UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-20810-CIV-WILLIAMS/SIMONTON

GYPTEC, S.A.,

Applicant,

v.

CARLOS HAKIM-DACCACH,

Hakim-Daccach.
_____/

OMNIBUS ORDER ON CARLOS HAKIM-DACCACH'S VERIFIED RENEWED MOTION TO QUASH SUBPOENA AND TO VACATE THE COURT'S ORDER GRANTING GYPTEC'S 28 U.S.C. § 1782 APPLICATION AND CARLOS HAKIM-DACCACH'S MOTION TO STRIKE A MAJORITY OF GYPTEC'S SUR REPLY

This matter is before the Court on Carlos Hakim-Daccach's ("Hakim-Daccach") Verified Renewed Motion to Quash Subpoena and to Vacate the Court's Order Granting Gyptec's 28 U.S.C. § 1782 Application, and Hakim-Daccach's Motion to Strike a Majority of Gyptec's Sur-Reply. ECF Nos. [18] and [38]. This matter was referred to the undersigned Magistrate Judge pursuant to the Order Referring Matter to Magistrate. ECF No. [3]. For the reasons set forth below, the undersigned denies both of Hakim-Daccach's motions.

I. BACKGROUND

On March 4, 2016, Gyptec petitioned this Court for an Order to permit discovery of information from Hakim-Daccach, a Florida resident, for use in what Gyptec described as an ongoing Colombian proceeding, (the "Colombian Litigation"). ECF No. [1]. Gyptec contended that the underlying matters relate to Hakim-Daccach's claim of ownership over Gyptec, a Latin American corporation. ECF No. [6] at 2. According to the Application, Gyptec was established in 2004 by Hakim-Daccach's uncle, Doctor

Alejandro Hakim-Dow ("Hakim-Dow") and cousins Alejandro Hakim Tawil, deceased, and Jorge Hakim Tawil ("Tawil). Gyptec contends that since 2005, two Panamanian Companies owned by Dr. Alejandro Hakim-Dow hold 99% of Gyptec, and the remaining shares are held by Hakim-Dow's two sons and Hakim-Daccach. ECF No. [6] at 6.

Gyptec asserts that in March 2014, Hakim-Daccach filed a derivative complaint against Gyptec's directors and officers for allegedly breaching their fiduciary duties by purportedly misappropriating funds. Hakim-Daccach contends that he owns one-third of Gyptec by virtue of investments allegedly made by his father in 2004 and 2005. ECF No. [6] at 1. Gyptec argued that in order to substantiate his claims of ownership, Hakim-Daccach relied upon copies of wire transfer records containing hand written annotations by his father, which indicate an intended capital contribution to Gyptec. ECF No. [6] at 3. Conversely, Gyptec and its shareholders assert that Hakim-Daccach owns only 10 out of 530,987 shares. ECF No. [6] at 1. Hence, Gyptec sought in its application to discover the original wire transfer records, in addition to other related information, in order to dispute Hakim-Daccach's claims.

Gyptec alleged in its Application that as a result of the Colombian Litigation, it suffered monetary harm, including an inability to receive and use funds resulting from a sale of assets to Knauf international Gmbh ("Knauf"). Gyptec asserted that it intended to use the sought-after discovery in contemplated claims against Hakim-Daccach should his claims of ownership be false. ECF No. [6] at 3. Specifically, Gyptec alleged that Hakim-Daccach held himself out as a significant shareholder and communicated false information to its partner, USG International Ltd. ("USG"). ECF No. [6] at 3. Gyptec sought information to support its allegations that Hakim-Daccach interfered with an attempted merger between Gyptec and USG by falsely informing USG that (1) he owned one-third of Gyptec and (2) Gyptec had not disclosed to him its negotiations with USG.

Gyptec claimed that it sought this Court's assistance to obtain evidence to demonstrate Hakim-Daccach's efforts to interfere in Gyptec's business dealings. With regard to the ongoing Colombian Litigation, Gyptec sought Hakim-Daccach's, (1) communications and correspondence, including emails, discussing any investments, capital contributions or loans to Gyptec or the Panamanian companies; and (2) financial records, including wire transfers, reflecting investments, capital contributions or loans to Gyptec, which it maintains is within his custody, possession or control. In addition, Gyptec sought to depose Hakim-Daccach in Miami, Florida regarding the aforementioned topics.

For the contemplated litigation, Gyptec sought (1) communications and correspondence, including emails, regarding Gyptec's proposed asset sales to USG or Knauf; (2) records, including calendars or agendas, reflecting meetings with or regarding USG and Knauf or their agents or representatives. Gyptec also requested to depose Hakim-Daccach for information related to those matters.

On August 26, 2016, after considering Gyptec's Application, this Court entered an Order on Ex Parte Application for an Order under 28 U.S.C. § 1782. ECF No. [8]. This Court granted Gyptec's application and authorized Gyptec to issue and serve a subpoena on Carlos Hakim-Daccach.

On October 31, 2016, Hakim-Daccach filed his Verified Renewed Motion to Quash Subpoena and to Vacate the Court's Order Granting Gyptec's 28 U.S.C. § 1782 Application, ECF No. [18]. Gyptec has filed a response, and Hakim-Daccach has filed a reply in support of its Motion to Quash. ECF Nos. [20][25]. On May 26, 2017, the undersigned required Gyptec to file a Sur-Reply. ECF No. [32]. On June 5, 2017, Gyptec filed its Sur-Reply, and thereafter Hakim-Daccach filed his Motion to Strike the Majority of Gyptec's Sur-Reply. ECF Nos. [34] and [38].

II. LEGAL FRAMEWORK

***Ex Parte* applications under Section 1782 are proper, and courts, including those in the Southern District of Florida, commonly grant such *ex parte* applications.[1] *See e.g.*, *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. 2014); *In re Alianza Fiduciaria S.A.*, No. 13-81002-MC, 2013 WL 6225179 (S.D. Fla. Oct. 24, 2013). Before a court is authorized to grant a petition for discovery under Section 1782, four *prima facie* requirements must be 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.**

28 U.S.C. § 1782(a); *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 747 F.3d at 1269 (quoting *In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007)). "If the aforementioned requirements are met then Section 1782 authorizes, but does not require, the Court to provide assistance." *In re Pimenta,* 942 F. Supp. 2d 1282, 1286 (S.D. Fla. 2013). If the application is granted, the document or thing produced must be done so in accordance with the Federal Rules of Civil Procedure. 28 U.S.C. § 1782(a). Additionally, the Supreme Court held that a proceeding before a foreign tribunal need only be within reasonable contemplation, not pending or imminent, for an applicant to invoke Section 1782(a) successfully. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, at 253-54, 258 (2004).

However, even if a court has authority to permit discovery under Section 1782 it is not mandated to do so. *Intel*, 542 U.S.at 246. The Supreme Court outlined the following factors to be considered prior to a court exercising discretionary authority under 1782(a):

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[1] **The individual from who discovery is sought may still object to requests after an *ex parte* application is granted, as occurred in the case at bar.**

> **(1) whether the person from whom discovery is sought is a participant in the foreign proceeding, because the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant; (2) 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; (3) 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; and (4) whether the request is otherwise unduly intrusive or burdensome.**

***In re Clerici*, 481 F.3d at 1334 (quoting *Intel*, 542 U.S. at 264-65).**

"When considering these factors, the Court should keep in mind the twin aims of Section 1728(a); providing efficient means of assistance to participants in litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *In re Thai-Lao Lignite (Thail.) Co.*, 821 F. Supp. 2d 289, 293 (D.D.C. 2011).

Finally, the burden rests with the party objecting to the discovery. *In re Chevron Corp.,* Case No. 11-24599-CV, 2012 WL 3636925 at *6 (S.D. Fla. June 12, 2012); *Heraeus Kulzer, GmbH v. Biomet, Inc*., 633 F.3d 591, 597 (7th Cir. 2011) ("once a section 1782 applicant demonstrates a need for extensive discovery for aid in a foreign lawsuit, the burden shifts to the opposing litigant to demonstrate, by more than angry rhetoric, that allowing the discovery sought (or a truncated version of it would disserve the statutory objectives).

III. HAKIM-DACCACH'S RENEWED MOTION TO QUASH SUBPOENA

A. Position of the Parties

1. Hakim-Daccach's Motion to Quash Subpoena, ECF No. [18].

Hakim-Daccach asserts that the subpoena should be quashed because: 1) the discovery sought is not, and cannot be for use in a proceeding before a foreign tribunal because the Colombian litigation has concluded, the contemplated Columbian proceeding does not qualify as a necessary foreign proceeding because it cannot

reasonably be contemplated, Hakim-Daccach's ownership interest has been conclusively decided, and because Gyptec has no more than a subjective intent to bring further proceedings; 2) even If Gyptec could satisfy the Section 1782 factors, the discretionary factors weigh strongly against Section 1782 assistance; and 3) the application was made in bad faith and is premised on misstatements.[2]

a. Colombian Arbitration Tribunal

Hakim-Daccach asserts that in April 2010, he commenced arbitral proceedings seeking among other things recognition of his ownership shares in the Panamanian companies. Hakim-Daccach asserts that by Gyptec's own admission, the Panamanian companies own over 99% of Gyptec. The disputed shares, according to Hakim-Daccach, represent a one-third ownership interest in the Panamanian companies. Hakim-Daccach also asserts that he sought an award directing Tawil to deliver the shares to him as the rightful owner. Hakim-Daccach states that Tawil filed a counterclaim against him for purported damages related to Hakim-Daccach's alleged interference with Gyptec's negotiations with USG International.

Hakim-Daccach asserts that tribunal held that Hakim-Daccach is the owner of the shares and found that he was not liable for the alleged interference with the USG negotiations. Hakim-Daccach alleges that under Colombian law, the tribunal award has the same weight and effect as a civil judgment. Hakim-Daccach claims that Tawil filed a motion to vacate the award in the Bogota Superior Tribunal, and that the tribunal dismissed the challenge. Hakim-Daccach also asserts that the shares were not returned to him and he was forced to commence in action to domesticate the award as Tawil and his father advised that the shares were with a Panamanian company. Hakim-Daccach asserts that the Panamanian Supreme Court granted recognition and enforcement of the

[2] **In his Reply Hakim-Daccah conceded that there is an ongoing proceeding in Colombia and withdrew his "no foreign proceeding argument." ECF No. [25] at 4.**

arbitration judgment and deemed the judgment enforceable in Panama, finding that Carlos Hakim holds an ownership interest of 33% of each of the Panamanian companies.

Hakim-Daccach asserts that in 2014, after the arbitral panel issued the award rejecting Tawil's and Gyptec's counterclaim of interference with negotiations with USG, Tawil and Gyptec commenced a civil lawsuit against Hakim-Daccach alleging the same claims with respect to USG. Hakim-Daccach has raised a *res judicata* defense to the claim.

b. <u>The Colombian Civil Litigation</u>

Hakim-Daccach asserts that the Colombian proceedings allowed for discovery, and Hakim-Daccach abided by his discovery obligations. Hakim-Daccach contends that on June 9, 2016, the Court issued a ruling finding that Tawil and Dow had breached their fiduciary duties and embezzled funds from Gyptec for their personal use. Hakim-Daccach argues that his ownership interest in Gyptec played no role in the Court's consideration of the merits of the lawsuit, instead Tawil raised Hakim-Daccach's ownership interest to challenge Hakim-Daccach's standing to bring the case. Hakim-Daccach states that the Court rejected the argument, and explains that he appealed the ruling, asserting that the Court underestimated the amount of money that Tawil and Hakim-Dow had embezzled. Hakim-Daccach asserts that Tawil filed a cross-appeal, which is permissible under Colombian law, but that the Colombian appellate court, in considering the appeal, is limited to the record below, and Tawil will be unable to submit any new evidence.

c. <u>Misrepresentations and Omissions in Gyptec's Application</u>

Hakim-Daccach asserts that this Court relied on several misrepresentations made by Gyptec in granting Gyptec's application. Hakim-Daccach alleges that his ownership interest has already been determined by two courts in Colombia. Hakim-Daccach also asserts that Gyptec misrepresented that Hakim-Dow was the owner of the Panamanian

companies. Hakim-Daccach argues that the Colombian tribunal noted that Hakim-Dow acknowledged that he received Hakim-Daccach's shares as guarantee and that he was not the owner, and that per the Panamanian Court's order, he will shortly not be the holder of the shares either.

d. Intel Discretionary Factors

Hakim-Daccach asserts that even if Gyptec could satisfy the § 1782 mandatory factors, the *Intel* discretionary factors weigh strongly against granting § 1782 assistance.

i. First Intel Factor- Participant in Foreign Proceeding

Hakim-Daccach asserts that the first discretionary factor, whether the person from whom the discovery is sought is a participant in the foreign proceeding, weighs against granting the application. Hakim-Daccach asserts that because he was a party to the Colombian civil litigation, and would be a party to the contemplated Colombian litigation, this factor clearly dictates against granting the application. Hakim-Daccach also argues that Colombian civil procedure allows a party to request production of documents from its opposing party, and a Colombian court will order production of documents even if held abroad. Finally, Hakim-Daccach states that he will produce all documents ordered to be produced by a Colombian court.

ii. Second and Third Factors-Character of the Proceedings and Receptivity of Foreign Tribunal

Hakim-Daccach suggests that the second and third *Intel* factors weigh in favor of quashing the subpoena because the Colombian proceedings resolved the issues on which Gyptec now seeks discovery, and Gyptec is seeking to use discovery in the United States as a means to circumvent the finality of the foreign proceedings and re-litigate such issues. Hakim-Daccach asserts that the application is no more than an attempt to circumvent the multiple rulings against Tawil and Gyptec by opening a new front to the litigation. Additionally, Hakim-Daccach asserts that where the locus of the dispute is in a

foreign country, the Court should be wary of attempt to seek discovery in the United States as such attempts may constitute forum shopping under the guise of Section 1782.

iii. Fourth Factor- Burdensomeness

Hakim-Daccach asserts that the fourth discretionary factor of *Intel*, whether the request is otherwise unduly intrusive or burdensome, weighs in favor of quashing the subpoena. Hakim-Daccach argues that because the ownership and interference issues have already been decided in Hakim-Daccach's favor, the effort for discovery relate to these issues is nothing more than harassment. Hakim-Daccach also argues that the requests are unduly burdensome because the information sought is equally available in the foreign tribunal. Finally, Hakim-Daccach asserts that the requested discovery is duplicative of the discovery that has already occurred in the Colombian litigation.

e. Bad Faith and Misrepresentations

Hakim-Daccach asserts that under Eleventh Circuit law, a court should deny any application if it is made in bad faith or constitutes a fishing expedition. Hakim-Daccach asserts that because the application was made in bad faith and premised on misstatements, the order granting the application should be vacated. Hakim-Daccach argues that Gyptec misrepresented that Hakim-Dow owned the Panamanian companies, failed to reveal that multiple courts have already determined that Hakim-Daccach is a one-third owner of the Panamanian companies, and failed to identify that the purported contemplated claim for inference had already been adjudicated. Hakim-Daccach also asserts that Gyptec failed to advise that Court that within weeks of submitting its application, a ruling was entered in the Colombian civil litigation in which the court held that the level of Hakim-Daccach's ownership was a non-issue. Finally, Hakim-Daccach asserts that the subpoena should be quashed because the request constitutes a fishing expedition in the hopes of developing facts to mount an improper collateral attack on the award of the Colombian court.

2. GYPTEC'S BRIEF IN OPPOSITION TO HAKIM-DACCACH'S RENEWED MOTION TO QUASH, ECF No. [20]

a. Ownership of Gyptec

Gyptec asserts that the arbitration tribunal in Colombia did not determine Gyptec's ownership whatsoever. Gyptec asserts that the arbitration tribunal did not decide Gyptec's ownership, but rather it determined that the termination agreement in which Hakim-Daccach agreed to sell his purported shares in the Panamanian companies and Gyptec, to Tawil, violated Colombian law because Tawil had transferred Gyptec assets to Hakim-Daccach as collateral without authorization from Gyptec's shareholders. Gyptec asserts that the arbitration tribunal rescinded the termination agreement, ordering Tawil to return to Hakim-Daccach the four shares in the Panamanian companies that Tawil had purportedly acquired from Hakim-Daccach through the termination agreement, and explicitly dismissed all other claims, including Hakim-Daccach's ownership claim, counterclaims and defenses, as moot.

Gyptec also asserts that the Panamanian enforcement action did not decide whether Hakim-Daccach owns one-third of Gyptec. Gyptec asserts that while Hakim-Daccach requested that the Court deliver four shares, amounting to 33% of each Panamanian company, based upon the arbitration panel's decision, the tribunal had in fact not determined that those four shares were equal to one-third of the Panamanian companies. Gyptec states that on August 31, 2016, the Panamanian Court granted Hakim-Daccach's request for delivery of the four shares of each Panamanian company without adjudicating the issue of Gyptec's or the Panamanian companies' ownership.

In conclusion, Gyptec asserts that no court has decided that Hakim-Daccach owns one-third of the Panamanian companies or Gyptec. Gyptec also outlines the ongoing nature of the Colombian litigation but because Hakim-Daccach withdrew his argument related to the issue, the argument is not included here.

b. Statutory Requirements of Section 1782

Gyptec contends that of the four prerequisites to a Section 1782 Petition, only the third is contested, that is, whether Gyptec seeks the requested discovery for use in a foreign proceeding. As noted above, Hakim-Daccach has withdrawn his argument that there is no foreign proceeding, and therefore the Court will not re-iterate Gyptec's response on the issues.

c. Discretionary Factors

Gyptec asserts that the *Intel* factors also weigh in favor of its application. First, Gyptec asserts that Hakim-Daccach's residency in the United States weighs in favor of its application. Gyptec asserts that Colombia is a fact-pleading jurisdiction, in which plaintiffs are required to identify the facts and evidence underlying their cases at the time of filing, and therefore Colombian law does not provide for fact discovery as that concept is understood in the United States. Gyptec asserts that the discovery mechanism in Colombia requires that the requesting party identify with particularity the document or documents sought, and if the party failed to produce a document in response, Colombian Courts can only send an officer of the court to physically inspect the person's residence or office in Colombia. Gyptec asserts that it has no way of knowing what responsive materials are within Mr. Hakim-Daccach's possession or describing those documents with particularity. In addition, Gyptec asserts that the Colombian court does not have jurisdiction to inspect relevant documents in Miami.

Gyptec asserts that the second discretionary factor of *Intel*, weighs in favor of its application as it asserts that the Colombian civil litigation is on appeal, and specifically contemplates further proceedings to determine Mr. Hakim-Daccach's ownership interest in Gyptec. Gyptec also asserts that it is not attempting to circumvent Colombian tribunals as the Colombian Court ordered that the ownership claim should be solved before the competent authorities. Gyptec asserts that it is not forum shopping as Hakim-

Daccach resides in the United States and the documents that it seeks are outside the jurisdictional reach of the Colombian Courts.

Finally, Gyptec contends that its application is tailored to avoid unnecessary burdens in accordance with the Federal Rules of Civil Procedure. Gyptec asserts that its application fits squarely with the parameters established by the Federal Rules of Civil Procedure as both categories of information that it seeks relate directly to the Colombian civil litigation and further contemplated proceedings. Gyptec asserts that even if the discovery were equally available in Colombia, courts in the United States have declined to read an exhaustion requirement into Section 1782.

3. REPLY IN SUPPORT OF MOTION TO QUASH

Hakim-Daccach asserts in his Reply that his ownership in the Panamanian companies has been established and confirmed. Hakim-Daccach asserts that Gyptec attempts to claim that when the Colombian tribunal awarded four shares of the Panamanian companies to Hakim-Daccach, it did not mean four shareholder certificates which would be the equivalent of one-third ownership and Hakim-Daccach asserts that this explanation is not plausible given that Tawil advocated for the termination agreement, and Tawil did not testify that the agreement was mistaken on this crucial point. Hakim-Daccach points to Tawil and Hakim-Dow's recognition, through letters to Hakim-Daccach's counsel, that the award directed the return to Hakim-Daccach of four share certificates representing one-third of the Panamanian companies.

Hakim-Daccach also asserts that he has agreed to submit to Gyptec's discovery requests in Colombia and that when a party has agreed to participate in discovery, the request for Section 1782 discovery should be denied. Hakim-Daccach asserts that under Colombian law, a party can request categories of documents, as evidenced by the general discovery orders that Hakim-Daccach and Gyptec have obtained in the parties long-running dispute. Hakim-Daccach contends that any doubts about the ability of

tribunals in Colombia to compel discovery of the type requested here were resolved when a Colombian tribunal required Hakim-Daccach to produce documents that Gyptec seeks through its application. Hakim-Daccach also asserts that the application should be denied because the requested discovery constitutes harassment.

4. GYPTEC'S SUR-REPLY

In its Sur-Reply, ECF No. [34]. Gyptec asserts that Hakim-Daccach's assertion regarding his agreement to submit to Gyptec's discovery requests in Colombia is false. Gyptec argues that the only evidence that Hakim-Daccach has provided at any stage in the proceedings are records of three wire transfers, and Hakim-Daccach has made no showing whatsoever that he has provided any other evidence regarding his ownership claims over Gyptec.

B. ANALYSIS OF MOTION TO VACATE

At the outset, the undersigned notes that while there is extensive briefing and filings by both sides in this dispute, the issue before the Court is a limited one, whether the twin aims of Section 1782 are met and whether Hakim-Daccach has met his burdein in objection to the discovery requests. There is no dispute that Gyptec met its burden as to the *prima facie* elements of a Section 1782 application, therefore, the analysis turns on whether the *Intel* discretionary factors have been met.

1. Factor One: Participation in Foreign Proceeding

The first discretionary factor for the court to consider is whether the person from whom the discovery is sought is a participant in the foreign proceeding, because the need for Section 1782 assistance is generally not as apparent when evidence is sought from a participant. *In re Clerici* at 1334. As the Court explained in *Intel*, "a foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence." *Intel* at 2493. However, courts have granted Section 1782 discovery where the discovery procedures in the country where the lawsuit is proceeding do not

allow for the party seeking the application to obtain the information. *See Heraeus Kulzer, GmbH v. Biomet, Inc.,* 633 F.3d 591 (7th Cir. 2011) (allowing discovery where German court would not allow discovery for categories of documents). Additionally, even if the discovery is available to Gyptec in Colombia, this does not mean that Gyptec is not entitled to seek discovery using the procedures set forth in Section 1782. The decision of how to seek discovery lies with the party seeking the discovery, and requiring that Gyptec seek the discovery in Colombia would result in including an exhaustion requirement in section 1782 that is not present. *In re Application of North Am. Potash, Inc.,* Case No. 12-20637-CIV-WILLIAMS, 2012 WL 12877816 (S.D. Fla. Nov. 19, 2012). Therefore, whether or not Hakim-Daccach has stated that he will submit to the discovery requests if ordered by a court in Colombia (or whether discovery of specific documents is allowed in Colombian procedures), Gyptec is still entitled to seek the discovery pursuant to Section 1782. While the first factor may weigh slightly in favor of Hakim-Daccach as he is party to ongoing litigation, this does not preclude Gyptec from seeking the discovery pursuant to Section 1782.[3]

Additionally, despite the fact that the parties argued vociferously regarding whether a court has previously established Hakim-Daccach's ownership interest in Gyptec via the Panamanian companies, the undersigned finds that this fact does not tip the scales in favor of either party as related to the *Intel* discretionary factors. Whether or not a previous court has determined Hakim-Daccach's ownership interest, the parties are

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[3] Hakim-Daccach cites to *In Matter of Application of Leret*, 51 F. Supp. 3d 66 (D.D.C. 2014) for the proposition that because Hakim-Daccach agreed to participate in discovery in his motion to vacate, the order granting the application should be vacated. However, while the Magistrate Judge exercised her discretion in denying the application in *Leret* where the respondent agreed to submit to discovery based upon the facts of the case, here there is evidence to support the contention that Gyptec has had difficulty obtaining this information previously as the parties have been involved in various litigation spanning several years. The undersigned finds that granting the application in the case at bar provides an efficient means of assistance and will encourage foreign courts to provide similar assistance to our courts thus meeting the twin aims of Section 1782.

currently engaged in litigation in Colombia and Gyptec asserts that this discovery is relevant to litigation that Hakim-Daccach does not deny exists. The fact that a Colombian court may ultimately decide that the evidence is not admissible has no bearing on whether Gyptec is entitled to the discovery pursuant to Section 1782. *John Deere Ltd. V. Sperry Corp.*, 754 F.2d 132, 137 (3rd Cir. 1985); *In re App. of North Am. Potash, Inc.* at *8 ("for purposes of § 1782, district courts should consider neither discoverability or admissibility in the foreign proceeding. Instead, courts should err on the side of ordering discovery, since foreign courts can easily disregard any material that they do not wish to consider") (quoting *Brandi-Dohrn v. IKB Deutsche Insustriebank AG*, 673 F.3d 76, 82 (2nd Cir. 2012)).

In conclusion, the Court does not find Hakim-Daccach's argument that the motion granting the application should be vacated because Gyptec could seek discovery in Colombia persuasive, and the fact that the discovery may not be ultimately admissible in a Colombian court is of no import to the undersigned's analysis.

2. <u>Factors Two and Three: Character of the Proceedings and Receptivity of Foreign Tribunal</u>

Hakim-Daccach's argument that the second factor weighs in favor of quashing the subpoena because the Colombian proceeding resolved the issue on which Gyptec seeks discovery is without merit given that Hakim-Daccach has conceded that proceedings are occurring in Colombia currently. Hakim-Daccach's argument that because the locus of the dispute is in Colombia, the subpoena should be quashed also fails. Hakim-Daccach resides in the United States and it appears that the documents that Gyptec seeks are also located in the United States making Hakim-Daccach's argument that the dispute is centered in a foreign country unpersuasive.[4] Again, Hakim-Daccach's other argument

[4] **The case that Hakim-Daccach cites in support of the proposition that discovery should be addressed by a Colombian court is distinguishable. *Kestrel Coal Pty. Ltd v. Joy Global, Inc.*, 362 F.3d 401 (7th Cir. 2004) involved the retrieval of documents in Australia**

that the Colombian litigation has concluded, and therefore the character of the proceedings is such that Section 1782 discovery should not be allowed, is moot as Hakim-Daccach withdrew this contention. Finally, the undersigned notes that Hakim-Daccach's contention that Gyptec is both able to seek the requested discovery in Colombia, and that Gyptec is seeking to circumvent Colombian procedures is contradictory. Accordingly, factors two and three remain in favor of Gyptec.

3. Factor Four: Burdensomeness

Hakim-Daccach's assertion on burdensomeness misses the mark. The fact that Hakim-Daccach contends that the issue of ownership interest has been resolved does not make the discovery that Gyptec seeks burdensome. In fact, Hakim-Daccach has already stated that he would submit to the discovery requests in Colombia. The undersigned also finds Hakim-Daccach's assertion that the requested discovery is duplicative of discovery that has already occurred unpersuasive. Again, Hakim-Daccach seems to be saying both that the discovery has been produced and that it should not be produced unless ordered by a Colombian court. This position is not tenable. Based upon the limited nature of the subpoena, and the fact that Hakim-Daccach has not demonstrated how the discovery is burdensome, the fourth factor weighs in favor of Gyptec.

4. Bad Faith and Misrepresentation

Hakim-Daccach's argument that the subpoena should be quashed is based upon Hakim-Daccach's contention that Hakim-Daccach's ownership interest in Gyptec was previously adjudicated. While the parties clearly disagree on the interpretation of findings made in previous litigation, the undersigned does not find this to be an adequate basis for a finding of bath faith on the part of Gyptec. Even if the Court were to

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to be shipped to the United States and provided to an Australian buyer. Additionally, the court in *Kestrel* found that the documents were not discoverable under the Federal Rules of Civil Procedure.

accept Hakim-Daccach's contentions related to the purported misrepresentation made by Gyptec, the analysis of this Court does not change. The undersigned returns to the point that the facts in dispute (which form the basis of Hakim-Daccach's assertion of bad faith) are all related to whether Hakim-Daccach's ownership interest in Gyptec has been previously adjudicated. Even if the Court were to accept that the ownership interest has been established, the discovery could be used in current litigation as asserted by Gyptec. The current litigation is described as involving Hakim-Daccach's alleged tortious interference with Gyptec's relationship with USG (a description that Hakim-Daccach does not contest). As described above, Gyptec alleges that Hakim-Daccach held himself out as a significant shareholder and communicated false information, including that he owned one-third of Gyptec, to USG. Thus, Hakim-Daccach's ownership interest is certainly discoverable under the Federal Rules of Civil Procedure, and a resolution of the parties' dispute regarding the holdings of prior adjudications is not necessary for the Court to uphold the subpoena.

In conclusion, because both the statutory and discretionary factors weigh in favor of Gyptec, and Hakim-Daccach has not met his burden in objecting to the discovery, Hakim-Daccach's Motion to Vacate is denied.

IV. HAKIM-DACCACH'S MOTION TO STRIKE ECF No. [38]

A. Position of the Parties

Hakim-Daccach asserts that the Sur-Reply filed by Gyptec far exceeds the scope of the information that the Court permitted Gyptec to include in the Sur-Reply, and instead of limiting the issue to the information the Court requested, Gyptec improperly attempted to obscure the issues before the court, "spew wholly unsupported and blatantly false representations and assert positions that should have been raised in Gyptec's opposition to the Motion to Quash.

Gyptec asserts that Gyptec did not exceed the scope of the Court's Order, and argues that striking the Sur-Reply under Fed. R. Civ. Pr. 12(f) would be improper as the rule only applies to pleadings. Gyptec also asserts that the Sur-Reply does not obscure or confuse the issues, contain any misrepresentations, or re-argue old positions. Specifically, Gyptec argues that the Sur-Reply demonstrates that Hakim-Daccach's purported agreement to comply with Gyptec's future discovery requests in Colombian is false, and all of the discovery issues set forth in Gyptec's application remain open. Gyptec also argues that it delivered a letter to Hakim-Daccach and Hakim-Daccach's counsel in Colombia requesting that Hakim-Daccach respond to Gyptec's discovery requests.

In Hakim-Daccach's Reply in Support of the Motion to Strike, Hakim-Daccach asserts that Gyptec "has concocted a plant to attempt to (i) trap Hakim, (ii) short-circuit the whole § 1782 Application procedure that it instituted and (ii) to bolster its opposition to the motion to strike." Hakim-Daccach asserts that Gyptec's delivery of the letter seeking discovery ignored proper procedure as it was not submitted through any of the Colombian lawsuits, nor did not comply with the most basic procedures for service of discovery in either the United States or Colombia. Hakim-Daccach again asserts that he has agreed to submit to discovery in the ongoing Colombian litigation, and that the Court has authority to strike portions of the Reply. Hakim-Daccach argues that the Section 1782 Application was based on the proposition that Hakim-Daccach has not already been deemed one-third owner of Gyptec, which he has. Hakim-Daccach argues that Gyptec misled the Court in representing that the arbitration ruled that Hakim-Daccach does not own one-third of Gyptec (through the Panamanian companies) and that the 2011 arbitration award was res judicata on the issue. Finally, Hakim-Daccach asserts that the Sur-Reply constituted re-argument and improper supplemental briefing.

B. Analysis of Motion to Strike Sur-Reply

On May 26, 2017, the undersigned entered an order requiring that Gyptec provide a Sur-Reply. The Order stated that "In his Reply in Support of his Verified Renewed Motion to Quash Subpoena, ECF No. [25], Carlos Hakim-Daccach stated that he agreed to submit to discovery requests as part of the Parties' Colombian litigation. Therefore, on or before June 5, 2017, Gyptec S.A. shall file a Sure-Reply, not to exceed five pages, which shall address Carlos Hakim-Daccach's contention and set forth the remaining discovery issues." ECF No. [32].

While Gyptec is correct in stating that Fed. Rule of Civ. Pr. 12(f) states that a court is allowed to strike from a *pleading* an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter, this Court is still able to strike other filings that do not comply with the Court's Orders. *See Madura v. BAC Home Loans Servicing, LP,* 593 F. App'x 834, 850 (11th Cir. 2014) (finding that district judge has an inherent authority to manage her own docket so as to achieve the orderly and expeditious disposition of cases) (internal quotation omitted).

A review of the Sur-Reply shows that while Gyptec included background information related to the procedural history of the case and the position of the parties, this information was related to the Court's request that Gyptec address Hakim-Daccach's contention regarding whether Hakim-Daccach had provided responses that would have mooted Gyptec's application. To the extent that the Sur-Reply contained arguments related to Hakim-Daccach's Motion to Quash, the undersigned will consider Hakim-Daccach's Motion to Strike as a response to Gyptec's Sur-Reply therefore negating Hakim-Daccach's contention that Gyptec asserted arguments related to the Motion to Quash as opposed to the confines of the Sur-Reply. Therefore, the undersigned has considered the Parties' arguments raised in the Motion to Strike briefing as part of the overall analysis of the Motion to Vacate, and Hakim-Daccach's Motion to Strike is denied.

V. CONCLUSION

In sum, the Court finds that Gyptec's Section 1782 application satisfies the twin aims of Section 1782 and Hakim-Daccach has not met his burden in objecting to the discovery requested.

Therefore it is hereby

ORDERED AND ADJUDGED Hakim-Daccach's Verified Renewed Motion to Quash Subpoena and to Vacate the Court's Order Granting Gyptec's 28 U.S.C. § 1782 Application, ECF No. [18] is DENIED. Gyptec is authorized to issue and serve a subpoena in substantially the same form, and for the documents specified in the proposed subpoena attached as Appendix A of the application, ECF No. [6-17].

It is further ordered, that Hakim-Daccach's Motion to Strike a Majority of Gyptec's Sur-Reply. ECF No. [38]. is DENIED.

DONE AND ORDERED in Miami, Florida, in chambers, on September 27, 2017.

Andrea M. Simonton

ANDREA M. SIMONTON
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Honorable Kathleen M. Williams
All counsel of record via CM/ECF