EXHIBIT A

2025 WL 2977513
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United States Court of Appeals, Third Circuit.

IN RE: Application of FINANCIALRIGHT CLAIMS GMBH, for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in a Foreign Proceeding
Burford German Funding LLC; German Litigation Solutions LLC; Burford Capital LLC, Appellants

No. 24-3171
|
Argued on March 4, 2025
|
(Filed: October 22, 2025)

On Appeal from the United States District Court for the District of Delaware (D. Del. No. 1:23-cv-01481), District Judge: Honorable Colm F. Connolly

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Before: MATEY, FREEMAN, and ROTH, Circuit Judges

OPINION

ROTH, Circuit Judge,

***1** Appellee, financialright claims GmbH (FRH), initiated a discovery procedure under 28 U.S.C. § 1782. Appellants, Burford German Funding (BGF), Burford Capital LLC (BCL), and German Litigation Solutions LLC (GLS) (collectively "Burford"), believed that the proceeding breached FRH's contractual commitments to them and moved to compel arbitration. Although 9 U.S.C. § 206 would likely have authorized that motion, Burford chose instead to bring it under 9 U.S.C. § 4. The District Court denied Burford's motion, finding that § 1782 petitions are not "civil actions," as required by § 4. As a matter of first impression, we agree. While both sides have put forth thoughtful arguments, and this appeal provides us with no need to determine the meaning of "civil actions" generally, our review of § 4's history and context, as well as of our sister-circuits' interpretation of parallel provisions, persuades us that the District Court properly disclaimed jurisdiction. We will affirm.

I.

BGF is an entity created to fund mass antitrust suits in Germany. It is co-owned by BCL and GLS (collectively with BGF, "Burford"). Because German law does not allow for class actions, bringing a mass action necessitates going one by one to potential plaintiffs and having them assign their individual claims to a claim aggregator.

In July of 2016, the European Commission found that five truck manufacturers had engaged in price fixing. This gave many German truck owners potential causes of action against those manufacturers. In April 2017, BGF entered into a Capital Provision Agreement (CPA) with FRH, under which FRH would serve as the aggregator for those claims and BGF would fund the ensuing litigations. The CPA included an expansive arbitration provision, covering any "dispute, controversy or claim arising out of or in connection with" the CPA "including any question regarding its formation, existence, validity, interpretation, performance, breach, or termination."[1]

The CPA further required FRH to use BGF's chosen law

firm—Hausfield Rechtanswalte LLP—to prosecute the litigations. FRH entered into a representation agreement with Hausfield in June 2017. That agreement did not contain an arbitration provision and instead required all disputes to be litigated in German court in Berlin.

In late 2021, FRH came to believe that individuals affiliated with Hausfield held an undisclosed ownership stake in GLS, one of BGF's parent entities. As a result, Hausfield was allegedly indirectly receiving a percentage of the recovery from the ongoing litigations—which, FRH argues, violated Germany's restrictions on contingency fees. This led FRH to file a complaint against Hausfield in German court in December 2023.

Simultaneously, FRH petitioned in the District of Delaware for an order, pursuant to 28 U.S.C. § 1782, authorizing it to seek discovery from Burford.[2] Relying on the arbitration clause in the CPA, Burford moved to compel arbitration under 9 U.S.C. § 4, and to stay proceedings pending that arbitration under 9 U.S.C. § 3. When pressed at a motion hearing, Burford confirmed that the statutory bases for its motions were §§ 3 and 4. The District Court denied Burford's arbitration motion, finding that § 4 of the FAA does not confer subject matter jurisdiction to compel the arbitration of § 1782 petitions.[3] Burford appealed.[4]

II.

***2** The District Court had jurisdiction over FRH's discovery petition under 28 U.S.C. § 1782.[5] It had putative jurisdiction over Burford's motion to compel under 9 U.S.C. § 4, and over its stay motion under § 3. We have interlocutory appellate jurisdiction under 9 U.S.C. §§ 16(a)(1)(A)–(B). We apply plenary review to the District Court's analysis of the FAA and determinations concerning its subject matter jurisdiction.[6]

III.

9 U.S.C. § 4 authorizes any district court which, "save for" an arbitration agreement, "would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties" to issue an order compelling arbitration. By its terms, § 4 thus requires the litigation in question to be both a "suit" and (outside of admiralty) a "civil action." The District Court concluded that § 1782 petitions do not satisfy these predicate requirements, and we agree. That said, whether the drafters of the FAA would have viewed § 1782 petitions as suits is far from clear. Multiple lines of evidence, however, collectively persuade us that they would not have viewed them as civil actions.

A.

Although undoubtedly capacious, statutory references to the term "suit" have never been treated as encompassing all judicial proceedings. Instead, courts have traditionally assumed that (barring contrary evidence) Congress intended the term to cover only proceedings that are both sufficiently formal and sufficiently independent from any related litigation.[7] Likewise, courts have long expressed hesitancy before applying that term to requests for purely discretionary judicial intervention.[8] This reflects the reality that the touchstone of a "suit" has always been the vindication of an affirmative right of the suitor.[9]

***3** The boundaries laid out by these precedents are admittedly murky, and their application can be charitably described as inconsistent.[10] Yet, in the context of discovery mechanisms like § 1782, we do not write on a blank slate. While we are aware of no court that has meaningfully analyzed whether subpoena petitions are "suits" for the purpose of the FAA, courts have frequently been asked to decide whether various subpoena proceedings qualify as "suits" for Eleventh Amendment purposes—and have widely found that they do not.[11] Our Court has not yet weighed in on that question, but we note that the case for following our sister-circuits' reasoning is stronger in the context of § 1782. Unlike other discovery mechanisms, § 1782 petitions are, by definition, ancillary to a separate proceeding,[12] purely discretionary,[13] and primarily aimed at assisting foreign tribunals.[14] It is thus hard to describe § 1782 petitions as vindicating any "right" at all.[15] Nor are they comparable to declaratory or injunctive suits, in which a plaintiff has no right to a particular remedy but *has* suffered an injury to a vested legal[16] or equitable[17] right. We therefore question whether, even focusing solely on the statute's "suit" requirement, § 1782 proceedings would qualify for arbitration under § 4.

B.

In fact, we need not resolve whether § 1782 proceedings satisfy § 4's "suit" requirement because, even assuming

Congress *would* have viewed § 1782 proceedings as "suits," we do not believe it would have considered them to be "civil actions."

Like many terms in the legal lexicon, the term "civil action" can be an elusive one. In its broadest sense, it has sometimes been used synonymously with "suit."[18] However, since the proliferation of the Field Code in the mid-19th century which merged law and equity and eliminated the traditional forms of action,[19] the term has developed a more technical, more common, and more limited definition: proceedings begun by a formal summons and pleadings and culminating in a judgment (as distinguished from special proceedings lacking these requirements).[20] While we acknowledge the considerable uncertainty in this area, we believe it most likely that the drafters of the FAA had this later definition in mind.

***4** By the time Congress passed the relevant iteration of § 4 in 1954, versions of the Field Code's conception of "civil action" had become widely adopted throughout the nation in both statutes and caselaw.[21] The Field Code definition was also reflected in the Alaskan civil code, enacted by Congress in 1900,[22] the Code of Civil Procedure of the Canal Zone, enacted by Congress in 1933,[23] and the Canal Zone Code, enacted by Congress in 1962.[24] Most importantly, the Field Code's conception of civil actions was embedded in the Federal Rules of Civil Procedure, which Burford acknowledges were (along with the codification of Title 28) the immediate impetus for § 4's current text.[25] Congress has also shown that, where it wishes to employ a broader definition of the term "civil action," it knows how to do so.[26]

***5** This statutory history does not mean that the modern definition of "civil actions" has become that term's *only* possible interpretation, or that it should be mechanically applied regardless of context.[27] Yet it does suggest to us that, in the absence of further Congressional guidance, it is the *best* interpretation for the purpose of this appeal. That is particularly true because, as with the term "suit," we do not paint on fresh canvas. The pages of the U.S. Code are flush with references to "civil actions." Whether it be the Equal Access to Justice Act,[28] the National Childhood Vaccine Injury Act,[29] the Federal Tort Claims Act,[30] or elsewhere,[31] courts addressing such clauses have generally done so through the lens of the Federal Rules (and the Field Code-inflected definition they reflect).

The most extensively analyzed such provision (and the only one Burford even attempts to address) is 28 U.S.C. § 1441, the primary vehicle through which litigants remove "civil actions" to federal court (which bears a near-identical statutory history to § 4).[32] The large majority of courts that have considered whether ancillary discovery proceedings constitute "civil actions" under § 1441 have concluded that they do not.[33] Burford attempts to distinguish these later cases because many involved prelitigation discovery, whereas FRH has already brought suit in Germany.[34] That might be an understandable distinction were Burford seeking to compel FRH to arbitrate its German civil action. Yet, that is not the case before us, and the existence of a civil action that is related to (or even subsumes) FRH's § 1782 petition does not turn that petition itself into a civil action.[35]

***6** To be clear, we do not construe today any statute other than 9 U.S.C. § 4. Particularly given the peculiar posture in which it has made its way to our desks, this appeal provides us with a poor vantage point to opine on the meaning of the term "civil action" generally. The breadth of the caselaw supporting FRH's position nevertheless strengthens our conclusion that we walk the right path. This is especially true because, here too, the case for applying that caselaw's reasoning is arguably stronger in the context of § 1782. Most of our sister-circuits' decisions attempting to define the term "civil action" have done so in the context of state-law proceedings, in which one relevant interpretative consideration is how best to integrate proceedings Congress did not design (and may not have envisioned) into a Congressionally-crafted framework.[36] In some instances, such cases may also implicate concerns that a state may be seeking to insulate its proceedings from federal review through creative use of procedure.[37] Here, meanwhile, it was *Congress* that enacted § 1782, and it was *Congress* that chose not to structure it as a traditional civil action. If our sister-circuits' reasoning is to apply *anywhere*, we are satisfied that this appeal presents such a case.

Seeking to avoid the consequences of § 4's text, Burford suggests that the words "civil action" in § 4 were intended as a non-substantive emendation to a prior version of § 4 which referred to actions "at law, in equity, or in admiralty."[38] This amendment history gives us momentary pause. However, as a general rule, "we must presume that a legislature says in a statute what it means and means in a statute what it says there."[39] Even were we permitted to revise Congress' handiwork, this appeal presents a poor candidate for doing so—and not only because it is doubtful that § 1782 petitions would have fallen under the prior version of the statute. Burford has not shown that Congress intended the 1954 amendments to the FAA to be *purely* non-substantive—and certainly has not presented enough evidence to override the best reading of those amendments' text.[40] And to the extent there is ambiguity, the legislative history for the 1954 amendments expressly indicates that Congress *did not*

intend § 4 to permit the arbitration of special proceedings (of which § 1782 petitions are an apparent example).[41]

In short, the text, context, statutory history and (to whatever extent it is relevant) legislative history of § 4 collectively persuade us that, while the matter is not as clear as we may have wished, Congress most likely intended the term "civil action" in § 4 to mean precisely what it does in the Federal Rules of Civil Procedure and its precursors. There is no question that § 1782 proceedings—which are ancillary to a foreign suit, initiated without pleading or summons, granted without notice,[42] and concluded without a judgment—are not civil actions under that definition.

IV.

***7** As an alternative ground for reversing, Burford asks us to find that, where "a case is already properly in federal court, the court's jurisdiction over that case gives it jurisdiction to hear a motion to compel arbitration under FAA § 4" even if that case is not a Title 28 "civil action ... of the subject matter of a suit." Burford makes no meaningful effort to reconcile this suggestion with the text of § 4.[43] Nor does it explain why, if § 4's Title 28 "civil action" requirement falls by the wayside as soon as a court has assumed jurisdiction, numerous traditionally non-arbitrable classes (such as criminal defendants) could not shift their prosecutions to arbitral tribunals.[44] Burford's approach is also at tension with the Supreme Court's guidance in *Vaden* that the presence (or absence) of § 4 jurisdiction should generally not turn on the parties' filing choices.[45]

As a justification for ignoring the plain text of § 4, Burford hangs its hat on the Supreme Court's statement in *Badgerow v. Walters* that, where a court already has jurisdiction, "there is no need to 'look through' the motion in search of a jurisdictional basis outside the court."[46] Yet, in context, *Badgerow* plainly did not mean that all limiting language in the FAA becomes irrelevant where a court has any basis for jurisdiction.

The language Burford cites addresses the longstanding rule that, *in addition to those limitations expressly delineated in the FAA*, a court may not grant a motion under Chapter 1 of the FAA (9 U.S.C. §§ 1–16) unless it has a basis outside of the FAA for asserting jurisdiction.[47] The result of this rule is that, where (non-diverse) parties are fighting over a federal issue, a court may not act under Chapter 1 where the parties' right to *arbitrate* that dispute arises solely from state law (or from the FAA itself).[48] In *Vaden*, the Court created a limited "look-through" exception to that rule for § 4, under which a district court that *would have* jurisdiction over the underlying dispute the parties seek to arbitrate may compel arbitration.[49] In *Badgerow*, the Court refused to expand this exception outside the confines of § 4.[50] It noted in this context that where litigation is already pending there is no role for a look-through style approach to play since, even under the FAA's anomalously high standards, the independent-jurisdictional-basis requirement will already have been satisfied.[51] *Badgerow* did not hold that a court may also ignore the *other* prerequisites laid out in the FAA, and there is no basis for reading such a conclusion into its reasoning.[52]

***8** Burford's invocation of language in *Vaden v. Discovery Bank* that, where "a federal-question suit has been filed in or removed to federal court, the court may order arbitration under FAA § 4" also fails to persuade us.[53] In light of our holding that § 1782 proceedings are not civil actions for the purpose of § 4, it is doubtful that they fall within § 1331's grant of federal-question jurisdiction.[54] Yet even if they do, the passage Burford cites in *Vaden* merely held that § 4's independent jurisdictional basis test is satisfied once federal-question jurisdiction has been shown. It *did not* hold that all threshold requirements imposed by § 4 become irrelevant where federal-question jurisdiction exists.

V.

As a final backstop, Burford urges us to hold that its motion should have been granted under Chapter 2 of the FAA (rather than under § 4). We do not reach this argument. Despite multiple opportunities, Burford consistently declined to invoke Chapter 2 before the District Court and repeatedly told the District Court that its motion was predicated on § 4. Burford argues that, because the District Court raised subject matter jurisdiction *sua sponte*, it lacked a previous opportunity to respond. That suffices to let Burford raise new arguments defending the § 4 motion it actually presented.[55] Burford has done so, and we have considered those arguments carefully. It does not authorize Burford to present an entirely new statutory basis for its motion for the first time on appeal.[56]

VI.

This is an unusual appeal, and we suspect the question it presents will not often recur. Meanwhile, the interpretive issues it implicates concerning the general definition of terms such as "suit" and "civil action" are both difficult and far-reaching. There will be time for a fuller discussion of those broader issues should the need present itself. For today, it is enough for us to hold that, in the limited context of § 4, Burford has failed to show that ancillary discovery proceedings pursuant to § 1782 would have been viewed by Congress as civil actions. We will accordingly affirm the District Court's order, dismissing Burford's motion to compel arbitration.

MATEY, Circuit Judge, dissenting.

The majority ably grapples with this discrete, yet demanding, question, concluding that proceedings pursuant to 28 U.S.C. § 1782 do not qualify as "civil actions" under 9 U.S.C. § 4. But I would look to the ordinary meaning of the term at the time of enactment. Early in the twentieth century, a civil action was understood in "Common Law" systems as "one which seeks the establishment, recovery, or redress of private and civil rights."[1] That broad conception has remained constant,[2] and is consistent with section 1782, through which applicants may seek an order demanding information under penalty of contempt. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). Jurisdiction for section 4 requires a "suit," which is satisfied because "the terms 'action' and 'suit' are [by 1951] nearly, if not entirely, synonymous."[3] And the District Court needed no more to exercise jurisdiction over FRC's section 1782 application and Burford's motion to compel. *See Badgerow v. Walters*, 596 U.S. 1, 15 (2022); *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009). For that reason, I would review the order denying the motion to compel arbitration and remand for a second look, and so respectfully dissent.

All Citations

Not Reported in Fed. Rptr., 2025 WL 2977513

Footnotes

1 Appx. 141 § 27(a).

2 Parallel to its § 1782 petition, FRH brought a separate action in the District of Delaware, seeking a declaratory judgment that the arbitration clause in the CPA had been fraudulently induced, which has since been referred to arbitration. *See Financialright Claims GMBH v. Burford German Funding LLC*, No. 24-929-CFC, 2025 WL 2306958, at *5 (D. Del. Aug. 11, 2025). That second action involves a different cast of parties and issues from those in FRH's § 1782 petition and has no bearing on the question we consider in this appeal.

3 Separately, the District Court analyzed FRH's § 1782 petition on the merits, found the requested discovery was warranted, and granted leave to subpoena Burford. That merits ruling is not before us on this interlocutory appeal. *See In re Amgen Inc.*, 139 F.4th 265, 267 (3d Cir. 2025) (*per curiam*).

4 We granted Burford's motion to stay proceedings pending resolution of this appeal. *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 738 (2023) (holding that a district court must stay proceedings during the pendency of a § 16(a) appeal).

5 *See In re Chevron Corp.*, 633 F.3d 153, 160 (3d Cir. 2011); *In re Chevron Corp.*, 650 F.3d 276, 286 (3d Cir. 2011). We acknowledge that we have at times cited 28 U.S.C. § 1331 as an alternative jurisdictional basis for § 1782 petitions.

See, e.g., *In re Amgen*, 139 F.4th at 267. Because jurisdiction is undoubtedly proper under § 1782, we need not address whether § 1782 petitions fall within the scope of § 1331. *See Hagans v. Levine*, 415 U.S. 528, 533 n.5 (1974) (noting that unanalyzed statements concerning background issues lack precedential weight); *Grant v. Shalala*, 989 F.2d 1332, 1341 (3d Cir. 1993) (same).

[6] *See Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422, 429 (3d Cir. 2016); *Gov't Emps. Ins. Co. v. Mount Prospect Chiropractic Ctr., P.A.*, 98 F.4th 463, 467 (3d Cir. 2024).

[7] *See First Nat'l Bank v. Turnbull & Co.*, 83 U.S. 190, 194–95 (1872) (questioning, where an enforcement action did not require process, pleas, or written response, whether "so informal a proceeding" should be considered "a suit, and not essentially a motion"); *Barrow v. Hunton*, 99 U.S. 80, 83 (1878) (distinguishing, in light of *Turnbull*, between ancillary proceedings and independent suits); *see generally Ohio v. Doe*, 433 F.3d 502, 506 (6th Cir. 2006); *Armistead v. C & M Transp., Inc.*, 49 F.3d 43, 46 (1st Cir. 1995).

[8] *See, e.g.*, *Bath Cnty. v. Amy*, 80 U.S. 244, 248 (1871) (expressing doubt that, without clearer instructions, Congress would have intended the phrase "suits of a civil nature at common law, or in equity" to cover purely prerogative proceedings); *Ex parte Milligan*, 71 U.S. 2, 72 (1866) (treating habeas petition as a suit where "the point in controversy was a matter of right and not of discretion"); *Cohens v. Virginia*, 19 U.S. 264, 410 (1821) (Marshall, C.J.) (declining to treat petition as suit where no substantive claim was asserted).

[9] *See, e.g.*, 3 William Blackstone, Commentaries *116 (noting the existence of "a diversity of suits and actions, which are defined by the Mirror to be 'the lawful demand of one's right' "); *Suit*, Black's Law Dictionary (4th ed. 1951) (noting that the term "suit" entails "the redress of an injury or the enforcement of a right").

[10] *Cf. Int'l Org. Masters, Mates & Pilots of Am., Loc. No. 2 v. Int'l Org. Masters, Mates & Pilots of Am., Inc.*, 342 F. Supp. 212, 214 (E.D. Pa. 1972) (noting that cases applying the "ancillariness" doctrine are "few, old, and sometimes difficult to reconcile" and that courts are "hopelessly divided in their results and reasoning").

[11] *See, e.g.*, *United States Dep't of Just. v. Ricco Jonas*, 24 F.4th 718, 727 (1st Cir. 2022); *Barnes v. Black*, 544 F.3d 807, 812 (7th Cir. 2008); *In re Missouri Dep't of Nat. Res.*, 105 F.3d 434, 436 (8th Cir. 1997); *Univ. of Texas at Austin v. Vratil*, 96 F.3d 1337, 1340 (10th Cir. 1996). *But cf. Russell v. Jones*, 49 F.4th 507, 512 n.8 (5th Cir. 2022) (disagreeing with the majority approach, but doing so because the Eleventh Amendment reflects a pre-existing right sweeping broader than its text, not because subpoena proceedings constitute "suits").

[12] *See Post v. Toledo, C. & St. L.R. Co.*, 11 N.E. 540, 548 (Mass. 1887) (noting that, in aiding a foreign tribunal, domestic courts act "ancillary to" that tribunal); *Mitchell v. Smith*, 1 Paige Ch. 287, 288 (N.Y. Ch. 1828) (same); *Republic of Ecuador v. Connor*, 708 F.3d 651, 655 (5th Cir. 2013) (noting that a § 1782 proceeding "addresses an interlocutory discovery application that is ancillary to a non-domestic proceeding," and " 'adjudicates' nothing else").

[13] *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004) ("[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.").

[14] *See ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 632 (2022) (noting that "the animating purpose of § 1782 is comity").

[15] *See Connor*, 708 F.3d at 655; *cf. Mosseller v. United States*, 158 F.2d 380, 382 (2d Cir. 1946) (noting that petitions for discovery to be used in a separate proceeding "[are] not [a] determination of substantive rights, but merely the providing of aid for the eventual adjudication of such rights").

[16] *See* 28 U.S.C. § 2201; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (noting that declaratory actions call "for an adjudication of present right upon established facts").

[17] *See Alexander v. Hillman*, 296 U.S. 222, 239 (1935) ("Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge, and promptly to enforce substantial rights of all the parties before them."); Joseph Story, *Commentaries on Equity Jurisprudence*, §§ 25–28 (1988 ed.).

[18] *See, e.g., Holmes v. Jennison*, 39 U.S. 540, 565 (1840) (treating "civil action" and "suit" as synonyms); *United States v. Ten Thousand Cigars*, 28 F. Cas. 39, 39 (C.C.D. Iowa 1867) (Miller, J.) ("The phrase 'civil actions' includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved[.]").

[19] The Field Code, which was first enacted by New York State in 1848 and then adopted in whole or in part by other American states, attempted to recognize and simplify procedural law.

[20] *See* ch. 438, 1849 N.Y. Laws 614, §§ 2–3 ("An action is an *ordinary proceeding* in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding." (emphasis added)); *Belknap v. Waters*, 11 N.Y. 477, 478 (1854) (noting that the phrase "ordinary proceeding" "was intended to designate those ordinary proceedings which are instituted by summons and complaint").

[21] *See, e.g., Roberts v. Roberts*, 162 P.2d 117, 120 (Wyo. 1945) ("There can be no doubt that the 'action' mentioned ... means an ordinary proceeding in a court of justice, involving process, pleadings and ending in a judgment."); *Nelson v. Cowling*, 116 S.W. 890, 893 (Ark. 1909); *In re Joseph's Estate*, 50 P. 768, 768 (Cal. 1897); *Denver & N. O. R. Co. v. Lamborn*, 8 P. 582, 584 (Colo. 1885); *Appeal of Slattery*, 96 A. 178, 179 (Conn. 1915); *Nelson v. Steele*, 88 P. 95,

95–96 (Idaho 1906); *Evans v. Evans*, 5 N.E. 24, 27–28 (Ind. 1886); *In re Bradley*, 79 N.W. 280, 281 (Iowa 1899); *Lanning v. Gay*, 78 P. 810, 810–11 (Kan. 1904); *Gay v. Morgan*, 67 Ky. 606, 606–07 (1868); *Schuster v. Schuster*, 87 N.W. 1014, 1015 (Minn. 1901); *Bopst v. Williams*, 229 S.W. 796, 798–99 (Mo. 1921); *Deer Lodge Cnty. v. Kohrs*, 2 Mont. 66, 70–71 (1874); *Turpin v. Coates*, 11 N.W. 300, 301 (Neb. 1881); *State ex rel. Germain v. District Court*, 51 P.2d 219, 222 (Nev. 1935) (overruled primarily on statutory grounds by *Cord. v. Second Judicial District*, 533 P.2d 1355 (Nev. 1975)); *Tate v. Powe*, 64 N.C. 644, 647–48 (1870); *Dow v. Lillie*, 144 N.W. 1082, 1084 (N.D. 1914); *State v. Rosenwald Bros. Co.*, 170 P. 42, 43–44 (N.M. 1918); *Missionary Soc. of Methodist Episcopal Church v. Ely*, 47 N.E. 537, 538 (Ohio 1897); *Harryman v. Bowlin*, 4 P.2d 1011, 1012 (Okla. 1931); *Livesly v. Landon*, 138 P. 853, 854 (Or. 1914); *Smith v. Saye*, 127 S.E. 568, 569 (S.C. 1925); *In re Golder's Estate*, 158 N.W. 734, 736 (S.D. 1916); *Smith v. Ormsby*, 55 P. 570, 570 (Wash. 1898); *In re Welch*, 84 N.W. 550, 552 (Wis. 1900); *see generally* Kellen Funk, *Equity without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. Legal Hist. 152, 167 (2015) (noting that, by 1900, "more than twenty-five states and territories had enacted one or another version of the [Field] Code").

[22] Act of June 6, 1900, ch. 786, 31 Stat. 321, 338.

[23] Act of Feb. 27, 1933, Pub. L. No. 72-375, ch. 127, 47 Stat. 908, 909.

[24] C.Z. Code tit. 5 §§ 5–6 (1962); *cf.* Act Providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands, Act No. 190, § 1 (1901) (enacted by the Taft Commission under Congressional authorization).

[25] *See* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

[26] *See* 28 U.S.C. § 1442(d)(1) (providing, *solely* for federal-officer removal purposes, that the term "civil action" includes "ancillary" proceedings over "a subpoena for testimony or documents"); *see also Florida v. Cohen*, 887 F.2d 1451, 1454 (11th Cir. 1989) (holding that, prior to the enactment of § 1442(d)(1), subpoena proceedings were non-removable under § 1442). *But cf. Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (departing from *Cohen* based on "the purpose of the removal statute ... rather than the actual language" of § 1442, while acknowledging that subpoena proceedings are not technically civil actions).

[27] *See Civil Action*, Black's Law Dictionary (4th ed. 1951) (first defining the term as entailing an issue "presented for trial formed by averments of complaint," but also noting alternative definitions); *cf. In re Wilcox*, 135 P. 995, 995 (Kan. 1913) (concluding that a particular statutory reference to an "action" was best understood, in light of context and purpose, as reflecting a broad definition of the term); *Dinsmore v. Barker*, 212 P. 1109, 1110 (Utah 1923) (similar).

[28] *See In re Teter*, 90 F.4th 493, 499 (6th Cir. 2024) (holding that, to qualify as a "civil action" under the EAJA, a proceeding must normally involve "the filing of a complaint").

[29] *See Schindler v. Sec'y of Dep't of Health & Hum. Servs.*, 29 F.3d 607, 610 (Fed. Cir. 1994) (holding that probate proceedings are not "civil actions" under 42 U.S.C. § 300aa-11(a)(7)'s dual-recovery bar).

[30] *See N. V. Philips' Gloeilampenfabrieken v. Atomic Energy Comm'n*, 316 F.2d 401, 405 (D.C. Cir. 1963) (Wright, J.) (noting that the phrase "civil action" in the FTCA's statute of limitations "is a term of art judicially and statutorily defined" by Rule 3).

[31] *See, e.g., Island Indus., Inc. v. Sigma Corp.*, 142 F.4th 1153, 1163 (9th Cir. 2025) (28 U.S.C. § 1582); *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 120 (2d Cir. 2017) (42 U.S.C. § 1650a); *Orr v. Clements*, 688 F.3d 463, 466 (8th Cir. 2012) (28 U.S.C. § 1915).

[32] *See* Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, 62 Stat. 869, 937 (replacing "any suit of a civil nature, at law or in equity" with "civil action").

[33] *See, e.g., Teamsters Loc. 404 Health Servs. & Ins. Plan v. King Pharms., Inc.*, 906 F.3d 260, 266–67 (2d Cir. 2018); *Young v. Hyundai Motor Mfg. Alabama, LLC*, 575 F. Supp. 2d 1251, 1253–55 (M.D. Ala. 2008); *In re Hinote*, 179 F.R.D. 335, 336 (S.D. Ala. 1998); *Barrows v. Am. Airlines, Inc.*, 164 F. Supp. 2d 179, 182 (D. Mass. 2001); *McCrary v. Kan. City S. R.R.*, 121 F. Supp. 2d 566, 569 (E.D. Tex. 2000); *Mayfield-George v. Tex. Rehab. Comm'n*, 197 F.R.D. 280, 283–84 (N.D. Tex. 2000); *Oshkosh Truck Corp. v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 67 F.R.D. 122, 123–24 (E.D. Wis. 1975). *But see, e.g., In re Texas*, 110 F. Supp. 2d 514, 519–21 (E.D. Tex. 2000), *rev'd on other grounds sub nom Texas v. Real Parties in Int.*, 259 F.3d 387 (5th Cir. 2001) (reviewing the enactment history of § 1441).

[34] *But see, e.g., F.B.I. v. Superior Ct. of Cal.*, 507 F. Supp. 2d 1082, 1088–89 (N.D. Cal. 2007) (holding that mid-suit subpoenas are not civil actions either).

[35] *See Kuznar v. Kuznar*, 775 F.3d 892, 895 (7th Cir. 2015) (noting that motions related to civil actions are not themselves civil actions); *In re Teter*, 90 F.4th at 499 (same); *cf. In re Cintas Corp. Overtime Pay Arb. Litig.*, 444 F. Supp. 2d 1353, 1355 (J.P.M.L. 2006) (holding that, "[i]n order to effectuate the statutory objective[ ]" of 28 U.S.C. § 1407, the term "civil action" should be construed as including all civil motions).

[36] *See Commr's of Rd. Improvement Dist. No. 2 of Lafayette Cnty., Ark. v. St. Louis Sw. Ry. Co.*, 257 U.S. 547, 558 (1922) (noting that "[w]hile the decision of the state court as to the nature of a proceeding under state statutes ... is, of course, very persuasive, it is not controlling" where a federal statute is at issue).

[37] *See Donald v. Phila. & Reading Coal & Iron Co.*, 241 U.S. 329, 332 (holding that a state may not by statute "seek to prevent ... foreign commercial corporations doing local business from exercising their constitutional right to remove suits into Federal courts"); *cf.* The Federalist, No. 80 (Alexander Hamilton) (noting that federal diversity jurisdiction

aims to protect out-of-state litigants' rights "against all evasion and subterfuge").

[38] *See* Rep. Br. 9 (quoting 61 Stat. 671 (1947)).

[39] *See United States v. Jabateh*, 974 F.3d 281, 296 n.18 (3d Cir. 2020) (quotation omitted).

[40] *Cf.* Anita S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 305–06 (2022) ("[I]t could very well be the case that Congress amended a statute precisely in order to change its longstanding thrust, rather than simply to clarify the meaning the statute had all along."); *In re Clark*, 678 F. Supp. 3d 112, 123 (D.D.C. 2023) (drawing the opposite inference from a near-identical amendment).

[41] *See* S. Rep. No. 2498, 9 (1954) reprinted in 1954 U.S.C.C.A.N. 3991, 3998 ("The words 'in a civil action' were substituted for 'at law, in equity' because, in civil matters other than admiralty ***and special proceedings***, Rule 2 of the Federal Rules of Civil Procedure provides that in district courts there shall be one form of action." (emphasis added)); H.R. Rep. 1981, 9 (1954) (same).

[42] *See In re Schlich*, 893 F.3d 40, 51 (1st Cir. 2018) (noting that "it is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 ex parte" (quotation omitted)); *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1196 (11th Cir. 2016).

[43] Burford notes the inherent "ancillary enforcement jurisdiction" district courts possess to "manage [their] proceedings, vindicate [their] authority, and effectuate [their] decrees." *See Butt v. United Bhd. of Carpenters & Joiners of Am.*, 999 F.3d 882, 887 (3d Cir. 2021)**.** Whatever the bounds of this inherent authority, it has no bearing on a district court's jurisdiction to compel arbitration *pursuant to* 9 U.S.C. § 4.

[44] It is true that such a proceeding would still need to "aris[e] out of" a "contract evidencing a transaction involving commerce." *See* 9 U.S.C. § 2. But a controversy can "arise out of" a contract to which it bears only a minimal nexus. *But cf. In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 523 (3d Cir. 2019). And, without § 4's civil proceeding requirement, there is no obvious reason why a fraud, bribery, or embezzlement prosecution stemming from a government contract could not qualify.

[45] *See Vaden v. Discover Bank*, 556 U.S. 49, 65 (2009) (rejecting an approach which "would permit a federal court to entertain a § 4 petition only when a federal-question suit is already before the court" and not "a § 4 petitioner who *could* file a federal-question suit in ... federal court, but who has not done so" (emphasis in original)).

[46] *See Badgerow v. Walters*, 596 U.S. 1, 15 (2022).

47 *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

48 *See Badgerow*, 596 U.S. at 9.

49 *See Vaden*, 556 U.S. at 62–65.

50 *See Badgerow*, 596 U.S. at 15.

51 *See id.*

52 Because neither Burford nor FRH disputes that, if § 4 bars Burford's motion at all, it does so jurisdictionally, we do not consider whether § 4's limiting language is best understood as a jurisdictional element, as a non-jurisdictional claims-processing rule, or as a substantive element of a § 4 motion.

53 *See Vaden*, 556 U.S. at 65 (internal quotation omitted).

54 *See supra* note 5.

55 *See Prop. & Cas. Ins. Ltd. v. Cent. Nat. Ins. Co. of Omaha*, 936 F.2d 319, 323 n.7 (7th Cir. 1991); *Reyes-Colón v. Banco Popular De Puerto Rico*, 110 F.4th 54, 66 n.14 (1st Cir. 2024).

56 *See United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996) ("Our duty to consider unargued *obstacles* to subject matter jurisdiction does not affect our discretion to decline to consider waived arguments that might have *supported* such jurisdiction.").

1 *Civil Action*, A Law Dictionary 203 (2d ed. 1910); *see also* Walter A. Shumaker & George Foster Longsdorf, The Cyclopedic Dictionary of Law 152 (1901) (same).

2 *See Civil Action*, Black's Law Dictionary 312 (4th ed. 1951) (defining "civil action" as "[b]oth actions at law and actions in equity" and repeating the common law definition); *Civil Action*, Black's Law Dictionary 331 (3d ed. 1933) (repeating the common law definition).

[3] *Action*, Black's Law Dictionary 49 (4th ed. 1951). Any semantic separation that remained stemmed from an action sounding only in law, while a suit sounded in law and equity—a distinction that no longer makes a difference in federal practice. Put differently, suit is "[a] generic term of comprehensive signification, and applies to any proceeding by one person against another" where "the plaintiff pursues the remedy which the law affords him." *Suit*, Black's Law Dictionary 1603 (4th ed. 1951); *see also Suit*, Black's Law Dictionary 1676 (3d ed. 1933) (same); *Hohn v. United States*, 524 U.S. 236, 246 (1998) ("Presentation of the petition for judicial action is the institution of a suit." (quoting *Ex Parte Quirin*, 317 U.S. 1, 24 (1942))).

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EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-3171

In re: Application of financialright claims GmbH

For an Order Pursuant to 28 U.S.C. 1782 to
Conduct Discovery for Use in a Foreign Proceeding

BURFORD GERMAN FUNDING LLC;
GERMAN LITIGATION SOLUTIONS LLC;
BURFORD CAPITAL LLC,

Appellants

(D.C. Civ. No. 1:23-cv-01481)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE, MASCOTT and *ROTH, Circuit Judges

The petition for rehearing filed by **appellants** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the

* The vote of the Honorable Jane R. Roth is limited to panel rehearing only.

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Jane R. Roth
Circuit Judge

Date: January 2, 2026
JK/cc: All Counsel of Record

EXHIBIT C

2024 WL 4818177
Only the Westlaw citation is currently available.
United States District Court, D. Delaware.

IN RE APPLICATION OF FINANCIALRIGHT CLAIMS GMBH
For an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding

Civil Action No. 23-1481-CFC
|
Filed November 18, 2024

Attorneys and Law Firms

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MEMORANDUM OPINION

COLM F. CONNOLLY, CHIEF JUDGE

***1** financialright claims GmbH (FRC) initiated this action with the filing of an *Ex Parte* Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding. D.I. 2. Section 1782 provides that "upon the application of any interested person" a district court "may order" "a person [who] resides or is found" in the district "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." 28 U.S.C. § 1782(a). A "person" for § 1782 purposes "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

FRC seeks by its application an order granting it permission to obtain discovery from three Delaware LLCs "for use in connection with the foreign proceeding *financialright claims GmbH v. Hausfeld Rechtsanwälte LLP*, Case No. 11162-22/ST/sg, brought by FRC against Hausfeld Rechtsanwälte, LLP [(Hausfeld)] in the Berlin Regional Court" in Germany (the Hausfeld Litigation). D.I. 48 at 1. The three LLCs are: Burford Capital LLC (Burford Capital), Burford German Funding LLC (Burford Germany), and German Litigation Solutions LLC (GLS). I will refer to them collectively as either Burford or the Burford Entities.

Pending before me in addition to FRC's application is a motion filed by Burford to compel arbitration and stay this action pending arbitration (D.I. 20).

I.

The circumstances that ultimately gave rise to the German lawsuit for which FRC seeks discovery by its § 1782 application trace their roots to truck sales in Europe in the late 1990s. In 2016, the European Commission announced that it had imposed approximately three billion dollars in fines against certain manufacturers that had participated in a cartel to fix the price of medium-duty and heavy-duty trucks in Europe between 1997 and 2011. D.I. 5 ¶ 4; *Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel*, Eur. Comm'n (July 18, 2016), https://ec.europa.eu/commission/presscorner/detail/el/ip_16_2582 [https://perma.cc/HT7R-RUBL]. In the wake of this announcement, FRC began a campaign to acquire the legal claims of consumers who had purchased trucks at inflated prices from the manufacturers that had engaged in the unlawful price fixing.

To fund the acquisition and prosecution of these claims, FRC turned to Burford Capital. Negotiations between Sven Bode of FRC and Bernd Pill of Burford Capital resulted in a so-called Capital Provision Agreement (CPA). D.I. 37 ¶¶ 3, 7. According to Bode, "[a]s these negotiations progressed, Burford [Capital] informed [him] that FRC's counterparty to the CPA would be an entity named Burford German Funding LLC [(i.e., Burford Germany)]." D.I. 37 ¶ 4. And, indeed, the only parties to the CPA, which was signed in April 2017, are FRC and

Burford Germany. D.I. 4 at 4; D.I. 5-1 at 63.

Under the CPA, Burford Germany agreed to fund FRC's acquisition and prosecution of truckers' claims against certain manufacturers in exchange for a share of any damages garnered from FRC's assertion of those claims. D.I. 4 at 4; D.I. 5-1 at 64–66. Two paragraphs of the CPA bear on the matters before me.

***2** First, paragraph 5.3(a)(ii) requires FRC to "retain and remunerate" the German law firm of Hausfeld Rechtsanwälte, LLP (Hausfeld) "to prosecute [FRC's claims] vigorously in a commercially reasonable manner in order to bring about the reasonable monetization of" FRC's trucker claims. D.I. 5-1 at 69. Second, paragraph 27(a) of the CPA, referred to by the parties before me as "the Arbitration Agreement," provides:

> Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its formation, existence, validity, interpretation, performance, breach or termination ... shall (to the exclusion of any other forum) be referred to and finally resolved by arbitration under the Arbitration Rules of The London Court of International Arbitration (the "***LCIA***"), which rules are deemed to be incorporated by reference into this Section. Any attempt by [FRC] to seek relief or remedies in any other forum shall constitute a breach of this Agreement and entitle [Burford Germany] to damages, equitable relief and full indemnification against all costs and expenses incurred in connection therewith. [FRC] shall be obliged to post security for costs as directed by the arbitral tribunal ("***Tribunal***").

D.I. 5-1 at 86–87 (emphasis in the original).

Consistent with paragraph 5.3(a)(ii), FRC retained Hausfeld in 2017 to litigate the claims it had acquired from truckers. D.I. 37 ¶ 7. FRC's engagement letter with Hausfeld provides in relevant part that FRC shall compensate Hausfeld for its services in the form of a "fee, which is calculated on the basis of time spent and hourly rates." D.I. 37-1 at 10. The engagement letter also states that "the exclusive place of jurisdiction for all claims in connection with this [retainer] agreement is Berlin." D.I. 37-1 at 12. FRC maintains—and Burford does not dispute—that this latter sentence requires FRC to litigate in German courts in Berlin any disputes with Hausfeld relating to Hausfeld's representation of FRC with respect to FRC's trucker claims. D.I. 36 at 8–9; D.I. 37 ¶ 10; D.I. 38 at 3–4.

Fast forward to late 2022. FRC alleges in its briefing that Bode learned at that time that Burford Germany "was part-owned by GLS, an entity owned by Hausfeld partners, including one of FRC's lead lawyers [retained to litigate FRC's trucker claims]." D.I. 36 at 9; *see also* D.I. 5 ¶¶ 6–7; D.I. 5-1 at 28. According to FRC, this ownership structure allowed Hausfeld lawyers who worked on FRC's trucker claims to share in recoveries gained from the assertion of those claims in violation of both the terms of FRC's engagement letter with Hausfeld and German law's prohibition of attorney contingency fees.

On December 29, 2023, FRC filed the Hausfeld Litigation in the Berlin Regional Court. FRC and Hausfeld are the only parties in that case. FRC alleges in the Hausfeld Litigation that by virtue of ownership interests in GLS, Hausfeld partners shared in Burford Germany's recoveries from FRC's trucker claims in violation of Germany's prohibition of attorney contingency fee compensation. D.I. 5-1 at 30. FRC also alleges that it is entitled to restitution of any proceeds Hausfeld and its partners obtained or will obtain in the future from FRC's trucker claim recoveries. D.I. 5-1 at 30.

The same day it filed the Hausfeld Litigation, FRC filed its § 1782 application in this Court. D.I. 2. The application seeks an order giving it leave to subpoena document productions and deposition testimony from the Burford Entities on various topics, including the CPA. *See* D.I. 28-1; D.I. 28-2; D.I. 28-3; D.I. 28-4; D.I. 28-5; D.I. 28-6.

***3** On January 30, 2024, FRC moved to stay the action "to allow FRC and [Burford] to continue discussing a potential resolution of this matter." D.I. 12 at 1. Later that day, I granted FRC's motion and stayed the action "until FRC notifies the Court that discussions of a potential resolution of [its] [a]pplication have been unsuccessful." D.I. 13.

On May 31, 2024, FRC "notifie[d] the Court that the stay imposed by the Court's January 30, 2024 Order is hereby

ended, as discussions of a potential resolution of FRC's application pursuant to 28 U.S.C. § 1782 have been unsuccessful." D.I. 19 at 1 (internal quotation marks removed). Within hours of that notification, Burford filed its motion to compel arbitration. D.I. 20. The parties completed their briefing on Burford's motion on July 26, 2024. D.I. 42. I heard oral argument on the motion on November 1, 2024.

II.

Burford purports to bring its motion pursuant to the Federal Arbitration Act (the FAA or Act), codified at 9 U.S.C. § 1 *et al.* It describes the motion as a "request that the Court compel arbitration and continue to stay these proceedings pending arbitration, as required by § 3 and § 4 of the Federal Arbitration Act ('the FAA')." D.I. 21 at 2.

A.

Section 4 of the FAA "provides for United States district court enforcement of arbitration agreements." *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009). The section reads in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, ... the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may ... demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury .... If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 4.[1]

Section 3 of the Act requires the district court to grant any application to "stay the trial of the action" "[i]f any suit or proceeding be brought ... upon any issue referable to arbitration under an agreement in writing for such arbitration" and the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3.

B.

***4** A threshold—and, as it turns out, dispositive—question I must decide is whether I have jurisdiction to consider Burford's motion. FRC did not raise this issue, but I "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

The FAA "bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute." *Vaden*, 556 U.S. at 59 (internal quotation marks, alterations, and citations omitted); *see also Badgerow v. Walters*, 596 U.S. 1, 4 (2022) ("A federal court may entertain an action brought under the FAA only if the action has an

'independent jurisdictional basis.' " (quoting *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 582 (2008)). For that reason, an applicant seeking to compel an arbitration under § 4 of the Act must identify a grant of jurisdiction apart from the FAA. *See Badgerow*, 596 U.S. at 4. Under the express terms of § 4, this independent jurisdictional base must be "under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. As the Supreme Court held in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), "[s]ection 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute." *Id.* at 25 n.32.

1.

Burford has not identified, and I have not found, an independent jurisdictional basis in title 28 for a district court to enforce an agreement to arbitrate a § 1782 application. Burford argues that because "Congress has not expressly exempted § 1782 applications from arbitration, ... such proceedings fall within the FAA." D.I. 21 at 12. And it insists that "[n]othing in § 1782 overrides the FAA or even suggests that Congress intended to preclude a litigant from agreeing to arbitration rather than a judicial forum for discovery requests in aid of foreign proceedings." D.I. 21 at 12. But the premise of these contentions—that jurisdiction exists under the FAA unless Congress says otherwise—cannot be reconciled with the Supreme Court's oft-repeated holding that the FAA does not grant federal courts jurisdiction. The relevant question for determining if I have jurisdiction to consider Burford's motion is neither whether Congress exempted § 1782 from the FAA nor whether § 1782 overrides the FAA. The question is instead: Is there a provision in title 28 that provides an independent jurisdictional basis for a district court to entertain a motion to enforce an agreement to arbitrate a § 1782 application? Burford has not pointed to, and I do not know of, any such provision.

Citing (and quoting selectively from) *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), Burford writes in its briefing that "the Supreme Court has explained[ ] [that] the FAA's requirement that courts enforce arbitration agreements by their terms applies to 'any suit or proceeding,' 9 U.S.C. § 3—including those arising under federal statutes—'unless the FAA's mandate has been 'overridden by a contrary congressional command.' " D.I. 21 at 12 (quoting *Am. Express*, 570 U.S. at 233). This assertion is flawed in two respects.

***5** First, the Court did not mention § 3 in *American Express*, and in any event, § 4—not § 3—authorizes parties to file and district courts to grant petitions to enforce arbitration agreements. As discussed above, by its express terms, § 4 applies to arbitration agreements for which enforcement is sought only if "save for such agreement, [the court] would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Section 3 does not mention the enforcement of arbitration agreements, let alone authorize or require courts to enforce such agreements. Section 3 requires a district court, if asked, to "stay *the trial*" of "any suit or proceeding" filed (and for which jurisdiction exists) in that court if the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under ... an [arbitration] agreement" and "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (emphasis added). There being no such thing as a trial in a § 1782 action, § 3 has no bearing on the jurisdictional question before me.

Second, the Supreme Court neither held nor "explain[ed]" in *American Express* that "the FAA's requirement that courts enforce arbitration agreements by their terms applies to 'any suit or proceeding,' ... 'unless the FAA's mandate has been 'overridden by a contrary congressional command.' " D.I. 21 at 12. Rather, the Court held that the FAA's requirement that courts enforce arbitration agreements by their terms "holds true *for claims that allege a violation of a federal statute*, unless the FAA's mandate has been 'overridden by a contrary congressional command.' " *Am. Express*, 570 U.S. at 233 (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)) (emphasis added). Claims that allege a violation of a federal statute arise under federal law, and therefore, district courts have an independent jurisdictional basis to entertain such claims under 28 U.S.C. § 1331. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").[2] Thus, the sentence in *American Express* Burford points to is not in tension with the "independent jurisdictional basis" doctrine imposed by *Vaden, Badgerow, Hall Street Associates*, and *Moses H. Cone*. The principle set forth in that sentence is simply that *if* a federal court has an independent jurisdictional basis to enforce an arbitration agreement under the FAA, the court must enforce the agreement by its terms unless Congress has mandated otherwise. In this case, the absence of an independent jurisdictional basis dooms Burford's motion.

2.

***6** It might be argued—and FRC seems to have assumed—that § 1782 itself provides an independent jurisdictional basis for Burford's motion. Because Burford stated at the November 1 oral argument that it "would have the option to immediately appeal" my denial of its motion, D.I. 49 at 73:21–22, I think it prudent to explain why in my view § 1782 does not grant a district court an independent jurisdictional basis to entertain a motion to compel arbitration under the FAA.

As an initial matter, "[d]escribing a federal court's authority under § 1782 as 'jurisdictional' fits awkwardly with conventional Article III [i.e., "case or controversy"] terminology." *Republic of Ecuador v. Connor*, 708 F.3d 651, 655 (5th Cir. 2013). "Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). The Supreme Court has called § 1782 "a purely evidentiary proceeding," *United States v. Zubaydah*, 595 U.S. 195, 214 (2022), and at least two courts of appeals have described § 1782 as "simply a discovery mechanism." *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002); *Akebia Therapeutics, Inc. v. Fibrogen, Inc.*, 793 F.3d 1108, 1110 (9th Cir. 2015) (describing § 1782 as a "discovery mechanism"). As the Fifth Circuit noted in *Connor*:

> Normally, federal court jurisdiction reflects the courts' power to decide cases or controversies between contending parties. Significantly, a § 1782 application may or may not be adversarial. The federal court addresses an interlocutory discovery application that is ancillary to a non-domestic proceeding. Its § 1782 order "adjudicates" nothing else. Perhaps in recognition that Congress delegated a quasi-administrative role to the courts in § 1782, the Supreme Court [has] discussed the scope of a court's "authority"—not its "jurisdiction"—under the statute. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246, 124 S.Ct. 2466, 2472, 159 L.Ed.2d 355 (2004).

708 F.3d at 655.

But even if § 1782 could be said to grant district courts jurisdiction to entertain applications for discovery for foreign proceedings and disputes arising out of those applications, nothing in the text of § 1782 gives district courts jurisdiction over "a civil action ... of the subject matter of a suit arising out of [a] controversy between [two or more] parties." 9 U.S.C. § 4. Section 1782 does not create a claim or cause of action to resolve controversies between parties. *Lazaridis v. U.S. Dep't of Just.*, 2009 WL 10715774, at *1 n.2 (D.D.C. Aug. 27, 2009) ("[Section 1782] does not create a private cause of action but rather is a mechanism for foreign or international tribunals or litigants appearing before them to obtain testimony or discovery via the 'district court of the district in which a person resides' for use in the foreign tribunal." (quoting 28 U.S.C. § 1782(a)); *In re Mongolia v. Itera Int'l Energy, LLC*, 2009 WL 10712603, at *11 (M.D. Fla. Nov. 10, 2009) ("[A] § 1782 Petition is a discovery device which does not impose liability or initiate a cause of action[.]"). Indeed, § 1782 does not create any legal right to a remedy, as "a district court's compliance with a § 1782 request is not mandatory." *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001) (quoted approvingly in *Intel*, 542 U.S. at 264); *see also In re Accent Delight Int'l Ltd.*, 869 F.3d 121, 133 (2d Cir. 2017) ("[E]ven if [§ 1782's] statutory requirements are met, a grant of discovery under [§] 1782 remains within the discretion of the district court."). Section 1782 is, in short, a mechanism for a party to gain discovery for foreign proceedings, not an action to resolve existing controversies between parties. And because § 1782 does not grant a district court "jurisdiction over a suit on [an] underlying dispute," *Moses H. Cone*, 460 U.S. at 25 n.32, it does not provide a jurisdictional basis for me to entertain Burford's motion to compel arbitration.

* * * *

***7** Having concluded that I lack jurisdiction to entertain a petition to compel the arbitration of a § 1782 application, I will deny Burford's motion. I turn, then, to FRC's application.

III.

As noted above, FRC seeks by its application an order giving it leave to serve document and deposition subpoenas on the three Burford Entities. D.I. 48. *See* D.I. 28-1; D.I. 28-2; D.I. 28-3; D.I. 28-4; D.I. 28-5; D.I. 28-6. The subject matters of the documents and testimony FRC seeks to obtain from Burford Germany include, among other things, (1) Burford Germany's corporate structure, owners, and investors; (2) Burford Germany's relationships, communications, and financial dealings with Burford Capital, GLS, Hausfeld, and Hausfeld's partners; and (3) the CPA. D.I. 28-1 at 13–17; D.I. 28-2 at 10–14. The subject matters of the documents and testimony FRC seeks to obtain from Burford Capital include, among other things, (1) Burford Capital's involvement and interests in Burford Germany; (2) its relationship with GLS; (3) its relationship with Hausfeld; and (4) the negotiation of the CPA. D.I. 28-5 at 13–16; D.I. 28-6 at 10–14. The subject matters of the documents and testimony FRC seeks to obtain from GLS include, among other things, (1) GLS's corporate structure; (2) its interest in Burford Germany; (3) its relationship with Hausfeld and Hausfeld's partners; and (4) the CPA. D.I. 28-3 at 13–16; D.I. 28-4 at 10–13.

A district court has authority to grant an application under § 1782 when three statutory conditions are met: (1) the person from whom discovery is sought "resides or is found" within the district; (2) the discovery is "for use in a proceeding in a foreign or international tribunal"; and (3) the application is made by an "interested person." 28 U.S.C. § 1782(a); *see also In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). If the statutory conditions are satisfied, the decision to grant a § 1782 application lies within the district court's discretion. *Intel*, 542 U.S. at 264. The Court identified in *Intel* four factors relevant to that discretionary determination: (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 foreign proceedings, and the receptivity of the foreign government to federal judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies; and (4) whether the request is unduly intrusive or burdensome. *Id.* at 264–65. "A court should apply these factors in support of § 1782's 'twin aims' of 'providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.' " *In re Biomet Orthopaedics Switz. GmBh*, 742 F. App'x 690, 696 (3d Cir. 2018) (quoting *Intel*, 542 U.S. at 252).

All three statutory conditions are met in this case. First, each of the Burford Entities is a Delaware LLC and therefore a person that resides in this district. 1 U.S.C. § 1. Second, the discovery sought is for use in and relevant to a proceeding in a foreign tribunal—i.e., the Hausfeld Litigation in the Berlin Regional Court. Third, FRC, as a litigant in that proceeding, is an "interested person" under § 1782. *See Intel*, 542 U.S. at 256 ("[L]itigants are included among, and may be the most common example of, the 'interested person[s]' who may invoke § 1782." (second alteration in the original)).

***8** Turning to the discretionary *Intel* factors, the first factor appears to favor granting the application because the Burford Entities are not parties to the Hausfeld Litigation and thus they may be "outside the ... jurisdictional reach" of the Berlin Regional Court and the evidence FRC seeks may be "unobtainable absent § 1782(a) aid." *Intel*, 542 U.S. at 244. The second factor also appears to favor granting FRC's application. I make that finding based on the determinations by numerous courts that the second *Intel* factor favors the granting of § 1782 applications for evidence to be used in German court proceedings. *See, e.g.*, *Heraeus Kulzer GmbH v. Esschem, Inc.*, 390 F. App'x 88, 92 (3d Cir. 2010); *Heraeus Kulzer GmbH v. Biomet, Inc.*, 633 F.3d 591, 596 (7th Cir. 2011); *In re Cal. State Tchrs.' Ret. Sys.*, 2017 WL 1246349, at *3 (D.N.J. Apr. 3, 2017); *In re Application of Johannes Roessner to Take Discovery Pursuant to 28 U.S.C. 1782 in Aid of Foreign Litigants or Proc.*, 2021 WL 5042861, at *3 (S.D.N.Y. Oct. 29, 2021).

I make no finding with respect to the third *Intel* factor. FRC provided no declarations or citations to German law that would enable me to determine whether its application "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies." *Intel*, 542 U.S. at 265. Lastly, with respect to the fourth *Intel* factor, I find that it favors granting the application because the discovery sought by FRC is not unduly intrusive and producing it would not be unduly burdensome.

Because FRC's application meets the statutory requirements of § 1782 and three of the four *Intel* factors weigh in favor of granting FRC's application, and mindful that I "should apply these factors in support of § 1782's 'twin aims' of 'providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts,' " *In re Biomet*, 742 F. App'x at 696 (quoting *Intel*, 542 U.S. at 252), I will exercise my discretion and grant the application.[3]

IV.

For the reasons stated above, I will deny Burford's motion to compel arbitration and grant FRC's § 1782 application.

The Court will issue an Order consistent with this Memorandum Opinion.[4]

All Citations

Slip Copy, 2024 WL 4818177

Footnotes

[1] For reasons not clear to me, § 4 does not say what the court is to do if, after a bench trial, it finds "that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder."

[2] The claims the petitioners sought to arbitrate in *American Express* were federal antitrust claims, 570 U.S. at 231, and thus § 1337 of title 28 provided an additional independent jurisdictional basis for the district court to entertain the petition to enforce the claims under the FAA. *See* 28 U.S.C. § 1337 ("The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies ...."). Federal courts also have jurisdiction over federal antitrust claims under 15 U.S.C. § 15. *See* 15 U.S.C. § 15 (providing that, with certain exceptions, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent"). Section 15, however, cannot provide an independent jurisdictional basis for a petition to compel arbitration under the FAA because the express terms of § 4 of the FAA require that the independent jurisdictional basis for the "civil action ... of the subject matter of a suit arising out of the controversy between the parties" be "under title 28."

[3] Burford did not and was under no obligation to file an opposition to FRC's § 1782 application. Burford stated in its memorandum filed in support of its motion to compel that it "reserve[d] the right to substantively address the deficiencies in FRC's § 1782 application, and to seek further protections if any discovery is permitted, either before the arbitral tribunal or this Court." D.I. 21 at 11 n.3. Burford, of course, can move to quash any subpoena served on the Burford Entities by FRC and is free to address in any such motion alleged deficiencies in FRC's § 1782 application. *See, e.g.*, *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022) (addressing on appeal from denial of a motion to quash subpoenas issued pursuant to order granting § 1782 application whether district court had lawfully granted the application).

[4] I also have pending before me FRC's Motion for Leave to File Sur-Reply in Opposition to Respondents' Motion to Compel Arbitration and to Stay Further Proceedings Pending Arbitration. D.I. 39. As I saw no need to read and did not read the sur-reply FRC sought leave to file, I will deny the motion as moot.

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