No. 21-401

In the Supreme Court of the United States

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

Petitioners,

V.

LUXSHARE, LTD.,

Respondent.

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

JOINT APPENDIX

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ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (April 16, 2021):

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RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Sixth Circuit
Case No. 21-2736

#	Date	Docket Text
1	07/21/2021	Civil Case Docketed. Notice filed by Appellants Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc.. Transcript needed: y. (RLJ) [Entered: 07/21/2021 02:02 PM]
		* * *
8	07/23/2021	MOTION filed by Mr. Sean M. Berkowitz for Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc. to stay district court order. Certificate of Service: 07/23/2021. [21-2736] (SMB) [Entered: 07/23/2021 08:04 PM]
9	07/27/2021	SHOW CAUSE order: It is therefore ORDERED that Respondents SHOW CAUSE within twenty-one (21) days of the file date of this order why this appeal should not be dismissed for lack of jurisdiction. Following the receipt of a response from Respondents or the expiration of the 21-day response period, whichever occurs first, Petitioner, if it so chooses, shall have ten (10) days in which to file a reply.

#	Date	Docket Text
		Thereafter, the issue of appellate jurisdiction will be referred to the court for disposition. Response due by 08/17/2021 for Sean M. Berkowitz, Roman Martinez and Tyce R Walters. (RLJ) [Entered: 07/27/2021 08:14 AM]
		* * *
12	07/30/2021	RESPONSE filed to the show cause for jurisdiction, [9]. Response filed by Attorney Mr. Roman Martinez for Appellants Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc.. Certificate of Service: 07/30/2021. [21-2736] (RM) [Entered: 07/30/2021 04:53 PM]
13	08/02/2021	RESPONSE in opposition filed regarding a motion stay district court order, [8]; previously filed by Mr. Sean M. Berkowitz for ZF Automotive US, Inc., Gerald Dekker and Christophe Marnat. Response from Attorney Mr. William R. Jansen for Appellee Luxshare, Ltd.. Certificate of Service: 08/02/2021. [21-2736] (WRJ) [Entered: 08/02/2021 11:51 PM]
14	08/02/2021	FILED: *Declaration of William Jansen* by Mr. William R. Jansen for Luxshare, Ltd.. Certificate of

#	Date	Docket Text
		Service: 08/02/2021. [21-2736] (WRJ) [Entered: 08/02/2021 11:56 PM]
		* * *
20	08/09/2021	REPLY filed by Mr. Roman Martinez for Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc. regarding *motion to stay pending appeal and interim stay pending consideration of stay motion* Certificate of Service: 08/09/2021. [21-2736] (RM) [Entered: 08/09/2021 05:56 PM]
21	08/17/2021	LETTER filed by Mr. Bradley Pensyl for Luxshare, Ltd. regarding *Supplemental Authority in Connection with Respondents-Appellants' Motion for Stay Pending Appeal* Certificate of Service: 08/17/2021. [21-2736] (BP) [Entered: 08/17/2021 05:18 PM]* * *
24	09/09/2021	LETTER filed by Mr. Bradley Pensyl for Luxshare, Ltd. regarding *recent development relevant to Respondents-Appellants' Motion for Stay* Certificate of Service: 09/09/2021. [21-2736) (BP) [Entered: 09/09/2021 03:46 PM)

#	Date	Docket Text
25	09/09/2021	LETTER filed by Mr. Roman Martinez for Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc. regarding *Appellants' September 9, 2021 LETTER regarding recent development relevant to Respondents-Appellants' Motion for Stay* Certificate of Service: 09/09/2021. [21-2736] (RM) [Entered: 09/09/2021 06:14 PM]
26	09/10/2021	LETTER filed by Mr. Bradley Pensyl for Luxshare, Ltd. regarding *Opposition to Respondents-Appellants' intended filing of a Supplemental Brief* Certificate of Service: 09/10/2021. [21-2736] (BP) [Entered: 09/10/2021 06:47 PM]
27	09/14/2021	LETTER filed by Mr. Roman Martinez for Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc. regarding *Response to Petitioner-Appellee's September 10, 2021 LETTER regarding Opposition to Respondents-Appellants' intended filing of a Supplemental Brief* Certificate of Service: 09/14/2021. [21-2736] (RM) [Entered: 09/14/2021 12:15 PM]

#	Date	Docket Text
28	09/16/2021	LETTER filed by Mr. Bradley Pensyl for Luxshare, Ltd. regarding *Response to Appellants' September 14, 2021 Letter* Certificate of Service: 09/16/2021. [21-2736] (BP) [Entered: 09/16/2021 12:39 PM]
29	09/21/2021	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellant ZF Automotive US, Inc.. Supreme Court Case No:21-401, 09/10/2021. (CL) [Entered: 09/21/2021 04:22 PM]
30	10/08/2021	EMERGENCY MOTION filed by Mr. Bradley Pensyl for Luxshare, Ltd. to expedite decision. Certificate of Service: 10/08/2021. [21-2736]--[Edited 10/12/2021 by LTK] (BP) [Entered: 10/08/2021 05:57 PM]
31	10/13/2021	PUBLISHED ORDER filed: The showcause order is WITHDRAWN, the motion for stay pending appeal [8] is DENIED, and the motion to expedite [30] is DENIED AS MOOT. Decision for publication. Jeffrey S. Sutton, Chief Judge; John M. Rogers and Richard Allen Griffin, Circuit Judges. (CL) [Entered: 10/13/2021 04:09 PM]

#	Date	Docket Text
32	10/14/2021	EMERGENCY MOTION filed by Mr. Roman Martinez for Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc. for *summary affirmance* Certificate of Service: 10/14/2021. [21-2736]--[Edited 10/15/2021 by LTK] (RM) [Entered: 10/14/2021 06:55 PM]
33	10/21/2021	RESPONSE in opposition filed regarding a motion, [32] previously filed by Mr. Roman Martinez for ZF Automotive US, Inc., Gerald Dekker and Christophe Marnat. Response from Attorney Mr. Bradley Pensyl for Appellee Luxshare, Ltd.. Certificate of Service: 10/21/2021. [21-2736] (BP) [Entered: 10/21/2021 12:40 PM]
		* * *
35	10/27/2021	U.S. Supreme Court Order filed: The order of the United States District Court for the Eastern District of Michigan, entered August 17, 2021, is STAYED pending the disposition of the petition for a writ of certiorari before judgment. (CL) [Entered: 10/27/2021 01:57 PM]
		* * *
37	10/28/2021	REPLY filed by Mr. Roman Martinez for Gerald Dekker,

#	Date	Docket Text
		Christophe Marnat and ZF Automotive US, Inc. regarding *Time-Sensitive Motion for Summary Affirmance* Certificate of Service: 10/28/2021. [21-2736) (RM) [Entered: 10/28/2021 01:01 PM]
		* * *
39	11/04/2021	ORDER filed: The motion for summary affirmance, [32], is DENIED.. Julia Smith Gibbons, Circuit Judge; Jane Branstetter Stranch, Circuit Judge and Joan L. Larsen, Circuit Judge. (LTK) [Entered: 11/04/2021 02:33 PM]
40	11/05/2021	APPELLANT BRIEF filed by Mr. Roman Martinez for Gerald Dekker, Christophe Marnat and ZF Automotive US, Inc.. Certificate of Service: 11/05/2021. Argument Request: not requested. [21-2736] (RM) [Entered: 11/05/2021 01:42 PM]
		* * *
42	12/14/2021	U.S. Supreme Court letter filed. The petition for a writ of certiorari [29] before judgment in No. 21-401 is granted. The motion of International Institute for Conflict Prevention & Resolution, Inc. for leave to file a brief as amicus

#	Date	Docket Text
		curiae in No. 21-518 is granted. The petition for a writ of certiorari in No. 21-518 is granted. The cases are consolidated, and a total of one hour is allotted for oral argument. Supreme Court Case No: 21-401, 12/10/2021.. (DRK) [Entered: 12/14/202111:30 AM]
43	12/21/2021	RULING LETTER SENT to hold briefing in abeyance pending resolution of the U.S. Supreme Court case 21-401. (LTK) [Entered: 12/21/2021 03:45 PM]

RELEVANT DOCKET ENTRIES

U.S. District Court for the Eastern District of Michigan (Detroit)
Case No. 2:20-mc-51245-LJM-APP

#	Date	Docket Text
1	10/16/2020	Ex Parte Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings filed by Luxshare, Ltd., Receipt No: AMIEDC-8110780 - Fee: 47 dollars. (Attachments: # l Index of Exhibits, # 2 Exhibit 1 - ZF Automotive US, Inc. Subpoena, # 3 Exhibit 2 - G. Dekker Subpoena, # 4 Exhibit 3 - C. Marnat Subpoena, # 5 Exhibit 4 - D. Huang Declaration, # 6 Exhibit 5 - A. Masser Declaration, # 7 Exhibit 6 - G. Tschernjavski Declaration, # 8 Exhibit 7 - Proposed Order) (Brady, Michael) (Entered: 10/16/2020)
		* * *
3	10/22/2020	ORDER Granting Ex Parte Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings. Signed by District Judge Laurie J. Michelson. (EKar) (Entered: 10/22/2020)

#	Date	Docket Text
		* * *
5	11/16/2020	STIPULATION AND ORDER Setting Briefing Schedule for ZF Automotive US, Inc.'s Motion to Quash. Signed by District Judge Laurie J. Michelson. (EKar) (Entered: 11/16/2020)
6	12/04/2020	MOTION to Quash *Improper Subpoenas* by All Defendants. (Attachments: # 1 Index of Exhibits, # 2. Exhibit 1: Declaration of C. Baus w/Exhibits A & B, # 3 Exhibit 2: Declaration of G. Decker, # 4 Exhibit 3: Declaration of D. Eckhardt) (Jorissen, Jonathan) (Entered: 12/04/2020)
		* * *
8	12/08/2020	ORDER Referring Pretrial Matters to Magistrate Judge Anthony P. Patti re 6 Motion to Quash. Signed by District Judge Laurie J. Michelson. (EKar) (Entered: 12/08/2020).
		* * *
13	01/08/2021	RESPONSE to 6 MOTION to Quash *Improper Subpoenas* filed by Luxshare, Ltd.. (Attachments: # 1 Declaration of Travis Taylor, # 2 Second Declaration of Anna

#	Date	Docket Text
		Masser) (Pensyl, Bradley) (Entered: 01/08/2021)
14	01/18/2021	REPLY to Response re 6 MOTION to Quash *Improper Subpoenas* filed by All Defendants. (Jorissen, Jonathan) (Entered: 01/18/2021)
15	02/19/2021	NOTICE by All Defendants re 6 MOTION to Quash *Improper Subpoenas - Joint Statement of Unresolved Issues* (Jorissen, Jonathan) (Entered: 02/19/2021)
	02/24/2021	Minute Entry for proceedings before Magistrate Judge Anthony P. Patti: Motion Hearing held on 2/24/2021 re: 6 MOTION to Quash *Improper Subpoenas* Disposition: Motion taken under advisement. (Court Reporter: Jodi Matthews) (MWil) (Entered: 02/24/2021)
	02/24/2021	TEXT-ONLY ORDER: Respondents' motion to quash improper subpoenas (ECF No. 6) is TAKEN UNDER ADVISEMENT. Meanwhile, no later than March 10, 2021 at 5 p.m., Petitioner and Respondents SHALL each file supplemental briefs, not to exceed 9 pages, which address: (1) case law on whether the contract arbitration clause is prohibitive or should be considered in a Section 1782 analysis; (2) the meaning of

#	Date	Docket Text
		the exact contract language without recourse to the ordinary courts of law[,] (ECF No. 6-2, PageID.266); and, (3) how a foreign arbitration tribunal is treated under the receptivity factor (see Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004)). Then, although preserving ZF's objection that it need not produce anything, by March 17, 2021 at 5 p.m.: (1) the parties shall undertake another meet and confer conference to discuss what they can jointly agree upon and what they cannot agree upon if the Court were to order production in response to the subpoenas (with reference to the fourth Intel factor); and, (2) submit another joint statement reflecting the parties conditional agreements (subject to ZF's preserved objections) and proposals. Finally, attorney Sean Berkowitz SHALL file an appearance in this matter at his earliest convenience. taking under advisement 6 Motion to Quash--Entered by Magistrate Judge Anthony P. Patti. (MWil) (Entered: 02/24/2021)
		* * *

#	Date	Docket Text
17	03/02/2021	TRANSCRIPT of MOTION TO QUASH IMPROPER SUBPOENAS held on February 24, 2021. (Court Reporter/Transcriber: Nefertiti Jodi Matthews) (Number of Pages: 53) The parties have 21 days to file with the court and Court Reporter/Transcriber a Redaction Request of this transcript. If no request is filed, the transcript may be made remotely electronically available to the public without redaction after 90 days. Redaction Request due 3/23/2021. Redacted Transcript Deadline set for 4/2/2021. Release of Transcript Restriction set for 6/1/2021. Transcript may be viewed at the court public terminal or purchased through WWW.TRANSCRIPTORDERS.COM before the deadline for Release of Transcript Restriction. After that date, the transcript is publicly available. (Matthews, N) (Entered: 03/02/2021)
18	03/10/2021	SUPPLEMENTAL BRIEF re Order on Motion to Quash,,,,, 6 MOTION to Quash *Improper Subpoenas* filed by All Defendants. (Attachments: #1 Exhibit A: Federal Court of Justice Decision)

#	Date	Docket Text
		(Jorissen, Jonathan) (Entered: 03/10/2021)
19	03/10/2021	SUPPLEMENTAL BRIEF re 6 MOTION to Quash *Improper Subpoenas* filed by Luxshare, Ltd.. (Pensyl, Bradley) (Entered: 03/10/2021)
20	03/10/2021	DECLARATION by Anna Masser re 19 Supplemental Brief, 6 MOTION to Quash *Improper Subpoenas Third Declaration of Anna Masser* filed by Luxshare, Ltd. (Pensyl, Bradley) (Entered: 03/10/2021)
21	03/19/2021	STATEMENT of Resolved and Unresolved Issues - *Joint Statement of Unresolved Issues re Respondents' Motion to Quash Petitioner's Subpoenas* re 6 MOTION to Quash *Improper Subpoenas* by All Defendants (Jorissen, Jonathan) (Entered: 03/19/2021)
22	03/25/2021	NOTICE by All Defendants *Letter to Court re Certiorari Granted by Supreme Court in Servotronics v. Rolls Royce* (Jorissen, Jonathan) (Entered: 03/25/2021)
23	03/26/2021	RESPONSE to 22 Notice (Other) by Luxshare, Ltd.. (Pensyl, Bradley) (Entered: 03/26/2021)

#	Date	Docket Text
24	04/12/2021	REVISED TRANSCRIPT of MOTION TO QUASH IMPROPER SUBPOENAS held on February 24, 2021. (Correction to errors per Judge's Request) [DO NOT USE ECF#l7-Prevous Transcript)(Court Reporter/Transcriber: Nefertiti Jodi Matthews) (Number of Pages: 53) The parties have 21 days to file with the court and Court Reporter/Transcriber a Redaction Request of this transcript. If no request is filed, the transcript may be made remotely electronically available to the public without redaction after 90 days. Redaction Request due 5/3/2021. Redacted Transcript Deadline set for 5/13/2021. Release of Transcript Restriction set for 7/12/2021. Transcript may be viewed at the court public terminal or purchased through WWW.TRANSCRIPTORDERS.COM before the deadline for Release of Transcript Restriction. After that date, the transcript is publicly available. (Matthews, N) (Entered: 04/12/2021)
25	05/24/2021	REVISED TRANSCRIPT 2 of MOTION TO QUASH IMPROPER SUBPOENAS held on February

#	Date	Docket Text
		24, 2021. (Correction to error of "won't" to "will" p. 41 of the transcript, line 21, ECF 24, PageID.538-former transcript, per Judge's Request) [DO NOT USE ECF#l7 and #24-Previous Transcripts)(Court Reporter/Transcriber: Nefertiti Jodi Matthews) (Number of Pages: 53) The parties have 21 days to file with the court and Court Reporter/Transcriber a Redaction Request of this transcript. If no request is filed, the transcript may be made remotely electronically available to the public without redaction after 90 days. Redaction Request due 6/14/2021. Redacted Transcript Deadline set for 6/24/2021. Release of Transcript Restriction set for 8/23/2021. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date, the transcript is publicly available. (Matthews, N) Modified on 8/3/2021: Transcript released; should have been released 6/1/2021. (JPur) (Entered: 05/24/2021)

#	Date	Docket Text
26	05/27/2021	OPINION AND ORDER granting in part and denying in part Respondent's 6 Motion to Quash-- Signed by Magistrate Judge Anthony P. Patti. (MWil) (Entered: 05/27/2021)
27	06/10/2021	OBJECTION to 26 Order on Motion to Quash by Gerald Dekker, Christophe Mamat, ZF Automotive US, Inc.. (Jorissen, Jonathan) (Entered: 06/10/2021)
28	06/24/2021	RESPONSE to 27 Objection by Luxshare, Ltd.. (Brady, Michael) (Entered: 06/24/2021)
29	07/01/2021	ORDER Overruling Objections to Magistrate Judge's Order Granting in Part and Denying in Part Respondents' Motion to Quash 26. Signed by District Judge Laurie J. Michelson. (EPar) (Entered: 07/01/2021)
30	07/16/2021	MOTION to Stay re 29 Memorandum Opinion & Order, Terminate Motions *Pursuant to Federal Rule of Appellate Procedure 8* by All Defendants. (Jorissen, Jonathan) (Entered: 07/16/2021)
31	07/16/2021	MOTION to Compel *Respondents to Comply with Subpoenas and to Produce Documents* by Luxshare,

#	Date	Docket Text
		Ltd.. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1 - Declaration of Bradley Pensyl, # 3 Exhibit 2 - Correspondence Related to the Motion to Compel, # 4 Exhibit 3 - Proposed Stipulation and Order) (Pensyl, Bradley) (Entered: 07/16/2021)
32	07/20/2021	NOTICE OF APPEAL by Gerald Dekker, Christophe Marnat, ZF Automotive US, Inc. re 29 Memorandum Opinion & Order, Terminate Motions. Receipt No: AMIEDC-8544844 - Fee: $ 505 - Fee Status: Fee Paid. (Berkowitz, Sean) (Entered: 07/20/2021)
		* * *
34	07/26/2021	ORDER Vacating 8 Order Referring Pretrial Matters to Magistrate Judge. Signed by District Judge Laurie J. Michelson. (SSch) (Entered: 07/26/2021)
35	07/28/2021	RESPONSE to 30 MOTION to Stay re 29 Memorandum Opinion & Order, Terminate Motions *Pursuant to Federal Rule of Appellate Procedure 8* filed by Luxshare, Ltd.. (Pensyl, Bradley) (Entered: 07/28/2021)

#	Date	Docket Text
36	07/30/2021	RESPONSE to 31 MOTION to Compel *Respondents to Comply with Subpoenas and to Produce Documents* filed by All Defendants. (Jorissen, Jonathan) (Entered: 07/30/2021)
		* * *
	08/06/2021	TEXT-ONLY ORDER: The Court scheduled a status conference with the parties to discuss the issue of a tolling agreement. Having reviewed the parties briefing, that does not appear to be a viable option. Thus, the status conference on August 11, 2021 is hereby canceled. Issued by District Judge Laurie J. Michelson. (EPar) (Entered: 08/06/2021)
38	08/17/2021	OPINION and ORDER Denying 30 MOTION to Stay and Granting 31 MOTION to Compel. Signed by District Judge Laurie J. Michelson. (EPar) (Entered: 08/17/2021)
39	09/21/2021	LETTER from the US Supreme Court that a petition for writ of certiorari was filed on 9/10/21. [Supreme Court Case Number: 21-401] [Court of Appeals Case

#	Date	Docket Text
		Number: 21-2736] (TTho) (Entered: 09/22/2021)
40	10/13/2021	ORDER from U.S. Court of Appeals - Sixth Circuit re 32 Notice of Appeal filed by Gerald Dekker, ZF Automotive US, Inc., Christophe Marnat [Appeal Case Number 21-2736] (SKra) (Entered: 10/14/2021)
41	12/14/2021	LETTER from the US Supreme Court granting the petition for writ of certiorari [Supreme Court Case Number: 21-401] [Court of Appeals Case Number: 21-2736] (TTho) (Entered: 12/14/2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUXSHARE, LTD., Petitioner-Appellee,

v.

ZF AUTOMOTIVE US, INC.; GERALD DEKKER; CHRISTOPHE MARNAT, Respondents-Appellants.

No. 21-2736

Decided and Filed: October 13, 2021

15 F.4th 780

Before: SUTTON, Chief Judge; ROGERS and GRIFFIN, Circuit Judges.

ORDER

This case concerns discovery, but with an international flavor. ZF Automotive US, Inc., Gerald Dekker, and Christophe Marnat (collectively, "ZF US") appeal a district court order granting limited discovery to Luxshare, Ltd., under 28 U.S.C. § 1782. Luxshare plans to use the discovery in the parties' international arbitration. ZF US moves for a stay pending appeal, highlighting the Supreme Court's grant of certiorari in *Servotronics v. Rolls-Royce PLC*, —— U.S. ——, 141 S. Ct. 1684, 209 L.Ed.2d 463 (2021), as well as ZF US's pending motion before the Supreme Court to grant an immediate appeal on the same issues raised in *Servotronics*.

As a threshold issue, the clerk ordered ZF US to show cause why its appeal should not be dismissed for lack of jurisdiction. Courts of appeals, outside of a few

exceptions, have authority to review only "final decisions" of the district courts. 28 U.S.C. § 1291. The rule is designed to prevent "piecemeal" adjudication. *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Litigants thus cannot immediately appeal discovery orders in most cases. More specifically, we have said that "a party served with a subpoena typically cannot appeal the denial of a motion to quash the subpoena until [it] has resisted the subpoena and been held in contempt." *Doe v. United States*, 253 F.3d 256, 261 (6th Cir. 2001).

But a § 1782 proceeding is different, as the entire dispute concerns discovery. Section 1782(a) permits 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." The district court's decision whether to order discovery—or, as here, whether to quash a subpoena ordering discovery—conclusively resolves the subject matter of the underlying proceeding. In the absence of "an 'underlying' [merits] proceeding, many of the concerns that make us reluctant to review discovery orders on an interlocutory basis disappear." *In re Naranjo*, 768 F.3d 332, 347 (4th Cir. 2014). We thus join the steady drumbeat of our sister circuits, which uniformly hold that orders under § 1782, including on motions to quash subpoenas, are final, appealable orders under 28 U.S.C. § 1291. *See, e.g.*, *In re Application of Gianoli Aldunate*, 3 F.3d 54, 57 (2d Cir. 1993); *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 189 n.1 (3d Cir. 1999); *Naranjo*, 768 F.3d at 346–47; *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 593 (7th Cir. 2011); *United States v. Sealed 1, Letter of Request for Legal Assistance from the Deputy*

Prosecutor Gen. of the Russian Fed'n, 235 F.3d 1200, 1203 (9th Cir. 2000) (order); *Republic of Ecuador v. For the Issuance of a Subpoena Under 28 U.S.C. § 1782(a)*, 735 F.3d 1179, 1183 (10th Cir. 2013); *In re Application of Furstenberg Fin. SAS v. Litai Assets LLC*, 877 F.3d 1031, 1033 (11th Cir. 2017).

Assured of our jurisdiction, we turn to the motion to stay. We consider four factors in determining whether to grant a stay: 1) "whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits"; 2) the likelihood the "applicant will be irreparably injured absent a stay"; 3) "whether issuance of the stay will substantially injure" other interested parties; and 4) "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). The first two factors "are the most critical." *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). But while the party seeking a stay "need not always establish a high probability of success on the merits," the party "is still required to show, at a minimum, 'serious questions going to the merits.'" *Mich. Coal. of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 153–54 (6th Cir. 1991) (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

ZF US primarily argues that it has established a likelihood of success on appeal based on the Supreme Court's grant of certiorari in *Servotronics*, which could reach a different result from the one our court did in *Abdul Latif Jameel Transportation Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019), about whether § 1782 applies to private arbitration. But ZF US must show "[m]ore than a mere 'possibility'" of success on the merits to satisfy this factor. *Nken*, 556

U.S. at 434, 129 S.Ct. 1749 (alteration in original); *cf. Trump v. Int'l Refugee Assistance Project*, —— U.S. ——, 137 S. Ct. 2080, 2089, 198 L.Ed.2d 643 (2017) (Thomas, J., concurring in part) (acknowledging that, when a party seeks a stay pending certiorari, the applicant must show not only "a reasonable probability that certiorari will be granted" but also "a significant possibility that the judgment below will be reversed" (quoting *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302, 112 S.Ct. 1, 115 L.Ed.2d 1087 (1991) (Scalia, J., in chambers))). The Supreme Court at any rate has since dismissed *Servotronics*, so this argument falls to the side either way. ZF US's other arguments for reversing the district court likewise fail to meet the requisite burden at this stage.

ZF US also alleges that it will suffer irreparable harm in the absence of a stay because—should this court find in its favor—the arbitration proceedings will likely be complete, and it will have no remedy for the harm. But ZF US has failed to show that the minimal and nonconfidential discovery here would constitute irreparable harm. In any event, it has not shown the requisite likelihood of success on the merits of its appeal. *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 524 (6th Cir. 2021) (order) ("Given that the [movant] is unlikely to succeed on the merits, we need not consider the remaining stay factors."). If we ultimately reverse the district court, we may mitigate any harms from the discovery as the circumstances allow. *See JSC MCC EuroChem v. Chauhan*, No. 18-5890, 2018 WL 9650037, at *2 (6th Cir. Sept. 14, 2018) (order).

Accordingly, the show cause order is withdrawn. The motion to stay pending appeal is **DENIED**. The motion to expedite is **DENIED AS MOOT**.

No. 21-2736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 04, 2021
DEBORAH S.
HUNT, Clerk

LUXSHARE, LTD., Petitioner-Appellee,	)	
v.	)	O R D E R
ZF AUTOMOTIVE US, INC., et al., Respondents-Appellants.	)	

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

Respondents ZF Automotive US, Inc., Gerald Dekker, and Christophe Marnat (collectively, "ZF US") appeal a district court order granting limited discovery to Petitioner Luxshare, Ltd., pursuant to 28 U.S.C. § 1782, in the parties' international arbitration. ZF US moved for a stay pending appeal, which a previous panel of this court denied. *Luxshare, Ltd. v. ZF Auto. US, Inc.*, -- F.4th --, 2021 WL 4771732 (6th Cir. 2021). ZF US now moves for summary affirmance of the district court's order granting discovery, "[i]n order to more efficiently seek Supreme Court review." However, this court generally does not consider the merits of an appeal in a summary fashion. *See* 6 Cir. R. 27(e) ("The court will not consider a motion to affirm the

judgment appealed from."). Moreover, there is already another petition for certiorari pending in the Supreme Court raising this issue that has been fully exhausted in the lower courts. *See AlixPartners, LLP v. Fund for Prot. of Inv. Rights in Foreign States*, No. 21-518, 2021 WL 4705742 (U.S. Oct. 2021).

Accordingly, the motion for summary affirmance is **DENIED**.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	:	Case No.
	:	Hon.

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

* * *

ISSUES PRESENTED

I. Does this Application meet the statutory requirements for 28 U.S.C. § 1782 discovery?

Yes, because this Application is brought by interested parties seeking narrow discovery for use in proceedings before a foreign tribunal from three Respondents who are found in the Eastern District of Michigan.

II. With the statutory requirements satisfied, should the Court exercise its discretion to grant the Application?

Yes, because the discretionary factors for Section 1782 discovery identified by the United States Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004), and applied by

the courts of this Circuit, weigh in favor of granting the Application.

* * *

Applicant Luxshare Ltd. (the "Applicant" or "Luxshare") respectfully submits this Memorandum of Law in support of its *Ex Parte* Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings (the "Application").

PRELIMINARY STATEMENT

This Application seeks the Court's permission to obtain limited and specific discovery from two individuals and a company based in this District—Gerald Dekker ("Dekker"), Christophe Marnat ("Marnat"), and ZF Automotive US, Inc. f.k.a. TRW Automotive, Inc. ("ZF US") (collectively, the "Respondents")—bearing directly on a billion dollar dispute that will be the subject of Arbitration in Munich, Germany between Luxshare and ZF US involving the sale of two business units.

In August 2017, the Applicant purchased those two business units from ZF US for nearly a billion dollars pursuant to the terms of a Master Purchase Agreement dated August 29/30, 2017 (as amended, "MPA"). Those two businesses were ZF US's Global Body Control Systems business ("BCS Business") and ZF US's Radio Frequency Electronics business ("RFE Business") (collectively, the "BCS-RFE Businesses"). As the Applicant has now only recently discovered, ZF US concealed from Luxshare certain material facts and developments concerning the significant decline in business relationships with, and expected purchases from, several of the most important customers of ZF US's BCS-RFE Businesses, all which

information ZF US was otherwise required to disclose to Luxshare prior to signing the MPA. ZF US's concealments and omissions inflated the purchase price paid by Luxshare for the BCS-RFE Businesses by hundreds of millions of dollars over the amount it would otherwise have paid for them. ZF US learned of these materially adverse business developments before signing the MPA, yet failed to disclose this critical information to Luxshare. German law required ZU US to disclose this critical information during the due diligence period and/or prior to the execution of the MPA, either in the voluminous due diligence materials that ZF US provided, or in the numerous pre-signing discussions between representatives of the parties.

Specifically, prior to the execution of the MPA, certain directors and officers of ZF US, including Respondents Dekker and Marnat, learned of these critical developments, which resulted in a drastic decline in sales to core customers of the BCS-RFE Businesses, Fiat Chrysler Automobiles ("FCA"), Ford Motor Company ("Ford"), and General Motors ("GM") (collectively, the "Relevant Customers"). Among other things, and unbeknownst to the Applicant, ZF US learned prior to the execution of the MPA that FCA had decided to phase out its purchases from the BCS-RFE Businesses, that GM had cancelled eight of the nine platforms that had historically purchased vehicle parts from the BCS Business, and that Ford had decided not to purchase parts for one of its platforms from the BCS Business. These multiple undisclosed developments have resulted in a decline of hundreds of millions of sales to these key customers for the two business units.

To obtain redress for the massive losses suffered as a result of ZF US's wrongful conduct, the Applicant will bring claims against ZF US in an arbitration under the Rules of the German Institution of Arbitration eV. ("DIS" and "DIS Rules"), which is designated as the dispute resolution forum in the MPA. While the Applicant has only recently learned that ZF US and certain of its senior officers were aware of many aspects of these adverse customer and sales developments prior to the execution of the MPA, Luxshare brings this Application to allow it to obtain discovery to acquire necessary detail concerning ZF US internal communications at ZF US prior to the closing of the deal that will shed light on ZF US's wrongful decisions to conceal this critical information concerning the lost sales volumes. The narrow and specific discovery sought here will help the DIS arbitral tribunal to better know the facts and thus better adjudicate the merits of this substantial dispute.

Luxshare respectfully submits that this is a textbook case for the authorization of Section 1782 discovery for use in foreign proceedings. The information sought in this Application is needed to ensure that the foreign arbitral tribunal is able to reach fully informed decisions on a developed record regarding the transactions and events underlying the Applicant's claims. The Application meets all of the requirements for Section 1782 discovery, and the balance of the discretionary factors considered by courts in determining Section 1782 applications weighs decisively in favor of permitting the requested discovery. As such, the Applicant respectfully requests that the Court grant this Application and authorize the service of the proposed subpoenas,

Exhibit Nos. 1-3 (the "Subpoenas"), on the Respondents.

STATEMENT OF FACTS

The Applicant, Luxshare Ltd., is a limited liability company incorporated in Hong Kong and, through its equity investments, is engaged in the business of manufacturing in the fields of consumer electronics, communications, and automotive. Exhibit 4, Decl. Huang ¶ 3. The Applicant has global operations and, through its investments, also employs more than 180 workers in Livonia, Michigan. Decl. Huang ¶ 3.

The Respondents all reside within the Eastern District of Michigan. Exhibit 5, Decl. Masser ¶ 6. ZF US's principal place of business, or in the words of ZF US, its "North American Headquarters" is located at 12001 Tech Center Drive, Livonia, Michigan. Decl. Masser. ¶ 6. Respondent Gerald Dekker resides at 4262 Pocahontas Dr., Shelby Charter Township, Maycomb County, MI 48315-1264. Decl. Masser. ¶ 7. Respondent Christophe Marnat resides at 2755 Ayershire Dr., Bloomfield Hills, Oakland County, MI 48302-0804. Decl. Masser. ¶ 8.

A. The Genesis of the Sale and the Due Diligence

Luxshare was approached by an investment firm in early 2017 to discuss whether it would be interested in a potential acquisition target to expand its business. Decl. Huang ¶ 9. In March 2017, Luxshare began discussing with its advisor, Commerzbank, the possibility of bidding for the BCS-RFE Businesses. Decl. Huang ¶ 9.

In April 2017, after the Applicant expressed its interest to ZF US, ZF US provided the Applicant with a confidential information pack prepared by ZF US's

investment banking advisors and accountants. Decl. Huang ¶ 10. One of the most critical items contained in these materials was a business plan (the "Sale Supporting Business Plan"), which detailed the current and projected sales for the BCS-RFE Businesses, and included the 2016 actual financials for the businesses, and an estimate for 2017-2021 sales for the Relevant Customers. Decl. Huang ¶ 10. After reviewing these materials, Luxshare then submitted a non-binding offer on April 3, 2017. Decl. Huang ¶ 10.

After further reviewing the materials provided by ZF US during the bidding process, the Applicant submitted a revised confirmed offer on April 24, 2017, including a net purchase price of $1.135 billion that was subject to additional due diligence. Decl. Huang ¶ 11. In the offer letter, the Applicant confirmed that the offer was based on the Applicant's review of the adjusted financials and materials provided by ZF US and its advisors. Decl. Huang ¶ 11. The adjusted financial referenced in the ZF US's due diligence materials presented the 2014, 2015, 2016 actual financials of the BCS-RFE Businesses and the 2017 through 2021 estimated adjusted financials for those two businesses, based in largely on the projected sales of the Relevant Customers and other customers (the "Adjusted Financials"). Decl. Huang ¶ 11.

After ZF US received Luxshare's first non-binding offer on April 3, 2017, Luxshare engaged in several months of further due diligence, during which time it received additional information from ZF US. Decl. Huang ¶ 12. Such additional due diligence included an expert session in Zurich on May 10, 2017, access to virtual data rooms (the "Virtual Due Diligence" or "VDD"), question and answer sessions, a second

version of the Adjusted Financials and vendor due diligence materials prepared by ZF US's accounting firm on May 22, 2017, and a management presentation on June 20, 2017. Decl. Huang ¶ 12.

The VDD was an important aspect of the due diligence process as it provided access to the books and records of the BCS-RFE Businesses. Decl. Huang ¶ 13. Although initially planned as three phases, the VDD opened to the Applicant in two phases with ZF US providing the Applicant with progressively greater access to information and materials. Decl. Huang ¶ 13.

The first phase of the VDD was the opening of the "Green Room" and "White Rooms" (collectively, "Green/White Rooms") on May 18, 2017 that offered access to information and documents on material costs, product price, R&D, capital expenditures, the 2017 budget, sales details by region, customer, and product. Decl. Huang ¶ 14. The Green/White Rooms also provided access to ZF US's wins and losses by customer program from 2016-2017 YTD, the profitability of wins and losses, and included information on the reason for any loss. Decl. Huang ¶ 14.

The second stage of the VDD was the opening of the "Red Room" on June 26, 2017. Decl. Huang ¶ 15. The Red Room offered access to additional information about ZF US, including access to ZF US's HR data, employment compensation, customer contracts, purchasing contracts, and corporate agreements including exceptions to customer's terms and conditions. Decl. Huang ¶ 15.

The profitability and success of the BCS-RFE Businesses was heavily dependent on sales to the

Relevant Customers. For example, FCA was a key customer for the BCS Business because the business unit provided several vehicle components for the new models of FCA vehicles such as the Alfa Romeo Giulia and Stelvio models. Exhibit 6, Decl. Tschernjavski ¶ 10. The Adjusted Financials projected a total sales volume for the Alfa Romeo Giulia and Stelvio car models for 2017 to 2021 of approximately $101 million. Decl. Tschernjavski ¶ 10.

In addition, FCA was one of the two main customers of the RFE Business's Tire Pressure Monitoring System ("TPMS") product line, primarily developed in Farmington Hills, MI, and produced in Auburn, NY. Decl. Tschernjavski ¶ 11. The Adjusted Financials reflected that FCA accounted for 55% of the RFE Businesses' total TPMS and remote keyless entry sales revenues. Decl. Tschernjavski ¶ 11. Together, these projected FCA sales accounted for $340 million in anticipated revenue. Decl. Tschernjavski ¶ 11.

A second Relevant Customer, Ford, was similarly essential to the BCS Business, which relied on Ford's orders for various vehicle components, such as those used for heating, ventilation and air conditioning systems, including, the major P552 Platform (Ford's F-Series trucks). Decl. Tschernjavski ¶ 12. Prior to the sale, the BCS Business averaged approximately $100 million in annual sales to Ford through the supply of vehicle components for Ford's P552 Platform. Decl. Tschernjavski ¶ 12.

Moreover, as depicted in the due diligence materials provided by ZF US, a new Ford platform held significant promise for future sales. Specifically, the Adjusted Financials provided by ZF US contained projected sales volumes for the P702 Platform— the

successor to the P552 Platform—of approximately $85 million up to 2021 and over $300 million up to 2026. Decl. Tschernjavski ¶ 13. These figures underscore the importance of the P552 and P702 Platforms for the BCS Business. ndeed, the BCS Business' Winona, Minnesota plant was fully dedicated to manufacturing parts for this Ford truck series. Decl. Tschernjavski ¶ 13.

A third key customer for the BCS Business was GM, which was a significant purchaser of vehicle components, such as steering column control modules. Decl. Tschernjavski ¶ 14. The Adjusted Financials projected a total sales volume of approximately $44 million until 2021 and $89 million over seven years for the 9BXX Platform. Decl. Tschernjavski ¶ 21

After conducting due diligence, and in reliance upon the information provided by ZF US, the Applicant signed the MPA on August 29/30, 2017. Decl. Huang ¶ 14. The MPA is governed by German law. Decl. Huang ¶¶ 5, 21. Critically, for purposes of the arbitration, German law required that ZF US disclose all material facts that the Applicant may reasonably expect to receive, including information that could jeopardize the purpose of the transaction for the Applicant. Decl. Masser ¶ 11. The MPA contains an arbitration clause, requiring that all disputes arising out of the MPA be submitted to arbitration in DIS Rules in Munich, Germany. Decl. Huang ¶ 8.

On August 25, 2017 (five days prior to the signing of the MPA), ZF US delivered a confirmation to the Applicant, which affirmed that all of ZF US's Seller's Representations, specifically including its representations regarding "Sold Contracts," were

"true, correct, and complete as of August 25th, 2016, to our best knowledge and [did] not omit to state anything, the omission of which could make any of the Seller's Representations misleading." Decl. Huang ¶ 16. Additionally, ZF US's "knowledge" under the MPA included what was actually known by Respondents Dekker and Marnat. Decl. Huang ¶ 16.

The MPA also included Exhibit 12.1.1 "Exceptional Actions in the Interim Period" which detailed any "exceptional" changes from the Ordinary Course of Business that were expected between September 1, 2017 and April 16, 2018. Decl. Huang ¶ 17. The transaction closed on April 27, 2018 in Frankfurt, Germany (the "Closing"). Decl. Huang ¶ 18.

B. ZF US's Fraudulent Omissions

After the Closing, the Applicant learned that ZF US was fully aware of certain factual developments that would result in the imminent loss of business from FCA, Ford and GM and that rendered ZF US's depiction of the state of the BCS-RFE Businesses materially inaccurate. Decl. Huang ¶ 19. Moreover, the Applicant learned that executives of the BCS-RFE Businesses who attended three quarterly operations review meetings on February 15, 2017, April 26, 2017, and July 26, 2017 (the "Operations Review Meetings") specifically recall discussing these developments internally. Decl. Tschernjavski ¶¶ 15-21. As discussed in greater detailed below, these events include knowledge by ZF US of (i) significant reduced sales volumes for FCA relating to Stelvio and Giulia, (ii) a decision by FCA to put the RFE Business "out of strategy", (iii) a decision by Ford not to award component supply of the P702 Platform to the BCS Business, (iv) and GM's cancellation of the 9BXX

platform. Decl. Huang ¶ 20. ZF US failed to disclose these Critical Issues to the Applicant. Decl. Huang ¶ 19.

First, on February 15, 2017, *six months prior to the signing of the MPA*, Respondent Marnat attended a quarterly operations review meeting with BCS Business executives to review and discuss current state of the BCS Business. Decl. Tschernjavski ¶ 16. Like other quarterly operations review meetings, this was a high-level strategic meeting that included the Senior VP and General Manager, VP Finance and VP Sales of the BCS Business, along with other BCS executives and the ZF US executive leadership team supervising the BCS Business. Decl. Tschernjavski ¶ 17. Among other topics, the meeting covered the sales volumes for FCA for several vehicle components for the new Alfa Romeo Giulia and Stelvio models. Decl. Tschernjavski ¶ 17. The executives present at this meeting specifically discussed the fact that the actual production numbers for Alfa Romeo Giulia and Stelvio fell far behind the calculations conveyed to the Applicant. Decl. Tschernjavski ¶ 17. In fact, it was disclosed that the sales volume for vehicle components for the Alfa Romeo Giulia and Stelvio models, for 2017 alone, was reduced by more than 33%. Decl. Tschernjavski ¶ 17.

This actual decline in sales volume for components of the Alfa Romeo Giulia model vehicles was never disclosed to the Applicant, nor included in the Exhibit 12.1.1 to the MPA as updated ten months later on December 22, 2017 (collectively, "Exhibit Updates"). Decl. Huang ¶ 19. Nor was this material fact disclosed fourteen months later when ZF US again updated the schedule. Decl. Huang ¶ 19. BCS Business executives told ZF US about these adverse

developments and urged them to include them in the Exhibit Update. Decl. Tschernjavski ¶ 22. Yet despite the immense significance of this information to the Applicant, and its negative impact of the projected financials, ZF US failed to disclose it to the Applicant, either during the due diligence period (April to July 2017) or in the period thereafter leading up to the Closing. Decl. Huang ¶ 19.

This was not the only materially adverse issue relating to FCA sales volumes that ZF US became aware of prior to the execution of the MPA, but failed to disclose to the Applicant. On June 30, 2017, *two months before the signing of the MPA*, there was a meeting between ZF US and FCA in Auburn known as "One Voice." Decl. Tschernjavski ¶ 18. At the One Voice meeting, FCA disclosed that it would be sanctioning the RFE Business because of quality control issues, would put it on a "business hold" and would phase out the RFE Business' TPMS product line and the keyless access system. Decl. Tschernjavski ¶ 18. FCA labeled the RFE Business as "out of strategy," meaning that the RFE Business would no longer be invited to respond to new business bid requests and that existing business would be phased out. Decl. Tschernjavski ¶ 18.

As a direct result of being "out of strategy," the RFE Business' sales to FCA has declined significantly, including a more than 24% reduction in 2019. Decl. Tschernjavski ¶ 19. Illustrative of the drastic consequences of FCA's decision, the RFE Business' plant in Auburn, New York has been forced to schedule a permanent close of operations by the end of Q2 2021 as the direct result of FCA's sanctions. Decl. Tschernjavski ¶ 19. Yet, ZF US did not disclose this phase-out to the Applicant prior to the signing of

the MPA, Decl. Huang ¶ 19, even in the face of urging by the BCS-RFE Businesses executives to do so. Decl. Tschernjavski ¶ 22.

The known but undisclosed problems did not stop at FCA. On July 26, 2017, *over a month before the signing of the MPA*, Respondents Dekker and Marnat attended another quarterly operations review where the participants discussed the Ford P702 Platform. Decl. Tschernjavski ¶ 20. Generating sales of vehicle components from the P702 Platform was crucial for the future success of the BCS Business because those sales were projected in the financial materials provided by ZF US to generate over $85 million in sales during a two-year production period from 2020 to 2021 and to generate upwards of $300 million through 2026. Decl. Tschernjavski ¶ 20. At that meeting, the BCS and ZF US executives discussed the fact that Ford had decided ***not to award*** component supply for the P702 Platform to the BCS Business. Decl. Tschernjavski ¶ 20. Internally, the BCS Business reported and characterized this as a "critical event" for the business. Decl. Tschernjavski ¶ 20. The BCS Business executives implored ZF US to disclose Ford's decision not to award BCS Business the P702 Platform in the Exhibit Updates to Exhibit 12.1.1. *Id.* ¶ 22. However, neither this materially adverse fact, nor its substantial negative impact, was disclosed to the Applicant. Decl. Huang ¶ 19.

Also discussed at the same July 26, 2017 quarterly operations review meeting was GM's 9BXX Platform. Decl. Tschernjavski ¶ 21. The 9BXX Platform was supposed to be implemented across nine programs for GM cars. Decl. Tschernjavski ¶ 21. The total sales of components for the 9BXX Platform was projected to the Applicant to be $44 million until 2021 and $89

million over seven years. Decl. Tschernjavski ¶ 21. However, during the meeting, it was disclosed that GM was considering canceling eight of the nine programs of the 9BXX Platform. Decl. Tschernjavski ¶ 21. ZF US did not disclose this cancelation. Decl. Huang ¶ 19.

Again, BCS Business executives proposed including GM's cancelation of eight of its nine programs for the 9BXX Platform in the Exhibit Updates because it was a critical event that adversely impacted a significant projected revenue stream. Decl. Tschernjavski ¶ 22. However, that information was never conveyed to the Applicant. Decl. Huang ¶ 19.

In December 2017 and April 2018, well after the above described meetings, executives of the BCS-RFE businesses continued to understand that the four events described above were "critical events" materially adverse to the business. Decl. Tschernjavski ¶ 22. Again, BCS-RFE Businesses executives proposed updates to Exhibit 12.1.1 and submitted those updates to ZF US so that ZF US would disclose them to the Luxshare. Decl. Tschernjavski ¶ 22. The Applicant was not provided with this information. Decl. Huang ¶ 19.

C. <u>The Foreign Legal Proceedings</u>

While the Applicant conducted extensive due diligence (as described above), there was no mention of these critical issues in any of the due diligence materials that were provided to the Applicant. Decl. Huang ¶ 19. In any event, under German law, ZF US has a duty to (i) convey information that is factually accurate and (ii) disclose material facts that the buyer may reasonably expect to receive, inter alia

information that may jeopardize the purpose of the transaction for the potential buyer. Decl. Masser ¶ 11. ZF US's concealment of this information caused extensive losses to the Applicant and violated ZF US's obligations under German law.

As such, the Applicant has retained Allen & Overy LLP ("A&O") to prepare and file a Request for Arbitration to be submitted in Germany and to advance its interests in that Arbitration. Decl. Huang ¶ 21. The Applicant has also retained an expert witness, Versant Partners, to prepare an expert report to substantiate the materially negative financial impact of each of the four issues that ZF US failed to disclose to the Applicant. Decl. Huang ¶ 22. The Applicant has authorized the filing of the Request for Arbitration, and A&O is in the process of preparing the arbitration filing. Decl. Masser ¶ 29.

This Application seeks information that is narrowly tailored and proportional to the needs of the arbitration that will be filed in the near future to resolve this billion dollar dispute. Specifically, this Application seeks documents and deposition testimony concerning: (i) the February 15, 2017 and July 26, 2017 quarterly operations review meetings attended by Respondents Dekker and Marnat; (ii) the June 30, 2016 "One Voice" meeting between FCA and RFE; (iii) internal communications concerning the sales projections of the Relevant Customers during the due diligence period; (iv) internal communications regarding the disclosures made to the Applicant about the Relevant customers; and (v) communications between ZF US and the BCS-RFE Businesses relating whether to update MPA Exhibit 12.1.1 "Exceptional Actions in the Interim Period." Ex. Nos. 1-3.

As the Applicant has no choice but to file for arbitration under the expedited rules of the DIS Rules as specified in the arbitration clause within the MPA, the need for efficient discovery of materials is of particular importance in this case. Decl. Masser ¶18. The DIS Rules do not prohibit consideration of documents or deposition testimony that would be collected if this Application is granted. Decl. Masser ¶ 19. Importantly, under the DIS Rules, an arbitrator may order discovery of this nature, but lacks the power under law to compel it. Decl. Masser ¶¶ 19, 26. Moreover, an arbitrator acting under the DIS Rules would, by all accounts, be receptive to considering evidence obtained as a result of this Application. Decl. Masser ¶ 19. Accordingly, discovery resulting from this Application would be beneficial to the parties and tribunal.

ARGUMENT

I. THE APPLICATION MEETS THE STATUTORY PREREQUISITES OF 28 U.S.C. SECTION 1782

Section 1782 provides in pertinent part that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person . . . ." 28 U.S.C. § 1782(a). There are four requirements to obtain discovery pursuant to Section 1782:

> (1) the request must be made "by a foreign or international tribunal," or by "any interested person"; (2) the request must seek evidence, whether it be the "testimony or statement" of a

> person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.

financialright GmbH v. Robert Bosch LLC, 294 F. Supp. 3d 721, 727–28 (E.D. Mich. 2018) (*citing In re Clerici*, 481 F.3d 1324, 1331–32 (11th Cir. 2007). Each of these four statutory prerequisites is satisfied here.

First, the statute requires that the application be "made by an interested person" is met here. The Applicant is clearly an "interested person" within the meaning of the statute because the Applicant will be the claimant in the forthcoming coming arbitration in Munich, Germany. *Intel,* 542 U.S. at 256 (observing that a litigant is the most "obvious" example of an interested person).

Second, this Application meets the second statutory prerequisite because the Application seeks documents and deposition testimony under Federal Rules of Civil Procedure 26, 30, and 34 from the Respondents. *In re Application for Discovery Pursuant to 28 U.S.C. § 1782*, 1:19-MC-0102, 2019 WL 4110442, at *2 (N.D. Ohio Aug. 29, 2019) (finding that a Section 1782 request for "documents and deposition testimony" that is "directly relevant" satisfied the requirement). The documents and deposition testimony requested in this Application qualifies as evidence in the arbitration as it is relevant to the facts underpinning the claims of

fraudulent misrepresentation and omission under German law. Decl. Masser ¶ 25.

Third, the Applicant meets the third statutory prerequisite because this Application seeks materials "for use" in a contemplated foreign arbitration. District Courts throughout the United States have recognized that the burden of proving the "for use" requirement is "de minimis." *See, e.g., In re Veiga*, 746 F. Supp. 2d 8, 17 (D.D.C. 2010) ("[T]he burden imposed upon an applicant is *de minimis*."); *In re Application of Sveaas*, 249 F.R.D. 96, 106–07 (S.D.N.Y. 2008) (noting that the courts apply a "broadly permissive" standard in determining whether the information is relevant to a foreign proceeding). This "liberal standard" is satisfied so long as the discovery sought "has some reasonable bearing upon" a pending foreign proceeding or a foreign proceeding that is within the "reasonable contemplation" of the Applicant. *See In re Veiga*, 746 F. Supp. 2d at 19, 21, 23 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004)).

As the Sixth Circuit has definitively ruled, a private foreign commercial arbitration tribunal such as a tribunal constituted under the DIS Rules is a "foreign or international tribunal" and satisfies the third statutory requirement of Section 1782. *In re Application to Obtain Discovery for Use in For. Proceedings*, 939 F.3d 710, 730 (6th Cir. 2019) ("[O]ur conclusion [is] that the word "tribunal" in § 1782(a) encompasses private, contracted-for commercial arbitrations.").

Moreover, the proceedings that these materials and information will be used in is within "reasonable contemplation." *In re Caterpillar Inc.*, 3:19-MC-0031,

2020 WL 1923227, at *9 (M.D. Tenn. Apr. 21, 2020) (citing the Second Circuit's standard in *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 124 (2d Cir. 2015) to explain how an applicant must provide some objective indicium that the proceeding is "within reasonable contemplation."). An applicant meets the "reasonable contemplation" yardstick where the applicant provides "some concrete basis" for the claims such that the foreign proceeding is not merely "a twinkle in counsel's eye." *Certain Funds,* 798 F.3d at 124.

This standard is plainly met here, as the Applicant has (i) retained counsel to undertake an investigation of the facts and to prepare the Request for Arbitration, Decl. Huang ¶ 21; (ii) retained experts to analyze the scope of the Applicant's suffered damages, Decl. Masser ¶ 22; (iii) has set forth details and the basis of its legal claim, Decl. Masser. ¶¶ 10-14; and has attested to its intent to file the Request for Arbitration. Decl. Huang ¶ 8. As the contemplated arbitration is a significant claim with a potential remedy of unwinding a billion-dollar transaction, counsel is working diligently to prepare and file the Request for Arbitration and is awaiting the financial analysis from the experts. Decl. Masser ¶ 29. Accordingly, this Application has set forth a sufficient basis that meets and exceeds the reasonable contemplation standard. *See In re Hansainvest Hanseatische Inv.- GmbH,* 364 F. Supp. 3d 243, 249 (S.D.N.Y. 2018) (finding requirement met where applicants provided "indicia that litigation is contemplated, including hiring German litigation counsel, retaining experts, and sending a detailed demand letter[.]"); *In re ALB- GOLD Teigwaren GmbH*, 19MC1166MKBST, 2019 WL 4140852, at *10

(E.D.N.Y. Aug. 30, 2019) (finding requirement met where the applicant provided "indicia of possible fraud by the respondents" even though foreign counsel had yet to be hired).

Fourth, the Respondents are "found" in the District. Generally, district courts have held that if the Court can exercise "personal jurisdiction over the person whom discovery is discovery is sought," the respondent can be "found" within the district. *In re Del Valle Ruiz*, 342 F. Supp. 3d 448, 453 (S.D.N.Y. 2018), *aff'd sub nom. In re del Valle Ruiz, 939 F.3d 520* (2d Cir. 2019). A court has general, all-purpose personal jurisdiction over a legal entity when that entity is incorporated in the state or it has its principal place of businesses within the state. In *Hertz Corp. v. Friend*, the Supreme Court clarified that the principal place of business for a corporation is the "nerve center" where "a corporation's officers direct, control, and coordinate the corporation's activities." 559 U.S. 77, 92–93 (2010). For natural persons, general jurisdiction is clearly established when the individual resides within the district. *Conn v. Zakharov*, 667 F.3d 705, 711 (6th Cir. 2012) ("[Natural persons] who reside in the forum state will always be subject to the personal jurisdiction of the court.").

The Respondents can be found in the Eastern District of Michigan. ZF US has its principal place of business and its "North American Headquarters" in Livonia, Michigan, which is within this district. Decl. Masser ¶ 8. Respondents Dekker and Marnat also can be found in the district as they both reside in the Eastern District of Michigan.

Lastly, "it is neither uncommon nor improper for district courts to grant applications made pursuant to

§ 1782 *ex parte*. The [respondents'] due process rights are not violated because [they] can later challenge any discovery request by moving to quash pursuant to Federal Rule of Civil Procedure 45(c)(3)." *Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012) (collecting cases). Indeed, district courts within the Sixth Circuit routinely permit *ex parte* 1782 petitions. *See financialright GmbH v. Robert Bosch LLC*, 294 F. Supp. 3d 721, 736 (E.D. Mich. 2018) (*ex parte* application); *In re IPC Do Nordeste, LTDA, For an Or. Seeking Discovery Under 28 U.S.C. 1782, 12-50624*, 2012 WL 4448886, at *2 (E.D. Mich. Sept. 25, 2012) (same); *In re Ltr. Rogatory from J. Ct., Dist. of Montreal, Canada*, 383 F. Supp. 857, 857 (E.D. Mich. 1974), aff'd, 523 F.2d 562 (6th Cir. 1975) (same); *In re Application of Nokia Corp.*, 107-MC-47, 2007 WL 1729664, at *1 (W.D. Mich. June 13, 2007) (same). For the reasons above, this *ex-parte* Application meets the statutory standards.

II. THE DISCRETIONARY FACTORS WEIGH IN FAVOR OF GRANTING THE APPLICATION

If all of the statutory requirements are met, § 1782 then courts consider the discretionary factors identified by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004) to decide whether or not to grant the application. In exercising this discretion, the Supreme Court has instructed district courts to consider the "twin aims" of the statute, which are "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Id.* at 252 (citation omitted).

Relevant factors courts consider in determining whether to order discovery include: (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding,"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of… the court or agency abroad to U.S. federal-court judicial assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the request is "unduly intrusive or burdensome." *Id.* at 264–65 (the *Intel* factors); *JSC MCC EuroChem v. Chauhan*, 18-5890, 2018 WL 9650037, at *1 (6th Cir. Sept. 14, 2018). These factors weigh in favor of granting the Application here.

First, Respondents Dekker and Marnat are non-parties to the contemplated foreign commercial arbitration. Although, Respondent ZF US will be a party to the proceeding, this Court should consider the aim of "efficient assistance" and weigh this factor in the Applicant's favor. *Intel*, 542 U.S. at 252. As a Northern District of Ohio Court reasoned, the first *Intel* factor may still weigh in favor of granting the application even if the respondent is a party to the proceeding where, like here, the arbitral tribunal lacks power to compel the requested discovery. *See In re Application for Discovery Pursuant to 28 U.S.C. § 1782.*, 1:19-MC-0102, 2019 WL 4110442, at *2 (N.D. Ohio Aug. 29, 2019) (weighing the first *Intel* factor in favor of granting the application even when the respondents were parties to an Italian proceeding because, as residents of Ohio, the respondents fell outside the authority of the Italian courts to compel compliance with domestic discovery). This is

precisely the case here. Decl. Masser ¶ 27. Similarly, here, the proceedings will occur in Munich, Germany, but the Respondents are found here in the Eastern District of Michigan. Accordingly, this Application seeks discovery of materials and information that is located, here, in the Eastern District of Michigan. *See* Ex. Nos. 1-3. Moreover, the DIS Rules have no mechanism to compel discovery in the United States. Decl. Masser ¶ 26. For these reasons, it would be efficient to grant this Application because the discovery lies here in the district, and this Court has the power to compel its production to promote the twin aims of the statute.

Second, the nature of the foreign tribunal weighs in favor of granting this Application. The second *Intel* factor weighs "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Intel*, 542 U.S. at 264. "Absent specific directions to the contrary from a foreign forum, the statute's underlying policy should generally prompt district courts to provide some form of discovery assistance." *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995). This factor weighs in favor of permitting Section 1782 discovery unless there is "authoritative proof that [the] foreign tribunal would reject evidence obtained with the aid of section 1782." *Id.* at 1100.

The character of the contemplated proceeding supports the second *Intel* factor. For the character of the proceedings, district courts consider the issues at stake in the proceeding and whether its discovery assistance is needed. *See in re Application of Chevron Corp.*, 762 F. Supp. 2d 242, 250 (D. Mass. 2010)

(finding in favor of the second *Intel* factor when respondent has "at least some information" concerning the foreign tribunal and it was not "entirely clear" that the foreign tribunal would be receptive or not to the evidence). Here, the discovery sought in the Applicant's proposed Subpoenas bear squarely on the issues presented by the claims in the DIS arbitration, including (i) the February 15, 2017 and July 26, 2017 quarterly operations review meetings attended by Respondents Dekker and Marnat; (ii) the June 30, 2016 "One Voice" meeting between FCA and RFE; (iii) electronic communications concerning the sales projections of the Relevant Customers during the Due Diligence Period; (iv) electronic communications regarding the disclosures made to the Applicant about the Relevant customers; and (v) communications between ZF US and the BCS-RFE Businesses relating whether to update MPA Exhibit 12.1.1 "Exceptional Actions in the Interim Period." *See* Ex. Nos. 1-3. Accordingly, the nature of this proceeding supports granting this Application as the desired discovery would be beneficial to the proceeding.

Next, there is every indication that an arbitral tribunal constituted under the DIS Rules would be receptive to this discovery. *See* Decl. Masser ¶ 25; *In re Application of Gemeinschaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *6 (S.D.N.Y. Dec. 29, 2006) (holding that this factor weighs in favor of permitting 1782 discovery absent "authoritative proof" that the foreign tribunal would reject the discovery sought). Here, the rules of the DIS empower the arbitrator to consider the discovery acquired by Luxshare in connection with this Application. Decl. Masser ¶ 19. Additionally, the

courts of this Circuit have recognized that the receptivity factor is supported when the evidence resulting from the granting of an application is "evaluated by the judicial officer… to independently evaluate the probative value of that evidence." *See In re Application for Discovery Pursuant to 28 U.S.C. § 1782.*, 1:19-MC-0102, 2019 WL 4110442, at *3 (N.D. Ohio Aug. 29, 2019) (weighing factor in favor of applicant and granting application where applicant's foreign attorneys attested that the discovery sought in the application would be discoverable under the applicable rules). Here, the arbitral tribunal has the power "to independently evaluate the probative value of each piece of evidence" collected from this Application and decide whether or not to admit it. Decl. Masser ¶ 19. Therefore, the nature of these proceedings and the receptivity of the DIS tips sharply in favor of granting this Application.

Third, the Application is not an attempt to circumvent the proof-gathering restrictions. As the Second Circuit has clarified, "proof gathering restrictions are best understood as rules akin to privileges that ***prohibit*** the acquisition or use of certain materials, rather than as rules that ***fail to facilitate***" discovery. *Mees v. Buiter*, 793 F.3d 291, 303 n.20 (2d Cir. 2015) (emphasis in original).[1] In the

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[1] *JSC MCC EuroChem v. Chauhan*, 3:17-MC-00005, 2018 WL 3872197, at *13 (M.D. Tenn. Aug. 15, 2018) (citing "long-standing Second Circuit precedent "reject[ing] any requirement that evidence sought in the United States pursuant to § 1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding." *Metallgesellschaft AG v. Hodapp (In re Metallgesellschaft AG*), 121 F.3d 77, 79 (2d Cir. 1997)).

former situation, the third *Intel* factor weighs against the application, while in the latter situation—*i.e.*, instances where a country or arbitral rules "do not enable broad discovery within a litigation does not mean that it haves policy that restricts parties from obtaining evidence through other lawful means"–the third *Intel* factor weighs in favor of permitting the discovery. *Id.*

As noted above, the Arbitration Rules of the DIS do not prohibit the discovery sought in this Application and the arbitral tribunal has the authority to consider the evidence. Decl. Masser.¶ 25. This Application seeks discovery that is here in the Eastern District of Michigan, and the DIS Rules do not have any mechanism to compel its production. Decl. Masser ¶ 26.[2] Accordingly, this Application does ***not*** "seek to circumvent foreign proof-gathering restrictions" of the DIS Rules because the DIS Rules do not "prohibit" this discovery. *Intel*, 542 U.S. at 265. This factor, like the others, weighs in favor of the Applicant.

Fourth, the discovery requests contained in the Subpoenas are not unduly intrusive or burdensome, as the discovery sought in this Application is "narrowly tailored" to obtain "easily identifiable,

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[2] Unlike the case *In re IPC Do Nordeste, LTDA, For an Or. Seeking Discovery Under 28 U.S.C. 1782*, 12-50624, 2012 WL 4448886, at *7 (E.D. Mich. Sept. 25, 2012), where the court found that the third *Intel* factor weighed against the application because it sought information regarding a Brazilian corporation through its U.S. parent entity rather than in Brazil, the location of the tribunal and discovery materials. Here the materials and information are here in the Eastern District of Michigan and involve a U.S. entity, thus this Application promotes the statute's aim of efficiency.

readily accessible" documents and deposition testimony. *In re Application for Discovery Pursuant to 28 U.S.C. § 1782*, 1:19-MC-0102, 2019 WL 4110442, at *3 (N.D. Ohio Aug. 29, 2019). Specifically, the proposed Subpoenas are limited to seeking documents and testimony relating to the events at issue in the contemplated arbitration, including, (i) the February 15, 2017 and July 26, 2017 quarterly operations review meetings attended by Respondents Marnat and Dekker; (ii) the June 30, 2016 "One Voice" meeting between FCA and RFE; (iii) electronic communications concerning the sales projections of the Relevant Customers during the due diligence period; (iv) electronic communications regarding the disclosures made to the Applicant about the Relevant customers; and (v) communications between ZF US and the BCS-RFE Businesses relating whether to update MPA Exhibit 12.1.1 "Exceptional Actions in the Interim Period". *See* Ex. Nos. 1-3. Thus this Application is not unduly intrusive or burdensome.[3]

Because each of the discretionary factors weighs in favor of granting the Application, this Court should

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[3] To note, this Application is distinguishable from the application in *financialright GmbH v. Robert Bosch LLC*, 294 F. Supp. 3d 721, 727–28 (E.D. Mich. 2018). In *financialright GmbH,* the applicant sought to advance claims worth only €15,000 in an Irish proceeding, and yet propounded 24 requests on a non-party that would have yielded "hundreds of thousands documents." *Id.* Additionally, the court in *financialright GmbH* discredited the recently filed German litigation because prior, unsuccessful foreign litigation by the applicant in Germany had likely already doomed the recently filed claims in Germany. *Id.* In stark contrast, this Application involves a dispute in the realm of a billion dollars and has narrowly tailored its requests for documents and deposition testimony.

exercise its discretion and grant the Application with leave to serve the Subpoenas.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Application and enter the Proposed Order, attached as Exhibit 7, granting leave to serve the Subpoenas submitted in connection with the Application.

Dated: October 16, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	:	[___ Civ. ____ (___) (___)]

DECLARATION OF DAVID HUANG

I, David Huang, pursuant to 28 U.S.C. § 1746 hereby declares as follows:

1. I am the Vice President of Luxshare Precision Industry Company Limited, an equity investment of Luxshare Ltd. (the "Applicant"), and I submit this declaration in support of Luxshare Ltd.'s Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings (the "Application").

2. I make this declaration based on personal knowledge and my review of contemporaneous documents. 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 derived from the sources identified or attached as exhibits to my declaration.

I. Overview of the Background Giving Rise to the Foreign Proceedings

3. The Applicant, Luxshare Ltd. ("Luxshare" or "Applicant"), is a limited liability company

incorporated in Hong Kong and is engaged through its investments in the business of manufacturing in the fields of consumer electronics, communications, and automotives. The Applicant has global operations and, through its investments, also employs more than 180 workers in Livonia, Michigan.

4. Respondent ZF Automotive US Inc., f.k.a. TRW Automotive Inc. ("ZF US") is a company with its principal place of business in Livonia, Michigan that is engaged in the business of manufacturing and supplying automotive systems, modules, and components to automotive original equipment manufacturers and related aftermarkets.

5. This Application relates to the Applicant's purchase of two business units from ZF US for nearly a billion dollars on August 29/30, 2017 (the "Transaction"): (i) ZF US's Global Body Control Systems' business unit (the "BCS Business") and (ii) Radio Frequency Electronics business unit ("RFE Business") (collectively, the "BCS-RFE Businesses"). The sale was governed by a master purchase agreement entered by and between the Applicant and ZF US in Munich, Germany on August 29/30, 2017 (as amended, the "MPA"). Specifically, this Application relates to ZF US's omissions of critical factual information that induced the Applicant to enter into the deal and to overpay for these business units by at least $120 million.[1]

6. I was personally involved in the Transaction and my role was mainly managing the Transaction

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[1] The Applicant has retained an expert to analyze the financials to determine the quantum of damages, and that the Applicant reserves all rights to amend its claimed damages.

process. I coordinated with internal as well as external stakeholders to evaluate the BCS-RFE Businesses.

7. As described in greater detail below, ZF US failed to disclose vital facts that arose between April 2017 and July 2017 (the "Due Diligence Period") concerning three of its largest customers, Fiat Chrysler Automobiles ("FCA"), Ford Motor Company ("Ford"), and General Motors ("GM") (collectively, the "Relevant Customers"). After the Transaction, I learned that there were "critical" developments that adversely impacted the BCS Business' sales to the Relevant Customers. ZF US omitted these critical developments and failed to disclose any of this information to the Applicant during the Due Diligence Period or in the MPA's Exhibit 12.1.1 as updated on December 22, 2017 and April 16, 2018 (collectively, "Exhibit Updates").

8. As a result, the Applicant intends to file arbitration proceedings against ZF US in Munich, Germany in under the Arbitration Rules of the German Institution of Arbitration eV. (DIS) ("DIS Rules") and pursuant MPA Section 20.10.2.

II. The Genesis of the Sale and the Due Diligence

9. Luxshare was approached by an investment firm in early 2017 to discuss whether it would be interested in a potential acquisition target to expand its business. After initially being hesitant, Luxshare approached Commerzbank in March 2017 and seriously started to consider to bid for the BCS-RFE Businesses.

10. Interested in the potential acquisition of the BCS-RFE Businesses, the Applicant expressed its

interest to ZF US. ZF US then provided the Applicant with a confidential information pack prepared by the global investment bank on ZF US's behalf. The confidential information pack included materials prepared by a global accounting firm on ZF US's behalf and included the "Sale Supporting Business Plan." The Sale Supporting Business Plan detailed the current and projected sales for the BCS-RFE Businesses, and included the 2016 actual financials, and an estimate for 2017-2021 for the Relevant Customers. Luxshare then submitted a non-binding offer on April 3, 2017.

11. After further reviewing the materials provided by ZF US during the bidding process, the Applicant submit ted a revised confirmed offer on April 24, 2017 of a net purchase price of $1.135 billion that was subject to additional due diligence. In the offer letter, the Applicant confirmed that the offer was based on the Applicant' s review of the adjusted financials and materials provided by ZF US and its advisors. The adjusted financial referenced in the ZF US's due diligence materials presented the 2014, 2015, 2016 actual financials and the 2017 through 2021 estimated adjusted financials of the Relevant Customers and other customers of the BCS-RFE Businesses.

12 After ZF US received Luxshare's first non-binding offer on April 3, 2017, Luxshare engaged in several months of further due diligence, during which time it received additional information from ZF US. Such additional due diligence included an expert session in Zurich on May 10, 2017, access to the virtual data room, the ability to ask questions and receive answers, a second version of the materials

prepared by ZF US's accounting firm on May 22, 2017, and a management presentation on June 20, 2017.

13. Access to the VDD was an important aspect of the due diligence process as it provided access to the books and records of the BCS-RFE Businesses. Although initially planned as three phases, the VDD opened to the Applicant in two phases with ZF US providing the Applicant with progressively greater access to information and materials.

14. The first phase of the VDD was the opening of the "Green Room" and "White Rooms" (collectively, "Green/White Rooms") on May 18, 2017 that offered access to information and documents on material costs, product pricing, R &D, capital expenditures, the 2017 budget, sales details by region, customer, and product. The Green/White Rooms also provided access to ZF US's wins and losses by customer program from 2016-2017 YTD, the profitability of win s and losses, and included information on the reason for any loss.

15. The second and final stage of the VDD was the opening of the "Red Room" on June 26, 2017. The Red Room offered access to additional information about ZF US including access to ZF US's HR data, employment compensation, customer contracts, purchasing contracts, and corporate agreements including exceptions to customer's terms and conditions

16. The Applicant signed the MPA on August 29/30, 2017. On August 25, 2017 (five days prior to the signing of the MPA on August 30, 2017), ZF US delivered confirmation to the Applicant, which affirmed ZF US's Seller's Representations, including its representation regarding "Sold Contracts" was

"true, correct, and complete as of August 25th, 2016, to our best knowledge and [did] not omit to state anything, the omission of which could make any of the Seller's Representations misleading." Additionally, ZF US's "knowledge" under the MPA included what was actually known by Messrs. Dekker and Marnat.

17. The MPA also included a scheduled, Exhibit 12.1.1, titled "Exceptional Actions in the Interim Period" that was required to detail any "exceptional" changes from the Ordinary Course of Business between September 1, 2017 and April 16, 2018.

18. The transaction closed on April 27, 2018 in Frankfurt, Germany.

II. ZF US Did Not Disclose the Critical Issues During the Sales Process

19. I have reviewed the declaration of Gregor Tschernjavski that is being filed in support of this Application. The "critical issues" described in Mr. Tschernjavski's declaration (the "Critical Issues") were not disclosed to Luxshare prior to Signing the MPA. Decl. Tschernjavski 15-21. None of these developments were disclosed prior to the Closing of the Transaction.

20. Because of my involvement as project lead for the Transaction, I personally attended the main meetings with ZF US and ZF Friedrichshafen management prior to Signing. While we discussed sales and projections at almost any meeting, as is usual for this size of a deal, ZF US never disclosed the issues described in Mr. Tschernjavski' s declaration to the Applicant at any time. Specifically, ZF US failed to disclose any of the four "Critical Issues" described in Paragraphs 15-22 of Mr. Tschernjavski's declaration that have come to our attention after the

Transaction closed, in particular: (i) the reduced sales volumes for FCA relating to Stelvio and Giulia, (ii) FCA putting the RFE Business "out of strategy", (iii) Ford's decision not to award the P702 platform to the BCS Business, (iv) and GM' s cancellation of the 9BXX platform.

III. Preparation for Arbitration

21. In preparation for arbitration, the Applicant has retained Allen & Overy LLP in July of 2020 to represent the Applicant in this matter and prepare the Request for Arbitration, which the Applicant plans to file with the German Institution of Arbitration eV. (DIS) in Munich, Germany.

22. Further, in preparation of the contemplated arbitration, the Applicant has also retained Versant Partners in August 2020 to analyze the financial impacts of the issues that ZF US chose not to disclose and to determine the extent of the damages suffered by the Applicant.

IV. Summary of Respondent's Central Roles in the Events and the Need for Discovery from Them

23. As the Applicant intends to bring claims sounding in fraud, the details of the extent of ZF US's knowledge of the Critical Issues, and importantly, what ZF US decided to do with that information, is necessary to resolve this dispute.

24. As described in Mr. Tschernjavski's declaration, ZF US's executives, including Messrs. Dekker and Marnat, were directly involved in the events and activities that give rise to the foreign proceeding at issue, including:

- The February 15, 2017, quarterly operations review of the BCS Business.
- The July 26, 2017, quarterly operations review of the BCS Business.

25. Discovery is necessary to determine who else within ZF US management knew of the Critical Issues that were discussed in these quarterly operations review meetings. Specifically, documents and deposition testimony from Messrs. Dekker and Marnat is necessary to understand the extent of their knowledge of these "Critical Issues" and who they conveyed these underlying factual developments to at ZF US.

26. Further, discovery of written materials is necessary from ZF US to reveal the extent of ZF US's knowledge of the Critical Issues and their assessment of its importance to the Transaction. Additionally, discovery is necessary from ZF US to determine who within ZF US management knew about the developments discussed during the One Voice meeting on June 30, 2017 described in Paragraph 15-22 of Mr. Tschernjavski's declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 5– Oct. , 2020

/s/ David Huang
David Huang

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	:	[___ Civ. ____ (___) (___)]

DECLARATION OF ANNA MASSER

Anna Masser, pursuant to 28 U.S.C. § 1746 hereby declares as follows:

1. I am an attorney [*Rechtsanwältin*] qualified to practice in Germany, and a member of Allen & Overy LLP ("A&O"). I represent the Applicant, Luxshare Ltd. ("Applicant" or "Luxshare") in connection with contemplated arbitration proceedings in Munich, Germany against ZF Automotive US, Inc. ("ZF US").

2. I submit this Declaration in support of Luxshare's application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings (the "Application").

3. 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.

4. I incorporate by reference declarations of David Huang and Gregor Tschernjavski, where I believe the facts and matters to be 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.

I. Background Regarding the Respondents

5. This Application seeks discovery bearing on imminent foreign arbitration proceedings from ZF US, Gerald Dekker, and Christophe Marnat (collectively, the "Respondents"). ZF US – then still acting under the name of TRW Automotive Inc. – was the Seller and former owner of the Global Body Control Systems ("BCS Business") and Radio Frequency Electronic ("RFE Business") business units (collectively, the "BCS-RFE Businesses"). In addition to discovery from ZF US, the Applicant also seeks discovery from two of ZF US's executive officers, Respondents Dekker and Marnat, who directly and personally participated in the relevant transactions and events described herein that gave rise to the contemplated foreign proceeding.

6. Respondent ZF US is a Delaware corporation with its "North American headquarters" and principal place of business located at 12001 Tech Center Drive, Livonia, Michigan.[1] ZF US is engaged in the business of supplying automotive systems, modules, and components to automotive original equipment manufacturers and related aftermarkets.

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[1] *See* https://cofs.lara.state.mi.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx; https://www.zf.com/usa_canada/en/company/company.html

7. Gerald Dekker served as the Senior Vice President Profitability from 2016 to 2017. Based on the review of public records, Mr. Dekker resides at 4262 Pocahontas Dr., Shelby Charter Township, Macomb County, MI 48315-1264.

8. Christophe Marnat served as a member of the Board of Directors of ZF US in 2016 and 2017, and as the Executive Vice President & CFO from at least 2016 to 2017. Based on the review of public records, Mr. Marnat resides at 2755 Ayershire Dr., Oakland County, MI 48302-0804.

9. Both Respondents Dekker and Marnat were directly involved in the sales process of the BCS and RFE Business Units. Both were – to Luxshare's current knowledge – aware of at least three of the four issues potentially now leading to the contemplated arbitration.

II. Luxshare's Legal Claim Under German Law

10. The arbitration arises out of the purchase by Luxshare of certain sales and shares pertaining to parts of ZF US's business, specifically the business units of Global Body Control Systems ("BCS") and Radio Frequency Electronics ("RFE"). These two businesses are together referred to in the transaction documentation as "Montreux." Luxshare purchased these business units for a price of roughly USD 1 billion under a Master Purchase Agreement ("MPA") signed on 29/30 August 2017.

11. After closing on Montreux, Luxshare became aware of certain material facts, as stated in the Declarations of Gregor Tschernjavski and David Huang, which ZF US deliberately chose not to disclose. Moreover, Luxshare discovered that ZF US

and its directors and officers knew of those facts prior to the signing of the MPA. *See* Deel. Huang 19. The underlying issues, of which ZF US was aware prior to signing were: (i) the decision of FCA, the most important customer of the RFE business, to phase out of RFE Business' Tire Pressure Monitoring System due to persistent quality problems; (ii) Ford's decision not to award the BSC Business for any vehicle components for the P702 Platform; (iii) GM's decision to discontinue eight of the nine programs of the 9BXX Platform, sharply reducing the BSC's projected sales revenue to GM; and (iv) the BSC Business' unexpected steep decline in sales to FCA for components for the Alfa Romeo Giulia and Stelvio cars.

12. ZF US's failure to disclose this material information was fraudulent and constitutes a willfully deceptive breach of its contractual obligations to the Applicant pursuant to §§ 280 para 1, 241 para 2, 311 para 2 of the German Civil Code (Bürgerliches Gesetzbuch), also known as culpa in contrahendo, fault during contractual negotiations. Under well-settled German law, a seller during the negotiations has a duty to (i) convey information that is factually accurate and (ii) disclose material facts that the buyer may reasonably expect to receive, inter alia information that may jeopardize the purpose of the transaction for the potential buyer. *See, e.g.* German Federal Supreme Court ("BGH") judgment dated 6 February 2002, VIII ZR 185/00, NZI 2002, 341, 343; BGH judgment dated 4 April 2001, VIII ZR 32/00, BGH NJW 2001, 2163; BGH judgment dated 28 November 2001, VIII ZR 37/01, NJW 2002, 1042, 1043; BGH judgment dated 4 March 1998, VIII ZR 378-96, BGH NJW-RR 1998, 1406, 1406 et. seq.; BGH

judgement dated 6 December 1995, VIII ZR 192/94, BGHNJW-RR 1996, 429).

13. The legal consequence of this breach is that Luxshare is entitled to either unwind the Transaction in its entirety or claim damages.

14. As a result of ZF US's fraudulent conduct, which has caused hundreds of millions of dollars of damages to the Applicant, the Applicant intends to bring claims in an arbitration for fraud and accordingly a breach of pre-contractual obligations against ZF US in Munich, Germany in accordance with the Arbitration Rules of the German Institution of Arbitration eV. (DIS), as per the arbitration agreement in the MPA.

This Application seeks this Court's assistance in obtaining crucial information concerning the precise circumstances of ZF US's knowledge and its internal decision process to conceal this information from the Applicant. This information is vital to the German arbitration that the Applicant will file, and will provide critical detail needed to assist the arbitral tribunal in resolving the Applicant's claims.

III. Evidence Obtained in Pre-Trial Discovery is Admissible m German Court

16. The German Federal Supreme Court has decided back in 1992 that a US judgement that has taken into account evidence obtained in pre-trial discovery is recognizable in Germany. *See* BGH judgement dated 4 June 1992, IX ZR 149/91, NJW 1992, 3096). The Court expressly held that such pre-trial discovery is no violation of the German public policy as per section 328 para. 1 no. 4 of the German Code of Civil Procedure ("CCP"). Based on that

decision, the Higher Regional Court of Düsseldorf in 2011 held that a pre-trial discovery ordered by a US court that was to be performed in Germany by way of letters rogatory cannot be objected to based on a violation of public policy. See OLG Düsseldorf decision dated 28 December 2011, I-3 VA 2/11, BeckRS 2013, 13966. Legal scholars agree that evidence obtained by way of pre-trial discovery in the US can be used in a German court proceeding. *See* Dombrowski, Verwertbarkeit der Erkenntnisse aus einer US-Discovery auch in deutschen Gerichtsverfahren, GRUR-Prax 2017, 272 et seq. with reference to further court decisions on this issue.

IV. Evidence obtained in pre-trial discovery is admissible in German arbitration proceedings under the Rules of the German Institution of Arbitration eV. (DIS)

17. Similarly, in an arbitration in Germany, an arbitral tribunal will take into account evidence obtained by way of a 28 U.S.C. § 1782 application.

18. In Section 20.10 of the MPA ("Arbitration Agreement") the parties agreed that potential disputes should be arbitrated under the Arbitration Rules of the German Institution of Arbitration e.V. ("DIS Rules"). The Applicant intends to file a Request for Arbitration to initiate these arbitration proceedings as per the Arbitration Agreement in Munich, Germany.

19. The Arbitration Agreement – unusually for this size of deal – refers to the Supplementary Rules for Expedited Proceedings of the DIS Rules. As per Annex 4 of the DIS Rules, this entails that the arbitration proceedings will be fast track – the award shall be made at the latest six months after conclusion

of the case management conference (Article 1, Annex 4 DIS Rules). There will only be one round of written submissions following the Request for Arbitration and the Answer thereto (Article 3, Annex 4 DIS Rules) and only one oral hearing (Article 4, Annex 4 DIS Rules). Generally, the tribunal shall at all times take into account the parties' specific interest in accelerating the proceedings (Article 2, Annex 4 DIS Rules). There is – under this sort of proceedings – a very high likelihood that there will be very limited document production. The burden of proof, however, to show the willful intent of ZF US might fall on the Applicant, at least ZF US can be expected to argue this. Without assistance of this Court it will, therefore, be very difficult – if at all possible – to see justice done.

20. Tribunals constituted under the DIS Rules are free to admit and weigh the evidence in the arbitration at their discretion. As per Article 28.1 of the DIS Rules, the arbitral tribunal shall establish the facts of the case that are relevant and material for deciding the dispute. For this purpose, the arbitral tribunal may order any party to produce documents or electronically stored data (Article 28.2 DIS Rules). Thus, if and to the extent this Court grants the Application and Luxshare indeed gets access to documents that are relevant and material to the outcome of the contemplated arbitration and submits them as evidence in the German arbitration proceedings, the arbitral tribunal will – based on Article 28.2 of the DIS Rules – admit them as evidence and determine the relevance and materiality of the content. Thus, the arbitral tribunal will independently evaluate the probative value of each piece of evidence.

21. Under the DIS Rules, there are – hence – no blanket proof-gathering restrictions.

22. The same is true under the German CCP – Section 1042 para. 4 second sentence CCP provides: "*The arbitral tribunal is authorized to decide on the admissibility of the taking of evidence, to so take evidence, and to assess the results at its sole discretion*." Thus, the arbitral tribunal, once constituted, will be able to decide on the admissibility of evidence at its discretion.

23. Legal scholars agree with this conclusion. One leading commentary states that any evidence legally obtained in a foreign jurisdiction may be relied upon before an arbitral tribunal. *See* Schlosser, in: Stein/Jonas, CCP, 23rd ed. 2014, § 1050 Rn. 26. Schlosser emphasizes that in case a foreign court is willing and able to support evidence gathering for an arbitration in Germany there is no reason from a German law perspective to prohibit the parties or the arbitral tribunal to make use of this possibility. This is also true if the possibilities of the foreign court are broader than the ones a German court would have. See Schlosser, in: Stein/Jonas, CCP, 23rd ed. 2014, § 1050 Rn. 24).

24. While some authors argue that – once constituted – a party should ask the arbitral tribunal for permission before approaching the US courts, this issue is non-existent in cases where – like presently – there is not yet an arbitral tribunal that the Applicant could approach. An arbitral tribunal taking into account evidence obtained prior to the constitution of the arbitral tribunal is unproblematic. *See* Oehm, Das Rechtshilfeverfahren in Beweissachen nach 28 U.S.C. § 1782 in der internationalen Handels- und

Investitionsschutzschiedsgerichtsbarkeit, 2016, p. 170 *et seq*.).

25. Finally, if the Federal Supreme Court allows evidence obtained in pre-trial discovery, cf. supra ¶ 16, the conclusion is valid that this is even more true before an arbitral tribunal seated in Germany. This is because arbitral tribunals have greater discretion than state courts when deciding whether to admit or disallow evidence – tribunals are not bound by means that state courts can deploy. *See Wilske/Markert*, in: BeckOK, ZPO, 37th ed. 1.7.2020, § 1042 no. 28.

26. Accordingly, I have no reason to believe that the arbitral tribunal that will be selected for the intended arbitration in this matter would not be receptive to any documents or testimony produced because of this Application.

27. Finally, the Applicant is dependent on this Court because the Arbitral Tribunal does *not* have the power to compel discovery from non-parties. Even with regard to parties to the arbitration, an arbitral tribunal does not have coercive means to impose production of documents or witness testimony. For such evidentiary measures, the Arbitral Tribunal would have to request a State Court for their execution as per Section 1050 of the German Code of Civil Procedure. *See* Voit in Musielak/Voit, ZPO, 17th ed. 2020, § 1050 no. 1 and § 1042 no. 27; Wilske/Markert in: BeckOK ZPO, 37th Ed. 1.7.2020, § 1050 no. 1, 4 and § 1042 no. 27; Münch in: Münchener Kommentar ZPO, 5th ed. 2017, § 1050 no. 1, 4, 8 and § 1042 no. 118.

V. Preparation to Initiate a Foreign Arbitration

28. In preparation for arbitration, the Applicant has retained A&O on July 1, 2020 to represent the Applicant in this matter and prepare the Request for Arbitration that the Applicant intends to file in Munich, Germany.

29. Further, to prepare for the intended arbitration, the Applicant has retained Versant Partners to analyze the financial materiality of the issues that ZF US chose not to disclose to determine the extent of the damages suffered by the Applicant.

30. A&O is currently preparing the Request for Arbitration and Versant Partners is working on the expert report to be filed to substantiate and prove the financial impact of each of the four issues that ZF US deliberately chose not to disclose to the Applicant. The Applicant has authorized the filing of the Request for Arbitration, and A&O will file the request once it is ready.

31. The Applicant seeks this Application because it is an efficient means to collect additional facts that are highly relevant to the dispute. The documents, information, and relevant persons are located in the Eastern District of Michigan as well as the key events that are central to this dispute. As the Applicant intends to file for arbitration under the expedited rules of the DIS Rules, the need for efficient discovery of materials is even more important and indispensable.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 29.9. 2020, 2020.

/s/ Anna Masser
Anna Masser

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	:	[___ Civ. ____ (___) (___)]

DECLARATION OF GREGOR TSCHERNJAVSKI

I, Gregor Tschernjavski, pursuant to 28 U.S.C. § 1746 hereby declares as follows:

1. I am the CFO of BCS Automotive Interface Solutions, and I submit this declaration in support of Luxshare Ltd.'s (the "Applicant") Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings (the "Application").

2. I make this declaration based on personal knowledge and my review of contemporaneous documents. 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 derived from the sources identified or attached as exhibits to my declaration.

I. Background on ZF Automotive US Inc. and the BCS-RFE Businesses

3. ZF Automotive US Inc., f.k.a. TRW Automotive Inc. ("ZF US") is a company that is engaged in the business of manufacturing and supplying automotive

systems, modules, and components to automotive original equipment manufacturers and related aftermarkets. ZF US operated and sold two of its business units to the Applicant: (i) ZF US's Global Body Control Systems' business unit (the "BCS Business") and (ii) Radio Frequency Electronics business unit ("RFE Business") (collectively, the "BCS-RFE Businesses") during the course of my employment with the BCS Business Unit, starting from January 2017 through April of 2018.

4. The BCS Business Unit develops and manufactures products used in vehicle interiors dedicated to vehicle command and control. The major products of the BCS Business include switches, steering column control modules, HVAC controls, rain light sensors including humidity and solar load sensing, and mechanical/electrical steering locks.

5. The RFE Business was a separate business unit from the BCS Business and it supplies various components for automobiles to original equipment manufacturers ("OEMs"). Two of the RFE's prominent products were its entry systems and sensors, both of which employ radio frequency technology. The RFE Business's entry system products consisted of both remote keyless entry and passive entry systems. Concerning the sensor product line, the RFE Business manufactured and developed Tire Pressure Monitoring Systems ("TPMS").

6. I joined the BCS Business as the Head of Finance in January 2017, having worked for another Business Unit within TRW previously, and remained in this role through the closing of the sale. I was personally involved in the sales process, and specifically involved in the roadshows and financial

due diligence. This entailed drafting answers to financial due diligence queries from bidders, such as the Applicant, and sending those draft answers to the mergers and acquisitions group of ZF Friedrichshafen AG ("ZF M&A"). ZF Friedrichshafen AG ("ZF AG") is the parent entity of ZF US. Thus, bidders, such as the Applicant, would communicate with ZF M&A and would not directly communicate with employees of ZF US such as myself.

7. Respondent Mr. Marnat served as a member of the Board of Directors for ZF US in 2016 and 2017, and as the Executive Vice President and CFO from 2016 to April 2018. *See* Ex. A. Respondent Mr. Dekker was the Senior Vice President Strategic Initiatives of ZF US from 2016 to 2017 and became a director of ZF US in 2018.

II. The Genesis of the Sale and the Relevant Customers

8. In April 2017, ZF AG marketed its BCS-RFE Businesses in a "roadshow" in China to the Applicant. ZF AG provided materials to the Applicant that showed that the BCS-RFE Businesses were profitable businesses with long-standing relationships with several prominent customers. Following this, ZF AG provided the Applicant materials prepared by KPMG on ZF US's behalf and included the "Adjusted Financials." The Adjusted Financials presented the 2014, 2015, 2016 actual financials and the 2017 through 2021 estimated adjusted financials of the BCS-RFE Business, including current and projected sales for each customer.

9. Relevant to the Application, sales involving three of the BCS-RFE Businesses' largest customers were detailed in the Adjusted Financials: Fiat

Chrysler Automobiles ("FCA"), Ford, Motor Company ("Ford"), and General Motors ("GM") (collectively, the "Relevant Customers").

10. FCA was a key customer for the BCS Business because the business unit provided several vehicle components for the new models of FCA vehicles such as the Alfa Romeo Giulia and Stelvio models. The Adjusted Financials projected an aggregate sales volume for the Alfa Romeo Giulia and Stelvio from 2017 to 2021 of approximately $101 million.

11. FCA furthermore was one of the two main customers of the RFE Business's TPMS product line and keyless access entry systems, primarily developed in Farmington Hills, MI, and produced in Auburn, NY. FCA provided the RFE Business with approximately 55% of its revenue for TPMS and passive entry / remote keyless entry according to the Adjusted Financials. Together, this accounted for approximately $340 million in sales in the Adjusted Financials from 2017 to 2021, including expected growth in China.

12. Ford was another key customer for the BCS Business because of Ford's orders for various vehicle components, such as heating, ventilation and air conditioning units, for platforms such as the P552 Platform, which represents Ford F-series trucks. The P702 is the successor platform for the P552 Platform, and was due to be launched in 2020. In the automotive supplier industry, a "platform" such as the P702, is a term that refers to a specific model of automobile. The BCS Business had substantial sales of roughly $100 million a year with Ford through the supply of vehicle components for Ford's P552 Platform.

13. Although the sales of the P702 Platform were supposed to start only in 2020, the projected sales volume related to the P702 Platform in the Adjusted Financials amounted to approximately $85 million up to 2021 and over $300 million up to 2026. The high volume in a short-time frame underscores how important the P702 Platform was for the BCS Business, with its Winona plant being fully dependent on Ford and specifically on this one program.

14. A third key customer for the BCS Business was GM and the supply of vehicle components for its 9BXX Platform. GM had orders from the BCS Business for nine car program variants. Steering column control modules and other components were to be produced with an estimated product life cycle of seven years. The Adjusted Financials projected a total sales volume of approximately $44 million and the lifetime sales volume over seven years relating to the 9BXX Platform amounted to a total of approximately $89 million.

III. Events During the Sale and Due Diligence

15. From February 2017 to July 2017 (the "Due Diligence Period"), I, and other executives of the BCS Business, attended three quarterly operations review meetings on February 15, 2017, April 26, 2017, and July 26, 2017 ("Operations Review Meetings").

16. Generally, Ralf Jeskulke, Senior Vice President and General Manager of the BCS Business, led the Operations Review Meetings, while I was in a participant role. At two of these three Operations Review Meetings, we discussed several important events involving the Relevant Customers and

impacting the BCS Business. In particular, the "VP Commentary" on the first pages of the Operations Review Meeting presentation listed such important events and Mr. Jeskulke discussed the issues that were mentioned in these summaries. Exs. B - C. I also became aware, through the review of contemporaneous documents dating from June 2017, that the RFE Business had critical factual developments involving its sales to FCA. Ex. D.

17. On February 15, 2017, I attended the quarterly operations review meeting with Mr. Marnat to review and discuss current state of the BCS Business. The quarterly operations review meeting is an operational meeting that included at that time the Senior VP and General Manager, VP Finance and VP Sales of the BCS Business, along with other BCS executives and the ZF US executive leadership team supervising the BCS Business, amongst other ZF US businesses. At this quarterly operations review, the meeting covered the sales volumes for FCA for several vehicle components for the new models Alfa Romeo Giulia and Stelvio. It was discussed at this February 15, 2017 quarterly operations review meeting that the actual production numbers for Alfa Romeo Giulia were falling. It was conveyed at the meeting that the sales volume for vehicle components for the Alfa Romeo Giulia and Stelvio, for 2017 alone, was reduced by more than 33%.

18. From reviewing contemporaneous documents, I take it that on June 30, 2017, there was a meeting between ZF US and FCA known as "One Voice." Ex. D. At the One Voice meeting, according to the presentation on p. 113, FCA indicated that "TRW will be phased out of TPMS at the end of the 2019MY HD program." The passive entry / remote keyless entry

product is stated to be "out of strategy," Ex. D, due to "responses are very late and quotes are not competitive" in addition to "poor quality". Being "phased out" and "out of strategy" meant that the RFE Business would no longer be even invited to submit proposals for new requests and that existing business would be phased out. Ex. D.

19. As a direct result of being "out of strategy," the RFE Business' sales to FCA has declined significantly, including reduced sales of more than 24% in 2019. The RFE Business' plant in Auburn, NY was dependent upon this business and the impact of FCA's sanctions is that the Auburn plant is now scheduled to close permanently by the end of Q2 2021.

20. On July 26, 2017, I attended a quarterly operations review meeting with both Messrs. Dekker and Marnat and other BCS Business executives discussing the BCS Business. During this meeting, the participants discussed the P702 Platform for its customer, Ford. Generating sales of vehicle components from the P702 Platform was important for the BCS Business because it was projected to generate over $85 million in sales during a two-year production period from 2020 to 2021 and over $300 million up to 2026. At the meeting, the BCS and ZF US executives discussed that Ford had decided not to award the P702 Platform to the BCS Business, and therefore all of the projected sales were now obsolete. The BCS Business reported and characterized this as a "critical event" for the business included in the "VP Commentary".

21. Also discussed at this July 26, 2017 quarterly operations review meeting was GM's 9BXX Platform. The 9BXX Platform was supposed to be implemented across nine programs for GM cars. The total sales for

the 9BXX Platform was projected to the Applicant to be $44 million until 2021 and $89 million over seven years. However, during the meeting, it was disclosed that GM was discussing whether to cancel eight of the nine programs of the 9BXX Platform as a result GM's sale of its European entity, Opel Automotive Automobile GmbH, to a French car company called Groupe PSA.

22. In December 2017 when Closing of the Transaction was initially envisaged and in April 2018 when Closing actually took place, myself and other executives of the BCS-RFE Businesses understood that the events described in this Section III were material to the business. I, along with the other BCS executives, therefore included all four critical events in an update to an exhibit relating to Representation and Warranties in April of 2018 that was agreed to be updated prior to Closing, Exhibit 12.1.1. The updates were sent to ZF AG' legal department via email.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 14th, 2020

/s/ Gregor Tschernjavski
Gregor Tschernjavski

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	Case No. 2:20-mc-51245-LJM-APP

DECLARATION OF CHRISTOPH A. BAUS IN SUPPORT OF RESPONDENTS' MOTION TO VACATE THE COURT'S *EX PARTE* ORDER PURSUANT TO 28 U.S.C. § 1782 AND TO QUASH THE PENDING SUBPOENAS

I, Christoph A. Baus, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an attorney *[Rechtsanwalt]* with the law firm Latham & Watkins LLP, and am licensed to practice law in Germany. I am counsel for Respondent ZF Automotive US Inc. ("ZF US"), and I make this Declaration in support of Respondents' Motion to Vacate the Court's *Ex Parte* Order Pursuant to 28 U.S.C. § 1782 and to Quash the Pending Subpoenas. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

I. THE AGREEMENT OF THE PARTIES TO HAVE EXPEDITED ARBITRATION PROCEEDINGS: DISCOVERY AND DEPOSITIONS WERE NOT PART OF THE AGREEMENT

2. Luxhare Ltd. ("Luxshare") and ZF US signed a Master Purchase Agreement ("MPA") in August 2017

whereby Luxshare purchased one of ZF US' business units. A true and correct copy of a relevant excerpt of the MPA is attached to this Declaration as **Exhibit A**.[1]

3. The parties concluded this transaction before a public notary in Frankfurt, Germany on April 27, 2018. Notaries in Germany act as public officers and are generally required to provide legal assistance when concluding contracts. Under the German Notarization Act, the notary shall investigate the will of the parties involved, clarify the facts of the case, instruct the parties about the legal implications of the transaction, and reproduce their statements clearly and unambiguously in the minutes. In doing so, the notary shall ensure that errors and doubts are avoided and that inexperienced and inexpert participants are not disadvantaged.

4. In the MPA, Luxshare and ZF US agreed to submit all disputes related to the MPA to a specific regime under German law. Specifically, Section 20.10 of the MPA provides that the MPA "shall be governed by German law." It further provides:

> All disputes arising under or in connection with this Agreement (including any disputes in connection with its validity) shall be exclusively and finally settled by three (3) arbitrators in accordance **with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), including the Supplementary Rules**

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[1] Due to the length and proprietary nature of the MPA, Exhibit A is an excerpt that includes the title pages, table of contents, index of exhibits, and the section relevant to this motion regarding "Governing Law; Jurisdiction; Agent for Service of Process."

> **for Expedited Proceedings**, as applicable from time to time without recourse to the ordinary courts of law. The **place of the arbitration shall be Munich, Germany** . . ."[2]

(emphasis added)

5. This means that the Parties chose to have all disputes related to the MPA (i) governed by German law, (ii) resolved with Germany as the place of arbitration and only relevant jurisdiction, and (iii) submitted to the most expedited framework that exists under the rules of the German Arbitration Institute ("DIS"), Germany's most prominent arbitration body.

6. Commencing an arbitration under the DIS can easily be done by submitting a relatively generic request for arbitration that need only contain: (i) the names and addresses of the 5. This means that the Parties chose to have all disputes related to the MPA (i) governed by German law, (ii) resolved with Germany as the place of arbitration and only relevant jurisdiction, and (iii) submitted to the most expedited framework that exists under the rules of the German Arbitration Institute ("DIS"), Germany's most prominent arbitration body.

6. Commencing an arbitration under the DIS can easily be done by submitting a relatively generic request for arbitration that need only contain: (i) the names and addresses of the parties; (ii) a statement of the specific relief sought; (iii) a description of the facts and circumstances on which the claims are based; and (iv) the arbitration agreement(s) on which

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[2] Unless otherwise defined, all capitalized terms shall have the same meaning as defined in theMPA.

the claimant relies (see Art. 5.2 and 6.1 of the DIS Rules). The required "description of the facts and circumstances on which the claims are based" may be as generic or detailed as the claimant chooses; short and relatively high-level summaries are sufficient to initiate the proceeding. (See Salger/Trittmann/*Sessler*, Internationale Schiedsverfahren, 2019, § 7 at 38). The DIS Rules are attached to this Declaration as **Exhibit B**.

7. To date, the DIS has not transmitted a Request for Arbitration to ZF US.

II. THE APPLICABLE DIS RULES: THE DIS ARBITRATION PANEL MUST BE CONSTITUTED BEFORE IT CAN CONSIDER THE USE AND APPROPRIATE SCOPE OF DISCOVERY

8. In a DIS arbitration, the arbitral panel will resolve procedural questions, such as witness testimony and document production, according to the following hierarchy:

a. **Existing agreement between the parties**: The DIS panel will afford the most deference to the agreement between the parties. Here, the Parties expressly submitted to the "Arbitration Rules of the German Institution of Arbitration e.V. (DIS), including the Supplementary Rules for Expedited Proceedings," and *not* a framework that governs U.S.-style discovery.

b. **DIS Rules**: Where there is no agreement between the parties, the DIS Rules shall apply (DIS Rules, Art. 21.2). The DIS Rules (i) are silent on depositions and

(ii) generally state that the arbitration panel—once it is constituted—"may order any party to produce or make available any documents or electronically stored data" (DIS Rules, Art. 28.2).

c. **Ad hoc agreement between the Parties**: When the Rules are silent as to the procedure to be applied, the relevant procedure shall be determined by agreement of the parties (DIS Rules, Art. 21.3). Such agreement can be reached during the case management conference, where the arbitral tribunal shall discuss with the parties the procedural rules to be applied as well as the procedural timetable (DIS Rules, Art. 27.4). Here, ZF US will not agree to depositions or broad U.S.-style discovery.

d. **Discretion of the arbitration panel after consultation with the parties**: When the Rules are silent as to the procedure and there is no agreement of the parties, the arbitration panel shall determine the procedure in its discretion after consultation with the parties. (DIS Rules, Art. 21.3). Here, a panel has not even been constituted, so there is no way it could exercise its discretion. However, it is extremely unlikely that a German arbitration panel would order depositions or broad U.S.-style discovery against the express will of one of the parties.

9. If a DIS arbitration panel decides that some form of discovery is necessary, it will provide the parties with the time they need to take it, even, like

here, where the parties agreed to the expedited DIS rules.

III. THE PROCEDURAL FRAMEWORK: GERMAN PROCEDURAL LAW DOES NOT KNOW DEPOSITIONS AND U.S.-STYLE DISCOVERY

10. Arbitral panels in Germany generally look to the German Code of Civil Procedure ("CCP") for guidance when determining the use and scope of discovery, and can request the help of German courts in enforcing such requests under Section 1050 CCP. It is highly unlikely that the not-yet established arbitration panel in Germany would be receptive to depositions or U.S.style document discovery, as neither are contemplated in German procedural law. (*See* Christian Duve & Jill I. Gross, Commercial Arbitration: Germany and the United States; 24 No. 1 Disp. Resol. Mag., Fall 2017, at 15: Extensive discovery is "unheard of in Germany").

A. Depositions

11. With respect to depositions, neither the CCP nor the DIS Rules provide for a comparable concept. It is one of the core principles of German civil procedure that any taking of evidence, including the examination of witnesses, takes place in front of the deciding court (Section 355(1) CCP). It is one of the most fundamental and noble tasks of the court to examine the witnesses. (Kern/Diehm/*Förster*, ZPO, 2nd. ed. 2020, Section 355 at 1; MüKoZPO/*Heinrich*, 6th ed. 2020, Section 355 at 1). To that end, Article 28.2 of the DIS Rules expressly makes it the task of the arbitration panel to examine fact witnesses.

12. Pursuant to Section 397 CCP, the parties' role in the court's process of examining witnesses is

limited to submitting questions that the court shall ask. In certain instances, and only by request, the court will allow the representatives of the parties to ask questions to witnesses directly. U.S.-style cross-examinations are generally not allowed under German procedure (Zöller/*Greger*, Zivilprozessordnung, 33th ed. 2020, Section 397 at 1; Musielak/Voit/*Huber*, ZPO, 17th ed. 2020, Section 397 at 1).

B. Document Discovery

13. U.S.-style document discovery, with expansive categorical document requests, is similarly foreign to German civil procedure. Accordingly, Germany has made a reservation under Art. 23 of the Hague Convention on the Taking of Evidence that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

14. German procedural law presupposes that to prove the facts for which a party bears the burden of proof, that party may primarily use evidence in its possession. (*See* Christian Duve & Jill I. Gross, Commercial Arbitration: Germany and the United States; 24 No. I Disp. Resol. Mag., Fall 2017, at 17). Under the established case law of the German Federal Court of Justice ("FCJ"), parties generally do not have a duty to participate in establishing the other party's case (*See* FCJ, NJW 1990, 3151; FCJ, NJW 1997, 128, 129; FCJ, NJW 2000, 1108, 1109), and even less do persons who are not a party to the dispute have such a duty (FCJ, NJW 2007, 155, 156). The very sophisticated rules about the burden of proof are based on there being no opportunity to take expansive document discovery beforehand (*See* Rolf Trittmann, Die ,,Wahrheit" im internationalen

Schiedsverfahren/The "truth" in international arbitration, IWRZ 2016, 255, 259).

15. Pursuant to Section 142(1) CCP, only under the very specific circumstance where a party knows of and is able to precisely specify the individual document in another party's possession may a German court "direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference." Luxshare's request, for example, for "All documents and communications relating to the Relevant Sales" in order to "acquire necessary detail" would not be permitted in Germany. (Document Request No. 1 and Application, p. 3; *See* Christian Duve & Jill I. Gross, Commercial Arbitration: Germany and the United States; 24 No. 1 Disp. Resol. Mag., Fall 2017, at 17). The explanatory memorandum of the German legislature specifically mentions that these rules are not to invite expansive discovery, and that courts must exercise their discretion so as to avoid fishing expeditions (*See* report of the legal committee of the German Federal Parliament, BT-Drs 14/6036, page 120). Further, Section 142 CCP does not allow the court to order the production of documents for the purpose of gaining information the requesting party did not specifically allege before. (*See* report of the legal committee of the German Federal Parliament, BT-Drs 14/6036, page 121).

16. While these explanations of the German legislature make clear that Section 142 CCP shall not enable expansive "pre-trial" discovery, a "pre-suit" discovery is even more extraordinary under Section 142 CCP, as it is the indispensable rule of German civil procedure that the claimant must raise and

substantiate its claims first and request specific individual missing pieces of evidence afterwards (if at all).

17. Also the legislative materials on Section 1050 CCP emphasize that courts can reject requests for expansive discovery (*See* accompanying memorandum to the legislative proposal of the German government, BT-Drs 13/5274, page 51). In practice, state courts and arbitral panels are reluctant to grant such requests (*See* Christian Duve & Jill I. Gross, Commercial Arbitration: Germany and the United States; 24 No. I Disp. Resol. Mag., Fall 2017, at 17).

18. Luxshare's German counsel concedes that under the applicable German procedural rules, the burden of proof to show the alleged willful intent of ZF US "might"—and actually will—fall on the Applicant (see Masser Declaration, 1 19). By adding that it will be "very difficult—if at all possible" to fulfil this burden of proof without assistance of this court, Luxshare admits that it currently does not have enough evidence to prove its unsubstantiated claims. Under the applicable German procedural rules, this lack of evidence in its possession is fatal to any claims Luxshare believes it may bring.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 4, 2020.

/s/ Christoph A. Baus
CHRISTOPH A. BAUS

MASTER PURCHASE AGREEMENT
related to
PROJECT MONTREUX

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* * *

THIS MASTER PURCHASE AGREEMENT is made

BETWEEN

(1) **TRW Automotive Inc.**, a corporation incorporated under the laws of Delaware, registered with the Secretary of State in the State of Delaware under file number 3589359 and with its principal office in Livonia, Michigan, USA,

- the "**Seller**" -

and

(2) **Luxshare Limited** [non-Roman text omitted] (company number: 686629), a limited liability company incorporated in Hong Kong and under the laws of Hong Kong, registered under the Business Registration Ordinance of Hong Kong and holding the Business Registration Certificate No. 30393885-000-08-17-5 with registered office at Room 1904, 19/F., Tung Wai Commercial Building, 109-111 Gloucester Road, Wan Chai, Hong Kong,

- the "**Purchaser**"-,

(the Seller and the Purchaser collectively referred to as the "**Parties**", and each of them as a "**Party**").

20.10 Governing Law; Jurisdiction; Agent for Service of Process

20.10.1 Governing Law. This Agreement shall be governed by German law, excluding the German conflict of law rules and excluding the United Nations Convention on Contracts for the International Sale of Goods (CISG).

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

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	Case No. 2:20-mc-51245-LJM-APP

DECLARATION OF DIETER ECKHARDT IN SUPPORT OF RESPONDENTS' MOTION

I, Dieter Eckhardt, declare under the penalty of the laws of the United States, pursuant to 28 U.S.C. § 1746, as follows:

1. My name is Dieter Eckhardt. I am a resident of Friedrichshafen, Germany.

2. I am Senior Vice President and Head of M&A at ZF Friedrichshafen AG ("ZF AG"). I have held this job since 2005 and this title since 2016; before that, it was Vice President M&A. I joined ZF in 1990, became Head of Commercial Auditing in 1995 and moved to M&A in 1998. I work at ZF AG's head office in Friedrichshafen, Germany.

3. I submit this Declaration in support of ZF Automotive US Inc. ("ZF US")'s motion. I make this Declaration based upon my personal knowledge.

4. ZF US is a 100% (indirect) subsidiary of ZF AG. ZF AG is a German stock corporation. It traces its roots back to gear making activities of Count Zeppelin for his airships in Germany in the early 20th Century. Today, ZF AG and its subsidiaries, including ZF US, are among the leading global suppliers of technology

systems for passenger vehicles, commercial vehicles, and industrial technology.

5. ZF US has its headquarters in Livonia, Michigan. ZF US (f/k/a TRW Automotive Inc.) was a subsidiary of TRW Automotive Holdings Corp. In 2015, TRW Automotive Holdings Corp. merged with a subsidiary of ZF AG. ZF US has eleven facilities across Michigan and thirty-one other facilities or research & development locations elsewhere in the United States.

6. Christophe Marnat is a former and current Executive Vice President and Chief Operations Officer of ZF US. Gerald Dekker was Vice President of Profitability & Strategic Initiatives at ZF US and retired in December 2019.

7. In 2016, ZF AG conducted a strategic review of its business portfolio. In this process, my team and I provided strategic and M&A-related input regarding, e.g., marketability and the scope of a potential transaction. After this review, ZF AG decided to sell its Global Body Control Systems ("BCS") business unit and its Radio Frequency Electronics ("RFE") business unit. BCS and RFE focused on producing switches, interior electronic control panels, steering column control modules, access systems, and sensors, as well as heating, ventilation, and air conditioning ("HVAC") controls. The entity practically heading the BCS business unit was TRW Automotive Electronics and Components GmbH, a German subsidiary with its principal offices and a plant in Radolfszell, Germany.

8. ZF AG and ZF US engaged with several bidders, including Luxshare Limited ("Luxshare"), a Hong Kong company. Luxshare's sole shareholders

Laichun and Laisheng Wang, individuals and nationals of the People's Republic of China, first expressed interest to enter into the auction process via their investment advisor Commerzbank AG, one of Germany's major and internationally renowned banking institutions, in March 2017. Initially, they presented the Chinese company Luxshare Precision Industry Co., Ltd. as the potential purchaser, in which Luxshare at that time held 50.6%. Later in the process, they replaced the Chinese company by the Hong Kong company. After their first expression of interest, ZF AG, ZF US, and Luxshare began a period of negotiations and due diligence that lasted for several months. In this due diligence and negotiations, the Luxshare team was at all times supported by professional, experienced and renowned commercial, financial, and legal advisers.

9. During the negotiation and diligence period, ZF AG and ZF US provided Luxshare access to a virtual data room, which included detailed information regarding, e.g., the target and its organization, its customers, markets, and products, and comprised legal, commercial, operational, financial, IP, HR, and other information customarily provided in such a transaction process. The parties also engaged in an intensive question-and-answer process involving, among others, individuals from ZF AG, ZF US, and Luxshare. In this process, Luxshare had direct access to individuals at BCS, including Gregor Tschernjawski, then and still today CFO of the BCS business, and Ralf Jeskulke, then and initially after closing CEO of the BCS business. The due diligence process also included miscellaneous site visits (e.g. Radolfzell, Suzhou, Auburn, Winona) before the signing. After the signing and before the closing, BCS

and Luxshare jointly visited key customers like Daimler, VW, Audi, FCA, Ford, and GM in Germany and in the United States.

10. With the exception of one meeting in Shanghai, China, all legal and contractual in-person negotiations preceding the sale of BCS took place in Germany.

11. At the conclusion of the negotiation and diligence period, the parties came to an agreement for ZF US to sell BCS including RFE to Luxshare. Representatives from ZF US and Luxshare signed a Master Purchase Agreement containing the terms of the BCS sale on August 29 and 30, 2017 in Frankfurt, Germany. The parties closed the BCS sale in Germany on April 27, 2018.

12. I am not aware of any allegations of fraud until Luxshare submitted its application in this case. Even in a so-called business dialogue between ZF AG and BCS in November 2019 and related emails, Luxshare/BCS only described a deteriorating business situation and asked ZF AG for voluntary concessions due to this situation, but never made such allegations.

Date: 04 Dec., 2020 *_/s/ Dieter Eckhardt_*
DIETER ECKHARDT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	:	Case No. 2:20-mc-51245-LJM-APP Hon. Laurie J. Michelson Hon. Mag. J. Anthony P. Patti

SECOND DECLARATION OF ANNA MASSER

Anna Masser, pursuant to 28 U.S.C. § 1746 hereby declares as follows:

1. I am the same attorney *[Rechtsanwültin]* qualified to practice in Germany, and partner of Allen & Overy LLP ("A&O") who has already submitted a first declaration in support of the application for an Order Pursuant to 28 U.S.C. 1782 (the "Application") by the Applicant, Luxshare Ltd. ("Applicant" or "Luxshare") in connection with contemplated arbitration proceedings in Munich, Germany against ZF Automotive US, Inc. ("ZF US"). I head A&O's German arbitration practice and advise on all stages of dispute resolution with a particular focus on international commercial arbitration.

2. I submit this Second Declaration in support of Luxshare's Memorandum of Law in Opposition to Motion to Quash and to respond to certain assertions contained in the Declaration of Christoph A. Baus ("Baus").

3. 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.

I. The Tribunal Has Broad Discretion to Admit and Weigh Evidence in the Arbitration

4. As indicated in my First Declaration ("Masser"), tribunals constituted under the DIS Rules are free to admit and weigh the evidence in the arbitration at their discretion. *See* Masser, para. 20. Consequently, DIS panels make evidentiary determinations on a regular basis.

5. Mr. Baus agrees with the basic conclusion that tribunals constituted under the DIS Rules are free to admit and weigh the evidence in the arbitration at their discretion. *See* Baus, para. 8. However, he goes on to state that "[a]rbitral panels in Germany generally look at the German Code of Civil Procedure ("CCP") when determining the use and scope of discovery". *See* Baus, para. 10. Relying on this assumption, he concludes that a tribunal in Germany would not be receptive to depositions or U.S.-style document discovery from the fact that German procedural law does not contemplate for either of them. *See* Baus, para. 10. This conclusion is inaccurate since tribunals in an international commercial arbitration seated in Germany do not generally look at the CCP when determining the use and scope of discovery.

6. Rather than looking for guidance in the CCP, tribunals in Germany would look – as correctly listed by Baus – to (i) an existing party agreement, (ii) the DIS Rules, an ad-hoc agreement by the Parties, and would, failing all that, (iv) use its procedural discretion when determining the question whether to allow for any sort of discovery. The only provisions of the CCP binding an arbitral tribunal in Germany are the mandatory provisions included in the 10th book of the CCP (Sections 1025-1066 CCP), which is applicable to international commercial arbitrations as the one contemplated by Luxshare.

7. Section 1042 of the CCP (titled "General procedural rules") provides to that effect: "(1) The parties are to be accorded equal treatment. Each of the parties is to be given an effective and fair legal hearing. (2) Attorneys may not be prohibited from acting as attorneys-in fact. (3) In all other cases, the parties to the dispute may themselves provide for the procedure, subject to the mandatory stipulations in the present Book, or by making reference to existing rules of arbitration. (4) Absent an agreement by the parties, and in those cases regarding which the present Book does not make any provisions, the procedural rules shall be determined by the arbitral tribunal at its sole discretion. The arbitral tribunal is authorized to decide on the admissibility of the taking of evidence, to so take evidence, and to assess the results at its sole discretion."

8. In line with the explicit language of Section 1042 (4) of the CCP, the predecessor of the German Federal Supreme Court *("Reichsgericht")* decided already back in 1928 that "arbitrators are in no way bound to provisions of the Code of Civil Procedure which are not included in the 10th book." *See* RGZ

121, 279, 281. The provisions of the CCP not found in the 10th Book of the CCP (Sections 1025-1066), to which Mr. Baus refers in his declaration, will therefore not apply in the contemplated arbitration. *See* also Klaus Sachs and Torsten Lörcher, in Karl-Heinz Böckstiegel, Stefan Kröll and Patricia Nacimiento (eds.), Arbitration in Germany: The Model Law in Practice (2nd ed. 2015), Introduction to §§ 1042-1050 ZPO, para. 2; Wilske/Markert in BeckOK, ZPO, 38th ed. 1 September 2020, § 1042 para. 17; Geimer m Zöller, Zivilprozessordnung, 33rd ed. 2020, § 1042 para. 28.

9. Given that neither an agreement by the Parties nor the DIS Rules nor the mandatory provisions of the CCP limit the tribunal's discretion to admit and weigh evidence, the tribunal will have broad discretion to make such evidentiary determinations in the arbitration.

II. The Tribunal's Discretion Encompasses the Discretion to Admit Evidence Obtained by Way of This 1782 Application

10. As a consequence of its broad discretion to admit and weigh the evidence in the arbitration, any future tribunal constituted under the DIS Rules will also be free to admit and weigh evidence obtained by way of this Application. This stems from the fact that neither an existing party agreement nor the DIS Rules nor the applicable mandatory provisions of the CCP limit the tribunal's discretion to admit evidence obtained in 1782 applications. While there are no immediate precedents to be found by arbitral tribunals seated in Germany, likely because of the confidential nature of arbitral proceedings, support for this conclusion can be drawn from scholarly articles. Scholars generally agree that tribunals are

free to admit into evidence documents obtained by way of discovery and transcripts of witness examinations obtained in a different proceeding, irrespective of the nature of the proceedings. *See* Münch in Münchener Kommentar, ZPO, 5th ed. 2017, § 1049 para. 79; Voit in Musielak/Voit, 17th ed. 2020, § 1042 para. 23; Schlosser in Stein/Jonas, ZPO, 23rd ed. 2014, § 1050 para. 26.

11. Referring to the tribunal's discretion, Mr. Baus states that "it is extremely unlikely that a German arbitration panel would order depositions or broad U.S.-style discovery against the express will of one of the parties". *See* Baus, para. 8. However, this does not in any way suggest that Luxshare is precluded from collecting evidence in a Section 1782 proceeding, or that the tribunal is precluded from considering it. Once constituted, the tribunal will have broad discretion whether to allow or not allow the evidence.

12. Mr. Baus also suggests that evidence discovery obtained through this Application would be admissible only if the parties had expressly agreed to admit a 1782 application in support of the contemplated arbitration. *See* Baus, para. 8. That, however, is not the case.

13. Practitioners in the cross-border transactional and arbitration spaces are generally aware of the possibility of Section 1782 discovery. As German, U.S. and international arbitration authorities and scholarly articles recognize, parties are free to include language in their arbitration agreement excluding or restricting the parties' right to obtain evidence through a 1782 application. *See, e.g.*, Born, International Commercial Arbitration, 2nd ed. 2014, Chapter 16, p. 2421 *et seq*.: [CJ Agreements Excluding Judicial Assistance in Evidence-Taking);

Illmer/Steinbrück, 25 J. Int'l Arb. 329 (2008), 342; Pieper, Case Note on United States Court of Appeals for the Second Circuit: In Re: Application of Antonio del Valle Ruiz and Others for an Order to Take Discovery for Use in Foreign Proceedings pursuant to 28 U.S.C. § 1782, in SchiedsVZ 2020, 189, 195; Rothstein, 19 ARIA 61 (2008), 88; Schönknecht, GRUR Int. 2011, 1000, 1007.

14. There is no such exclusionary language in the arbitration clause here, which is contained in Section 20.10.2 of the Master Purchase Agreement. This is – but for the inclusion of the expedited procedure – a standard international arbitration clause. While this clause requires parties to submit substantive disputes to arbitration rather than the courts, it does not preclude them from seeking interim relief or pursuing discovery applications in the courts.

15. I am not aware of any decision adopting Mr. Baus' suggestion that discovery is inadmissible on the basis that an arbitration agreement alone – without express language specifically excluding it – reflects an intention by the parties to exclude discovery under 28 U.S.C. § 1782.

16. Thus, the tribunal of the contemplated arbitration will be free to admit into evidence the documents obtained and the transcripts of the depositions taken under 28 U.S.C. § 1782 in the U.S.

III. German Courts Admit Evidence Obtained By Way Of U.S. Discovery Applications

17. While Mr. Baus' assumption that a tribunal seated in Germany necessarily looks to the CCP for guidance in determining whether to admit a specific piece of evidence is admissible is not correct (see

above section 11.), a tribunal looking at the CCP for guidance would in fact find support for admitting evidence obtained in a 1782 application. Mr. Baus puts a lot of emphasis on the fact that depositions and U.S.-style discovery are not contemplated in German procedural law. *See* Baus, para. 10 *et seq*. He fails to mention, however, that German courts are nevertheless receptive to admitting evidence obtained by pre-trial discovery in other jurisdictions, including the U.S.

18. As a general principle of German law, German courts should exclude evidence only in exceptional circumstances. *See, e.g.*, German Federal Supreme Court ("BGH") NJW 2006, 1657, 1659; Eschenfelder, Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess, 2002, p. 197 *et seq*. For instance, German courts must not *per se* dismiss evidence that was obtained in violation of provisions of the CCP but must assess its admissibility on a case by case basis, balancing the interests at stake. *See* BGH NJW 2006, 1657, 1659; see also Rollin, Ausländische Beweisverfahren im deutschen Zivilprozess, 2007, p. 130 *et seq*. With regard to evidence obtained in the course of a foreign procedure, a court should refrain from admitting the evidence only if admitting the evidence were to violate German public policy. *See* Dombrowski, GRUR-Prax 2017, 272, 272 *et seq.;* Eschenfelder, RiW 2006, 443, 447; Eschenfelder, IPrax 2006, 89, 97; Eschenfelder, Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess, 2002, p. 162 *et seq.;* Schönknecht, GRUR Int. 2011, 1000, 1007.

19. The fact that evidence obtained in the course of a foreign proceeding could not have been obtained through the means of German civil procedure does not

render the evidence inadmissible. *See* Rollin, Ausländische Beweisverfahren im deutschen Zivilprozess, 2007, p. 142 *et seq.;* Eschenfelder, Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess, 2002, 189. Rather, a violation of German public policy requires extreme circumstances, *e.g.,* that the evidence was obtained by torture or that admitting the evidence amounted to a violation of a fundamental right. *See* Rollin, Ausländische Beweisverfahren im deutschen Zivilprozess, 2007, p. 145; Dombrowski, GRUR-Prax 2017, 272, 272 *et seq.;* Eschenfelder, RIW 2006, 443, 446 *et seq.;* Eschenfelder, Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess, 2002, p. 211 *et seq.*

20. In contrast to those examples, German scholars agree that admitting evidence obtained by way of a 1782 application does not generally violate German public policy. *See* Dombrowski, GRUR-Prax 2017, 272, 272 *et seq.;* Eschenfelder, RiW 2006, 443, 445 *et seq.;* Eschenfelder, IPrax 2006, 89, 97; Eschenfelder, Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess, 2002, p. 255 *et seq* as well as p. 256 in conjunction with p. 183 et *seq.* and p. 208 et *seq.;* Schönknecht, GRUR Int. 2011, 1000, 1007 *et seq.* The prevailing view is that Courts should admit evidence obtained by way of U.S. discovery generously since excluding any evidence obtained by way of U.S. discovery *per se* would violate the right to effective legal protection and the right to be heard, which are both granted by the German constitution and incorporated in the CCP. *See* Dombrowski, GRUR-Prax 2017, 272, 272 *et seq.;* Eschenfelder, RiW 2006, 443, 446 *et seq.;* Rollin, Ausländische Beweisverfahren im deutschen

Zivilprozess, 2007, p. 128 *et seq*. Therefore, Eschenfelder concludes that the exclusion of evidence obtained in a 1782 application is "hard to imagine" and will be "only rare". *See* Eschenfelder, RiW 2006, 443, 447; see also Eschenfelder, Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess, 2002, p. 256 in conjunction with 211; Rollin, Ausländische Beweisverfahren im deutschen Zivilprozess, 2007, p. 142 with further references.

21. German state courts indeed admit evidence obtained by way of discovery applications in the U.S. For example, in a judgment, the Higher Regional Court of Frankfurt am Main admitted evidence obtained by way of Section 1782 discovery proceedings under U.S. law. The court in that case held that it had "no concerns" about the introduction of such evidence and that use of such evidence in no way contravenes "fundamental principles of German law". *See* OLG Frankfurt am Main, judgment dated 5 June 2014, Reference No. 6 U 15/13. A true and correct copy of the relevant excerpt of this decision is attached hereto as Exhibit 1. We obtained this excerpt from claimant's counsel in the proceedings, who indicated that the remainder of the decision contains numerous trade and business secrets of claimant and any further excerpts can therefore only be obtained with their agreement. I have no reason to believe that the court in any other passage of the decision referred to the U.S. discovery proceedings.

22. In two further decisions by Higher Regional Courts in Germany the issue was whether the costs of the discovery applications were to be reimbursed in the German proceedings. *See* OLG Düsseldorf, BeckRS 2015, 15124; OLG Frankfurt am Main, BeckRS 2013, 11400. While both of the courts held

that the costs were nonrefundable in the specific circumstances, neither of the two took an issue with the fact that the evidence obtained by way of the discovery apparently had been admitted into the proceedings in the first place.

23. If German state courts *may* admit evidence obtained by way of 1782 applications in state court proceedings, and they actually *do admit it,* there is even less reason for an arbitral tribunal seated in Germany to refrain from admitting evidence obtained by way of 1782 applications given that arbitral tribunals have broader discretion to establish the facts of a case than state courts.

IV. Tribunals Seated in Other Civil Law Jurisdictions Have Used Their Discretion to Admit Evidence Obtained by Way Of 1782 Applications

24. While arbitration submissions in Germany are confidential and unpublished, there are public awards rendered under the auspices of the PCA, seated in The Hague, in UNCITRAL arbitrations which confirm that the proper course is to allow the tribunal to decides on the admissibility of evidence once it has been introduced in the arbitration rather than to deprive parties of the ability to obtain discovery from the outset. These awards are particularly instructive because the Netherlands has similar discovery and procedural rules to Germany.

25. For example, in Procedural Order No. 3 of the PCA Case No. 2012-17 between Mesa Power Group, LLC and the Government of Canada, the tribunal held that a party should not be precluded from collecting 1782 discovery and submitting those

materials to the tribunal for consideration. The tribunal ruled:

> "Second, the Tribunal does not believe that it should summarily reject – in advance of their filing – all the Section 1782 documents that the Claimant may one day submit, for the sole reason that they have been procured though *[sic]* court proceedings. Once the documents are before the Tribunal, the Respondent will be able to object to them on the basis of the IBA Rules on the Taking of Evidence or any other applicable rules of arbitral procedure. If Canada raises an objection, the Tribunal will then rule on the admissibility of the specific evidence at issue."

See Mesa Power Group, LLC v. Government of Canada, PCA Case No. 2012-17, Procedural Order No. 3, 28 March 2013, para. 65.

26. The same reasoning applies to two other decisions by tribunals in PCA cases seated in The Hague. In both decisions, one or more of the parties had obtained evidence from a 1782 application. In both decisions, the evidence was admitted. In fact, in one of the cases, the claimant's claim was essentially based on the evidence obtained in the 1782 application. See Balkan Energy Limited *et al.* v. Republic of Ghana, PCA Case No. 2010-7, Award, 1 April 2014, paras. 490 *et seq.;* Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II), PCA Case No. 2009-23, quoted by Alford, Ancillary Discovery to Prove Denial of Justice, 53 Va. J. Int'l L. 127 (2012), 142 *et seq.*

V. The Tribunal Has No Coercive Power to Compel Document Production or Witness Testimony

27. If Luxshare had waited with this application until a tribunal would have been constituted, its chances to obtain the evidence would be diminished. Mr. Baus suggests that "[i]f a DIS arbitration panel decides that some form of discovery is necessary, it will provide the parties with the time they need to take it, even, like here, where the parties agreed to the expedited DIS rules". *See* Baus, para. 9. This suggestion, however, is beside the point considering that the tribunal would lack the authority to enforce any order to produce the documents which Luxshare seeks from ZF US in this 1782 Application or to compel Mr. Marnat and Mr. Dekker to testify. DIS tribunals seated in Germany have no coercive means to impose production of documents on the parties, *i.e.* ZF US, nor do they have the power to compel discovery from employees and ex-employees of ZF US, like Mr. Marnat and Mr. Dekker. *See* Masser, para. 27 with further references. For such measures, the tribunal would have to tum to German state courts for assistance pursuant to § 1050 CCP (Masser, para. 47 with further references), or to U.S. courts as per 28 U.S.C. § 1782. Either way, this will take time; time that will likely make it impossible for the tribunal to make the award within six months as stipulated per the DIS Rules.

28. In light of the fact that the DIS Rules require the parties and the tribunal to conduct the proceedings in a time- and cost-efficient manner (Article 27 Section 1 DIS Rules), a tribunal may very well be reluctant to extend deadlines to await the outcome of the discovery application if Luxshare had

initiated the discovery proceedings only after filing the contemplated arbitration. In fact, this scenario happened to a claimant in an ICSID proceeding, where the tribunal decided not to prolong deadlines in order to allow the claimant to potentially put into evidence documents obtained by way of a 1782 application. *See* Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12, Procedural Order No. 3, 26 May 2006, para. 2.6. The only way to avoid this potential outcome was to seek Section 1782 discovery prior to filing the arbitration.

VI. German Law Allows Luxshare to Bring the Arbitration until the End of 2021

29. Mr. Baus further states that submitting a request for arbitration under the DIS Rules can easily be done by a short and high-level summary. *See* Baus, para. 6. While this is – technically – correct, Luxshare would have been ill-advised to proceed in such a manner in the present case. This is because the parties have agreed on the expedited rules of the DIS, meaning that following the request for arbitration and the answer thereto, there will only be one further round of written submissions and there will be only one oral hearing, including the taking of evidence. *See* Masser, para. 19. The award shall be made at the latest six months after conclusion of the case management conference. *See* Masser, para. 19. In light of this, the first "request for arbitration" following a billion dollar acquisition will – if possible – have to be detailed, including witness statements and expert reports in order to be able properly plead the facts and put the tribunal in a position to render a decision on this substantial dispute.

30. Luxshare has been analyzing its legal options and the merits of the claim both as regards liability in principle and as regards quantum, its counsel has been diligently preparing the arbitration demand, and its experts have been diligently preparing a comprehensive expert report on damages (which is near completion). The Application in this Court has not been lodged lightly and the decision to initiate these proceedings and to expend substantial resources preparing for the arbitration.

31. German law recognizes that the decision to file a claim should be a matter of last resort and not be taken lightly, and that preparing a claim often takes time. Therefore, the standard period of limitation under the German statute of limitation runs for three years (Section 195 CCP).

32. ZF US's non-disclosure of relevant facts prior to the signing of the agreement with Luxshare entitles Luxshare to choose between unwinding the Transaction in its entirety and claiming damages (*culpa in contrahendo*). See *Masser*, para. 12 *et seq*. For such a damages claim, the period of limitation starts to run at the end of the year in which the creditor becomes aware of the facts giving rise to the claim and the debtor (Section 199 (1) CCP). It then runs for standard period of three years (Section 195 CCP). Presently, the earliest conceivable time for this period to have started running is at the end of the year in which Closing of the Transaction took place, i.e. at the end of 2018. This entails that the period of limitation will end at the end of 2021.

33. Until then, Luxshare has the right to bring the arbitration without having to fear consequences for allegedly "waiting too long." There are no legal or equitable principles that would give rise to a defense

to Luxshare's claims on the basis of a purported "delay".

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 8 January , 2021.

/s/ Anna Masser
Anna Masser

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery For Use In Foreign Proceedings	:	Case No. 2:20-mc-51245-LJM-APP Hon. Laurie J. Michelson Hon. Mag. J. Anthony P. Patti

THIRD DECLARATION OF ANNA MASSER

Anna Masser, pursuant to 28 U.S.C. § 1746 hereby declares as follows:

1. I am the same attorney [*Rechtsanwältin*] qualified to practice in Germany, and partner of Allen & Overy LLP ("A&O") who has already submitted a first declaration and a second declaration in support of the application for an Order Pursuant to 28 U.S.C. 1782 (the "Application") by the Applicant, Luxshare Ltd. ("Applicant" or "Luxshare") in connection with contemplated arbitration proceedings in Munich, Germany against ZF Automotive US, Inc. ("ZF US").

2. I submit this Third Declaration in support of Luxshare's Supplemental Brief in Opposition to Motion to Quash.

3. 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 to the best of my information and belief, and such facts and matters are

supported by contemporaneous documents and information that I have reviewed.

I. The Clause within Section 20.10.2 of the MPA, "Without Recourse to the Ordinary Courts of Law" Does Not Prohibit § 1782 Discovery

4. https://www.disarb.org/werkzeuge-und-tools/dis-musterklauseln. The suggested wording is in pertinent part: "All disputes arising out of or in connection with this contract or its validity shall be finally settled in accordance with the Arbitration Rules of the German Arbitration Institute (DIS) without recourse to the ordinary courts of law." By this standard wording, the parties agree that the main claim – if any – shall be arbitrated, not litigated. The parties using this standard language do not, however, generally exclude the assistance of state courts. German state courts regularly assume jurisdiction, even if such standard wording "without recourse to the ordinary courts of law" is included. *See* Higher Regional Court Munich, decisions dated 7 January 2009 (34 SchH 14/08, relating to the question whether an arbitration is admissible as per sec. 1032 CCP), 28 June 2013 (34 SchH 5/13, relating to a challenge of arbitrators as per sec. 1037 CCP) and 10 July 2013 (34 SchH 8/12, relating to a challenge of arbitrators as per sec. 1037 CCP).

5. Furthermore, German state courts do assume jurisdiction in spite of an arbitration agreement if the application brought concerns ancillary or interim proceedings but not the main claim itself. For example, the Higher Regional Court of Koblenz decided that it "is permissible according to the unanimous opinions of legal authorities and jurisprudence" for a party to commence a legal

proceeding in a German state court to compel the counter-party to preserve evidence for use in an arbitration. *See* decision dated 15 July 1998 (5 W 464/98), BeckRS 1998, 07103. This is now expressly set out in German statutory law, sec. 1033 of the Code of Civil Procedure ("**CCP**"), which provides for the jurisdiction of state courts for interim relief proceedings where the substantive dispute is controlled by an arbitration agreement and is confirmed by decisions of courts throughout Germany. *See e.g.* the decisions of Higher Regional Court Brandenburg dated 16 February 2011 (13 U 11/10), Higher Regional Court Düsseldorf dated 7 February 2008 (I-20 W 152/07) and Regional Court Berlin on 8 June 2011 (94 OH 2/10). The admissibility of interim relief in spite of an arbitration clause is, furthermore, expressed by the German legislature in the reasoning for the revised provisions in CCP. *See* BT-Druchs. 13/5274 p. 38 *et seq.* Finally, according to some prominent authors, sec. 1033 CCP regarding the right to state court relief for interim, non-substantive proceedings where the parties have an arbitration agreement is mandatory and cannot be excluded even by virtue of an express party agreement to the contrary. *See e.g.* Münchener Kommentar zur ZPO, 5th ed. 2017, § 1033 no. 18.

6. Generally, when interpreting an arbitration agreement pursuant to German statutory law and principles, one has to consider the parties' intention at the time of concluding the contract (Sections 133 and 157 German Civil Code). *See* Geimer in Zöller Zivilprozessordnung, 33rd Ed. 2020, § 1029 para. 18. Here, the parties chose to include the DIS standard wording, amended by referring to the expedited procedure. As can be seen from the jurisprudence

cited above, such standard wording is not to the exclusion of state court support. Had the parties wanted to exclude any recourse to the ordinary courts for not only for the main claim but also for everything else, including evidence preservation and other interim relief applications, they would have needed to have expressly agreed on this and expressly stated it. But, as stated above, some authors suggest that parties cannot make such agreements because it is contrary to public policy.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 10 March, 2021.

/s/ Anna Masser
Anna Masser