way to assist litigation in another country is to allow the foreign plaintiff to obtain non-privileged documents, already produced to that same plaintiff in previous related litigation, from the U.S. law firm that handled the document production. The specific questions presented are:

1. Is Cravath “found” in the Southern District of New York within the meaning of 28 U.S.C. § 1782, because its office is in Manhattan and because – pursuant to *Ratliff v. Davis, Polk & Wardwell*, 354 F.3d 165 (2d Cir. 2003) – a court may subpoena non-privileged documents in the possession of a law firm within its jurisdiction, some of which originated from a foreign corporate client, even if it does not have jurisdiction over the client?
2. Is a district court within its discretion under Section 1782 in determining that the most efficient way to assist litigation in a foreign country is to allow use of documents already produced in related litigation in the United States, where re-production of those documents is not burdensome and is more efficient than engaging in discovery in the foreign jurisdiction, the foreign jurisdiction is receptive to Section 1782 evidence, and the parties have stipulated to a confidentiality order that mirrors the order in the original litigation?

## STATEMENT OF THE CASE

### A. Petitioner's claims and the *Kiobel* litigation.

Petitioner previously brought suit in U.S. court against four defendants associated with Royal Dutch Shell (“Shell”), and the allegations of that suit, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618 (S.D.N.Y.), also form the basis of her imminent suit in the Netherlands.

Petitioner alleges that Shell's operations in Nigeria's Ogoni territory devastated property, farmland, and natural resources. A28-30. Eventually, in the early 1990s, the Ogoni people formed a popular, grassroots protest organization, the Movement for the Survival of the Ogoni People (MOSOP). A17, A30. To quell the widespread public outcry against Shell's activities, the Nigerian military resorted to a campaign of violence, aided and abetted by Shell. A16, A31-34.

Nigerian soldiers subjected peaceful protestors and community organizers to systematic human rights violations, including torture, arbitrary arrest and detention, rape, massacres, and other extrajudicial killings. A15-26, A31-39. This culminated in the 1995 arrest and military trial of Ogoni leaders – the “Ogoni Nine” – which included MOSOP leader and acclaimed writer Ken Saro-Wiwa, as well as Petitioner's husband, Dr. Kiobel. A36-39. When Petitioner tried to bring food to her husband in detention, she was whipped, sexually assaulted, and detained without food, water, or other basic necessities for three weeks. A18-19. Finally, the Ogoni Nine were sentenced to death. A39. Despite widespread international condemnation, on

November 10, 1995, all were hanged. *Id.*

Petitioner alleges that Shell conspired with the Nigerian junta before and during the sham trial leading to Dr. Kiobel's execution, which was carried out "1) in retaliation for his outspoken objection within policy making circles in the Nigerian government to . . . the plan to support [Shell's] operations in Ogoniland by means of violent military suppression of the popular opposition; and 2) to prevent him from revealing to the public Shell's conspiracy and cooperation with the Nigerian government" in this violence. A18.

In 1996, victims of the campaign of terror in Ogoni, including Ken Saro-Wiwa's family, sued Shell under the ATS and the common law. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93-94 (2000). The district court originally dismissed on *forum non conveniens* grounds, but this Court reversed, *id.* at 108, also finding personal jurisdiction over Shell. *Id.* at 95. The *Wiwa* plaintiffs subsequently filed actions against a Shell executive, *Wiwa v. Brian Anderson*, No. 01 Civ. 1909 (S.D.N.Y.), and Shell's Nigerian subsidiary, *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, No. 04 Civ. 2665 (S.D.N.Y.).

In 2002, Petitioner and others brought the original *Kiobel* action against Shell. A11. The district court then consolidated *Wiwa* and *Kiobel* for pre-trial discovery. *Id.* The cases resulted in a significant volume of discovery, including depositions and documents produced. *Id.* This discovery proceeded pursuant to stipulated confidentiality agreements (the "Original Orders"). *See* A12, A55-83. Although the

agreements were entered as court orders, the court made “no finding as to whether the documents are confidential,” and did not authorize filings under seal. A81.

Shell settled the three *Wiva* cases in 2009 for \$15.5 million, just before trial. *See* Settlement Agreement in *Wiva v. Royal Dutch Petroleum Co.* (S.D.N.Y. 2009), 48 I.L.M. 972 (Sept. 2009).

Meanwhile, *Kiobel* proceeded on interlocutory appeal to this Court, which held that corporations could not be sued under the ATS. 621 F.3d 111, 120 (2d Cir. 2010). The U.S. Supreme Court granted *certiori*, but ultimately addressed a different issue. It dismissed the case, ruling that the ATS does not apply to extraterritorial conduct where the only connection to the United States was the defendant corporations’ “mere presence” here. *Kiobel*, 133 S. Ct. at 1669.

**B. Petitioner pursues litigation in the Netherlands, but cannot use the *Kiobel* discovery.**

Following the Supreme Court’s decision, Petitioner sought to pursue her claims against Shell in the Netherlands, its home (the “Dutch *Kiobel* Case”). A195. Her counsel began preparing the case, *id.*, but Petitioner could not simply use the U.S. discovery. The Original Orders only permitted her to use confidential materials in “the Litigation” – although undefined, presumably the U.S. litigation – and prohibited retention of such materials after dismissal of the “Litigation.” A74, A79-80.

Rather than starting over from scratch in the Netherlands after ten years of U.S. litigation, Petitioner followed the most efficient course: to reproduce the U.S.



discovery. The party most likely to have a complete record of the discovery was Cravath, which represented Shell and directly produced the discovery to the plaintiffs. A11.

**C. Petitioner seeks 28 U.S.C. § 1782 discovery to aid in the Dutch case.**

Because Dutch law requires a higher evidentiary showing at the filing stage, A86, Petitioner sought to obtain the prior discovery in order to prepare the Dutch Kiobel Case. She filed a 28 U.S.C. § 1782 petition, which was assigned to Judge Alvin K. Hellerstein.

At the hearing, Cravath conceded that it had the documents “[i]n a warehouse,” and did not disagree with Judge Hellerstein’s supposition that they were kept “[i]n a highly organized fashion that a sophisticated law firm uses.” A212-13. Nor did Cravath dispute Judge Hellerstein’s observation that Cravath, which continues to represent Shell, “will make every argument that Shell wants it to make.” A225.

Judge Hellerstein indicated he would grant the petition, but wanted to ensure that the materials would only be used for the Dutch Kiobel Case, A220-21, and thus required the parties to work out “an application of the old protective order to the new situation.” A234. Judge Hellerstein gave the parties no other direction on the substance of the confidentiality order.

The parties were able to agree upon and submitted a stipulated confidentiality order (the “New Order”), essentially mirroring the Original Orders. A236-244. Cravath did not object to any terms in the confidentiality order, except for preserving

its position that discovery was improper. A243. Only after the New Order was in place did the district court grant the Section 1782 petition. A276-90.

Cravath appealed and, upon Cravath's application, the district court stayed enforcement of its order pending appeal. A291-94.

### **SUMMARY OF THE ARGUMENT**

As the district court stated at oral argument, its order is the "cheapest and easiest thing to do." A222. It avoids "complexity that is needless." A226. The documents here are "easy to get to and it's appropriate to subpoena them." A229. This efficiency is one of the two major aims of 28 U.S.C. § 1782; the other is encouraging foreign countries to offer reciprocal assistance. Would U.S. courts want foreign countries to similarly make already-produced documents and testimony available for use in subsequent U.S. litigation? Of course.

Section 1782 requires that three statutory prerequisites are met before discovery is issued; if so, the district court has discretion to grant discovery, guided by several factors. Cravath argues that the district court erred as to one of the prerequisites, and abused its discretion in granting discovery.

In concluding that all statutory requirements had been met, the district court simply followed this Court's binding precedent. Cravath argues that the first requirement of being "found" in the district is not met because, despite Cravath's office here, some of the documents originated with its foreign client, Shell. But this requirement is a simple question of territorial jurisdiction; no court has interpreted

this requirement in the manner Cravath suggests. This Court addressed this exact scenario in *Ratliff*, concluding that non-privileged documents held by U.S. attorneys, originating with a foreign client outside the personal jurisdiction of U.S. courts, are subject to subpoena. 354 F.3d at 170-71. While a foreign client's documents might be considered privileged if transferred to U.S. counsel solely for the purpose of confidential review and advice, they do not maintain this privilege once disclosed. Cravath does not and could not maintain that this discovery is privileged.

Even if the issue were not controlled by precedent, and Cravath's policy-based arguments were relevant, those arguments are unpersuasive. Cravath and its *amici* suggest that discovery will "chill" privileged attorney-client communications, but that argument is misplaced because these documents are concededly not privileged. They argue that foreign litigants will be less cooperative with U.S. discovery if the documents could be re-purposed, but the decision below allows use only of the same documents by the same party to litigate the same claims. Litigants cooperate with U.S. discovery because the law requires it, and no defendant reasonably expects that discovery produced to a plaintiff will not be used to prove that plaintiff's claims. Foreign multinationals do not typically forego arguments that might limit discovery. If the law already compels them to provide discovery despite the risk of liability in the United States, there is no reason to suppose that they will refuse to follow the law due to the remote chance that discovery might be used to prove the same claims in a foreign suit.

Because the statutory prerequisites are easily satisfied here, the district court could exercise its discretion to determine whether discovery was warranted. This Court shows great deference to such determinations; it has *never* reversed a district court's discretionary grant of Section 1782 discovery, and should not start now.

Cravath argues that the district court erred in its analysis of all four factors that guide its discretion. There was no abuse of discretion. Even if Cravath were correct as to one or two factors, that would not change the overall result here, because the district court found that *all* factors favored discovery.

Under the first factor, the district court properly found that, at this point, the evidence may be unavailable in Dutch court absent Section 1782 assistance. While Shell is the intended defendant in the imminent Dutch *Kiobel* Case, Petitioner needs the evidence to *prepare* her case. Additionally, even after filing, Shell may not have all the documents – but Cravath does. The district court was not required to endorse a cumbersome procedure in which Petitioner must ask a Dutch court to order Shell to obtain documents from Cravath in the United States, when it is far more efficient simply to produce the documents here.

As to the second and third factors, the district court properly found that Dutch courts are highly receptive to Section 1782 evidence, and faithfully applied this Court's precedents to determine that Petitioner was not attempting to evade Dutch proof-gathering restrictions. Cravath's only objection is that the Dutch government's amicus brief in *Kiobel* evidences some disagreement with the broad scope of American

discovery, but the district court properly found that that brief did not address Section 1782 evidence at all; in any event the Dutch judiciary is independent and has repeatedly accepted such evidence.

Last, the district court properly found that producing already-gathered documents is not burdensome, and allowed Cravath to negotiate a confidentiality order to meet any concerns for protecting the documents. While Cravath argues that there is no guarantee that documents will be kept under seal in the Netherlands, or that court hearings will be closed, that is no different from the Original Orders – which neither authorized filing under seal nor closed courtrooms. And Shell can still seek such protections in the Dutch court, which is what it would have to do anyway under Cravath’s suggested procedure of having the Dutch court order production. Any reliance that Shell had on the Original Orders is not upset, because Shell always expected that Petitioner would use the evidence at issue to prove her claims.

The district court did not abuse its discretion or commit any reversible error.

### **ARGUMENT**

Courts address Section 1782 petitions in a two-step fashion. If the three requirements found in the statute’s text are met, the court then considers whether, in the exercise of its discretion, discovery should issue. *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015). The first step is reviewed *de novo*, the second for abuse of discretion. *Id.* at 297 & n.7. The court’s discretion “must be exercised 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.” *Id.* at 297-98 (internal quotation marks omitted).

Cravath’s arguments have shifted dramatically from those it presented to the district court. These new arguments “are deemed waived.” *Millea v. Metro-North R.R.*, 658 F.3d 154, 163 (2d Cir. 2011). Cravath cannot claim that the district erred, let alone abused its discretion, in rejecting or failing to address arguments that Cravath never presented.

**I. The statutory requirements for Section 1782 discovery are met, because Cravath is found in New York.**

Cravath disputes only one statutory prerequisite: whether Cravath “resides or is found in” the Southern District of New York. 28 U.S.C. § 1782(a). The answer to this question is obvious, given Cravath’s offices here.

Despite the fact that this Court “and the Supreme Court have declined to read into the statute requirements that are not rooted in its text,” *Mees*, 793 F.3d at 298, Cravath argues that the real question in a Section 1782 case involving a law firm is where the firm’s *client* resides. There is no authority that this issue arises within the first statutory factor – or, indeed, any authority supporting Cravath’s argument at all. Under the general discovery principles that Cravath concedes apply in Section 1782 cases, Br. for Respondent-Appellant (“Resp.”) 21-22, non-privileged documents from a foreign client may be obtained from a U.S. law firm, especially where those

documents have been previously produced to third parties. *Ratliff*, 354 F.3d at 170-71.

Cravath's argument that Section 1782 does not authorize discovery because "a subpoena directed to an attorney cannot reach client documents the court could not compel the client to produce," Resp. 23, is overbroad. Cravath relies on two lines of inapposite authority: cases holding that a court cannot compel a law firm to disclose *privileged* client documents, and cases holding that a court cannot compel a local agent of a foreign party to produce documents *located abroad* without personal jurisdiction over the foreign party. Neither line of cases is relevant here, because the documents are concededly not privileged and they are present in the United States.

**A. Cravath is found in New York.**

This Court's jurisprudence establishes that the first statutory requirement is met. The phrase "resides or is found" simply refers to the "well-settled case law on territorial jurisdiction." *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002). This is because Congress intended the statute to "be interpreted broadly," *id.* at 180, with a "flexible reading of the phrase 'resides or is found.'" *Id.* at 178. Cravath is found in the Southern District of New York, A278, as counsel's signature block indicates. This ends the inquiry.

**B. There is no bar to obtaining non-privileged, previously-produced client documents from a law firm.**

As this Court held in *Ratliff*, non-privileged documents from a foreign client may be subpoenaed from a U.S. law firm. 354 F.3d at 170-71. None of Cravath's

arguments displaces this holding.

**1. The location of Cravath's client is irrelevant for Section 1782 discovery.**

Cravath argues that “the court must ask whether the *client* ‘resides or is found’ in the judicial district in which the application is made.” Resp. 23 (quoting 28 U.S.C. § 1782(a)). No case supports this notion.

Cravath fails to mention that the only case to squarely consider this argument – in which Cravath itself made the argument – rejected it. In *In re Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003), the court noted that Cravath’s identical argument “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.” *Id.* at 296.

Multiple decisions of this Court confirm that Section 1782 discovery from law firms may be appropriate, without regard to the residence of the client. In *Schmitz*, this Court considered the client’s residence only in discussing the discretionary factors – not under the first statutory requirement. *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004). A brief footnote in *Schmitz* refers to “the difficult question . . . whether § 1782 applies to documents only temporarily present in the jurisdiction for the purpose of discovery in another case,” *id.* at 85 n.6, but there is no discussion or any indication that this question arises under the first statutory factor. Indeed, *Schmitz* observed that the discretionary factors are only relevant “[o]nce the



statutory requirements are met,” *id.* at 83 (internal quotation marks omitted), confirming that the client’s residence posed no problem for the first factor.

More recently, in *Optimal Investment Services, S.A. v. Berlamont*, 773 F.3d 456 (2d Cir. 2014), this Court affirmed a Section 1782 order authorizing a subpoena to a law firm. *Id.* at 459. As here, the firm’s client was a foreign company, but neither this Court nor the district court considered whether the client resided in New York. Instead, the district court’s opinion – which this Court endorsed, *id.* – noted that the *documents* were “located in New York, were created and produced in the context of a case pending in New York, and are being sought from United States lawyers in a court in New York pursuant to a United States statute.” *In re Berlamont*, No. 14-mc-00190, 2014 U.S. Dist. LEXIS 111594, \*6 (S.D.N.Y. Aug. 1, 2014); *see also In re Republic of Kazakhstan*, 110 F. Supp. 3d 512, 518 (S.D.N.Y. 2015) (ordering discovery from a law firm in New York of documents concerning its foreign clients).

This Court’s summary order in *Mare Shipping Inc. v. Squire Sanders (US) LLP*, 574 F. App’x 6 (2d Cir. 2014), further supports Petitioner. The Court considered whether documents held by a law firm could be discovered even though its client was the Kingdom of Spain – which is not only foreign, but actually entitled to sovereign immunity. While the Court concluded that discovery was not appropriate at that time under the discretionary factors, it did not disturb the district court’s conclusion that the mandatory requirements had been met. *Id.* at 8-9. Indeed, the Court found that discovery might be appropriate even though Spain itself was entitled to immunity, and

ordered the attorneys to preserve relevant documents. *Id.*

**2. Non-privileged documents from a foreign client are subject to discovery.**

Cravath supposes a general principle that “a subpoena directed to an attorney cannot reach client documents the court could not compel the client to produce.” Resp. 23. But despite its insistence that this is established by “a long line of precedent,” *id.*, no case states this broad, alleged principle. Instead, the principle is that *privileges* held by the client cannot be abrogated when discovery is sought from the lawyer. Where documents are not privileged, no such bar applies – even if the court cannot reach the client.

As Cravath concedes, cases concerning Rule 45 subpoenas, such as *Ratliff*, apply to determine the scope of permissible discovery under Section 1782. *See* Resp. 21. Under that caselaw, non-privileged client documents may be obtained from law firms, even where the client is outside the court’s geographic jurisdiction:

Indeed, documents held by an attorney in the United States *on behalf of a foreign client*, absent privilege, are as susceptible to subpoena as those stored in a warehouse within the district court’s jurisdiction.

*Ratliff*, 354 F.3d at 170 (emphasis added). Cravath’s quotation of this passage omits the critical phrase “held . . . on behalf of a foreign client.” Resp. 26. Those seven words destroy Cravath’s argument. This Court was allowing discovery in exactly the situation that Cravath claims it is impermissible: obtaining non-privileged client documents from U.S. attorneys where the foreign client is outside the geographic

jurisdiction of the court.

Davis Polk argued exactly what Cravath argues here: that “documentary evidence is not available from a lawyer custodian, even absent attorney-client privilege, if the court does not have jurisdiction over the client/document owner.” 354 F.3d at 167. The Court disagreed, finding that there is no bar to production of non-privileged documents held by counsel. *Id.* at 170.

This Court’s decision in *In re Application of Sarrío, S.A.*, 119 F.3d 143 (2d Cir. 1997), likewise rejects Cravath’s position. There, the applicant sought documents that had been sent from abroad to allow Chase Manhattan’s counsel in New York to review them. *Id.* at 145. Chase argued the documents were privileged, because (unlike the documents here) they were “only present in the United States for an attorney’s review.” *Id.* This Court discussed whether discovery of a foreign client’s documents may be had from a law firm, but considered this question as a matter of privilege: “whether *the attorney-client privilege shields* documents undiscoverable abroad but transferred to an attorney in the United States for advice on their amenability to § 1782 subpoena.” *Id.* at 147 (emphasis added). The Court’s disposition confirms that the privilege claim was key: the Court remanded rather than deciding the question because Chase “no longer assert[ed] its privilege on appeal.” *Id.*

If the rule were as Cravath suggests – that documents may never be obtained from an attorney where they originate from a client outside the

jurisdiction – Chase’s withdrawal of privilege in *Sarrio* would not have mattered; the district court’s opinion quashing the subpoena would have been affirmed without remand. Instead, the privilege waiver “remove[d] the basis” for the district court’s order, *id.* at 148. *Sarrio* thus confirms that in the absence of privilege, there is no bar against discovery.

### 3. The documents at issue are not privileged.

Cravath’s caselaw involving privileged documents is equally unavailing, because these documents are not privileged:

Judge Hellerstein: “This is not attorney-client privileged documents. These are documents that have already [been] produced.”

Counsel for Cravath: “That’s right.”

A215. Nonetheless, Cravath presents its first issue as involving “documents belonging to a company beyond [the district court’s] subpoena power” that were transferred “to counsel for purposes of obtaining legal advice in responding to discovery requests.”

Resp. 5. That is inaccurate. The documents at issue were *actually produced*. As the transcript demonstrates, either the documents are not privileged or the privilege was abandoned.

The general rule is that “putting otherwise non-privileged” documents “in the hands of an attorney – or printing out such records for an attorney to review – does not render the documents privileged or work product.” *United States v. Walker*, 243 F. App’x 621, 623 (2d Cir. 2007) (summary order). Nonetheless, it is an open question whether the situation changes when a foreign client transfers documents to U.S.

counsel for the purpose of review. *See Sarrío*, 119 F.3d at 146-47 (discussing but not deciding this issue).<sup>1</sup> But that question is not presented here, because the district court ordered production only of deposition transcripts and documents that were either not transferred here or were already produced in discovery to Petitioner herself, so there is no claim that they are privileged. Thus, Cravath's discourse on the centuries-long pedigree of the notion that a document given to an attorney in confidence is privileged, Resp. 23-24, is irrelevant.

Cravath's brief ignores the deposition transcripts entirely, but these have never been entitled to any kind of privilege; nor were they "transferred" to Cravath by Shell.

Similarly, Shell's documents were not originally privileged. And even if they acquired privilege when they were transferred to Cravath for *review*, they lost that privilege when they were *produced* to third parties. *E.g. In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973). Indeed, nowhere does Cravath argue that the documents are actually privileged; Cravath simply suggests it by repeatedly quoting inapposite caselaw discussing privileged documents. Resp. 23-27, 29, 31.

Even if the documents were privileged, Cravath has waived any argument that privilege doctrine bars discovery. Cravath now relies on cases discussing privilege such

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<sup>1</sup> Because *Sarrío*'s discussion was *dicta*, *see Ratliff*, 354 F.3d at 169, it is doubly improper for Cravath to claim that it is entitled to "*Sarrío* protection," Resp. 30, or that *Sarrío* "bars" discovery here, Resp. 26.

as *Ratliff*; *Sarrio*; *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962); and *Hunt v. Blackburn*, 128 U.S. 464 (1888); it claims that “*Fisher*, *Sarrio*, and *Ratliff* bar *Kiobel*’s attempts to obtain Shell’s documents.” Resp. 26. Its brief to the district court cited none of these cases, and Cravath never previously made this argument.

**4. *Ratliff* is not distinguishable here.**

With no caselaw supporting its position, and *Ratliff* foreclosing it, Cravath advances four arguments to distinguish that case. None is persuasive.

First, the fact that Cravath did not voluntarily produce documents to the government to obtain favorable treatment, like the client in *Ratliff*, makes no difference. The salient feature in *Ratliff* was the absence of privilege, not how it had been lost. 354 F.3d at 170.

Second, Cravath suggests that Rules 502(d)-(e) of the Federal Rules of Evidence somehow protect the documents here. Those rules are about maintaining *privilege*; these documents are not privileged. Cravath does not even suggest that the district court in *Kiobel* ever entered a Rule 502(d) order – indeed, Rule 502 was enacted six years after the Original Orders were entered. *See* A70, A81 (orders entered in 2002); Pub. L. No. 110-332, 122 Stat. 3537 (Sept. 19, 2008) (enacting Rule 502). Nor did the Original Orders themselves qualify as Rule 502(e) agreements, because they only provided for the preservation of privilege with respect to “inadvertently” produced documents that a party identifies. A76.

Third, the notion that Petitioner “had no right to the discovery materials,” Resp. 30, is both irrelevant and wrong. It is irrelevant because Section 1782 discovery cannot turn on the merits of prior litigation. *Ratliff* did not turn on whether the SEC’s investigation, in which the documents were produced, was valid; to the contrary, the documents had been voluntarily produced *even though the SEC had no jurisdiction over Davis Polk’s client*. 354 F.3d at 167. The relevant fact was that the documents had been produced and were not in counsel’s hands in a privileged fashion – just as in this case.

But the suggestion that the discovery never should have happened is also plainly wrong. The documents at issue were produced not only in *Kiobel*, which included solely ATS claims, but also in the *Wiva* cases, which included both ATS and common-law claims, claims that were sufficiently well-founded to end in a settlement just before trial. The *Wiva* cases would not have been barred by the Supreme Court’s *Kiobel* decision, because it only addressed ATS claims and expressly distinguished ordinary transitory tort claims, like those in *Wiva*. *Kiobel*, 133 S. Ct. at 1666-67. The documents at issue would have been produced (or created, with respect to deposition transcripts) even if the *Kiobel* case had been dismissed without discovery.

Cravath suggests that the original discovery somehow amounted to “improper disclosure of privileged material,” Resp. 31 (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009)), but this ignores both the *Wiva* cases and the fact that the materials here are not privileged.

Cravath’s last claim, amplified by its *amici*, is a series of policy arguments that

are irrelevant in the face of *Ratliff* – and also misguided. The concern that the decision here will “chill” attorney-client communications, Resp. 26; Br. of *Amicus Curiae* Chamber of Commerce *et al.* (“Chamber Br.”) 8; Amicus Br. of the N.Y.C. Bar Ass’n (“N.Y.C. Br.”) 6, is misplaced, as the district court found, because its order applies only to “documents that Cravath has already produced,” A280, not to documents that Shell transferred seeking legal advice. Nothing in the district court’s order implicates Shell’s ability “to obtain fully informed legal advice.” *Fisher*, 425 U.S. at 403. This case does not present the question left open in *Sarriso*, as to whether documents provided to local counsel purely for review acquire privilege.

Moreover, is Cravath suggesting that its client would have chosen to violate the Federal Rules of Civil Procedure and resisted producing relevant documents if it thought those documents might someday be used to support the same claims in another forum? While one *amicus* argues that this case will discourage “voluntary” cooperation in U.S. litigation, N.Y.C. Br. 3-4, Shell did not “voluntarily” submit to U.S. discovery, and no other litigant would do so. If anything, *Ratliff* presented *stronger* facts for this argument, because there the foreign company had voluntarily cooperated with a U.S. investigation – surely behavior worth encouraging. Nonetheless, this Court found that non-privileged documents provided could be subpoenaed.

Cravath’s *amici* incorrectly imply that the district court’s decision represents an expansion beyond *Ratliff*, with dire consequences. But as soon as *Ratliff* was decided, the New York commercial litigation bar understood that it applied to non-privileged



“documents held by an entity’s attorneys, where the attorneys, but not the entity itself, are within the court’s subpoena power.” Edward M. Spiro, *Reduced Protection for Discovery from Attorneys*, 231 N.Y.L.J. 62 (Apr. 1, 2004). The bar also understood that this would have limited impacts on behavior in civil litigation, because if a foreign client is “drawn into . . . civil litigation in the United States,” then it “will have to produce its documents.” Michael E. Gertzman & James J. Beha II, *Deciding Where to Review Overseas Client Documents*, 246 N.Y.L.J. 110 (Dec. 8, 2011). And attorneys already “take[] this guidance into account when representing foreign clients in U.S. enforcement proceedings.” Joseph P. Armao, Robert H. Bell, & Thomas G. Haskins Jr., “*Compelling*” *Arguments: A subpoena of foreign documents in a New York firm’s custody raises many issues*, 247 N.Y.L.J. 29 (Feb. 14, 2012).

Cravath argues that the decision below encourages “discovery tourists looking to seize documents belonging to foreign companies.” Resp. 32-33. Nonsense. What Cravath derisively calls “discovery tourism” is precisely what Section 1782 promotes: “providing efficient means of assistance to participants in international litigation.” *Mees*, 793 F.3d at 300 (internal quotation marks omitted). Allowing discovery in these narrow, possibly unique, circumstances – providing the same plaintiff renewed access to previously-produced documents, which are not burdensome to re-produce, to be used to pursue the same claims in another country, rather than re-litigating every conceivable discovery issue – will have none of the broad consequences Cravath asserts.

**C. Cravath's personal jurisdiction argument is waived and wrong.**

Cravath has waived any argument that due process prohibits discovery because Shell was not subject to the court's personal jurisdiction, *cf.* Resp. 33-38; neither the phrase "personal jurisdiction" nor "due process" appears in Cravath's brief or the hearing transcript. A88-118; A203-234. Cravath's argument is waived.

Even if it were not, it is unavailing, because once again this question is controlled by *Ratliff*. There, the reversed district court had held that Davis Polk's client, E&Y, "was not subject to the court's subpoena power by virtue of its location," and then made exactly the same argument that Cravath makes: that if "E&Y was not subject to the court's jurisdiction, the documents obtained by Davis Polk through and in connection with its representation of E&Y were similarly unreachable." 354 F.3d at 167-68. But the Second Circuit found no need to consider E&Y's amenability to personal jurisdiction in order to reverse on the availability of the documents. *Id.* at 168-71. Cravath does not mention *Ratliff* in its discussion of personal jurisdiction.

Instead, Cravath cites cases concerning whether a court may obtain an entity's documents *abroad* by obtaining personal jurisdiction over an agent within the district. For example, in *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987), the D.C. Circuit considered a subpoena to a witness who was apparently living abroad, in an attempt to obtain corporate records that were also apparently outside the United States. *Id.* at 1271. The personal jurisdiction objection centered on the fact that "the Witness had

been served in his representative capacity as ‘custodian’ *rather than in his individual capacity*,” *id.* (emphasis added), in an attempt to obtain all corporate records. The D.C. Circuit simply held that jurisdiction over the individual did not automatically establish jurisdiction over the corporations sufficient to “inspect their records.” *Id.* at 1273.

This Court’s decision in *In re Marc Rich & Co.*, 707 F.2d 663 (2d Cir. 1983), similarly deals with an attempt to obtain company documents located in Switzerland by subpoenaing the company’s principals in New York. *Id.* at 665, 667-68. The same is true of *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197 (2d Cir. 2016), which considered “the use of a subpoena to compel a recipient to produce an item under its control *and located overseas*.” *Id.* at 215 (emphasis added); *see also Estate of Ungar v. Palestinian Auth.*, 412 F. Supp. 3d 328, 330-33 (S.D.N.Y. 2006) (nonresident U.S. citizen subpoenaed in an attempt to obtain corporate documents outside the United States).

None of these cases has any bearing on documents *within* this district. “A federal court’s . . . power to issue a subpoena is determined by its jurisdiction.” *Marc Rich*, 707 F.2d at 669. The Southern District of New York obviously has jurisdiction over Cravath and documents within Cravath’s possession; Petitioner is not seeking documents in Shell’s possession. While Petitioner does not dispute that there is a principal-agent relationship between Cravath and its client, *cf. Resp. 36, Ratliff* establishes that such relationship is irrelevant when the documents are in Cravath’s possession in the United States. The jurisdiction of U.S. courts over persons and

things within the United States cannot be limited by the interests of absent foreign parties.

**II. In granting the Petition, the district court acted well within its discretion.**

The district court found that, on balance, all four discretionary factors set out in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), weighed in favor of granting discovery. A282-90. This was not necessary to grant the Petition; *Intel* “did not conclude that any of these factors should be given more weight than the others,” nor “that any one factor should be dispositive.” *Marubeni Am. Corp. v. LBA Y.K.*, 335 F. App’x 95, 97 (2d Cir. 2009) (summary order). But the fact that Petitioner ran the table only highlights Cravath’s heavy burden in seeking to reverse the district court’s discretionary decision.

To abuse its discretion, the district court must have “based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions.” *Brandi-Dobrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 79-80 (2d Cir. 2012) (internal quotation marks omitted). That range is considerable; in the Section 1782 context, “Congress planned for district courts to exercise broad discretion” in the decision of “whether to grant a discovery order.” *Edelman*, 295 F.3d at 181. While Cravath argues that *any* error in the district court’s discretionary analysis “warrants reversal,” Resp. 39, it relies on this Court’s approach to asylum cases, in which, due to

their “special nature,” the “exercise of discretion” is subject to “extensive limitations.” *Wu Zheng Huang v. INS*, 436 F.3d 89, 97 (2d Cir. 2006).

In the Section 1782 context, “[t]he Second Circuit has consistently ruled that it is far better to provide federal court assistance than none at all.” *Minatec Fin. S.a.r.l. v. SI Group Inc.*, Civ. No. 1:08-CV-269, 2008 U.S. Dist. LEXIS 63802, \*12 (N.D.N.Y. Aug. 18, 2008). Cravath cites no case in which a district court’s discretionary grant of discovery under Section 1782 has been reversed by this Court. Petitioner has only located decisions in which courts that *denied* discovery were found to have abused their discretion, typically for interpreting the statute too narrowly. *See, e.g., Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995) (reversing denial of 1782 petition for an abuse of discretion and interpreting “section 1782’s investment of broad discretion in the district courts as an invitation for district judges to fashion creative means of implementing the statute’s double goal . . . . Absent specific directions to the contrary from a foreign forum, the statute’s underlying policy should generally prompt district courts to provide some form of discovery assistance”); *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101 (2d Cir. 1992) (reversing denial of 1782 petition for abuse of discretion and noting “the effort to liberalize the assistance provided by American courts to foreign and international tribunals”); *Metallgesellschaft v. Hodapp*, 121 F.3d 77, 78-80 (2d Cir. 1997) (reversing denial of a 1782 petition for abuse of discretion and remanding); *Brandi-Dobrn*, 673 F.3d at 80-84 (reversing grant of motion to quash Section 1782 subpoenas for abuse of discretion,

and noting that “the statute has, over the years, been given increasingly broad applicability” (internal quotation marks omitted)).

Cravath fails to show that anything in the district court’s ruling was contrary to established law, let alone so beyond the range of permissible decision that this case should mark the first time that this Court reverses a discretionary grant of Section 1782 discovery. Even if Judge Hellerstein could have reached a different conclusion, there is no miscarriage of justice here – Petitioner is simply obtaining access to documents she *already* had access to, in order to pursue claims in the forum in which the Supreme Court indicated they should be litigated.

**A. The district court did not abuse its discretion in determining that the evidence was not easily available in the foreign jurisdiction.**

The district court was correct, and well within its discretion, in finding that the documents might be “unobtainable absent §1782(a) aid.” A284 (quoting *Intel*, 542 U.S. at 264). This is so both because Dutch procedure presents barriers to pre-filing discovery and because Shell may no longer have all the documents (if it ever did). Moreover, Cravath’s principal argument on this point is waived.

Cravath insists that under *Intel*, whether the documents are actually obtainable in the foreign court is irrelevant; “all that matters is that the documents would be sought from a participant in a Dutch proceeding and thus presumptively within the Dutch court’s jurisdictional reach.” Resp. 42 (internal quotation marks omitted). This argument fails on multiple fronts, including the plain language of *Intel* that the relevant

inquiry is whether the evidence may be “unobtainable absent § 1782(a) aid.” 542 U.S. at 264; *see* A284; *see also Gorsoan Ltd. v. Bullock*, 652 F. App’x 7, 9 (2d Cir. 2016) (summary order) (noting that where ability to obtain documents abroad is in doubt, “participation in the foreign proceedings does not automatically foreclose § 1782 aid”). Cravath suggests that this reasoning applies “only where . . . there is some doubt that the target has or will comply with its foreign discovery obligations,” Resp. 44-45 n.6, but nothing about these cases suggests that the analysis is so constricted.

Cravath’s argument depends on rejecting its own rule. If *Intel* requires only a formalistic analysis of whether the respondent is a participant in the foreign court – rather than a practical assessment of whether the evidence is obtainable there – then Cravath obviously loses, as it is not, and will not be, a party in the Dutch Kiobel Case. Shell’s participation in the Dutch case is only relevant to the practical question of whether the need for Section 1782 aid is apparent, as the district court discussed. *See Schmitz*, 376 F.3d at 81; A284.

Moreover, Cravath ignores the district court’s finding that Petitioner needs these documents in order to prepare the as-yet-unfiled Dutch Kiobel Case, and that Shell thus remains outside of a Dutch court’s subpoena powers. A284. Cravath cites *Schmitz*, but there the foreign civil action was pending and Cravath’s client was already a participant within the foreign court’s jurisdictional reach. 376 F.3d at 85. Here, until Petitioner files her action, Dutch courts cannot exert their “general power to exercise authority over all persons and things with[in] its territory” to compel production

from Shell. Resp. 42 (citing *Jurisdiction*, *Black's Law Dictionary* (10th ed. 2014)).<sup>2</sup> Judge Hellerstein did not abuse his discretion in finding that, absent Section 1782 aid, “Kiobel’s contemplated action may be foreclosed before there is any opportunity to obtain this discovery directly from Shell in the Dutch proceedings.” A284.

Even if Shell were a current participant, courts have held that Section 1782 may nonetheless be warranted if there are barriers to obtaining the evidence abroad. *See In re OOO Promnefstroy*, Misc. No. M 19-99, 2009 U.S. Dist. LEXIS 98610, \*15 (S.D.N.Y. Oct. 15, 2009) (“[I]t 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 re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1039 (N.D. Cal. 2016) (“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.”).

Cravath does not dispute the district court’s finding that Shell may not have all the evidence, A284-85, but argues – for the first time on appeal – that Section 1782

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<sup>2</sup> Cravath does not argue that Dutch pre-filing discovery procedures are sufficient to obtain this evidence; in any event, they are not. Utilizing the Dutch procedures would require knowledge of which particular documents Petitioner needs to prove specific elements of her claims; Dutch courts have found that at this stage, it cannot “be determined to what extent [the] plaintiff would actually need the documents to discharge his burden of proof.” A196.



discovery is unnecessary because Shell could order Cravath to turn over the materials. Resp. 42-43. It was no abuse of discretion for the district court not to accept an argument Cravath never made.<sup>3</sup>

That argument is also incorrect on the law and the facts. This Court has suggested that simply because a participant in foreign proceedings might have the right to obtain the evidence from another source, that does not mean that Section 1782 aid is unwarranted. For example, in a summary order issued in *In re Catalyst Managerial Services, DMCC*, No. 16-2653-cv, 2017 U.S. App. LEXIS 3242 (2d Cir. Feb. 23, 2017), the Court considered an argument that “the documents here requested are in the UK court’s reach by virtue of its ability to order LAP to access them from third parties and produce them. The cases cited by LAP do not support its reading of this factor.” *Id.* at \*7. The district court did not abuse its discretion in determining that it was most efficient to order discovery from the U.S. possessor of evidence in the United States, rather than forcing a Dutch court to order a Dutch litigant to obtain documents from its U.S. counsel abroad.

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<sup>3</sup> This argument is absent from Cravath’s brief below. At oral argument, Cravath’s counsel did cite *In re Bank of Cyprus Public Co. Ltd.*, No. 10 Misc. 23, 2011 U.S. Dist. LEXIS 6082 (S.D.N.Y. Jan. 21, 2011), in arguing that the first *statutory* factor prohibited discovery “because of the law’s recognition that documents in the possession of a party’s attorney are in the party’s possession, custody, or control.” A224. But this was before counsel “mov[ed] on to the *Intel* factors,” *id.*, and counsel never raised this in the context of the first *Intel* factor.

The first Intel factor favors discovery, because as the district court found, Cravath's suggested two-step procedure – requiring a Dutch court to order multiple Shell entities to obtain documents from Cravath – “would create a lot of complexity that is needless.” A226. In *In re Gemeinschaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88, 2006 U.S. Dist. LEXIS 94161 (S.D.N.Y. Dec. 29, 2006), the district court found that the first factor “decisively” favored discovery despite the fact that the evidence was “within the reach of the foreign tribunal,” noting that it would be error to “plac[e] too much emphasis on the *foreign tribunal's* need of United States assistance, while ignoring the *interested party's* need of such assistance.” *Id.* at \*19. It was not an abuse of discretion for the district court to account for Ms. Kiobel's interest in avoiding such needless complexity.

Cravath's own caselaw rejects such a two-step procedure. In *In re Application of Thai-Lao Lignite (Thailand) Co.*, 821 F. Supp. 2d 289 (D.D.C. 2011), the petitioners sought to obtain documents *outside* the United States by subpoenaing a U.S. affiliate of a *foreign* entity, on the theory that it could compel the U.S. entity to obtain the documents from abroad. *Id.* at 297-98. The court held that this “would be unduly burdensome and inefficient.” *Id.* at 298. This supports the district court's conclusion that obtaining the documents directly from the entity that holds them, in the country where they are present, is the most efficient approach.

Nor is there any guarantee that Shell actually has the right to obtain all of the documents held by Cravath, despite the general rule that “clients have a right to access

documents held on their behalf by counsel.” Resp. 43. The district court noted that Cravath acted for “four different entities,” A226, and that includes former Shell executive Brian Anderson – who is not an intended defendant in the Dutch Kiobel Case.<sup>4</sup> Cravath has not established or argued that Anderson’s documents are available upon Shell’s request. Thus, the first *Intel* factor favors discovery because the documents sought from Cravath may well be “broader in scope” than documents available from Shell itself. *In re Application of Bracha Found.*, 663 F. App’x 755, 765 (11th Cir. 2016) (unpublished).

Even if Shell could obtain all the documents, however, that would not establish an abuse of discretion, because the district court was entitled to conclude that Section 1782 discovery was more efficient and avoided needless complexity.

**B. No authoritative proof demonstrates that Dutch courts would reject evidence gathered through Section 1782.**

The district court acted well within its discretion in concluding that there was no “authoritative proof that the Netherlands is unreceptive to Section 1782 discovery.” A286. Indeed, the proof to the contrary is so overwhelming that any other conclusion would have been impermissible.

It was Cravath’s burden to provide “authoritative proof” that Dutch courts

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<sup>4</sup> Mr. Anderson apparently lives in Hong Kong. See <http://www.addax-oryx-foundation.org/en/the-foundation/our-team/brian-anderson.php>.

would reject this evidence. *Euromepa*, 51 F.3d at 1100. Such proof is typically in the form of “explicit pronouncements by courts . . . enjoining discovery in foreign jurisdictions.” *In re Essex*, 101 F.3d 873, 877 (2d Cir. 1996). But as commentary from Jones Day notes, “[t]he Dutch Supreme Court (*Hoge Raad*) has held that evidence” obtained through Section 1782 “may be used in proceedings before the national courts.” Jones Day, *Effective Use of Discovery Obtained Pursuant to 28 U.S.C. § 1782 in Proceedings Before Dutch Courts* (Sept. 2009), available at <http://www.jonesday.com/effective-use-of-discovery-obtained-pursuant-to-28-usc--1782-in-proceedings-before-dutch-courts-09-09-2009/>; see A86. Indeed, U.S. courts have repeatedly found Dutch courts to be receptive to Section 1782 evidence; Cravath has never argued otherwise. 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); *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); *In re Geert Duijzendstraal*, 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).

Against this, Cravath relies solely on an amicus brief the Government of the Netherlands submitted to the Supreme Court in *Kiobel* (“Netherlands Amicus”), which has nothing to do with Section 1782 discovery or foreign discovery procedures generally, and cannot change Dutch *courts*’ position regarding their receptivity to

Section 1782 aid. Cravath claims that the Netherlands Amicus suggests a special rule for this case alone, because the Dutch government opposed hearing Petitioner's claims in U.S. courts and therefore, Cravath supposes, would not want evidence developed in the *Kiobel* litigation to be used in Dutch courts. Resp. 46-48.

The district court did not reject the Netherlands Amicus "out of hand," Resp. 48, but gave it careful consideration. Judge Hellerstein noted that while the brief expressed some concern over "the generally broader discovery available to plaintiffs in the U.S." and other "plaintiff-favoring" rules, "it did not discuss Section 1782 or otherwise address whether Dutch courts accept evidence gathered under foreign procedures." A286. The district court did not abuse its discretion in determining that this did not amount to authoritative proof that Dutch courts would create a special rule rejecting discovery in this case. Indeed, as Cravath admits, the concern for U.S.-style discovery expressed by the Netherlands Amicus related to "the non-reimbursable litigation costs" that such discovery entails – not a desire to hide relevant evidence from Dutch courts. Resp. 46 (quoting Netherlands Amicus, A167). Allowing the use of the already-produced documents entails no such costs.

Even if the Netherlands Amicus had taken a position against Section 1782 aid, it would not amount to the authoritative proof required, for two reasons. First, there is no evidence that the current Dutch government would take the same position today. Second, even if it were to do so, Dutch "law provides for an independent judiciary," and its governments have "generally respected judicial independence." U.S.

Dep't of State, *Country Reports on Human Rights Practices for 2016, Netherlands* at 5, available at <https://www.state.gov/j/drl/rls/hrrpt/2016/eur/265456.htm>. As noted above, the Dutch *judiciary* is in fact open to discovery obtained through Section 1782 aid. See generally K. J. Krzeminski, *U.S. discovery for use in Dutch civil proceedings*, Tijdschrift Voor Civiele Rechtspleging 2008-2 (describing multiple Dutch decisions).

In cases denying Section 1782 discovery due to this factor, the foreign tribunals were “explicit” in their opposition to the use of the statute under the circumstances at hand. *In re Gorsoan Ltd.*, No. 13 Misc. 397, 2014 U.S. Dist. LEXIS 175613, \*20-21 (S.D.N.Y. Dec. 10, 2014). See, e.g., *Schmitz*, 376 F.3d at 84 (German Ministry of Justice sent “specific requests” to the district court to deny the Section 1782 petition); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006) (European Commission “explicitly stated that it opposes the discovery sought by Microsoft and is not receptive to U.S. judicial assistance”). Cravath offered nothing approaching this.

Finally, Cravath is incorrect in implying that the district court rejected concerns about U.S. courts’ possible interference in the Netherlands’s ability to adjudicate cases concerning its own nationals. Resp. 48. Rather, the district court explained that these concerns would not be implicated by granting Petitioner’s application, since the Dutch court would ultimately determine whether the documents obtained are admissible evidence under Dutch rules. A229. The district court’s reading of the Dutch government’s amicus was sound, and its conclusion that there was no authoritative proof that Dutch courts would reject Section 1782 discovery was not an

abuse of discretion.

**C. The district court did not impermissibly ignore Dutch restrictions on proof-gathering.**

The district court committed no legal error in concluding that there was no evidence of any Dutch restriction on gathering evidence through Section 1782. A288. It is well-established that the Netherlands accepts this sort of discovery, and the district court was quick to realize that Kiobel's petition is not an end-run around Dutch procedures simply because the process for obtaining similar discovery there is more difficult. A287-88.

Cravath's only claim of abuse of discretion on this factor is that the district court erred in concluding that the discoverability of the evidence in the Netherlands was irrelevant. *See* Resp. 48-49. Cravath is wrong. This Court has held that "a district court *should not consider* the discoverability of the evidence in the foreign proceeding." *Brandi-Dobrn*, 673 F.3d at 82 (emphasis altered)<sup>5</sup>; *see also In re O'Keefe*, 650 F. App'x 83, 85 (2d Cir. 2016) (summary order) (noting "our [Section 1782] precedents *expressly forbid* district courts from considering the discoverability of evidence in a foreign proceeding" (emphasis added)). While Cravath cites *Intel* to suggest that foreign discoverability is relevant, Resp. 48, *Intel* specifically says that "[w]hen the foreign tribunal would readily accept relevant information discovered in the United States,

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<sup>5</sup> Cravath cites this case in its brief, but omits its holding on this point. Resp. 6.

application of a foreign-discoverability rule would be senseless.” *Intel*, 542 U.S. at 262.

And noted above, *supra* Part II(B), the Netherlands readily accepts information discovered pursuant to Section 1782.

The district court quoted *Mees* at length for its explanation of this factor:

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. ‘Proof-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.”

A288 (quoting *Mees*, 793 F.3d at 303 n.20). The district court properly applied this law, noting that the third *Intel* factor looks not to whether Dutch counsel used the pre-complaint discovery procedure, but rather to whether the Netherlands would prohibit the parties from gathering the type of proof that Section 1782 might provide. A288. The district court simply followed the meaning of “proof-gathering restrictions” established by this Court in *Mees*, a case considering Dutch procedures.

Cravath nonetheless claims that *Mees* imposed a requirement that district courts consider discoverability. *Mees* did quote a pre-*Intel* case for the proposition that ““district judges *may well find that in appropriate cases* a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782,”” 793 F.3d at 303 (quoting *Foden v. Gianoli Aldunate*, 3 F.3d 54, 60 (2d Cir. 1993)) (emphasis added), which is in tension with *Brandi-Dobrn’s* express command to the contrary. Regardless, this language is obviously permissive, not a



requirement. Thus, even if it is not always error to consider foreign discoverability if unusual circumstances are presented, in the ordinary course it is not a consideration, and it is certainly not an abuse of discretion to follow this Court's express holdings.

Indeed, other courts have facilitated access to documents in nearly identical situations: *i.e.*, where the moving party alleges it might not be able to obtain documents abroad, due to a more restrictive discovery procedure that requires specific identification of documents. *See, e.g., Infineon Techs. AG v. Green Power Techs. Ltd.*, 247 F.R.D. 1, 3 (D.D.C. 2005) (permitting modification of a protective order to provide German counsel access to documents previously discovered in separate U.S. litigation). The failure to utilize a more burdensome process abroad does not amount to an end run around proof-gathering restrictions.

**D. Confidentiality concerns cannot defeat Section 1782 assistance entirely, and Cravath has waived any objections to the scope of the new confidentiality order in the Dutch proceedings.**

The last *Intel* factor concerns whether the request is “unduly intrusive or burdensome.” 542 U.S. at 265. Cravath never disputed that the Petition would be uncommonly easy to respond to, as it involves simply re-producing discovery from the *Kiobel* case. Instead, Cravath claims that the confidentiality order in *Kiobel* makes it burdensome to allow use of the U.S. discovery for the Dutch *Kiobel* Case. But allowing the discovery subject to a new confidentiality order was a sound exercise of the district court's discretion. And while the court did not need to modify the Original Orders to authorize this discovery, even if it had, the Original Orders allowed

disclosure upon an order of the court; Shell always anticipated that this discovery would be used to litigate Petitioner's claims; and the New Order both incorporates, and is nearly identical to, the Original Orders.

**1. Unless the confidentiality orders are an absolute barrier to Section 1782 discovery – which they are not – any further objections are waived.**

This Court has held that “it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright.” *Mees*, 793 F.3d at 302 (quoting *Euromepa*, 51 F.3d at 1101). That militates strongly against a conclusion that the Original Orders on confidentiality present an insurmountable barrier to Section 1782 discovery. Cravath cites no case finding that it would be an abuse of discretion to grant Section 1782 discovery due to prior protective orders.

Judge Hellerstein faithfully followed this Court's guidance. In consideration of Cravath's confidentiality concerns, he entered a confidentiality order that Cravath negotiated, stipulated to, and jointly submitted to the district court. A236-44. He required only that the New Order permit the use of the documents in Dutch court. The entire substance was up to the parties, and Cravath could have – but did not – maintain objections to any of its confidentiality procedures and protections.

Cravath argues that the New Order “is no guarantee that Shell's documents will remain confidential in a Dutch proceeding,” and that “there is no way to anticipate all

of the ways . . . confidential documents . . . could become exposed.” *See* Resp. 53-54 (citing *In re Cathode Ray Tube (CRT) Antitrust Litig.*, Nos. 07-5944 SC, CV-12 80 151 MISC, 2012 U.S. Dist. LEXIS 184777, \*65 (N.D. Cal. Oct. 22, 2012)). If Cravath is objecting to the conditions imposed under the New Order, its argument is waived; it could have argued for more stringent protections but did not. If it is suggesting that discovery could not have been allowed at all due to these speculations, its argument would bar Section 1782 discovery in every case involving purportedly confidential documents, and is untenable under this Court’s precedent.

While Cravath charges that Petitioner is circumventing the Original Orders by filing a Section 1782 application, Resp. 52, those orders were never intended to prevent Petitioner from proving her claims against Shell. Indeed, Cravath’s position would defeat the basic purpose of Section 1782, disallowing highly relevant evidence from use in proving the same claims for which it was originally produced.

And Cravath’s proposed alternative, that the discovery can only be used upon “a discovery order from the new [Dutch] tribunal,” Resp. 53, makes little sense. Cravath or Shell can seek a protective order from the Dutch Court. There is no reason that *discovery* must be ordered by the Dutch court in the first instance. And this proposal undermines Cravath’s argument. Either the Dutch court will protect the documents to Cravath’s satisfaction, or it will not. If the former, there is no prejudice in allowing the documents to be filed there; if the latter, having the Dutch court issue a discovery order would not assist Cravath or Shell. The cumbersome, multi-step

process proposed by Cravath would serve no purpose but the ones for which it is actually intended: delay and inefficiency.

**2. The district court acknowledged Cravath's confidentiality concerns and issued a closely tailored discovery order that shields the documents from public view.**

The determination of whether the Petition is unduly burdensome is guided by the broad discretion allowed under “the familiar standards of Rule 26.” *Mees*, 793 F.3d at 302. And while Cravath is correct that confidentiality concerns should factor into the analysis, Resp. 49-50, the district court has enormous discretion to fashion a confidentiality order to alleviate those concerns. “If a district court is concerned that granting discovery under § 1782 will engender problems in a particular case, it is well-equipped to determine the scope and duration of that discovery.” *In re Esses*, 101 F.3d at 876; *see also Minatex*, 2008 U.S. Dist. LEXIS 63802, at \*29 (“[T]he beauty of § 1782 is that it permits this Court to impose a protective order that would extinguish any concern that privileged, confidential, or proprietary information would be indecorously revealed.”). The district court here was well within its discretion to allow the parties to work out the elements of the New Order, requiring only that the order allow the documents to be used in Dutch court.

Cravath incorrectly insinuates that the district court attempted to “avoid considering the documents’ confidentiality” and that Petitioner or the district court attempted to “de-designate materials as confidential.” Resp. 50. Neither Cravath nor Shell ever justified its confidentiality designations, and the court in *Kiobel* made “no

finding as to whether the documents are confidential,” A81, but in any event nothing has, or will be, de-designated. The New Order allows Cravath to designate as confidential any material previously designated as such under the Original Orders. A237.

Cravath negotiated for the confidentiality provisions that it wanted. Indeed, the district court required that Petitioner’s use *must* be limited: the documents could be used “only for court proceedings,” A220, and not “for publicity purposes” or to “malign Shell or anyone else in the press.” A219. And after receiving assurances that Dutch counsel would sign on to “essentially the same confidentiality orders” as the originals, *id.*, the court held that the documents could only be subpoenaed “subject to working out an application of the old protective order . . . [and] proper representation of confidentiality from those using the documents.” A234.

The assurances the district court fashioned are similar to those guaranteed in other cases. For example, in *Infineon Technologies*, in which a protective order was modified to provide documents to a German proceeding, the German court had complete discretion over whether to keep the documents confidential. 247 F.R.D. at 3. Nonetheless, the district court found it sufficient to order the party “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.” *Id.* at 3-4. While *Infineon* was not a Section 1782 case, the court noted that “were this a § 1782 request there certainly would be a strong basis to furnish these materials to the German court.” *Id.* at 5.

Almost identical protective considerations have been made here: Petitioner and her Dutch counsel must (1) use the documents only for the Dutch *Kiobel* Case; (2) submit the confidentiality order and ask the Dutch court to maintain the documents as confidential; and (3) request that the Dutch court conduct any hearing behind closed doors and consider the confidential nature of the material. A237-38; A240-41. The New Order also expressly incorporates the Original Orders. A237. And nothing prevents Cravath or Shell from seeking further protections from the Dutch court.

Moreover, Cravath never established any likelihood that the documents would somehow be released in the Netherlands. The privacy protections offered in Dutch court proceedings are generally greater than those offered in the United States: oral proceedings are not transcribed, and documents filed in court are almost impossible for third parties to obtain. A197. While Dutch court hearings are public, the parties have the ability to request closed hearings for “reasons of privacy.” *Id.* Regardless, Cravath loses no protection that it had under the Original Orders, because those orders did not allow a sealed courtroom or even filings under seal, and counsel are unaware of any times during the *Kiobel* and *Wima* litigation when a courtroom was closed to protect confidentiality. A193-94.

Cravath relies principally on an out-of-circuit case, *Andover Healthcare, Inc. v. 3M*

*Co.*, 817 F.3d 621 (8th Cir. 2016), but its facts are highly distinguishable. Unlike this case – in which neither Shell originally nor Cravath today made any attempt to establish that any of the designated documents, let alone all of them, meets the Rule 26(c) standard for protection – *Andover Healthcare* involved trade secrets and the potential for irreparable harm was at issue. *Id.* at 624. The U.S. courts acknowledged and referenced the inherent sensitivity of the documents at issue, – a determination that has never been made here. *Id.* at 622-624. Furthermore, discovery had already been sought through German court channels, and the German court indicated that it would grant the request if necessary. *Id.* Even in that case, the Eighth Circuit did not rule that the district court was prohibited from allowing the discovery, only that “the district court did not abuse its discretion in denying” discovery. *Id.*

**3. Cravath’s argument regarding modification of the original confidentiality orders is waived, but even if it is not, the district court had ample authority to allow Petitioner’s claims to be filed in the Netherlands.**

The district court did not need to modify the Original Orders, because by their own terms they only apply to plaintiffs’ use of documents produced by Shell in that litigation – not subsequent production from Cravath. Regardless, Cravath has waived any argument that Petitioner must meet the standard for modifying a protective order. But even if the district court’s decision is evaluated under the standards for modifying a protective order, the district court did not abuse its discretion.

**a. Cravath's argument is waived.**

Before the district court, Cravath made a general argument that the Original Orders counsel against providing the documents to a Dutch tribunal, and that Dutch law does not provide for U.S.-style protective orders; it did not argue that Petitioner needed to modify the Original Orders, or meet a certain standard in doing so. A114-17. Cravath cited three out-of-circuit district court Section 1782 cases in support of its argument. A115-17. Now, for the first time on appeal, Cravath argues that this Circuit's standard for modification of a protective order, deriving from *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and its progeny, should apply. Resp. 50-53.

None of these cases was presented to the district court. Cravath cannot claim that Judge Hellerstein abused his discretion by not accepting an argument Cravath did not make.

**b. The confidentiality orders allow disclosure upon order of the court.**

Even if the documents remained protected by the Original Orders, and even if the New Order were not fully consistent with the Original Orders, the Original Orders do not bar the discovery the district court authorized. They expressly allow discovery upon a court order by the Southern District of New York. As Cravath conceded, that court retained jurisdiction over the Orders, and could authorize use of the documents upon further "order of the Court." A115 & n.8; A74 ¶ 8, A80 ¶ 21.



Where a protective order allows discovery upon a further order of the court, the court has discretion to allow for subsequent use. In its summary order in *U.S. Philips Corp. v. Iwasaki Elec. Co.*, 142 F. App'x 516 (2d Cir. 2005), for example, this Court found that a protective order under which the district court could issue “an order allowing . . . disclosure,” gave the district court “broad discretion” to allow the use of the documents pursuant to Section 1782. *Id.* at 518. It found that, had the parties wished to limit the court’s discretion, “these sophisticated parties could certainly have drafted the protected order to so state.” *Id.* The same could be said of Shell and Cravath.

**c. A strong presumption against modification does not apply here.**

Even if the district court’s decision should be considered a modification of the Original Orders, it did not need to meet the *Martindell* standard that Cravath now urges – that modification requires showing that the orders were improvidently granted, or extraordinary circumstances or compelling need. *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (applying *Martindell*). Cravath relies on *TheStreet*, but that case found that the *Martindell* standard applies only “[w]here there has been *reasonable reliance* by a party” on a “protective order granted under Rule 26(c).” *Id.* at 229 (emphasis added). This Court found that reliance on the protective orders was not warranted, and affirmed a district court order unsealing testimony as within the court’s discretion. *Id.* at 233-34.; *see also Gambale v. Deutsche Bank AG*, 377 F.3d 133,

142 n.7 (2d Cir. 2004) (“If reliance would be unreasonable, it is within the discretion of the court to . . . modify a protective order.”).

Shell could not have reasonably relied on the Original Orders.

First, the Original Orders were stipulated, blanket confidentiality orders.

Although a “whereas” clause in the stipulation asserts that it is made “for good cause shown,” A56, the court expressly noted that “the Court makes no finding as to whether the documents are confidential.” A81. While a few specific pieces of information relating to the privacy of plaintiffs were identified in the Original Orders, A57, all of the materials at issue here were simply unilaterally designated by Shell without a court finding of confidentiality; no hearing was held to determine whether any of them were entitled to protection under the Rule 26(c) standard, and Cravath does not suggest that the materials meet this standard.

“A protective order granted on the basis of a stipulation by the parties carries less weight than a protective order granted after a hearing to show good cause[.]” and “[t]he fact that a court has entered a stipulated protective order . . . does not automatically affirm the parties’ reasonable reliance on the order for the indefinite protection of each item.” *Int’l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, No. 05 Civ. 2745, 2010 U.S. Dist. LEXIS 19510, \*16-17, \*31-32 (S.D.N.Y. Mar. 2, 2010) (quoting *In re EPDM Antitrust Litig.*, 255 F.R.D. 308, 321 (D. Conn. 2009)). The Second Circuit “has found reliance on such an order unreasonable.” Charles Alan Wright et al., 8A *Federal Practice & Procedure* § 2044.1 (3d ed.) (citing *In re Agent Orange*

*Product Liability Litig.*, 821 F.2d 139, 147 (2d Cir. 1987)<sup>6</sup>).

Similarly, the *Martindell* standard should not apply “where . . . confidentiality designations are made without a showing of good cause.” *King Pharms., Inc. v. Eon Labs, Inc.*, No. 04-CV-5540, 2010 U.S. Dist. LEXIS 102703, \*10 (E.D.N.Y. Sept. 28, 2010). Indeed, where the court most likely would have ordered the defendants to produce the documents anyway, reliance on such a blanket confidentiality order “is not reasonable,” especially compared to “protective orders focused on a particular document or the testimony of a few key people” as was the case in *Martindell*. *EPDM*, 255 F.R.D. at 319. Thus Shell cannot have reasonably relied on the Original Orders.

Second, as noted above, the Original Orders specifically allowed disclosure upon a court order. No litigant would have expected that such a provision would have guaranteed perpetual protection for discovery materials.

Third, in issuing the Original Orders, Judge Kimba M. Wood specifically declined to order paragraph 15 – which purported to allow filing documents under seal and closing the courtroom when confidential discovery was discussed. A77, A81. Shell could not have expected that its documents, especially documents relevant to Petitioner’s claims, would stay protected forever when the court specifically declined to authorize filing under seal until a “document-by-document” determination of

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<sup>6</sup> Aspects of *Agent Orange* relating to public access have been superseded by statute. *TheStreet.com*, 273 F.3d at 233 n.11.

confidentiality was made. A81. And Cravath does not suggest that any court ever made such a determination with respect to any of these materials.

Fourth, Shell especially could not have relied on the Original Orders to preclude Petitioner – a plaintiff in the underlying litigation – from using the discovery to prove the same claims in subsequent litigation. *Martindell* arose in the context of third parties seeking access to the discovery. 594 F.2d at 296 (noting that “a witness should be entitled to rely upon the enforceability of a protective order against *any third parties*” (emphasis added)). The unusual circumstance of this case is that the district court ordered the documents to be used for exactly the purpose they were originally contemplated for – proving Petitioner’s claims against Shell.

This case thus stands apart from the Second Circuit cases and sources relied on by Cravath and its *amici* – cases that involve *non-party* intervenors seeking to modify protective orders, or even intervention to allow public access, as opposed to the same plaintiff using the materials to prove the same claims against the same defendant as in the original litigation. One *amicus* cites cases and articles relating to public access to discovery – which is not at issue here at all. *See, e.g.*, Chamber Br. 12-24 (relying on, *e.g.*, Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991)). Cravath and *amici* cite no Second Circuit case applying the *Martindell* presumption against modification where a party to the original litigation, rather than a third party, seeks further use of the protected information.

Cravath cites to Wright’s *Federal Practice & Procedure* for the principle that

discovery should not be used in collateral litigation to “subvert” limitations on discovery in the other forum, Resp. 52, but as noted, *supra* Part II(B), Dutch courts welcome Section 1782 discovery. Indeed, in the same section, Wright notes that “the most forceful case can be made for access to use material as evidence in other litigation so that later litigants do not have to ‘reinvent the wheel.’” Charles Alan Wright et al., 8A *Federal Practice & Procedure* § 2044.1 (3d ed.). Contrary to the suggestion of *amici*, N.Y.C. Br. 15, neither Shell nor Cravath ever had a “justified expectation” that this discovery would never be used in foreign litigation concerning the same claims.

Indeed, Shell did not even bother to define the term “Litigation” in the Original Orders, which is the key limitation on the use of the documents. A72, A74. The term “Litigation” is not obvious on its face; it cannot be restricted only to *Kiobel v. Royal Dutch Petroleum*, because the documents were also produced in the *Wiva* cases. If Shell actually were relying on a guarantee that, should the litigation need to proceed in another forum, the plaintiffs would be unable to use the discovery to prove their claims there, Shell would have included a clear definition of this term.

In the absence of reasonable reliance on the Original Orders, *Martindell* and *TheStreet.com* allowed the district court discretion in modifying the protective order.

- d. Even if a strong presumption against modification applies, Petitioner’s case involves extraordinary circumstances; she has a compelling need for the discovery; and the confidentiality orders were improvidently granted if they are read to prohibit this use.**

Even if the *Martindell* presumption against modification were applied to this case, the standard is easily met.

The unique features of this case – involving successive litigation of the same claims by the same parties in different forums – qualify as extraordinary circumstances. Cravath’s *amici* suggest that the decision below somehow undermines confidence in protective orders generally, but these circumstances are unlikely to recur. Additionally, even if “the fact that [Shell and Cravath] never were required to show good cause as mandated by Rule 26(c)” is not enough to undermine reliance on the Original Orders, it “amounts to the type of extraordinary circumstances contemplated” in this Court’s “prior decisions.” *Agent Orange*, 821 F.2d at 147-148.<sup>7</sup>

This case also demonstrates a compelling need, because “allowing the sharing of discovery among related cases is an efficient and effective means of avoiding

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<sup>7</sup> Cravath’s *amici* also use *Schmitz* to suggest that these sort of confidentiality agreements “weigh against disclosure” to foreign proceedings. *See* Chamber Br. 19; N.Y.C. Br. 15-16. But the salient fact in *Schmitz* was that the foreign prosecutor specifically opposed the Section 1782 application, 376 F.3d at 82; it does not reflect any general principle that courts must prohibit Section 1782 discovery even where the petitioner agrees to be bound by the same protective order from the domestic proceedings.

duplicative and costly discovery, as well as avoiding unnecessary delay.” *Charter Oak Fire Ins. Co. v. Electrolux Home Prods.*, 287 F.R.D. 130, 134 (E.D.N.Y. 2012); *see also TradeWinds Airlines, Inc. v. Soros*, No. 08 Civ. 5901, 2016 U.S. Dist. LEXIS 94735, \*6 (S.D.N.Y. July 20, 2016) (finding “compelling need” where claims in another court “are closely related to the claims brought before this Court,” in order to “avoid considerable unnecessary effort and expense”). Here, the Dutch *Kiobel* Case is not merely related to the original *Kiobel* litigation, it involves the *same* claims; a more compelling need can hardly be imagined.

Cravath argues that Petitioner cannot meet the *Martindell* test because she is attempting to circumvent Dutch discovery restrictions, Resp. 52, but as noted above, there is no effort to evade Dutch proof-gathering restrictions. *Supra* Part II(C). Cravath relies on *AT&T Corp. v. Spring Corp.*, 407 F.3d 560 (2d Cir. 2005), but there the intervenor was requesting the discovery for use in a case where discovery had already closed, and attempting to circumvent that closure. *Id.* at 561-62. Here, Petitioner’s case has yet to be filed and Dutch courts are receptive to this type of evidence. *Supra* Part II(A)-(B).

Finally, if the Original Orders really had been issued in contemplation that not only would Petitioner’s claims be dismissed from U.S. courts on extraterritoriality grounds, but that Petitioner would then be unable to use the U.S. discovery in an unquestionably proper forum, the orders were improvidently granted. Such a restriction would have no purpose other than to prevent a full airing of relevant

evidence relating to Petitioner's claims. No party is entitled to such a windfall.

**4. Shell's role is no reason to reverse.**

Cravath now claims that the New Order is infirm because Shell "has no power to enforce the District Court's confidentiality order," and Cravath "does not have the same incentives as Shell to do so." Resp. 53. That is a rather extraordinary statement for Cravath to make about its relationship with its client, and this Court should neither believe nor countenance Cravath's disavowal of its ethical obligations. But it is of no moment, for two reasons.

First, Cravath has again waived this argument. Cravath could have insisted that Shell must be a party to the New Order and retain the ability to enforce it, but did not. When Judge Hellerstein noted at oral argument, "I am sure that Cravath will make every argument that Shell wants it to make," A225, counsel did not disagree, but pivoted to arguing that discovery was unnecessary because Shell would be a party in the Dutch case. *Id.* Cravath still represents Shell, A216, so Shell undoubtedly knows about these proceedings and could have intervened.

Second, the argument is moot because Petitioner will stipulate that Shell may enforce the New Order in Cravath's shoes. That underscores the reason for the waiver doctrine, of course – if Cravath had raised this below, it would already have been incorporated into the order.



## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court affirm the decision of the district court and dissolve the stay pending appeal.

Dated: May 18, 2017

Respectfully submitted,

/s/Richard L. Herz

Richard L. Herz\*

Marco B. Simons†

Alison Borochoff-Porte

EarthRights International

1612 K Street N.W. Suite 401

Washington, DC 20006

(202) 466-5189

[rick@earthrights.org](mailto:rick@earthrights.org)

*Counsel for Petitioner-Appellee*

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

† Application for admission pending.

**CERTIFICATE OF SERVICE**

I, Richard Herz hereby certify that on this 18th day of May 2017, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that the Motion was served electronically to all parties by operation of the Court's electronic filing system.

/s/Richard Herz  
Richard Herz

**CERTIFICATE OF COMPLIANCE**

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/s/ Richard Herz  
Richard Herz

Dated: May 18, 2017