

No. 18-___

IN THE
Supreme Court of the United States

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

v.

CRAVATH, SWAINE & MOORE LLP,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Legal Assistance Statute, 28 U.S.C. § 1782, allows federal district courts, in their discretion, to order production of documents for use in foreign legal proceedings. This Court held in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004), that where a “foreign tribunal would readily accept relevant information discovered in the United States” pursuant to Section 1782, a rule requiring that the documents would be discoverable if located in the foreign country “would be senseless.” *Id.* at 262.

The Second Circuit Court of Appeals held, as a matter of law, that the district court abused its discretion in granting discovery under Section 1782 because the documents “would not be discoverable abroad,” despite the fact that the foreign court would be receptive to this discovery. The question presented is:

Under *Intel*, may a district court in its discretion allow Section 1782 discovery where the foreign court is receptive to U.S. discovery, but the documents at issue “would not be discoverable abroad”?

PARTIES TO THE PROCEEDING

The Petitioner is Esther Kiobel, by and through her attorney-in-fact, Channa Samkalden.

The Respondent is Cravath, Swaine & Moore LLP.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Esther Kiobel, by and through her attorney-in-fact, Channa Samkalden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in No. 17-424-cv.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1-20) is published at 895 F.3d 238. The relevant opinion of the district court (Pet. App. 21-40) is unreported, and may be found at 2017 U.S. Dist. LEXIS 9746.

JURISDICTION

The court of appeals issued its opinion on July 10, 2018. Pet. App. 1. The court of appeals denied rehearing en banc on August 30, 2018. Pet. App. 41-42. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Foreign Legal Assistance Statute, 28 U.S.C. § 1782, states as follows:

- (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the

application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

INTRODUCTION

The Second Circuit’s decision below contravenes this Court’s unambiguous holding in *Intel v. Advanced Micro Devices*, 542 U.S. 241, 262 (2004), that “[w]hen the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless.”

The U.S. District Court for the Southern District of New York, exercising its discretion, granted a petition for discovery under the Foreign Legal Assistance Statute, 28 U.S.C. § 1782, finding among other things that the foreign court would be receptive to the evidence at issue. Pet. App. 34-35. The Second Circuit reversed, holding that granting discovery was an abuse of discretion where the documents “would not be discoverable abroad.” Pet. App. 3. The court of appeals disregarded this Court’s clear instruction in *Intel*.

Without discussing the relevant language from *Intel*, the Second Circuit reached its conclusion because it found that the documents at issue – which are currently housed in a law firm but not privileged – should not be discoverable in the U.S. where they would not be discoverable from the firm’s clients abroad. Pet. App. 3-4. But this runs counter both to *Intel*’s express language and its recognition that the basic purpose of Section 1782 is to provide discovery that is *not* available abroad.

Section 1782 prohibits discovery of privileged documents, *see* 28 U.S.C. § 1782(a), but the Second Circuit did not rule that these documents are privileged, and they obviously are not. Indeed, the documents are in the hands of a law firm precisely

because they were previously produced in litigation in the United States – in fact, they were previously produced to the same party that now seeks them for related litigation abroad.

This Court should be wary of courts of appeal carving out exceptions to its clear rules. *Intel* held that where Section 1782’s statutory requirements are met, a district court has “authority” to “grant a § 1782(a) discovery application.” *Id.* at 264. Here, the Second Circuit found that the statutory requirements were met, but nonetheless denied the district court the authority that this Court recognized. This marks the only time that the Second Circuit has *ever* reversed a district court’s discretionary grant of discovery under Section 1782.

The decision below also conflicts with *Intel*’s acknowledgement of the basic purpose of Section 1782: “to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws.” *Id.* at 262. Despite repeated indications that the foreign court would welcome Section 1782 assistance, the Second Circuit used the unavailability of the evidence abroad as the basis for *denying* the petition, overriding the district court’s discretion and this Court’s holding in *Intel*.

Only weeks after the opinion below, the Third Circuit, considering indistinguishable facts, came to the opposite conclusion. *In re Biomet Orthopaedics Switz. GmbH*, No. 17-3787, ___ Fed. Appx. ___, 2018 WL 3738618, 2018 U.S. App. LEXIS 21684 (3d Cir. Aug. 6, 2018). In *Biomet*, as here, the petitioner sought to obtain from counsel in U.S. litigation

discovery materials that had been produced in that litigation, so that the petitioner could use the information in a foreign proceeding. 2018 U.S. App. LEXIS 21684 at *5. The district court had *denied* the petition, reasoning that the petition had not shown that the foreign court would be receptive, and that the U.S. discovery material – which might contain confidential trade secrets – was subject to a protective order. *Id.* at *6. Nonetheless the Third Circuit reversed, concluding that it was an abuse of discretion to deny discovery on this basis – precisely *because* the petitioner could not “obtain the discovery it needs in the [foreign] legal system.” *Id.* at *11 (quoting *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 596 (7th Cir. 2011)). In the opinion below, however, the Second Circuit used the same fact – the inability to obtain the documents abroad – as the basis for the opposite conclusion, finding an abuse of discretion in *granting* Section 1782 discovery.

Biomet faithfully followed this Court’s ruling in *Intel*; the decision below did not. Courts of appeal should not create exceptions to *Intel* without this Court considering the issue; only this Court has the authority to limit its holdings. But given the clear conflict with *Intel*’s express language, this Court should consider summary reversal.

STATEMENT OF THE CASE

1. Petitioner Esther Kiobel seeks documents, previously produced to her in discovery in the United States, to pursue related claims in the Netherlands after her U.S. litigation was dismissed for lack of jurisdiction. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), this Court held that Ms. Kiobel’s claims against Royal Dutch Petroleum, a company

“incorporated in the Netherlands,” could not proceed under the Alien Tort Statute because a defendant’s “mere corporate presence” in the United States did not “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.” *Id.* at 124-25. But the Court noted that the Netherlands was among countries that “permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad.” *Id.* at 136.

Ms. Kiobel then proceeded to pursue litigation against Royal Dutch Shell (Shell)¹ in its home forum. Pet. App. 5. To avoid needless waste of resources and duplication of effort, and because Dutch procedures require a substantial evidentiary showing at the initial stage, she sought to obtain the discovery that had been developed in the U.S. litigation prior to its termination. This discovery included documents and deposition transcripts. Pursuant to the terms of a stipulated confidentiality order, Ms. Kiobel had not been permitted to retain that material following the dismissal of her claims. The documents were, however, retained by Shell’s U.S. counsel, Respondent Cravath, Swaine & Moore LLP (Cravath). Ms. Kiobel sought the prior discovery from Cravath before filing her Dutch suit. Pet. App. 5-6.

2. In 2016, Ms. Kiobel filed her petition under the Foreign Legal Assistance Statute, 28 U.S.C. § 1782,

¹ In 2005, the two Shell parent companies – Royal Dutch Petroleum Co. and the Shell Transport & Trading Co. – were unified into the single entity Royal Dutch Shell plc. *See, e.g.*, Royal Dutch Shell, “Royal Dutch Shell Unification Completed” (July 20, 2005), *available at* <http://shell-proposal.production-investis.com/announcements/20-07-2005.aspx>.

in the Southern District of New York, seeking from Cravath the deposition transcripts and the documents Shell had previously produced. Cravath argued both that the statutory requirements for Section 1782 had not been met, and that each of the discretionary factors under *Intel* pointed against granting discovery. In particular, Cravath argued that the person from whom discovery was sought was not “found” in the Southern District of New York because the real target of discovery was Shell, not Cravath, and that the discovery was not “for use” in the Dutch proceeding because the Dutch lawsuit had not yet been filed. Pet. App. 24, 27. Cravath also argued, among other things, that the Dutch government was unreceptive to U.S. discovery in this case, that Petitioner was attempting to avoid restrictive Dutch discovery procedures, and that the request would be burdensome unless there were a mechanism to ensure confidentiality. *Id.* at 34, 37-39.

At oral argument, Cravath’s counsel specifically conceded that the documents at issue were “not attorney-client privileged documents.” Dist. Ct. Dkt. No. 14 at 13:15-17. The district court then indicated that it was inclined to grant the petition, subject to the parties agreeing on a new confidentiality order governing the use of the materials in Dutch court, including a “proper representation of confidentiality from those using the documents.” Dist. Ct. Dkt. No. 14 at 32:4-7. Following negotiations, the parties stipulated to a proposed confidentiality order. Dist. Ct. Dkt. No. 17. The district court then granted the discovery petition, and entered the stipulated confidentiality order. Pet. App. 39-40; Dist. Ct. Dkt. No. 20.

The district court held that the petition met the statutory requirements of Section 1782. In particular, the district court held that the discovery was “for use” in foreign litigation despite the fact that Ms. Kiobel’s Dutch lawsuit had yet to be filed, and rejected Cravath’s argument that because some of the documents at issue originated with Shell, the discovery was not sought from a person residing within the district. Pet. App. 26-29.

The district court also held that, on balance, *Intel*’s discretionary factors weighed in favor of granting the petition. The district court held that the first factor – under which a court examines whether “the need for § 1782(a) aid” is “apparent,” in part due to whether the respondent “is a participant in the foreign proceeding” – favored discovery, because the petitioner could not obtain the discovery from Shell at the pre-filing stage of Dutch litigation. *Id.* at 30-33. On the second factor, the district court held, citing prior Second Circuit caselaw, that the Dutch courts would be receptive to the use of discovery materials obtained through Section 1782. *Id.* at 33-35. And under the third discretionary factor – “whether the request conceals an attempt to circumvent foreign proof-gathering limits,” *Intel*, 542 U.S. at 265 – the district court held that “Cravath has provided no evidence that the Netherlands prohibits or otherwise restricts parties from gathering evidence via Section 1782.” Pet. App. 38. Last, under the fourth discretionary factor, the district court held that “Cravath’s burden is extremely minimal because it has previously produced all of the documents currently sought.” *Id.* Although the district court acknowledged Cravath’s concern for the confidentiality of the discovery material, the court

noted that “the parties have since stipulated to a confidentiality agreement, which renders this issue moot.” *Id.* at 38-39.

3. A three-judge panel of the Second Circuit reversed. The panel affirmed the district court’s conclusion that the statutory requirements of Section 1782 had been met. Pet. App. 11. The panel also did not take issue with the district court’s findings that the Dutch courts would be receptive to the discovery at issue, or that producing the discovery was not burdensome. *Id.* at 13-14, 20.

The Second Circuit held that the district court erred in its analysis of the first *Intel* factor, because “when the real party from whom documents are sought (here, Shell) is involved in foreign proceedings, the first *Intel* factor counsels against granting a Section 1782 petition seeking documents from U.S. counsel for the foreign company.” *Id.* at 13-14. The court of appeals did not suggest that this error would require reversal, however, as opposed to remand to re-weigh the factors.

Instead, the court of appeals focused on the third factor, circumvention of proof-gathering restrictions in the Netherlands. The panel held that because the documents were not available under Dutch discovery procedures, this amounted to an attempt to “circumvent the Netherlands’ more restrictive discovery practices, which is why they are seeking to gather discovery from Cravath in the U.S.” *Id.* at 14. Thus “the combination of the confidentiality order and the more restrictive Dutch discovery practices makes the documents at issue undiscoverable from Shell in the Netherlands,” which in turn made it

“perilous” to “provide access to the documents” pursuant to Section 1782. *Id.* at 17-18.

4. Petitioner sought rehearing en banc; the court of appeals denied the petition without comment. *Id.* at 41-42.

REASONS FOR GRANTING THE WRIT

This Court’s decision in *Intel* is clear: “When the foreign tribunal would readily accept relevant information discovered in the United States, application of a categorical foreign-discoverability rule would be senseless.” 542 U.S. at 262. In direct contravention of this command, the Second Circuit used the undiscoverability of the information in the Netherlands as the reason to deny discovery in this case. The Second Circuit noted that the documents were subject to a confidentiality order when previously produced for U.S. litigation, but the same was true in *Intel* itself, and provides no basis for a departure. The Second Circuit also noted that, although unprivileged, the documents were in the hands of a law firm. This fact is also present in many Section 1782 cases, and does not justify abrogation of this Court’s holding. While the Second Circuit purported to rely on this Court’s caselaw concerning documents that are privileged when in the hands of counsel, the court specifically did *not* rule that the documents here were privileged – and it could not, because these very documents were previously produced to opposing parties, and some of them are deposition transcripts that were not even transmitted by a client.

In the wake of *Intel*, no other circuit has considered the undiscoverability of documents in a foreign legal system to be a reason to deny discovery

– let alone a reason to overrule a district court’s exercise of its discretion. The Third Circuit, in particular, considered nearly identical facts – also involving documents in the hands of a law firm, which were produced in U.S. litigation subject to a confidentiality order – and came to the opposite conclusion from the decision below. This Court should make clear that the Second Circuit’s departure from *Intel* is unwarranted.

I. This Court should confirm that its holding in *Intel* is binding.

This Court’s decision in *Intel* provides detailed guidance to the lower courts regarding the determination of petitions for discovery under the Foreign Legal Assistance Statute: once the basic prerequisites of the statute are met, district courts are free to grant discovery in their discretion, keeping in mind a number of considerations, but without any categorical limitations not found in the statutory text. Specifically, the Court rejected a requirement that the material sought be discoverable abroad. 542 U.S. at 266.

The Court has not revisited Section 1782 since *Intel*, let alone called that decision into question. The Second Circuit’s failure to faithfully follow *Intel*, however, has created an intractable circuit split and raises the possibility that any number of issues, thought settled after *Intel*, will become disputed. To avoid this, the Court should make clear that *Intel* remains binding, and that courts of appeal should not depart from its holdings due to their own opinions about what makes a particular case unique. Here, neither the fact that discovery is sought from the non-privileged files held by a law firm, nor the fact that

the documents were previously produced under a confidentiality order, justifies any departure from *Intel*.

A. The opinion below directly conflicts with *Intel's* direction that foreign non-discoverability does not bar discovery where the foreign court is receptive.

Intel established that where the foreign court would be receptive to the evidence, foreign non-discoverability cannot be used to bar Section 1782 discovery. 542 U.S. at 262. Indeed, where the documents are “unobtainable absent § 1782(a) aid,” this helps *establish* the “the need for § 1782(a) aid.” *Id.* at 264. But the Second Circuit used this very fact to find that granting discovery was an abuse of discretion.

The Second Circuit held that “the combination of the confidentiality order and the more restrictive Dutch discovery practices makes the documents at issue undiscoverable from Shell in the Netherlands.” Pet. App. 17. And because the documents were undiscoverable from Shell, the court of appeals characterized Ms. Kiobel’s petition as an effort to “bypass Dutch discovery restrictions and gain access to documents she could not otherwise acquire.” *Id.* at 14 n.3. This is exactly backward.

There is no doubt that the Dutch courts would be receptive to Section 1782 aid. The court of appeals did not disturb the district court’s finding on this point. And prior decisions of both the Second Circuit and other courts firmly establish that Section 1782 aid is welcomed by courts in the Netherlands. *See Mees v. Buiter*, 793 F.3d 291, 296 (2d Cir. 2015); *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, at *18 (D. Nev. May 28, 2015); *In re Qwest Communs. Int'l, Inc.*, No. 3:08mc93, 2008 U.S. Dist. LEXIS 115845, at *12-13 (W.D.N.C. July 9, 2008); *In re Geert Duizendstraal*, No. 3:95-MC-150-X, 1997 U.S. Dist. LEXIS 16506, at *5-7 (N.D. Tex. Apr. 16, 1997); see also 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/>.²

Given foreign receptivity, the unavailability of the discovery abroad should have been a reason to grant, rather than deny, the discovery petition. But instead the Second Circuit used foreign non-discoverability as the primary basis for overturning the district court's discretionary grant of discovery. This cannot be squared with *Intel*. Since the statutory requirements had been satisfied, the district court had authority to grant discovery in its discretion; in

² Numerous decisions of the Dutch courts themselves confirm this. See generally K. J. Krzeminski, *U.S. discovery for use in Dutch civil proceedings*, Tijdschrift Voor Civiele Rechtspleging 2008-2; see also JBPR 2012/75 (District Court of Rotterdam Aug. 8, 2012), available at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2012:BX4521> (holding that even though Dutch law does not have similar discovery procedures, there is no public policy prohibiting litigants from developing evidence through Section 1782); C/09/539155 / HA ZA 17-956 (District Court of The Hague June 6, 2018), available at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2018:6542> (noting that documents obtained under Section 1782 had been kept strictly confidential in Dutch proceedings).

any event foreign non-discoverability should not have been used as the basis for reversal.³

B. Foreign non-discoverability is not a basis to reject discovery of non-privileged documents held by a law firm, and produced in prior litigation.

The Second Circuit held that undiscoverability in the Netherlands required denying Section 1782 discovery because Cravath is a law firm, holding unprivileged documents previously produced in U.S. litigation by a foreign client. This does not, however, provide any basis for departing from *Intel*.

For decades, it has been clear that non-privileged documents may be discovered from law firms just like any other custodian. Unless “the client himself would be privileged from production of the document, either as a party at common law . . . or as exempt from self-incrimination,” documents may be obtained from the attorney. *Fisher v. United States*, 425 U.S. 391, 404 (1976) (quoting 8 J. Wigmore, Evidence § 2307, p. 592 (McNaughton rev. 1961)). In *Fisher*, the Court considered “whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.” 425 U.S. at 402. These documents were held to be privileged, because if the “damaging information could more

³ Justice Breyer dissented in *Intel*. See 542 U.S. at 267-73. Even under Justice Breyer’s formulation, however, discovery would be warranted here, because there is no question that the Dutch court qualifies as a “tribunal,” *id.* at 269, and because this “discovery would . . . be available under domestic law in analogous circumstances,” *id.* at 270 – indeed, it was actually previously produced under domestic law to the same litigant.

readily be obtained from the attorney following disclosure than from [the client] in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.” *Id.* at 403. But the Court emphasized the narrowness of this holding: “[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures – necessary to obtain informed legal advice – which might not have been made absent the privilege.” *Id.* As a result, “pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice.” *Id.* at 403-04.

Here, the panel read *Fisher* far too broadly, to carve out an exception to *Intel*. Citing *Fisher*, the Second Circuit suggested that “a district court should not exercise its discretion to grant a Section 1782 petition for documents held by a U.S. law firm in its role as counsel for a foreign client if the documents are undiscoverable from the client abroad, because this would disturb attorney-client communications and relations.” Pet. App. 17. But this formulation avoids the essential question: whether, under *Fisher*, the documents are privileged. If they are, then the restrictions of 28 U.S.C. § 1782(a) regarding privileged documents apply, and *Intel*’s holding that there is no foreign discoverability requirement is irrelevant. If they are not, however, *Fisher* provides no basis to limit *Intel*.

But Cravath never argued that the documents here were privileged under *Fisher*, and the Second Circuit did not hold that they were. Indeed, it could not have. The discovery at issue includes documents that were previously produced to opposing parties in litigation as well as deposition transcripts. The documents that Shell transmitted to its counsel were sent with the understanding and intention that they would be produced in litigation to which Shell was a party. And the deposition transcripts were never transmitted by Shell to its counsel to begin with, and thus even *Fisher's* predicate of disclosure from the client does not apply.

There is no argument that Shell would not have given the documents or transcripts to Cravath “absent the privilege.” 425 U.S. at 403. Because Petitioner could have obtained these documents from Shell when it possessed them – and in fact did so, in the underlying litigation – the documents “may also be obtained from the attorney.” *Id. Fisher* can have no application to documents transmitted to counsel for production in litigation, because these communications would be required regardless of any privilege.

The absence of privilege negates any suggestion that a departure from *Intel* is warranted here. Indeed, the Second Circuit’s holding turns *Intel* on its head. The major purpose of Section 1782 is to make discovery available to foreign litigants where they cannot obtain it abroad – thus *Intel's* focus on “the need for § 1782(a) aid.” 542 U.S. at 264. If the documents here could not be obtained in the Netherlands, that merely underscores the need to obtain them via Section 1782.

C. The fact that the documents were previously produced in litigation, where they were subject to a confidentiality order, provides no basis for departing from *Intel*.

The Second Circuit's other basis for considering foreign non-discoverability was the original confidentiality order protecting the previously-produced discovery – and specifically, the district court's "decision to alter the confidentiality order without Shell's participation, and without considering the costs of disclosure to Shell." Pet. App. 18. This, too, cannot justify a departure from *Intel*, because this was exactly the situation in *Intel*.

In *Intel*, the documents at issue were "documents Intel had produced in a private antitrust suit" in U.S. court. 542 U.S. at 250. As in this case, the petitioner had sought "documents discovered in [prior U.S.] litigation." 542 U.S. at 251. As in this case, the producing party had prevailed in the litigation in which the documents had been originally produced. *Id.* at 251 n.4. And as in this case, the documents were subject to "[a] protective order" that "govern[ed] the confidentiality of all discovery in that case." *Id.* Even though the petitioner was seeking to bypass a protective order to obtain documents that would be otherwise unavailable, this Court still rejected the notion that the documents could not be discovered if they were undiscoverable in the foreign jurisdiction. *Id.* at 262.

Even if *Intel* were not on all fours, the confidentiality order here still provides no basis for the Second Circuit's decision. The original confidentiality order was a stipulated, blanket order

under which the parties were permitted to designate any material they chose as “confidential,” without a prior good-cause showing to the court. In entering the order, the district court in the underlying litigation specifically noted: “the Court makes no finding as to whether the documents are confidential. That finding will be made, if ever, upon a document-by-document review.” Dist. Ct. Dkt. No. 4-3 at 31. The court also pointedly did not allow documents to be filed under seal on the basis of the stipulated order. *Id.* Thus, the order was just a means to postpone confidentiality disputes, not a finding that confidentiality was warranted.

Blanket confidentiality orders stipulated by the parties, without a specific showing of good cause under Rule 26(c), cannot bar further discovery of the materials produced. The Second Circuit itself previously held that where the parties “never were required to show good cause as mandated by Rule 26(c),” this provides a justification for departing from a stipulated confidentiality order. *In re “Agent Orange” Prod. Liab. Litig.*, 821 F.2d 139, 148 (2d Cir. 1987). Other circuits are in accord that parties cannot rely on stipulated, blanket confidentiality orders to protect documents in perpetuity. *E.g.*, *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988) (blanket orders “without a showing of good cause for confidentiality as to any individual documents” are “peculiarly subject to later modification”); *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (“Reliance will be less with a blanket order, because it is by nature overinclusive.”). The purpose of such a stipulated blanket order is to “expedit[e] the flow of pretrial discovery materials,” *Public Citizen*, 858 F.2d at 790,

not to establish that materials will remain protected in perpetuity. Such an order cannot justify a categorical removal of a district court's discretion to grant Section 1782 discovery.

And even if the district court erred in allowing discovery without Shell's participation, that could easily be corrected on remand. It does not justify a usurpation of the district court's discretionary authority to grant discovery under *Intel*.⁴

Thus the fact that the documents were originally produced under a confidentiality order does not provide a basis for departing from *Intel*.

D. The Second Circuit departed from *Intel*'s holding that discovery is committed to the discretion of the district court.

Under the *Intel* framework, if the statutory requirements for Section 1782 discovery are met, courts of appeal virtually *never* reverse discretionary grants of discovery by district courts – and indeed they should not. In the few cases where courts of appeals have found error in discretionary grants of discovery, remand for further proceedings is the typical result. *See, e.g., Pallares v. Kohn (In re Chevron Corp.)*, 650 F.3d 276 (3d Cir. 2011); *Fuhr v.*

⁴ The district court did not consider it necessary to formally make Shell a participant to the proceedings because Cravath made it clear that it “continue[s] to represent Shell” with respect to the issues in Ms. Kiobel's case. Dist. Ct. Dkt. No. 14 at 14:19. In any event, under the original confidentiality order, notice of any potential modifications of the order is given to Shell through its counsel of record – which is Respondent Cravath. Dist. Ct. Dkt. No. 4-3 at 31. Nor did the district court actually modify the original confidentiality order, which expressly allowed documents to be produced in response to legal process. *Id.* at 28.

Credit Suisse AG, 687 Fed. Appx. 810 (11th Cir. 2017) (unpublished). That is as it should be, since the discretion to apply the *Intel* factors belongs to the district court. *Intel*, 541 U.S. at 260.

Petitioner has located only one other case in which a court of appeals reversed a discretionary grant of Section 1782 discovery. In *Kestrel Coal PTY. LTD. v. Joy Global, Inc.*, 362 F.3d 401 (7th Cir. 2004), the Seventh Circuit reversed a district court's grant of discovery even though the statutory requirements had been met. *Id.* at 404, 406. Finding error in the district court's analysis, the court of appeals discussed whether to remand the case for further consideration, but ultimately concluded that "it would be an abuse of discretion for the district judge to order" any discovery. *Id.* at 406. This conclusion was based on the fact that the foreign court had concluded that the petitioner "does not need these documents to make out its claim," and thus "no purpose would be served by their production in the United States under § 1782." *Id.* But *Kestrel Coal* recognized that Section 1782 discovery *would* be appropriate if "the documents are relevant to the [foreign] suit, and difficult or impossible to obtain through that court's processes," *id.* – and that is exactly the situation here.

The Second Circuit's decision here presumes that, as a matter of law, the district court was *barred* from granting discovery because the documents at issue were "undiscoverable from Shell in the Netherlands." Pet. App. 17-18. But such a categorical bar is exactly what *Intel* rejected. If the district court made errors in its analysis, but nonetheless could have granted discovery in its discretion, the appropriate course

would have been remand for further proceedings – not requiring the district court to dismiss the petition.⁵

This Court should correct the Second Circuit’s erroneous ruling that a district court can be barred from exercising its discretion to grant discovery because the documents at issue are undiscoverable in the foreign forum. Following *Intel* is not optional.

II. To the extent there is any doubt, this Court should resolve whether obtaining non-privileged documents from counsel’s files, subject to a prior confidentiality order, presents an exception to *Intel*.

Intel is clear: foreign-discoverability should not be considered where the discovery materials would be readily accepted by the foreign court. To the extent that there is any lingering doubt, however, this Court should resolve it, for three reasons. First, there is an entrenched circuit split over this issue, with the Third Circuit coming to the opposite conclusion from the opinion below. Second, no other court of appeals has considered foreign non-discoverability as a basis for denying Section 1782 discovery since *Intel*. Third, this fact pattern arises often, guidance to the lower courts is warranted, and this case presents an ideal vehicle to resolve the circuit split.

⁵ Petitioner argued that the district court could, in fact, still grant the petition upon remand. Dist. Ct. Dkt. No. 39. Respondent Cravath argued the opposite, stating that the petition must be dismissed. Dist. Ct. Dkt. No. 40. The district court agreed with Respondent, denying the petition in its entirety and dismissing the case without further analysis. Dist. Ct. Dkt. No. 42.

A. There is an entrenched circuit split over this issue.

The Second Circuit concluded that this case was “extraordinary, and possibly unique” – implying that departure from *Intel* was therefore justified – because the documents were in the hands of a law firm and subject to a prior stipulated confidentiality order. Pet. App. 17-18. But these same circumstances appear in the Third Circuit’s ruling in *Biomet*, which followed *Intel* and held that discovery was permitted.

Biomet is indistinguishable on its facts from the opinion below – including in all of the factors that led the Second Circuit to its departure from *Intel*. In both cases, a party to European litigation sought Section 1782 discovery from U.S. law firms of documents that its opponent previously produced in discovery during U.S. litigation, which were subject to a protective order. 2018 U.S. App. LEXIS 21684 at *4-5. Petitioners in each faced almost identical procedural obstacles to obtaining the documents in the foreign forum – like the Dutch discovery procedures at issue here, the German procedures in *Biomet* only allowed the petitioner “to request the specific documents it already has,” and not the “broader set of documents pertinent to its [case] without being able to identify those individual documents.” *Id.* at *11-12. The Third Circuit specifically considered the fact that the documents had been previously produced under a protective order, but held that “discovery in one lawsuit that is subject to a protective order may not necessarily, or even often, preclude discovery in a subsequent lawsuit (with or without a protective order issued by the new court).” *Id.* at *18. And in *Biomet*, as here, the respondent did not show that the

foreign court would be unreceptive to U.S. discovery. *Id.* at *14-15.

Indeed, to the extent that there are distinctions with *Biomet*, the Third Circuit case is a *less* compelling case for discovery, for three reasons. First, while the district court here exercised its discretion to grant discovery, in *Biomet* the district court had done the opposite. In many cases where the statutory requirements are met, of course, the grant of discovery will be committed to the sound discretion of the district court. Yet while the Second Circuit found abuse of discretion in *granting* discovery, the Third Circuit found such abuse in *denying* it, holding that “it is far preferable” to “issu[e] a closely tailored discovery order rather than [] simply denying relief.” *Id.* at *18 (quoting *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995)).

Second, *Biomet* reversed the denial of discovery even though the case involved trade secrets and a protective order that barred the petitioner from accessing sealed materials. *Id.* at *4-5. In contrast, this case involves no trade secrets, the original protective order did not even allow documents to be filed under seal, and Petitioner previously had access to all the documents at issue. Indeed, as noted above, many of the documents are deposition transcripts that did not even originate with Cravath’s clients.

Third, in *Biomet*, the petitioner sought discovery from the law firms representing the producing party’s opponent, who had little incentive to be vigilant about enforcing confidentiality. *Id.* at *5. Here, Cravath represented and still represents the producing party, Dist. Ct. Dkt. No. 14 at 14:19-20, and has every

incentive to uphold the confidentiality order. Respondent cannot distinguish *Biomet*.⁶

While this circuit split is fresh, there is no reason to believe that it will be resolved without this Court's intervention. The Third Circuit issued its decision less than a month after the Second Circuit, while citing the opinion below. *See* 2018 U.S. App. LEXIS 21684 at *10. Yet it squarely rejected the Second Circuit's reasoning, and there is no reason to believe it will reconsider. There is likewise no reason to believe that the Second Circuit will reconsider; the conflict with *Biomet* was brought to its attention during its consideration of the en banc petition, Ct. App. Dkt. No. 172-1, but the court nonetheless denied rehearing. Pet. App. 41-42.

B. No other circuit has used foreign non-discoverability to deny Section 1782 discovery since *Intel*.

Aside from the opinion below, no court of appeals has used foreign non-discoverability as a basis for denying Section 1782 discovery since *Intel*. The Second Circuit's decision is a distinct outlier. *E.g.*,

⁶ The fact that *Biomet* is unpublished does not diminish the significance of this split – it merely confirms that the Third Circuit understood that the law was so clear that publication was unnecessary. This Court has granted certiorari where circuit decisions are in conflict, even where some are unpublished. *See, e.g., Kingsley v. Hendrickson*, ___ U.S. ___, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416 (2015). Indeed, this Court has even granted certiorari to review unpublished decisions, noting that “the fact that the Court of Appeals’ order under challenge here is unpublished carries no weight in [this Court’s] decision to review the case.” *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987). Here, of course, the Second Circuit’s decision is published and precedential.

Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1200 (11th Cir. 2016) (noting that *Intel* rejected a “purportedly implicit ‘foreign-discoverability rule’” and holding that other categorical limitations are similarly inappropriate).

To the extent that the circuits have considered discoverability at all, they have faithfully applied *Intel*'s holding that the key question is whether the foreign tribunal will accept the evidence at issue. *See, e.g., Nikon Corp. v. ASML U.S., Inc.*, 707 Fed. Appx. 476, 477 (9th Cir. Dec. 12, 2017) (unpublished) (noting that the fact that “the foreign tribunals would welcome the discoverable evidence” weighed in favor of discovery); *Andover Healthcare, Inc. v. 3M Co.*, 817 F.3d 621, 624 (8th Cir. 2016) (noting *Intel*'s holding and recognizing that foreign courts would be receptive, but upholding a discretionary denial of discovery for other reasons); *In re Clerici*, 481 F.3d 1324, 1333 n.12, 1335 (11th Cir. 2007) (affirming grant of discovery where the foreign court was receptive to it, and noting that *Intel* had abrogated the court's prior foreign-discoverability requirement). Again, the Second Circuit's decision here stands out, and should be corrected.

C. This fact pattern occurs frequently, and this case presents an ideal vehicle to resolve the circuit split.

Despite the Second Circuit's professed suggestion that the particulars of this case are highly unusual, *Biomet* also demonstrates that this is not the case; the same situation arose in two circuits within a month. Indeed this is one of the most natural applications of Section 1782 – when there is related litigation in another country, using documents already produced

in U.S. litigation serves Section 1782's aim of "providing efficient assistance to participants in international litigation." *Intel*, 542 U.S. at 252 (quoting *Advanced Micro Devices v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002)). And such documents will often be subject to confidentiality or protective orders – especially the kind of "stipulated 'blanket' protective orders" which are now "standard practice in complex cases." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citing Manual for Complex Litigation (Second), § 21.431 (1985)). As noted above, that was the situation in *Intel* itself. And although the documents here are housed in a law firm, that, too, is quite common for discovery documents.

Indeed, in addition to *Intel* itself, the opinion below, and *Biomet*, multiple Section 1782 applications have involved prior discovery documents subject to a confidentiality order. *See, e.g., In re POSCO*, 794 F.3d 1372, 1376-77 (Fed. Cir. 2015) (applying Section 1782 to a motion to modify a protective order to use prior U.S. discovery materials in foreign litigation); *Infineon Technologies AG v. Green Power Technologies Ltd.*, 247 F.R.D. 1 (D.D.C. 2005) (same); *Financialright GmbH v. Robert Bosch LLC*, 294 F. Supp. 3d 721, 732 (E.D. Mich. Feb. 12, 2018) (denying Section 1782 discovery of documents produced under a protective order because statutory requirements were not met). Others have involved discovery of documents held by law firms. *E.g., Pallares*, 650 F.3d at 279-80 (considering possibility that Chevron could obtain documents from law firm where they were not privileged); *Chevron Corp. v. Page (In re Naranjo)*, 768 F.3d 332, 351 (4th Cir. 2014) (same); *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). And several other cases have involved both prior discovery documents under protective order *and* discovery from counsel's files – the situation that the opinion below describes as “possibly unique.” Pet. App. 18. *See, e.g., Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 81, 84 (2d Cir. 2004) (where documents previously produced under protective order were sought from law firm, affirming discretionary denial of discovery because “the German government was obviously unreceptive to the judicial assistance”); *In re Berlamont*, No. 14-mc-00190, 2014 U.S. Dist. LEXIS 111594, *3-5 (S.D.N.Y. Aug. 1, 2014) (allowing discovery of documents subject to confidentiality order from prior litigation held by New York law firm); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2012 U.S. Dist. LEXIS 184777 (N.D. Cal. Oct. 22, 2012) (recommending denial of discovery of documents produced to law firm and protected by court order), *report & recommendation adopted by* 2013 U.S. Dist. LEXIS 8255 (N.D. Cal. Jan. 17, 2013); *see also* Ted Folkman, *Case of the Day: Kiobel v. Cravath, Swaine & Moore* (July 13, 2018), at <https://lettersblogatory.com/2018/07/-13/case-of-the-day-kiobel-v-cravath-swaine-moore/> (noting the author's personal experience with analogous cases).

Courts ruling on these petitions have, in their discretion, sometimes granted discovery and sometimes not, but none has suggested that these circumstances justify a departure from *Intel's* holding that foreign discoverability is not a prerequisite for granting a Section 1782 petition. To the extent there is any doubt, the lower courts should have guidance

on this recurring situation. Because the Second Circuit's holding raises the purely legal question of whether foreign discoverability is required, this case presents an ideal vehicle to provide that guidance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Because the Second Circuit made an unwarranted departure from unambiguous controlling law, this Court should consider summary reversal.

Respectfully submitted,

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November 28, 2018