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**SUMMARY ORDER, U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
(APRIL 1, 2026)**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: ORTHOGEN INTERNATIONAL GMBH, for
an order pursuant to 28 U.S.C. § 1782 to conduct
discovery for use in a foreign proceeding,

Petitioner.

ORTHOGEN INTERNATIONAL GMBH, for an
order pursuant to 28 U.S.C. § 1782 to conduct
discovery for use in a foreign proceeding,

Appellee,

v.

DR. DOUGLAS SCHOTTENSTEIN,
SCHOTTENSTEIN PAIN & NEURO, PLLC,
d.b.a. NY SPINE MEDICINE,

*Intervenors-
Appellants.*

Nos. 25-1253 (Lead)
25-1258 (Con)

Before: Denny CHIN, Richard J. SULLIVAN and
Eunice C. LEE, Circuit Judges.

SUMMARY ORDER

Appeal from orders of the United States District Court for the Southern District of New York (Vernon S. Broderick, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the February 28, 2025 and April 30, 2025 orders of the district court are **AFFIRMED**.

Dr. Douglas Schottenstein and his clinic, Schottenstein Pain & Neuro, PLLC (together, “Schottenstein” or “Appellants”), appeal from two orders of the district court authorizing Orthogen International GmbH to take discovery pursuant to 28 U.S.C. § 1782 in connection with contemplated, but not yet commenced, litigation against Schottenstein in Germany. J. App’x at 1-2. Appellants argue that (i) the German litigation is still too inchoate to justify discovery in the United States, (ii) the German courts would reject any evidence obtained under section 1782, (iii) the parties’ forum selection clause bars Orthogen’s petition for domestic discovery, (iv) applying section 1782 here would violate the Constitution, (v) the district court incorrectly dismissed their counterclaim, and (vi) the district court should have *sua sponte* offered to let them amend their counterclaim. We assume the parties’ familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

In deciding whether to grant a motion for discovery pursuant to section 1782, a district court must first assess the three statutory requirements, namely, whether “(1) the person from whom discovery is sought resides (or is found) in the district of the district court

to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign or international tribunal, and (3) the application is made by a foreign or international tribunal or any interested person.” *Banoka S.a.r.l. v. Elliott Mgmt. Corp.*, 148 F.4th 54, 64 (2d Cir. 2025) (alterations adopted) (quoting *Fed. Republic of Nigeria v. VR Advisory Servs., Ltd.*, 27 F.4th 136, 148 (2d Cir. 2022)). If those three requirements are met, the court must also consider the discretionary factors set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), which focus on “(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, court, or agency to U.S. federal-court judicial assistance’; (3) ‘whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States’; and (4) whether the request is ‘unduly intrusive or burdensome.’” *Fund for Prot. of Inv. Rts. in Foreign States v. AlixPartners, LLP*, 5 F.4th 216, 230 (2d Cir. 2021) (quoting *Intel*, 542 U.S. at 264-65).

We review a district court’s application of the statutory requirements *de novo*, and its assessment of the *Intel* factors for abuse of discretion. *See Banoka S.a.r.l.*, 148 F.4th at 64. A district court abuses its discretion “if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions.” *In re Application for an Ord. Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proc.*, 773 F.3d 456,

459-60 (2d Cir. 2014) (alteration adopted and internal quotation marks omitted). Finally, we review motions for reconsideration for abuse of discretion. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 435 (2d Cir. 2011).

I. The District Court Did Not Err in Finding That the Discovery Sought by Orthogen was “For Use in a Proceeding in a Foreign or International Tribunal.”

Schottenstein first contends that Orthogen failed to satisfy the second statutory factor because section 1782 does not permit the sort of pre-suit discovery that it seeks here. But the Supreme Court in *Intel* explicitly “rejected the view, expressed in *In re Ishihara Chemical Co.*,” — and by Schottenstein here — “that [section] 1782 comes into play *only when* adjudicative proceedings are ‘pending’ or ‘imminent.’” 542 U.S. at 259 (emphasis added) (quoting *In re Ishihara Chem. Co.*, 251 F.3d 120, 125 (2d Cir. 2001)). Indeed, the Supreme Court recognized that “Mt is not necessary for the adjudicative proceeding to be pending at the time the evidence is sought, but only that the evidence *is eventually to be used* in such a proceeding.” *Id.* (alterations adopted and emphasis added) (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 (1965)).

In the years since, we have clarified that a section 1782 applicant “must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that the action is being *contemplated*.” *Certain Funds, Accts. and/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 123 (2d Cir. 2015) (emphasis added). And that is precisely

what the district court found to be the case here. *See* J. App'x at 17 (“Orthogen . . . provides the ‘objective indicium’ that there is reasonable contemplation [that it will bring] the Contemplated German Proceeding.” (quoting *Certain Funds*, 798 F.3d at 123)). We therefore agree with the district court that the pre-suit discovery requested here was consistent with our Circuit’s caselaw.

II. The District Court Did Not Err in Its Application of *Intel*’s Second Factor

Schottenstein next asserts that the district court misapplied *Intel*’s second factor by requiring Schottenstein to introduce “authoritative proof” that the German courts would reject evidence obtained with the aid of section 1782. Appellants’ Br. at 52 (internal quotation marks omitted). But the district court did no such thing. It simply observed that Orthogen’s foreign legal expert knew of no German law — or any restriction whatsoever — that would bar Orthogen from collecting and using documents obtained through section 1782. *See* J. App'x at 9; *see also id.* (citing *In re Application of Johannes Roessner to Take Discovery Pursuant to 28 U.S.C. 1782 in Aid of Foreign Litigants or Proc.*, No. 21-MC-513, 2021 WL 5042861, at *3 (S.D.N.Y. Oct. 29, 2021) for the proposition that no “German laws or restrictions” “preclude the use of the discovery sought in” a section 1782 application) (internal quotation marks omitted)). We therefore see no abuse of discretion in the district court’s analysis of the second *Intel* factor.

III. The Parties' Forum Selection Clause Does Not Bar Discovery under Section 1782

Schottenstein also argues that the mandatory forum selection clause in the parties' contract — designating Dusseldorf, Germany as the jurisdiction for all suits stemming from their agreements with Orthogen — precludes section 1782 discovery here. But this challenge to the application of the *Intel* factors is contradicted by *Intel* and our Circuit's intervening caselaw.

As we recently said in *Banoka S.a.r.l.*, “a [forum selection] clause remains *a factor* that the district court *may* consider in its exercise of discretion” when assessing a section 1782 motion. 148 F.4th at 66 n.9 (emphases added). Indeed, we have never implied that the existence of a forum selection clause serves as an absolute bar to pre-suit discovery. And with good reason, since the inclusion of a forum selection clause often says very little about whether the parties intended to restrict access to discovery in the United States pursuant to section 1782. If the parties really intended to close that door, they easily could have included such a provision in the text of their agreement. They did not, which left the door open for the district court to weigh the forum selection clause as one factor among many to be considered in the exercise of its discretion.

Here, the district court did consider the forum selection clause as a relevant factor in assessing the propriety of discovery. *See* J. App'x at 20. It nonetheless concluded that the remaining three *Intel* factors weighed in favor of allowing discovery. *See id.* (“Assuming . . . that the forum-selection clause counsels against such discovery, the third *Intel* factor is only one among four non-exclusive factors”; because “Ortho-

gen prevails in establishing the other three *Intel* factors, the forum-selection clause here is not dispositive.” (internal quotation marks omitted)).

In short, we see no reason to reverse the district court’s “fact-sensitive and highly contextual analysis regarding the forum-selection clause.” *Banoka S.a.r.l.*, 148 F.4th at 68 (internal quotation marks omitted).

IV. The District Court Did Not Err in Denying Schottenstein’s As-Applied Constitutional Challenge Under the Equal Protection Clause

Schottenstein further contends that the district court’s grant of Orthogen’s section 1782 applications “run[s] afoul of the [Fourteenth Amendment’s] Equal Protection Clause,” which he claims applies to the actions of the federal government via the Fifth Amendment’s Due Process Clause. Schottenstein Br. at 39-40. We disagree.

Congress’s decision to permit pre-suit discovery through section 1782 clearly satisfies our rational-basis review. *See United States v. Amalfi*, 47 F.4th 114, 118 (2d Cir. 2022) (holding that rational basis review “requires us to ask whether there is *any conceivable* basis to support Congress’ decision at issue”). As the Supreme Court recently explained, Congress enacted section 1782 “to assist foreign or international adjudicative bodies in evidence gathering.” *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 623 (2022); *id.* at 632 (“[T]he animating purpose of [section] 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance.”); *see also Jankowski*

Burczyk v. I.N.S., 291 F.3d 172, 178 (2d Cir. 2002) (“[W]e will assume that a statute is constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” (internal quotation marks omitted)).

V. The District Court Did Not Err in Dismissing Schottenstein’s Counterclaim for Breach of Contract

Schottenstein next contends that the district court erred in dismissing its counterclaim for damages based on Orthogen’s alleged breach of the forum selection clause. As an initial matter, Schottenstein offers no authority for the proposition that parties may append counterclaims to motions filed in connection with section 1782 litigation. Indeed, the text, purpose, and history of section 1782 suggest otherwise. Section 1782 merely creates a mechanism whereby witnesses and/or documents in the United States may be made available “for use in a proceeding in a foreign or international tribunal.” 28 U.S.C. § 1782(a). And it authorizes a district court to issue only orders “prescrib[ing] the practice and procedure . . . for taking the testimony or statement or producing the document” for the foreign proceeding. *Id.*

Stretching section 1782’s language to its limit, Schottenstein asserts that his right to bring counterclaims derives from the statute’s provision that “No the extent that the order *does not prescribe otherwise*, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.” *Id.* (emphasis

added). But clearly section 1782 is about the taking of testimony and the production of documents. It does not graft the entirety of the Federal Rules of Civil Procedure into a single statute. Nor does it open the door for claims or counterclaims that are typically better left to the foreign tribunal. Moreover, even if we were to assume that such counterclaims *could be* asserted in a section 1782 proceeding, Schottenstein's counterclaim was properly dismissed because it revolves around a question of German law — namely, whether the parties' forum selection clause creates a cause of action for damages when one party seeks evidence from the other outside of Germany. The answer to that question, of course, turns on a prediction of “the procedural or substantive law of the foreign jurisdiction” and thus lies beyond the scope of a section 1782 inquiry. *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995) (internal quotation marks omitted). We therefore see no error in the district court's dismissal of Schottenstein's counterclaim for damages stemming from Orthogen's alleged breach of the forum selection clause.

VI. The District Court Did Not Err in Failing to *Sua Sponte* Grant Schottenstein Leave to Amend Its Counterclaims

Schottenstein finally argues that the district court erred in not permitting it to amend its counterclaims against Orthogen, notwithstanding the fact that Schottenstein never requested leave to amend. We disagree.

Our caselaw makes clear that district courts are under no obligation to *sua sponte* offer parties opportunities to amend their dismissed claims, particularly

for sophisticated parties represented by counsel. *See, e.g., Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249 (2d Cir. 2004) (“Because an amendment is not warranted absent some indication as to what appellants might add to their complaint in order to make it viable, the [d]istrict [c]ourt was under no obligation to provide the [plaintiffs] with leave to amend their complaint, much less provide such leave *sua sponte*.” (alteration adopted and citation and internal quotation marks omitted)). Indeed, we have previously labeled it “frivolous” for a plaintiff to advance the “contention that the [d]istrict [c]ourt abused its discretion in not permitting an amendment that was never requested.” *Id.* at 249-50.

We therefore affirm the district court’s dismissal of Schottenstein’s counterclaims.

* * *

We have considered Schottenstein’s remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the orders of the district court.

FOR THE COURT:

/s/ Catherine O’Hagan Wolfe
Catherine O’Hagan Wolfe
Clerk of Court

**OPINION AND ORDER, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK,
CASE NO. 24-MC-504
(APRIL 30, 2025)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Application of Orthogen International GmbH,

Petitioner.

for an order pursuant to 28 U.S.C. § 1782 to conduct
discovery for use in a foreign proceeding.

24-MC-504 (VSB)

Before: Vernon S. BRODERICK,
United States District Judge.

VERNON S. BRODERICK,
United States District Judge:

OPINION & ORDER

Applicant Orthogen International GmbH (“Applicant” or “Orthogen”) filed this *ex parte* application (the “Application”), along with a memorandum of law and declarations in support, seeking discovery in aid of a foreign proceeding pursuant to 28 U.S.C. § 1782. (Docs. 9–12.) Specifically, Applicant seeks an order granting it the authority to serve subpoenas for certain records from Judith Capla (“Judith”) and Tomas Capla (“Tomas” and with Judith “Judith and

Tomas”). Orthogen intends to use these records in support of litigation in Germany in which it will allege claims based on underpayment of royalties in connection with certain license agreements (the “Contemplated German Proceeding”). Judith and Tomas have not opposed or otherwise appeared in this action. Because Applicant has made a sufficient showing that the statutory elements of § 1782 are met and the discretionary factors identified in *Intel Corporation v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), weigh in favor of granting the request, the Application is GRANTED.

Also before me is a motion to intervene filed by Dr. Douglas Schottenstein (“Dr. Schottenstein”) and his practice, Schottenstein Pain & Neuro, PLLC d/b/a NY Spine (“NY Spine,” together with Dr. Schottenstein, the “Schottenstein Parties”), which includes five proposed counterclaims. (Doc. 15.) For the reasons below, Dr. Schottenstein’s motion to intervene is GRANTED, NY Spine’s motion to intervene is DENIED, and the proposed counterclaims are DISMISSED.

I. Factual Background¹

Orthogen is “a German biotech company that licenses its patented medical technology” to doctors globally through the “Regenokine Program.” (Doc. 10 (“1782 Mem.”) at 2.) The two licensees at issue here are Edward Capla—the son of Judith and Tomas Capla—and Dr. Schottenstein. (*Id.*) Pursuant to the

¹ The following is only a brief summary of background information contained in Applicant’s Memorandum of Law in Support of Orthogen’s § 1782 Application, to provide some context for this Opinion & Order. I make no findings of fact.

Regenokine Program, Edward Capla regularly sent royalty reports to Orthogen regarding (1) “the number of Regenokine Program treatments that were administered” through NY Spine, and (2) the monetary amount “invoiced to/paid by patients in connection with such treatments.” (*Id.*)

In December 2022, Dr. Schottenstein initiated an action in the Southern District of New York against, among others, Orthogen and Edward Capla for tortious interference, fraud, breach of contract, and other claims. (*Id.* at 3); see *Schottenstein v. Capla*, No. 22-CV-10883 (S.D.N.Y. Dec. 27, 2022), ECF No. 1. In that action (the “N.Y. Action”)², Dr. Schottenstein’s verified complaint included (1) a numerical figure of patient treatments administered by NY Spine that was “far higher” than what Edward Capla had regularly reported to Orthogen and (2) allegations that Dr. Schottenstein and Edward Capla had “each received millions of dollars more in connection with those treatments” than what Edward Capla had regularly reported to Orthogen. (*Id.*) Dr. Schottenstein eventually filed two amended verified complaints in the N.Y. Action, both of which included similar allegations. (*Id.*) Through these verified complaints and the litigation in the N.Y. Action overall, Orthogen learned that Edward Capla and Dr. Schottenstein had defrauded Orthogen out of millions of dollars in royalty fees by underreporting both the number of treatments administered and the dollar amounts invoiced to or paid by

² On June 14, 2024, Judge P. Kevin Castel so ordered the Schottenstein Parties’ voluntary dismissal of all claims against Orthogen. Dismissal, *Schottenstein v. Capla*, No. 22-CV-10883 (S.D.N.Y. June 14, 2024), ECF No. 129. The N.Y. Action remains ongoing.

patients in connection with those treatments. (*Id.*) Orthogen now seeks to bring a civil lawsuit regarding the underpayment of royalties in the Contemplated German Proceeding.

Prior to initiating the Contemplated German Proceeding, Orthogen sought to obtain more information and evidence, including through several § 1782 applications. In May 2023, Orthogen filed a § 1782 petition against Dr. Schottenstein and NY Spine in this District, *see In re: Orthogen Int’l GmbH*, No. 23-MC-152 (S.D.N.Y. May 4, 2023), ECF No. 1 (the “Schottenstein 1782 Action”), which was assigned to me. (*Id.* at 4.) Separately, Orthogen filed a § 1782 petition in Florida against Edward Capla and his wife Yolanda Capla (the “Florida 1782 Action”). (*Id.*)

Orthogen separately obtained information from two former employees of Dr. Schottenstein and NY Spine, Pearl Chan and Derek Lee, during their April 3, 2024 interview with Orthogen’s counsel. (*Id.* at 5.) That interview was conducted in the presence of Ms. Chan’s and Mr. Lee’s own counsel.³ (*Id.*) In the interview, Ms. Chan and Mr. Lee stated that that Edward Capla had “created monthly handwritten ledgers” that they claimed show more patient treatments and more monetary amounts invoiced to or paid by patients compared to the regular reports Edward Capla sent to Orthogen. (*Id.*) According to Ms. Chan and Mr. Lee, those monthly handwritten ledgers indicated that “Judith and Tomas Capla sometimes received a portion of [Edward] Capla’s share of those amounts paid.” (*Id.*) After the interview, counsel for Ms. Chan

³ It appears as if Ms. Chan and Mr. Lee were represented by the same attorney.

and Mr. Lee provided Orthogen with various documents, including “copies of the handwritten ledgers for seven months, two of which reflect that Judith Capla received approximately one third of [Edward] Capla’s share of the amounts paid.” (*Id.*) Based in part upon the documents provided by Ms. Chan and Mr. Lee, Orthogen filed a § 1782 petition in Texas (the “Texas 1782”).

II. Procedural Background

On October 31, 2024, Applicant filed an ex parte application for an order pursuant to 28 U.S.C. § 1782 to conduct discovery for use in the Contemplated German Proceeding, (Doc. 1), along with a memorandum of law and two declarations in support, (Docs. 5–7.) Orthogen also filed a statement of relatedness to the Schottenstein 1782 Action that was assigned to me. (Doc. 3.) On November 1, 2024, due to filing errors, Orthogen refiled its ex parte § 1782 application, (Doc. 9), along with a memorandum of law, (Doc. 10 (“1782 Mem.”)), and two declarations in support, (Docs. 11–12). Specifically, Applicant seeks documents from Judith Capla and Tomas Capla, including those “identifying the full amount of [Edward] Capla’s share of the unreported Regenokine Program income that was paid to Judith and Tomas Capla.” (1782 Mem. 8.) These payments are “highly relevant to Orthogen’s damages claims.” (*Id.*) Because the requested discovery may contain information protected by the Health Insurance Portability and Accountability Act (“HIPAA”), Orthogen also attached a proposed HIPAA Order. (*See id.* at 18.) On November 6, 2024, this action was assigned to Judge J. Paul Oetken. The next day, on November 7, 2024, I accepted this case as related

to the Schottenstein 1782 Action and it was reassigned to me.

On December 31, 2024, the Schottenstein Parties moved to intervene. (Doc. 15.) Schottenstein's motion to intervene asserted five counterclaims against Orthogen. (*See* Doc. 15-2 ("Intervention Plea") at 21–27.) On January 28, 2025, Orthogen filed an opposition brief and a supporting declaration. (Docs. 18–19.) Applicant "does not object to the Schottenstein Parties intervening in order to participate in any discovery that this Court authorizes," but objects to their request to interpose the proposed counterclaims. (Doc. 18 ("Opp'n") at 1.) On February 18, 2025, the Schottenstein Parties filed a reply brief. (Doc. 20 ("Reply").) On February 24, 2025, Orthogen filed a letter-motion for a conference in anticipation of a motion to expedite a decision in the Schottenstein 1782 Action and the instant action. (Doc. 21.)

To date, Judith Capla and Tomas Capla have not opposed the § 1782 application or otherwise appeared in this action. Nor have they appeared in the Schottenstein 1782 Action.

III. Discussion

The instant action currently has two pending requests: (1) Orthogen's § 1782 application to which Judith and Tomas Capla have not objected, and (2) the Schottenstein Parties' fully briefed motion to intervene. I address each in turn.

A. Applicable Law

1. Section 1782

Section 1782 contains three statutory requirements: “(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign or international tribunal, and (3) the application is made by a foreign or international tribunal or any interested person.” *Mangouras v. Squire Patton Boggs*, 980 F.3d 88, 97 (2d Cir. 2020) (quoting *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015) (cleaned up)).

“Once the statutory requirements are met, a district court may order discovery under § 1782 in its discretion, taking into consideration the twin aims of the statute, namely, 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.” *Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 117 (2d Cir. 2015) (internal quotation marks omitted). “The Supreme Court has identified four” factors—the so-called “*Intel* factors”—that are relevant to a district court’s discretion under § 1782:

- (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding,” in which case “the need for § 1782(a) aid generally is not as apparent”;
- (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.”

Mangouras, 980 F.3d at 97–98 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004) (cleaned up)).

2. Motion to Intervene

Under Rule 24(a) of the Federal Rules of Civil Procedure, a court is required to allow intervention of a party that “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).

B. Application

1. Section 1782

a. The § 1782 Statutory Requirements

The statutory requirements of Section 1782 are met here. First, Judith and Tomas Capla “reside” in this District. An individual resides or is found in a district if they are subject to personal jurisdiction of a court in that district. *See In re del Valle Ruiz*, 939 F.3d 520, 527 (2d Cir. 2019) (“[T]he statutory scope of ‘found’ extends to the limits of personal jurisdiction consistent with due process.”). “For an individual, the paradigm forum for the exercise of general jurisdic-

tion is the individual's domicile." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (internal quotation marks omitted). Orthogen avers that Judith and Tomas Capla's primary residence is in the Bronx, New York, (1782 Mem. 21), so they reside in this District. Accordingly, the first § 1782 statutory requirement is met.

Second, the requested § 1782 discovery is for "use in a proceeding before a foreign tribunal." *KPMG*, 798 F.3d at 117. The Supreme Court has stated that the foreign proceeding need only to be within "reasonable contemplation" to satisfy the second statutory requirement. *Intel*, 542 U.S. at 259. The Schottenstein Parties argue, in their fourth proposed counterclaim, that "[a] hypothetical litigation within the subjective contemplation of a private foreign citizen and its attorneys" is insufficient. (Intervention Plea ¶ 123.) This argument fails.

The Second Circuit requires more than "a twinkle in counsel's eye" of anticipated litigation, and instead requires that the § 1782 applicant provide "some objective indicium" or "concrete basis" that there is reasonable contemplation of the foreign proceeding. *KPMG*, 798 F.3d at 123–24. Orthogen proffers the following "objective indicium": (1) the retainer of German counsel, (2) substantial evidence that would support Orthogen's claims for breach of contract and fraud in the Contemplated German Proceeding, (3) German counsel's declaration that it will initiate the Contemplated German Proceeding, and (4) other "concrete steps" Orthogen has taken, including "drafting the pleadings and adjusting them based on the evidence obtained to date." (1782 Mem. 21–22.) Courts in this District have found the "reasonable contempla-

tion” standard satisfied in similar circumstances where the petitioner retained foreign counsel, had “begun preparing the necessary pleadings for the petition,” had “set forth a theory” of the underlying claims, and “provided declarations expressing an intent to initiate” subsequent proceedings. *In re Kuwait Ports Auth.*, No. 20-MC-00046, 2021 WL 5909999, at *8 (S.D.N.Y. Dec. 13, 2021) (finding second statutory requirement was met); *see also In re Hansainvest Hanseatische Inv.-GmbH*, 364 F. Supp. 3d 243, 249 (S.D.N.Y. 2018) (same).

Third, Orthogen demonstrates that it is an “interested person” because it will be the plaintiff in the Contemplated German Proceeding. *Intel*, 542 U.S. at 256 (“No doubt litigants are included among, and may be the most common example of, the ‘interested persons’ who may invoke § 1782.” (internal quotation marks omitted and alterations adopted)).

Accordingly, the Application meets the three statutory requirements.

b. The Discretionary *Intel* Factors

The statutory requirements having been met, I next consider whether the discretionary *Intel* factors counsel in favor of § 1782 discovery. *See Mees*, 793 F.3d at 297–98 (citing *Intel*, 542 U.S. at 264–65). Judith and Tomas Capla have not appeared in this matter to argue that the *Intel* factors do not favor § 1782 discovery. I find that, on balance, the *Intel* factors weigh in favor of granting the § 1782 application.

The first *Intel* factor easily weighs in favor of the Applicant. Orthogen expressly stated that “Judith and Tomas Capla will not be parties to the Con-

templated German Proceeding.” (1782 Mem. 23.) *See Intel*, 542 U.S. at 264 (explaining that the first factor favors discovery if person or entity from whom discovery is sought will be a non-party to foreign proceeding).

The second *Intel* factor also weighs in favor of granting the Application. “In this Circuit, this factor requires consideration of ‘only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of Section 1782.’” *In re Polygon Glob. Partners LLP*, No. 21-MC-364, 2021 WL 2117397, at *8 (S.D.N.Y. May 25, 2021) (quoting *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995)); *accord Mees*, 793 F.3d at 303 n.20. The Schottenstein Parties fail to present any authoritative proof that the relevant German courts would reject the discovery. In fact, Orthogen’s German counsel declares “that he (i) is ‘not aware of any German laws or restrictions that would preclude Orthogen from seeking or obtaining through Section 1782 the discovery it seeks here,’ and (ii) has no ‘reason to believe that a German court would reject or otherwise decline to consider the [discovery].” (1782 Mem. 23 (quoting Doc. 12 (“Kruger Decl.”) ¶ 46).) *See In re Roessner*, No. 21-MC-513, 2021 WL 5042861, at *3 (S.D.N.Y. Oct. 29, 2021) (relying on the attestation of petitioner’s German counsel and finding no “authoritative proof that the German Court would reject Section 1782 assistance” (cleaned up)).

The third *Intel* factor is neutral. On the one hand, although the discovery sought would not be available in Germany, “[c]ourts routinely grant § 1782 applications where the discovery sought might not be available in the foreign legal system, but [as here] is not explicitly prohibited from being acquired by way of a

§ 1782 application.” *In re Tiberius Grp. AG*, No. 19-MC-467, 2020 WL 1140784, at *5 (S.D.N.Y. Mar. 6, 2020); *see id.* (collecting cases). Applicant has demonstrated that the discovery sought is relevant and there is no reason that the German court would reject it, so there is an argument that the third factor weighs in favor of discovery.

On the other hand, the Schottenstein Parties’ arguments regarding the forum-selection clause, assuming they are accurate, weigh against discovery. The Schottenstein Parties aver that Orthogen’s numerous § 1782 actions in the United States constitute a “willful attempt to evade” the forum-selection clause, (Intervention Plea ¶ 100), ostensibly within the realm of the third *Intel* factor. It is true that a forum-selection clause can be a factor that weighs against § 1782 discovery. *See, e.g., Klein v. Altara RK Invs. Ltd.*, No. 24-228-CV, 2025 WL 560105, at *3 (2d Cir. Feb. 20, 2025) (summary order). However, the existence of a forum-selection clause does not categorically foreclose all foreign discovery. *Id.* Therefore, the weight of a forum-selection clause depends on the facts of each case. *See, e.g., In re Bm Brazil 1*, No. 23-MC-208, 2024 WL 555780, at *13 (S.D.N.Y. Jan. 18, 2024) (“[F]orum selection clauses are neither dispositive nor irrelevant.”), *report and recommendation adopted*, 2024 WL 554302 (S.D.N.Y. Feb. 12, 2024); *In re Ativos Especiais II*, No. 24-MC-119, 2024 WL 4169550, at *14 n.10 (S.D.N.Y. Sept. 12, 2024) (“The Court places no weight on the forum-selection clause.”).

Here, I need not delineate exactly when a forum-selection clause weighs in favor of or against § 1782 discovery. Nor do I need to find whether the forum-selection clause here supports the arguments made by

either Orthogen or the Schottenstein Parties. As an initial matter, the parties do not dispute that Judith and Tomas Capla are not parties to the license agreements that contain the forum-selection clause at issue. In any event, assuming in the Schottenstein Parties' favor that the forum-selection clause counsels against such discovery, the third *Intel* factor is only one out of four "non-exclusive factors." *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 244 (2d Cir. 2018). Because I find that Orthogen prevails in establishing the other three *Intel* factors, the third factor, assuming it weighs in the Schottenstein Parties' favor, is not dispositive.

The final *Intel* factor also supports granting the Application. The requested discovery is not unduly intrusive or burdensome and the Schottenstein Parties do not argue otherwise. The subpoenas that the Applicant proposes "are focused on matters central to Orthogen's anticipated claims," including payments that Judith and Tomas Capla received and other information related to the Regenokine Program and the underlying claim. (1782 Mem. 25.) Indeed, the proposed subpoenas request only documents related to the Regenokine Program, further indicating a narrowly tailored discovery request. (*See* Docs. 10-2 (proposed Judith Capla subpoena), 10-3 (proposed Tomas Capla subpoena).)

On balance, the *Intel* factors weigh in favor of granting the Application. Orthogen's § 1782 application is therefore GRANTED.

2. Motion to Intervene

a. Intervention

Dr. Schottenstein and NY Spine jointly move to intervene of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. (*See* Doc. 15-1.) Orthogen does not oppose the Schottenstein Parties' intervention "in order to participate in any discovery" in this action. (Opp'n 1.)⁴ In the § 1782 context, the "ultimate targets" of a § 1782 petition and/or "a party against whom the requested information is to be used [each] has standing to challenge the validity of such a subpoena on the ground that it is in excess of the terms of . . . § 1782." *Application of Sarrio, S.A.*, 119 F.3d 143, 148 (2d Cir. 1997) (internal quotation marks omitted). I therefore grant Dr. Schottenstein's motion to intervene, because the requested discovery will be used against him in the Contemplated German Proceeding. *In re Bourlakova*, No. 24-MC-71, 2024 WL 4839047, at *2 (S.D.N.Y. Nov. 20, 2024) (granting unopposed motion to intervene because requested discovery would be used against proposed intervenors in foreign proceeding).

In contrast, Orthogen states that NY Spine will not be a party to the Contemplated German Proceeding. (Opp'n 19 n.14.) Therefore, NY Spine is not among the "ultimate targets" of the Contemplated German Proceeding to confer standing, so its motion to intervene must fail. *Cf. Sarrio*, 119 F.3d at 148. NY Spine's motion to intervene also fails because its proposed counterclaims, which it shares with Dr. Schotten-

⁴ The Schottenstein Parties do not request reciprocal discovery.

stein, are denied as futile.⁵ *Cf. In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, No. 02-CV-8472, 2008 WL 2594819, at *13 (S.D.N.Y. June 26, 2008) (denying motion to intervene because intervenor’s claims are futile).

b. Proposed Counterclaims

i. An Intervenor’s Right to File Counterclaims in a § 1782 Action

At the outset, it is unclear whether an intervenor can file counterclaims in a § 1782 proceeding. The Schottenstein Parties declare their right to assert these compulsory counterclaims under Rule 13(a) of the Federal Rules of Civil Procedure because they “all arise in connection with Orthogen’s breach of” the forum-selection clause of the underlying license agreement. (Reply 3.) However, neither party cites any case law holding that an intervenor in a § 1782 action can assert compulsory counterclaims against the petitioner. Nor have I found any. For the purposes of this Opinion & Order, I assume, without deciding, that they apply and that the Schottenstein Parties can assert counterclaims, and I turn to the merits of the counterclaims.⁶

⁵ See *infra* § III.B.2.b (regarding proposed counterclaims).

⁶ I note several points regarding the unresolved issue of whether an intervenor can assert compulsory counterclaims against the petitioner in a § 1782 action. First, the statute’s reference to the Federal Rules of Civil Procedure is limited to the manner in which “the testimony or statement shall be taken, and the document or other thing produced.” 28 U.S.C. § 1782(a); see also *In re Application of Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012) (applying Rule 26 to deposition sought under § 1782), *aff’d sub nom. Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir.

ii. The Schottenstein Parties’ Counterclaims

I now turn to the Schottenstein Parties’ five proposed counterclaims. First, the Schottenstein Parties assert a breach-of-contract claim regarding the forum-selection clause. (Intervention Plea ¶¶ 11 101–107.) Second, the Schottenstein Parties assert, in the alternative, a counterclaim for declaratory judgment that Orthogen waived any arguments regarding the forum-selection clause. (*Id.* ¶¶ 108–111.) Third, the Schottenstein Parties assert a counterclaim for dismissal of the Application under the doctrine of forum non conveniens and *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas*, 571 U.S. 49 (2013). (*Id.* ¶¶ 112–122; *see also* Reply 7–11.) Fourth, the Schottenstein Parties assert a claim for dismissal of the Application for failure to satisfy

2014). Nowhere in the statute, or any case law that I can find, does it state that § 1782 actions are governed by the Federal Rules more broadly, including Rule 13’s governance of counterclaims. Second, the nature of a counterclaim is a claim that a defendant has against a plaintiff in litigation. *See, e.g. Counterclaim*, Black’s Law Dictionary (12th ed. 2024) (“[C]ounterclaim n. (18c) A claim for relief asserted against an opposing party after an original claim has been made.”). It is not clear that a § 1782 action, which is a discovery tool for assistance in litigation in foreign proceedings, is the type of action where a counterclaim plays the same role compared to other civil suits where claims are adjudicated and relief is rewarded. Intervenors have been permitted to assert counterclaims outside of the § 1782 context when their rights are more directly affected by the underlying litigation. *See, e.g., Fredericks v. Shapiro*, 160 F.R.D. 26, 27–28 (S.D.N.Y. 1995) (permitting intervenor’s counterclaims because he was “the primary obligor on the alleged debt and a party indirectly liable for plaintiff’s claim if upheld”). It is not clear that the Schottenstein Parties are so directly affected by this § 1782 action that they can file counterclaims as intervenors.

the second statutory requirement of § 1782. (Intervention Plea ¶¶ 123–132.) Fifth, Schottenstein Parties assert a claim under the Equal Protection Clause of the Constitution. (*Id.* ¶¶ 133–142.)

iii. The Proposed Counterclaims Are Futile

All five proposed counterclaims fail. As an initial matter, the Schottenstein Parties are precluded from asserting the first and second proposed counterclaims because they failed to raise those arguments in the related Schottenstein 1782 Action. *See Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 209 (2d Cir. 2004) (explaining that compulsory counterclaim are “forfeited” if not previously asserted). Even if these arguments were not forfeited, I have already addressed the relevance of the forum-selection clause in the § 1782 context, not just in this action,⁷ but also in the related 1782 Schottenstein Action⁸ where the Schottenstein Parties stand as Respondents. Accordingly, the first and second proposed counterclaims are rejected.

The third proposed counterclaim is essentially an argument regarding the *Intel* discretionary factors. (Intervention Plea ¶¶ 5–6.) Indeed, this counterclaim is not really a “claim,” but a request for dismissal of the Application. (*Id.* ¶ 121.) The Schottenstein Parties argue that the forum-selection clause, under *Atlantic Marine*, “materially impacts how *Intel*’s discretionary factors may be applied.” (*Id.* ¶ 118.) Respondents

⁷ *See supra* § III.B.1.b (recognizing the forum-selection clause to be relevant but not dispositive to the *Intel* analysis).

⁸ *See In re: Orthogen Int’l GmbH*, No. 23-MC-152, Doc. 40 (S.D.N.Y. Apr. 30, 2025).

argue that the “*Intel* factors must be ‘adjusted’” in light of *Atlantic Marine*. (*Id.* ¶ 5.)

The Schottenstein Parties’ reliance on *Atlantic Marine* is misplaced. In that case, the Supreme Court held that a party may enforce a forum-selection clause through a motion to transfer, and not through a motion to dismiss based on a “wrong” venue under 28 U.S.C. § 1406(a) or “improper” venue under Federal Rule of Civil Procedure 12(b)(3). *Atl. Marine*, 571 U.S. at 55. The Court held that, in evaluating a transfer motion based on a forum-selection clause, “a district court may consider arguments about public-interest factors only,” *id.* at 64, including “the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law,” *id.* at 63 n.6 (internal quotation marks omitted).

It is unclear how *Atlantic Marine* applies in the § 1782 context, or how it supports the Schottenstein Parties. First, *Atlantic Marine* never references § 1782, and the Schottenstein Parties fail to cite any case law, let alone any in the Second Circuit, applying *Atlantic Marine* in the § 1782 context, despite the fact that *Atlantic Marine* was decided over a decade ago in 2013. Nor do the Schottenstein Parties demonstrate how the Supreme Court’s narrow holding, regarding the procedural mechanism for challenging venue based on a forum-selection clause, applies in a § 1782 request for discovery for use in a foreign proceeding. Moreover, even if *Atlantic Marine* applied here, the Schottenstein Parties fail to establish how the public factors warrant dismissal of the Application. The Schottenstein Parties essentially request that the

public-factor analysis under *Atlantic Marine* replace the *Intel* factors entirely and categorically preclude all § 1782 discovery if a forum-selection clause exists. I have already declined to hold that the forum-selection clause dictates such an outcome, and have already addressed *Atlantic Marine*. I have already found that the *Intel* factors, on balance, weigh in favor of discovery.⁹ Because this argument has already been rejected, the third proposed counterclaim is rejected.

The fourth proposed counterclaim alleges that the second statutory requirement of § 1782 is not met. (Intervention Plea ¶ 123.) I have already found that the Application satisfied the second statutory requirement of § 1782,¹⁰ so this counterclaim is likewise rejected as futile.

Finally, the fifth proposed counterclaim is an as-applied challenge to the § 1782 application under the Equal Protection Clause because it arbitrarily and unfairly gives pre-suit subpoena power to those contemplating litigation in a foreign tribunal compared to those contemplating litigation in a federal court. (Intervention Plea ¶ 137.) According to the Schottenstein Parties, this classification “cannot survive rational basis scrutiny” because it “gives completely unequal access to Rule 45” of the Federal Rules of Civil Procedure. (*Id.* ¶ 141.)

As an initial matter, the fifth proposed counterclaim is also “forfeited” because the Schottenstein

⁹ *This* argument was also already raised in and rejected by me in the Schottenstein 1782 Action.

¹⁰ *See supra* § III.B.1.a. This argument was also already raised in and rejected by me in the Schottenstein 1782 Action.

Parties failed to present this constitutional challenge in the Schottenstein 1782 Action. However, even if the challenge were not forfeited, it would fail on the merits.

The fifth proposed counterclaim is doomed under rational-basis review, which the Schottenstein Parties concede is the applicable standard. (*Id.* ¶ 141 (“This classification . . . cannot survive rational basis scrutiny.”).) Under the rational-basis test, the challenged law will be “upheld ‘so long as it bears a rational relation to some legitimate end.’” *Clementine Co., LLC v. Adams*, 74 F.4th 77, 89 (2d Cir. 2023) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). The Supreme Court has long recognized that § 1782’s “twin aims” are “providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.” *Intel*, 542 U.S. at 252 (internal quotation marks omitted); see also *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 632 (2022) (“[T]he animating purpose of § 1782 is comity.”). Allowing pre-suit discovery for use in a foreign proceeding under § 1782 clearly “bears a rational relation” to that end.

The Schottenstein Parties argue that the logic of *ZF Automotive* applies here. (Intervention Plea ¶ 141.) In *ZF Automotive*, the Supreme Court engaged in statutory interpretation and held that private arbitrations do not constitute “foreign or international tribunals” under 28 U.S.C. § 1782. 596 U.S. at 623. To rule otherwise would create “significant tension with the [Federal Arbitration Act],” as well as “a notable mismatch between foreign and domestic arbitration” because “§ 1782 permits much broader discovery than the FAA allows.” *Id.* at 632. The Supreme Court had

difficulty rationalizing “giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations.” *Id.* at 633 (quoting *Servo-tronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020)).

The Schottenstein Parties seek to improperly extend *ZF Automotive* here. For one, they fail to cite to any other federal statute that would face “significant tension” with a ruling that allows pre-suit § 1782 discovery. *Id.* at 632. For another, *ZF Automotive* does not stand for the broad proposition that the scope of permitted discovery under § 1782 must be identical to that permitted in federal proceedings in the United States. *ZF Automotive* relied on an analysis of the word “tribunal” to be “best understood as an adjudicative body that exercises governmental authority.” *Id.* at 628. The Schottenstein Parties offer no explanation why *ZF Automotive*, which involved private arbitration proceedings abroad, should apply to this action which involves an anticipated proceeding before governmental courts in Germany. Moreover, the Schottenstein Parties’ overly broad reading of *ZF Automotive* would add a new requirement to the § 1782 analysis, one that must be satisfied before the *Intel* factors come into play. According to the Schottenstein Parties, a § 1782 applicant must establish that the discovery it seeks does not create a classification that provides any unequal access between the applicant and a litigant who seeks discovery in the federal courts in the United States. I decline to add such a requirement here.

The Schottenstein Parties fail to overcome the “strong presumption of validity” accorded to the challenged law, and utterly fails to bear “the burden to negate every conceivable basis which might support it.” *United States v. Amalfi*, 47 F.4th 114, 124–25 (2d Cir. 2022) (emphasis omitted). For example, allowing pre-suit discovery may facilitate more efficient litigation abroad, which may encourage pre-suit discovery abroad that facilitates more efficient litigation in the United States. The Schottenstein Parties fail to address, let alone negate, any conceivable basis that Congress may have had in permitting pre-suit discovery in a § 1782 action. The Schottenstein Parties are prohibited from “second-guessing Congress’s ‘wisdom, fairness, or logic of legislative choices,’” and fail to overcome the “extremely deferential standard” that is rational-basis review. *Id.* at 125 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

In sum, all five of the Schottenstein Parties’ proposed counterclaims fail and are rejected as futile. The first, second, and fifth compulsory counterclaims were “forfeited” because the Schottenstein Parties failed to make those arguments in the Schottenstein 1782 Action. The arguments underlying the third and fourth compulsory counterclaims have already been rejected in this Opinion & Order. All five proposed counterclaims also fail on the merits. Accordingly, all five proposed counterclaims are DISMISSED.

IV. Conclusion

Applicant’s request for an order pursuant to 28 U.S.C. § 1782 is GRANTED. Accordingly, it is hereby:

ORDERED that Applicant is authorized to serve Judith Capla and Tomas Capla with the subpoenas

annexed to Applicant's Memorandum of Law, (Doc. 10), as Exhibit A.

IT IS FURTHER ORDERED that Applicant's HIPAA Order, annexed to Applicant's Memorandum of Law, (Doc. 10), as Exhibit D, is authorized. I will issue the HIPAA Order simultaneously with the filing of this Opinion & Order.

IT IS FURTHER ORDERED that Judith Capla and Tomas Capla shall comply with subpoenas served pursuant to this Order in accordance with the Federal Rules of Civil Procedure, the Local Rules, and my Individual Rules, including with respect to their rights to object to or move to quash any such subpoena.

IT IS FURTHER ORDERED that Dr. Schottenstein's motion to intervene is GRANTED. However, Dr. Schottenstein's proposed counterclaims are DISMISSED.

IT IS FURTHER ORDERED that NY Spine's motion to intervene is DENIED.

The Clerk of Court is respectfully directed to terminate Document 9 (the § 1782 Petition), Document 15 (motion to intervene), and Document 21 (letter-motion for conference).

SO ORDERED.

/s/ Vernon S. Broderick

Vernon S. Broderick

United States District Judge

Dated: April 30, 2025

New York, New York

**OPINION AND ORDER, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK,
CASE NO. 23-MC-152
(FEBRUARY 28, 2025)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Application of Orthogen International GmbH,

Petitioner.

for an order pursuant to 28 U.S.C. § 1782 to conduct
discovery for use in a foreign proceeding.

23-MC-152 (VSB)

Before: Vernon S. BRODERICK,
United States District Judge.

VERNON S. BRODERICK,
United States District Judge:

OPINION & ORDER

Applicant Orthogen International GmbH (“Applicant” or “Orthogen”) filed this *ex parte* application (the “Application”), along with a memorandum of law and declarations in support, seeking discovery in aid of a foreign proceeding pursuant to 28 U.S.C. § 1782. (Docs. 1–5.) Specifically, Applicant seeks an order granting it the authority to subpoena records from Dr. Douglas Schottenstein (“Dr. Schottenstein”) and Schottenstein Pain & Neuro, PLLC d/b/a NY Spine

(“NY Spine,” together with Dr. Schottenstein, “Schottenstein”) that it intends to use in support of litigation in Germany in which it will allege breach of contract and fraud claims, (the “Contemplated German Proceeding”). (Doc. 3 at 1–3.)

Because Applicant has made a sufficient showing that the statutory elements of § 1782 are met and the discretionary factors identified in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004), weigh in favor of granting the request, the Application is GRANTED.

I. Background¹

On May 4, 2023, Applicant filed an ex parte application for an order pursuant to 28 U.S.C. § 1782 to conduct discovery for use in the Contemplated German Proceeding, (Doc. 1), along with a memorandum of law and two declarations in support, (Docs. 3–5.) On May 9, 2023, legal counsel for Schottenstein filed a letter explaining that they indirectly learned of the Application and will be filing an opposition. (Doc. 9.) On May 10, 2023, the Applicant filed a supplemental letter in support of the Application. (Doc. 10.) In this supplemental letter, the Applicant raises statements that Schottenstein made in a proposed amended complaint in another matter that is pending between the parties in the Southern District of New York (the “Pending Action”). (*Id.*) Applicant asserts that these statements support the need to conduct discovery for the Contemplated German Proceeding. (*Id.*)

¹ The following is only a brief summary of background information to provide some context for this Opinion & Order. I make no findings of fact.

On May 13, 2023, counsel for Schottenstein filed a proposed order to show cause, (Doc. 13), memorandum of law, (Doc. 14), and a declaration, (Doc. 15), requesting that I deny the Application and order Applicant to consolidate the Contemplated German Proceeding, the Pending Action, and an already-filed German proceeding (the “Pending German Proceeding”). On May 16, 2023, Applicant opposed the proposed order to show cause. (Docs. 16, 17.) On May 18, 2023, Schottenstein filed a supplemental declaration reasserting their position opposing the Application. (Doc. 18.) On May 19, 2023, Applicant filed a letter noting, among other things, that they disagree with the factual assertions made by Schottenstein. (Doc. 19 at 1.) Applicant also explains that a court in the Southern District of Florida granted a parallel § 1782 motion (the “Florida 1782 Action”) filed by Applicant against two other defendants in the Pending Action. (*Id.*) On May 22, 2023, Schottenstein filed a letter arguing that the application filed in the Southern District of Florida is not instructive because it was unopposed and therefore the court was unaware of the issues Schottenstein asserts in the present matter. (Doc. 20.)

On October 19, 2023, Applicant filed a letter explaining that a magistrate judge in the Southern District of Florida overruled objections to certain subpoenas and denied a motion to quash or modify the subpoenas. (Doc. 21.) On December 11, 2023, Applicant filed a letter with updates in the Florida 1782 Action as well as the Pending Action. (Doc. 25.) Applicant filed more status-update letters on January 29, 2024, (Doc. 26), March 27, 2024, (Doc. 27), and July 3, 2024, (Doc. 28). On October 31, 2024, Applicant filed a letter stating that it will contemporaneously file

another 1782 petition in a separate action (the “Judith/Tomas 1782 Action”). (Doc. 32.) That case was accepted as related to the present action and re-assigned to me on November 7, 2024. *See* Case No. 24-MC-504. On February 24, 2025, Applicant filed a letter-motion requesting a pre-motion conference in anticipation of a motion to expedite a decision in both this action and the Judith/Tomas 1782 Action. (Doc. 34.)

II. Discussion

A. Applicable Law

Section 1782 contains three statutory requirements: “(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign or international tribunal, and (3) the application is made by a foreign or international tribunal or any interested person.” *Mangouras v. Squire Patton Boggs*, 980 F.3d 88, 97 (2d Cir. 2020) (quoting *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015) (cleaned up)).

“Section 1782 does not define what it means for an entity to reside or be found in a district.” *In re Sargeant*, 278 F. Supp. 3d 814, 819 (S.D.N.Y. 2017). Several courts in this District, however, have recognized that “[a]t minimum, . . . compelling an entity to provide discovery under § 1782 must comport with constitutional due process.” *Id.* at 820; *accord In re Fernando Celso De Aquino Chad*, No. 19-MC-261, 2019 WL 2502060, at *2 (S.D.N.Y. June 17, 2019); *In re Fornaciari*, 17-MC-521, 2018 WL 679884, at *2 (S.D.N.Y. Jan 29, 2018); *Australia & New Zealand Banking Grp. Ltd. v. APR Energy Holding Ltd.*, No.

17-MC-216, 2017 WL 3841874, at *3 (S.D.N.Y. Sept. 1, 2017) (“Regardless of what section 1782 requires, the Constitution’s due process protections apply.”). The Second Circuit has agreed with this interpretation, holding that “the statutory scope of ‘found’ extends to the limits of personal jurisdiction consistent with due process.” *In re del Valle Ruiz*, 939 F.3d 520, 527 (2d Cir. 2019).

“Once the statutory requirements are met, a district court may order discovery under § 1782 in its discretion, taking into consideration the twin aims of the statute, namely, 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.” *Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 117 (2d Cir. 2015) (internal quotation marks omitted). “The Supreme Court has identified four” additional factors relevant to a district court’s discretion under § 1782:

- (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding,” in which case “the need for § 1782(a) aid generally is not as apparent”;
- (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.”

Mangouras, 980 F.3d at 97–98 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004) (cleaned up)).

“[I]t is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright.” *Mees*, 793 F.3d at 302 (citation omitted).

B. Application

1. The § 1782 Statutory Factors

The first factor of § 1782 requires a determination of whether Dr. Schottenstein and NY Spine “reside” and/or are “found” in this district. Applicant argues that they are, and I agree. An individual or corporation resides or is found in a district if they are subject to personal jurisdiction of a court in that district. *In re del Valle Ruiz*, 939 F.3d at 527 (“[T]he statutory scope of ‘found’ extends to the limits of personal jurisdiction consistent with due process.”). “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Dr. Schottenstein both “practices medicine . . . and maintains his primary residence and domicile in this District,” and NY Spine “maintains its principal office within this District.” (Doc. 3 at 15.) Schottenstein does not dispute that they both are found and/or reside in this district within the meaning of § 1782. Accordingly, the first § 1782 factor is met.

It is also clear from Applicant's filings, and undisputed by Schottenstein, that the second and third elements of § 1782's statutory factors are met. "[T]he discovery sought is for use in a foreign proceeding or tribunal," *In re Al-Attabi*, 21-MC-207, 2021 WL 4027021, at *2 (S.D.N.Y. Sept. 3, 2021) (internal quotation marks omitted), because Applicant "intends to file suit in Germany" against Dr. Schottenstein, (Doc. 3 at 11). At the time of the Application, the Applicant demonstrated that the Contemplated German Proceeding was "within reasonable contemplation," *Intel*, 542 U.S. at 259, and it had "retained German counsel" and begun "drafting the necessary pleadings." (Doc. 3 at 15.) The Applicant will be the plaintiff in the Contemplated German Proceeding and is "asserting claims of breach of contract and fraud," (*Id.*), which renders them an interested party, *Intel*, 542 U.S. at 256 ("No doubt litigants are included among, and may be the most common example of, the interested person[s] who may invoke § 1782." (internal quotation marks omitted)).

2. The Discretionary *Intel* Factors

Because the Applicant meets the three statutory factors, I proceed to determine whether the discretionary *Intel* factors counsel against permitting the requested discovery from Schottenstein. *See Mees*, 793 F.3d at 297–98 (citing *Intel*, 542 U.S. at 264–65). I find they do not.

The first *Intel* factor ultimately weighs in favor of the Applicant. Although NY Spine would not be named in the Contemplated German Proceeding, Dr. Schottenstein would. (Doc. 3 at 19.) Typically, "the need for § 1782(a) aid generally is not as apparent" when discovery is sought from a party of the foreign

action. *Intel*, 542 U.S. at 264. However, the Applicant asserts that they “would be unable to obtain the discovery it seeks through this Petition in the Contemplated German Proceeding.” (Doc. 5 at ¶ 44.) Schottenstein does not dispute this assertion.

The second *Intel* factor also weighs in favor of granting the Application. “In this Circuit, this factor requires consideration of ‘only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of Section 1782.’” *In re Polygon Glob. Partners LLP*, No. 21-MC-364, 2021 WL 2117397, at *8 (S.D.N.Y. May 25, 2021) (quoting *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995)). Schottenstein does not present any authoritative proof that the German Court would reject the discovery, and Applicant submitted a declaration from their German counsel stating: “I am not aware of any German laws or restrictions that would preclude the use of the discovery sought through this Petition. Nor do I have any reason to believe that a German civil court (including a civil court in Dusseldorf or Frankfurt) would reject or otherwise decline to consider the evidence obtained through this Petition.” (Doc. 5 ¶ 51.) *See In re Application of Johannes Roessner to Take Discovery Pursuant to 28 U.S.C. 1782 in Aid of Foreign Litigants or Proc.*, No. 21-MC-513, 2021 WL 5042861, at *3 (S.D.N.Y. Oct. 29, 2021) (relying on the attestation of petitioner’s German counsel and finding no “authoritative proof that the German Court would reject Section 1782 assistance”).

The third factor weighs in favor of granting the Application. Although the discovery sought would not be available in Germany, “[c]ourts routinely grant § 1782 applications where the discovery sought might

not be available in the foreign legal system, but [as here] is not explicitly prohibited from being acquired by way of a § 1782 application.” *In re Tiberius Grp. AG*, 2020 WL 1140784, at *5 (S.D.N.Y. Mar. 6, 2020). Applicant has demonstrated that the discovery sought is relevant and there is no reason that the German court would reject it. Further, I disagree with Schottenstein’s claim that the Application “conceals an attempt to circumvent the existing case in the United States.” (Doc. 14 at 9.) The Applicant never concealed the Pending Action and discussed it in the memorandum of law in support of the Application. (*See* Doc. 3 at 8). Although Schottenstein suggests that the Application must be brought in bad faith because it was brought *ex parte*, “it is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*.” *Gushlak v. Gushlak*, 486 F. App’x 215, 217 (2d Cir. 2012) (summary order). The Second Circuit has stated that a § 1782 “respondent’s due process rights are not violated because he can later challenge any discovery request by moving to quash pursuant to Federal Rule of Civil Procedure 45(c)(3).” *Id.* Schottenstein also argues that the Application was brought in bad faith because the Applicant “can obtain discovery in the pending litigation involving the same parties.” (Doc. 14 at 5.) However, because the Contemplated German Action and the Pending Action “address different topics” and “different time periods,” (Doc. 16 at 8), I disagree. Applicant also claims that license agreements between Orthogen and Dr. Schottenstein each contain a forum-selection clause that requires Dr. Schottenstein to bring “[a]ny dispute arising from or in connection with” the license agreements against Orthogen in Germany. (Doc. 16 at 6–7.) In any event, Judge P. Kevin Castel so ordered Schot-

tenstein’s notice of voluntary dismissal in the Pending Action dismissing claims against various defendants, including Orthogen, because the German courts had “preliminarily ruled that jurisdiction is proper before them and that they have jurisdiction over the parties.” *See Order, Schottenstein v. Capla*, No. 22-CV-10883 (S.D.N.Y. June 14, 2024), ECF No. 129.

The final *Intel* factor supports granting the Application. The requested discovery is not unduly intrusive or burdensome and Schottenstein does not argue otherwise. The subpoenas that the Applicant proposes “are narrowly tailored to obtain documents and testimony about topics that are central to its anticipated claims in the Contemplated German Proceeding including: the number of patient treatments provided under the license Agreements, the amounts paid by patients and received by Dr. Schottenstein and Mr. Capla in connection with those treatments, and the representations about the treatments that were made to Orthogen.” (Doc. 3 at 22–23.)

3. Consolidation

Finally, I address Schottenstein’s request that “Petitioner [be] ordered to consolidate the [A]pplication as well as the German litigation with the pending Schottenstein action.” (Doc. 14 at 28.) Pursuant to Federal Rule of Civil Procedure 42(a)(2), a district court may consolidate “actions before the court involv[ing] a common question of law or fact.” “A determination on the issue of consolidation is left to the sound discretion of the Court.” *In re UBS Auction Rate Sec. Litig.*, No. 08-CV-2967, 2008 WL 2796592, at *1 (S.D.N.Y. July 16, 2008) (internal quotation marks omitted). “The party seeking consolidation bears the burden of demonstrating that the interest of

judicial economy is outweighed by the possibility of prejudice or delay.” *CCR International, Inc. v. Elias Group., LLC*, No. 15-CV-6563, 2018 WL 3135849, at *3 (S.D.N.Y. June 26, 2018).

Schottenstein has not met that burden here. Schottenstein has not shown that there is a requisite common question of law or fact, or that the interests of judicial economy are outweighed by potential prejudice or delay. Schottenstein also does not address the apparent “German forum selection clause in the license agreements” between the parties, (Doc. 16 at 10), or the fact that “Orthogen filed the Pending German Proceeding against Dr. Schottenstein in Germany on December 21, 2022 (six days before Dr. Schottenstein and his practice filed the SDNY Action),” (Doc. 16 at 12). Finally, on November 13, 2023, Judge Castel denied a motion to consolidate the Florida 1782 Action, the Pending Action, and this case. *See Schottenstein v. Capla*, No. 22-CV-10883-PKC (S.D.N.Y. November 13, 2023), Doc. 90. I do not find that Schottenstein has made a sufficient showing that the Application should be consolidated with any other action.

III. Conclusion

Applicant’s request for an order pursuant to 28 U.S.C. § 1782 is GRANTED. Accordingly, it is hereby:

ORDERED that Applicants are authorized to serve Dr. Douglas Schottenstein and Schottenstein Pain & Neuro, PLLC d/b/a NY Spine with the subpoenas annexed to Applicant’s Memorandum of Law, (Doc. 3), as Exhibit B.

IT IS FURTHER ORDERED that Schottenstein shall comply with subpoenas served pursuant to this

Order in accordance with the Federal Rules of Civil Procedure, the Local Rules, and my Individual Rules, including with respect to their rights to object to or move to quash any such subpoena.

The Clerk of Court is respectfully directed to terminate Document 1 (the 1782 Petition) and Document 34 (letter-motion for conference). A decision concerning the Judith/Tomas 1782 Action will be issued in due course.

SO ORDERED.

/s/ Vernon S. Broderick
Vernon S. Broderick
United States District Judge

Dated: February 28, 2025
New York, New York

**OPINION AND ORDER DENYING
RECONSIDERATION, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK,
CASE NO. 23-MC-152
(APRIL 30, 2025)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Application of Orthogen International GmbH,

Petitioner.

for an order pursuant to 28 U.S.C. § 1782 to conduct
discovery for use in a foreign proceeding.

23-MC-152 (VSB)

Before: Vernon S. BRODERICK,
United States District Judge.

OPINION & ORDER

VERNON S. BRODERICK,
United States District Judge:

Respondents Dr. Douglas Schottenstein (“Dr. Schottenstein”) and Schottenstein Pain & Neuro, PLLC d/b/a NY Spine (“NY Spine,” together with Dr. Schottenstein, the “Schottenstein Parties” or “Respondents”) move to vacate my February 28, 2025 Opinion & Order (“Opinion” or (“Op.”)) pursuant to Federal Rule of Civil Procedure 60(b)(1) and Local Civil Rule 6.3. The Opinion granted the ex parte appli-

cation (the “Application”) from Applicant Orthogen International GmbH (“Applicant” or “Orthogen”) seeking discovery in aid of a foreign proceeding pursuant to 28 U.S.C. § 1782. (Doc. 36.) Because Respondents fail to demonstrate the Opinion contained any “mistake” sufficient to warrant reconsideration, Respondents’ motion for reconsideration is DENIED.¹

I. Background²

On May 4, 2023, Applicant filed an ex parte application for an order pursuant to 28 U.S.C. § 1782 to conduct discovery for use in support of litigation in Germany in which it will allege breach of contract and fraud claims (the “Contemplated German Proceeding”). (Doc. 1.) On May 10, 2023, counsel for Respondents filed a letter explaining that they indirectly learned of the Application and will be filing an opposition. (Doc. 9.) On May 15, 2023, counsel for Respondents filed a proposed order to show cause, (Doc. 13), memorandum of law, (Doc. 14), and a declaration, (Doc. 15), requesting that I deny the Application. On May 16, 2023, Applicant opposed the proposed order to show cause. (Docs. 16, 17.) On May 18, 2023, the

¹ I construe Respondents’ motion to vacate as a motion for reconsideration. See *Leonard v. Lowe’s Home Ctrs., Inc.*, 83 F. App’x 402, 403 (2d Cir. 2003) (summary order) (construing motion under Rule 60(b)(1) as a motion for reconsideration). “The motion to vacate is essentially the same motion as the motion for reconsideration.” *D’Angelo v. Kirschner*, No. 02-CV-1313, 2007 WL 1834518, at *1 (D. Conn. June 26, 2007), *aff’d in part, vacated in part on other grounds*, 288 F. App’x 724 (2d Cir. 2008).

² The following is only a brief summary of relevant background information to provide some context for this Opinion & Order. I make no findings of fact.

Schottenstein Parties filed a supplemental declaration reasserting their position opposing the Application. (Doc. 18.)

On May 19, 2023, Applicant filed a letter noting, among other things, that they disagree with the factual assertions made by Respondents. (Doc. 19 at 1.) Applicant also explained that a court in the Southern District of Florida granted a parallel § 1782 motion (the “Florida 1782 Action”) filed by Applicant against two other relevant parties. (*Id.*) On May 22, 2023, Respondents filed a letter arguing that the application filed in the Southern District of Florida is not instructive because it was unopposed and therefore the court was unaware of the issues Respondents assert in the present matter. (Doc. 20.)

On February 24, 2025, Applicant filed a letter motion requesting a pre-motion conference in anticipation of a motion to expedite a decision in this action. (Doc. 34.)³

On February 28, 2025, I issued an Opinion & Order granting the Application approving the issuance of the requested subpoenas. (Doc. 35.) On March 14, 2025, Respondents filed the instant motion to vacate the

³ Respondents state that they were “certainly surprised” to see the Opinion was issued before they had filed a response to Orthogen’s letter-motion for a conference. (Mem. 11 n.8.) Because the Opinion resolved the fully briefed § 1782 application, where Respondents had an opportunity to—and in fact did—oppose, (*see* Docs. 13–15), the letter-motion for conference was also resolved, (*see* Op. 10). The Opinion also noted that a decision concerning a separate § 1782 action, the Judith/Tomas 1782 Action, will “issue in due course.” (*Id.*) The decision in the Judith/Tomas 1782 Action will be issued simultaneously with this Opinion & Order.

Opinion pursuant to Federal Rule of Civil Procedure 60(b)(1) and Local Civil Rule 6.3, (Doc. 36), an accompanying memorandum of law, (Doc. 36-1 (“Mem.”)), and a request for judicial notice of documents filed in other courts and accompanying exhibits, (*see* Docs. 36-2–36-8). Orthogen filed an opposition brief on March 28, 2025. (Doc. 37 (“Opp’n”).) On April 4, 2025, Respondents filed a reply brief. (Doc. 38 (“Reply”).) On April 8, 2025, Petitioner filed a letter motion which (1) requested a conference in anticipation of filing a motion to compel compliance with the subpoenas, and (2) contained the parties’ respective positions regarding their discovery dispute. (Doc. 39.)

II. Discussion

A. Applicable Law

Federal Rule of Civil Procedure 60(b)(1) grants relief from “a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect.” The Supreme Court has interpreted “mistake” to “cover[] all mistakes of law made by a judge,” and not just “obvious” legal mistakes. *Kemp v. United States*, 596 U.S. 528, 533–34 (2022). The Second Circuit has recognized that a motion for reconsideration under Rule 60(b)(1) “is a ‘mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances.’” *Lawtone-Bowles v. Brown*, No. 21-1242-CV, 2022 WL 839280, at *1 (2d Cir. Mar. 22, 2022) (summary order) (quoting *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008)). Under Rule 60(b)(1), “[t]he burden of proof is on the party seeking relief from judgment, and such relief is extraordinary, exceptional and generally not favored.” *Suber v. VVP Servs., LLC*, No. 20-CV-8177, 2024 WL

1313812, at *1 (S.D.N.Y. Mar. 25, 2024) (internal quotation marks omitted).⁴

B. Application

Respondents offer five arguments why the Opinion involved a “mistake” that warrants reconsideration and vacatur. These arguments concern a statutory requirement of Section 1782, certain discretionary factors set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), and Section 1782’s “twin aims” of mutual assistance by tribunals in the United States and abroad. First, Respondent argues that Section 1782’s second statutory requirement—whether discovery is for use in a foreign proceeding before a foreign tribunal—is not met because Applicant’s numerous § 1782 applications indicate there is no “reasonable contemplation” of the Contemplated German Proceeding. Second, Respondent argues that the first *Intel* factor weighs in Respondents’ favor because Dr. Schottenstein would be a participant in the Contemplated German Proceeding. Third, Respondent argues that the Opinion erred in requiring “authoritative proof” that a German tribunal would reject the requested § 1782 materials under the second *Intel* factor. Fourth, Respondent argues that the forum-selection clause in this action indicates an attempt to circumvent the foreign proof-gathering restrictions of Germany, contrary to the third *Intel* factor. Finally,

⁴ Respondents make clear that they are moving for vacatur under Federal Rules of Civil Procedure 60(b)(1), and “not” moving for reconsideration under Rules 59(e) or 60(b)(6). (Reply 1 (emphasis omitted); see also Mem. 1 (motion pursuant to Rule 60(b)(1)).) I therefore only construe the instant motion under Rule 60(b)(1).

there are “parity concerns” underlying Section 1782 that warrant reconsideration. I address each in turn.

First, Respondents’ narrow interpretation of “reasonable contemplation” to require an “inevitable” ruling by a foreign tribunal at or soon after the filing of a Section 1782 application is filed is not supported by the law. Specifically, Respondents argue—but fail to cite any supporting case law—that the second statutory requirement of Section 1782 is not met because Orthogen has yet to initiate litigation in Germany. (Mem. 5–7.) The Opinion noted that Orthogen established “reasonable contemplation” because it, among other things, “retained German counsel” and had “begun drafting the necessary pleadings.” (Op. 6 (internal quotation marks omitted).) This finding conforms with decisions in this District that have similarly found the “reasonable contemplation” standard to have been met where the petitioner retained foreign counsel, had “begun preparing the necessary pleadings for the petition,” had “set forth a theory” of the underlying claims, and “provided declarations expressing an intent to initiate” subsequent proceedings. *In re Kuwait Ports Auth.*, No. 20-MC-46, 2021 WL 5909999, at *8 (S.D.N.Y. Dec. 13, 2021) (finding second statutory requirement was met); *In re Hansa-invest Hanseatische Inv.-GmbH*, 364 F. Supp. 3d 243, 249 (S.D.N.Y. 2018) (same). Orthogen states that it has taken similar steps here. (Opp’n 4 (listing several steps that Orthogen’s counsel has taken before filing the instant § 1782 application).) Orthogen proffers more than “a twinkle in counsel’s eye,” and instead provides the “objective indicium” that there is reasonable contemplation of the Contemplated German Proceeding to satisfy the second statutory requirement. *Certain*

Funds, Accts. &/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 123 (2d Cir. 2015). Further, Respondents did not challenge the second statutory requirement in their initial opposition to the § 1782 application, (*see* Op. 5 (“It is also clear from Applicant’s filings, and undisputed by Schottenstein, that the second and third elements of § 1782’s statutory factors are met.”)), so this argument is waived, *cf. Devi v. Silva*, 861 F. Supp. 2d 135, 143 (S.D.N.Y. 2012) (“[A] party is not permitted to raise a new argument in a motion for reconsideration that it failed to raise in the underlying motion.”).

Second, Respondents claim that the first *Intel* factor counsels against discovery because Dr. Schottenstein is a party to the Contemplated German Proceeding, as supported by the Second Circuit’s recent summary order in *Hranov*. (Mem. 7–8.) In *Hranov*, the Second Circuit found no abuse of discretion in the district court’s decision to quash certain § 1782 subpoenas. *Hranov v. Deutsche Bank AG*, No. 22-1075, 2025 WL 573727, at *2 (2d Cir. Feb. 21, 2025) (summary order). Regarding the first *Intel* factor, the *Hranov* court noted that the respondent was “a party to the German action” and that the petitioner failed to show that the documents she sought were unobtainable absent § 1782(a) aid. *Id.* (internal quotation marks omitted). Below, the district court’s analysis of the first *Intel* factor had focused on whether the § 1782 application was an “end-run” on the foreign tribunal’s practices by subpoenaing U.S.-based subsidiaries. *See In re Hranov*, No. 21-MC-751, 2024 WL 2193866, at *6 (S.D.N.Y. May 15, 2024).

Respondents’ reliance on *Hranov* is misplaced. As an initial matter, NY Spine will not be a party to the

Contemplated German Proceeding, so *Hranov* is inapplicable as to NY Spine. (Opp’n 7 (“NY Spine will not be a party to the Contemplated German Proceeding.”).) Further, regarding Dr. Schottenstein, the Application is not a similar end-run on discovery requirements and procedures of German courts because there is no risk that Orthogen is improperly seeking discovery materials of a U.S.-based subsidiary. Nor are the § 1782 respondents or requested documents located in a foreign tribunal; both Dr. Schottenstein and the sought-after § 1782 materials are located here in this District. Moreover, unlike in *Hranov*, Orthogen has demonstrated that Dr. Schottenstein’s depositions and certain documents in his or his practice’s possession are unobtainable but for § 1782. *See Hranov*, 2025 WL 573727, at *2 (“[Petitioner] has not shown that the documents she seeks are ‘unobtainable absent § 1782(a) aid.’” (quoting *Intel Corp.*, 542 U.S. at 264)). In any event, this argument is waived because Respondents failed to make this argument in their opposition to the § 1782 application. *Cf. Devi*, 861 F. Supp. 2d at 143. In their opposition to the § 1782 application, Respondents did not dispute Orthogen’s assertion that it would be unable to obtain the § 1782 discovery materials in the Contemplated German Proceeding. (Op. 6.)

Third, Respondents fail to show that the “authoritative proof” standard for the second *Intel* factor is no longer binding law. According to Respondents, the Opinion erroneously relied on an outdated Second Circuit case, which required “authoritative proof” that the foreign tribunal would reject the requested § 1782 materials. (Mem. 9.) Rather, Respondents say that I should look to a recent Seventh Circuit decision that

rejected the “authoritative proof” standard. See *In re Application of Venequip, S.A. v. Caterpillar Inc.*, 83 F.4th 1048, 1057–58 (7th Cir. 2023). Respondents are mistaken; the Second Circuit recently affirmed the “authoritative proof” standard. See, e.g., *Fund for Prot. of Inv. Rts. in Foreign States v. AlixPartners, LLP*, 5 F.4th 216, 230 (2d Cir. 2021), *rev’d on other grounds sub nom. ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022). Respondents fail to cite any binding authority rejecting the “authoritative proof” standard. Accordingly, the Opinion did not err in requiring “authoritative proof” that the German courts would reject evidence obtained through Section 1782.

Fourth, Respondents cite to a summary order where the Second Circuit found that the district court did not abuse its discretion in finding that a forum-selection clause was a factor that weighed against § 1782 discovery. See *Klein v. Altara RK Invs. Ltd.*, No. 24-228-CV, 2025 WL 560105, at *3 (2d Cir. Feb. 20, 2025) (summary order). In doing so, the Second Circuit affirmed the trial court’s “acknowledg[ment] that case law does not categorically hold that exclusive jurisdiction clauses foreclose all foreign discovery.” *Id.* Applicant’s response is that *Klein* is distinguishable and that forum-selection clauses that designate a forum whose courts are receptive to § 1782 discovery, like the one here, do not weigh against discovery. (Opp’n 9–11.)

What is clear is that the existence of a forum-selection clause does not categorically prohibit § 1782 discovery. Instead, a more fact-intensive inquiry is required. However, I need not delineate when exactly a forum-selection clause weighs in favor of or against § 1782 discovery. Assuming in Respondents’ favor

that the forum-selection clause counsels against such discovery, the third *Intel* factor is only one among four “non-exclusive factors.” *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 244 (2d Cir. 2018); accord *Klein*, 2025 WL 560105, at *3 (describing the existence of a forum-selection clause as “a factor” to be considered (internal quotation marks omitted)). Because I find that Orthogen prevails in establishing the other three *Intel* factors, the forum-selection clause here is not dispositive and Respondents fail to demonstrate the “extraordinary” circumstance that calls for reconsideration of the Opinion.⁵

Finally, Respondents express concern with, “[p]erhaps most significantly,” a “significant fifth factor” regarding “parity” issues underlying Section 1782 that calls for reconsideration. (Mem. 10–11.) Respondents argue that Orthogen unfairly wields the German forum-selection clause as both a sword and a shield because Respondents “can never get the same” discovery. (*Id.* at 10.) However, Respondents’ “fifth” factor essentially parrots their previous arguments regarding the forum-selection clause and their invocation of fairness. Further, Respondents have never sought reciprocal discovery, despite Orthogen’s acknowledgement that they “will be permitted” to do so. (Opp’n 11–12.) As in the

⁵ Respondents also argue that the Opinion failed to discuss *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the W.D. Tex.*, 571 U.S. 49 (2013), which supposedly “required” an adjustment of the *Intel*-factors analysis due to the presence of both forum-selection and choice-of-law clauses. (Mem. 8 n.7.) However, Respondents overstate *Atlantic Marine*, which never references § 1782. Nor do Respondents cite to any case law, let alone any in the Second Circuit, applying *Atlantic Marine* to the § 1782 context, despite the fact that *Atlantic Marine* was decided over a decade ago in 2013.

Florida 1782 Action, Respondents here “did not seek reciprocal discovery and instead attempt[] to use it as an argument against” discovery taking place. *In re Orthogen Int’l GmbH*, No. 23-MC-80743, 2023 WL 6813223, at *12 (S.D. Fla. Oct. 16, 2023), *aff’d*, 2023 WL 8418969 (S.D. Fla. Nov. 28, 2023). Indeed, it is Respondents who seem to wield the forum-selection clause as both a sword and shield in doing so. Accordingly, Respondents’ parity arguments fail.

In sum, the Opinion does not contain any “mistake” sufficient to constitute “extraordinary” or “exceptional” circumstances that warrant reconsideration under Rule 60(b)(1).

III. Conclusion

Because Respondents fail to show any “mistake” that warrants reconsideration under Rule 60(b)(1), Respondents’ motion for reconsideration is DENIED.⁶

Regarding the parties’ discovery dispute and anticipated motion to compel, (Doc. 39), simultaneously with the filing of this Opinion & Order I am filing a referral of the discovery dispute to a magistrate judge who will be assigned to this action pursuant to the referral order.

⁶ Respondents’ request for oral argument is also denied.

App.57a

The Clerk of Court is respectfully directed to terminate Document 36. SO ORDERED.

/s/ Vernon S. Broderick
Vernon S. Broderick
United States District Judge

Dated: April 30, 2025
New York, New York