No. _____

# In the
# Supreme Court of the United States

ZF AUTOMOTIVE US, INC., GERALD DEKKER, AND CHRISTOPHE MARNAT,

*Petitioners*,

v.

LUXSHARE, LTD.,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT


Sean M. Berkowitz
LATHAM & WATKINS LLP
330 N. Wabash
Suite 2800
Chicago, IL 60611

Zachary L. Rowen
Justin S. Kirschner
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

Roman Martinez
*Counsel of Record*
Tyce R. Walters
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

*Counsel for Petitioners*

## QUESTION PRESENTED

The question presented in this case is substantively identical to the question presented in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794 (oral argument originally scheduled for Oct. 5, 2021; case removed from oral argument calendar Sept. 8, 2021):

Whether 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in "a foreign or international tribunal," encompasses private commercial arbitral tribunals, as the U.S. Courts of Appeals for the Fourth and Sixth Circuits have held, or excludes such tribunals, as the U.S. Courts of Appeals for the Second, Fifth, and Seventh Circuits have held.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner ZF Automotive US Inc. hereby states that it is not a publicly traded company, it is owned by a parent company ZF Friedrichshafen AG, and no publicly held corporation owns 10% or more of its stock, nor does any publicly held corporation own 10% or more of the stock of ZF Friedrichshafen AG.

## LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioners state that there are no proceedings directly related to this case in this Court.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners ZF Automotive US Inc., Gerald Dekker, and Christophe Marnat respectfully petition this Court for a writ of certiorari before judgment to the United States Court of Appeals for the Sixth Circuit, and seek reversal of the order of the United States District Court for the Eastern District of Michigan requiring petitioners to produce discovery under 28 U.S.C. § 1782(a) (Section 1782).

## OPINIONS AND ORDERS BELOW

The order of the district court granting the *ex parte* application of respondent Luxshare, Ltd. to take discovery under Section 1782 (App. 20a-21a), is not reported. The order of the district court denying petitioners' motion to quash Luxshare's Section 1782 subpoenas (App. 1a-19a), is also not reported but is available at 2021 WL 2705477. The district court's order denying petitioners' motion to stay and granting Luxshare's motion to compel production of discovery (App. 57a-69a) is not reported but is available at 2021 WL 3629899.

## JURISDICTION

The order of the district court denying the motion to quash and ordering discovery was entered on July 1, 2021. App. 1a-19a. Petitioners filed a notice of appeal on July 20, 2021. Dkt. No. 32.[1] The

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[1] Citations to "Dkt. No. [#]" refer to documents filed below in *In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings*, No. 2:20-mc-51245 (E.D. Mich.). Citations to "CA6 ECF No. [#]" refer to documents filed in *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 21-2736 (6th Cir.).

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1782(a) of Title 28 provides, in relevant part:

> 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 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.

28 U.S.C. § 1782(a).

## INTRODUCTION

This case squarely presents the same legal question currently pending before this Court in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794 (oral argument originally scheduled for Oct. 5, 2021; case removed from oral argument calendar Sept. 8, 2021)—whether a private commercial arbitral panel

qualifies as a "foreign or international tribunal" under Section 1782, which authorizes district courts to compel testimony or evidence "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a); *see Servotronics* Pet. i (filed Dec. 7, 2020). Unlike *Servotronics*, however, this case is free from a potential jurisdictional hurdle: Whereas the respondents in *Servotronics* have raised a substantial concern that *Servotronics* is or soon will be moot—and the petitioners have just indicated that they plan to submit a motion for voluntary dismissal, *see Servotronics* Letter of Sept. 8, 2021—this case undeniably presents a live controversy. If, as seems likely, *Servotronics* is dismissed, this case thus presents an ideal vehicle by which the Court could resolve the longstanding circuit split and determine—once and for all—what Section 1782 means.

In both this case and *Servotronics,* one party sought discovery that it intended to use before a private arbitral panel against the other party. In *Servotronics*, the Seventh Circuit *rejected* the request for discovery, holding that Section 1782 does not allow such discovery because a private arbitral panel is not a "foreign or international tribunal." Here, the district court *granted* a virtually identical discovery request based on binding Sixth Circuit precedent holding that a private arbitral panel *is* a "foreign or international tribunal." App. 17a-19a (citing *In re Application to Obtain Discovery for Use in Foreign Proceedings* (*Abdul Latif Jameel Transp. Co. v. FedEx Corp.)*, 939 F.3d 710, 730 (6th Cir. 2019) ("*Abdul Latif*")). Petitioners in this case have appealed that decision to the Sixth Circuit, which will be bound to apply its prior decision in *Abdul Latif*, 939 F.3d at

717-31, holding that Section 1782 discovery is potentially available.

This Court granted certiorari in *Servotronics* on March 22, 2021, and on July 13, 2021 it scheduled oral argument to be held on October 5, 2021. The *Servotronics* briefing made clear, however, that there exists a substantial question about whether that case is—or will soon become—moot. Specifically, the foreign arbitration hearing at issue in *Servotronics* concluded months ago, and a final decision in that proceeding may be imminent. The *Servotronics* respondents thus contended that because the evidentiary record is now closed, the petitioners have no ongoing interest in obtaining the Section 1782 discovery they originally sought. *Servotronics* Rolls-Royce Br. 12-14 (June 21, 2021); *Servotronics* Boeing Br. 12-14 (June 21, 2021). On September 8, 2021, petitioner in *Servotronics* notified this Court that it intended to file a motion for voluntary dismissal pursuant to Rule 46 of the Rules of this Court. *Servotronics* Letter of Sept. 8, 2021. This Court subsequently removed *Servotronics* from the October 2021 argument calendar.

If, as seems likely, the Court grants Servotronics' motion for voluntary dismissal, it will be unable to use that case to resolve the underlying question as to whether Section 1782 applies to private foreign arbitration proceedings. It will thereby leave intact an entrenched circuit split separating the Fourth and Sixth Circuits (which have said that Section 1782 *does* apply in such circumstances), from the Second, Fifth, and Seventh Circuits (which have said it does *not*). And a circuit split is particularly pernicious in this context: As amici in *Servotronics* have explained, "divergent approaches [between the circuits] may

disincentivize parties from entering into contractual agreements to privately arbitrate disputes" in the first place. *See Servotronics* Atlanta Int'l Arbitration Soc'y Amicus Br. in Supp. of Cert. 9 (Jan. 11, 2021).

Courts and litigants thus have a strong interest in having this Court clarify whether and how Section 1782 applies to foreign private arbitration proceedings. That is presumably why this Court granted review in *Servotronics* in the first place. But if *Servotronics* is dismissed, the existing circuit split—and the disuniformity and uncertainty it engenders—will persist.

In these unusual circumstances, petitioners are seeking a writ of certiorari before judgment. Petitioners appreciate the atypical nature of this request, but believe there is good cause to seek the Court's intervention at this time. Petitioners respectfully submit that this Court should follow its prior practice of granting certiorari before judgment "when a similar or identical question of constitutional or other importance was before the Court in another case," and when granting review in the second case would facilitate review of an important question presented. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.20 (11th ed. 2019, online) (citing eleven examples).

Granting the petition (or holding the petition, pending the Court's ultimate resolution of *Servotronics*) would ensure that the Court is able to definitively resolve the important question on which it granted certiorari in *Servotronics*, regardless of the likely dismissal of that case. The proper interpretation of Section 1782 has intractably divided the federal courts of appeal, and only a decision by this Court can ensure uniform application of this

important federal law. The Court should use this case to ensure that this question receives an answer.[2]

## STATEMENT OF THE CASE

### A. The Parties And The Underlying Transaction

Petitioner ZF US is a Michigan-based automotive parts manufacturer and an indirect subsidiary of ZF Friedrichshafen AG ("ZF AG"), a German corporation headquartered in Germany. Dkt. No. 6-4 at 1-2 (¶¶ 2-5). Petitioner Gerald Dekker was formerly a Vice President at ZF US. Petitioner Christophe Marnat is Chief Operations Officer and formerly Executive Vice President of ZF US. *Id.* at 2 (¶ 6).

In August 2017, after several months of negotiations and due diligence, ZF AG sold its Global Body Control Systems business unit to Respondent Luxshare, a Hong Kong limited liability company. *See id.* at 2-3 (¶¶ 8, 11). The terms of the sale are contained in a Master Purchase Agreement ("MPA"). *See* Dkt. No. 6-2 at Exh. A. The MPA provides that it is to be governed by German law, *id.* § 20.10.1, and requires that all disputes:

> shall be exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS),

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[2] Petitioners are currently seeking a stay of the district court's discovery order with the Sixth Circuit, and the district court recently specified that petitioners need not produce the Section 1782 discovery until 14 days after the Sixth Circuit resolves that stay request. *See* App. 68a-69a. If the Sixth Circuit declines to grant a stay, petitioners will seek a stay from this Court well before that 14-day period expires.

> including the Supplementary Rules for Expedited Proceedings, . . . without recourse to the ordinary courts of law.

*Id.* § 20.10.2.

As relevant here, the DIS Rules chosen by the parties place the DIS arbitral panel in charge of taking evidence in its own proceedings, empowering the panel to "on its own initiative, appoint experts, . . . and order any party to produce or make available any documents or electronically stored data." *See* Dkt. No. 6-2 at Exh. B (2018 DIS Arbitration Rules, art. 28.2). The parties are restricted to one written submission and one oral hearing after opening pleadings, and the arbitral panel is directed to make a final award within six months from its formation, if possible. *See id.* (Annex 4).

As Luxshare alleges, "[a]fter the [April 2018] [c]losing" of its deal with ZF AG, it learned that ZF US fraudulently concealed information during the negotiation and diligence process. *See* Dkt. No. 1 at 9-10. Luxshare, however, did not raise any of these fraud allegations in its many discussions with individuals from ZF AG in the two-and-a-half years that followed. *See* Dkt. No. 6-4 at Exh. 3 at 3-4 (¶ 12).

### B. Luxshare Commences The Section 1782 Action Years After The Transaction Closed

1. On October 16, 2020, more than two years after the transaction's closing, Luxshare filed an *ex parte* application for discovery under Section 1782. *See* Dkt. No. 1. Four days later, on October 22, 2020—and without awaiting a response by petitioners—the district court granted Luxshare's application in a one-

page order, with no analysis of the applicable law. *See* Dkt. No. 3. The following day, Luxshare served petitioners with subpoenas. *See* Dkt. No. 6 at 7.

On December 4, 2020, petitioners timely moved to quash the subpoenas on various grounds, including that the application should have been denied in its entirety. *See* Dkt. No. 6. Petitioners argued that Luxshare's application did not satisfy two of Section 1782's statutory prerequisites—namely, the DIS arbitration was not "within reasonable contemplation," and the arbitral panel was not a "tribunal" within the meaning of Section 1782. *See id.* at 9-11 & n.4. Although petitioners recognized that the Sixth Circuit has held that a private arbitral body qualifies as a Section 1782 tribunal, *see Abdul Latif*, 939 F.3d at 717-31, petitioners also noted there was a circuit split on this issue. Petitioners thus preserved their argument that the prospective DIS panel was not a "tribunal," consistent with the law in the Second, Fifth, and Seventh Circuits, as well as various district courts. *See* Dkt. No. 6 at 11-12 n.4. Three days later, the petition for a writ of certiorari was filed with this Court in *Servotronics,* presenting the question whether a foreign private arbitral panel is a Section 1782 "tribunal." *Servotronics* Pet. i.

Petitioners further argued that even if Luxshare *had* met Section 1782's statutory prerequisites, the subpoenas should still be quashed because the four applicable discretionary factors weighed against permitting such discovery. *See* Dkt. No. 6 at 12-25; Dkt. No. 14 at 2-5; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246-47 (2004) (establishing factors). On February 24, 2021, the magistrate judge held oral argument on petitioners' motion to quash. There, petitioners again preserved

the argument that foreign private arbitrations are not Section 1782 "tribunals," in the event this Court granted review in *Servotronics*. *See* Dkt. No. 25 at 6:20-8:5.

2. On March 22, 2021, this Court granted certiorari in *Servotronics*, as to the question: "Whether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in 'a foreign or international tribunal' encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and, in the case [at issue], the Seventh Circuit, have held." *Servotronics* Pet. i. The Court originally scheduled oral argument in *Servotronics* for October 5, 2021, the second day of its upcoming term.

In *Servotronics*, petitioner Servotronics seeks Section 1782 discovery from respondents Boeing and Rolls-Royce for use in a private arbitration in London. *Servotronics* Pet. 2-6. The Seventh Circuit denied the application for discovery, holding that Section 1782 was not available to obtain discovery for use in such private arbitral proceedings. *Id.* at 5; *Servotronics* Pet. App. 1a-16a.

In the two months following this Court's grant of review, the London arbitration proceedings for which Servotronics sought its discovery continued to move forward, culminating in a hearing that lasted from May 10 to 21, 2021. *See Servotronics* Rolls-Royce Br. 8. In their merits briefs to this Court, both Boeing and Rolls-Royce asserted as their primary argument that the arbitral hearing's conclusion renders the case moot, and that in any event the case will undoubtedly be moot once the arbitrators announce their final

decision (which could occur at any moment). *Id.* at 12-14; *Servotronics* Boeing Br. 12-14. Presumably for these reasons, Servotronics recently notified this Court that it intended to file a motion for voluntary dismissal, *Servotronics* Letter of Sept. 8, 2021. The Court then removed the case from its argument calendar.

3. Meanwhile, in the proceedings below, petitioners here notified the district court of the grant of certiorari in *Servotronics*. Dkt. No. 22. On May 27, 2021, the magistrate judge partially granted and partially denied petitioners' motion to quash. *See* Dkt. No. 26. Specifically, it ordered ZF US and Mr. Marnat to respond to their respective document subpoenas, subject to certain limitations, and ordered either Mr. Marnat or Mr. Dekker to sit for a deposition. *Id.* at 28-35. Further, though no party had briefed the issue, the magistrate judge expressly declined to stay discovery pending *Servotronics*. *Id.* at 25-27.

Petitioners timely objected to the magistrate judge's order. Dkt. No. 27. The district court overruled petitioners' objections. Reviewing the magistrate judge's order under the deferential "clearly erroneous or contrary to law" standard, the district court deferred to the magistrate judge's assessment of the *Intel* factors. *See* App. 4a-17a (citation omitted). The court also approved the magistrate judge's decision not to stay discovery pending *Servotronics*. *See id.* at 17a-19a.

On July 12, 2021, petitioners' counsel informed Luxshare of their intent to appeal. *See* Dkt. No. 31-3 at 5. Recognizing Luxshare's approaching deadline for filing any arbitration, petitioners offered to agree not to invoke the statute of limitations on Luxshare's

putative claims before the DIS during the pendency of petitioners' appeal. *Id.* Luxshare rejected that proposal. *Id.* at 2.[3]

On July 16, 2021, petitioners moved in the district court under Federal Rule of Appellate Procedure 8 to stay proceedings pending resolution of their appeal. *See* Dkt. No. 30. In that motion, petitioners reiterated their commitment not to invoke the statute of limitations on Luxshare's deadline to file its arbitration if a stay were granted. *Id.* at 17; *see supra* at 11 n.3. In response, Luxshare filed a motion to compel the production of certain documents. *See* Dkt. No. 31.

On August 17, 2021, the district court denied petitioners' motion for a stay pending appeal, and simultaneously granted Luxshare's motion to compel. App. 57a-69a. The district court recognized, however, that (1) petitioners had also sought a stay from the Sixth Circuit; (2) there was "some legal basis for ZF US to appeal and seek a stay given the state of the

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[3] German law is clear that invocation of the statute of limitations is an affirmative defense that can be waived by a defendant. Petitioners have committed to refraining from raising that defense for any arbitration filed within four months from the expiration of a stay entered by the Sixth Circuit, and if necessary they will make the same commitment as to any stay issued by this Court. *See supra* at 6 n.2. A party's commitment not to invoke the statute of limitations for a specific period of time is fully enforceable. Bundesgerichtshof [BGH] [Federal Court of Justice], 16 March 2009, II ZR 32/08, marginal number 22; 17 Dec. 2015, IX ZR 61/14, marginal number 42-43; 10 Nov. 2020, VI ZR 285/19, marginal number 15 (collectively available at https://www.bundesgerichtshof.de/DE/Entscheidungen/entscheidungen_node.html; and certified English translations of relevant excerpts provided to counsel for respondent with this petition).

law in the Sixth Circuit and the fact that the issue is pending before the Supreme Court"; and (3) ZF US had "'engaged in good-faith efforts to collect responsive documents to be prepared to expeditiously produce these documents.'" App. 68a-69a (citation omitted). Accordingly, the district court specified that petitioners need not produce any discovery to Luxshare now, but would have 14 days after any denial by the Sixth Circuit of the motion to stay to produce the requested discovery. *Id.* at 69a.[4]

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[4] Shortly after petitioners' filed their notice of appeal, the Sixth Circuit issued an order for the parties to brief the question of appellate jurisdiction, noting that discovery orders are ordinarily not appealable absent the threat of contempt. Petitioners accordingly briefed that issue, explaining that the federal courts of appeals uniformly agree that in the unique context of Section 1782, an order requiring the production of discovery is "final" for purposes of 28 U.S.C. § 1291, because "[o]nce the district court has ruled on the parties' motions concerning the evidentiary requests, there is no further case or controversy before the district court." *In re Application of Furstenberg Fin. SAS* (*Furstenberg Fin. SAS v. Litai Assets LLC)*, 877 F.3d 1031, 1034 (11th Cir. 2017) (alteration in original) (quoting *United States v. Global Fishing, Inc. (In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.)*, 634 F.3d 557, 566 (9th Cir. 2011); *see* CA6 ECF No. 12; *see also In re Premises*, 634 F.3d at 566 (noting that for decades, courts of appeals "have permitted appeals from a district court's orders under [Section] 1782, even if the complaining party has not subjected himself or herself to contempt sanctions"); *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 189 (3d Cir. 1999); *In re Letters Rogatory Issued by the Dir. of Inspection of the Gov't of India*, 385 F.2d 1017, 1018 (2d Cir. 1967).

## REASONS FOR GRANTING THE WRIT

### I. Granting Certiorari Before Judgment Is The Best Way To Resolve The Vital Question Of Section 1782's Scope If *Servotronics* Is Dismissed

The question presented in this case is the exact same question on which this Court already granted review in *Servotronics*: Whether "the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in 'a foreign or international tribunal' encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals . . . as the Second, Fifth, and . . . the Seventh Circuit, have held." *Servotronics* Pet. i; *see supra* at i. But the Court appears unlikely to resolve this crucial issue in *Servotronics*, given that petitioner in that case plans to move for voluntary dismissal. If *Servotronics* is dismissed, the Court can and should grant certiorari here in order to resolve the Section 1782 issue.

1. In *Servotronics*, the Court planned to address the fundamental question whether Section 1782 can be used to obtain discovery in connection with foreign private arbitrations. Though the Sixth Circuit and Fourth Circuits have previously answered that question in the affirmative, the Second, Fifth, and Seventh Circuits—and district courts in many jurisdictions—have held that foreign private arbitrations are *not* Section 1782 "tribunal[s]." *See, e.g.*, *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999); *National Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 185-86 (2d Cir. 1999); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d

689, 696 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021). Indeed, one district court within the Third Circuit only recently sided with the majority of circuits in holding that private arbitrations are not Section 1782 tribunals, *see In re EWE Gasspeicher GmbH*, No. CV 19-mc-109-RGA, 2020 WL 1272612, at *2 (D. Del. Mar. 17, 2020), *appeal docketed*, No. 20-1830 (3d Cir. Apr. 24, 2020), while a district court within the Ninth Circuit sided with the Sixth Circuit in holding that private arbitrations are Section 1782 tribunals, *see HRC-Hainan Holding Co., LLC v. Yihan Hu,* No. 19-mc-80277-TSH, 2020 WL 906719, at *4 (N.D. Cal. Feb. 25, 2020), *appeal docketed*, No. 20-15371 (9th Cir. Mar. 4, 2020); *see also* Order, *HRC-Hainan Holding Co.*, No. 20-15371 (9th Cir. Mar. 22, 2021) (holding Ninth Circuit appeal in abeyance pending this Court's resolution of *Servotronics*). This question is thus every bit as vital today—and the split between the circuits every bit as deep—as it was when this Court granted review in *Servotronics*.

A circuit split on this issue is particularly troublesome because of the uncertainty that it creates and the forum shopping it encourages. A party seeking discovery for use in a private arbitration may enlist the United States courts in that effort if it sues in Cleveland, but not if it sues in Chicago. And that same party will be unsure whether or not it can make use of the federal courts if it sues in Los Angeles. Moreover, proper venue may depend in large part on where relevant witnesses and documents happen to be located at the time the Section 1782 application is brought. Such uncertainty undermines many of the key advantages of private arbitration: "[D]ivergent approaches [between the circuits] may disincentivize parties from entering into contractual agreements to

privately arbitrate disputes," as it will often be impossible to know *ex ante* in which circuits potential witnesses will be located—much less how those circuits which have not weighed in on the issue will come out. *See Servotronics* Atlanta Int'l Arbitration Soc'y Amicus Br. in Supp. of Cert. 9.

This uncertainty explains why, after the Sixth Circuit initiated the current circuit split by first interpreting Section 1782 to encompass private arbitrations, "the international arbitration community was flooded with scores of comments in articles, legal blogs and law firm 'alerts' commenting on the circuit split and the need for Supreme Court review." *Servotronics* Int'l Inst. for Conflict Prevention & Resolution Amicus Br. in Supp. of Cert. 12 & n.8 (Jan. 5, 2021) (collecting relevant sources).[5] As one amicus informed the Court, "it cannot be overstated that the international arbitration community is anxiously awaiting the Supreme Court's definitive resolution of this important issue of federal law that has significant implications globally for the resolution of disputes arising from cross-

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[5] There have also been at least four law review articles written on this issue. *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089 (2020); Recent Case, *Statutory Interpretation—Textualism—Sixth Circuit Holds That Private Commercial Arbitration is a Foreign or International Tribunal—In re: Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019), 133 Harv. L. Rev. 2627 (2020); Jason Arendt, Comment, *Authorization of Discovery in International Commercial Arbitration: Demystifying the Sixth Circuit's Statutory Construction of 28 U.S.C. § 1782(a)*, 9 Am. Univ. Bus. L. Rev. 417 (2020); Alejandro A. Nava Cuenca, Note, *Debunking the Myths: International Commercial Arbitration and Section 1782(a)*, 46 Yale J. Int'l L. 155 (2021).

border business transactions." *Id.* at 16. Given all this, it is hardly surprising that this Court agreed to review *Servotronics* to provide the certainty that litigants across the globe sorely desire.

2. The problem is that—apparently in light of the mootness concerns raised by respondents—*Servotronics* appears likely to be dismissed. In the lower courts, the petitioner in *Servotronics* sought discovery for use in private arbitration proceedings in London, conducted pursuant to the rules of the Chartered Institute of Arbitrators. *See Servotronics* Rolls-Royce Br. 4-5. But the hearing in that London arbitration concluded on May 21, 2020. *Id.* at 3. Although no final decision has been issued, the record in that hearing appears to be closed. According to the *Servotronics* respondents, no effective relief is now possible, because any discovery ordered by this Court would come too late to be introduced into evidence or otherwise affect the London proceedings. *Id.* at 12-14. As a result, the respondents argued, the case is "almost certainly moot," *Servotronics* Boeing Br. 12-13; *see also Servotronics* Rolls-Royce Br. 12 ("This case appears to be moot, and will certainly be moot when the arbitrators' award issues."). And Servotronics appears to have conceded the issue by agreeing to file a motion for voluntary dismissal.

3. If this Court grants dismissal of *Servotronics*, the Court will likely still want to resolve the important Section 1782 issue on which it granted certiorari. The Court's best opportunity for doing so would be to grant this petition.

This case cleanly presents the same pure legal question presented in *Servotronics*. There is no doubt that the DIS Panel for which Luxshare seeks discovery is a foreign private arbitral panel, and it is

undisputed that if Section 1782 does not extend to arbitrations conducted by such panels, Luxshare's request must be denied.

Moreover, if the Sixth Circuit grants the stay of the district court's discovery order that petitioners have requested—or, alternatively, if this Court were to grant the stay that petitioners anticipate seeking from this Court immediately after any stay denial by the Sixth Circuit—there is no risk this case will become moot. Because Luxshare has not yet even commenced arbitration proceedings, the discovery dispute will remain live pending a ruling from this Court. Indeed—and as explained above—petitioners have committed to refrain from invoking the statute of limitations for Luxshare to initiate arbitration until four months after any stay of discovery entered by the Sixth Circuit or this Court expires, so there is no risk that the arbitration proceedings for which discovery is sought could conclude before this Court has had a chance to issue its decision. *See supra* at 10-11 & n.3.

To be sure, the Sixth Circuit has not yet ruled on petitioners' appeal, and ordinarily this Court would wait to see what the appellate court does before granting review itself in the first instance. Here, however, it is absolutely clear that the Sixth Circuit will reject petitioners' threshold argument that Section 1782 does not authorize discovery. As Luxshare and the district court have both (correctly) emphasized, the Sixth Circuit's binding decision in *Abdul Latif*, 939 F.3d at 730-31, unequivocally holds that district courts are authorized to grant discovery for use in foreign arbitration proceedings, on the theory that foreign arbitral panels *do* count as "proceeding[s] in a foreign or international tribunal"

under Section 1782. *See, e.g.*, CA6 ECF No. 13 at 14 (Luxshare's opposition to stay); App. 60a. Petitioners will inevitably lose on that issue if forced to litigate it in the Sixth Circuit.

The best vehicle in which to review the Section 1782 issue is a case like this one—in which the courts below have granted discovery, but where this Court can conduct its merits review before both (1) the discovery is produced, and (2) the foreign arbitration proceeding has begun. If the Court waits for another case in which the court of appeals *denies* discovery, it will face the same mootness problem that appears to have doomed *Servotronics*, in which the foreign arbitration proceedings move forward to a conclusion without the discovery. Indeed, the mootness problem is so fundamental in this arena that the *Servotronics* petitioner had previously argued that the dispute in that case was one that was "capable of repetition yet evading review." *Servotronics* Reply Br. 3 (July 21, 2021).

In these circumstances, the certiorari-before-judgment mechanism offers a procedural safety valve to ensure that important questions regarding discovery can be resolved by this Court. That mechanism is reserved for cases "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Here, this Court has already determined (in *Servotronics*) that the Section 1782 is sufficiently important to require this Court's attention this Term. And, for the reasons explained above, if *Servotronics* is dismissed, the Court may not have a similar opportunity to address the issue again in a subsequent case.

Notably, the Court has granted certiorari before judgment in analogous circumstances, "when a similar or identical question of constitutional or other importance was before the Court in another case," and when granting review in the second case would facilitate review of the question presented. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.20 (11th ed. 2019, online) (citing eleven examples). Indeed, in at least one case, the Court appears to have granted certiorari before judgment to protect against the possibility that an earlier-granted case presenting the same issue could be moot. *See Porter v. Dicken*, 328 U.S. 252, 254 (1946) (addressing whether district courts could consider actions by federal Price Administrator seeking to enjoin state court eviction proceedings, alongside *Porter v. Lee*, 328 U.S. 246 (1946), where court of appeals had dismissed *Lee*, 328 U.S. at 252, as moot because eviction had already occurred, unlike in *Dicken* where the eviction was enjoined).

In short, while this Court rarely grants certiorari before judgment, this case presents an ideal vehicle for reviewing the Section 1782 issue in the likely event that *Servotronics* is dismissed. For that reason, this Court should grant certiorari here to allow the Court to resolve the meaning of Section 1782.

## II. The Sixth Circuit's Position Is Wrong

Certiorari is especially warranted in this case because the Sixth Circuit's settled interpretation of Section 1782 is mistaken. That interpretation—accurately reflected in the district court's decision granting discovery in this case—is unmoored from that statute's text, contemporaneous dictionary definitions, this Court's precedent, legal scholarship,

and compelling policy concerns. *See, e.g.*, *Servotronics* Rolls-Royce Br. 14-50. All of those sources confirm that a "foreign or internal tribunal" under Section 1782 includes only governmental or intergovernmental adjudicative bodies, and excludes private arbitrators that have no sovereign authority. A host of amici agree, including the United States and the U.S. Chamber of Commerce. *See Servotronics* United States Amicus Br. (June 28, 2021), *Servotronics* Chamber of Commerce of U.S., et al. Amici Br. (June 28, 2021). And so do the Second, Fifth, and Seventh Circuits, in thorough and well-reasoned opinions. *See supra* at 13-14.

As those sources have explained, at the time Section 1782 was enacted in 1964, dictionaries consistently defined a "tribunal" as a court or other governmental adjudicator—a definition that plainly excludes private arbitrators, who exercise no sovereign authority. *See, e.g.*, *Oxford English Dictionary* (1933, reprinted 1961); *Webster's Seventh New Collegiate Dictionary* (1963); *Black's Law Dictionary* (4th ed. 1951). This understanding is confirmed by statutory usage. *See, e.g.*, *Servotronics* Rolls-Royce Br. 21-23 & n.1 (collecting federal statutes using the term "tribunal"). It is similarly confirmed by this Court's own contemporary precedent, which uniformly used the phrase "foreign tribunals" as a synonym for courts or their equivalents around the time Section 1782 became law. *See, e.g.*, *id.* at 25-27; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

Contemporary usage and academic discussion likewise reinforce that Section 1782 authorizes judicial assistance only for governmental and intergovernmental authorities. *Servotronics* Rolls-

Royce Br. 29-31 (collecting sources). For instance, in 1939 a group of American officials and scholars, in a *Draft Convention on Judicial Assistance* (the Harvard Draft Convention), defined a "tribunal" to include "all courts and a limited number of administrative agencies." 33 Am. J. Int'l L. Sup. 11, 36 (1939). And those authorities expressly specified that the "judicial authority must be an authority created by the State" and that a "tribunal of arbitration set up by private parties . . . is not included, unless the law of the State declares it to be a judicial authority of the State." *Id.* Similarly, a 1962 article by one professor who drafted legislative recommendations for Section 1782 defined an "international tribunal" as one that "owes both its existence and its powers to an international agreement." Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 Colum. L. Rev. 1264, 1267 (1962). Indeed, any definition of "foreign or international tribunal" that *did* sweep in private arbitrators would be unworkably vague and indeterminate, leaving parties with no way to know which private bodies might or might not be eligible to trigger Section 1782.

Legislative history, too, is in accord. Before Congress revised Section 1782 to include the language at issue here, the statute referred only to foreign "court[s]," Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769, 769, and to "judicial proceeding[s] pending in any court in a foreign country with which the United States is at peace," 28 U.S.C. § 1782 (1958). The Rules Commission that proposed the revisions to Section 1782 had been tasked by Congress with improving "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." Act of Sept. 2,

1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743. Private arbitrators, of course, are neither foreign courts nor quasi-judicial agencies. And when it presented its revisions to Section 1782, the Rules Commission explained that its new language was designed to provide district courts with "discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries," and emphasized that the "necessity for obtaining evidence in the United States may be as impelling in proceedings before a *foreign administrative tribunal or quasi-judicial agency* as in proceedings before a conventional foreign court." Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H.R. Doc. No. 88, 88th Cong., 1st Sess. at 45 (1963) (emphasis added).

Those statements clearly reflect the drafters' intention that Section 1782 be broadened to permit United States courts to assist the many varieties of quasi-judicial bodies operating in foreign countries. But they contain no hint at all that Congress intended to allow the conscription of United States courts to aid purely private foreign arbitrators.

The structure and surrounding text of Section 1782 likewise show that the statutory phrase "foreign and international tribunals" is limited to sovereign adjudicative bodies. For instance, Section 1782 permits district courts to apply "the practice and procedure *of the foreign country or the international tribunal*," 28 U.S.C. § 1782(a) (emphasis added), as an alternative to the Federal Rules of Civil Procedure—an allowance that links such "tribunals" to sovereignty. *See Servotronics*, 975 F.3d at 695. And Section 1782's specification that U.S. courts may facilitate evidence-gathering "for use in a proceeding

in a foreign or international tribunal, *including criminal investigations conducted before formal accusations*," 28 U.S.C. § 1782(a) (emphasis added), similarly underscores Congress's focus on proceedings before sovereign bodies. Private arbitrators, of course, do not conduct criminal investigations.

Finally, a contrary reading of Section 1782 would create unnecessary conflicts with the Federal Arbitration Act (FAA) and unduly burden U.S. courts. *See Servotronics* Rolls-Royce Br. 40-50. Indeed, as the Seventh Circuit and the United States have both recognized, "extending judicial assistance under Section 1782 to [foreign private] arbitration would create tension with the FAA . . . by allowing more expansive discovery in foreign disputes than what is permitted domestically." *Servotronics* United States Amicus Br. 26 (citation omitted); *see Servotronics*, 975 F.3d at 695 ("The discovery assistance authorized by § 1782(a) is notably broader than that authorized by the FAA. . . . If § 1782(a) were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations."). As the United States has pointed out in *Servotronics*, moreover, the "logic" of the Sixth Circuit's position "would extend Section 1782 to encompass investor-state arbitration," with harmful policy consequences. *Servotronics* United States Amicus Br. 16; *see also id.* at 28-34.

In sum, text, contemporary usage, structure, history, and policy concerns all militate in favor of reversal of the district court's decision in this case, and the binding Sixth Circuit interpretation of Section 1782 that the district court applied. But

perhaps even more important is the serious harm inflicted by the ongoing circuit split and the uncertainty that it creates. That uncertainty should be resolved, one way or another, by this Court. If *Servotronics* is not ultimately the proper vehicle to do so, the Court should grant this petition to ensure that this vital question receives a conclusive answer.

## CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

Sean M. Berkowitz
LATHAM & WATKINS LLP
330 N. Wabash
Suite 2800
Chicago, IL 60611

Zachary L. Rowen
Justin S. Kirschner
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

Roman Martinez
*Counsel of Record*
Tyce R. Walters
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

*Counsel for Petitioners*

September 10, 2021

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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| LUXSHARE, LTD.,<br>Petitioner,<br>v.<br>ZF AUTOMOTIVE US, INC., GERALD DEKKER, and CHRISTOPHE MARNAT,<br>Respondents. | Case No. 2:20-mc-51245<br>Honorable Laurie J. Michelson<br>Magistrate Judge Anthony P. Patti |

**ORDER OVERRULING OBJECTIONS TO MAGISTRATE JUDGE'S ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO QUASH [26]**

2021 WL 2705477

As a result of a business dispute involving hundreds of millions of dollars in potential damages, Luxshare, LTD intends to initiate, by the end of the year, an arbitration proceeding in Munich, Germany against ZF Automotive US, Inc. Luxshare seeks discovery for this foreign proceeding from ZF US and two of its senior officers who all reside in the Eastern District of Michigan. Luxshare has filed an application pursuant to 28 U.S.C. § 1782 seeking to serve subpoenas for the production of documents and testimony. In evaluating Luxshare's request, Magistrate Judge Anthony P. Patti reviewed the initial briefing, conducted an extensive hearing, requested supplemental briefing, thoroughly

analyzed all of the relevant factors from the governing case, *see generally Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), and issued a 36-page opinion. Magistrate Judge Patti determined that some discovery was appropriate, but he significantly limited its scope. Now before the Court are Respondents' objections to Magistrate Judge Patti's order. None of them reveal any legal error or abuse of discretion. The objections are OVERRULED.

**I.**

In August 2017, Luxshare, LTD purchased two business units from Michigan-based automotive parts supplier and manufacturer ZF Automotive US, Inc. for nearly a billion dollars. (ECF No. 1, PageID.9.) The two businesses were ZF US's Global Body Control Systems business and ZF US's Radio Frequency Electronics business (collectively, the "BCS-RFE Businesses"). (*Id.*) The terms of the deal were set forth in a Master Purchase Agreement. (*Id.*) The deal closed in April 2018.

Luxshare claims that it only recently discovered that, during the due diligence period and prior to the closing on the transaction, ZF US fraudulently concealed certain material facts and developments concerning the significant decline in business relationships with, and expected purchases from, several of the most important customers of the BCS-RFE Businesses (i.e., FCA, Ford, and GM). (*Id.* at PageID.9–10.) This alleged fraud, claims Luxshare, inflated the purchase price it paid for the BCS-RFE Businesses by hundreds of millions of dollars over the amount it would otherwise have paid for them. (*Id.* at PageID.10.)

The parties' Master Purchase Agreement provides that "[a]ll disputes arising under or in connection with this Agreement . . . shall be exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), including the Supplementary Rules for Expedited Proceedings . . . ." (ECF No. 6-2, PageID.266.) Also, "[t]he place of the arbitration shall be Munich, Germany." (*Id.*)

Luxshare intends to bring claims with a DIS arbitral tribunal to recover for the losses it claims to have suffered as a result of ZF US's alleged wrongful conduct. (ECF No. 1, PageID.10–11.) Luxshare has until the end of 2021 to file for arbitration. (ECF No. 13, PageID.335.)

But prior to doing so, and because the arbitration proceedings will be expedited, Luxshare seeks to obtain discovery from ZF US and two of its senior officers, Gerald Dekker (retired) and Christopher Marnat, pertaining to the concealment of information concerning the lost sales volumes. So on October 16, 2020, Luxshare filed an ex parte Application seeking the Court's permission to obtain this discovery pursuant to 28 U.S.C. § 1782. (ECF No. 1.) Attached to the Application are a subpoena for documents from ZF US and subpoenas duces tecum for the depositions of Dekker and Marnat. (ECF Nos. 1-2, 1-3, 1-4.) This Court granted Luxshare's ex parte application on October 22, 2020. (ECF No. 3.) Luxshare served the § 1782 subpoenas on respondents the next day. (ECF No. 13, PageID.331.)

Respondents then moved to quash (ECF No. 6), which Luxshare opposed (ECF No. 13). The motion was referred to Magistrate Judge Anthony P. Patti. He conducted a hearing and then requested

supplemental briefing. Judge Patti ultimately entered an order granting in part and denying in part the motion to quash. (ECF No. 26.) Judge Patti authorized discovery but limited it as follows: document searches in only the emails of Marnat and one other custodian, and documents contained in a centrally maintained shared drive, between December 2016 and April 2018; modifications to certain definitions in the subpoenas; and a deposition of either Marnat or Dekker, but not both. *Id.* Respondents oppose the production of any discovery and thus, have filed timely objections. (ECF No. 27.)

**II.**

The parties dispute whether a magistrate judge's ruling on an application brought under 28 U.S.C. § 1782(a) constitutes a nondispositive order requiring plain error review or a dispositive order requiring de novo review. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). "Neither the Supreme Court nor any circuit court appears to have squarely addressed this issue. Most lower courts, however, have found that such rulings are not dispositive and are therefore subject to review only for clear error." *In re Hulley Enters.*, 400 F. Supp. 3d 62, 71 (S.D.N.Y. 2019) (citing cases). As one court in this Circuit has likewise explained, "[t]he majority of persuasive authority on this topic concludes that a magistrate judge's ruling on a motion for discovery under 28 U.S.C. § 1782(a) is nondispositive." *JSC MCC EuroChem v. Chauhan*, No. 17-00005, 2018 U.S. Dist. LEXIS 138075, at *2 (M.D. Tenn. Aug. 15, 2018) (citing cases).

The Court sees no reason to deviate from this majority view or to treat this matter differently from other discovery disputes. "In a § 1782 proceeding, there is nothing to be done 'on the merits.' Section

1782 empowers a district court to order a person residing within its district 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.' The only issue before the district court is discovery; the underlying litigation rests before a foreign tribunal." *In re Republic of Ecuador*, 735 F.3d 1179, 1182 (10th Cir. 2013). Thus, the Court will uphold Magistrate Judge Patti's order unless it is "clearly erroneous or contrary to law." *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001).

A ruling is " 'clearly erroneous' when, although there is evidence to support it, the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed." *Hagaman v. Comm'r of Internal Revenue*, 958 F.2d 684, 690 (6th Cir. 1992) (citation omitted). A legal conclusion is "contrary to law 'when it fails to apply misapplies relevant statutes, case law, or rules of procedure.'" *Ford Motor Co. v. United States*, No. 08-12960, 2009 U.S. Dist. LEXIS 81720, 2009 WL 2922875, at *1 (E.D. Mich. Sept. 9, 2009) (citation omitted). Relatedly, in deciding discovery disputes, a magistrate judge is entitled to the same broad discretion as a district judge and his order is overruled only upon a finding of an abuse of discretion. *State Farm Mutual Auto. Ins. Co. v. Pointe Physical Therapy, LLC*, 255 F. Supp. 3d 700, 703 (E.D. Mich. 2017) *report and recommendation adopted* No. 14-11700, 2017 U.S. Dist. LEXIS 113535, 2017 WL 3116261 (July 21, 2017); *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 209 (6th Cir. 1995). An abuse of discretion exists when the court applies the wrong legal standard, misapplies the correct legal standard, or relies on

clearly erroneous findings of fact. *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993).

**III.**

The purpose of an application under 28 U.S.C. § 1782 is to obtain federal-court assistance in gathering evidence and testimony for use in foreign tribunals. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004). To invoke § 1782, an applicant must first meet certain threshold criteria: (1) the person from whom discovery is sought "resides or is found" within the district; (2) the discovery is "for use in a proceeding before a foreign or international tribunal"; and (3) the application is made by an "interested person." 28 U.S.C. § 1782(a).

If these statutory prerequisites are met, the district court is authorized, but not required, to permit discovery. *Intel.*, 542 U.S. at 264. In other words, § 1782 "leaves the issuance of an appropriate order to the discretion of the court." (*Id.* at 260–61.) The following (*Intel*) factors guide the Court's exercise of its discretion: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the agency abroad to federal-court judicial assistance; (3) whether the application conceals an attempt to circumvent foreign proof-gathering restrictions or other policies; and (4) whether the discovery sought is unduly intrusive or burdensome. *Id.* at 264–65. The decision to grant an application is made in light of the "twin aims" of § 1782: "providing efficient means of assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Id.* at 252.

The thrust of Respondents' objections involve Magistrate Judge Patti's rulings on the *Intel* factors. Respondents believe that "each discretionary factor weighs in favor of quashing the Section 1782 Subpoenas in their entirety." (ECF No. 27, PageID.651.) They also contend that his ruling does not achieve either of the "twin aims" of § 1782. Respondents do not object to Judge Patti's substantive rulings on the statutory prerequisites of § 1782. But they do object to his refusal to stay the application pending a ruling in *Servotronics, Inc. v. Rolls-Royce PLC*, 141 S. Ct. 1684 (2021) (cert. granted), because the Supreme Court might determine that § 1782 does not apply to a foreign, private, commercial arbitration. (*Id.*) The Court will address the objections in turn.

**A.**

The first discretionary factor to be considered is whether "the person from whom discovery is sought is a participant in the foreign proceeding." *Intel*, 542 U.S. at 264. If so, "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." *Id.* This is because "[a] foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence." *Id.* "In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid." *Id.*

Here, the contemplated German arbitration will be against ZF US and not the individuals Gerald Dekker and Christophe Marnat. And it is ZF US and not Dekker and Marnat that have possession of the

documents requested in the subpoenas. Thus, Magistrate Judge Patti found the participation factor "was mixed" and warranted "permitting some discovery as to the non-participants (Respondents Dekker and Marnat) but curtailing discovery as to the intended participant." (ECF No. 26, PageID.613.) Respondents claim this is error. (ECF No. 27, PageID.652.) "If neither Mr. Dekker nor Mr. Marnat have any responsive documents in their individual possession, and those documents are instead held by ZF US," say Respondents, "then this is not a 'mixed factor' at all: the discovery can only come from an entity that is a party to the foreign arbitration." (*Id.* at PageID.654.)

But this is not dispositive. Some courts are "not persuaded that *Intel* precludes § 1782 discovery of parties participating in the underlying international proceeding. Section 1782 aid is not foreclosed just because the need for such aid may not be as readily apparent." *In re Application of Auto-Guadeloupe Investissement S.A., for an Ord. to Take Discovery Pursuant to 28 U.S.C. Section 1782*, No. 12 MC 221 RPP, 2012 WL 4841945, at *5 (S.D.N.Y. Oct. 10, 2012).

"Although the identity of the party is instructive, the analysis turns on whether the evidence is 'unobtainable absent § 1782(a) aid.'" *Republic of Kaz. v. Lawler*, No. CV-20-00090, 2020 U.S. Dist. LEXIS 12694, at *10 (D. Az. Jan. 27, 2020) (citing *Intel*, 542 U.S. at 264); *see also In re Judicial Assistance Pursuant to 28 U.S.C. 1782 by Macquarie Bank Ltd.*, No. 14-cv-00797, 2015 WL 3439103, at *6 (D. Nev. May 28, 2015) ("Although the case law at times refers to whether the 'person' is within the foreign tribunal's jurisdictional reach, the key issue is whether the

material is obtainable through the foreign proceeding."); *In re Ex Parte Application of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1039 (N.D. Cal. 2016) ("[W]hether an entity is a participant . . . is not dispositive; *Intel* puts it in the context of whether the foreign tribunal has the authority to order an entity to produce the disputed evidence.").

Luxshare provided affidavits from Anna Masser, its German counsel who will be handling the DIS arbitration. (ECF No. 1-6; ECF No. 13-2.) She supports Luxshare's position that the DIS Rules have no mechanism to compel discovery in the United States. (*See, e.g.,* ECF No. 1-6, PageID.95.) Masser explains that the subpoenaed documents and witnesses are all located in the United States, and thus, for both parties and non-parties alike, the DIS tribunal will have no authority to compel the production of documents and deposition testimony sought. (ECF No. 13-2, PageID.364–365.) This supports Magistrate Judge Patti's finding that this factor is "mixed." *See In re Application for Discovery Pursuant to 28 U.S.C. § 1782*, 19-MC-0102, 2019 WL 4110442, at *2 (N.D. Ohio Aug. 29, 2019) (weighing the first *Intel* factor in favor of granting the application even when the respondents were parties to an Italian proceeding because, as residents of Ohio, the respondents fell outside the authority of the Italian courts to compel compliance with domestic discovery).

Moreover, there is no dispute that the individual Respondents will not be participants in the foreign proceeding and thus, the first *Intel* factor weighs in favor of permitting one of their depositions.

There is simply no legal error or abuse of discretion in Magistrate Judge Patti's weighing of the first *Intel* factor.

**B.**

Under the second discretionary *Intel* factor, the Court considers "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." *Intel*, 542 U.S. at 264. Prior to evaluating this factor, Magistrate Judge Patti asked the parties for supplemental briefing on the issue of DIS's receptivity to § 1782 discovery. (ECF No. 25, PageID.600.) He found the parties to be "at odds." (ECF No. 26, PageID.615.)

So Judge Patti reviewed the DIS rules, the parties' competing declarations, and the relevant case law. He found that the 2018 DIS Arbitration Rules related to "Establishing the Facts," namely Articles 28.1 and 28.2, "do not restrict evidence gathering." (ECF No. 26, PageID.613.) More specifically, Article 28.2 provides that the tribunal "may, inter alia, on its own initiative, appoint experts, examine fact witnesses other than those called by the parties, and order any party to produce or make available any documents or electronically stored data." (*Id.*) An entire section of the declaration of Luxshare's German counsel is devoted to explaining that "German Courts Admit Evidence Obtained By Way Of U.S. Discovery Applications[]." (ECF No. 13-2, PageID.359–362). Considering this evidence, and "without authoritative proof that the DIS would reject Section 1782 discovery," Magistrate Judge Patti "assume[d] that the DIS would receive it if it were obtained and presented." (ECF No. 26, PageID.616.) He ultimately

found that "while DIS does not provide a generous ration of discovery, it appears receptive to whatever evidence a party wants to put in front of it, and it does not impede proof-gathering." (*Id.*)

Respondents disagree. They first point to case law that has "cast aside" the notion that the receptivity factor requires a respondent to provide "authoritative proof" of non-receptivity.

But other courts have taken the opposite view. *See In re Application for Discovery for Use in Foreign Proceeding Pursuant to 28 U.S.C. § 1782*, No. 17-4269, 2019 U.S. Dist. LEXIS 5632, at *20–21 (D.N.J. Jan. 10, 2019) ("In evaluating a foreign tribunal's receptivity, the court considers 'authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782.'") (quotation omitted); *In re O'Keeffe*, 646 F. App'x 263, 265–66 (3d Cir. 2016) (finding that the district court did not abuse its discretion in requiring "authoritative proof that the foreign court would reject the evidence obtained with the aid of Section 1782" on a motion to quash a subpoena). Indeed, another court in this District recently stated that "[t]he majority of opinions from other circuits indicate that the second *Intel* factor weighs against a section 1782 application only if there is 'authoritative proof that [the] foreign tribunal would reject evidence obtained with the aid of section 1782.'" *In re Ex Parte Caterpillar Inc.,* 2020 U.S. Dist. LEXIS 70913, at *31–33 (M.D. Tenn. Apr. 21, 2020) (citing *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995)); *see also Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010) (noting that the party opposing discovery "ha[s] not pointed to any judicial, executive or legislative declaration that clearly demonstrates that

allowing discovery in this case would offend Ecuadorian judicial norms" (internal citation and quotations omitted)). Also, "District courts have . . . been 'instructed to tread lightly and heed only clear statements by foreign tribunals that they would not welcome § 1782 assistance.'" *Caterpillar,* 2020 U.S. Dist. LEXIS 70913, at *32 (quoting *In re Porsche Automobile Holding SE*, No. 19-MC-91129, 2019 WL 5806913, at *7 (D. Mass. Nov. 6, 2019)).

After evaluating the record, Judge Patti found no definitive proof that the DIS panel would be unreceptive to evidence derived from Luxshare's section 1782 application. There is no legal error in his ruling. He reasonably relied on the DIS rules and Masser's declarations. So there is no abuse of discretion either.

Respondents next contend that the magistrate judge should have found the receptivity factored weighed against discovery because Luxshare has yet to commence the arbitration in Germany and thus, cannot demonstrate that the DIS panel would find the discovery useful. Respondents cite case law in support.

But again, there is case law supporting the opposite view. *See, e.g., In re Mesa Power Group, LLC*, 878 F. Supp. 2d 1296, 1303 (S.D. Fla. 2012) ("Section 1782 may authorize and encourage judicial assistance even if the foreign proceeding has not commenced or advanced because '§ 1782 is not limited to proceedings that are pending.'" (citation omitted)).

And *Intel* rejected the view that a pending proceeding before a foreign tribunal was necessary for § 1782 discovery—it required only that the proceeding be "within reasonable contemplation."

542 U.S. at 259. So it must be that that the district courts can do precisely what Judge Patti did here—review the rules of the foreign arbitration panel and declarations from German lawyers to try to discern the panel's receptivity to the requested discovery.

The Court cannot say that the magistrate judge's weighing of the discretionary receptivity factor in Luxshare's favor is contrary to law or clearly erroneous.

**C.**

Respondents next focus on Luxshare's admissions that they are seeking § 1782 discovery because "[i]t is unlikely we'd be able to get this level of discovery in the DIS, which is exactly why we're seeking it here" and that "if [Luxshare] were to seek this discovery, the DIS . . . would not permit it." (ECF No. 27, PageID.658.) These admissions, say Respondents, are the "essence of circumvention" of foreign proof-gathering restrictions and thus, this *Intel* should weigh in their favor. (*Id.* at PageID.659.)

Judge Patti, too, expressed concerns about these admissions. And after considering them, the declarations from both parties' German law experts concerning the scope of DIS discovery, and some relevant case law, found this factor to be "mixed." (ECF No. 26, PageID.621.) He recognized that most foreign legal systems do not embrace the breadth and scope of American civil discovery. (*Id.* at PageID.617.) But he was also persuaded that § 1782 discovery is not prohibited under German law or by DIS Rules. (*Id.* at 620.) As Judge Patti thoughtfully explained: "while the Court maintains a healthy caution about giving discovery here that may not be readily or at all available under the DIS Arbitration Rules, the Court

also notes that they neither foreclose nor prohibit such discovery. In other words, the Court wants to be cautious by not giving Petitioner full-blown Section 1782 discovery for use in a tribunal—DIS Arbitration—that does not *expressly permit* it, but the Court also certainly need not completely bar the request where the rules do not *expressly prohibit* it." (ECF No. 26, PageID.622 (emphasis in original).)

Respondents say this is error. They rely on a number of district court opinions that they believe "confirm[] that courts closely guard against attempts to use § 1782 to evade foreign proof-gathering rules." (ECF No. 27, PageID.659.)

But again, there is competing case law. And this Court finds persuasive the reasoning from another court in this Circuit that "a section 1782 applicant does not circumvent a foreign court's purview merely by seeking discovery that would not be available in that jurisdiction." *In re Ex Parte Caterpillar Inc.*, 2020 U.S. Dist. LEXIS 70913, at *34–35 (M.D. Tenn. Apr. 21, 2020); s*ee also Mees v. Buiter*, 793 F.3d 291, 303 (2d Cir. 2015) (holding that because section 1782 contains no foreign-discoverability requirement, "the availability of the discovery in the foreign proceeding should not be afforded undue weight"). "It is in fact well within a district court's authority to grant 'broader discovery under § 1782 than what might be permitted in the foreign tribunal.'" *Id.* (quoting *In re Gorsoan Ltd.*, —— F. Supp. 3d ——, 2020 WL 409729, at *8 (S.D.N.Y. Jan. 24, 2020)). And this policy "makes logical sense" given that the DIS tribunal will ultimately "serve as gatekeeper as to any evidence derived from [Luxshare's] subpoenas." *Id.* at *35 (citing *In re Biomet Orthopaedics Switzerland GmBh*, 742 F. App'x 690, 698 (3d Cir. 2018); *see also In re*

*Biomet*, 742 F. App.'x at 698 (noting that despite granting a section 1782 application, "the German court retains the authority to disregard irrelevant or cumulative evidence, or even to conclude that it will not admit any of the submissions")).

Absent a more compelling showing by Respondents that the discovery sought by Luxshare would be prohibited by the German arbitral tribunal, the Court cannot say that the magistrate judge's weighing of this discretionary *Intel* factor is contrary to law or clearly erroneous.

**D.**

The fourth *Intel* factor concerns the scope of the discovery requests. Respondents even take issue with Magistrate Judge Patti's efforts to scale back the scope of the subpoenas.

First, say respondents, "there is no permissible scope for a subpoena that fails the first three discretionary factors." (ECF No. 27, PageID.662.) But, for the well-supported reasons provided by the magistrate judge and, as set forth above, Luxshare's requests do not fail the first three discretionary factors.

Next, respondents contend that the magistrate judge's decision fails to satisfy the "twin aims" of § 1782, which are "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Intel*, 542 U.S. at 252. Respondents are most upset with Magistrate Judge Patti's finding that he "need not wait to see what DIS is going to do, because 'the Panel has the authority to admit evidence as it sees fit,' and it is 'in

the best position to make those evidentiary determinations.'" (ECF No. 27, PageID.662.)

But the Court fails to see how allowing limited discovery now of information located in this District, that will help keep the arbitration on an expedited track once it commences, and then permitting DIS, with its superior knowledge of foreign law and procedure, to serve as the ultimate evidentiary gate-keeper, is inefficient for the participants. And, as pointed out by Luxshare, "the grant of Section 1782 [discovery] serves as a 'generous example' to encourage foreign countries to provide similar means of assistance to U.S. litigants." (ECF No. 28, PageID.698–699 (citing *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011)).) Thus, the "twin aims" of section 1782 do not appear to be in any peril from the magistrate judge's ruling.

Respondents also suggest that Magistrate Judge Patti's ruling somehow contravenes the parties' intent in contracting for the German arbitration. But Judge Patti was cognizant of this concern. He requested and then carefully considered the parties' supplemental briefing on this issue. He aptly noted that the parties' arbitration provision "could have included appropriate language prohibiting Section 1782 discovery," but did not, and he reiterated that "the 2018 DIS Arbitration Rules . . . do not restrict evidence gathering." (ECF No. 26, PageID.623.) Moreover, the discovery being sought bears on key issues at stake in the impending arbitration, that being Respondents' knowledge that Ford, GM, and FCA were reducing or eliminating their business with the ZF US business units being purchased by Luxshare and Respondents' decision to not disclose this information to Luxshare. Also, as Judge Patti

found, Luxshare's pursuit of this Section 1782 discovery now "is consistent with a desire to keep the arbitration on an expedited track, once it commences, by obtaining the discovery beforehand." (ECF No. 26, PageID.626.) So again, the Court fails to see how Judge Patti's allowance of limited, relevant discovery upsets the efficiency Respondents believe they bargained for by expressly electing for dispute resolution by the DIS.

In sum, there is nothing about the "twin aims" of § 1782 that warrants a reversal of Magistrate Judge Patti's ruling.

**E.**

Respondents' final objection concerns Magistrate Judge Patti's denial of their request to stay these proceedings.

The Supreme Court is presently considering whether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses or excludes private, commercial arbitral tribunals. *See Servotronics, Inc. v. Rolls-Royce PLC*, 141 S. Ct. 1684 (2021). This will resolve a circuit split. The Sixth Circuit has held that Section 1782 discovery is available for private, foreign arbitrations. *Abdul Latif Jameel Trans. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710, 730 (6th Cir. 2019). Of course, this Court remains bound by *Abdul* until the Supreme Court says otherwise. If, however, the Supreme Court determines that foreign private arbitrations are not subject to § 1782, then Luxshare's application will not satisfy the statutory prerequisites. Thus, say Respondents, it was error for

Magistrate Judge Patti to refuse to stay this case pending a ruling in *Servtronics*.

While this is easy to say, it is much harder to prove. A district court has "broad discretion . . . as an incident to [its] power to control its own docket" to stay some or all of pending proceedings. *Clinton v. Jones*, 520 U.S. 681, 706 (1997). Indeed, "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248 (1936). The court "must tread carefully in granting a stay of proceedings, since a party has a right to a determination of its rights and liabilities without undue delay." *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977).

As he did in weighing the *Intel* factors, Magistrate Judge Patti gave thoughtful consideration to the stay issue:

> Given the potential length of time before the Supreme Court issues its decision in *Servotronics*, the fact that there is binding precedent from the Sixth Circuit, and the need for swifter action and greater certainty within the timeframe for the filing and pursuit of what will be expedited arbitration proceedings in Germany, the Court declines to exercise its discretion to stay the case pending the Supreme Court's decision in *Servotronics*.
>
> Furthermore, the limited scope of the discovery

> which this Court has decided to grant takes the uncertainty of how the Supreme Court will rule on this issue into account—in conjunction with the discretionary *Intel* factors—permitting some, but by no means all of the requested discovery, and recognizing that both DIS and the Supreme Court may give further guidance in the future.

(ECF No. 26, PageID.629–630.)

There is simply no merit in any contention that this ruling is an abuse of discretion or in any other way erroneous.

**IV.**

For all of these reasons, Respondents' objections to Magistrate Judge Patti's order on their motion to quash are OVERRULED.

SO ORDERED.

Dated: July 1, 2021

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**

| | | |
|---|---|---|
| In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings | : | 2:20-mc-51245-LJM-APP |

**ORDER GRANTING *EX PARTE* APPLICATION FOR AN ORDER PURSUANT TO 28 U.S.C. § 1782 TO CONDUCT DISCOVERY FOR USE IN FOREIGN PROCEEDINGS**

Upon consideration of Luxshare Ltd.'s ("Applicant") *ex parte* Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings (the "Application") and accompanying memorandum of law, declarations and exhibits appended thereto, it is hereby:

ORDERED that the Application be and hereby is GRANTED; and it is further

ORDERED that the Applicants, Luxshare Ltd., through their counsel, are permitted to obtain discovery for use in foreign proceedings from ZF Automotive US, Inc., Gerald Dekker, and Christophe Marnat by way of subpoenas that are (1) served in accordance with the Federal Rules of Civil Procedure and this Court's local rules; and (2) substantially in the form of the proposed subpoenas attached hereto as Exhibits 1-3.

**SO ORDERED.**

Dated: Detroit, Michigan.
October 22, 2020

s/ Laurie J. Michelson
United States District Judge

[Exhibits 1-3 omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | |
|---|---|
| LUXSHARE, LTD.,<br>Petitioner,<br>v.<br>ZF AUTOMOTIVE US, INC., GERALD DEKKER, and CHRISTOPHE MARNAT,<br>Respondents. / | Case No. 2:20-mc-51245<br>District Judge Laurie J. Michelson<br>Magistrate Judge Anthony P. Patti |

**OPINION AND ORDER GRANTING IN PART and DENYING IN PART RESPONDENTS' MOTION TO QUASH IMPROPER SUBPOENAS (ECF NO. 6)**

2021 WL 2154700

## I. OPINION

### A. Petitioner's *Ex Parte* Application

Petitioner Luxshare, Ltd. has filed an *Ex Parte* Application For An Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings. (ECF No. 1.) Section 1782 concerns "[a]ssistance to foreign and international tribunals and to litigants before such tribunals." 28 U.S.C. § 1782. Of importance to the matter currently before the Court are Luxshare's subpoenas to ZF Automotive US, Inc. ("ZF US"), Gerald Dekker, and Christophe Marnat (collectively "Respondents"). (ECF Nos. 1-2, 1-3, 1-4.)

On October 22, 2020, Judge Michelson entered an order granting Luxshare's *ex parte* application. (ECF No. 3.) In so doing, the Court permitted Luxshare "to obtain discovery for use in foreign proceedings from ZF Automotive US, Inc., Gerald Dekker, and Christophe Marnat ("Respondents") by way of subpoenas that are (1) served in accordance with the Federal Rules of Civil Procedure and this Court's local rules; and (2) substantially in the form of the proposed subpoenas attached hereto as Exhibits 1-3." (*Id.*, PageID.165.)

**A. Respondents' Motion to Quash**

Currently before the Court is Respondents' December 4, 2020 motion to quash improper subpoenas. (ECF No. 6.) Luxshare has filed a response (ECF No. 13), Respondents have filed a reply (ECF No. 14), and the parties have filed a joint statement of unresolved issues (ECF No. 15).

Judge Michelson referred this case to me for pretrial matters, and, ultimately, a hearing was held on February 24, 2021, at which counsel for Luxshare (Bradley Pensyl, Kendall Robert Pauley, Michael G. Brady, and Anna Masser) and Respondents (Herbert C. Donovan, Sean Berkowitz, Alena McCorkle, and Christoph Baus) appeared. (ECF Nos. 8, 10.) The Court entertained oral argument on the motion, ordered additional briefing, and took the matter under advisement. (ECF No. 25 [Revised Transcript].)

**C. Discussion**

**1. Legal Framework: A Two Step Inquiry**

**a. Statutory Factors/Requirements**

The present *ex parte* application is governed by 28 U.S.C. 1782(a), which reads as follows:

> 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.

As one court has summarized these threshold requirements for exercising authority under the statute:

> A district court has the authority to grant an application for judicial assistance if the following statutory requirements in § 1782(a) are met: (1) the request must be made "by a foreign or international tribunal," or by "any interested person"; (2) the request must seek evidence, whether it be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.

*In re Clerici*, 481 F.3d 1324, 1331–32 (11th Cir. 2007); *see also Bey v. Resurgent Mort. Serv'g*, No. 14-51040, 2014 WL 5512663, at *2 (E.D. Mich. Oct. 31, 2014) (Drain, J.).

If all the statutory requirements are met, § 1782 then "authorizes, but does not require, a federal district court to provide assistance." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004). In ruling on such an application, "a district court must first consider the statutory requirements and then use its discretion in balancing a number of factors." *Brandi-Dohrn v. IKB Deutche Industriebank*, 673 F.3d 76, 80 (2d Cir. 2012). Put another way, a § 1782 application "presents two inquiries, first, whether the district court is

authorized to grant the request; and second, if so, whether the district court should exercise its discretion to do so." Buchwalter, Annotation, *Construction and Application of 28 U.S.C.A. § 1782, Permitting Federal District Court to Order Discovery for Use in Proceeding in Foreign or International Tribunal*, 56 A.L.R. Fed.2d 307, § 2 (2011). If the court concludes that any of the statutory requirements are not met, thus depriving it of the authority to grant relief under the statute, the inquiry ends there; however, if the statutory requirements are met, the court goes on to consider the discretionary factors. Importantly, "the district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." *Intel Corp.*, 542 U.S. at 264 (citing *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001)). "Once the statutory requirements are met, a district court is free to grant discovery in its discretion." *Schmitz v. Bernstein, Liebhard & Lifshitz*, LLP, 376 F.3d 79, 83 (2d Cir. 2004) (internal citations omitted). In exercising this discretion, the court takes "into consideration the 'twin aims' of the statute, namely, '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.'" *Certain Funds, Accounts and/or Investment Vehicles v. KPMG*, L.L.P. et. al., 798 F.3d 113, 117 (2d Cir. 2015) (quoting *In re Metallgesellschaft*, 121 F.3d 77, 79 (2d Cir. 1997)).

**b. Discretionary Factors**

The leading and controlling authority is supplied by the Supreme Court's decision in *Intel*, where Justice Ginsburg, writing for the majority, identified

"factors that bear consideration in ruling on a § 1782(a) request." *Intel Corp.*, 542 U.S. at 264. These factors are consistently introduced by discretionary language, such as "may take into consideration[,]" "could consider[,]" and "may be rejected or trimmed." *Id.* at 264-265. As applied to the present application for discovery, the factors that "bear consideration" are: (1) Whether ZF Automotive US, Inc., Gerald Dekker, and Christophe Marnat are participants in the foreign proceeding(s); (2) the nature of the foreign tribunal(s), including (a) the character of the proceedings underway abroad and (b) the receptivity of the foreign government or tribunal to judicial assistance from United States federal courts; (3) whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or of the United States; and, (4) whether the requests are unduly intrusive, and, if so, whether they ought to be "rejected or trimmed." *Id.* at 265.

**2. Whether Petitioner's requested discovery meets Section 1782's statutory requirements?**

Luxshare seeks § 1782 discovery in connection with a prospective arbitration to be filed against ZF US in Germany. (ECF No. 1, PageID.9; ECF No. 1-6, PageID.87, ¶ 1.) Respondents contend that "[t]he requested Section 1782 discovery is not 'for use' in the prospective German arbitration[.]" (ECF No. 6, PageID.232-234.) At the hearing, with *Certain Funds* and *In re Sargeant*, 278 F. Supp. 3d 814, 824 (S.D.N.Y. 2017) in mind, Respondents argued that "1782 should not be used as a means of discovering whether you have a case." (ECF No. 25, PageID.573.) True; however, the Supreme Court has directed that

"Section 1782(a) does not limit the provision of judicial assistance to 'pending' adjudicative proceedings[,]" and that "§ 1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be *within reasonable contemplation*." *Intel Corp.*, 542 U.S. at 258-259 (emphasis added). *Compare Certain Funds,* 798 F.3d at 124 (affirming district court's denial of Section 1782 application where, "at the time the evidence was sought in this case, the Funds had done little to make an objective showing that the planned proceedings were within reasonable contemplation."); *In re Sargeant*, 278 F. Supp. 3d at 823-824 (denying application where "the Section 1782 Application [wa]s bereft of even the broadest contours of what the possible proceeding(s) in the United Kingdom or the Isle of Man may entail—they [we]re entirely embryonic.").

Having reviewed the parties' arguments and submissions on this issue (ECF No. 13, PageID.331-337; ECF No. 14, PageID.378-380), the Court concludes that Petitioner has met the statutory requirements of § 1782. Preliminarily, Luxshare addressed the "for use" requirement in its application, ultimately asserting that the Application "has set forth a sufficient basis that meets and exceeds the reasonable contemplation standard." (*See* ECF No. 1, PageID.25-27; *see also* ECF No. 3.) Moreover:

- while the Supreme Court has recently granted a petition for certiorari in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, 2021 WL 1072280 (Mar. 22, 2021) on the issue of "[w]hether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in 'a

foreign or international tribunal' encompasses private commercial arbitral tribunals[,]" 2020 WL 7343172, this Court is currently bound by *In re Application to Obtain Discovery for Use in Foreign Proc. (Abdul Latif Jameel Transportation Company Limited, Movant-Appellant, v. FedEx Corporation, Respondent-Appellee.)*, 939 F.3d 710, 730 (6th Cir. 2019), which found that it does (*See also* ECF No. 25, PageID.557-558);

- "the word 'tribunal' in § 1782(a) encompasses private, contracted-for commercial arbitrations of the type at issue here[,]" *Abdul*, 939 F.3d at 730;
- Respondents agree that Luxshare has until the end of 2021 to file the arbitration (*See* ECF No. 25, PageID.558; *see also id.*, PageID.583-584, 590);
- when confronted about waiting to see what the DIS Arbitration tribunal ("DIS") – *i.e.*, the German Arbitration Institute (https://www.disarb.org/en) – actually wants, Luxshare explained, *inter alia*, that the Court need not wait to see what DIS is going to do, because "the Panel has the authority to admit evidence as it sees fit[,]" and it is "in the best position to make those evidentiary determinations[,]" (ECF No. 25, PageID.580-581, 588-589);
- Luxshare provided David Huang's declaration, which reflects that Luxshare retained counsel – Allen & Overy LLP, a law firm with offices around the world (https://www.allenovery.com/en-gb/global/global_coverage) – in July 2020 "to represent [it] in this matter

> and prepare the Request for Arbitration," which Luxshare "plans to file with the German Institution of Arbitration ev. (DIS) in Munich, Germany[,]" (ECF No. 1-5, PageID.84 ¶ 21).[1]

The only statutory factor that Respondents question in their motion is the requirement that the requested evidence or testimony be for use in foreign proceedings, because the arbitration has yet to be filed. (ECF No. 6, PageID.232-234.) In other words, they attack the notion that the DIS arbitration is "within reasonable contemplation." The Court is well satisfied, on this record, that it is.

**3. Whether the first three discretionary *Intel* factors favor granting Respondents' motion to quash?**

Respondents and Luxshare are also at odds as to whether the discretionary *Intel* factors weigh in favor of granting the motion to quash in its entirety, denying it outright, or circumscribing the requested discovery. (*Compare*, ECF No. 6, PageID.235-248, *and* ECF No. 14, PageID.375-378, *with* ECF No. 13, PageID.338-350.) For the reasons that follow, the Court concludes that the requested discovery should be permitted, but circumscribed.

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[1] *Compare financialright GmbH v. Robert Bosch LLC*, 294 F. Supp. 3d 721, 725, 729-732 (E.D. Mich. 2018) (Patti, M.J.) ("the German court had dismissed the test case after finding that there was no viable claim," and the statutory factors / requirements had not been met, in part because "the documents in question will not be 'usable' and, therefore, not 'for use' in these foreign proceedings."). In fact, the Court mentioned some of the differences between this case and *financialright GmbH* during the February 24, 2021 hearing. (ECF No. 25, PageID.560-561, 564, 566, 575.)

**a. Participant**

"[W]hen the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." *Intel Corp.*, 542 U.S. at 264. "A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence." *Id.* "In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid." *Id.*

As noted above, Luxshare has issued subpoenas to ZF US, Gerald Dekker, and Christophe Marnat. (ECF Nos. 1-2, 1-3, 1-4.) While Respondents contend that ZF US would "would be a party in any potential DIS arbitration[,]" Luxshare notes that "respondents Dekker and Marnat are [or, more accurately, would be] non-parties[,]" much of which was also confirmed at oral argument. (ECF No. 6, PageID.235-238; ECF No. 13, PageID.340-341; ECF No. 14, PageID.377-378; ECF No. 25, PageID.591-592.) Luxshare also has no reason to challenge Respondents' claim that Dekker and Marnat have none of the documents for which they were subpoenaed, as these are maintained by ZF US, making at least that issue a moot point. (ECF No. 25, PageID.592-593.) In light of all this, the Court views the question of who will be a participant in the DIS arbitration as a mixed factor, which warrants permitting some discovery as to the non-participants (Respondents Dekker and Marnat) but curtailing discovery as to the intended participant (Respondent ZF US). Moreover, the DIS Arbitration

tribunal can always say that more should be required or produced by the participants, as the 2018 DIS Arbitration Rules related to "Establishing the Facts," namely Articles 28.1 and 28.2, do not restrict evidence gathering; in fact, Article 28.2 provides that the tribunal "may, *inter alia*, on its own initiative, appoint experts, examine fact witnesses other than those called by the parties, *and order any party to produce or make available any documents or electronically stored data*." (*See* ECF No. 6-2, PageID.280-281 (emphasis added); *see also* ECF No. 25, PageID.568-569, 588-589.) Additionally, even the expedited proceedings rules which would apply to this arbitration provide that, "[i]f the final award cannot be made within the time limit set in Article 1 of this Annex, the arbitral tribunal shall inform the parties and the DIS in writing of the reasons therefor[e]." (ECF No. 6-2, PageID.291, Art. 4.) As pointed out by Respondents at oral argument, "[T]hat contemplates . . . a situation where the arbitral tribunal believe[s] that there are some important facts that they want or need." (ECF No. 25, PageID.568.)

**b. Receptivity**

"[A] court presented with a § 1782(a) request may take into account 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." *Intel Corp.*, 542 U.S. at 264. When the Court ordered supplemental briefing, it asked the parties to discuss "how a foreign arbitration tribunal is treated under the receptivity prong . . . ." (ECF No. 25, PageID.600.)

The nature of the foreign tribunal and the character of the proceedings underway abroad are a

yet to be filed arbitration before DIS, which, as alluded to above, is a private arbitration tribunal to which the parties agreed to submit any disputes under the Master Purchase Agreement (MPA). (ECF No. 6-2, PageID.266 [20.10.2 Arbitration.].) As for DIS's receptivity to U.S. federal-court judicial assistance, Respondents and Luxshare are at odds. (*See* ECF No. 6, PageID.238-243; ECF No. 13, PageID.341-345; ECF No. 14, PageID.376-377.)

The 2018 DIS Arbitration Rules are important, not only for what they say but also for what they do not say. (ECF No. 6-2, PageID.267-298.) Importantly, as noted above, the 2018 DIS Arbitration Rules related to "Establishing the Facts," namely Articles 28.1 and 28.2, do not restrict evidence gathering. (*See* ECF No. 6-2, PageID.280-281; *see also* ECF No. 25, PageID.568-569, 588-589.)

Respondents contend that "[c]ourts will quash subpoenas where an arbitral panel appears unreceptive to § 1782 discovery[.]" (ECF No. 18, PageID.453-456.) *See*, *e.g.*, *In re Dubey*, 949 F. Supp. 2d 990, 997 (C.D. Cal. 2013) ("there is currently no evidence about the arbitral panel's receptivity to the requested materials."). However, Luxshare notes that "[d]istrict courts consistently grant § 1782 assistance to applicants for use in foreign arbitrations where, like here, the respondents provide no authoritative proof that the tribunal would reject the evidence[,]" and points to, *inter alia*, Respondents' admission at the hearing that "the DIS rules do not contain an explicit restriction on the collection of evidence[.]" (ECF No. 25, PageID.572 at 22:8–12; ECF No. 19, PageID.479.) *See, e.g., Gov't of Ghana v. ProEnergy Servs. LLC*, No. 11-9002-MC-SOW, 2011 WL 2652755, at *4 (W.D. Mo. June 6, 2011) ("The

intervening party, Balkan, has not provided the Court with reliable evidence of non-receptivity in this case. Even if Balkan could produce reliable evidence that the arbitration tribunal would reject the evidence, Balkan has not provided the Court with reliable evidence that the High Court of Ghana would reject the evidence."). Without authoritative proof that the DIS would *reject* Section 1782 discovery, and given Masser's declaration that "German Courts Admit Evidence Obtained By Way Of U.S. Discovery Applications[,]" (ECF No. 13-2, PageID.359-362 ¶¶ 17-23) and the above-cited DIS Rules, the Undersigned assumes that the DIS *would* receive it if it were obtained and presented. (*See also* ECF No. 13, PageID.342, 344.)

In sum, while DIS does not provide a generous ration of discovery, it appears *receptive* to whatever evidence a party wants to put in front of it, and it does not impede proof-gathering.

In addition to the DIS Arbitration Rules not prohibiting Section 1782 discovery, Section 1782 is an independent statute; it is not beholden to the DIS Arbitration Rules (ECF No. 6-2, PageID.267-298). "Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here." *Intel Corp.*, 542 U.S. at 263; *see also Abdul*, 939 F.3d at 729 (when comparing the breadth of Section 1782(a) discovery to Federal Arbitration Act discovery, the court "decline[d] to conclude that simply because similar discovery devices may not be available in domestic private arbitration, § 1782(a) categorically does not apply to foreign or international private arbitration.").

**c. Circumvention**

"[A] district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Intel Corp.*, 542 U.S. at 265. Respondents argue that Luxshare's application is an "end-run" around the DIS's "more restrictive discovery rules . . . [,]" while Luxshare contends that it "is not circumventing proof-gathering prohibitions[.]" (ECF No. 6, PageID.243-245; ECF No. 13, PageID.345-349; ECF No. 14, PageID.375-376.)

The Court views circumvention as a mixed factor here. Respondents offer the declaration of Christoph A. Baus to support the assertion that "U.S.-style document discovery, with expansive categorial document requests, is . . . foreign to German civil procedure." (ECF No. 6-2, PageID.256-258.) This Court has previously made the same observation. *See financialright*, 294 F. Supp. 3d at 736-737. But most foreign legal systems do not embrace the broad form, style, and scope of American civil discovery. *See* Marcus, Ricard L., *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tul. J. Int'l & Comp. L. 153, 154 (1999) ("Whatever the ulterior motives elsewhere, it is clear that America's 'unique' discovery has raised hackles abroad.") Indeed, "[t]he Restatement (and in turn, the Supreme Court) also assumed a basic comparative point: that American discovery laws are far broader than, and in constant tension with, the vast majority of other nations' discovery systems." Simowitz, Aaron D., *Transnational Enforcement Discovery*, 83 Fordham L. Rev. 3293, 3322 (2015). Indeed, Luxshare's own counsel acknowledged that he does

not "know of any other court that has U.S.-style depositions." (ECF No. 25, PageID.591.) The inquiry can hardly end on that basis alone. Even if there is limited proof-gathering under the foreign arbitration rules (*i.e.*, even if the foreign arbitration does not adopt U.S.-style litigation), Luxshare has offered the declaration of Masser, who touches upon receptivity in Germany in particular and asserts that "German courts are nevertheless receptive to admitting evidence obtained by pre-trial discovery in other jurisdictions, including the U.S." (ECF No. 13-2, PageID.359 ¶ 17.) Presumably offered under Fed. R. Civ. P. 44.1 as a witness to prove foreign law, Masser (a member of the international law firm hired to represent Luxshare in connection with contemplated arbitration proceedings and who is qualified to practice in Germany (ECF No. 1-6, PageID.87, ¶ 1)) painstakingly explains:[2]

> 18. As a general principle of German law, German courts should exclude evidence only in exceptional circumstances. ****For instance, German courts must not *per se* dismiss evidence that was obtained in violation of provisions of the CCP but must assess its admissibility on a case by case basis, balancing the interests at stake. ****With regard to evidence obtained in the course of a foreign procedure, a court should refrain from admitting the evidence only if admitting the evidence were to violate German public policy. ****

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[2] Quoted in substantive part only, for ease on the reader, with supporting citations to German law omitted, as indicated by asterisks.

19. The fact that evidence obtained in the course of a foreign proceeding could not have been obtained through the means of German civil procedure does not render the evidence inadmissible. ****Rather, a violation of German public policy requires extreme circumstances, *e.g.*, that the evidence was obtained by torture or that admitting the evidence amounted to a violation of a fundamental right. ****

20. In contrast to those examples, German scholars agree that admitting evidence obtained by way of a 1782 application does not generally violate German public policy. ****The prevailing view is that Courts should admit evidence obtained by way of U.S. discovery generously since excluding any evidence obtained by way of U.S. discovery *per se* would violate the right to effective legal protection and the right to be heard, which are both granted by the German constitution and incorporated in the CCP. ****Therefore, Eschenfelder concludes that the exclusion of evidence obtained in a 1782 application is "hard to imagine" and will be "only rare". ****

21. German state courts indeed admit evidence obtained by way of discovery applications in the U.S. For example, in a judgment, the Higher Regional Court of Frankfurt am Main admitted evidence obtained by way of Section 1782 discovery proceedings under U.S. law. The court in that case held that it had "no concerns" about the introduction of such evidence and that use of such evidence in no way contravenes "fundamental principles of German law". ****

> 22. In two further decisions by Higher Regional Courts in Germany the issue was whether the costs of the discovery applications were to be reimbursed in the German proceedings. **** While both of the courts held that the costs were nonrefundable in the specific circumstances, neither of the two took an issue with the fact that the evidence obtained by way of the discovery apparently had been admitted into the proceedings in the first place.
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> 23. If German state courts *may* admit evidence obtained by way of 1782 applications in state court proceedings, and they actually *do admit it*, there is even less reason for an arbitral tribunal seated in Germany to refrain from admitting evidence obtained by way of 1782 applications given that arbitral tribunals have broader discretion to establish the facts of a case than state courts.

(*Id.*, PageID. 359-362 ¶¶ 18-23 (emphases in original, except for underscoring in ¶ 23).) As put forth at the hearing, even Respondents seem to agree that Section 1782 discovery is *not prohibited* under German law or by DIS Rules. (ECF No. 25, PageID.571.)

However, the discussion of "strategy" within the motion papers and at the hearing is not helpful to Luxshare's cause. In their motion, Respondents argue: "More than raising a 'specter' or 'perception' that it is trying to circumvent the DIS Rules, here, Luxshare leaves the court with no doubt: it is enlisting the Court to bail it out from the arbitration rules for which it bargained. The Section 1782 framework does not permit such a tactic." (ECF No. 6, PageID.245; *see also* ECF No. 25, PageID.571, 587.)

In its response and at oral argument, Luxshare explains its decision to file its Section 1782 application before commencing arbitration, elucidating that, with expedited arbitration – and given the Section 1782 process and the possible objections and appeals which may flow therefrom – there may not be enough time to obtain this discovery once the arbitration has commenced, or the arbitration may be stalled by this process. (ECF No. 13, PageID.335-336; *see also* ECF No. 13-2, ¶¶ 27.) Then, during the hearing, counsel for Luxshare and the Court debated the "strategic" nature of Luxshare's application (ECF No. 25, PageID.581, 584-585), prompting the Court to ask Luxshare's counsel, "[w]hy don't we . . . have you start the arbitration [and] wait to see what DIS wants[?][,]" (*id.*, PageID.580). Petitioner's counsel instead urged that "[t]he better strategy here is to make sure that we have all of our evidence and all of our evidence lined up, submitted right when we commence the arbitration." (ECF No. 25, PageID.581; *see also id.*, PageID.584-585, 588-589.) Tellingly, Luxshare's counsel admitted that, "It's unlikely we'd be able to get this level of discovery in the DIS, which is exactly why we're seeking it here[,]" but argued that case law suggests that this is "the exact situation [Section 1782] was designed to help." (ECF No. 25, PageID.586.) The "strategic" use of Section 1782 perhaps tilts against Luxshare on the circumvention factor, arguably supporting an inference of circumvention; then again, lawyers make strategic / tactical decisions all the time within the bounds of the law. (*Compare* ECF No. 25, PageID.589, *with id.*, PageID.595-596.) As Luxshare's attorney further points out, "That doesn't

suggest, in any way, that we are somehow subverting the Panel by seeking discovery here in the U.S. first." (ECF No. 25, PageID.589.) It may, or it may not. More troubling, however, is the further admission by Luxshare's counsel that he "would absolutely agree that if [Luxshare] were to seek this discovery, the DIS . . . would not permit it." (ECF No. 25, PageID.580.)

Nevertheless, even if this factor might thus weigh in Respondents' favor, circumvention is only one of the discretionary factors under *Intel*. The Supreme Court has not instructed that evidence of circumventing the foreign tribunal's discovery rules forecloses any and all relief under 1782. This factor alone is not the "end-all, be-all." And while the Court maintains a healthy caution about giving discovery here that may not be readily or at all available under the DIS Arbitration Rules, the Court also notes that they neither foreclose nor prohibit such discovery. In other words, the Court wants to be cautious by not giving Petitioner full-blown Section 1782 discovery for use in a tribunal – DIS Arbitration – that does not *expressly permit* it, but the Court also certainly need not completely bar the request where the rules do not *expressly prohibit* it.

Before moving on to address the fourth and final discretionary *Intel* factor, it is important to consider certain other issues which are specific to this case and/or on which the Court received further briefing.

**4. Whether discovery and depositions were part of the MPA?**

Respondents offer the declaration of Christoph A. Baus in support of their claim that "discovery and depositions were not part of the agreement[.]" (ECF No. 6-2, PageID.252-254.) Accordingly, the Court

asked the parties to brief "case law on whether the contract arbitration clause is prohibitive or should be considered in a Section 1782 analysis." Respondents contend that "the parties' arbitration provision reflects their intent to prohibit access to § 1782 discovery[.]" (ECF No. 18, PageID.448-450.) Luxshare contends that "[t]he case law demonstrates that this arbitration clause in no way prohibits or limits Section 1782 discovery[;]" instead, "the absence of any restrictions in the clause itself or in the DIS Rules on the admissibility or collection of evidence weighs in favor of this avenue of discovery." (ECF No. 19, PageID.472-475.) In fact, at the hearing, Luxshare's counsel posited that "[e]vidence collected in connection with a 1782 application is admissible." (ECF No. 25, PageID.598.)

The Court agrees that "the arbitration clause does not prohibit Section 1782 discovery." (ECF No. 19, PageID.472.) First, the clause's plain language does not bar such discovery. (*See* ECF No. 6-2, PageID.266.) If the parties had desired to stay away from court on Section 1782 discovery, they could have included appropriate language to that effect; they did not. (*See* ECF No. 20, PageID.483-484 ¶ 6 [Masser Decl.].) Or, alternatively, they could have included an express limitation on the ancillary purposes for which a party could seek a court's assistance by including words of limitation, such as "solely to compel arbitration or enforce an arbitration award." Second, and as mentioned above, the 2018 DIS Arbitration Rules related to "Establishing the Facts," namely Articles 28.1 and 28.2, do not restrict evidence gathering. (*See* ECF No. 6-2, PageID.280-281; *see also* ECF No. 25, PageID.568-569, 588-589.) Finally, the Sixth Circuit permits § 1782 discovery for use in

private commercial arbitration. *Abdul*, 939 F.3d at 714.

**5. Whether the MPA's arbitration clause phrase "without recourse to the ordinary courts of law" bars Luxshare from seeking this Court's assistance with Section 1782 discovery?**

Section 20.10 of the MPA provides that the agreement "shall be governed by German law," and further provides as to arbitration:

> All disputes arising under or in connection with this Agreement (including any disputes in connection with its validity) shall be exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), including the Supplementary Rules for Expedited Proceedings, as applicable from time to time *without recourse to the ordinary courts of law*. The place of the arbitration shall be Munich, Germany. The language of the arbitral proceedings shall be English. Documents in the German language shall be translated into the English language.

(ECF No. 6-2, PageID.266 (emphasis added); *see also* ECF No. 6-2, PageID.271 [DIS Model Clauses].)

At the conclusion of the hearing, the Court sought supplemental briefing on the meaning of the contract language "[w]ithout recourse to the ordinary courts of law[.]" (ECF No. 25, PageID.599.) Respondents argue that "the MPA prohibits 'recourse' to a § 1782 petition[.]" (ECF Nos. 18, PageID.450-452; ECF No. 25, PageID.561, 567.) Luxshare contends that the

phrase "without recourse to the ordinary courts of law" does not "prohibit or limit Luxshare's right to obtain ancillary court relief such as Section 1782 discovery[,]" (ECF No. 19, PageID.475-478; ECF No. 25, PageID.578). The Court agrees that a 1782 motion seeks ancillary relief, as it is "supplementary" or "subordinate" to the main action. *Ancillary*, Black's Law Dictionary (11th ed. 2019).[3]

On balance, the Court is persuaded by Luxshare's argument. First, as for Respondents' reference to "Luxshare's unexplained delay in commencing an arbitration," (ECF No. 6, PageID.234), Petitioner convincingly argues that "[u]nder German law, Luxshare is well within the statute of limitations for bringing its claim and has until the end of 2021 to file for arbitration[,]" and that "a purported 'delay' in bringing claims does not supply a basis to deny a Section 1782 application[,]" (ECF No. 13, PageID.335). (*See also* ECF No. 13-2, PageID.367 ¶¶ 29-33 [Masser Jan. 8, 2021 Decl.].)

Second, notwithstanding the DIS Arbitration Rules on "Expedited Proceedings" (ECF No. 6-2, PageID.291), or Respondents' "expedited arbitration" argument (*see*, *e.g.*, ECF No. 6, PageID.243-245; ECF No. 14, PageID.380; ECF No. 25, PageID.561, 567), it is not mutually exclusive to undergo expedited arbitration and engage in Section 1782 discovery. As Attorney Masser declares, Section 20.10.2 of the MPA "does not preclude [Luxshare] from seeking interim

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[3] *See also Suit*, Black's Law Dictionary (11th ed. 2019) (defining "ancillary Suit" as "[a]n action . . . that grows out of and is auxiliary to another suit and is filed *to aid* the primary suit, to enforce a prior judgment, or to impeach a prior decree.") (emphasis added).

relief or pursuing discovery applications in the courts." (ECF No. 13-2, PageID.358 ¶ 14.) *See In re Faiveley Transp. Malmo AB*, 522 F. Supp. 2d 639, 641-642 (S.D.N.Y. 2007) (The injunctive relief being sought "to maintain the status quo during the pendency of [the] arbitration" would not jeopardize the requirement that "'[a]ny dispute arising out of or in connection with this agreement shall be finally settled by arbitration *without recourse to the courts*[,]" (emphasis in original), and "it is undisputed that the arbitration tribunal has not yet been convened, or its members selected, and hence resort to 'any competent judicial authority for *interim or conservatory measures*' is precisely what is contemplated by the very Rules that the parties agreed would govern.") (emphases added, external footnote omitted)). And, Luxshare's pursuit of this relief under 1782 before commencing the arbitration is consistent with a desire to keep the arbitration on an expedited track, once it commences, by obtaining the discovery beforehand. Unlike the Federal Rules of Civil Procedure, which explicitly prohibit discovery without leave of the court until the suit is underway and certain milestones have been passed, the DIS Arbitration Rules do not appear to contain such a prohibition. *See* Fed. R. Civ. P. 26(d)(1).

Finally, as the Court noted at the hearing, Black's Law Dictionary lists alternate definitions of *recourse*: (1) "[t]he act of seeking help or advice[;]" and, (2) "[e]nforcement of, or a method for enforcing, a right." *Recourse*, Black's Law Dictionary (11th ed. 2019). (ECF No. 25, PageID.578-579.) Upon consideration, the Court concludes – in context and including consideration of what could have been but was not addressed or excluded by the contract

language – that the second of these definitions of *recourse* is the one most applicable here. In other words, the phrase "without recourse to the ordinary courts of law" prevents Luxshare from coming to this Court for adjudication *on the merits*, *i.e.,* "a method for enforcing, a right," which Luxshare will do through the yet to be filed arbitration. Nonetheless, in the matter at hand, Luxshare is permitted to come to this Court for ancillary proceedings, such as assistance to compel arbitration to begin, *i.e.*, an "act of seeking help[,]" to procure evidence by compelling Section 1782 discovery, or to enforce an arbitration award. This interpretation is supported by Masser's declaration:[4]

> 4. [URL omitted] The suggested wording is in pertinent part: "All disputes arising out of or in connection with this contract or its validity shall be finally settled in accordance with the Arbitration Rules of the German Arbitration Institute (DIS) without recourse to the ordinary courts of law." By this standard wording, the parties agree that the main claim - if any - shall be arbitrated, not litigated. The parties using this standard language do not, however, generally exclude the assistance of state courts. German state courts regularly assume jurisdiction, even if such standard wording "without recourse to the ordinary courts of law" is included.
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> 5. Furthermore, German state courts do assume jurisdiction in spite of an arbitration agreement if the application brought concerns ancillary or

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[4] Quoted in substantive part only, for ease on the reader, with supporting citations to German law omitted, as indicated by asterisks.

interim proceedings but not the main claim itself. For example, the Higher Regional Court of Koblenz decided that it "is permissible according to the unanimous opinions of legal authorities and jurisprudence" for a party to commence a legal proceeding in a German state court to compel the counter-party to preserve evidence for use in an arbitration. **** This is now expressly set out in German statutory law, sec. 1033 of the Code of Civil Procedure ("CCP"), which provides for the jurisdiction of state courts for interim relief proceedings where the substantive dispute is controlled by an arbitration agreement and is confirmed by decisions of courts throughout Germany. **** The admissibility of interim relief in spite of an arbitration clause is, furthermore, expressed by the German legislature in the reasoning for the revised provisions in CCP. **** Finally, according to some prominent authors, sec. 1033 CCP regarding the right to state court relief for interim, non-substantive proceedings where the parties have an arbitration agreement is mandatory and cannot be excluded even by virtue of an express party agreement to the contrary. ****

6. Generally, when interpreting an arbitration agreement pursuant to German statutory law and principles, one has to consider the parties' intention at the time of concluding the contract (Sections 133 and 157 German Civil Code). **** Here, the parties chose to include the DIS standard wording, amended by referring to the expedited procedure. As can be seen from the jurisprudence cited above, such standard wording is not to the exclusion of state court support. Had the parties wanted to exclude any recourse to the ordinary courts for not

> only for the main claim for also for everything else, including evidence preservation and other interim relief applications, they would have needed to have expressly agreed on this and expressly stated it. But, as stated above, some authors suggest that parties cannot make such agreements because it is contrary to public policy.

(ECF No. 20, PageID.482-484 ¶¶ 4-6 [Masser Decl.].)

**6. Whether a decision on Luxshare's motion should be stayed pending the Supreme Court's decision in *Servotronics, Inc.*?**

After Petitioner and Respondents filed their supplemental briefs, the Supreme Court granted the petition for a writ of certiorari in *Servotronics, Inc.*, 2021 WL 1072280, at *1. The question presented is:

> Whether the discretion granted to district courts in 28 U.S.C. § 1782(a) *to render assistance* in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and, in the case below, the Seventh Circuit, have held.

*See* https://www.supremecourt.gov/qp/20-00794qp.pdf (emphasis added).[5] While Respondents have alerted the Court of this pending matter (ECF No. 22),

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[5] Interestingly, the question on which certiorari was granted appears to be consistent with the discussion above concerning the meaning of "recourse" to the ordinary courts of law, *i.e.*, that 1782 merely provides "assistance" via an ancillary action to the main action.

Luxshare contends that the Sixth Circuit's decision in *Abdul* remains binding and that "the grant of certiorari in *Servotronics* should bear no weight on the Respondents' pending motion to quash[,]" (ECF No. 23). Upon consideration, the Court declines to stay today's decision. It appears that the Supreme Court will consider *Servotronics* during the 2021-2022 term. As Luxshare points out, a decision could be issued as late as June 30, 2022. (ECF No. 23, PageID.497.) Until then, *Abdul* is binding on this Court. Given the potential length of time before the Supreme Court issues its decision in *Servotronics*, the fact that there is binding precedent from the Sixth Circuit, and the need for swifter action and greater certainty within the timeframe for the filing and pursuit of what will be expedited arbitration proceedings in Germany, the Court declines to exercise its discretion to stay the case pending the Supreme Court's decision in *Servotronics*.[6] Furthermore, the limited scope of the discovery which this Court has decided to grant takes the uncertainty of how the Supreme Court will rule on this issue into account – in conjunction with the discretionary *Intel* factors – permitting some, but by no means all of the requested discovery, and recognizing that both DIS

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[6] Notably, the expedited arbitration rules call for a decision within six months of the case management conference, with the case management conference to be held "in principle within 21 days" after the arbitral tribunal is constituted. (ECF No. 6- 2, PageID.280, § 27.2; *id*., PageID.291 Annex 4, Art. 1.) Since the statute of limitations dictates that this arbitration proceeding be commenced by December 2021, it will be well underway and may well be nearing completion by the time the Supreme Court renders its decision in *Servotronics*.

and the Supreme Court may give further guidance in the future.

**7. The final *Intel* factor**

**a. Unduly intrusive or burdensome**

"[U]nduly intrusive or burdensome requests may be rejected or trimmed." *Intel Corp.*, 542 U.S. at 265. "In determining whether such requests are intrusive or burdensome, the statute itself instructs that, '[t]o 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.'" *financialright*, 294 F. Supp. 3d at 738-39 (quoting 28 U.S.C. § 1782(a)). "Requests are unduly intrusive and burdensome where they are not narrowly tailored, request confidential information and appear to be a broad 'fishing expedition' for irrelevant information." *In re Ex Parte Application of Qualcomm Incorporated*, 162 F.Supp.3d 1029, 1043 (N.D. Cal. 2016) (footnote omitted); *see also Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007). Respondents and Luxshare dispute whether Luxshare's subpoenas are overly broad, invasive, or unduly burdensome. (ECF No. 6, PageID.246-248; ECF No. 13, PageID.349-350.)

**b. What is the proper scope of discovery?**

"Unless otherwise limited by court order, the scope of discovery is as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in

> controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). *See also In re Sargeant*, 278 F. Supp. 3d at 824 ("while this Court does not reach consideration of the *Intel* factors, Rule 26(b) circumscribes the scope of discovery to that which is 'proportional to the needs of the case.'") (quoting Fed. R. Civ. P. 26(b)(1)).

Anticipating the *possibility* that the Court might permit *some* discovery, the Court's February 24, 2021 text-only order also provided: "although preserving ZF's objection that it need not produce anything . . . : (1) the parties shall undertake another meet and confer conference to discuss what they can jointly agree upon and what they cannot agree upon if the Court were to order production in response to the subpoenas (with reference to the fourth *Intel* factor); and, (2) submit another joint statement reflecting the parties conditional agreements (subject to ZF's preserved objections) and proposals."

On March 19, 2021, the parties reported that they "were unable to reach an agreement regarding the proper scope of discovery that might be permitted pursuant to 28 U.S.C. § 1782." (ECF No. 21, PageID.487 ¶ 3.) They have provided detail about their attempts to negotiate the proper scope of discovery. (ECF No. 21, PageID.487-493.) Respondents' initial, albeit conditional, proposal is for Petitioner "to make requests for specific documents

created between May 1, 2017 and August 30, 2017[,]" as "such a proposal is consistent with the scope of any discovery that a DIS Panel would even consider in any future arbitration." (ECF No. 21, PageID.487.) Among other things, Luxshare points out that "the scope of Section 1782 discovery is governed by the Federal Rules of Civil Procedure and not the DIS Rules." (ECF No. 21, PageID.490.) The Court is well aware of this and has considered, in addition to the question of relevance discussed throughout this opinion, each of the proportionality factors listed in Fed. R. Civ. P. 26(b)(1). The rulings which follow attempt to resolve this discovery dispute in a manner that is "proportional to the needs of the case," noting "the importance of the issues at stake in the action," the indisputably large amount in controversy – "nearly a billion dollars pursuant to the terms of" the MPA (ECF No. 1, PageID.9), Luxshare's relative lack of access to much of the relevant information, the seemingly large resources of both sides, and "the importance of the discovery in resolving the issues[.]" Fed. R. Civ. P. 26(b)(1).

Further, upon consideration of the *Intel* factors, taking cognizance of the potential for the Supreme Court to foreclose § 1782 discovery in foreign arbitrations without staying this application in its entirety, and with due deference to the "circumvention" and "unduly intrusive or burdensome" factors, the Court concludes that discovery is warranted, but in a more limited scope than Luxshare requests in its subpoenas.

**i. The temporal scope**

First, as for the temporally appropriate period, instead of Respondents' suggestion that it should be cut off upon the signing of the MPA, the Court finds

it appropriate to "shorten the temporal scope of all of the document requests to the 16-month period of December 2016 to the April [27, ]2018 closing[,]" as offered by Luxshare. (ECF No. 21, PageID.488-489, 491-492.)[7] Luxshare persuasively argues that "[t]he period between signing and closing is a critical period in any fraud case arising from an M&A transaction, and internal ZF US communications in that period may certainly reflect discussion of the fraud[,]" and that "[e]ven more fundamentally, the MPA was amended shortly before closing, on April 14, 2018." (*Id*., PageID.493; *see also* ECF No. 1-2, PageID.44 ¶ 14.) (*See also* ECF No. 25, PageID.561, 590-591, 597.) The Court recognizes from experience that misrepresentation as to material facts upon which a party to a contract may rely to its detriment may well occur during post-contract, pre-closing due diligence, as sometimes occurs in a pre-closing home inspection or the sharing of a business's financial ledger.

**ii. Scope of document searches**

Second, the document searches shall be limited to "(i) the emails of Respondent . . . Marnat and [one]

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[7] The beginning of this time frame allows for a brief period before the April 2017 commencement of the "Due Diligence Period" and accounts for the fact that the 2016 actual financials were part of the disclosures. (ECF No. 1-5, PageID.80-81 [Huang Oct. 5, 2020 Decl., ¶¶ 7 & 10].) It is also what Luxshare requested as the starting point, albeit not the endpoint specified in its subpoenas, which, in several places and inconsistent with the instructional section, sought information "between December 1, 2016 *and the date of this Subpoena* . . . ." (*See, e.g.,* ECF No. 1-2, PageID.50, No. 8 (emphasis added); ECF No. 25, PageID.590-591.) And, while Respondents take issue with having the closing date as the endpoint, they do not take issue with the December 2016 starting point. (ECF No. 21, PageID.489.)

other custodian[]," and (ii) "documents contained in any shared data drive or other reasonably accessible centrally maintained sources." (ECF No. 21, PageID.491.) The Court will not require Dekker to serve as a document custodian, as he provided an unrebutted declaration, which states:

- To the extent that while working at ZF US I possessed any documents related to the Luxshare transaction or otherwise responsive to the subpoena served on me in this case, I left these documents in the possession of ZF US when I stopped working at ZF US.
- When I left ZF US, I did not retain any documents related to the Luxshare transaction or otherwise responsive to the subpoena . . . .
- I do not have in my possession any documents related to the Luxshare transaction or otherwise responsive to the subpoena served on me in this case.

(ECF No. 6-3, PageID.300, ¶¶ 4-6.) In other words, only *one* document custodian *besides* Marnat will be permitted. Additionally, as both sides suggested (ECF No. 21, PageID.489, 491, 492), the parties shall agree to a list of search terms.

Moreover, while the Court agrees with Respondents that the document requests are overbroad in several respects, Respondents made no effort to convince the Court that the requests are "unduly burdensome," despite alluding to that contention in a mere topic heading. (ECF No. 6, PageID.246.) The Court requires significantly more than that to contest discovery on this basis, as it is

"well-settled law that, '[i]f an objection is interposed based on an alleged undue burden, the objecting party must make 'a specific showing, usually . . . by affidavit, of why the demand is unreasonably burdensome.'" *State Farm Mut. Auto. Ins. Co. v. Elite Health Centers, Inc.*, 364 F. Supp. 3d 758, 766 (E.D. Mich. 2018) (citation omitted). That did not happen here. And, "the fact that it will be either bothersome or burdensome to respond to a discovery request does not necessarily mean that it will be *unduly* so." *State Farm*, 364 F.Supp.3d at 767 (emphasis in original).

Respondents' contention that the requests are *too broad* has greater traction, although the requests are relatively targeted compared to much of the large-scale commercial litigation seen by this Court on a regular basis. For example, Respondents protest that they ought not be required to reveal communications with other bidders or banks concerning the "Big Three" U.S. automakers, *i.e.*, the "Relevant Customers." (ECF No. 6, PageID.247.) The Court disagrees. Those communications could reveal the exchange of information – particularly financial information – that runs contrary to the information provided to and reasonably relied upon by Luxshare, perhaps constituting evidence of fraud. Nonetheless, some of Luxshare's definitions of the key entities and some of Luxshare's requests are unreasonably broad, and the litany style used to define certain common words, such as the word *concerning*, go so far afield as to make no sense. With that in mind, Luxshare will be required to make the following deletions from its subpoenas: **(a)** "edifying" and "starting" from the definition of "concerning" (*id.*, ¶ 6); **(b)** "affiliates," "predecessors," "successors," "representatives," "agents," "consultants," and "advisors" from the

definitions of "FCA," "Ford," and "GM" (*id.*, ¶¶ 9, 11, 12); **(c)** the errant paragraph (*id.*, ¶ 16); **(d)** "including, but not limited to" from Request Nos. 2 & 3; and, **(e)** "or the information contained therein" from Request No. 4. Further, Request No. 6 will be limited to communications concerning the "past or future sales or sales volumes" with respect to the Relevant Customers. In making these adjustments, the Court takes into consideration both the purported procedure in Germany that does not permit "categories of discovery," as Respondents point out (ECF No. 6, PageID.248), and the notion that "courts are counseled to pare down the requests rather than denying [them] outright[,]" as Luxshare advocates (ECF No. 13, PageID.349). *See Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 598 (7th Cir. 2011) (In a § 1782 discovery matter, "[i]f it's asking for too much, the district court can and should cut down its request, but not to nothing, as it did. That was unreasonable, and therefore reversible.").

**iii. Depositions**

Similarly, with respect to depositions, the Court is inclined to give some, but not all. In considering the question of depositions, the Court bears in mind that: (1) the parties to the MPA contracted for arbitration in Germany, not full-blown U.S. litigation; (2) they agreed to do this on an "expedited," *i.e.*, streamlined basis; (3) Luxshare believes it has "evidence to support [its] claims right now[,]" but just "need[s] that discovery to make sure that [it has] *the strongest possible pleading* when [it] commence[s] the arbitration[,]" (ECF No. 25, PageID.581-582 (emphasis added)); and, (4) there needs to be a balance between the *Intel* Court's concern that nonparties' testimony may be unattainable absent

relief under § 1782 *and* the duty of both the subpoenaing party and the Court to "avoid imposing undue burden . . . on a person subject to the subpoena[,]" Fed. R. Civ. P. 45(d)(1). This last consideration is especially noteworthy where witnesses face the prospect of being dragged into litigation involving their former employer. With all of this in mind, the Court has determined that one deposition is enough. Accordingly, the Court will permit Luxshare – at its own choosing – to take the deposition of either Respondent Gerald Dekker or Respondent Christophe Marnat. It may not take both.

**II. ORDER**

Accordingly, Respondents' motion to quash improper subpoenas (ECF No. 6) is **GRANTED IN PART** and **DENIED IN PART**. Consistent with the foregoing, ZF US and Marnat **SHALL** respond to the respective subpoenas (ECF Nos. 1-2, 1-3, 1-4) consistent with this opinion by a reasonable deadline to be mutually worked out by counsel.

**IT IS SO ORDERED.**[8]

Dated: May 27, 2021 s/ Anthony Patti
U.S. MAGISTRATE JUDGE

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[8] The attention of the parties is drawn to Fed. R. Civ. P. 72(a), which provides a period of fourteen (14) days after being served with a copy of this order within which to file objections for consideration by the district judge under 28 U.S.C. § 636(b)(1).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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|---|---|
| LUXSHARE, LTD.,<br>Petitioner,<br>v.<br>ZF AUTOMOTIVE US, INC., et al.,<br>Respondents. | Case No. 2:20-mc-51245<br>Honorable Laurie J. Michelson<br>Magistrate Judge Anthony P. Patti |

**OPINION AND ORDER DENYING MOTION TO STAY [30] AND GRANTING MOTION TO COMPEL [31]**

2021 WL 3629899

As a result of a business dispute involving hundreds of millions of dollars in potential damages, Luxshare, LTD intends to initiate, by the end of the year, an arbitration proceeding in Munich, Germany against ZF Automotive US, Inc. Luxshare came to this federal court in the Eastern District of Michigan pursuant to 28 U.S.C. § 1782 seeking discovery for the arbitration from ZF US and two of its senior officers who reside in the District.

Some procedural history tees up the motion now before the Court. This Court referred Luxshare's petition to Magistrate Judge Anthony P. Patti. He reviewed the briefing, conducted an extensive hearing, and requested supplemental briefing, before ultimately granting discovery in limited scope. Judge Patti permitted Luxshare to obtain limited email

production and to take one deposition. (ECF No. 26.) ZF US filed objections to Judge Patti's opinion and order, which this Court reviewed under an abuse of discretion standard. The Court found no legal error or abuse of discretion in Judge Patti's order and overruled ZF US's objections. (ECF No. 29.) Even so, ZF US has not produced any discovery materials; instead it filed a motion to stay. (ECF No. 30.) On the same day, Luxshare filed a motion to compel. (ECF No. 31.) ZF US has since filed a notice of appeal (ECF No. 32) and a motion to stay with the Sixth Circuit, Motion, *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 21-2736 (6th Cir. July 23, 2021). A few days later, the Sixth Circuit ordered ZF US to show cause why the appeal should not be dismissed for lack of jurisdiction. *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 21-2736 (6th Cir. July 27, 2021) (show cause order). ZF US has filed a response, but the Sixth Circuit has not yet ruled. *See* Response, *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 21-2736 (6th Cir. July 30, 2021).

In the meantime, ZF US's motion to stay and Luxshare's motion to compel are before this Court. For the reasons that follow, the Court denies ZF US's motion to stay. The Court grants Luxshare's motion to compel and orders ZF US to produce the discovery within 14 days of a ruling from the Sixth Circuit denying the motion to stay or dismissing the appeal.

## I. The Motion to Stay

The Court begins with ZF US's motion to stay the case pending appeal. This Court has discretion to stay its ruling and ZF US "bears the burden of showing that the circumstances justify an exercise of [ ] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). The Court considers four factors to determine

whether a stay should be issued pending appeal: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits on appeal; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whether the public interest is served. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *JSC MCC EuroChem v. Chauhan*, No. 18-5890, 2018 WL 9650037, at *1 (6th Cir. Sept. 14, 2018).

**A.**

For a stay pending appeal, the first factor, likelihood of success on the merits, essentially asks whether there is "a likelihood of reversal." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). To justify a stay the movant "need not always establish a high probability of success on the merits." *Michigan Coal.*, 945 F.2d at 153 (internal citations omitted). But the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay" and the movant is "always required to demonstrate more than the mere possibility of success on the merits." *Id.* (internal citations and quotation marks omitted). As will be discussed below, ZF US has not demonstrated any irreparable harm, so it needs to show a high likelihood of success on this factor.

ZF US argues that it has a likelihood of success on the merits of its appeal because (1) the Supreme Court has granted review of a case involving the same key issue presented in this case, and (2) ZF US's

appeal to the Sixth Circuit involves issues of first impression.

In March 2021, the Supreme Court granted certiorari in *Servotronics, Inc. v. Rolls-Royce PLC* to address a circuit split over whether § 1782 encompasses private commercial arbitral tribunals. *Servotronics, Inc. v. Rolls-Royce PLC*, 141 S. Ct. 1684 (2021). If § 1782 does not encompass private commercial arbitral tribunals, Luxshare would not be entitled to the discovery granted in this case.

But the current law in the Sixth Circuit is that § 1782 discovery may be used for private commercial arbitrations. *See Abdul Latif Jameel Trans. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710, 723 (6th Cir. 2019). The Supreme Court's grant of certiorari in *Servotronics* does not change this binding precedent. *See In re Bradford*, 830 F.3d 1273, 1275 (11th Cir. 2016) ("[G]rants of certiorari do not themselves change the law, and must not be used by courts as a basis to grant relief that would otherwise be denied." (internal citation and quotation marks omitted)). So if the Sixth Circuit rules on ZF US's appeal based on the current binding precedent, ZF US has very little likelihood of success on the merits.

Another possibility is that the Sixth Circuit will not decide ZF US's appeal until after the Supreme Court's ruling in *Servotronics*. But even considering the possibility that the Sixth Circuit law could change as a result of the Supreme Court's ruling, many unknowns remain. At this point, it is not even clear that the case will be heard by the Supreme Court as scheduled in October 2021. The respondents in *Servotronics* recently filed a brief arguing that the case has become moot and asking the Supreme Court to dismiss the case. (ECF No. 35, PageID.824) (citing

Brief for Respondent at 12-14, *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794 (June 21, 2021).) Even if the case is heard in October, the decision could come as late as June 2022, six months after Luxshare's deadline to initiate arbitration that will be expedited. And of course, the Supreme Court may interpret § 1782 as the Sixth Circuit has. Luxshare raises an additional relevant piece of information: In the parallel *Servotronics* case decided by the Fourth Circuit, the Supreme Court recently declined to stay the Fourth Circuit's order allowing discovery under § 1782. *See Rolls-Royce PLC v. Servotronics, Inc.*, No. 20A160, 2021 WL 1618133 (U.S. Apr. 27, 2021).

In sum, Sixth Circuit law controls unless the Supreme Court says otherwise. Under current Sixth Circuit law, ZF US has little likelihood of success. And the Supreme Court may not say otherwise until after the arbitration takes place or the Sixth Circuit rules on ZF US's appeal. Moreover, it may not say otherwise at all, and instead adopt the view of the Sixth Circuit. So the grant of certiorari only shows that ZF US has, at best, a possibility, not a likelihood, of succeeding on appeal.

ZF US's second likelihood-of-success argument fares no better. ZF US argues that it can satisfy the likelihood-of-success factor simply by showing that there are substantial legal questions or matters of first impression at issue. (ECF No. 30, PageID.734.) But this is not a position endorsed by the Sixth Circuit. Even on questions of first impression, ZF US must demonstrate a likelihood of reversal to a degree inversely proportional to the irreparable harm it would suffer absent a stay. *See Michigan Coal.*, 945 F.2d at 153. Again, as discussed below, ZF US has not demonstrated any irreparable harm, so it would

need to show a high likelihood of success on this factor.

To determine ZF US's likelihood of success, it is important to consider the standard of review. A district court's authorization of discovery under § 1782 is reviewed for an abuse of discretion. *JSC*, 2018 WL 9650037, at *1. "An abuse of discretion occurs only 'when the district court relies on clearly erroneous findings of fact, . . . improperly applies the law, . . . or . . . employs an erroneous legal standard.'" *Id.* (quoting *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 748 (6th Cir. 2005)).

Considering ZF US's three supposed questions of first impression under the abuse of discretion standard, ZF US has not shown a likelihood of success on any of them. For the first two issues, ZF US does not allege that the Court made a clearly erroneous finding of fact or an incorrect legal ruling, so it has not shown any likelihood that the Sixth Circuit would overrule the Court's order on either of these bases.

For the third issue, ZF US does argue that the Court employed the wrong legal standard by reviewing the magistrate judge's decision under the "clearly erroneous or contrary to law" standard. (ECF No. 30, PageID.739.) ZF US argues that the magistrate judge's decision should be considered dispositive and thus must be reviewed de novo. (*Id.*) True, the Sixth Circuit has not ruled on this question. But in its own order, this Court considered this question and noted that although no appellate court has addressed the issue, most lower courts have found that such rulings are not dispositive. *Luxshare, LTD. v. ZF Auto. US, Inc.*, No. 2:20-MC-51245, 2021 WL 2705477, at *2 (E.D. Mich. July 1, 2021) (citing *In re Hulley Enters.*, 400 F. Supp. 3d 62, 71 (S.D.N.Y.

2019)). ZF US has not presented any evidence to suggest that the Sixth Circuit will rule differently.

Instead, ZF US argues, without any case law in support, that because a decision on a motion to quash is final and appealable, it must also be dispositive. (ECF No. 30, PageID.739.) But, in fact, in the show cause order issued by the Sixth Circuit in this case, the court of appeals questioned whether this Court's ruling is even appealable. *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 21-2736 (6th Cir. July 27, 2021) (show cause order). The Sixth Circuit's denial of a stay in *JSC MCC EuroChem* provides an additional clue. In that case, the district court similarly reviewed the magistrate judge's order under an abuse of discretion standard and the Sixth Circuit did not raise this as an issue in its decision denying a stay. 2018 WL 9650037, at *1.

So although the standard of review for a magistrate judge's order on a motion to quash a subpoena pursuant to § 1782 is an issue of first impression in the Sixth Circuit, ZF US has not presented any evidence of "more than the mere possibility of success on the merits" of this question.

Because § 1782 extends to private arbitration under binding precedent that currently applies to ZF US's appeal and it is uncertain when and what the Supreme Court might rule in *Servotronics*, and because ZF US has not shown a high likelihood that this Court otherwise erred in its ruling, the Court finds that the first factor, likelihood of success on appeal, does not favor a stay.

**B.**

The Court next considers whether ZF US would be irreparably harmed in the absence of a stay and

balances the degree of potential harm with the likelihood of success on appeal discussed above. "In evaluating irreparable harm, we consider: the 'substantiality of the injury alleged'; whether the injury will likely occur; and whether the movant provided adequate proof of the alleged injury." *JSC MCC EuroChem*, 2018 WL 9650037, at *2 (quoting *Mich. Coalition*, 945 F.2d at 154).

For a multi-billion-dollar company like ZF US, the time and money required to produce a limited category of emails and conduct a single deposition is clearly not irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." (internal citation omitted)). But ZF US argues that the source of irreparable harm is that if ZF US produces the discovery materials now, Luxshare will immediately initiate arbitration and use the materials against ZF US. And the expedited arbitration proceedings will likely conclude before the Sixth Circuit rules on ZF US's appeal and the Supreme Court rules on *Servotronics*. So, ZF US argues, there would be no remedy if it is later determined that Luxshare was not entitled to the discovery.

But even if a discovery order cannot be undone, it does not automatically follow that this creates irreparable harm. The worst case for ZF US is that it has to produce limited discovery that it should not have to—but as just stated, that is not a substantial cost for a company like ZF US. ZF US cites several cases that discuss the irreparable harm that can be caused by an "erroneous forced disclosure" of confidential or privileged information. *In re Pros.*

*Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009); *see also In re Lott*, 139 F. App'x. 658, 662 (6th Cir. 2005); *In re Ford Motor Co.*, 110 F.3d 954, 962–64 (3d Cir. 1997). In the case of confidential or privileged information there is an inherent harm in wrongfully disclosing "information that is claimed to be protected by the Constitution, privilege, or more general interests in privacy." *In re Pros. Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009) (quoting 16 Wright & Miller, Federal Practice & Procedure § 3935.3). And in the case of disclosure of privileged information, there is a harm done to the privilege itself, which cannot be cured. *In re Lott*, 424 F.3d 446, 452 (6th Cir. 2005).

But in this case, the discovery ordered by the Court does not include any privileged or confidential materials. Reading between the lines, ZF US seems to be concerned about the harm that might accrue to ZF US if Luxshare discovers evidence supportive of its claims and uses it against ZF US in the arbitration. But ZF US cannot claim that it would be harmed by the disclosure of evidence of its own wrongdoing that is not privileged or confidential. So because the discovery is not privileged or confidential, and ZF US offers no other argument for how the production of this discovery would cause irreparable harm, ZF US has not met its burden on this factor.

ZF US's final argument, that it will be harmed by not having reciprocal discovery, is unavailing. ZF US did not ask for reciprocal discovery.

In sum, the Court agrees with its sister court in the Southern District of New York that "a requirement to produce documents, at least absent a claim of privilege or sensitivity, is not generally the type of injury that is irreparable." *In re Platinum*

*Partners Value Arbitrage Fund LP*, 2018 WL 3207119, at *6 (S.D.N.Y. June 29, 2018).

Considering the low likelihood of success on the merits its appeal along with the absence of any irreparable harm, the outcome of ZF US's motion to stay seems apparent. But in the interest of thoroughness, the Court will briefly address the final two stay factors.

**C.**

The third factor is whether a stay will substantially injure the other parties interested in the proceeding. Both parties agree that Luxshare could be harmed if a stay were granted without tolling the statute of limitations for initiating arbitration by the end of 2021. In its motion, ZF US states that if a stay is granted it agrees that the statute of limitations will be tolled pending the Sixth Circuit appeal. (ECF No. 30, PageID.745.) Luxshare is skeptical of ZF US's offer because it was only made in their brief without any sort of binding declaration or agreement. (ECF 35, PageID.830.) The Court also notes that neither party has made it clear whether the private arbitration tribunal would accept a tolling agreement.

Regardless, Luxshare argues that it would be harmed even if the statute of limitations were tolled. First, production of the discovery has already been delayed. And particularly in the case of the deposition, further delay comes with the risk of fading memory or witness incapacity. As discussed above, it could be 10 months before the Supreme Court issues a decision in *Servotronics*. And the timeline for ZF US's appeal is unknown. Luxshare claims that ZF US is responsible for hundreds of millions of dollars of damages. So Luxshare could be substantially injured

if it is denied access to discovery it is ultimately entitled to. Given these risks, the possible harm to Luxshare if a stay is granted is at least as great as the risk to ZF US in the absence of a stay.

**D.**

Finally, the Court must consider whether the public interest would be served by a stay. ZF US argues that third parties should be protected from the burden of sitting for a deposition, but the two potential deponents here are both parties to this case. On the other hand, Luxshare argues that a stay of discovery would frustrate the twin aims of § 1782. These twin aims are "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *In re Application to Obtain Discovery for Use in Foreign Proc.*, 939 F.3d 710, 730 (6th Cir. 2019) (internal citation omitted); *see also Nikon Corp. v. GlobalFoundries U.S., Inc.*, No. 17-MC-80071-BLF, 2017 WL 4865549, at *3 (N.D. Cal. Oct. 26, 2017) ("[The dual] purposes would be frustrated by a stay order."). A number of courts have held that the public interest weighs against a stay of discovery in a § 1782 case because discovery "supports the truth in foreign actions." *In re Bracha Found.*, No. 2:15-MC-748, 2015 WL 6828677, at *4 (N.D. Ala. Nov. 6, 2015); *see also In re Application of Procter & Gamble Co.*, 334 F. Supp. 2d 1112, 1118 (E.D. Wis. 2004) ("[T]he public interest favors allowing the discovery because doing so furthers the search for the truth in the foreign actions."); *In re Sergeeva*, No. 1:13-CV-3437, 2015 WL 13774466, at *3 (N.D. Ga. July 20, 2015) ("[A]llowing the information to be produced will assist in the foreign tribunal's search for the truth."). The Court agrees that the public's

interest in truth and efficiency in foreign actions and in encouraging mutual assistance between foreign tribunals weighs against a stay in this case.

* * *

ZF US's low, or at best uncertain, likelihood of success on the merits of its appeal, the absence of irreparable harm to ZF US absent a stay, the harm that Luxshare could suffer if discovery is stayed, and the public interest weigh against a stay. ZF US' motion to stay will be thus be denied.

**II. The Motion to Compel**

Also before the Court is Luxshare's motion to compel the discovery previously ordered by the Court.

Judge Patti's decision to allow Luxshare limited discovery became final on July 1, 2021 when the Court overruled ZF US's objections to the order. (ECF No. 29.) As detailed above, the Court is denying ZF US's motion to stay the order. ZF US does not offer any real reason why the motion to compel should not be granted beyond reiterating arguments that the Court has already addressed and rejected in this opinion and previous opinions. Nor can it. Luxshare is entitled to discovery under the Court's July 1 order and so the motion to compel that discovery will be granted.

But the Court appreciates that ZF US has also filed a motion to stay with the Sixth Circuit. And ZF US represents that it has "engaged in good-faith efforts to collect responsive documents to be prepared to expeditiously produce these documents." (ECF No. 36, PageID.841.) So if the Sixth Circuit denies the motion for stay or dismisses the appeal, ZF US will have 14 days from either of those events to produce the discovery.

In its motion to compel, Luxshare also requests the costs and attorney's fees for its motion. (ECF No. 31, PageID.759.) Luxshare argues that this request is justified under Fed. R. Civ. P. 37(b)(2) because ZF US "fail[ed] to obey an order to provide or permit discovery[.]" Rule 37(b)(2) also states that attorney's fees and expenses are justified "unless the failure was substantially justified or other circumstances make an award of expenses unjust." Here, an award of fees is not warranted because ZF US communicated to Luxshare shortly after the Court's July 1 order that it intended to appeal the decision and seek a stay. And there was some legal basis for ZF US to appeal and seek a stay given the state of the law in the Sixth Circuit and the fact that the issue is pending before the Supreme Court. So ZF US was substantially justified in failing to comply with the order while it prepared and promptly filed its motion to stay and notice of appeal.

**III.**

For the reasons stated above, the Court DENIES ZF US's motion for a stay (ECF No. 30). The Court GRANTS Luxshare's motion to compel (ECF No. 31) and orders ZF US to comply with the subpoenas and produce the discovery materials as directed in the Court's previous order (ECF No. 26) within 14 days of an order by the Sixth Circuit either denying ZF US's motion to stay or dismissing the appeal.

SO ORDERED.

Dated: August 17, 2021

s/ Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES
DISTRICT JUDGE

28 U.S.C. § 1782(a)

**§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals**

(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.

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