NO. 21A80

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IN THE

# Supreme Court of the United States

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

*Applicants*,

v.

LUXSHARE, LTD.,

*Respondent*.

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RESPONSE TO APPLICATION DIRECTED TO THE HONORABLE BRETT M. KAVANAUGH FOR STAY AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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October 21, 2021

## RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Luxshare Ltd. hereby states that it has no parent company and that no publicly held company owns 10% or more of its stock.

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## INTRODUCTION

Applicants move under the All-Writs Act, 28 U.S.C. § 1651, for a stay pending certiorari before judgment in a case that comprises nothing but a civil discovery dispute. No basis exists for that extraordinary relief. The application should be denied.

A year ago, the district court authorized respondent Luxshare Ltd. to issue subpoenas under 28 U.S.C. § 1782(a), seeking discovery for use before an arbitral tribunal in Germany. Applicants have fought tooth and nail to resist turning over evidence of a fraud they committed in connection with a billion-dollar corporate transaction. After losing five rounds of motion practice in the district court and the court of appeals, including two motions to stay, Applicants must comply with the subpoenas by October 27, 2021.

In a last-ditch attempt to continue the concealment of their wrongdoing, Applicants now seek certiorari before judgment to review whether § 1782(a) encompasses foreign arbitral tribunals, and an All-Writs Act stay from this Court in the meantime. It is past time for Applicants to comply with the subpoenas. The stay should be denied.

Turning to the stay factors, the court of appeals correctly determined that Applicants will not be irreparably harmed by providing the "minimal and nonconfidential discovery" the district court ordered—3,400 documents and a single

deposition. To be sure, Applicants will lose the arbitration when the tribunal sees the evidence of their fraud, but that is not a judicially cognizable injury. Applicants' evident wish to conceal their fraud from the arbitral tribunal does not warrant a stay.

Luxshare, on the other hand, would be significantly injured by a stay. Applicants have already delayed complying with the subpoenas for a year. To avoid statute-of-limitations issues, Luxshare should file the arbitration by December 31, 2021. Applicants sought to neutralize this factor by attaching to their application a purported waiver of the German statute of limitation. But the annexed declaration of Heidelberg University Professor Dr. Dr. h.c. Thomas Pfeiffer, an expert in German, private international and comparative law, explains that there is a considerable risk that the arbitral tribunal will determine the proffered waiver to be invalid and ineffective. In light of that risk and given the magnitude of the claim, which runs into the hundreds of millions of dollars, Luxshare formally rejects the proffered waiver due to the absence of proof of authority and intends to initiate the arbitration by December 31, 2021.

Moreover, the applicable arbitration process is so expedited and the opportunities to submit evidence to the tribunal so limited that Luxshare should—if at all possible—incorporate the evidence sought through this § 1782 proceeding into its December 2021 request for arbitration. And it is likely that the arbitration process will conclude before this Court could issue a decision on the question presented. As

a practical matter, a stay will likely deny Luxshare the ability to use the evidence of Applicants' fraud to pursue its claims against them.

Further, a stay should be denied because Applicants have not shown either that this Court is likely to grant certiorari before judgment, or that it is likely to reverse the Sixth Circuit's 2019 ruling that § 1782(a) encompasses foreign arbitral tribunals. Cognizant that they cannot possibly satisfy the demanding standard for certiorari before judgment, Applicants recently asked the court of appeals to grant a summary affirmance against themselves, on the basis that its 2019 ruling dooms their appeal. That was obvious from the time the subpoenas were issued, but it did not stop Applicants from litigating in the district court and in the court of appeals, and thereby securing a year of delay. This Court should not reward their gamesmanship with a stay.

Applicants' delay tactics have run their course. The discovery is due by October 27, 2021. This Court should permit no further delay. The application should be denied.

## BACKGROUND

### I. Statutory Background

28 U.S.C. § 1782(a) authorizes a district court to order a person "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." 28 U.S.C. § 1782(a) (emphasis added).

In *In re Application to Obtain Discovery for Use in Foreign Proceedings* (*Abdul Latif Jameel Transportation Co. v. FedEx Corp.*), 939 F.3d 710 (6th Cir. 2019), the United States Court of Appeals for the Sixth Circuit performed a thorough analysis of the statutory language and context, and concluded that § 1782(a) encompasses foreign arbitral tribunals. *See id.* at 717–31.

Earlier this year, this Court granted certiorari to resolve a circuit split on the applicability of § 1782(a) to foreign arbitral tribunals, but that case was recently dismissed by stipulation. *Servotronics v. Rolls-Royce PLC*, No. 20-794, *cert. granted*, 141 S. Ct. 1684 (2021), *cert. dismissed*, No. (R46-44 / OT 2020), 2021 WL 4619271 (U.S. Sept. 29, 2021). Earlier this month, a petition for writ of certiorari was filed in another case that presents the question of whether § 1782(a) encompasses foreign arbitral tribunals, and that seemingly presents no mootness concerns.[1]

[1] *AlixPartners, LLP v. The Fund for Prot. of Inv. Rights in Foreign States*, *pet. for cert. docketed*, No. 21-518 (Oct. 7, 2021).

## II. Factual Background

### A. Applicant ZF US Defrauds Respondent Luxshare

Respondent Luxshare is a Hong Kong limited liability company. Dkt. No. 1-5 at 1 (¶ 3).[2] Through its equity investments, Luxshare engages in manufacturing in the areas of consumer electronics, communications, and automotive. *Id*. Applicant ZF Automotive US Inc. ("ZF US") is a Michigan-based manufacturer of automotive parts. Dkt. No. 1-6 at 2–3 (¶ 6); *see* App'n at 6. Applicants Marnat and Dekker are Michigan residents, and, respectively, current and former senior officers of ZF US. Dkt. No. 1-6 at 3 (¶¶ 7–8), No. 1-7 at 3 (¶ 7); *see* App'n at 6.

In August 2017, Luxshare purchased two business units from ZF US for approximately $1 billion. Dkt. No. 1-5 at 2 (¶ 5). The parties entered into the German law-governed purchase agreement in Germany. *Id.*; Dkt. No. 6-2 (PageID.266) (¶ 20.10.1). The transaction closed in Germany in April 2018. Dkt. No. 1-5 at 6 (¶ 18).

Luxshare subsequently learned that ZF US had concealed material negative developments concerning several of the acquired businesses' largest customers. Dkt.

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[2] 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.). The application for a stay is cited as "App'n" and the exhibits to the application are cited as "App'n Ex. __".

No. 1-5 at 3 (¶ 7), 6 (¶ 19), No. 1-7 at 4–9 (¶¶ 9–22). Applicants Dekker and Marnat were directly involved in the due diligence process and they were aware of at least some of the undisclosed information. Dkt. No. 1-5 at 8 (¶ 24), No. 1-6 (¶ 9), No. 1-7 at 6 (¶ 17), 8 (¶ 20). ZF US's concealment of material negative information violated the applicable German law and inflated the purchase price paid by Luxshare by hundreds of millions of dollars. Dkt. No. 13-1 at 2 (¶ 3).

### B. To Avoid Statute-of-Limitation Issues, Luxshare Should Initiate an Expedited Arbitration Proceeding in Germany by the End of 2021

Pursuant to the purchase agreement, Luxshare's claims must be arbitrated in Munich, Germany, under the fast-track Supplementary Rules for Expedited Proceedings of the Arbitration Rules of the German Institution of Arbitration e.V. (known as the "DIS Rules"). Dkt. No. 1-6 at 6 (¶ 18); *see* Dkt. No. 6-2 (PageID.266) (¶ 20.10.2). Luxshare intends to initiate that arbitration. Dkt. No. 1-6 at 5 (¶ 14), 10 (¶¶ 28–30). To avoid statute-of-limitation issues, the request for arbitration should be filed by December 31, 2021. Dkt. No. 13-2 at 14–15 (¶ 32).

Once Luxshare has filed its request for arbitration and ZF US has answered, the parties are limited to one written submission each, and there will be only one oral hearing. Dkt. No. 1-6 at 7 (¶ 19), No. 13-2 at 13–14 (¶ 29). The tribunal should render its award within six months of the case management conference. Dkt. No. 1-6 at 7 (¶ 19), No. 13-2 at 13–14 (¶ 29). As a practical matter, the expedited process requires that Luxshare's December 2021 request for arbitration—if at all possible—

incorporate the evidence in support of Luxshare's case, including the evidence to be gathered through this § 1782 proceeding. Dkt. No. 13-2 at 13–14 (¶ 29).

## III. Procedural Background

### A. The District Court Permits Luxshare to Take Limited Discovery Under 28 U.S.C. § 1782(a) for Use Before the German Arbitral Tribunal

In October 2020, the district court authorized Luxshare to issue subpoenas to Applicants pursuant to 28 U.S.C. § 1782(a), to secure evidence pertaining to ZF US's concealment of material information from Luxshare. App'n Ex. A; *see* Dkt. No. 1-6 (¶ 15). ZF US asserts that Luxshare will not prevail on its claims without the evidence of fraudulent intent that Luxshare seeks through this § 1782 proceeding. Dkt. No. 6-2 (PageID.258) (¶ 18); *see also* Dkt. No. 1-6 at 7 (¶ 19).

In May 2021, a magistrate judge granted in part and denied in part Applicants' motion to quash the subpoenas. App'n Ex. B. The magistrate judge weighed the discretionary "factors that bear consideration in ruling on a § 1782(a) request," *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 258, 264–66 (2004), and rejected Applicants' contention that those factors required the denial of discovery. App'n Ex. B at 9–35. Instead, the magistrate judge determined that, under the facts and circumstances of this case, the "*Intel*" factors militated in favor of limiting the scope of discovery from that requested. App'n Ex. B at 28–35. Therefore, Luxshare would be permitted to depose Dekker or Marnat, but not both, and document discovery

would be limited in several ways, including through the imposition of a narrowed time frame and search terms, and by limiting the search to the emails of two custodians and documents held on ZF US's shared drives. App'n Ex. B at 30–35.[3]

In July 2021, the district court rejected Applicants' objections to the magistrate judge's ruling. App'n Ex. C at 1–17. The district court also affirmed the magistrate judge's decision not to stay the proceeding pending this Court's decision in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, as to whether § 1782(a) authorizes assistance in gathering evidence for use before a foreign arbitral tribunal. App'n Ex. C at 17–19. The district court noted, in particular, the imminent expiration of the German limitation period, and the significant limitations the magistrate judge imposed on the scope of the discovery. *Id.* at 18.

### B. The District Court Compels Applicants to Comply with the § 1782(a) Subpoenas, and Denies a Stay Pending Appeal

Even after the district court declined to quash the § 1782 subpoenas, Applicants refused to comply with them. Therefore, in July 2021, Luxshare filed a

[3] The magistrate judge also rejected Applicants' argument that § 1782(a) is inapplicable because Luxshare has not yet commenced an arbitration. As the magistrate judge correctly held, § 1782 is satisfied because Luxshare's arbitration is "'*within reasonable contemplation*.'" App'n Ex. B at 6 (emphasis in original) (citing *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 258–59 (2004)). Under Federal Rule of Civil Procedure 72(a), Applicants waived any objection to that ruling by not raising it with the district judge. Dkt. No. 27.

motion to compel, Dkt. No. 31, which the district court granted in August 2021, App'n Ex. D.

For their part, in July 2021, Applicants moved for a stay pending appeal, Dkt. No. 30, which the district court denied in August 2021, App'n Ex. D. In doing so, the district court recognized the harm that Luxshare would suffer if it does not receive the requested discovery in time for the expedited arbitration, *id.* at 10–11, and aptly determined that "[f]or a multi-billion 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," *id.* at 8.

### C. Applicants File an Appeal and Seek a Stay, Petition for Certiorari Before Judgment, and Seek Summary Affirmance in Their Own Appeal Following the Court of Appeals' Denial of a Stay

Without waiting for the district court to rule on their motion for a stay pending appeal, in July 2021, Applicants filed a notice of appeal, Dkt. No. 32, and sought a stay pending appeal from the court of appeals, CA6 ECF No. 8.

In support of their motion to stay, Applicants contended that the district court committed three errors that required reversal, independent of the question of whether § 1782(a) encompasses foreign arbitral tribunals: (1) the district judge applied the wrong standard of review to the magistrate judge's ruling—an issue that, according to Applicants "may well be outcome-determinative;" and (2) the district court erred in its consideration of two of the *Intel* discretionary factors: (a) the receptivity of the

German arbitral tribunal to § 1782 discovery, and (b) whether Luxshare is seeking to evade foreign proof-gathering restrictions. CA6 ECF No. 8 at 16–17; *see also* CA6 ECF No. 19. In support of their stay request, Applicants told the court of appeals that each of these arguments "provides an independent basis" to vacate the grant of § 1782 discovery. CA6 ECF No. 8 at 13–15.

Without waiting for the court of appeals to rule on the motion to stay, on September 10, 2021, Applicants filed their petition for a writ of certiorari before judgment, seeking review of whether § 1782(a) encompasses foreign arbitral tribunals. Luxshare opposed on October 14, 2021, without seeking an extension of time.

On October 13, 2021, the court of appeals denied Applicants' motion to stay because Applicants satisfied neither of the two principal requirements for a stay. App'n Ex. E. The "minimal and nonconfidential discovery" required by the district court's order did not constitute irreparable harm. *Id.* at 3. And Applicants had "not shown the requisite likelihood of success on the merits of [their] appeal." *Id.* As the court of appeals noted, to warrant a stay, Applicants needed to demonstrate "'a significant possibility'" that this Court would disagree with the Sixth Circuit's decision in *Abdul Latif*, 939 F.3d 710, *supra* at 4, and determine that § 1782(a) excludes foreign arbitral tribunals. App'n Ex. E at 2–3 (quoting *Trump v. Int'l*

*Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., joined by Alito and Gorsuch, JJ., concurring in part and dissenting in part)).

Immediately after the court of appeals denied a stay, on October 14, 2021, Applicants filed a "time-sensitive" motion asking the court of appeals to enter a summary affirmance of the district court's decision "to more efficiently seek Supreme Court review." CA6 ECF No. 32 at 2. The following day, Applicants filed the present application for a stay pending certiorari before judgment.

On October 21, 2021, Luxshare responded to the motion seeking summary affirmance. CA6 ECF No. 33. Although Luxshare does not oppose affirmance, it notes that instead of moving in July 2021 for summary affirmance as a means to seek review by this Court, Applicants prosecuted a stay motion before the court of appeals, based in large part on the "independent" arguments that they have now abandoned, and thereby secured several months of delay. *Id.* Luxshare has therefore cross-moved the court of appeals for an award of fees under 28 U.S.C. § 1912, due to the unnecessary delay caused by Applicants' appeal and motion to stay. *Id.*

## REASONS FOR DENYING THE REQUESTED STAY

A stay is "'an exercise of judicial discretion,'" not a "'matter of right,'" and should not be granted "reflexively." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). The

applicant "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34.

Ordinarily, this Court considers four factors to guide the exercise of its discretion: (1) whether the applicant "has made a strong showing that he is likely to succeed on the merits; (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) where the public interest lies." *Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors are "the most critical." *Id.* The third and fourth factors come into play only if the applicant satisfies the first two. *Id.* at 435.[4]

However, "significantly higher justification" is required when—as here—the stay is sought under the All-Writs Act, 28 U.S.C. § 1651. *See* App'n at 1; *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). "The Circuit Justice's injunctive power is to be used sparingly and only in the most critical and exigent circumstances," "where

[4] *See also Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., joined by Alito and Gorsuch, JJ., concurring in part and dissenting in part) ("When we determine that those critical factors are satisfied, we must 'balance the equities' by 'explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large.'") (alterations in original) (quoting *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers)).

the legal rights at issue are indisputably clear." *Id.* (citations and quotation marks omitted).

A stay should be denied here because, even under the standard that applies to ordinary stays under 28 U.S.C. § 2101(f), Applicants satisfy neither of the two "most critical" factors, and the remaining factors confirm that a stay is unwarranted. Much less do Applicants satisfy the "significantly higher" standard for the "extraordinary relief" of a stay under the All-Writs Act. *Ohio Citizens for Responsible Energy, Inc.,* 479 U.S. at 1312 (denying stay under the All-Writs Act where counsel, as here, "neither specifically requested it nor addressed the peculiar requirements for its issuance").

## I. Applicants Have Not Shown that They Will Be Irreparably Injured Absent a Stay of the Order Compelling Discovery

An appellant is not entitled to a stay, "'even if irreparable injury might otherwise result to the appellant.'" *Nken*, 556 U.S. at 433 (quoting *Virginian Ry. Co.*, 272 U.S. at 672). However, the *absence* of irreparable injury to the movant requires that a stay be denied. *See id.* at 434–35; *see also Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., joined by Alito, Gorsuch, and Kavanaugh, JJ., concurring in the grant of stay) (applicant for stay pending certiorari must show,

*inter alia*, "a 'likelihood that irreparable harm will result from the denial of a stay'") (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)).[5]

1. Here, the court of appeals determined that the requirement to provide "*minimal and nonconfidential discovery*" would not cause Applicants irreparable harm. App'n Ex. E at 3 (emphasis added). Similarly, the district court observed that "[f]or a multi-billion 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." App'n Ex. D at 8. When, as here, the lower court has assessed the irreparable-injury factor, "its decision is entitled to weight and should not be lightly disturbed." *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers).

There is no basis to disturb the lower courts' determinations that Applicants will suffer no irreparable injury absent a stay. Sitting for a single deposition and turning over 3,400 non-confidential documents that may be used in a confidential arbitral process to which Respondents agreed in the context of a billion-dollar transaction, *supra* at 5, does not constitute irreparable injury.

Because the production of non-confidential, non-privileged discovery does not constitute irreparable injury, examples abound of appellate courts declining to

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[5] *See also Barnes*, 501 U.S. at 1302 (Scalia, J., in chambers) (showing of irreparable harm is among the "*conditions* that must be met before issuance of a [28 U.S.C.] § 2101(f) stay is appropriate") (emphasis added).

stay § 1782(a) discovery orders pending appeal.[6] Indeed, this Court recently declined to stay such an order. *See Rolls-Royce PLC v. Servotronics, Inc.*, No. 20A160, 2021 WL 1618133 (U.S. Apr. 27, 2021). To be sure, Applicants have located a handful of examples of stays being granted without explanation,[7] but that does not support their contention that § 1782(a) orders are "routinely" stayed pending appeal. App'n at 27.

2. Applicants are mistaken that the "time and expense" of complying with the district court's discovery order constitutes irreparable injury, App'n at 27, certainly in light of the very significant legal resources they have devoted to fighting that discovery. As this Court has recognized in another context: "Mere litigation

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[6] *See, e.g.,* Order*, Rothe v. Aballi,* No. 20-12543 (11th Cir. Oct. 28, 2020)*;* Order*, In re ex Porsche Automobil Holding SE v. John Hancock Life Ins. Co.,* No. 20-1239 (1st Cir. Aug. 10, 2020); *JSC MCC EuroChem v. Chauhan,* No. 18-5890, 2018 WL 9650037, at *1 (6th Cir. Sept. 14, 2018); Motion Order*, Mangouras v. Squire Patton Boggs,* No. 17-3633 (2d Cir. Dec. 7, 2017), ECF No. 60; Order, *Dep't of Caldas v. Diageo PLC,* No. 17-15267 (11th Cir. Mar. 8, 2018); Order*, Catalyst Managerial Servs., DMCC v. Libya Afr. Inv. Portfolio,* No. 16-2653 (2d Cir. Sept. 21, 2016), ECF No. 44; Order, *In re Application of Kate O'Keeffe,* No. 16-1004 (2d Cir. May 12, 2016), ECF No. 56*;* Order*, Gissin v. Freedman,* No. 16-370 (2d Cir. Mar. 25, 2016), ECF No. 58; Order*, Weber v. Finker*, 08-13372 (11th Cir. Aug. 4, 2008). Additional examples appear at CA6 ECF No. 13 at 12, n.2.

[7] *See Bouvier v. Adelson* (*In re Accent Delight Int'l Ltd.*)*,* 869 F.3d 121, 127 (2d Cir. 2017); *Lancaster Factoring Co. v. Mangone* (*In re Lancaster Factoring Co.*), 90 F.3d 38, 41 (2d Cir. 1996); Order, *Khrapunov v. Prosyankin*, No. 18-16254 (9th Cir. Aug. 2, 2018), ECF No. 7. *Pallares v. Kohn* (*In re Chevron Corp.*)*,* 650 F.3d 276 (3d Cir. 2011), in particular, does not support the notion that § 1782(a) orders are stayed as a matter of course, because that appeal turned on whether the discovery was privileged, *see id.* at 286, 288–95.

expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980) (issuance of an administrative complaint is not subject to judicial review before the administrative process concludes).[8] Given the very modest obligations the discovery order imposes on them, Applicants misplace their reliance on a case in which this Court stayed a judgment requiring the immediate payment of over $250 million, a substantial portion of which was to be distributed to class members before this Court could adjudicate the case. *See Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304–05 (2010) (Scalia, J., in chambers).

3. Applicants are also incorrect that Luxshare's "intention to quickly use" the information for purposes of the foreign arbitration threatens irreparable injury. App'n at 27–30. The district court saw this argument for what it is: "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." App'n Ex. E at 9. Luxshare will prevail when it proves

[8] *See also Sampson v. Murray*, 415 U.S. 61, 90 (1974) (vacating a preliminary injunction issued to enjoin the termination of a government employee pending an administrative appeal, holding that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough") (internal citation omitted); *In re Swift Transp. Co.*, 830 F.3d 913, 916 (9th Cir. 2006) (per curiam) (ordinary litigation expenses did not warrant a writ of mandamus to compel the district court to vacate its case-management order and decide a petition to compel arbitration).

Applicants' wrongdoing through the discovery the district court has ordered, but that is not a judicially cognizable injury. Applicants' desire to conceal their fraud from the arbitral tribunal does not warrant a stay.

Tellingly, Applicants offer no support for their argument that Luxshare's use of the § 1782(a) discovery would constitute irreparable injury. They misplace their reliance on cases recognizing that the holder of *privileged* information would be irreparably injured by its compelled disclosure and use in a public litigation. *See* App'n at 28–29.[9] Those cases are wholly inapposite here, where the situation is reversed—the challenged discovery order compels the production of "*nonconfidential*" information, App'n Ex. F at 3 (emphasis added), for use in a *private* arbitration proceeding.

4. Finally, Applicants are not assisted by their mootness argument—that they face irreparable injury because once the discovery has been produced and used before the German arbitral tribunal, "United States courts are powerless to order the

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[9] *See In re Pro. Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009) (mandamus to vacate a discovery order compelling the production of privileged materials); *United States v. Amlani*, 169 F.3d 1189, 1192–96 (9th Cir. 1999) (same); *In re von Bulow*, 828 F.2d 94, 98–99 (2d Cir. 1987) (same); *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 655 (10th Cir. 1984) (same).

Applicants' reliance on *In re Gorsoan Ltd.* is also misplaced. App'n at 27. Contrary to Applicants' suggestion, in *Gorsoan* it was the abridgment of the respondent's Fifth Amendment rights that constituted irreparable harm warranting a stay. No. 18-MC-431 (RA) (KNF), 2020 WL 4194822, at *7 (S.D.N.Y. July 21, 2020).

DIS panel to ignore it," even if it is later determined that § 1782(a) does not apply to foreign arbitral tribunals. App'n at 26–28.

Contrary to Applicants' contention, App'n at 26, a "possibility of mootness" does not automatically warrant a stay without regard to the gravity of the threatened injury. *See Republic of Philippines v. Westinghouse Elec. Corp*., 949 F.2d 653, 658 (3d Cir. 1991) (risk of mootness "alone does not justify pretermitting an examination of the nature of the irreparable injury alleged and the particular harm that will befall the appellant should the stay not be granted"). Notably, in the cases that Applicants cite, *see* App'n at 26*,* this Court granted stays because, in those cases, mootness would have threatened significant public harm, including "jeopardizing an important ongoing grand jury investigation," *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308–09 (1989) (Marshall, J., in chambers), and requiring the imminent release or retrial of a convicted felon, *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers).[10] Here, Applicants have articulated no such injury.

Moreover, also contrary to Applicants' assertion, App'n at 26, this Court did not suggest in *Chafin v. Chafin*, 568 U.S. 165 (2013), that "the threat of mootness warrants 'stays as a matter of course.'" To the contrary, *Chafin* requires that the

[10] *Cf. New York v. Kleppe*, 429 U.S. 1307, 1307 (1976) (Marshall, J., in chambers) (the need to "preserve a question for review by the full Court" did *not* warrant dissolution of stay because the movant would not suffer irreparable injury).

mootness doctrine be applied sparingly, precisely so that courts will *not* seek to avoid mootness by issuing "stays as a matter of course." *Id.* at 178. And here, Applicants' unsupported assertions do not establish that their appeal will necessarily be moot once the discovery is turned over to Luxshare. Applicants correctly note that they can ask the arbitral tribunal to ignore the discovery—hardly an injurious or unjust remedy, given that Applicants agreed to arbitrate as part of a transaction that saw them paid a billion dollars. *Supra* at 5–6. Moreover, the court of appeals perceived that it could "mitigate any harms from the discovery as the circumstances allow," in the event the discovery order was later vacated. App'n Ex. E at 4 (citation omitted).[11] Applicants worry that the likelihood of effective relief is reduced if the arbitration proceeding concludes before this Court rules on the scope of § 1782(a), App'n at 25–26, but that is a self-inflicted and therefore non-cognizable injury, resulting from and exacerbated by Applicants' delay tactics in the district court and in the court of appeals. *Supra* at 8–11; *infra* at 26–28.[12] In any event, uncertainty about the

[11] This Court has held, for example, that compliance with an IRS summons does not moot an appeal from an order to compel because the court can order the return of the documents. *Church of Scientology of Calif. v. United States*, 506 U.S. 9, 12–13 (1992).

[12] *Cf. Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., joined by Alito, Gorsuch, and Kavanaugh, JJ., concurring in the grant of stay) ("While a stay may preclude this particular initiative from appearing on the ballot this November, that consequence is attributable at least in part to Reclaim Idaho, which delayed unnecessarily its pursuit of relief until more than a month after the deadline for submitting signatures.) (citation and quotation marks omitted); *see also Al Otro*

effectiveness of potential future relief "does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured." *Chafin*, 568 U.S. at 175.

As Luxshare demonstrates below, *infra* at 30–32, it is actually *Luxshare*—not Applicants—that will be concretely injured if this case is mooted as a result of the issuance of a stay. Because the expedited arbitration should be filed by December 31, 2021 and concluded within six months of the procedural hearing, a stay will effectively deprive Luxshare of the ability to make any use of the information in the arbitration. *Infra* at 31–32. There is no basis for a stay.

## II. Applicants Have Not Made a Strong Showing that this Court Is Likely to Grant Certiorari Before Judgment and Rule in Applicants' Favor on the Question of Civil Procedure Presented Here

In the context of a stay pending certiorari, the success-on-the-merits factor requires the applicant to show "both 'a reasonable probability that certiorari will be granted' and 'a significant possibility that the judgment below will be reversed.'" *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., joined by Alito and Gorsuch, JJ., concurring in part and dissenting in part)

*Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) ("[S]elf-inflicted wounds are not irreparable injury.") (alteration in original; citation and quotation marks omitted).

(quoting *Barnes*, 501 U.S. at 1302 (Scalia, J., in chambers)).[13] Applicants have made neither of those showings.

### A. Applicants Have Not Shown a Reasonable Probability that this Court Will Grant Their Petition for Writ of Certiorari Before Judgment to Address this Discovery Dispute

Luxshare has already shown that this Court should deny the petition for writ of certiorari before judgment. *See ZF Automotive* Br. in Opp. to Cert. (No. 21-401). This case does not satisfy the demanding standard for certiorari before judgment. *See id.* at 9–14. In addition, this case is a poor vehicle to address the question presented, as it is likely to be moot before this Court can rule. *See id.* at 17–20. Moreover, a petition for writ of certiorari is already pending in another case that seemingly offers a superior vehicle to address the question presented. *See id.* at 19–20.

1. This case and the question of whether § 1782(a) encompasses foreign arbitral tribunals cannot satisfy the "very demanding standard" for certiorari before judgment. *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014) (Alito, J., respecting denial of certiorari before judgment). A grant of certiorari before

[13] *See also Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., joined by Alito, Gorsuch, and Kavanaugh, JJ., concurring in the grant of stay) (applicant for stay pending certiorari must show, *inter alia*, "a 'reasonable probability' that this Court will grant certiorari, [and] (2) a 'fair prospect' that the Court will reverse the judgment below") (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)).

judgment is an "extremely rare occurrence," *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), reserved for cases that are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," S. Ct. R. 11. *See ZF Automotive* Br. in Opp. to Cert. at 9–13.

Contrary to Applicants' contention, App'n at 18–19, the present discovery dispute and the esoteric question of civil procedure it presents pale alongside the momentous cases in which this Court had granted certiorari before judgment. *See ZF Automotive* Br. in Opp. to Cert. at 9–13. Those were cases of "great constitutional significance" or that had "extraordinary national importance for other reasons." S. Shapiro, et al., *Supreme Court Practice* § 4.20 (11th ed. 2019, online) (collecting cases). *See ZF Automotive* Br. in Opp. to Cert. at 9–13. This case cannot compare to any of them.

2. Even if Applicants could satisfy the demanding standard for certiorari before judgment, this case is a poor vehicle to address the question of whether § 1782(a) encompasses foreign arbitral tribunals. *See id.* at 14–20. As in *Servotronics*—this case is likely to become moot before this Court can decide the question presented. To avoid statute-of-limitation issues, the request for arbitration should be filed by December 31, 2021. *Supra* at 6. Once Luxshare has filed its request for arbitration and ZF US has answered, the parties are limited to one written

submission each, and there will be only one oral hearing. *Supra* at 6. Given the expedited process, as a practical matter Luxshare needs—if at all possible—to incorporate the discovery sought under § 1782(a) into its December 2021 filing. *Supra* at 6. The arbitrators should render their award within six months of the procedural hearing. *Supra* at 6. Doubtless, Applicants would oppose any request to extend the six-month deadline to wait for the § 1782(a) discovery, and there can be no guarantee that the arbitral tribunal would grant such an extension. Therefore, it is not likely that this Court will be able to render a decision on the question presented in time for the § 1782 discovery to be used before the arbitral tribunal.

Meanwhile, other cases that are pending in or that have recently been resolved by the courts of appeals may present this Court with one or more appropriate vehicles to decide the question presented. *See ZF Automotive* Br. in Opp. to Cert. at 16–17, 19–20. In particular, a petition for writ of certiorari was recently filed in *AlixPartners, LLP v. The Fund for Protection of Investor Rights in Foreign States*, *pet. for cert. docketed*, No. 21-518 (Oct. 7, 2021), raising the question of whether § 1782(a) applies to arbitral tribunals.[14] The parties in *AlixPartners* have entered into

[14] This Court recently denied certiorari before judgment when—as here—another case presented the same questions in the context of an ordinary post-judgment petition for writ of certiorari. *See Pro-Football, Inc. v. Blackhorse*, 137 S. Ct. 44 (2016) (mem.) (denying certiorari before judgment); *Lee v. Tam*, 137 S. Ct. 30 (2016) (mem.) (granting certiorari).

a stipulation that obviates the mootness risk that caused the dismissal of *Servotronics* and that very likely will afflict the present case. *See AlixPartners* Pet. at 22–23.[15]

3. Applicants advance several meritless arguments in support of what even they concede is an "atypical" request for certiorari before judgment. App'n at 3. *First*, there is no basis for Applicants' novel argument that this Court should grant certiorari before judgment so that this case can serve as a vehicle to answer the question that *Servotronics* presented before it was dismissed. App'n at 16–19. Contrary to Applicants' contention, this case is not "analogous" to a handful of cases in which this Court has granted certiorari before judgment "'when a similar or identical question of constitutional or other importance was before the Court in another case,'" and where granting review in a second case would facilitate review of the question presented in the first case. App'n at 18 (quoting *Supreme Court Practice*, *supra*, ¶ 4.20). None of those examples involved a grant of certiorari before judgment to permit review of a question presented in a prior case that had been dismissed. In particular, and contrary to Applicants' theory, App'n at 19, this Court granted certiorari before judgment in *Porter v. Dicken*, 328 U.S. 252 (1946), not

[15] Applicants assert without explanation that *AlixPartners* "will not necessarily" resolve the question presented because it concerns an investor-state arbitration. App'n at 21–21 n.3. To the contrary, granting certiorari in *AlixPartners* will afford this Court the opportunity to address the applicability of § 1782(a) to foreign arbitral tribunals and to address any additional considerations presented by investor-state arbitrations, all with the benefit of the Second Circuit's ruling. *See ZF Automotive* Br. in Opp. to Cert. at 19–20.

because the first case, *Porter v. Lee*, 328 U.S. 246 (1946), was moot, but rather "by reason of the close relationship of the important question raised to the question presented in [*Lee*]." *Dicken*, 328 U.S. at 254.[16] *See ZF Automotive* Br. in Opp. to Cert. at 12–14.

Moreover, even if *Servotronics* were still pending, the examples that Applicants reference do not support the issuance of a writ of certiorari here. Most of those examples involved cases that formed part of a single overarching controversy, arising from a single event or course of conduct, or involving the same or overlapping parties.[17] *See ZF Automotive* Br. in Opp. to Cert. at 12–13. In at least

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[16] *Porter v. Lee*, 328 U.S. 246 (1946), and *Porter v. Dicken*, 328 U.S. 252 (1946), involved cases brought by the same petitioner, the Price Administrator, to vindicate his powers under the Emergency Price Control Act. *Id.* at 253; *Lee*, 328 U.S. at 249.

[17] S*ee New Haven Inclusion Cases*, 399 U.S. 392, 398, 413–18 (1970) (two cases presenting related issues arising from the same railroad merger); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 12 & n.1 (1963) (two cases challenging related NLRB determinations); *Hannah v. Larche*, 363 U.S. 420, 421–22 & n.3 (1960) (two cases challenging the conduct of the Commission on Civil Rights in Louisiana); *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281, 307 (1960) (two cases challenging the armed forces' application of the Uniform Code of Military Justice to civilian employees); *Reid v. Covert*, 354 U.S. 1, 3–5 (1957) (two cases challenging the armed forces' application of the Uniform Code of Military Justice to the spouses of service members); *Graham v. Goodcell*, 282 U.S. 409 (1931) (several taxpayer cases pressing the same argument against the Internal Revenue Service); *Johnson v. U.S. Shipping Bd. Emergency Fleet Corp*., 280 U.S. 320, 322–25 (1930) (three cases presenting the applicability of the Suits in Admiralty Act to vessels owned by the United States); *White v. Mechs.' Sec. Corp*., 269 U.S. 283, 298–99 (1925) (several cases challenging the availability of funds held by the U.S. government to satisfy debts of the Imperial German government). The last three examples also pre-date the 1954 addition of the "imperative public

two of those instances, certiorari before judgment was granted because the first case was a direct appeal from a three-judge district court under 28 U.S.C. § 1253, and therefore arrived in this Court while the second, related case was in the court of appeals.[18] *See ZF Automotive* Br. in Opp. to Cert. at 13–14. These examples offer no support for Applicants' request for certiorari before judgment to take up this case that—save for the legal question presented—has nothing to do with any other case before this Court. In the remaining examples, the "second" case, App'n at 19, would independently satisfy Rule 11's strict standard by raising urgent constitutional questions of imperative public importance.[19] *See ZF Automotive* Br. in Opp. to Cert. at 14. The present discovery dispute raises no such question.

*Second*, Applicants are mistaken that their recent procedural maneuvers have remedied the infirmities in their petition as filed. For the reasons set forth below, *infra* at 32–33, the eleventh-hour declaration that Applicants have proffered on the topic of tolling the statute of limitation does not remove Luxshare's risk of dismissal

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importance" requirement to the predecessor of Rule 11. S. Ct. R. 20, 346 U.S. 968 (adopted April 12, 1954, effective July 1, 1954).

[18] *See New Haven Inclusion Cases*, 399 U.S. at 418; *Hannah*, 363 U.S. at 422 & n. 3.

[19] *See United States v. Booker*, 543 U.S. 220, 229 (2005) (permissibility of imposing an enhanced sentence based on facts not found by a jury or admitted by the defendant); *Gratz v. Bollinger*, 539 U.S. 244, 259–60 (2003) (use of racial preferences in college admissions); *United States v. Thomas*, 361 U.S. 950, 950 (1960) (obstruction of minority voter registration).

on time-bar grounds, and therefore does not remove the specter of mootness. Given the dire risks of waiting and the scale of the claim, Luxshare intends to initiate the arbitration by December 31, 2021.

Applicants' pending motion for summary affirmance on their own appeal fares no better. To be sure, that motion abandons the three "independent" arguments that Applicants previously told the court of appeals required a stay, even if § 1782(a) encompasses foreign arbitral tribunals. *Supra* at 9–10. By limiting the case to a dispute over the reach of § 1782(a), Applicants have addressed *one* of the two reasons that this case is a poor vehicle—that a ruling on the question presented might not be dispositive or necessary. *Supra* at 22–23; *See ZF Automotive* Br. in Opp. to Cert. at 15–17. But that narrowing of the issues in dispute does not transform this case into a suitable vehicle to address the question presented because this case is still likely to become moot before this Court can rule. *Supra* at 22–23.

More fundamentally, however, this Court should not reward Applicants' procedural gamesmanship with a stay. In a last-ditch effort to secure review and a stay from this Court, Applicants now belatedly recognize that the court of appeals' 2019 decision in *In re Application to Obtain Discovery for Use in Foreign Proceedings* (*Abdul Latif Jameel Transport. Co. v. FedEx Corp.*), 939 F.3d 710 (6th Cir. 2019), dooms their prospects of success in the district court and in the court of appeals. But that was obvious a year ago, when the district court authorized the

§ 1782(a) subpoenas. Instead of accepting that reality and seeking review by this Court at that time, Applicants adopted a strategy of running out the clock so that Luxshare would have to file the arbitration without the § 1782(a) discovery, requiring four rounds of motion practice in the district court, and a motion to stay in the court of appeals. *Supra* at 8–11. This achieved over a year of delay, including several months of delay occasioned by filing a motion to stay in the court of appeals, a motion that was based in significant part on the "independent" arguments that Applicants now jettison so cavalierly. *Supra* at 9–10.[20]

As Applicants acknowledge, their delay tactics have run their course, and the discovery must be turned over by October 27, 2021. That is over a year since the district court authorized issuance of the § 1782(a) subpoenas, and months after the district court compelled production. This Court should award no further delay.

### B. Applicants Have Also Not Shown a Significant Possibility that this Court Will Overrule the Sixth Circuit's Holding that 28 U.S.C. § 1782(a) Encompasses Foreign Arbitral Tribunals

Section 1782(a) authorizes discovery "for use in a foreign or international tribunal." A stay is unwarranted here because Applicants have not shown that this

[20] Contrary to Applicants' suggestion, App'n at 19, it surely did not take the court of appeals' October 2021 denial of their motion to stay to inform Applicants that they were not likely to prevail by challenging the district court's application of the discretionary *Intel* factors. And by July 2021, Applicants could not genuinely have been holding out for a ruling in *Servotronics*, given that they acknowledge it was clear long before July 2021 that *Servotronics* was likely moot. App'n at 16.

Court is likely to reverse the court of appeals' decision in *Abdul Latif*, 939 F.3d 710, that § 1782(a) encompasses foreign *arbitral* tribunals.

As the court of appeals determined in *Abdul Latif*, "the text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties." *Id.* at 723. *First*, contrary to Applicants' contentions, App'n at 21–23, dictionaries and legal sources pre- and post-dating the enactment of § 1782 in 1964 confirm that foreign arbitral tribunals are encompassed within the ordinary meaning of the plain statutory language "foreign or international tribunal." *Abdul Latif*, 939 F.3d at 717–22. Moreover, this Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004), "determined that § 1782(a) provides for discovery assistance in non-judicial proceedings," *Abdul Latif*, 939 F.3d at 723, undermining Applicants' notion that Congress used "tribunal" as a synonym for "courts of their equivalents." App'n at 22. *Second*, also contrary to Applicants' contentions, App'n at 24, the "overall context and structure of the statute" confirm that § 1782(a) encompasses foreign arbitral tribunals. *Abdul Latif*, 939 F.3d at 722–23.

Further, the Sixth Circuit considered the contrary decisions of other courts of appeals, and determined that they erred in four respects. *First*, they improperly and unnecessarily considered legislative history to interpret the unambiguous statutory

language of § 1782(a). *Id.* at 726–27. *Second*, those other courts misapprehended the legislative history. *Id.* at 727–28. Contrary to the argument that Applicants advance, App'n at 23–24, the congressional reports "make clear Congress's intent to *expand* § 1782(a)'s applicability" beyond courts, and "the legislative history does not indicate that the expansion *stopped short* of private arbitration." *Abdul Latif*, 939 F.3d at 727–28 (emphasis in original). *Third*, the other courts of appeals improperly allowed their policy preferences to interfere with their interpretation of the statute that Congress enacted. *Id.* at 728. *Fourth*, and contrary to Applicants' argument, App'n at 24–25, holding that § 1782(a) encompasses foreign arbitral tribunals does not conflict with the Federal Arbitration Act. *Abdul Latif*, 939 F.3d at 729 ("Applying *Intel*'s reasoning, we decline 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.").

## III. A Stay Should Be Denied for the Additional Reasons that It Would Injure Luxshare and Disserve the Public Interest

Applicants' failure to satisfy either of the "most critical" factors requires the denial of their application for a stay. *Nken*, 556 U.S. at 434. This Court therefore need not proceed to the remaining factors, which require the court to "'balance the equities' by 'explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., joined by Alito and Gorsuch, JJ., concurring

in part and dissenting in part) (alterations in original) (quoting *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers)). Here, however, the equities confirm that a stay should be denied.

### A. A Stay Would Require Luxshare to Prosecute Its Claims Without the § 1782(a) Evidence of ZF US's Fraudulent Intent

Under the circumstances of this case, involving an expedited arbitration proceeding that, for statute-of-limitation reasons, should be initiated by the end of 2021, the district court correctly found that "Luxshare could be substantially injured if it is denied access to discovery it is ultimately entitled to." App'n Ex. D at 11.

To avoid statute-of-limitation issues, Luxshare should file its request for arbitration by December 31, 2021. *Supra* at 6. Once Luxshare has filed that request and ZF US has answered, the parties are limited to one written submission each, and there will be only one oral hearing. *Supra* at 6. Given the expedited process, as a practical matter Luxshare needs—if at all possible—to incorporate the § 1782(a) discovery into its December 2021 filing. *Supra* at 6.[21] The arbitrators should render their award within six months of the procedural hearing. *Supra* at 6. Doubtless, Applicants will oppose any request to extend the six-month deadline to wait for the § 1782(a) discovery, and there can be no guarantee that the arbitral tribunal would

[21] Because Luxshare intends to incorporate the § 1782(a) discovery into its request for arbitration, Applicants have it backwards with their argument that a stay would cause Luxshare no harm because it has not yet filed its request for arbitration. App'n at 31.

grant such an extension. Therefore, it is not likely that this Court will be able to render a decision on the question presented in time for the § 1782 discovery to be used before the arbitral tribunal.

As a practical matter, therefore, a stay is likely to preclude Luxshare from making any use of the § 1782(a) discovery, even if this Court later determines that § 1782(a) encompasses foreign arbitral tribunals. Due to the imminent filing deadline and the expedited nature of the arbitration proceeding, a stay creates the risk that this case will become moot before this Court can rule, as in *Servotronics*. *Supra* at 22–23. It is *Luxshare* that faces irreparable harm, because a stay will deny Luxshare the basic right to have its fraud claims against ZF US adjudicated based on the evidence. A stay should therefore be denied. *See JSC MCC EuroChem v. Chauhan*, No. 18-5890, 2018 WL 9650037, at *2 (6th Cir. Sept. 14, 2018) (denying stay of § 1782(a) discovery that would have caused an "inability to present evidence" to the foreign tribunal).

Tacitly recognizing that Luxshare's December 31, 2021 filing deadline precludes a stay, ZF US now proffers a purported "commitment" to waive the German statute of limitation, conditioned upon this Court's grant of a stay. App'n at 31; *id.* Ex. F (¶ 8). This is the latest in a long line of ever-shifting waivers that ZF US has suggested. *See ZF Automotive* Br. in Opp. to Cert. at 18–19. Luxshare has

no assurance that the arbitral tribunal will determine this most iteration to be effective.

Professor Dr. Dr. h.c. Thomas Pfeiffer, a recognized expert on German and private international law, explains in the annexed declaration that there is a considerable risk that the arbitral tribunal will determine the proffered waiver of the statute of limitation to be invalid and ineffective for two reasons. *See* Addendum, Ex. 1. *First*, the purported waiver is invalid under German law because it is conditional upon the discretionary act of a third party, *i.e*., upon this Court's grant of a stay. *Id.* ¶¶ 15, 17, 29–36. *Second*, the purported waiver is not effective because there is no evidence beyond the declarant's *ipse dixit* that he has the necessary corporate authorization to effect a waiver of the statute of limitation on behalf of ZF US. *Id.* ¶¶ 15, 18, 37–42. Given the very large sum at stake and the real risk that the arbitral tribunal will determine the purported waiver of the statute of limitation to be invalid due to its conditionality, and given Luxshare's rejection of the proffered waiver due to the absence of proof of authority, *id.* ¶¶ 19, 42, Luxshare intends to initiate the arbitration by December 31, 2021.

### B. Granting a Stay would Frustrate the Purpose of 28 U.S.C. § 1782(a) and Immunize ZF US's Fraud

The requested stay should be denied for the additional reason that it would disserve the public interest, by both frustrating Congress's purpose in enacting § 1782(a) and permitting fraud to go unremedied.

As this Court has recognized, a core legislative aim behind the enactment of § 1782(a) was the wish to "provid[e] *efficient* assistance to participants in international litigation." *Intel Corp. v. Adv. Micro Devices, Inc.*, 542 U.S. 241, 252 (2004) (emphasis added). Further delaying Applicants' compliance with § 1782(a) subpoenas the district court authorized a year ago would disserve that laudable purpose. Applicants have achieved a year of delay by requiring Luxshare to litigate three discovery motions and two motions to stay. *Supra* at 8–11. Indeed, they secured a multi-month delay by filing an appeal in respect of which they now seek summary affirmance on the ground that they lack any viable argument under Sixth Circuit law. *Supra* at 9–11. Enough is enough. No further delay is warranted.

Moreover, ZF US takes the position that Luxshare will not prevail on its claims without the evidence of fraudulent intent that Luxshare seeks through this § 1782(a) proceeding. *Supra* at 7. As much as Applicants may wish to conceal their wrongdoing from the arbitral tribunal, there is no public interest in allowing fraud to go unremedied.

Finally, Applicants are incorrect that a stay should be granted to promote the public interest in making this case the "vehicle" to decide the question presented concerning the scope of § 1782(a). App'n at 30. Any such generalized public interest does not outweigh the concrete harm that Luxshare would suffer if a stay were granted. And in any event, as Luxshare has shown, this case is a poor vehicle to

review the question presented because it is likely to be mooted before this Court can rule. *See ZF Automotive* Br. in Opp. to Cert. at 18–19; *see supra* at 22–23. However, other cases that raise the question presented are pending in or have recently been decided by the courts of appeals, *see ZF Automotive* Br. in Opp. to Cert. at 17, including *AlixPartners, LLP v. Fund for Protection of Investor Rights in Foreign States*, No. 21-518 (docketed Oct. 5, 2021), where the parties have reportedly consented to a stay, thereby alleviating the mootness problem that required the dismissal of *Servotronics* and that will likely drive this case to the same outcome.

## CONCLUSION

The applications for a stay and administrative stay should be denied.

Respectfully submitted,

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October 21, 2021

# ADDENDUM

# EXHIBIT 1

# DECLARATION OF PROFESSOR DR. DR. H.C. THOMAS PFEIFFER

**DECLARATION OF PROFESSOR DR. DR. H.C. THOMAS PFEIFFER**

Professor Dr. Dr. h.c. Thomas Pfeiffer, pursuant to 28 U.S.C. § 1746 hereby declares as follows:

1. I am full professor of law at Heidelberg University, Germany, since 2002, and director of this Faculty's Institute for Comparative Law, Conflict of Laws and International Business Law. I teach general civil law, conflict of laws, comparative law and international dispute resolution and conduct research in these areas.

2. Prior to teaching in Heidelberg, I served as a full Professor at Bielefeld University, Germany (1994-2002) and as a judge at the Oberlandesgericht Hamm (1996-2002), a court of appeals for the eastern part of the German state of Northrhine-Westfalia. Among other credentials, I hold a Dr. iur. (summa cum laude), Germany, and a post-doc law degree ("Habilitation") from the University of Frankfurt am Main.

3. I have been a visiting professor at the Georgetown Law Center, Washington DC(2005, 2010, 2019), at Hong Kong City University (2006), at the Straus Institute for Dispute Resolution, Malibu, Ca., USA (2014) and at the Universities of Leuven, Belgium (2015) and Verona, Italy (2016). I taught at The Hague Academy for International Law (2009) and gave guest lectures at various foreign universities and am continuously invited as speaker to international conferences. I spent 9 months as a visiting scholar at Yale Law School, New Haven, Connecticut, U.S.A., in the years 1989/90.

4. I have edited, authored or co-authored more than 400 publications in the fields of civil law, private international law, international dispute resolution, civil procedure and comparative law. I am also editor of several legal periodicals.

5. I am a member of "Deutscher Rat für Internationales Privatrecht" (German Council for Private International Law), which is the advisory committee of the German Federal Ministry of Justice for conflict of laws legislation, and a Board Member of the "Zivilrechtslehrervereinigung", i.e. the association of private law professors of Germany, Austria and Switzerland. I am also Vice-President of the Deutsch-Amerikanische Juristenvereinigung ("German American Lawyers' Association") and a fellow of the European Law Institute and coordinator of this organization's special interest group on dispute resolution.

6. I have been involved in more than forty national or international arbitration cases as an arbitrator (sole arbitrator, president of the tribunal or co-arbitrator) or legal expert.

7. I have given oral or written expert testimony on German, European or International law in several court cases (both State and Federal) and one arbitration case in the United States. I have also given written or oral expert testimony in the courts of the United Kingdom, Australia (New South Wales), Jamaica, and France as well as in arbitration proceedings, inter alia, in Singapore, Stockholm (Sweden), Lausanne, and Zurich (Switzerland). I am continuously appointed as a neutral expert on various foreign laws by German courts.

8. For my merits in the areas of international law and international academic exchange, I was awarded with the Order of Rio Branco by the Federal Republic of Brazil in 2010 and with an Honorary Doctor Iuris by the International Hellenic University, Thessaloniki, Greece, in 2015.

9. I am qualified to give expert testimony in relation to all German or European law questions addressed in this opinion.

10. I submit this Declaration in connection with Luxshare Ltd.'s ("Luxshare") response to an application for a stay of an order requiring the Applicants to provide discovery for use before a German arbitral tribunal ("Application").

11. I make this declaration based on personal knowledge and on my review of the documents noted herein. Where the facts and matters are stated as within my own knowledge, I know and believe them to be true. Where they are not within my own personal knowledge, they are true to the best of my information and belief, and such facts and matters are supported by contemporaneous documents and information that I have reviewed.

12. Luxshare has asked me to review the Declaration of Michael J. Way ("Declaration") submitted in support of the Application and to provide my professional opinion, based on my qualifications and experience, as to whether the German arbitral tribunal is likely to accept the Declaration as a valid, binding, and enforceable waiver of the statute of limitation.

13. I will be compensated for providing this declaration at an hourly rate of 450 Euros.

My compensation is not dependent on my expressing any particular opinion or on the outcome of this matter, and I have no other financial interest in the outcome of this matter.

14. I have reviewed the Application, the Declaration, and the Master Purchase Agreement ("MPA") dated August 28/29, 2017, between ZF Automotive US, Inc. ("ZF US"), formerly known as TRW Automotive Inc., and Luxshare, and a document titled "ANNUAL REPORT - For use by FOREIGN PROFIT CORPORATION", dated 5 May 2021 and filed by Michael J. Way as an "authorized agent" on behalf of ZF US with the Michigan Department of Licensing and Regulatory Affairs. I have also been instructed that Luxshare has stated its intent to commence arbitration proceedings under MPA Clause 20.10.2 (the "Contemplated Arbitration")

## OPINION

### Summary

15. My opinion will address the validity of the Declaration as a waiver under two aspects: (i) the circumstance that the statement made therein is contingent to a condition precedent (that is, the waiver is conditioned upon the U.S. court granting a stay) and (ii) that Luxshare has a right to reject the waiver because the author of the Declaration (Mr. Way) did not present a letter of authorization. In relation to these issues, I conclude as follows:

16. In the Contemplated Arbitration, a tribunal will apply German law in relation to the MPA including the question whether the Declaration includes a valid waiver of statutory limitation.

17. Under German law, the attempted waiver of statutory limitation in the Declaration is legally invalid because it is contingent on the Supreme Court's decision in this case and, therefore, in the moment it was received by Luxshare, brought about an uncertainty that is not acceptable.

18. If the matter were to be litigated in a German court, a German court would also apply German law to Luxshare's right to reject the Declaration because of a lacking letter of authorization. Whereas an arbitral tribunal having its seat in Munich is not bound by this position formally in a legal sense, a tribunal will most likely take the same view and apply German law in this respect as well.

19. Pursuant to section 174 of the German Civil Code, Luxshare may reject the Declaration because Mr. Way did not present a letter of authorization.

## Legal Reasoning

### I. Applicable Law

#### A. Waiver of limitation in general

20. German statutory law as well as the institutional arbitration rules of Deutsche Institution für Schiedsgerichtsbarkeit (German Institute or Institution for

Arbitration – the "DIS") recognize that parties, in their arbitration agreement, can provide for a choice of the applicable substantive law. Since there is no indication to the contrary, the choice of law clause in section 20.10.1 MPA is valid and binding for an arbitration tribunal under Article 24.1 of the DIS Arbitration Rules of 2018 (the "DIS Rules")[1] and under section 1051 (1) sentence 1 of the German Code of Civil Procedure ("Zivilprozessordnung" or "ZPO").[2] Article 24.1 DIS Rules is applicable because parties of an arbitration agreement may validly agree to an institutional choice of law provision in their arbitration agreement. Undoubted principle under section 1051 (1) sentence 2 ZPO,[3] see, e.g., Pfeiffer, Anwendbares Recht (§ 15), in Trittmann/Salger, Internationale Schiedsverfahren, 2019, p. 426 et seq., paragraph 41. Section 1051 ZPO is part of the German arbitration provisions, which are set forth in the 10th Book of the ZPO, i.e. sections 1025-1066 ZPO. German arbitration law is applicable, and its mandatory provisions are binding for the contemplated arbitral tribunal, because the parties have validly agreed on

[1] The English wording of this institutional provision is:
„The parties may agree upon the rules of law to be applied to the merits of the dispute."
[2] The English translation of this statutory provision is:
„The arbitral tribunal is to decide on the matter in dispute in accordance with the statutory provisions that the parties have designated as being applicable to the content of the legal dispute."
This English convenience translation was taken from a website sponsored by the German Ministry of Justice. https://www.gesetze-im-internet.de/englisch_zpo/, last accessed on 19 October 2021. All ZPO-provisions referred to in this report are taken from this website. In all cases however, I have reviewed the wording and agree to it. I add that the translated text uses British and not American spelling, which I have not changed.
[3] English translation of the wording:
„Unless the parties to the dispute have expressly agreed otherwise, the designation of the laws or the legal system of a specific state is to be understood as a direct referral to the rules of substantive law of this state, and not to its rules relating to the conflict of laws."

Munich, Germany, as their place of arbitration under sections 1025 (1)[4] and 1043 (1) sentence 1[5] ZPO in their arbitration agreement (Clause 20.10.2 MPA).

21. All of the above is binding for the tribunal of the Contemplated Arbitration since, under German law, arbitral tribunals are bound by applicable legal rules, unless the parties have authorized the tribunal to decide on the basis of general fairness principles, for which there is no indication in the case at hand. Oberlandesgericht München, 22. June 2005, Zeitschrift für Schiedsverfahren[6] ("SchiedsVZ") 2005, pp. 308-310, at 309; see also Article 24.4 DIS Rules[7] and section 1051 (3) ZPO.[8]

22. As a consequence, the tribunal will apply German substantive law in relation to the all claims arising under the MPA or in connection with the MPA.

23. Furthermore, questions of limitation qualify – without any doubt – as being substantitive under German law. Consequently they fall in the scope of the choice of law agreement in Clause 20.10.1 MPA. As regards the choice of law rules in regular court proceedings, there is an express and binding statutory provision to

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[4] English translation of the wording:
„The rules of the present Book are to be applied where the venue of the arbitration proceedings in the sense as defined by section 1043 (1) is located in Germany."
[5] English translation of the wording:
„The parties may make an agreement as to the venue of the arbitration proceedings."
[6] A law journal.
[7] English wording:
„The arbitral tribunal may not decide *ex aequo et bono* or act as an *amiable compositeur*, unless the parties have expressly agreed thereto."
[8] English translation of the wording:
"The arbitral tribunal is to take its decision based on considerations of what is fair and equitable only if the parties to the dispute have expressly authorised it to do so. The authorisation may be granted up until the time the arbitral tribunal takes such decision."

the effect that matters of limitation are part of the applicable contract law. See Article 12 (1) (d) Rome I Regulation.[9]

24. According to the prevailing view, this provision (like the Rome I Regulation in general) does not constitute formally binding law in arbitration proceedings because choice of law in arbitration is governed by section 1051 ZPO and institutional provisions such as Article 24.1 DIS Rules. Yet, arbitral tribunals will refer to the provisions of the Rome I Regulation as a persuasive authority for choice of law purposes if Germany is the seat of the arbitration. See e.g. Pfeiffer, Anwendbares Recht (§ 15), in Trittmann/Salger, Internationale Schiedsverfahren[10], 2019, p. 416, paragraph 11, and ibid. p. 429, paragraph 51; Pfeiffer, Neues internationales Vertragsrecht, Zeitschrift für Europäisches Wirtschaftsrecht ("EuZW")[11] 2008, 622, 623; Saenger, Zivilprozessordnung, 9th edition 2021, commentary[12] to section 1051, paragraph 2; Hausmann, Anwendbares Recht vor deutschen und italienischen Schiedsgerichten - Bindung an die Rom I-Verordnung oder Sonderkollisionsrecht?, in Kronke/Thorn (eds.),

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[9] REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I). The Rome I regulation is an instrument of European law, which provides for the statutory choice of law rules for contractual obligations in all EU Member states and, therefore, is directly applicable law in Germany. The official English wording of Article 12 (1) (d) Rome I Regulation is:
„Article 12 Scope of the law applicable
1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
(a)-(c) …
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) ..."

[10] A standard handbook for the practice of international arbitration. Standard handbooks or commentaries are regularly referred to by German courts as important authorities, in particular if no reliable case law is available.

[11] A law journal.

[12] In relation to the significance of commentaries see footnote 10.

Festschrift für Bernd von Hoffmann, pp. 971-986, at 973; Hartenstein, Das IPR der Schiedsgerichte, Transprecht[13] 2010, pp. 261-268, at 267. As a consequence, under German arbitration law and practice, a tribunal will apply German law to matters of limitation if German law is applicable in relation to the underlying contractual claim. Pfeiffer, Anwendbares Recht (§ 15), in Trittmann/Salger, Internationale Schiedsverfahren, 2019, p. 431, paragraph 56. In this respect, issues of limitation also include the question if, under which requirements and to which effects an obligor may wave his right to invoke limitation. Such a waiver excludes the obligor's right to refuse performance which is the most essential legal effect of limitation under German law (section 214 (1) of the German Civil Code[14] ("Bürgerliches Gesetzbuch" or "BGB")). In relation to this legal effect and nature of a waiver of limitation see Bundesgerichtshof (German Federal Court of Justice) ("BGH"),[15] 16 March 2009, Neue Juristische Wochenschrift ("NJW")[16] 2009, pp. 1598-1600, at 1599. Moreover, the statutory basis for such a waiver is section 202 BGB, a provision on statutory limitation. BGH, 16 March 2009, NJW 2009, pp 1598-1601, at paragraph 22.

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[13] A law journal.
[14] English translation of the wording:
„After limitation occurs, the obligor is entitled to refuse performance."
This English convenience translation was taken from a website sponsored by the German Ministry of Justice. https://www.gesetze-im-internet.de/englisch_BGB/, last accessed on 20 October 2021. All BGB-provisions referred to in this report were taken from this website. In all cases however, I have reviewed the wording and agree to it.
[15] The BGH is the highest judicial authority in civil law matters in Germany.
[16] A law journal.

25. As a consequence of the above, it is not doubtful, in my view, that a tribunal in the Contemplated Arbitration will apply German law to issues of limitation.

**B. Applicable law in relation to Luxshare's right to a reject the Declaration**

26. Pursuant to section 174 BGB,[17] the addressee of a unilateral legal transaction has a right to reject the transaction if a party was represented by an agent who did not present a document of authorization. In relation to choice of law issues, the question whether this statutory provision qualifies as a part of the applicable contract law or the applicable agency laws or a matter of the form of contract was, according to my knowledge and research, addressed in only one German highest court decision. This decision states expressly that the right to reject falls in the scope of the applicable contract law. Bundesarbeitsgericht (Federal Court of Labour Law, i.e. the highest German court for labor law disputes, the "BAG"), 24 September 2015, NJW 2016, pp. 345-250, at paragraph 20. I add that BAG decisions in employment disputes often address general contract law matters and are referred to as a relevant and important source of case law in contractual matters. This applies in particular if there is no BGH case law available.

27. Furthermore, the position stated by the BAG has found support by leading commentaries. E.g., Mankowski in beck-online GROSSKOMMENTAR, Update of 1

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[17] English translation of the wording:
„Section 174 Unilateral legal transaction by an authorisedgal transaction that an authorised representative undertakes in relation to another is ineffective if the authorised representative does not present a letter of authorisation and the other rejects the legal transaction without undue delay for this reason. Rejection is excluded if the principal notified the other of the authorisation."

October 2019, commentary to Article 8 of the Introductory Act to the German Civil Code ("Einführungsgesetz zum Bürgerlichen Gesetzbuch" or "EGBGB") paragraph 244; Spellenberg in Münchener Kommentar zum BGB, vol. 12, 8th 2020, commentary to Article 8 EGBGB, paragraph 185; in the same sense also Ostendorf, Kollisionsrechtliche Qualifikation von § 174 BGB, Recht der Internationalen Wirtschaft ("RIW")[18] 2014, pp. 93-96, at 95. Although the aforementioned BAG statement was an obiter dictum, it reflects a fair and accurate view of what the actual law in Germany is. Moreover, I am not aware of any German case law to the contrary. As a consequence, I conclude that a German court would apply section 174 BGB as a provision of German contract law to the case at hand.

28. Whereas a tribunal in the Contemplated Arbitration may not be bound legally by the above stated case law, it will give even more weight to the choice of German law by the parties in Clause 20.10.1 MPA. In my overall assessment, based also on my practical experience in arbitration, I conclude that, most probably, a tribunal in the Contemplated Arbitration will take the same position as a German court and apply section 174 BGB as part of the applicable German contract law.

[18] A law journal.

## II. Effects of the Declaration under German law

### A. Invalidity of a unilateral waiver if contingent to a condition precedent

29. Under German law, an obligor may waive the effects of limitation periods by way of a so-called unilateral statement of intent. See as a recent example BGH, 17 December 2020, I ZR 239/19, GRUR-RS 2020, 44633, beck-online,[19] para 19; furthermore, e.g., BGH, 16 March 2009, NJW 2009, 1598-1601, at paragraph 22.

30. In the light of the above, the statement that ZF US will not invoke the applicable statute of limitations (paragraph 8 of the Declaration) is a purported waiver of the effects of limitation in this sense. For reasons that will addressed in more detail *infra*, there is a substantial risk that a waiver of statutory limitation is invalid if it is made contingent to a condition precedent (section 158 (1) BGB).[20] The following will (a) explain this legal risk, and subsequently (b) set forth that the Declaration states a condition precedent in this sense.

#### *1. The general rule*

31. Under the principle of freedom of contract, parties are free to make their contractual statements contingent to a condition precedent. However, in general, German law does not accept a unilateral declaration of intent which is contingent to a condition precedent if the declaration exercises a unilateral right to change

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[19] A legal database.
[20] English translation of the wording:
„If a legal transaction is entered into subject to a condition precedent, the legal transaction that is subject to the condition comes into effect when the condition is satisfied."

the other party's legal position to that party's detriment (a so-called "unilateral legal transaction" or, in German, "*Gestaltungsgeschäft*"), e.g. the termination of a contract by unilateral notice. E.g., BGH, 21 March 1986, Entscheidungen des Bundesgerichtshofs in Zivilsachen ("BGHZ")[21] vol. 97, pp. 264-269, at juris[22] paragraph 16 et seq. The reason behind this legal principle is that any exercise of such rights requires utmost clarity so that the addressee cannot be in doubt as to whether its legal position was actually changed by the declaration or not. If the declaration is contingent on a condition (i.e. a future uncertain event) the addressee cannot be certain of its legal position. For this definition of the term "condition" see, e.g., BGH, 18 December 1990, case X ZR 57/89 (juris paragraph 21). In this respect, the critical point in time is the moment when the declaration is received by the addressee because, according to section 130 (1) BGB,[23] the validity of a declaration is determined in this moment so that it is of no help that certainty might be achieved later, i.e. when and if this Court should indeed grant the requested stay.

32. These principles also apply to limitation periods. In this respect, it is critical that limitation periods, unlike other defenses, may not be applied by courts on their

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[21] Official collection of BGH decisions.
[22] A legal database.
[23] English translation of the wording:
"A declaration of intent that is to be made to another becomes effective, if made in his absence, at the point of time when this declaration reaches him. It does not become effective if a revocation reaches the other previously or at the same time."

own motion, but have to be invoked by the obligor.[24] As a consequence, the lapse of a limitation period does not constitute a valid defense if it is invoked contingent to a condition. E.g. Schmidt-Räntsch, a BGH judge who is, in her former capacity as an official in the German ministry of Justice, known as the author of Germany's statutory limitation law, in Erman, BGB, 16th edition 2020, commentary to § 214 BGB, paragraph 3; furthermore, e.g., Bach in beck-online Großkommentar, update of 1 August 2021, commentary to § 214 BGB, paragraph 39; Peters/Jacoby in Staudinger, Bürgerliches Gesetzbuch, new edition 2019, commentary to section 214 BGB paragraph 9.

33. Whereas, usually, a waiver of limitation periods operates in favor of the obligee so that the question whether it is invalid because of a condition precedent does not become an issue, the situation is different in the case at hand because ZF US attempts to use the waiver as an argument against Luxshare. At least in this unusual situation, i.e. because the waiver may also operate to the detriment of Luxshare, it is relevant that, according to the aforementioned principles, a waiver of limitation rights constitutes a unilateral legal transaction in the above stated sense. E.g., Bach in beck-online Großkommentar, update of 1 August 2021, commentary to § 214 BGB, paragraph 61 et seq. As a consequence, a waiver of a limitation period is invalid if it is made contingent to a condition precedent. Practically speaking, based on the Declaration, it is unclear for Luxshare whether

[24] This is because section 214 (1) BGB only provides for a refusal right of the obligor. English translation of the wording of this provision:
„After limitation occurs, the obligor is entitled to refuse performance."

or not its rights will be enforceable after the lapse of the applicable limitation period (which, as I have been instructed, may lapse by the end of this year). As a result of the Declaration, Luxshare does not and cannot know whether or not it has to continue its preparations for the Contemplated Arbitration or not. It is the rationale of the above stated rules that one party (ZF US) cannot impose such uncertainty the other (Luxshare). Thus, I conclude that this rule must apply here and the waiver has to be considered invalid because it is contingent to a condition precedent. At best its validity is unclear for this reason.

***2. The Declaration includes a condition precedent***

34. Pursuant to section 158 (1) BGB[25] a condition is defined as a future uncertain event. If a certain legal effect is made contingent to a future decision of a court, the latter constitutes a future uncertain event. See, e.g., BGH, 18 December 1990, case X ZR 57/89 (juris paragraph 21).

35. A different conclusion may be drawn only in two exceptional cases. The first exception applies if the "condition" does not actually bring about any uncertainty because it only depends on the intent of the other party, which is not the case here; the second exception applies if the condition refers to a certain "objective" legal situation and not to a decision based, e.g., on the court's discretion. BGH, 15. May 1968, case VIII ZR 29/66 (juris paragraph 80). In the case at hand, the Declaration declares a waiver that does not depend on a certain "objective" legal situation but

[25] See *supra* footnote 20.

on the granting of a stay of proceedings which, as I understand, is subject to the court's discretion. This exception does, thus, not apply either.

36. It follows from the above that the reference to the possible granting of a stay of proceedings in paragraph 8 of the Declaration is a condition precedent that, under the general rules explained *supra* (paragraphs 31.-33.), constitutes a considerable risk that the waiver is considered to be invalid under German law.

**B. Luxshare's right to reject the Declaration**

37. Pursuant to section 174 BGB[26] the addressee of a unilateral legal transaction, stated by an agent, that brings about a change of legal rights may reject the declaration if the agent did not present a letter of authorization. The rationale of this provision is, again, to avoid any lack of clarity for the addressee of unilateral transaction; consequently, the requirements for an application of this provision are clear and easy to determine as well.

38. Firstly, it applies to all unilateral transactions such as the waiver of limitation periods. See *supra* paragraph 33. Therefore, section 174 BGB is applicable in case of a waiver of limitation periods.

39. Secondly, the relevant declaration has to made by an authorized representative, i.e. an authorized agent. However, the provision has also been applied by way of analogy to declarations of an officer of a company in cases of legitimate uncertainty, *inter alia* in relation to an officer of a US corporation in a German

[26] See footnote 17.

case. Oberlandesgericht (an appeals court) Cologne, 13 August 2015, case18 U 153/14, BeckRS 2016, 8158, beck-online. In the case at hand, the "ANNUAL Report of ZF US", dated 5 May 2021, indicates that Mr. Way acted as an authorized agent of ZF for purposes of filing that document, and also indicates that he is not an officer or director. In any event, section 174 BGB applies to the issue whether there was appropriate documentation of his authorization.

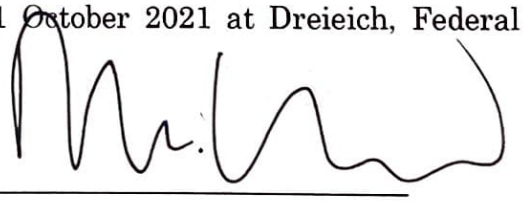
40. The document of authorization has to be presented in the moment (or prior to the moment) of execution of the unilateral transaction at issue. Schubert (a BGH judge) in Münchener Kommentar zum BGB, 9th edition 2021, commentary to section 174 BGB, paragraph 9. Furthermore, an original document is required so that, e.g., a copy is insufficient. BGH, 17 October 2000, NJW 2001, pp. 289-291.

41. As a consequence, Luxshare as the addresse of the Declaration had a right to reject the Declaration without undue delay. A "rejection" in this sense is a counter-declaration from the addressee to the author that a declaration is rejected because a document of authorization had not been presented. Pursuant to the requirement to reject "without undue delay", the rejection has to be stated speedily, but not immediately. This means, e.g., the addressee is granted sufficient time to obtain legal advice if the case requires that. E.g., BGH, 27 October 2000, NJW 2001, pp. 220-221, at 221. In general, in such a case a rejection within one week does not constitute undue delay, under special circumstances a longer period may apply.

E.g., BAG, 8 December 2011, Neue Zeitschrift für Arbeitsrecht 2012[27], pp. 495-499, at para 33.

42. In the case at and, Luxshare received the Declaration as an attachment to the Application, dated 15 October 2021. I have been instructed that Luxshare will submit its reply to the application on 21 October 2021, i.e. within less than a week. If Luxshare includes a rejection in this reply, this would be without undue delay as required by section 174 BGB. In case of a rejection, the unilateral legal transaction (here: the waiver) is legally invalid. This means that, if Luxshare states a rejection in its reply to the application, the waiver has no legal effects and does not result in any extension of limitation periods.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 21 October 2021 at Dreieich, Federal Republic of Germany.



Professor Dr. Dr. h.c. Thomas Pfeiffer

[27] A law journal.