

No. A-_____

IN THE

Supreme Court of the United States

ASML U.S., INC., GLOBALFOUNDRIES U.S., INC.

Applicants,

v.

NIKON CORPORATION,

Respondent.

**APPLICATION TO JUSTICE KENNEDY TO STAY THE JUDGMENT
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Supreme Court Rule 23, Applicant ASML U.S., Inc. (“ASML US”) respectfully request a stay of the judgment of the United States Court of Appeals for the Ninth Circuit pending the filing and disposition of a petition for a writ of certiorari in these matters.¹ ASML US is currently subject to a pair of district court discovery orders requiring imminent production of documents that should not be subject to discovery under 28 U.S.C. § 1782, because the documents in question were created in the Netherlands by people who work in the Netherlands about machines manufactured in the Netherlands and that have been within the Dutch court’s jurisdictional reach all along. ASML US timely appealed those orders, and the Ninth Circuit initially stayed them pending appeal. However, the Ninth Circuit lifted its stay of the district court orders before it even entered judgment, and—when it issued its opinion—then refused ASML’s emergency request for a stay pending disposition of a petition for certiorari. The Ninth Circuit even denied ASML US’s alternative request for a limited interim stay that would permit ASML US to seek a stay from this Court. Accordingly, absent a grant of this application, ASML US will be forced to begin production of documents that it should not be required to produce, thereby mooting its opportunity to seek correction of the erroneous orders below. This Court should stay the orders below pending disposition of

¹ This Application is joined by GlobalFoundries U.S., Inc., which appealed a similar decision of the U.S. District Court for the Northern District of California, and which was briefed, argued, and decided together with ASML US’s appeal.

ASML US's petition for certiorari, or at the very least pending decision on this Application.

This case presents an important question of the proper scope of discovery sought under 28 U.S.C. § 1782 and the Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). On October 24, 2017, the Ninth Circuit granted ASML US's motion to stay the district court's order granting discovery, recognizing that ASML US would suffer irreparable harm if its opportunity to seek appellate review were mooted by having to produce the ordered discovery before disposition of that review. On December 8, 2017, the Ninth Circuit lifted the stay the day after oral argument, but before it issued its judgment three days later on December 12, 2017. Now, having entered judgment but denied ASML US's motion to stay, the Ninth Circuit has placed ASML US in a position in which compliance with the discovery orders risks mooted the appeal and preventing ASML US from petitioning for certiorari.

The district court ordered ASML US to produce documents generated by its indirect Dutch parent regarding eleven models of highly-complex products manufactured in the Netherlands—documents that are not properly discoverable under 28 U.S.C. § 1782 because they are within the jurisdiction of the Dutch court overseeing the litigation for which they are sought. The district court's decision and the Ninth Circuit's affirmance were erroneous, and diverged from the approach of the Second and Seventh Circuits, both of which have held that orders to produce such documents within the jurisdiction of the foreign tribunal are an abuse of discretion. *Kestrel Coal Pty. Ltd. v.*

Joy Global, Inc., 362 F.3d 401, 406 (7th Cir. 2004); *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004).

ASML US expects to petition for a writ of certiorari. Without a stay, however, ASML US will effectively be deprived of that opportunity, as ASML US will be forced to comply with the discovery order (and thus moot its own petition for certiorari) in a matter of days. The need to resolve a circuit split weighs in favor of granting a stay. *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302-1305 (1991) (Scalia, Circuit Justice) (granting a motion to stay pending resolution of an application for certiorari, after reasoning that a split with the Ninth Circuit supported the issuance of the stay).

What is more, once document production begins, even a reversal by this Court could not put that genie back in the bottle, because ASML US's production of documents stands to moot its appeal. In the process, ASML's US personnel, who do not design, develop, or manufacture the components targeted by Respondent Nikon Corporation's ("Nikon") petition, will be forced to attempt to identify responsive documents created in the Netherlands by people who work in the Netherlands about machines manufactured in the Netherlands and that have been within the Dutch court's jurisdictional reach all along (because the original versions are maintained at the headquarters of the global ASML corporation in the Netherlands—of which ASML US is only an indirect subsidiary). Even ultimate victory on the merits could not undo the burden and disruption of such efforts.

In addition to visiting irreparable harm, a stay is further warranted in this case because ASML US has a substantial likelihood of success in the event the Court grants

certiorari. 28 U.S.C. § 1782 permits discovery to “assist” a foreign court when the documents sought are “unobtainable” within that court’s jurisdiction. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004). When the documents being sought **are** within the foreign court’s jurisdiction, the foreign court does not need assistance and should be permitted to decide for itself how to manage discovery of those documents. *Id.*; *see also Schmitz*, 376 F.3d at 85; *In re Kreke Immobilien KG*, 2013 WL 5966916, at *5 (S.D.N.Y. Nov. 8, 2013). The district court and the Ninth Circuit committed error by inverting this analysis—ordering production of all responsive documents located in the United States irrespective of whether those same documents exist within the Dutch court’s jurisdiction. This is contrary to the twin aims of § 1782, *see Schmitz*, 376 F.3d at 85, which do not support such a sweeping ruling. If allowed to stand, that ruling would allow foreign companies litigating against parties with a presence in the United States to use § 1782 as a mechanism to evade foreign discovery procedures altogether in favor of U.S.-style discovery—as Nikon has done here by deliberately **not** seeking any discovery in the foreign jurisdiction. In addition to expanding the burdens on U.S. courts and companies, the decision below would effectively substitute a U.S. court’s discretion for that of the Dutch court—undermining principles of comity and interfering with the Dutch court’s control over its own docket.

The balance of harms and the public interest likewise favor ASML US. Nikon cannot claim undue harm in awaiting this Court’s disposition of a petition for certiorari, not least because Nikon chose to file the underlying Dutch patent proceedings under a regime in which it was required to come to court already in possession of the evidence it

believed it needed to make out its case. Moreover, it is improper (and inconsistent) for Nikon to seek to impose scheduling deadlines from Dutch cases that were premised on Nikon's representation that it already had the documents it needed on a U.S. court under the guise of needing § 1782 discovery.

Accordingly, a stay is appropriate through the disposition of a petition for certiorari. And to ensure that this Court has appropriate time to consider this request, an interim stay should be granted pending this Court's decision on this motion.

STATEMENT

A. Nikon's Foreign Litigation Against ASML NV

ASML Holding N.V. and ASML Netherlands B.V. (collectively, "ASML NV") are based in the Netherlands and are the world's foremost manufacturer of photolithography systems. Photolithography machines are used to "print" integrated circuit patterns onto a silicon wafer as part of the manufacture of semiconductor chips. As Nikon admits, these machines are among the most complex products in the world, with each machine consisting of hundreds of distinct basic modules. They are also very expensive, with a single machine typically costing tens of millions of dollars.

As relevant here, Nikon has filed 14 patent infringement actions worldwide: 11 against ASML NV in the Netherlands, two against ASML NV in Japan, and one against Zeiss (an ASML NV supplier) in Germany (alleging infringement of two patents related to patents also asserted against ASML NV in the Netherlands). In each Dutch action, Nikon filed its complaints under a particular Dutch procedure that allows for expedited proceedings if the plaintiff comes to court with evidence already in hand sufficient to

make its case for infringement. Accordingly, Nikon's 11 Dutch pleadings each offer at least 32 exhibits—and most offer closer to 40—purporting to demonstrate infringement, as Dutch law required.

B. Nikon's Discovery Proceedings Against ASML US

ASML US is an indirect subsidiary of ASML Holding N.V. *Id.* ASML US is incorporated in Delaware and has its principal place of business in Chandler, Arizona. ASML US does not manufacture ASML NV's photolithography systems, which Nikon concedes are manufactured in the Netherlands. Rather, ASML US conducts research and development for certain discrete components, and also manufactures an even smaller set of components which are shipped to the Netherlands for further assembly. Nikon does not accuse the components designed and manufactured by ASML US.

Despite the choices Nikon made in filing under a specific regime in a specific foreign forum, Nikon has sought extraordinarily broad discovery in the United States, invoking 28 U.S.C. § 1782. Nikon's § 1782 request included nine document requests, seven of which seek extensive technical information, each beginning with the same phrase: "All documents, including but not limited to technical specifications, descriptions, technical drawings, photographs, videos, presentation materials, maintenance guides, manuals and training (including computer-based training) materials[.]" Nikon's requests cover seven broad topics (including "the basic modules constituting the entire lithography system") and include ninety-eight (98) subparts.

The district court granted-in-part and denied-in-part Nikon's § 1782 request. Exhibit 1, at 7. The court's order effectively applied the standards for U.S.-style discovery to

Nikon's § 1782 petition, ordering ASML US to produce all requested documents held by ASML US in the United States, ***even if*** they were also in the possession of ASML NV in the Netherlands. Exhibit 2, at 9. The district court ordered ASML US to begin producing documents by November 3, 2017, and complete production by December 31, 2017. Exhibit 3, at 3.²

On October 24, 2017 the Ninth Circuit stayed the district court's order so that ASML US could seek effective appellate review before such review would be mooted. Exhibit 6, at 1. On December 8, 2017, the day after oral argument, the Ninth Circuit lifted that stay (*see* Exhibit 7), but did not issue its judgment affirming the district court's order until December 12, 2017 (*see* Exhibit 8). The Ninth Circuit ruled that it could "not conclude that the court abused its broad discretion in ordering discovery limited to documents physically located within the United States." Exhibit 8, at 2 (internal quotation marks omitted)). The Ninth Circuit did not address in any way the conflicting decisions from the Seventh or Second Circuits that ASML US had highlighted. *Id.* at 2-3. Currently, the discovery orders require ASML US to begin producing documents on December 18, 2017 and complete production by February 14, 2017.

Shortly after the judgment entered, ASML US sought an emergency stay of the discovery orders pending disposition of a petition for certiorari, or in the alternative an interim stay until this Court was able to rule on a stay request, in order to avoid mooting the case before this Court would have a chance to consider whether to issue a stay.

² Similar orders were entered in the GlobalFoundries case. Exhibits 4-5.

Exhibit 9, at 18-19. Before Nikon filed any response, the Ninth Circuit denied the motion. Exhibit 10.³

STANDARD OF REVIEW

A Circuit Justice’s discretion to stay the judgment of a lower court is guided by four well-established principles. First, “it must be established that there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.” *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (internal quotation marks omitted). Second, the applicant must show that “there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous.” *Id.* Third, there must be “a demonstration that irreparable harm is likely to result from the denial of a stay.” *Id.* Fourth, “in a close case it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.” *Id.*

ARGUMENT

I. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL VOTE TO GRANT ASML US’S PETITION FOR CERTIORARI AND A FAIR PROSPECT THAT FIVE JUSTICES WILL VOTE TO REVERSE

1. The Ninth Circuit’s affirmance of the district court’s order departs from established precedent in both the Second and Seventh Circuits. Those circuits have rendered decisions holding that orders to produce documents that are within the jurisdiction of the foreign court are contrary to this Court’s decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), and are an abuse of discretion. The

³ Similar filings and orders were entered in the GlobalFoundries appeal. Exhibits 11-15.

existence of a circuit split weighs strongly in favor of granting a stay pending certiorari. *Barnes*, 501 U.S. at 1302-1305 (Scalia, Circuit Justice) (granting a motion to stay pending resolution of an application for certiorari, after reasoning that a split with the Ninth Circuit supported the issuance of the stay).

In *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401 (7th Cir. 2004), the Seventh Circuit considered a § 1782 petition filed by Kestrel Coal, an Australian corporation, for documents for use in its litigation against Joy Global Inc. (“Joy Global”), a Delaware corporation with subsidiaries in Australia. *Id.* at 402, 406. The documents sought were located in Australia, but the district court nevertheless ordered them produced because, in its view, Joy Global had control over the documents through its subsidiary. *Id.* at 403. The Seventh Circuit reversed, ruling that the district court had abused its discretion in ordering Joy to produce documents that were not within the United States. Importantly, however, when faced with the question whether to remand to the district court to determine whether any U.S.-based copies of the requested documents should be produced, the Seventh Circuit held that a remand would “not be productive . . . because it would be an abuse of discretion for the district judge to order their production.” *Id.* at 406; *see also Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011) (“But district courts must be alert for potential abuses that would warrant a denial of an application to be allowed to take such discovery. ***One abuse would be for a party to seek discovery in a federal district court that it could obtain in the foreign jurisdiction***, thus gratuitously forcing his opponent to proceed in two separate

court systems; the inference would be that the party seeking U.S. discovery was trying to harass his opponent.” (emphasis added)).

The Second Circuit reached the same holding on similar facts in *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004). There, the court considered a § 1782 petition from German-based investors in Deutsche Telecom (DT), a German corporation involved in ongoing civil and criminal proceedings in Germany, as well as a class-action lawsuit in the United States. The investors’ § 1782 petition was directed to U.S.-based law firms and requested documents that, although they originated in Germany, were within the firms’ possession in the United States as a result of their involvement in the U.S. class-action lawsuit. Citing the twin aims of § 1782—“providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts,” *Schmitz*, 376 F.3d at 83—the district court denied the petition. The Second Circuit affirmed, holding that although the district court had broad discretion, that discretion was constrained by the twin aims of the statute. *Id.* at 84. The Court explained that the first *Intel* factor did not favor discovery because, since “DT is a participant in the German litigation subject to German court jurisdiction, petitioner’s need for § 1782 help ‘is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.” *Id.* at 85 (citing *Intel*, 542 U.S. at 264); see also *In re Kreke Immobilien KG*, 2013 WL 5966916, at *5 (S.D.N.Y. Nov. 8, 2013) (“Moreover, when considering the first *Intel* prong, if ‘the documents or testimony sought by the application are within the foreign tribunal’s jurisdictional reach,’ this fact should cut against allowing

the discovery.”); *id.* at *6 (courts should “be vigilant against a petitioner’s attempt to replace a foreign decision with one by a U.S. court” (citing *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 195 (S.D.N.Y. 2006)); *In re Application of OOO Promnefstroy for an Order to Conduct Discovery for Use in a Foreign Proceeding*, 2009 WL 3335608, at *7 (S.D.N.Y. Oct. 15, 2009) (“Because the Court concludes that nearly all the documents that the subpoena seeks are also in the possession of parties to the foreign proceeding, the first factor weighs squarely [against discovery].”).

Accordingly, it is likely that four Justices will vote to grant certiorari to resolve the division in the Circuits regarding the appropriateness of using 28 U.S.C. § 1782 to seek discovery of U.S.-based copies of documents that are undisputedly subject to the jurisdiction of the foreign tribunal.

2. If the Court grants certiorari, there is also a fair prospect that five Justices will rule that the Ninth Circuit’s position is erroneous, as the discovery order rests on a misinterpretation of the reach of 28 U.S.C. § 1782. *See, e.g., Koon v. United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”). Here, the district court’s order—and the Ninth Circuit’s affirmance—raised and incorrectly decided the important question whether a U.S. court may order discovery under 28 U.S.C. § 1782 of documents that are available to the foreign tribunal through its own processes.

The twin aims of § 1782 are: first, to provide an “*efficient* means of *assistance*” to foreign courts, and second, to *encourage* foreign courts *by example* to provide similar assistance to our courts. *Intel*, 542 U.S. at 252 (emphasis added). These principles limit

the discretion of district courts under § 1782 and are the basis for the four factors this Court established in *Intel. Schmitz*, 376 F.3d at 84 (district court’s “discretion, however, is not boundless. . . . district courts must exercise their discretion under § 1782 in light of the twin aims of the statute”). Those factors are (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 foreign government or the court or agency abroad to U.S. federal-court judicial assistance”; (3) whether the 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.” *Intel*, 542 U.S. at 264-265.

This Court is likely to reverse the Ninth Circuit’s judgment for at least three reasons:

First, when the discovery sought is within the jurisdictional reach of a foreign court, the foreign court does not need U.S. “assistance” to reach it. *Intel* recognized this principle, ruling that when a foreign court has power to order the discovery, the justification for § 1782 assistance is “not as apparent.” *Intel*, 542 U.S. at 264. Indeed, *Intel* held that “§ 1782(a)’s objective [is] to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, **they cannot obtain under their own laws.**” *Id.* at 262 (emphasis added). The Ninth Circuit and district court erred by disregarding the Dutch court’s jurisdiction over these same documents in its *Intel* Factor 1 analysis.

Second, under *Intel*'s Factor 4, when the discovery is equally accessible in the foreign country, it is not "efficient" to require production in the U.S., only to ship the documents back to the foreign country. See *Kestrel*, 362 F.3d at 406 ("Although air transportation, the Internet, and even fax machines have shrunk the globe, it remains best to conduct an Australian suit in Brisbane rather than in Milwaukee, which is 8,915 miles away."); see also *Kreke*, 2013 WL 5966916, at *6 (courts should "be vigilant against a petitioner's attempt to replace a foreign decision with one by a U.S. court"); *In re IPC Do Nordeste, LTDA*, 2012 WL 4448886, at *1 (E.D. Mich. Sept. 25, 2012) ("One Brazilian corporation (IPC) travelling to the United States to seek information regarding a second Brazilian corporation (Dow Brasil) from a third party (Dow Chemical) for use in a case pending in Brazilian court is not an efficient manner of gathering information in the possession of the second Brazilian corporation (Dow Brasil)."); *In re Macquarie Bank Ltd.*, 2015 WL 3439103, at *9 (D. Nev. May 28, 2015) ("[w]hen the information sought is equally available through the foreign proceeding from a party to that foreign proceeding, such requests targeting a different person in the United States are **by their very nature unduly burdensome**." (emphasis added)). Although the Ninth Circuit's judgment referenced *Intel* Factor 4, it did not explain how an order requiring a U.S. company to search for, locate, and produce Dutch documents that are subject to the jurisdiction of the Dutch tribunal would be anything but "unduly burdensome" as the decisions cited above have concluded. Exhibit 8, at 2-3.

Third, *Intel* Factor 3 recognizes that litigants should not be encouraged to circumvent the proof-gathering restrictions and policies of a foreign court. That is not the

kind of example the twin aims of § 1782 seek to set. See *Kreke*, 2013 WL 5966916, at *6 (warning against creating “a perverse system of incentives—one counter to the efficiency and comity goals of § 1782,” by “encourag[ing] foreign litigants to scurry to U.S. courts to preempt discovery decisions from tribunals with clear jurisdictional authority”). The Dutch court has jurisdiction over the discovery Nikon seeks. Exhibit 1, at 4-5. However, Nikon chose to avoid the proof-gathering requirements of the Dutch courts altogether, as it did not even attempt to obtain the documents through the Dutch tribunal. The district court itself found that Nikon’s failure to seek any discovery under Dutch discovery procedures “suggests an attempt to side-step the burdens of those procedures.” *Id.* at 5-6. The district court committed legal error by treating that factor as neutral, ruling that it “neither weighs for nor against granting Nikon’s discovery request,” and the Ninth Circuit erred in treating such a ruling as within the district court’s discretion. *Id.* at 6; Ex. 8, at 2-3.

ASML US thus respectfully submits that this Court is likely to rule that U.S. district courts should not be mere discovery masters for patent cases around the world that are substantively litigated abroad and where all the discovery is in the foreign court’s jurisdiction. In such cases, assistance from § 1782 is not necessary at all, but rather runs counter to the twin aims of the statute. *Intel*, 542 U.S. at 264 (“[a] foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence”); *id.* (§ 1782 is meant to assist foreign tribunals in obtaining evidence that is “outside the foreign tribunal’s jurisdictional reach” and thus “**may be unobtainable absent § 1782(a) aid.**” (emphasis added)). There is accordingly a fair prospect that five

Justices will accept this view after briefing and argument and reverse the judgment of the Ninth Circuit.

II. A STAY IS ESSENTIAL TO AVOID IRREPARABLY HARMING ASML US BY MOOTING ITS OPPORTUNITY TO PETITION FOR CERTIORARI FROM THE NINTH CIRCUIT’S JUDGMENT, WHEREAS A STAY WILL NOT HARM NIKON

The balance of harms clearly weighs in favor of a stay. ASML US will suffer irreparable harm absent a stay of the district court’s order for at least two reasons.

First, without a stay, ASML US will be required to produce documents before this Court is able to determine whether to resolve the division in the circuits. In that circumstance, the appeal would become moot, since the production of documents is the only relief sought by Nikon’s § 1782 petition. A stay pending disposition of ASML US’s petition for writ of certiorari is thus necessary to preserve ASML US’s right to appeal and this Court’s opportunity to declare the correct law governing this case. *Becker v. United States*, 451 U.S. 1306, 1311 (1981) (Rehnquist, Circuit Justice) (“The balance of equities tips heavily in favor of applicants. If a stay is not granted, applicants will be required to turn over their videotapes and their appeal may well become moot.”).

Second, unlike discovery in a typical U.S. litigation, the discovery that the district court has ordered will, if not stayed, require significant labor by both ASML US and ASML NV in the Netherlands. Nikon’s requests to ASML US involve products and features that are designed and developed entirely in the Netherlands. As a result, ASML US has no U.S.-based personnel capable of conducting the requisite search for documents. ASML US’s only option, then, is to reach out to personnel at ASML NV for assistance locating the documents held by ASML US—a process for which there is no existing

procedure. Both ASML entities are likely to expend significant resources and suffer significant business disruption—including by having personnel from ASML NV in the Netherlands assist with document collection—in order to comply with an order that should be reversed or sharply narrowed on appeal. Absent a stay, ASML US will be deprived of the benefit of its appeal, as the production, once completed, cannot be undone. *Becker*, 451 U.S. at 1311; *Harris v. State of Washington Dep’t of Soc. & Health Servs.*, 2013 WL 3936803, at *2 (W.D. Wash. July 30, 2013) (granting stay in part because the ordered actions were “a bell that could not be unrung”).

Nikon has previously argued that its upcoming court deadlines in the Netherlands weigh against a stay, but those deadlines are self-imposed and should not be given any weight here. Nikon voluntarily filed its Dutch litigation on an expedited schedule, under a procedure intended for plaintiffs who have gathered all evidence they believe they need before filing suit, and then did nothing in the Dutch cases to seek any discovery. Nikon has not articulated any specific need for the broad, burdensome discovery it seeks from ASML US in light of the evidence it already possesses, and both its choice of forum and its decision not to seek *any* evidence in that forum show that it does not need any more evidence. Therefore, the burden on ASML US of unstayed production greatly outweighs any harm to Nikon caused by a brief stay pending this Court’s review.

The public interest also favors a stay. It is in the public interest, and in the interest of comity, to ensure that the jurisdiction of foreign courts is not circumvented by strategic litigants. The district court’s decision allows Nikon to apply the substantive patent infringement law of the Netherlands to the merits of its eleven patent infringement

actions, but bypass that jurisdiction's discovery procedures in favor of those of the United States. That circumvention of foreign discovery rules is an abuse of § 1782. *See Heraeus*, 633 F.3d at 594, 595 (“One abuse would be for a party to seek discovery in a federal district court that it could obtain in the foreign jurisdiction.... Other things to watch out for are ... a party's effort to combine the substantive law of a foreign country with the expansive discovery opportunities available in the United States.”).

It is also in the public interest to ensure that a party aggrieved by an immediately-appealable district court ruling is not deprived of its right to appellate review, particularly where compliance with the order could not be undone after a successful appeal. *See, e.g., Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-10 (1942) (“[I]t is reasonable ... to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong ... therefore ... a federal court can stay the enforcement of a judgment pending the outcome of an appeal.”).

III. AN INTERIM STAY SHOULD BE ENTERED TO PERMIT THIS COURT TO RULE ON THIS APPLICATION

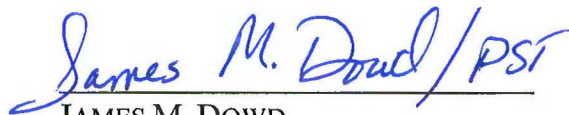
Unstayed, the district court discovery orders will require ASML US to begin production of documents on December 18, 2017 and complete production by February 14, 2017. In order to ensure that this Court has enough time to consider this Application, including any response from Nikon, the Court should at a minimum enter an interim stay of the discovery orders pending disposition of this Application. The Ninth Circuit's refusal to grant even that short-term relief risks depriving this Court of the opportunity to decide in

an orderly manner *whether to grant a stay*. Accordingly, a stay pending briefing and disposition of this Application should be granted at the very least.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit and the affirmed discovery orders of the district court should be stayed pending filing and disposition of ASML US's petition for certiorari. At the very least, an interim stay should be granted until such time as the Court can rule on this Application.

Respectfully submitted.

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