No. 20A160

IN THE SUPREME COURT OF THE UNITED STATES

ROLLS-ROYCE PLC, APPLICANT

v.

SERVOTRONICS, INC.

RESPONSE OF SERVOTRONICS, INC. TO APPLICATION FOR A STAY

Stephen R. Stegich
Counsel of Record
Katherine B. Posner
Wendy A. Grossman
Condon & Forsyth LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 490-9100
sstegich@condonlaw.com

Counsel for Servotronics, Inc.

CORPORATE DISCLOSURE STATEMENT

Servotronics, Inc., hereby states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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To the Honorable John G. Roberts, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Respondent Servotronics, Inc. ("Servotronics") respectfully submits this response urging the denial of the application of Rolls-Royce PLC ("Rolls-Royce") for a stay of the April 16, 2021 order of the United States District Court for the District of South Carolina that was issued in compliance with the April 15, 2021 writ of mandamus by the Fourth Circuit Court of Appeals. Such proceedings were necessitated by the district court's failure to act on an order the Fourth Circuit issued more than a year ago which was never the subject of an application for rehearing en banc or a petition for a writ of certiorari. Accordingly, Rolls-Royce has waived its right to seek relief from the Fourth Circuit's March 30, 2020 order determining that the South Carolina District Court is authorized to issue the deposition subpoenas Servotronics sought pursuant to 28 U.S.C. § 1782 to use in connection with an international arbitration between Rolls-Royce and Servotronics. Thus, Rolls-Royce's application constitutes an improper attempt to obtain relief from a final order that is no longer subject to review.

The sole order relating to the pending arbitration between Rolls-Royce and Servotronics that this Court has agreed to review was issued by the Seventh Circuit on September 22, 2020. It does not, as Rolls-Royce claims, involve the same discovery as did the Fourth Circuit order of March 30, 2020, but instead relates to a requested subpoena for documents that Servotronics is seeking to serve on The Boeing Company ("Boeing") at its headquarters in Chicago (Case No. 20-794).

Furthermore, proceeding with two oral depositions of one Boeing employee and one former Boeing employee, as ordered by the South Carolina District Court, cannot possibly cause Rolls-Royce irreparable harm. Rolls-Royce is an intervenor in the proceedings and on the deposition notices and will attend the depositions and later will have an opportunity to object to the use of their testimony in the arbitration. Thus, there exists no basis for issuance of the requested stay.

STATEMENT

In its application, Rolls-Royce takes the position that the adverse ruling of the Seventh Circuit on Servotronics' application pursuant to 28 U.S.C. § 1782 to obtain a subpoena duces tecum for documents at Boeing headquarters in Chicago should preclude Servotronics from pursuing enforcement of an earlier, favorable ruling of the Fourth Circuit for depositions of Boeing employees in South Carolina which never was the subject of a petition for certiorari to this Court or a suggestion for rehearing en banc in the Court of Appeals. Instead, intervenors filed motions to stay proceedings in both the district court and the Fourth Circuit, which motions were denied. The reason Rolls-Royce cites for its request is that this Court granted Servotronics' petition for a writ of certiorari to review the Seventh Circuit's opinion, based on a split of opinion among five Circuit Courts of Appeals. Nothing in law or logic would suggest that Rolls-Royce is entitled to the relief it is seeking.

A. The Underlying International Arbitration

Rolls-Royce and Servotronics are the sole parties to a commercial arbitration pending in London, England under the Rules of the Chartered Institute of Arbitrators. The arbitration arose from a January 16, 2016, aircraft engine tail pipe

fire that occurred during the course of Customer Demonstration and Acceptance Flight Tests at a Boeing facility in South Carolina. Rolls-Royce manufactured the Trent 1000 engine damaged by the fire and installed on the Boeing 787-9 Dreamliner aircraft that was the subject of the flight tests. Servotronics manufactured a Metering Valve Servo Valve component of the engine. Although representatives of Boeing, Rolls-Royce, and Boeing's customer (Virgin Atlantic Airways) attended the testing, no representative of Servotronics witnessed the event. Rolls-Royce and its insurers reached a settlement with Boeing for the damage to the aircraft. Rolls-Royce has taken the position that it is entitled to reimbursement from Servotronics, in response to which Servotronics has cited failures on the part of Boeing and Rolls-Royce personnel to follow their own procedures for the proper response to warning signs of fuel flow issues in the engine that would have averted the fire.

Shortly after the arbitration proceedings commenced, it became clear to Servotronics that information relevant to Servotronics' defense would not be forthcoming. Such unresolved discovery issues prompted Servotronics to file an *ex parte* application pursuant to Section 1782 for leave to serve a document subpoena on Boeing in the Northern District of Illinois, where it is headquartered, and an application in the District of South Carolina to depose three of the eleven Boeing employees involved in the event and in Boeing's ensuing investigation. Servotronics was not a participant in the Boeing investigation or in the discussions that resulted in the settlement between Boeing and Rolls-Royce.

B. Document Subpoena Sought in Illinois

On October 26, 2018, Servotronics filed an *ex parte* application pursuant to Section 1782 for leave to serve a document subpoena on Boeing in the Northern District of Illinois, where it is headquartered. After the district court granted the application, Rolls-Royce filed a successful motion to intervene and quash the subpoena, in which Boeing joined. Servotronics filed a timely appeal to the Seventh Circuit and, on September 22, 2020, the Seventh Circuit affirmed the order quashing the subpoena. *Servotronics, Inc. v. Rolls Royce PLC,* 975 F.3d 689 (7th Cir. 2020).

Servotronics petitioned this Court for a writ of certiorari on December 7, 2020. After Rolls-Royce and Boeing obtained an extension of time to oppose the petition, this Court granted certiorari on March 22, 2021.

C. Deposition Subpoenas Sought in South Carolina

On October 26, 2018, Servotronics filed an *ex parte* application in the District Court for the District of South Carolina for an order pursuant to 28 U.S.C. § 1782 for leave to depose three Boeing employees: Alan Sharkshnas, who participated in troubleshooting the engine before the fire; Scott Walston, who chaired the Boeing Incident Review Board that investigated the incident; and Terrance Shifley, who was involved in the January 16, 2016 test as a ground observer. The district court denied the application and Servotronics appealed with Rolls-Royce and Boeing appearing as intervenors. April 16, 2021 Order of the District of South Carolina District Court, Application Appendix at 2a; Fourth Interim Award in the Matter of

an Arbitration Under the Rules of the Chartered Institute of Arbitrators between Rolls-Royce PLC and Servotronics, Inc., Respondent's Application Appendix at 4ra

On March 30, 2020 the Fourth Circuit reversed, holding that the arbitral Tribunal convened in England to render a decision on the dispute between Rolls-Royce and Servotronics is a foreign or international tribunal within the meaning of Section 1782 and thus the district court has the authority to provide, in its discretion, assistance in connection with such proceeding. *Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209 (4th Cir. 2020).

Neither Rolls-Royce nor Boeing sought rehearing en banc in the Fourth Circuit and no petition for certiorari was ever filed in this Court to review the order of the Fourth Circuit.

Following remand to the South Carolina District Court, Servotronics renewed its application, the parties submitted briefs and the court held a hearing on July 30, 2020. Thereafter, the district court requested additional briefing. Application Appendix at 3a.

In December 2020, Servotronics advised the court that Mr. Shifley now resides in Minnesota.[1] At an earlier hearing held on June 30, 2020 Rolls-Royce had suddenly advised the court that it intended to offer detailed witness statements of the remaining two witnesses into evidence in the arbitration, which would give

[1] Upon learning of Mr. Shifley's change of residence, Servotronics filed another proceeding in federal court in Minnesota. Respondent's Application Appendix at 4ra.

Servotronics an opportunity to cross-examine them at the arbitration hearing.[2] Application Appendix at 4a.

On April 14, 2021, the South Carolina District Court issued an order "holding Servotronics' application in abeyance" and staying proceedings pending "guidance from the Supreme Court on the current circuit split." Application Appendix at 5a.

Servotronics had earlier petitioned the Fourth Circuit Court of Appeals for a writ of mandamus, which was granted on April 15, 2021. Finding that its mandate to the South Carolina District Court remained in force and thus was unaffected by the pending review of the Seventh Circuit order, the Fourth Circuit granted Servotronics' petition and directed the district court to issue "without delay" the requested subpoenas. Application Appendix at 21a-23a.

The next day, the South Carolina District Court complied with the writ of mandamus and issued a 20-page opinion and order. Application Appendix at 1-20a.

D. Further Efforts on the Part of Rolls-Royce to Prevent Servotronics From Obtaining Evidence

The campaign on the part of Rolls-Royce to prevent Servotronics from obtaining evidence in support of its defense has not been confined to opposing Servotronics' applications in the courts and delaying court decisions as long as possible. Rolls-Royce also requested that the arbitral tribunal enjoin Servotronics from pursuing judicial remedies in the United States. *See* Third Interim Award, Rolls-Royce Stay Application Appendix ("Application Appendix") at 39a-40a. Rolls-

[2] As noted in section D below, Rolls-Royce has since changed its position regarding the availability of Mr. Sharkshnas for cross-examination. Respondent's Application Appendix at 9ra.

Royce requested that the Arbitral Tribunal issue an order "[r]estraining" Servotronics from "taking any step in, and requiring [Servotronics] to discontinue its § 1782 proceedings for document production in Illinois (the 'Illinois Proceedings') and doing the same with regard to "proceedings to depose Mr. Scott Walston in South Carolina (the 'South Carolina Proceedings')." Rolls-Royce further requested an order stating "that the Tribunal does not require the documents sought in the Illinois Proceedings or the deposition of Mr. Walston in this arbitration and/or that any evidence so obtained by [Servotronics] shall not be admitted in this arbitration." *Id.* The Tribunal stated in no uncertain terms that it rejected Rolls-Royce's application and cited supporting English case law. Application Appendix at 47a. The Tribunal further expressed the view that:

> by exercising a supposed right available to it under US federal law to obtain documents from a third party (as, in this case, from Boeing), a party to arbitration proceedings in England is not departing from or interfering with the procedure of the arbitration proceedings: see Lord Brandon's speech in *South Carolina Insurance Co. v Assurantie Maatschappij* [1997] A.C. 24. The Respondent's application in the Illinois Proceedings is not contrary to the Claimant's rights and, whatever Boeing might think about it, is not oppressive or vexatious or unconscionable so far as the Claimant and this arbitration are concerned.

The Tribunal concluded: "There is, therefore, no good basis for the Tribunal to interfere with what the Respondent is seeking to achieve via USC §1782 in Illinois and now before the US Supreme Court." Application Appendix at 48a. The Tribunal also concluded that the "launching by the Respondent of § 1782 application in South Carolina was plainly appropriate…." *Id.*

The efforts on the part of Rolls-Royce to avoid presentation of evidence obtained directly from Boeing or its employees has continued in the form of the present Application, which Rolls-Royce reported to the Tribunal. In its Fourth Interim Award issued April 21, 2021, the Tribunal remarked on further maneuvers on the part of Rolls-Royce with respect to witness testimony:

> The Tribunal has already referred in paragraph 2.5 above to the Claimant's applications to the Supreme Court dated 20 April 2021 for (i) a stay of the US District Court for the District of South Carolina's Order pursuant to 28 USC section 1782 to take discovery for use in a foreign proceeding and/or (ii) an immediate administrative stay. Those applications by the Claimant appear designed, at least in part, to prevent the Respondent from taking the deposition of Mr Sharkshnas which has been noticed for 3 May 2021.
>
> In circumstances where the Claimant has previously told the Tribunal that it is unable to call Mr Sharkshnas to give oral evidence at the arbitration but will rely on his Witness Statement dated 22 September 2020, the Tribunal finds it curious that the Claimant appears determined to prevent Mr Sharkshnas from giving testimony at all. Quite what weight the Claimant thinks the Tribunal can or should accord to Mr Sharkshnas's Witness Statement in these circumstances is, no doubt, something that the Claimant will wish to consider and on which both parties will be making submissions in due course.

Respondent's Application Appendix at 9ra. The Tribunal "expresse[d] no concluded view on any of these issues but considers that the actions of the Claimant to prevent oral testimony being given by Mr Sharkshnas for use in this arbitration while at the same time relying on a statement taken by the Claimant's attorneys warrant particular mention." *Id.*

ARGUMENT

Rolls-Royce states that its application is made pursuant to 28 U.S.C. § 1651(a) and Supreme Court Rule 23 (Application at 3). However, the relief provided

by Rule 23 is only available to "[a] party to a judgment sought to be reviewed" and only to request a stay of "enforcement of that judgment." Supreme Court Rule 23.2. The judgment this Court has agreed to review was entered by the Seventh Circuit, not the Fourth Circuit. In fact, the time to review the Fourth Circuit's order determining that the South Carolina District Court has the power to issue the deposition subpoenas Servotronics requested pursuant to 28 U.S.C. § 1782 expired months ago. As a result, Rolls-Royce's application is not to stay enforcement of a judgment sought to be reviewed in this Court, but is instead directed at an order that Rolls-Royce has waived the right to challenge.

The injunctive power granted to a Circuit Justice "is to be used sparingly and only in the most critical and exigent circumstances" and "only where the legal rights at issue are indisputably clear..... Moreover, the applicant must demonstrate that the injunctive relief is necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n,* 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and internal quotation marks omitted). Thus, a stay will be granted "only in extraordinary circumstances." *Bartlett v. Stephenson,* 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers) (quoting *Whalen v. Roe,* 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers)).[3] In order to succeed on an application for a stay, the applicant must show (1)

[3] The application for stay in *Bartlett* was denied on the grounds that the applicants failed to "satisfy the threshold requirement for issuance of a stay." Specifically, Chief Justice Rehnquist was of the view that there was "not a reasonable probability" that four Justices would vote to grant certiorari in that case. 535 U.S. at 1304.

irreparable harm would occur if a stay is denied; (2) there is a likelihood that four Justices of the Court would grant certiorari to review the decision of the court of appeals; and (3) there is a likelihood that the Court would reverse the judgment of the Court of Appeals on the merits. *Rubin v. United States,* 524 U.S. 1301 (1998) (Rehnquist, C.J., in chambers). *See also Edwards v. Hope Medical Group for Women,* 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers).

In *Rubin,* Chief Justice Rehnquist was of the view that the Solicitor General on behalf of the Secretary of the Treasury had failed to show irreparable harm would result from enforcing subpoenas issued by the D.C. District Court pending review of the petition for certiorari, despite the assertion of Presidential privilege. Although Chief Justice Rehnquist believed that certiorari would be granted, the applicant failed to persuade him that the Court would reverse the decision of the Court of Appeals, which he deemed "cogent and correct." He noted that the District Court was of the same view and that none of the nine judges on the Court of Appeals had even requested a vote on the applicant's suggestion for rehearing en banc. Accordingly, the application for a stay was denied. 524 U.S. at 1302.

In this matter, there is no possibility that certiorari will be granted to review the March 30, 2020 order of the Fourth Circuit Court of Appeals because neither Rolls-Royce nor Boeing ever petitioned for such review. The matter this Court has agreed to review on certiorari involves the same international arbitration, but

different discovery.[4] Moreover, Rolls-Royce has failed to comply with the requirement of Supreme Court Rule 23.3. of setting "out with particularity why the relief sought is not available from any other court or judge" and how this case meets the standard of "the most extraordinary circumstances" that excuses its failure to first seek the requested relief in the Fourth Circuit Court of Appeals by requesting a rehearing en banc after that court handed down its March 30, 2020 order.

Nor has Rolls-Royce demonstrated that it would sustain any harm—irreparable or otherwise—if a stay is not issued. Boeing, not Rolls-Royce, is the employer or former employer of the witnesses whose depositions have been ordered by the South Carolina District Court pursuant to the mandate issued by the Fourth Circuit Court of Appeals. The only impact these depositions will have on Rolls-Royce is that they will produce testimony that will be offered into evidence in the arbitration. Rolls-Royce will have the same opportunity to object to such testimony that it has with regard to all evidence Servotronics will proffer to the arbitral tribunal.[5]

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[4] The Seventh Circuit judgment the Court has agreed to review quashed a subpoena duces tecum issued for service on Boeing at its headquarters in Chicago (975 F.3d at 691), whereas the Fourth Circuit's decision reversed and remanded the District of South Carolina's refusal to issue subpoenas for the depositions of three individuals who worked at Boeing's facility in that district (954 F.3d at 210).

[5] The "harm" Rolls-Royce claims in its application is a far cry from the irreparable harms Rule 23 stays are designed to prevent. *See, e.g., Mikutaitis v. United States,* 478 U.S. 1306 (1986) (Stevens, J., in chambers) (temporary stay of contempt order for refusal to testify under grant of immunity regarding cooperation with the Nazis, commission of war crimes and treason against the Soviet Union during World War II when there was the possibility that the Soviet Union would use such testimony in criminal proceedings against him in the event he were to be denaturalized and deported there); *California v. Hamilton,* 476 U.S. 1301 (1986) (Rehnquist, J., in

Finally, Rolls-Royce has failed to establish a likelihood of success on the merits when the Court reviews the Seventh Circuit's decision. Both the Fourth and Sixth Circuit Courts of Appeals conducted thorough analyses of Section 1782 and its legislative history and concluded that the language of the statute granting the district courts discretion to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals. *Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209 (4th Cir. 2019); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019) (*"FedEx"*).[6] These opinions found guidance in the thorough analysis of the statute in *Intel Corp. v. Advanced Micro Devices,* 542 U.S. 241, 247 (2004) (*"Intel"*), this Court's sole opinion interpreting Section 1782.[7]

As the Sixth Circuit noted, courts have used the term "tribunal" to refer to arbitral tribunals, including "private, contracted-for commercial arbitrations for many years before Congress added the relevant language to Section 1782(a) in

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chambers) (stay of enforcement of California Supreme Court order invalidating death sentence pending disposition of petition for certiorari); *Yasa v. Esperdy,* 80 S. Ct. 1366 (1960) (Harlan, J., in chambers) (stay of deportation).

[6] The Eleventh Circuit Court of Appeals reached the same conclusion in 2012, but vacated its order two years later when new issues were presented relating not to an arbitration, but to a contemplated foreign civil action. *See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 994-95 (11th Cir. 2012) (*"Consorcio I"*), *vacated and superseded,* 747 F.3d 1262 (11th Cir. 2014) ("*Consorcio II*").

[7] *Intel* arose in the context of an antitrust proceeding before the Commission of European Communities, a body charged with responsibility over various areas covered by the European Union treaty (542 U.S. at 250) and thus left open the question of whether Section 1782 applies to private commercial arbitral tribunals.

1964." *FedEx,* 939 F.3d at 721.[8] Indeed, this Court has a long history of employing such usage in its opinions and continues to do so. *See, e.g., Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 203 (1956) (referring to agreed arbitration under New York law by the American Arbitration Association when discussing the "nature of the tribunal where suits are tried"); *Louisiana v. Mississippi,* 202 U.S. 1, (1906) ("arbitration tribunal"); *North American Com. Co. v. United States,* 171 U.S. 110 (1898) (referencing a treaty "extending the modus vivendi, and the action taken under it before the tribunal of arbitration"). *See also Baltimore Contractors v. Bodinger,* 348 U.S. 176, 185 (1955) (Black, J. dissenting) ("decision of whether a judicial rather than an arbitration tribunal shall hear and determine this accounting controversy is logically and practically severable from the factual and legal issues crucial to determination of the merits of the controversy."). Furthermore, in *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985), where this Court was presented with the question of whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction, the Court used the terms "arbitration tribunal", "arbitral tribunal" and the unmodified word "tribunal" repeatedly throughout the opinion.

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[8] The Sixth Circuit collected cases dating as far back as 1853 to support this statement. Among these are *Henry v. Lehigh Valley Coal Co.,* 215 Pa. 448, 64 A. 635, 636 (1906) (panel of three engineers chosen by a method prescribed by the parties' contract referred to as a special tribunal to settle their dispute); *Susong v. Jack,* 48 Tenn. 415, 416-17 (1870) (referencing the voluntary act of the parties in submitting their case to arbitration as "submitting their cause to another tribunal"); and *Montgomery Cty. Comm'rs v. Carey,* 1 Ohio St. 463, 468 (1853).

The Seventh Circuit reached the result on Section 1782 which this Court has agreed to review, not by applying the widely-accepted meaning to the statutory language, but by imposing a limitation that has no support in the text of the statute. Specifically, the Seventh Circuit held that the term "foreign or international tribunal" as used in Section 1782(a) "is limited to a state-sponsored, public or quasi-governmental tribunal." 975 F.3d at 696.[9] This holding contravenes the time-honored canon of statutory construction that cautions courts against reading exceptions into legislation that are not expressed in the language of the statute. *See Intel,* 542 U.S. at 260 (if Congress had intended to impose sweeping restrictions to the district court's discretion at a time when it was enacting liberalizing amendments to a statute it would have included statutory language to that effect). *See also Food Mktg. Inst. v. Argus Leader Media,* __ U.S. __, 139 S. Ct. 2356, 2364 (2019) (rejecting "substantial competitive harm" test that had no basis in text of statute at issue); *Milner v. Dep't of the Navy,* 562 U.S. 562 (2011) (rejecting judicial construction of FOIA Exemption 2 for "personnel rules and practices" that extended such exemption to any "predominantly internal" materials of a governmental agency); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S, 479 (1985) (private civil RICO actions not limited to defendants who had been convicted on criminal charges and plaintiffs who had sustained "racketeering injury"); *United States v. Turkette,* 452 U.S. 576 (1981) ("neither the language nor the structure of RICO

[9] In so doing, the Seventh Circuit followed *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999), which also was followed by the Fifth Circuit in *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880 (5th Cir. 1999).

limits its application to legitimate 'enterprises.'"); *Maxwell v. Moore,* 63 U.S. (1 Wall.) 185 (1859) ("where the Legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so.").

Notably, the *Mitsubishi* Court concluded that:

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, even assuming a contrary result would be forthcoming in a domestic context.

473 U.S. at 629. Thus, this Court considers foreign and transnational arbitral tribunals that have been convened at the behest of private parties to commercial contracts as tribunals that are due the same types of consideration afforded to foreign and international governmental and quasi-governmental tribunals. Therefore, the Seventh Circuit's conclusion that foreign and international arbitral tribunals that decide commercial disputes pursuant to contractual arrangements between or among the parties appearing before them are excluded from the purview of Section 1782 contravenes the language and intention of that statute and is at odds with the manner in which this Court views such tribunals. On this basis, Servotronics respectfully suggests that the likelihood of affirmance of the Seventh Circuit's restrictive reading of Section 1782 is very much in doubt.

CONCLUSION

On the basis of the foregoing, Servotronics respectfully requests that the application of Rolls-Royce be denied.

Respectfully submitted,

/s/ Stephen R. Stegich

Stephen R. Stegich
Counsel of Record
Katherine B. Posner
Wendy A. Grossman
Condon & Forsyth LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 490-9100
sstegich@condonlaw.com

Counsel for Respondent
Servotronics, Inc.

April 23, 2021

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IN THE MATTER OF AN ARBITRATION

UNDER THE RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS

B E T W E E N:

ROLLS ROYCE PLC

Claimant

-and-

SERVOTRONICS INC

Respondent

FOURTH INTERIM AWARD

Introduction

1. By an application made by letter dated 14 April 2021 from Condon & Forsyth LLP, the Respondent has applied for the final hearing of this arbitration, which was fixed on 7 April 2020 (confirmed by Amended Order for Directions dated 10 July 2020) to commence on 10 May 2021, to be adjourned to a date not before 1 January 2022. In the alternative, if the Tribunal does not accede to the application to adjourn, the Respondent asks the Tribunal, in accordance with Article 31 of the Chartered Institute of Arbitrators Arbitration Rules ("CIArb Rules") to delay the making of any Final Award and "allow the admission of additional evidence through 31 December 2021".

2. The Tribunal has carefully considered the Respondent's letter of application dated 14 April 2021, the Claimant's Response letter dated 19 April 2021, the Respondent's Reply letter dated 20 April 2021, and the several exhibits to that correspondence. The Tribunal has also considered further material made available by the Respondent for the purposes of its application which, to the extent relevant, is referred to in this Award.

3. Since the date of the Tribunal's Third Interim Award (9 March 2021), in which the Tribunal rejected an earlier application by the Respondent for an adjournment of the final hearing of this arbitration, several things have happened:

2.1 On 21 March 2021, the United States Supreme Court granted the Respondent's Petition for a Writ of Certiorari dated 7 December 2020. The Respondent's Petition was in respect of the decision made by the United States Court of Appeals for the Seventh Circuit (affirming the prior decision of the US District Court for the Northern District of Illinois) to refuse the Respondent relief under 28 USC §1782 against Boeing to produce documents in Illinois for use in this arbitration. In consequence, the Supreme Court will hear the Respondent's appeal and, it is apprehended, will decide authoritatively the issue whether §1782 confers jurisdiction on district courts to order deposition evidence to be taken or discovery of documents to be made for use in such an arbitration as this, and specifically whether these arbitration proceedings are "*a proceeding in a foreign or international tribunal*" within the meaning of those words in §1782.

2.2 On 1 April 2021, the Honorable Magistrate Judge Katherine M. Menendez of the U.S. District Court of Minnesota, in a reversal of an earlier determination, ordered a stay of the proceedings before the Minnesota District Court in which the Respondent was seeking an order, pursuant to §1782, for a subpoena to take the deposition of Mr Shifley. The Honorable Magistrate Judge Katherine M. Menendez decided that a stay was warranted in light of the fact that, since her earlier determination, the United States Supreme Court had granted the Respondent's Petition for a Writ of Certiorari and so in due course would be deciding the specific jurisdictional issue existing between the parties in the Minnesota proceedings: namely, 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 Seventh Circuits have held.

2.3 By contrast, by Order dated 16 April 2021 and following the decision of the United States Court of Appeals for the Fourth Circuit dated 15 April 2021, the Honorable United States District Judge David C. Norton in the United States District Court for the District of South Carolina Charleston Division acceded to the Respondent's application for an order pursuant to §1782 to Take Discovery for Use in a Foreign Proceeding. In consequence, he granted the Respondent leave to issue subpoenas upon Mr Sharkshnas and Mr Walston.

2.4 The Tribunal understands from Condon & Forsyth LLP that those subpoenas have been served and depositions have been "*noticed*" in respect of Mr Sharkshnas for 3 May 2021 and in respect of Mr Walston for 5 May 2021. The Tribunal does not know whether either of

these gentlemen or Boeing or the Claimant will seek to challenge the subpoenas and, therefore, whether the depositions will proceed on the noticed dates.

2.5 The Claimant has, however, on 20 April 2021 applied to the Supreme Court of the United States for a stay of the US District Court for the District of South Carolina's Order (i.e. that made by Judge David C. Norton on 16 April 2021) and/or an immediate administrative stay pending the Supreme Court's consideration of the substantive stay application, either of which, if granted, will have the effect of preventing the Respondent from taking the deposition evidence of Mr Sharkshnas and Mr Walston.

2.6 On 15 April 2021, the Claimant served in this arbitration the second Witness Statement of Mr Walston dated 13 April 2021. This evidence is said by the Claimant to be responsive to the human factors evidence previously served by the Respondent.

Analysis

4. In support of its application, the Respondent draws attention to the fact that it has been striving for some significant time in the United States to obtain documentary and testimony evidence from the Claimant and from Boeing in relation to the matters in issue in this arbitration. The most particular matter in issue to which the Respondent draws attention is, of course, whether the chain of causation linking the defect in the Metering Valve Servo Valve manufactured by the Respondent to the tailpipe fire in the Claimant's Trent 1000 engine on the Boeing 787-9 Dreamliner aircraft that occurred on 16 January 2016 was broken in many places by failures by Boeing and the Claimant.

5. The Respondent says that, if the final hearing in the arbitration proceeds as planned in May of this year, there is a very real risk that it will be denied its due process rights under§1782. It suggests that, if this were to occur, it will or might be denied a fair and just hearing. The Respondent submits that, by its application, it is simply seeking to ensure that all the evidence it has sought in the United States for nigh on three years will be obtained to determine the truth of the matter for which it is claimed to be solely at fault.

6. The Tribunal is firmly of the view that, if this arbitration proceeds to its final hearing on and from 10 May 2021 without the Respondent having first obtained from Boeing or the Claimant the documentary and testimony evidence that it seeks in the United States through §1782, it will suffer no, or no real, prejudice.

(a) Illinois Proceedings (documents)

7. As indicated in the Third Interim Award, the documents sought by the Respondent in the Illinois Proceedings (as defined in the Third Interim Award) are in substance identical to those it sought by equivalent requests in its Redfern Schedule in this arbitration. Those documents fall into one of two categories: either (a) documents that the Tribunal ordered the Claimant to produce to the Respondent, and which now have been produced; or (b) documents requested by the Respondent, which the Tribunal rejected on the basis that those materials were not necessary for the fair disposal of this case.

8. If, therefore, the maintenance of the hearing dates means that the Respondent will be unable to deploy in this arbitration any documents it might obtain in the Illinois Proceedings following its appeal to the Supreme Court, assuming it to be successful, the Tribunal does not consider that result to justify the adjournment of the final hearing dates of this arbitration. As stated above, either those documents have already been produced in these proceedings to the Respondent or, as we have already determined, they are not necessary for the fair disposal of this arbitration.

(b) Minnesota Proceedings (Mr Shifley)

9. Mr Terrance Shifley was involved in the aircraft engine test on 16 January 2016 as ground observer. He was not involved in the prior troubleshooting of the engine or, it would appear, in the making of the decision to perform the engine test following the troubleshooting exercise. Mr Shifley's involvement was, therefore, limited.

10. The Respondent originally filed an application to the US District Court for South Carolina for a subpoena to take Mr Shipley's deposition. When, however, it was discovered that Mr Shipley had removed to Minnesota and so resided outside the jurisdiction of the District Court for South Carolina, the Respondent filed a §1782 application before the District Court of Minnesota for a subpoena to take his deposition in that State. As indicated in paragraph 2.2 above, the proceedings in Minnesota are now stayed, pending the decision of the Supreme Court on the Respondent's appeal from the decision made by the United States Court of Appeals for the Seventh Circuit in respect of the Illinois Proceedings.

11. The Tribunal does not consider that the possibility that the Respondent might at some time in the future secure the deposition evidence of Mr Shifley justifies any adjournment of or delay to this arbitration. There are several reasons:

11.1 Mr Shifley's involvement as ground observer took place over five years ago. It is very unlikely, in the Tribunal's view, that he will have any or any substantial independent recollection of the event in question that would assist the determination of the issues between the parties.

11.2 There is no clear indication of when, if at all, the Respondent will be able to take Mr Shifley's deposition. If the Supreme Court decides against the Respondent, the Tribunal assumes that the U.S. District Court of Minnesota will void any previous orders granting the Respondent's application to take Mr Shifley's deposition. If the Supreme Court finds in the Respondent's favour, it is likely not to be until late 2021 or, more probably, 2022 before Mr Shifley's deposition can be taken. That will put the fire over six years before his deposition is taken. That additional year can only hinder the remote possibility of any independent recollection that Mr Shifley might still enjoy.

11.3 The facts of Mr Shifley's limited involvement are readily apparent in the video footage of the engine run, in the audio recording of his communications with Mr Sharkshnas who was operating the engine in the cockpit, and in the notes of interview three days after the fire on 19 January 2016.

11.4 All this material, which is contemporaneous or almost contemporaneous to the fire, is likely, in the Tribunal's view, to be much more important to the just and fair disposal of this arbitration. Mr Shifley's own independent recollection of the event, assuming him to have any of any substance, will not, in the Tribunal's view, add anything of any significance to the record that is already available.

(c) South Carolina Proceedings (Mr Walston and Mr Sharkshnas)

12. The Tribunal has received two witness statements in this arbitration from Mr Walston. There is no good evidence to suggest that Mr Walston will not give oral testimony, by video link, at the final hearing of this arbitration next month in May 2021. On the contrary, in its application to the Supreme Court of the United States for a stay of the US District Court for the District of South Carolina's Order pursuant to 28 USC section 1782 to take discovery for use in a foreign proceeding, dated 20 April 2021 (referred to in paragraph 2.5 above), the Claimant stated that Mr Walston "*will also be providing testimony before the arbitral panel at the hearing scheduled for May 10, 2021, where Servotronics will have the opportunity to cross-examine him*".

13. All the signs are, therefore, that the Respondent will have a full and proper opportunity to cross examine Mr Walston at the final hearing of this arbitration. Any inability of the Respondent to depose Mr Walston in the United States prior to the final hearing in this arbitration should not, therefore, cause the Respondent any prejudice.

14. Moreover, as the Tribunal recorded in its Third Interim Award, Mr Walston was not involved in the events that led to the fire. He was appointed by Boeing as the chairperson of the Incident Review Board convened to investigate the cause of the fire and to make recommendations for avoiding future similar events. As chairperson, Mr Walston led the investigation, coordinated the efforts of the Board's members and presented the Board's findings to Boeing leadership. His role began only after the fire and was apparently confined to the specific tasks delegated to the Incident Review Board by Boeing. Thus, Mr Walston's evidence goes to the quality of Boeing's investigation into the causes of the fire and to the reliability of its findings: it only has an indirect bearing on the issues that arise between the parties in this arbitration.

15. Unlike Mr Walston, Mr Sharkshnas was involved in the events that led to the fire. The Respondent describes Mr Sharkshnas's evidence as highly relevant to its defence. It states that this is so "*with respect to: (1) the numerous improper, inadequate, and incorrect actions and failures to act by both Boeing and the Claimant employees leading to the tailpipe fire; and (2) Boeing's post-incident investigation, which is also relevant to the issues of its negligence and the chain of causation*". The Respondent concludes that "*[w]ithout Mr Sharkshnas's evidence being tested under cross-examination or in the form of a deposition, the Respondent is significantly limited in its ability to challenge much of the premise supporting the opinion evidence given by the Claimant's liability expert, Mr Keeping*".

16. The Tribunal disagrees. While it is correct that Mr Sharkshnas was involved in the events that led to the fire, the Tribunal does not consider his oral testimony to be necessary for the fair and just determination of the issues in this arbitration. As indicated in the Third Interim Award, it seems to the Tribunal that what is most likely to be controversial is not what happened or did not happen but, rather, the inferences to be drawn from well-documented events and the extent, if at all, to which the complaints of negligent failings are justified having regard to the narrative. These are primarily matters for expert evidence.

17. Further, Appendix B ("Graphic depiction of the Video and CVR of the Fire Event of 16 January 2016") to the Supplemental Report of Larry Vance, one of the experts to be called by the

Respondent, shows Mr Sharkshnas's actions (taken and not taken) in the immediate events leading to the tailpipe fire, and provides video footage of the engine run and an audio recording of the communications between Mr Sharkshnas (in the cockpit) and Mr Shifley (on the ground). The digitized format of Appendix B helpfully displays the context of the ramp environment, engine symptoms, verbal exchanges, and actions taken during the attempted start, all in relation to the actual timeline. The Tribunal will also have the benefit of a signed statement by Mr Sharkshnas dated 16 January 2016 (the same date as the fire) and the notes of an interview given by Mr Sharkshnas three days later on 19 January 2016.

18. The Tribunal also reminds itself of what was said very recently by the Respondent in its Skeleton Argument dated 1 March 2021, submitted by the Respondent in this arbitration for the application hearing on 4 March 2021. At paragraph 64, the Respondent stated: "*It is not the Respondent's submission that any evidence from the Illinois and South Carolina Proceedings must be obtained before the substantive hearing of this arbitration can take place. The Respondent submits that the hearing should be adjourned because a remote (or partially remote) hearing would be procedurally unfair. It is merely a relevant consideration that the rescheduled hearing could benefit from evidence obtained in the Illinois (and Minnesota) Proceedings*".

19. Nothing has occurred since 1 March 2021, in the Tribunal's view, to transform the nature or significance of any of the evidence in South Carolina, including any evidence from Mr Sharkshnas. The Tribunal considers that the Respondent's acknowledgement that evidence from Mr Sharkshnas (among others) was not necessary for the final hearing of this arbitration remains as valid now as it was when made on 1 March 2021.

20. Further, if for whatever reason (including the Claimant's application to the Supreme Court of the United States referred to in paragraph 2.5 above) it proves that Mr Sharkshnas's deposition cannot be taken before the start of the final hearing but only in late 2021 or in 2022, the Tribunal does not consider it just or fair to defer the final hearing of this arbitration for the sake of that evidence. In the Tribunal's view, such a delay would have a further detrimental impact on the recollections of other fact witnesses, would inevitably lead to further costs in the arbitration, and would be contrary to the demand upon the Tribunal to conduct the arbitration without unnecessary delay and expense. The Tribunal is also conscious of the fact that the parties have been working hard towards the May 2021 hearing and, therefore, should be fully prepared for such a hearing. The dislocation of the final hearing

for the sake of what is likely at best to be the marginal benefit of Mr Sharkshnas's deposition testimony is, in the Tribunal's view, not justified.

21. In coming to its decision, the Tribunal has paid full regard to the doctrine and principles of comity addressed by the Respondent at paragraphs 28 *et seq*. of Condon & Forsyth LLP's application letter of 14 April 2021. Those principles do not alter the Tribunal's decision. While the Tribunal has recognised the rights of the Respondent to seek further evidence in the United States and has done nothing to prevent their exercise, it is another matter whether or not the final hearing of this arbitration should be delayed in case the fruits of that exercise are made available in the future. The Tribunal does not consider that the interests of justice and fairness in this arbitration would be served by any such delay. On the contrary, the Tribunal has come to the conclusion that any such delay would be contrary to those interests.

Conclusion on adjournment application

22. For the reasons above, the Respondent's application to adjourn the final hearing of this arbitration to a date not before 1 January 2022 is rejected.

Application pursuant to Article 31 of the CIArb Rules

23. The Respondent has applied, in the alternative, for an order delaying the making of any Final Award to allow the admission of additional evidence through 31 December 2021.

24. The Tribunal sympathises with the thought but has no hesitation in rejecting the application. While an order made now to defer any final award until Mr Sharkshnas's deposition evidence can be taken and made available has some very superficial attraction, it is bedevilled by significantly undesirable problems.

25. First, there is no certainty that, if Mr Sharshnas's deposition cannot be taken on the presently noticed date in May 2021, the Respondent will be able to take it at all. That will, presumably, depend on the outcome of the Claimant's recent application to the Supreme Court referred to above in paragraph 2.5, any challenges by any entity or individual to the subpoena and, ultimately, the final decision of the Supreme Court on the issue of jurisdiction under §1782. Secondly, if Mr Sharkshnas's deposition evidence is taken at any time after the oral expert evidence had been given in the arbitration, there is a possibility that the parties will wish to recall their experts to give further evidence. Thirdly, there is also a further possibility that the parties will wish to make further written and oral submissions to the Tribunal, depending on

what Mr Sharkshnas will have said in his deposition. Fourthly, and for the reasons already expressed, the Tribunal does not consider the oral testimony of Mr Sharkshnas to be necessary for the fair and just determination of the issues in this arbitration.

26. In all these circumstances, the Tribunal finds no merit in the Respondent's alternative application for an order delaying the making of any Final Award to allow the admission of additional evidence through 31 December 2021. Accordingly, the Tribunal rejects it.

Postscript

27. The Tribunal has already referred in paragraph 2.5 above to the Claimant's applications to the Supreme Court dated 20 April 2021 for (i) a stay of the US District Court for the District of South Carolina's Order pursuant to 28 USC section 1782 to take discovery for use in a foreign proceeding and/or (ii) an immediate administrative stay. Those applications by the Claimant appear designed, at least in part, to prevent the Respondent from taking the deposition of Mr Sharkshnas which has been noticed for 3 May 2021.

28. In circumstances where the Claimant has previously told the Tribunal that it is unable to call Mr Sharkshnas to give oral evidence at the arbitration but will rely on his Witness Statement dated 22 September 2020, the Tribunal finds it curious that the Claimant appears determined to prevent Mr Sharkshnas from giving testimony at all. Quite what weight the Claimant thinks the Tribunal can or should accord to Mr Sharkshnas's Witness Statement in these circumstances is, no doubt, something that the Claimant will wish to consider and on which both parties will be making submissions in due course.

29. In its written submissions at paragraph 27, the Respondent has suggested that Mr Sharkshnas's Witness Statement should be "*stricken in its entirety*". There is presently no application before the Tribunal to that effect. In view of the Claimant's applications to the U.S. Supreme Court, it is apprehended that, at some appropriate time, such an application might be forthcoming.

30. The Tribunal expresses no concluded view on any of these issues but considers that the actions of the Claimant to prevent oral testimony being given by Mr Sharkshnas for use in this arbitration while at the same time relying on a statement taken by the Claimant's attorneys warrant particular mention.

Orders

31. The decisions to which the Tribunal has come, and the Orders that it makes, are as follows:

1. The Respondent's application to adjourn the substantive hearing of this arbitration from 10 – 21 May 2021 to the first available date not before 1 January 2022 is rejected.

2. The Respondent's application for an order pursuant to Article 31 of the Chartered Institute of Arbitrators Arbitration Rules to delay the making of any Final Award to allow the admission of additional evidence through 31 December 2021 is rejected.

Dated in England: 21 April 2021

Gavin Kealey Q.C.

On behalf of the Tribunal: Gavin Kealey QC, Michael Crane QC and William Wood QC.