UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE EX PARTE APPLICATION OF FOURWORLD EVENT OPPORTUNITIES FUND, L.P. : Docket #: 22-mc-00316

: New York, New York

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PROCEEDINGS BEFORE
THE HONORABLE KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

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THE DEPUTY CLERK: Your Honor, this is in the matter In re: Ex Parte Application of Fourworld Event Opportunities Fund, L.P.

Counsel, please state your name for the record beginning with plaintiff.

MR. ROSEN: Good afternoon. On behalf of Fourworld, my name is Marc Rosen, and I'm joined by my colleague, Alisa Benintendi.

THE COURT: Good afternoon to both of you. Thank you very much. This is Judge Failla.

Representing Mr. Ulbrich this afternoon?

MR. HARKNESS: This is Timothy Harkness from Freshfields Brookhouse Deringer US, LLP. And with me is Umer Ali, also Freshfields.

THE COURT: Okay. Thanks to both of you as well.

I appreciate everyone participating in this telephone conference. I also want to thank you at the outset for all of the very thoughtful briefing. And there was a lot of materials that I had to review in preparation for this decision, but what I'm going to do now with the theory that it will get to you quicker is to give you an oral decision. I will warn you, however, that this is an oral decision of considerable length, assuming my voice

holds out, and so I'll give you a moment at this time to just set your phones to mute or moot -- yeah, mute -- sorry -- so that I can -- I won't be interrupted when I'm reading. So I'll give you that moment now, and then I will begin.

As I mentioned, I do appreciate the parties' briefing and their submission of documents, including documents pertaining to the Stockholm District Court litigation and documents relating to Swedish and German law, all of which I've carefully reviewed in connection with this decision.

For the reasons that I'm about to state, I am granting respondent's motion to quash both the document and deposition subpoenas that have been served on the respondent, and I am vacating my prior order of November 10, 2022. I'll begin by giving a brief summary of the procedural history and the factual background of this case.

The petitioner, Fourworld, was a minority shareholder of Hembla AB. It's known now as Victoriahem Fastigheter AB, a Swedish real estate company, and HomeStar InvestCo AB, an indirect subsidiary of Vonovia SE, a German real estate company, acquired 61 percent of Hembla's share capital through an arrangement entered into between

Vonovia and Vega Holdco.

In September of 2009, Vonovia paid 215 Swedish krona per share. In line with Swedish law, HomeStar was then obligated to make an offer to acquire the remainder of Hembla's outstanding shares, and as a result, HomeStar issued a public-tender offer of 215 Swedish krona per share. The offer period was open from November 11th through December 9th of 2019, and HomeStar stated that the price would not be raised.

As it happened, HomeStar kept the offer open until January 8th of 2020, and while that offer was open, Hembla's shares continued trading. During this period, both an independent committee of Hembla's board and an investment bank retained by the board issued opinions stating, in essence, that HomeStar's offer was not fair to shareholders and that it did not reflect Hembla's true value.

By December 10th of 2020, enough Hembla shareholders had accepted HomeStar's offer that HomeStar owned more than 90 percent of Hembla's shares, which allowed HomeStar to initiate a compulsory acquisition of the remaining shares. HomeStar requested compulsory redemption of the remaining shares, many of which were owned by

petitioner. Subsequently, it applied for delisting of Hembla, which ceased trading on the NASDAQ Stockholm Exchange on January 10th of 2020.

Petitioner, as a minority shareholder, objected to the compulsory redemption of shares. In accordance with the Swedish Companies Act, HomeStar initiated an arbitration to resolve the dispute. The arbitration concerned the proper method for determining the price of Hembla's minority shares, and generally, under the Swedish Companies Act, minority shares are valued under a default rule known as either the Exchange Price Rule or the Listed Price Rule.

Under that rule, the purchase price for compulsorily redeemed shares traded on a regulated marketplace shall correspond to this share's listed value, unless special grounds otherwise dictate. If special grounds counsel departure from this rule, then the purchase price for a share shall be determined in such a manner that it corresponds to the price for the share which might be expected upon a sale under normal circumstances.

The arbitral tribunal found that special grounds did not exist for departure from the Listed Price Rule. Despite this arbitral ruling,

petitioner argued for substantially the same reasons in its application to this Court for a 1782 order that the listed price did not correspond to Hembla's true value.

Prior to issuing its merits decision, the arbitral tribunal rejected petitioner's document requests from Hembla and HomeStar. These requests included documents pertaining to business plans, reports and acquisition documents created by the various players involved in the acquisition. The tribunal found that the requests were irrelevant to determining the dispositive issue, which it defined as whether the Listed Price Rule should be applied, and it found that allegations of Hembla's surplus value did not constitute special grounds to depart from the default rule.

In line with the Companies Act, petitioners sought a repeal of the arbitral tribunal's decision in the Stockholm District Court, and that is the proceeding for which petitioner now seeks 1782 discovery. The Stockholm District court case was first filed in May of 2022. As in the arbitral proceeding, the determinative issue is whether there are Special Grounds for not applying the Listed Price Rule to value the compulsorily redeemed Hembla

shares.

In connection with this proceeding, petitioner filed new requests for production of documents from HomeStar, as well as non-parties Vonovia and Hembla, and these requests, respondent has characterized as essentially the same sought in the arbitration. The parties anticipate that the Stockholm District Court will rule on the document requests sometime this month, although, to the best of the Court's understanding, it hasn't happened yet.

Petitioner and HomeStar have been litigating these requests in the Stockholm Court for a period of months. HomeStar has taken the position that the requests seek irrelevant information. The Court has reviewed the submissions made in the Stockholm District Court, and they were attached as exhibits to the Wernberg declaration. Petitioner has not sought discovery from respondent in connection with the Stockholm District Court case, though that is understood.

So let me talk for a moment about the respondent, Mr. Ulbrich. He is a German national who lives in Germany and is a non-party to the Stockholm District Court proceedings. He has served

on Vonovia's supervisory board since August of 2014, and on that point, let me just pause for a moment.

Vonovia has a two-tier board structure consisting of a management board and a supervisory board. This is common in public German companies, but under this structure, the management board is responsible for managing the day-to-day business of the corporation and implementing business strategy. The management board is not subject to the supervisory board's direct instructions. By contrast, the supervisory board appoints and advises the management board and may approve certain large corporate transactions.

Even if the supervisory board members may not access files of the corporation in the ordinary course, the board and its members have certain statutory information rights. For example, the supervisory board may inspect and audit the books and records of the company, but this right must be exercised by majority vote of the board as a whole and not by individual board members. Both the board and individuals may request that the management board submit reports concerning the corporation's dealings, but this right does not give individuals the ability to request or inspect specific

documents, and these requests may be refused by the management board if the board determines that the individual or supervisory board are pursuing their own interests to the detriment of the company. Accordingly, if respondent requested reports from Vonovia, there is a chance that the management board would reject the request as against Vonovia's interest.

Respondent notes that he presently only has access to a limited number of documents prepared for supervisory-board and finance-committee meetings. These include notices of meeting, agendas, meeting minutes, and reports and summaries. The documents are stored on Vonovia's Diligent software system.

Respondent further attests that he does not -- and I'm quoting here -- "have access to any of the underlying communications or documents pertaining to the acquisition in the files of Vonovia or its subsidiaries." Supervisory board members, like the respondent, are also subject to certain statutory confidentiality obligations under German law. Under the German Stock Corporation Act, for example, supervisory board members are required to maintain confidentiality with respect to a corporation's secrets, and this would be

information, the confidentiality of which is in the objective interest of the company and which has been shared with only a limited circle.

Violations of this duty of confidentiality may be criminally prosecuted if the company makes a request to the government, and that request, the company is obligated to make if it is in the best interest of the company. Likewise, the company is generally obligated to seek civil liability against a supervisory board member for any breach of the confidentiality obligations. The duties of confidentiality are subject to certain exceptions. For example, they do not extend to lawful information requests by public authorities and courts or to circumstances where a member of the supervisory board sues the company.

On November 4th of 2022, petitioner filed its sealed Ex Parte § 1782 application. And based on the application and on the limited record presented to it, the Court granted the application in a sealed ex parte order on November 10th of 2022. Specifically, the Court granted petitioner's applications to serve two subpoenas; one related to documents, and the other for respondent's testimony. The subpoenas provide for broad discovery from

Vonovia, HomeStar, Blackstone and respondent related to the Hembla transaction and any documents created or sent in connection with the transaction or the lead-up to it.

For example, the document subpoena's first request is for, "all documents and communications concerning Hembla, the tender offer, the acquisition, and/or the buyout price for Hembla's stockholder shares, whether sent to and/or received from Vonovia, the Vonovia board of directors, HomeStar and the HomeStar board of directors, Hembla, Hembla's Board of Directors, the special committee, the Fairness Opinion Bank, and several other involved entities."

Let me, please, turn now to the legal standards.

§ 1782 of Title 28 of the United States Code provides that 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. As a result, the district court may grant such a petition if, one, the person from whom discovery is sought resides or is found in the district of the

district court to which the application is made; two, the discovery is for use in a proceeding before a foreign tribunal; and three, the application is made by a foreign or international tribunal or any interested person.

I'm quoting here and relying on the Second Circuit's 2018 decision in Kiobel by Samkalden v. Cravath, Swaine & Moore LLP; 895 F.3d 238.

But even where the statutory requirements are met, district courts have broad discretion to decide whether to grant or deny the discovery request. To guide district courts in this task, the Supreme Court has enunciated several discretionary factors to be considered in light of the twin aims of § 1782, which are defined as "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."

These factors are often called the Intel factors. They are set forth in Intel Corp. v. Advanced Micro Devices, Incorporated; 542 U.S. 241 from 2004. They include, number one, whether the person from whom discovery is sought is a participant in the foreign proceeding, in which case

the need for § 78 -- 1782 aid generally is not as apparent as it ordinarily is when the evidence is sought from a non-participant in the matter arising abroad; number two, the nature of the foreign tribunal, the character of the proceedings underway abroad and the receptivity of the foreign government or the court or agency abroad to U.S. Federal Court judicial assistance; number three, whether the § 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign government to the United States; and number four, whether the request is unduly intrusive or burdensome.

Respondent here argues that the instant subpoena should be quashed because the discovery sought is not for use in the Swedish proceeding and because the Intel factors counsel against foreign discovery. For the reasons that follow, this Court finds that the Intel factors weigh in favor of quashing the subpoenas.

I begin with the preliminary issue of whether the for-use statutory requirement is met. As just noted, respondent contains that it is not for use in a foreign proceeding because the legal question before the Stockholm District Court is a

narrow one, whether special grounds exist to depart from the Listed Price Rule. Respondent argues that the broad discovery into determining Hembla's fair value is irrelevant, as the arbitral tribunal found. Petitioner appears to concede that the arbitral tribunal will ultimately determine the value of the Hembla shares, but petitioner argues that discovery is, nonetheless, for use in the Stockholm District Court case because petitioner's claim in that court is that circumstances indicating that the fundamental value of Hembla does not accord with the stock-exchange price constitute special grounds for departing from the Listed Price Rule.

Discovery sought pursuant to § 1782 need not be necessary for the party to prevail in the foreign proceeding in order to satisfy the statutes for use requirement. Indeed, the Second Circuit has cautioned against equating this requirement with necessity of the information because such determination would entail a painstaking analysis not only of the evidence already available to the applicant, but also of the amount of evidence required to prevail in the foreign proceeding. Instead, the plain meaning of the phrase "for use in a proceeding" indicates something that will be

employed with some advantage or serve some use in the proceeding, not necessarily something without which the applicant could not prevail.

As such, the for-use requirement is liberally interpreted, and courts have described it as requiring only a de minimis showing that the information sought would be relevant to the foreign proceeding. As one example of that, I cite In re: Application of CBRE Global Investments (NL) B.V.; 2021 Westlaw 2894721. This Court found -- finds the analysis to be a close call, but one that must be made in light of 1782's liberality.

The Court understands respondent's contention, that the Stockholm District Court may follow the arbitral tribunal's lead and declare the type of evidence that petitioner seeks to introduce as irrelevant to the narrow issue at hand, but petitioner essentially argues that the share price and special-grounds issues in this proceeding overlap to a degree and that it is necessary to show that Hembla's fair value was not reflected in its market price.

This Court is not in a position to evaluate what is effectively a merits dispute in this § 1782 motion. Indeed, if the Court were to accept

respondent's argument, it would effectively be making the determination that special grounds do not, in fact, exist for departure from the Listed Price Rule. The parties' submissions indicate as much insofar as they disagree as to whether special grounds exist and the import of substantive Swedish law.

More to the point, the arbitral tribunal's decision received de novo review from the Stockholm District Court, and petitioner has made the threshold showing that any discovery could be used to argue its case before the Court. Again, the CBRE case I mentioned from the -- this district is something on which the Court relies. Respondent cannot argue that petitioner will not be able to introduce and argue based upon the discovery in the Stockholm District Court. He simply contends that petitioner's position is incorrect on the merits.

I'll pause here.

Petitioner has made the threshold statutory for-use showing, but respondent's arguments pertaining to the overall relevance of this discovery vis-à-vis the narrow legal issue in the Swedish District Court still have a role to play in this Court's consideration of the Intel factors,

which I will now discuss.

A The Court finds that the first Intel factor cuts against petitioner. That factor requires the district court to consider whether the information sought in the application is within the jurisdiction of the foreign court. That is discussed in a district-court decision In re Postalis; 2018 Westlaw 672546. That, in turn, cites In re Application of Elvis Presley Enterprises, LLC for an order to take discovery pursuant to 28 U.S.C. § 1782, and that's reported at 2016 Westlaw 843380.

So, traditionally, courts have considered the target of the discovery is a party to the underlying proceeding when weighing this factor. It's something that I mentioned earlier. But, in fact, party or non-party status is not dispositive. Rather, the Court must probe further, asking whether, for all intents and purposes, petitioners are seeking discovery from a person to the foreign proceeding and, thus, seeking evidence within the reach of the foreign tribunal. This is discussed by the Second Circuit in the case of Schmitz v. Bernstein Liebhard & Lifshitz, LLP; 376 F.3d 79.

For instance, when a subsidiary is party to a foreign proceeding but the parent is the discovery

target, the first Intel factor weighs against granting the discovery application because the evidence sought is within the foreign tribunal's jurisdictional reach. The Postalis and Elvis Presley Enterprise discussion -- cases I discussed a moment ago both speak to this issue.

Because it is the Court's duty to determine whether the evidence and real target of the relevant discovery is within the jurisdictional reach of the foreign tribunal, it largely finds the parties' dispute about EU Regulation 2020/1783, which provides a mechanism for an EU tribunal to obtain discovery located in another EU member state, to be immaterial. This Court does not believe that respondent himself is within the Stockholm District Court's jurisdiction because he is subject to the EU regulation, as that regulation does not appear to extend the Stockholm District Court's jurisdiction. And so, normally, that fact would weigh in favor of § 1782 discovery, but as is clear from petitioner's application from the subpoenas, respondent is not the real target of the requested discovery. He is merely a vehicle through which petitioner seeks discovery from Vonovia, HomeStar and Hembla. The latter two of those entities are plainly within the

reach of the Stockholm District Court.

Indeed, HomeStar is a party to the foreign proceeding, and petitioner is actively seeking discovery from these three entities in the Stockholm District Court; discovery which the parties agree is largely cumulative of that sought through this application. So in this respect, the application is quite similar to several cases in this district where sister courts have found that the first Intel factor cut against the petitioner because the petitioner was really seeking discovery from a non-party parent or subsidiary that was plainly within the possession of the related-party entity. And that was found, for example, in the Elvis Presley case and in the Schmitz case.

Those things are true here, but, even more, respondent is not a non-party parent entity as in the Elvis Presley case. He is an individual board member of a non-party parent entity, Vonovia, being asked to produce, for example, all documents and communications concerning Hembla created, sent, or received during the course of negotiations involving Vonovia, HomeStar, Blackstone or respondent. Much, if not all, of this information is plainly within the possession of parties to the Stockholm District

Court proceeding, the real targets of this § 1782 application, and not uniquely within respondent's possession.

So recognizing that, for all intents and purposes, the discovery nominally sought from respondent is, in essence, discovery from participants in the Stockholm District Court proceeding or within the reach of the Stockholm District Court, petitioner attempts to pivot and argues that the mere existence of some overlap or duplication is insufficient to preclude the production of § 1782 discovery.

Petitioner further argues that there is no real duplication in any event because the relevant entities are resisting petitioner's discovery requests in Stockholm. To be sure, some duplication is not enough to defeat a § 1782 application, and there is no requirement that an applicant must first seek discovery abroad before beginning a § 1782 petition. That was made clear by the Second Circuit in cases such as In re Catalyst Managerial Services, DMCC; 630 Federal Appendix 37, a Second Circuit summary order from 2017.

And the Court, this Court, is not suggesting that petitioner must first seek discovery

in Stockholm as to parties not within that court's reach before seeking a § 1782 application. That's discussed by the Second Circuit in cases such as Application of Malev Hungarian Airlines; 964 F.2d 97 from 1992. The petitioner cannot argue that entirely duplicative discovery is justified, especially given that the discovery would not be coming from respondent himself, but from Vonovia, HomeStar and Hembla simply by way of subpoenas served on him. And to the extent that petitioner notes that discovery that is duplicative in part can serve a corroborating purpose, this Court finds that argument to be premature.

As discussed, petitioner is not seeking discovery within respondent's possession for some use as a cross-check. It is seeking exactly the same discovery that is available to the Stockholm District Court from the parties before that court or within its jurisdiction, and evidence that is already the subject of discovery requests there. Thus, this situation is different from Catalyst Managerial Services, where the Second Circuit found that the district court did not abuse its discretion in ordering discovery from third-party banks because questions had been raised about the productions in

those proceedings.

Another case to which this case is distinguished is In re Aso, A-S-O, 2019 Westlaw 234543, where the petitioner sought discovery from third-party banks related to a party's purportedly secreted assets.

Further and separately, petitioner's argument that the requested discovery will provide corroborating information somehow puts the cart before the horse insofar as the real targets of petitioner's § 1782 application, petitioner's party opponents, have not yet even produced discovery. Petitioner can only speculate that corroboration would be necessary.

Finally, that the parties to the Stockholm proceeding are resisting discovery that is within that court's reach does not help petitioner. The first Intel factor does not ask whether a petitioner is presently -- excuse me -- within possession of evidence it has sought, but rather whether such evidence is available in -- to the foreign court. That the parties to the Stockholm District Court are presently fighting about production of discovery demonstrates that the Stockholm District Court can reach and order that discovery without this Court's

intervention.

The second Intel factor, to be fair, favors petitioner. It asks whether the foreign tribunal would be receptive to the discovery. Respondent does not clearly argue that the Stockholm District Court would not be receptive. Instead, respondent combines his analysis of the second and third Intel factors. So, in the absence of any meaningful debate on this issue, the Court finds that this Intel factor favors petitioner.

The third factor, however, cuts against petitioner. Here, respondent contends that the application is an attempt to circumvent the Stockholm District Court's resolution of petitioner's pending discovery request in contravention of the third Intel factor. Respondent expects that the Stockholm District Court will reject petitioner's request on relevance grounds in much the same way the arbitral tribunal did and, thus, argues the petitioner is seeking to preempt an adverse ruling.

Further, respondent argues that petitioner has not been transparent with this Court regarding the adverse ruling from the arbitral tribunal, which is an independent reason, he argues, to quash the

subpoenas. Petitioner responds that it has disclosed the relevant information to this Court and that the Stockholm District Court will review the arbitral tribunal's decision de novo, in any event.

So the third discretionary factor aims to protect against abuse of § 1782 as a vehicle to end-run foreign proof-gathering restrictions or other foreign policies. And courts have been loath to condone blatant end-runs around foreign proof-gathering restrictions or other policies of a foreign country and, therefore, have refused to grant § 1782 applications that would preempt or contradict decisions made by foreign tribunals. This is discussed in the case of In re XPO Logistics, Incorporated; 2017 Westlaw 2226593, and was later adopted by the district court at 2017 Westlaw 6343689.

This Court accepts that the Stockholm District Court reviews the arbitral tribunal's decision de novo. Though the Court would have appreciated being apprised of the tribunal's decision, the § 17 application -- § 1782 application pertains to the proceeding before the Stockholm District Court and not that tribunal. And it turns out that the Stockholm District Court may well

disagree with the arbitral tribunal, and given that, this application is somewhat different from that in the case of In re WinNet R CJSC; 2017 Westlaw 1373918, where the petitioner failed to disclose the extent to which Russian courts had repeatedly rejected its claims and failed to describe the adverse Russian rulings.

But this case is also not In re Aso on which the petitioner relies. In that case, the Court found that the third Intel factor weighed in favor of the petitioner because it was unclear whether the Japanese court had the authority to order discovery from non-parties who resided outside the court's jurisdiction, and because the lower Japanese court may have denied a discovery request because it did not have jurisdictional reach over the documents. Instead, for many of the same reasons the first Intel factor cuts against petitioner's application, so, too, does this factor.

Petitioner does not meaningfully contest that the § 1782 application is largely duplicative of requests made of HomeStar and Hembla, entities within the reach of the Stockholm District Court, and of requests already made of Vonovia through operation of the EU Regulations. So despite the

§ 1782 application being made of a nominal non-party to the foreign proceeding, this Court disagrees that the Stockholm District Court's pending decision to grant or deny the discovery request is irrelevant to the Court's receptiveness to the instant discovery, as was suggested at page 20 of petitioner's opposition.

Rather, petitioner has either set this course on a collision course with the Stockholm District court or put this Court in a position to order discovery largely cumulative of what that court might order. Because petitioner cannot contend that discovery sought through this application would, as respondent argues, completely subsume and render moot the Stockholm request, this Court finds that the third Intel factor favors quashing the subpoenas.

And courts in this district have often found that attempts to preempt or otherwise put the § 1782 application-receiving court in a position in conflict with the foreign tribunal weighs against granting a § 1782 application. For example, in In re Microsoft Corporation, petitioner sought the same discovery in its § 1782 application as it did from a request to the European Commission. And so

that was at 428 F. Supp. 2d 188, a Southern District decision from 2006.

That was abrogated on other -- abrogated on other grounds by a decision from the Second Circuit in 2019 in In re del Valle Ruiz. The petitioner and Microsoft had made the § 1782 application one day after requesting the same documents from the Commission. As such, it attempted to divest the Commission of jurisdiction over the matter and replace a European decision with one by an American court. This outcome was deemed plainly contrary to § 1782's purpose because the application pitted the Court against the Commission rather than fostering cooperation between them.

Likewise, though with facts somewhat distinct from this case, the case of In re Kreke Immobilien KG notes that this -- notes that this Intel prong does not count against a petitioner only when that party has already had its request requested by a foreign court. This factor also stands for the proposition that § 1782 was not intended as a vehicle to avoid an unfavorable discovery decision from a foreign tribunal. I'm quoting here from the opinion in the Kreke case, which is found at 2013 Westlaw 5966916.

To find the petitioner's application would preempt or otherwise moot the Stockholm District Court's pending decision with respect to most, if not all, of the discovery sought by petitioner is not -- to be clear, not to imply an exhaustion requirement. Indeed, this Court is aware of cases reiterating that § 1782 does not have an exhaustion requirement and that courts should not deny § 1782 applications on the basis that petitioner is first required to seek discovery from the foreign tribunal. As but one case on that point, I cite to In re Gushlack; 2011 Westlaw 3651268, an Eastern District decision from 2011.

But this circumstance is distinct insofar as the bulk of the requested discovery here is within the reach of the Stockholm District Court, and that court will imminently decide whether to order such discovery. At best, ordering discovery here would be cumulative of discovery the Stockholm District Court could order. At worst, this decision would directly contradict the Stockholm District Court's own resolution of the parties' discovery disputes. And as respondent points out in its reply at page 5, this goes above and beyond exhaustion as the Stockholm District Court is presently weighing

the relevance of this discovery and whether to order it in the first instance.

So this Court is not passing on the discoverability under foreign law of the evidence petitioner seeks, and it is not finding that the application seeks information that would not otherwise be discoverable in Sweden. Instead, the Stockholm District Court is imminently prepared to rule on whether the requested discovery is relevant and whether to order it. And this Court need not and will not contradict and undermine that court.

I turn now to the fourth Intel factor which cuts against petitioner, and that factor is often analyzed under the familiar standards of Rule 26 of the Federal Rules of Civil Procedure as discussed by the Second Circuit in Mees v. Buiter; 793 F.3d 291, a Second Circuit decision from 2015.

If the district court determines that a party's discovery application under § 1782 is made in bad faith or for the purpose of harassment or unreasonably seeks cumulative or irrelevant materials, the court is free to deny the application in toto. The Second Circuit issued that decision in Euromepa S.A. v. R. Esmerian, Incorporated; 51 F.3d 1095 in 1995.

And this court will not fully resolve the parties' dispute regarding the relevance of the requested discovery. As previously discussed in this opinion, both sides contest what is needed to argue the issue before the Stockholm District Court, and this Court remains cognizant of § 1782's broad purpose.

That being said, the Court understands the narrow issue before the Stockholm District Court related to whether departure from the Listed Price Rule is warranted. And the Court does not analyze the burden posed by ordering discovery in a vacuum. It balances the relevance of the discovery against the burden it poses. Though this Court is aware that the document subpoena here is broader than petitioner's discovery request for information within the reach of the Stockholm District Court, petitioner has not specifically argued that any of the discovery that is sought from this Court above and beyond that sought from the Stockholm District Court is necessary to argue its claims in the Stockholm District Court.

Thus, as a matter of proportionality, combined with this Court's finding as to the other Intel factors, the Court finds the petitioner's

application is unduly burdensome relevant to the -- relative to the relevance of the requested discovery. The respondent's arguments regarding custody and control do not perfectly map onto the Intel factors. The Court finds that respondent's apparent inability to freely access the bulk of the requested document discovery here cuts against the application and makes it burdensome.

On a § 1782 application, the testimony or statement shall be taken and the document or other thing produced in accordance with the Federal Rules of Civil Procedure and, therefore, the requested discovery must be in the responding party's possession, custody, or control. Though control has been construed broadly by the courts as the legal right, authority or practical ability to obtain the materials sought upon demand, it cannot be the case that legal entitlement alone is sufficient to find control where the subpoenaed party makes a showing that it lacks the practical ability to obtain access to documents. I quote here from In re Application of Potenima; 2015 Westlaw 4476612, a Southern District decision from a sister court in this district from 2015.

Here, petitioner does not merely seek a

whole swath of corporate documents. Its requests disregard any and all distinctions between and among corporate forums. It goes a step further and effectively equates a board member's position with custody and control of the parent and the subsidiaries' documents. Petitioner does nothing to contradict respondent's contention that, based on the particular structure of German companies and the distinction between management boards and supervisory boards, respondent does not have the practical ability to access the document discovery petitioner seeks. Instead, petitioner argues that respondent can receive reports from Vonovia in his individual capacity and can inspect Vonovia's books and records if the Board as a whole had issued a prior resolution.

Now, as to the former point, respondent correctly points out that a party has no obligation to create new documents in discovery. And that's discussed at cases such as Scantibodies Laboratory, Inc. v. Church & Dwight Company; 2016 Westlaw 11271874. And as to the latter point, petitioner erroneously equates respondent's purported ability to meaningfully influence the supervisory board's decision to pass a resolution allowing respondent to

freely access documents with respondent's custody or control over the documents. Vonovia's two-tier structure effectively guarantees that respondent does not have possession of a variety of materials petitioner seeks.

Further, petitioner makes no showing that, beyond Vonovia, respondent necessarily has access to Vonovia's subsidiaries' documents either. Respondent does concede that some documents, such as supervisory board reports related to the Hembla acquisition, may be accessible via Vonovia's Diligent document management system. And the Court is not persuaded by respondent's argument that Vonovia can simply restrict respondent's access to this system, but the requests for these documents appear to this Court to be cumulative of the requests already made of the corporate entities, and it is well within the Court's discretion to consider this fact in finding whether the application is unduly burdensome.

Further, two facts distinct to ordering discovery from a German national residing in Germany compounds the burden here. Those facts are the duty of confidentiality and the operation of the General Data Protection Regulation. The Court need not find

that respondent will surely face a criminal or civil liability under German law for complying with this Court's order before finding that the operation of German law increases respondent's burden. Indeed, petitioner does not meaningfully contest that German law imposes statutory duties of confidentiality and that respondent would, at a minimum, have to appeal to exceptions to these statutory obligations.

Both petitioner and respondent cite to authority that is readily distinguishable on this issue. For example, although respondent cites to Tiffany, LLC v. Qi Andrew; 276 F.R.D 143, he does not perform the comity analysis required to assert foreign law as a bar to production. And In re Polygon Global Partners, LLP concerns an entirely different Spanish secrecy law, and petitioner offers no meaningful proof that any issues here for respondent in his individual capacity would be resolved through operation of a protective order.

The Polygon case is found at 2021 Westlaw 2117397. But, again, this Court need not resolve the parties' dispute in order to find that operation of German law, at the very least, increases the burden on respondent, particularly in the context of the Court's other findings.

Similarly, though the parties dispute the extent of the burden occasioned by operation of the GDPR, at a minimum, it will pose an incremental burden on respondent who is effectively being called upon to serve as the vehicle for discovery into various separate corporate entities.

As with the Court's discussion of the duty of confidentiality, the costs imposed by the GDPR are not dispositive, but instead compound the burden occasioned by petitioner's requested discovery. Respondent points to specific costs that the GDPR will impose on respondent being called to engage in extensive document discovery. And the Polygon case the Court just mentioned was perfectly consistent with recognizing these costs as relevant, but not dispositive with burden inquiry. Here, the incremental costs imposed by the GDPR, taking into account the Court's findings as to the other Intel factors and the other burdens created by this application, counsel in favor of quashing the subpoenas.

Finally, this Court would be remiss to not point out the petitioner's application has stretched the bounds of tag jurisdiction to an extreme. The respondent has not argued that he was not found in

this district for purposes of § 1782 when he was served with the subpoenas. He rightfully points out that tag jurisdiction remains a valid method of acquiring personal jurisdiction over an individual, though not over a corporation through the persons of its officers. I quote here from Estate of Ungar v. Palestinian Authority; 400 F. Supp. 2d 541, a Southern District from 2005 that was later affirmed by the Second Circuit in a summary order.

So no doubt, this Court has jurisdiction to order discovery from respondent qua respondent, but as discussed, these subpoenas really seek discovery from Vonovia and its subsidiaries and not respondent. And though the location of evidence abroad is no bar to § 1782 discovery, a court may properly and, in fact, should consider the location of documents and other evidence when deciding whether to exercise its jurisdiction to authorize such discovery. I'm quoting here from the del Valle Ruiz decision from the Second Circuit.

In sum, petitioner seeks broad discovery from, number one, a parent corporation for which respondent merely serves as a board member, and number two, that parent's subsidiaries, all because respondent, in his personal capacity, traveled

through this district. All of the relevant discovery is located in either Sweden or Germany and would be in respondent's possession not by dint of his status as an individual, but instead because of his relation to corporate entities related to the underlying action.

Though the Court need not announce some undue jurisdictional bar to such discovery, certainly, these facts bear on the Court's analysis and impose yet another burden on respondent. To this point, the Court has largely focused on the document subpoena, as did the parties in their briefing. Indeed, petitioner hardly mentions the deposition subpoena other than stating in its opposition at page 25 that its discovery requests seek documents and testimony critical to its claims.

Respondent, on the other hand, makes specific arguments in favor of quashing the deposition subpoena premised on respondent's own averments that he, number one, has minimal involvement in the Hembla transaction and, number two, has no specific recollection of the transaction. That's found at pages 21 and 22 of the opening brief, and at Mr. Ulbrich's Declaration at paragraph 9.

This Court will not rehash its analysis with respect to the deposition subpoena, and the parties largely appear to agree that § 1782 analysis with respect to the deposition subpoena is the same. That being said, absent any specific arguments by petitioner rebuffing respondent's sworn statements that he was minimally involved with the Hembla transaction and has no recollection of it, the Court finds that the deposition subpoena should be quashed on this basis.

Courts in this district have frequently quashed deposition subpoenas served on individuals where the individual specifically avers that he or she has no recollection of the pertinent event. That includes the Polygon case I mentioned a little while ago; Top Matrix Holdings Limited, 2020 Westlaw 248716; Lee v. Kucker & Bruh, LLP, 2013 Westlaw 68729 as just a sampling of the cases.

And so for those reasons, this Court quashes the deposition subpoena. I bring you now to the conclusion of this decision.

For the reasons discussed, the Court quashes both the document and deposition subpoenas in full. It vacates its November 2, 2022 order. Despite respondent's arguments and clear indication

that he is opposed to all discovery, respondent -- excuse me -- petitioner did not respond by seeking narrower discovery or by pointing out requests that might not be cumulative or that might not be within the reach of the Stockholm District Court.

This Court, as it happens, does not believe that a narrower document subpoena would alleviate the burdens imposed by -- imposed on responded by such a subpoena. And for this reason, it's not going to be -- it's not going to negotiate against itself. Instead, it is quashing the subpoenas.

I do thank all of you for listening to this decision. I wish those of you involved in the district-court proceedings in Stockholm the very best of luck. We are adjourned. Thank you very much.

C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of In re: Ex Parte Application of Fourworld Event Opportunities Fund L.P., Docket #22-mc-00316, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Mignano

Marissa Mignano

Date: April 14, 2023

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: EX PARTE APPLICATION OF FOURWORLD EVENT OPPORTUNITIES FUND L.P.	22 Misc. 316 (KPF) **ORDER**

KATHERINE POLK FAILLA, District Judge:

As discussed during the Court's oral decision of April 12, 2023, Respondent's motion to quash Petitioner's Section 1782 subpoenas and to vacate the Court's November 10, 2022 Order is GRANTED in its entirety. (Dkt. #17). The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: April 12, 2023
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge