

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Application of CATERPILLAR CRÉDITO,
SOCIEDAD ANÓNIMA DE CAPITAL
VARIABLE, SOCIEDAD FINANCIERA DE
OBJETO MÚLTIPLE, ENTIDAD REGULADA,

Applicant,

For an Order Pursuant to 28 U.S.C. § 1782
Granting Leave to Obtain Discovery for Use in a
Foreign Proceeding.

22-MC-00273 (JGK) (BCM)

**REPORT AND RECOMMENDATION
TO THE HON. JOHN G. KOELTL**

BARBARA MOSES, United States Magistrate Judge.

Caterpillar Crédito, Sociedad Anónima de Capital Variable, Sociedad Financiera de Objeto Múltiple, Entidad Regulada (CAT) has applied, pursuant to 28 U.S.C. § 1782, for leave to serve a subpoena on American Express Company (AmEx), seeking records for use in a proceeding (the Curaçao Proceeding) pending before the Court of First Instance of Curaçao (the Curaçao Court). The application was referred to me by the Hon. John G. Koeltl, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1). (Dkt. 7.) For the reasons that follow, I respectfully recommend that the application be granted in part.¹

¹ In the past, I have treated applications made pursuant to 28 U.S.C. § 1782 as non-dispositive motions that I was authorized to hear and determine, on referral, pursuant to § 636(b)(1)(A) and Fed. R. Civ. P. 72(a). *See, e.g., In re Att'y Gen. of Brit. Virgin Islands*, 2021 WL 5361073 (S.D.N.Y. Oct. 29, 2021). This approach was consistent with the consensus view in this District that "rulings on § 1782 applications are *not* dispositive," and therefore such an application could be granted by a Magistrate Judge, subject to "clear error" review by the District Judge in the event of an objection. *In re Hulley Enterprises Ltd.*, 400 F. Supp. 3d 62, 71 (S.D.N.Y. 2019) (collecting cases). That view was most recently endorsed in *Fed. Republic of Nigeria v. VR Advisory Servs., Ltd.*, 2023 WL 2477889, at *1 (S.D.N.Y. Mar. 13, 2023) (Koeltl, J.) (overruling objections to Magistrate Judge's order granting § 1782 application pursuant to the "clearly erroneous" standard set out in 28 U.S.C. § 626(b)(a)(A) because the case presented "a traditional discovery dispute that should be decided with the deference that is usually accorded to Magistrate Judges in deciding discovery dispute"). Since then, however, in an unreported order in *Associacao dos Profissionais dos Correios v. Bank of New York Mellon*, No. 22-2865 (2d Cir. Mar. 29, 2023) a panel of the Second Circuit concluded that the appellate court lacked jurisdiction over a Magistrate Judge's order denying a § 1782 application, and remanded the matter so that the order could be "treated as a

I. BACKGROUND

The Curaçao Proceeding was brought by Carolina Varady de Bellosta (Ms. Bellosta) to "annul" two personal guarantees executed by her husband Carlos Bellosta Pallares (Mr. Bellosta) in favor of CAT, on the ground that the guarantees are unenforceable under Curaçao law because Mr. Bellosta signed them without the consent of his spouse. In this Court, CAT seeks credit and debit card records from AmEx to support its contentions that (i) Ms. Bellosta was not a "habitual resident" of Curaçao at the time the guarantees were signed, and therefore is not entitled to nullify them under Curaçao law; and (ii) Mr. Bellosta was not a resident of Curaçao at the time his wife filed the Curaçao Proceeding, thus depriving the Curaçao Court of jurisdiction over the case.

A. The Curaçao Proceeding

In 2007, CAT lent \$4,869,299.53 to the Venequip Group – which Mr. Bellosta controls – via its "financing arm," VMSC Curacao N.V. (VMSC). De Vries Decl. (Dkt. 3-1) ¶ 3. Thereafter, CAT and VMSC extended and amended the loan multiple times to increase the principal loan amount. In 2015, VMSC signed a loan agreement (the 2015 Loan Agreement) acknowledging that it owed CAT \$55,218,820.10 under the parties' pre-existing loan arrangements, and CAT increased VMSC's line of credit to \$110 million. *Id.*; *see also* Coster Decl. (Dkt. 3) Ex. 4 (Dkt. 3-6) (2015 Loan Agreement).² On October 16, 2015 and October 11, 2016, Mr. Bellosta signed personal guarantees in favor of CAT (the Personal Guarantees) to secure VSMC's obligations under the

report and recommendation and appropriate proceedings can be held." 2023 WL 3166357 at *1. Although the Second Circuit has never so held in a precedential decision – and although a distinction could be drawn between an order *denying* a § 1782 application, which "wholly dispose[s]" of the application, and an order *granting* the requested discovery, which may require further proceedings, *see Fed. Republic of Nigeria*, 2023 WL 2477889, at *1 – caution compels me to present my analysis in the form of a report and recommendation.

² Many of the exhibits submitted to this Court are in Spanish or Dutch. All are accompanied by English translations. No objections have been raised as to the accuracy of the translations.

2015 Loan Agreement. De Vries Decl. ¶ 4; *see also* Coster Decl. Exs. 5, 6 (Dkts. 3-7, 3-8) (Personal Guarantees).

VMSC fell behind on its payments, and in December 2017, CAT sent notices of default to VMSC and Mr. Bellosta, to which it received no response. De Vries Decl. ¶ 5. Multiple legal proceedings ensued, including an arbitration against Mr. Bellosta before the International Chamber of Commerce (the ICC Arbitration), in which CAT seeks to enforce the Personal Guarantees, claiming that it is owed \$120 million.³

On April 6, 2022, Ms. Bellosta filed a petition in the Curaçao Court, naming Mr. Bellosta and CAT as defendants, seeking a declaratory judgment that both Personal Guarantees "are nullified." Coster Decl. Ex. 3 (Dkt. 3-3) (Curaçao Pet.), at 4. Ms. Bellosta's central allegation is that when Mr. Bellosta executed the Personal Guarantees, he did so without her consent, which, under Curaçao law, permits her to annul them. *See id.* ¶¶ 8-9 ("[S]ections 1:88 and 1:89 of the Dutch Civil Code apply to this matter. Pursuant to Section 1:88 of the Dutch Civil Code, Carlos Bellosta needed the consent of his spouse to enter into the sureties[.]); *see also* de Vries Decl. ¶ 7 ("Pursuant to paragraph 1(c) of Article 1:88, a spouse needs the approval of the other spouse to provide security for the debt of a third person. Under Article 1:89, in the absence of the spousal

³ *See* De Vries Decl. ¶ 5; Curaçao Pet. Ex. 8 (Dkt. 3-4 at ECF pp. 20-39) (ICC Request for Arbitration) ¶ 64. Additionally, CAT has sued VMSC (the borrower) and Venequip, S.A. (which is the "principal entity" of the Venequip Group, De Vries Decl. ¶ 3, and also guaranteed VMSC's debt) in the Court of First Instance of Curaçao. *See* Bellosta Opp. Mem. (Dkt. 12) at 4. In the United States, CAT has sued Venequip Machinery Sales Corp. (VMSC Miami), yet another guarantor, in the Southern District of Florida, also seeking \$120 million. *See* Compl. (Dkt. 1), *Caterpillar Credito v. Venequip Machinery Sales Corp.*, Case No. 22-CV-23009 (S.D. Fl. Sept. 20, 2022) ¶¶ 30-34. This is by no means a complete list of the legal proceedings pending between CAT (and/or its affiliates) and VMSC (and/or its affiliates). *See* n.5, *infra*.

consent required by paragraph 1 of Article 1:88, the juridical act may be unilaterally annulled by the spouse whose consent was not sought").⁴

In her petition, Ms. Bellosta alleges that both she and her husband have lived in Curaçao since 2012, including "at the time the bonds were signed," making §§ 1:88 and 1:89 applicable to the Personal Guarantees. Curaçao Pet. ¶¶ 1, 8. She explains that under Curaçao's choice of law rules, "the question whether a spouse needs the consent of the other spouse for a juridical act and, if so, the consequences of the absence of such consent, is governed by the laws of the country where the spouse whose consent is required has his or her habitual residence at the time of the performance of the juridical act." *Id.* ¶ 5.

Unsurprisingly, when Mr. Bellosta answered the petition, he "joined his wife's request for annulment." Bellosta Opp. Mem. at 5.

B. The Application and Opposition

On September 27, 2022, CAT initiated this action by filing an *ex parte* application (Dkt. 1) seeking leave to serve AmEx – which is incorporated in New York – with a subpoena requiring the production of all monthly account statements and other records, from October 16, 2014 to October 11, 2017, for the AmEx credit and/or debit cards held (either jointly or separately) by the Bellostas. *See* Prop. Subp. (Dkt. 1-1) at 7, Req. No. 1. Additionally, CAT seeks AmEx records for Mr. Bellosta from April 6, 2021 to "the present." *Id.*, Req. No. 2.

In its supporting memorandum, CAT explains that the requested records are relevant to two of its "main defenses" in the Curaçao Proceeding: (i) whether Mr. Bellosta was a resident of

⁴ Ms. Bellosta identifies the relevant provisions of local law as sections 1:88 and 1:89 of the Dutch Civil Code. CAT identifies them as articles 1:88 and 1:89 of the Curaçao Civil Code. Notwithstanding the difference in labels, it is clear from their briefs and declarations that the parties are referencing the same statutes.

Curaçao in 2022, when that proceeding was initiated; and (ii) whether Ms. Bellosta was a "habitual resident" of Curaçao in 2015 and 2016, when the Personal Guarantees were signed. *See* CAT Mem. (Dkt. 2) at 7. CAT explains that the Curaçao Court must have jurisdiction over at least one resident "anchor" defendant, and since "there is no dispute that [CAT] is not a resident of Curaçao, the only possible anchor defendant is Mr. Bellosta." *Id.*; *see also* de Vries Decl. ¶ 10 ("[I]f it is established that that Mr. Bellosta was not resident in Curaçao [when Ms. Bellosta filed her petition on April 6, 2022], the Curaçao court does not have jurisdiction over him and therefore lacks jurisdiction to decide the claim."). CAT further explains that Ms. Bellosta cannot nullify the Personal Guarantees under Curaçao law if she "was not a habitual resident of Curaçao when the Personal Guarantees were given." CAT Mem. at 7-9; *see also* de Vries Decl. ¶ 8 ("Articles 1:88 and 1:89 only apply if the spouse of the individual purporting to enter into a personal guarantee habitually resides in Curaçao as at the date when that personal guarantee is given."). CAT "has reason to believe that the Bellostas' sporadic presence in Curaçao around the relevant times did not establish their residence in Curaçao within the meaning of the applicable Curaçao laws," and contends that the AmEx records will help document that "sporadic" presence. CAT Mem. at 8.⁵

⁵ Both CAT and the Venequip Group have made frequent use of § 1782 to seek evidence for use in their various overseas litigations against one another.

On September 26, 2022, CAT filed a § 1782 application in the District of Puerto Rico, seeking the Bellostas' banking records at Banco San Juan Internacional (BSJI) for use in the Curaçao Proceeding. *See* App. (Dkt. 1), *In re Caterpillar Credito, Sociedad Annima de Capital Variable, Sociedad Financiera de Objeto Múltiple, Entidad Regulada*, No. 22-MC-568 (hereafter, *CAT-PR*) (D.P.R. Sept. 26, 2022). After negotiations, BSJI produced documents "that were responsive to show Mr. Carlos M. Bellosta's location or residence during the period April 6, 2021, through April 6, 2022." *See* Minute Order (Dkt. 72), *CAT-PR* (March 23, 2023), at 1.

Also on September 26, 2022, CAT filed a § 1782 application in the District of Delaware, seeking the Bellostas' debit and credit card records from Visa and Mastercard, for use in the Curaçao Proceeding. *See* App. (Dkt. 1), *In Re: Request from Curacao*, No. 22-MC-412 (D. Del. Sept. 26, 2022). The District of Delaware has not yet ruled on that application.

In accordance with the parties' stipulation (Dkt. 10), the Bellostas intervened and, on December 12, 2022, filed an opposition memorandum, arguing principally that the AmEx records sought by CAT are not "for use" in the Curaçao Proceeding, as required by 28 U.S.C. § 1782(a), because "the Bellostas' sensitive account information, transaction details, payments, credit scores, and customer service information have no relationship to residency," which under Curaçao law turns on intent, not travel or spending habits. Bellosta Opp. Mem. at 12-13. According to the Bellostas, the present proceeding is a thinly-veiled effort to obtain "financial asset discovery" for use in the ICC Arbitration, *id.* at 14, which is impermissible because "[p]rivate adjudicatory bodies" like the ICC "do not fall within § 1782." *Id.* (quoting *ZF Auto US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2089 (2022)).

Finally, on September 27, 2022, CAT filed a § 1782 application in the Western District of Washington, seeking the Bellostas' phone records from T-Mobile, for use in the Curaçao Proceeding. *See App.* (Dkt. 1), *In re Caterpillar Credito, Sociedad Annima de Capital Variable, Sociedad Financiera de Objeto Múltiple, Entidad Regulada*, No. 22-CV-1549 (W.D. Wash. Sept. 27, 2022) (hereafter *CAT-WA*). The application was initially granted, in full, *ex parte*, *see Order* (Dkt. 2), *CAT-WA* (Oct. 3, 2022), and the phone records were produced. Following the Bellostas' intervention, the Western District of Washington issued a protective order (the *CAT-WA* Prot. Order) which, among other things, directed that the records shall "only" be used in the Curaçao Proceeding. *See CAT-WA Prot. Order* (Dkt. 14-7) ¶ 2. The court rejected the Bellostas' proposal that they be permitted to redact the records, either for confidentiality or for relevance. *See Order* (Dkt. 16), *CAT-WA* (Nov. 16, 2022) at 5-7.

Meanwhile, Venequip, S.A. "has submitted at least nine § 1782 applications in districts across the U.S. requesting discovery from various Caterpillar dealers, customers, and former employees," *Venequip, S.A. v. Caterpillar, Inc.*, 2022 WL 823856, at *1 (N.D. Ill. Mar. 18, 2022), all seeking documents for use in a Swiss lawsuit that Venequip, S.A. filed in October 2021, in Geneva, against a CAT affiliate known as Caterpillar S.A.R.L. *Id.* In the Swiss proceeding, Venequip, S.A. accuses Caterpillar S.A.R.L. of terminating the parties' business relationship in "bad faith," while Caterpillar S.A.R.L. says that Venequip, S.A. "defaulted on its obligations," *id.*, including its loan guarantee obligations. *See Resp. and Objection* (Dkt. 13), *Venequip, S.A. v. Caterpillar, Inc.*, No. 21-CV-6297 (N.D.Ill. Jan. 18, 2022), at 1 (characterizing the Swiss proceeding as a "last-ditch effort" by Venequip, S.A., "to avoid repayment of loans").

C. The Jurisdictional Judgment

On October 17, 2022, CAT filed a Statement of Reply and Statement of Defense in the Jurisdictional Motion in the Curaçao Proceeding, arguing (among other things) that Mr. Bellosta was not a resident of Curaçao as of April 2022, such that the court lacks jurisdiction, and asserting as one of its defenses that Ms. Bellosta was not a "habitual resident" of Curaçao when the Personal Guarantees were executed, and thus had no nullification rights under Curaçaoan law. *See* van den Heuvel Decl. (Dkt. 11-9) ¶¶ 10-11 & Ex. A (St. of Reply) (Dkt. 11-9 at ECF pp. 12-20 (excerpts)). In that filing, CAT disclosed this § 1782 proceeding to the Curaçao Court. St. of Reply ¶ 4.15. It also asked the Curaçao Court to order Ms. Bellosta to produce a long list of documents arguably relevant to her habitual residence in 2015-16, including (among many other categories) "detailed transaction records of all her debit and credit cards showing where and when [she] made payments in 2015 and 2016." *Id.* ¶¶ 4.13, 4.15.

On April 3, 2023, the Curaçao Court issued a judgment finding that it has jurisdiction over Mr. Bellosta, and thus over the Curaçao Proceeding. *See* Second Supp. van den Heuvel Decl. (Dkt. 17-3), Ex. 4 (Dkt. 17-4) (Jur. Judgment). The court wrote that it was "established that [the Bellostas] have both been registered as residents in the population register of Curaçao since 2012," and that it was "not refuted that they own a house in Curaçao, they have health insurance in Curaçao and file tax returns there," all of which "provide a strong presumption that [Mr. Bellosta] is domiciled in Curaçao." Jur. Judgment ¶ 3.3. Further, the court found that CAT "presented insufficient facts and circumstances to underpin that [Mr. Bellosta] is *not* domiciled in Curaçao[.]" *Id.* ¶ 3.4 (emphasis added). Although CAT established that Mr. Bellosta "spends much of the year in various places outside Curaçao," and "owns real estate in several other countries," it failed to show "that [Mr. Bellosta] always resides in one specific place outside of Curaçao, which could be

an indication of residence elsewhere." *Id.* The Curaçao Court therefore concluded that it "has international jurisdiction to hear the case[.]" *Id.*

CAT promptly sought permission to appeal the Jurisdictional Judgment, *see* Second Supp. van den Heuvel Decl. ¶ 8, and asserts that even if it is not permitted to mount an interlocutory appeal, it will have an automatic right to appeal the Jurisdictional Judgment *de novo* "at the conclusion of the Curaçao Proceedings." CAT Supp. Mem. (Dkt. 23) at 2. In either case, CAT asserts, it will be entitled to submit "new evidence" in support of its appeal, including any evidence obtained pursuant to § 1782. *Id.*

II. LEGAL STANDARD

28 U.S.C. § 1782(a) permits a federal district court to order any person who "resides or is found" in that district "to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person." The applicant must establish that (1) "the person from whom discovery is sought reside[s] (or is found) in the district of the district court to which the application is made"; (2) "the discovery [is] for use in a proceeding before a foreign tribunal"; and (3) "the application is made by a foreign or international tribunal or any interested person." *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2d Cir. 2004) (quotation marks and citations omitted).

Once the statutory factors are satisfied, the district court "is free to grant discovery in its discretion." *Schmitz*, 376 F.3d at 83-84 (quoting *In re Metallgesellschaft AG*, 121 F.3d 77, 78 (2d Cir. 1997)). Although the district court's discretion is broad, it must be exercised "in light of the twin aims of the statute: '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.'" *In re Metallgesellschaft*, 121 F.3d at 79 (quoting *In re Malev*,

964 F.2d 97, 100 (2d Cir. 1992)). In particular, the district court should consider the factors articulated in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004):

(1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," in which event "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad"; (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 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."

In re del Valle Ruiz, 939 F.3d 520, 533-34 (2d Cir. 2019) (quoting *Intel*, 542 U.S. at 264-65).

III. DISCUSSION

A. Statutory Requirements

1. The Parties' Arguments

The Bellostas do not dispute that AmEx resides or may be found in the Southern District of New York or that CAT, as a defendant in the Curaçao Proceeding, is an "interested person" entitled to seek discovery under § 1782. However, as noted above, they oppose CAT's application on the ground that the records it seeks from AmEx are not "for use" in the Curaçao Proceeding. Bellosta Opp. Mem. at 9-14; *see also* Bellosta Sur-Reply Mem. (Dkt. 15-1) at 2-5; Bellosta Supp. Mem. (Dkt. 17-1) at 1, 3-5.

"As the applicant, the burden is on [CAT] to show that the requested discovery is for use in the foreign proceedings." *In re Postalis*, 2018 WL 6725406, at *3 (S.D.N.Y. Dec. 20, 2018) (Koeltl, J.). CAT asserts that the Bellostas' AmEx records will help it show (i) that Mr. Bellosta was not a resident of Curaçao when Ms. Bellosta brought her complaint, and thus that the Curaçao Court lacks jurisdiction; and (ii) that Ms. Bellosta was not a "habitual resident" of Curaçao when Mr. Bellosta gave the Personal Guarantees, and thus cannot rely on Curaçaoan law to annul them.

CAT Mem. at 14; CAT Reply Mem. (Dkt. 14) at 3. CAT explains that that the AmEx records "are likely to show [the Bellostas'] location throughout the relevant periods," because they will "indicate the shops, restaurants, dry cleaners, etc., which they frequented," as well as "the billing address for the credit/debit card statements," which could also indicate their residence. CAT Memo at 2; CAT Reply Mem. at 1.

In response, the Bellostas argue that the AmEx records "are of dubious relevance to the Curaçao Court's determination of residency," Bellosta Opp. Mem. at 14, because even if they show where the Bellostas were at various times (as opposed to where they spent their money, which does not necessarily require a physical visit to the vendor), it is highly unlikely that such evidence could rebut the presumption of Curaçaoan residency established by their Curaçaoan civil registration. *See* Bellosta Sur-Reply at 3. Moreover, according to the Bellostas, the Jurisdictional Judgment "moots CAT's request for Amex records related to th[e] issue" of Mr. Bellosta's residence in 2022, and – more broadly – establishes "that the type of location-related discovery that CAT seeks is not relevant (or, at best, only marginally relevant) to the issue of [either of the] Bellostas' residence." Bellosta Supp. Mem. at 3. Although the Jurisdictional Judgment did not expressly address the question of Ms. Bellosta's habitual residence in 2015-16, the court's broad findings that the Bellostas "have both been registered as residents in the population register of Curaçao since 2012," have Curaçaoan identity cards, "own a house in Curaçao," "have health insurance in Curaçao and file tax returns there," *see* Jur. Judgment ¶ 3.3, render any remaining relevancy argument for the AmEx records "much too thin to justify CAT's sweeping request for the production of the Bellostas' most sensitive financial information." Bellosta Supp. Mem. at 5. In the Bellostas' view, CAT's continued pursuit of the AmEx records after losing its jurisdictional motion is further proof that its application is merely a pretext to obtain "improper pre-judgment

asset discovery" for use in the ICC Arbitration, which is not permitted under § 1782. Bellosta Supp. Mem. at 1.

CAT characterizes the Jurisdictional Judgment somewhat differently, asserting that the Curaçao Court found only that "the evidence brought by [CAT] was insufficient to rebut a presumption that Mr. Bellosta was domiciled in Curaçao in April 2022 which arose as a result of his having been registered in the country," CAT Supp. Mem. at 3. Since the court "acknowledged that it would be relevant if [CAT] could point to a single location where Mr. Bellosta resided," CAT reasons, it must now "gather evidence to support its appeal and to attempt to prove a specific alternative location where Mr. Bellosta resided." *Id.* at 6. Additionally, CAT emphasizes that the Jurisdictional Judgment addresses only the issue of Mr. Bellosta's domicile in April 2022: the Curaçao Court neither considered nor determined "which types of evidence would be relevant to determining Mrs. Bellosta's 'habitual residence' in 2015 and 2016." *Id.* at 7.

2. Analysis

The parties have submitted conflicting declarations about the degree of relevance of the AmEx records to the residency issues identified by CAT.⁶ In order to grant discovery under § 1782,

⁶ For example, CAT's Dutch-Caribbean attorney avers that "'habitual residence' means the country with which a person's life is most closely connected." De Vries Supp. Decl. (Dkt. 14-2) ¶ 6. This is a "different inquiry than domicile and was not addressed in the Curaçao Court's Jurisdictional Judgment." De Vries Second Supp. Decl. (Dkt. 24) ¶ 37. The question of "habitual residence," according to CAT, "requires more than just a registration in the census records and is heavily influenced by where a person actually spends his or her time." *Id.*

Ms. Bellosta's Dutch-Caribbean attorney, on the other hand, avers that a person "is presumed to have his residency in the place where he is registered as a resident" and that "[p]hysical presence outside of Curaçao is not determinative of residency; instead it is the person's intent, as generally reflected by his registered residence, on which residency is ordinarily determined." Van den Heuvel Supp. Decl. (Dkt. 15-1 at ECF pp. 26) ¶¶ 10, 14. Thus, "the discovery that CAT seeks is of dubious relevance to CAT's challenge to the Bellostas' position that they reside in Curaçao." *Id.* ¶ 23. Van den Heuvel does not address the differences, if any, between "residence" (or "domicile"), for jurisdictional purposes, and "habitual residence," for choice of law purposes.

however, the Court need not determine whether, under Curaçao law, information from the AmEx records would suffice either to rebut the presumption of Mr. Bellosta's Curaçaoan residency in 2022 or to demonstrate that Ms. Bellosta was not a habitual resident of Curaçao in 2015-16. As long as an applicant can demonstrate that the sought-after materials "can be made use of in the foreign proceeding to increase [its] chances of success," it will satisfy the "for use" requirement. *Mees v. Buiter*, 793 F.3d 291, 299 (2d Cir. 2015). "For that reason, courts have described the 'for use' element as requiring only a 'de minimis' showing that the information sought would be relevant to the foreign proceeding." *In re CBRE Global Investors*, 2021 WL 2894721, at *7 (S.D.N.Y. July 9, 2021); *see also Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 120 n.7 (2d Cir. 2015) ("The relevance of the information sought" bears on the "for use" prong of the statute only "insofar as it is difficult to conceive how information that is plainly irrelevant to the foreign proceeding could to be said to be 'for use' in that proceeding."). Thus, where the parties submit "conflicting statements, in the form of the declarations of opposing counsel in the [foreign] action[], about what the contested issues are in the foreign litigation[]," it would be "inappropriate to deny [the applicant's] discovery requests on the ground that the requested discovery is irrelevant to [the applicant's] foreign claims." *In re Sveaas*, 249 F.R.D. 96, 107 (S.D.N.Y. 2008) ("Where relevance is in doubt, the district court should be permissive."); *see also In re App. of Gemeinschaftspraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at *6 (S.D.N.Y. Dec. 29, 2006) ("[P]roof resting on equivocal interpretations of foreign policy or law generally provides an insufficient basis to deny discovery" because "the foreign tribunal may simply choose to exclude or disregard the discovered material should that tribunal find that the district court overstepped its bounds in ordering the discovery."). Here, CAT has made the required "'de minimis' showing" of relevance. *In re CBRE Global Investors*, 2021 WL 2894721, at *7.

The Bellostas argue that if this Court does not deny CAT's application altogether, it should at least "deny the discovery for the time period April 6, 2021-present," because "CAT's request for discovery for the supposed purpose of addressing the Curaçao court's jurisdiction [over Mr. Bellosta] is moot" after the entry of the Jurisdictional Judgment. Bellosta Supp. Mem. at 4. However, they do not challenge CAT's assertion that it can submit "new evidence" on appeal, including evidence obtained from AmEx, CAT Supp. Mem. at 2, and that if it is able to "prove a specific alternative location [outside of Curaçao] where Mr. Bellosta resided," *id.* at 6, it might yet convince the Curaçao Court that Mr. Bellosta was not a Curaçaoan resident in 2022. Since CAT "has the practical ability to inject the requested information into [the Curaçao Proceeding]," where it could be "employed with some advantage or serve some use," the discovery it seeks – including Mr. Bellosta's 2022 records – satisfies the "for use" requirement. *In re Accent Delight Int'l Ltd.*, 869 F.3d 121, 132 (2d Cir. 2017).

The Bellostas' remaining attack on CAT's proffered "use" of the evidence sought – that CAT's true objective is to use the AmEx records in the ICC Arbitration – is unpersuasive. The Bellostas argue that the Proposed Subpoena goes well beyond "the allegedly relevant 'location' information" and instead seeks information that could allow CAT to identify and value all of Mr. Bellosta's assets. Bellosta Opp. Mem. at 14-15. It seems unlikely, however, that the Bellostas' AmEx records (for limited periods) would permit CAT to identify and value all of Mr. Bellosta's "cash at bank, real estate, vehicles, air or sea craft, stocks and shares, art, [and] any other assets," as the Bellostas fear. *Id.* at 15. Moreover, the Court can "tailor [the] requested discovery to avoid attendant problems," *In re Postalis*, 2018 WL 6725406, at *2, by limiting CAT's use of the Bellostas' AmEx records to the Curaçao Proceeding, as the Western District of Washington did with respect to the § 1782 discovery that CAT obtained from T-Mobile. *See CAT-WA Prot. Order*

¶ 2 ("The Production only shall be used for prosecuting, defending, or attempting to settle the Curaçao Proceeding, and shall not in any manner be used for any other purpose, including to prosecute, defend, or attempt to settle any other proceeding, lawsuit, litigation, or arbitration (including without limitation the ICC arbitration Caterpillar Credito has brought against Mr. Bellosta)."). As the Second Circuit explained in *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995), "it 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."

B. *Intel* Factors

The Bellostas contend that the first, third, and fourth *Intel* factors weigh against CAT's application. Bellosta Opp. Mem. at 16-24. I disagree.

1. First Factor

"[W]hen the person from whom discovery is sought is a participant in the foreign proceeding, . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." *Intel*, 542 U.S. at 264. The Bellostas argue that "[t]heir own credit and debit card statements and documents are in their possession, custody, and control, and could be obtained directly from them in the foreign proceeding," such that CAT's § 1782 application is functionally equivalent to a discovery request in the Curaçao Proceeding for the Bellostas' own records. Bellosta Opp. Mem. at 17. Therefore, they say, the first *Intel* factor favors denial of the petition. *Id.*

Although courts may consider whether the documents at issue on a § 1782 application could be obtained directly from a party in the foreign proceeding, the sole Second Circuit case on

which the Bellostas rely is easily distinguished.⁷ Moreover, the Bellostas make no claim that they have kept all of their AmEx statements back to October 16, 2014, and concede that at least some of the AmEx records sought were never in their personal possession. As to these documents, "such as records relating to marketing or internal analyses of their credit scores," the Bellostas argue that they are "wholly irrelevant to their location," and therefore irrelevant to their Curaçaoan residency. Bellosta Opp. Mem. at 17. But I cannot conclude, in advance, that the only records that are responsive to the Proposed Subpoena and not in the Bellostas' personal possession are marketing brochures or credit score analyses. Consequently, I decline to accept their speculation that any such records would be "wholly irrelevant" to the issues in this litigation. *See In re Sveaas*, 249 F.R.D. at 106 (district courts considering § 1782 applications should be "particularly wary of denying discovery on relevance grounds").

⁷ The Bellostas cite *Schmitz*, 376 F.3d at 85. Bellosta Opp. Mem. at 17. In *Schmitz*, the petitioners were plaintiffs in a securities fraud action in Germany against Deutsche Telekom (DT) who alleged that DT misled investors by overstating the value of certain assets. *Id.* at 81. "Similar allegations [were] also the focus of a criminal investigation of former DT employees and others by the Public Prosecutor in Bonn, Germany . . . and a class action lawsuit commenced in American courts by American purchasers of DT's American Depository Shares." *Id.* In the American action, DT produced approximately 300,000 documents, subject to a protective order, through its counsel, the law firm Cravath, Swain, and Moore (Cravath). *Id.* Invoking § 1782, the German plaintiffs then sought those same 300,000 documents from Cravath. *Id.* However, "the Bonn Prosecutor and the German Ministry of Justice oppos[ed] [the application] on the grounds that production to petitioners at this time would compromise the ongoing criminal investigation in Germany and violate the rights of potential criminal defendants there." *Id.* at 81-82. Indeed, the German authorities had already refused a direct request from the German plaintiffs "for access to the same documents." *Id.* at 82. In denying the § 1782 application, Judge Stein of this Court relied primarily on the second *Intel* factor, and the Second Circuit affirmed on the same basis. *Id.* at 85 ("The district court carefully considered various appropriate factors, including 'the receptivity of the foreign government . . . to federal-court judicial assistance,'" in deciding how to exercise its considerable discretion under 28 U.S.C. § 1782.") (internal citation omitted). Only then did the appellate court note that Judge Stein's decision "also finds support in the first [*Intel*] factor," because, "[a]lthough technically the respondent in the district court was Cravath, for all intents and purposes petitioners are seeking discovery from DT, their opponent in the German litigation." *Id.*

2. Third Factor

The third *Intel* factor asks the district court to consider "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." *Intel*, 542 U.S. at 264-65. In order to defeat a § 1782 application on this basis, an objector must first identify the "foreign proof-gathering restrictions" that the applicant is attempting to circumvent; that is, the foreign rules "that *prohibit* the acquisition or use of certain materials[.]" *Mees*, 793 F.3d at 303 n.20; *see also In re Accent Delight Int'l Ltd.*, 791 F. App'x 247, 251 (2d Cir. 2019) (summary order) (affirming grant of § 1782 application where objector failed to show "that the policy or restrictions of any relevant foreign jurisdiction *prohibit* the discovery sought").

"Authoritative proof" of this point is required. *Mees*, 793 F.3d at 303 n.20; *see also App. of Esses*, 101 F.3d 873, 877 (2d Cir. 1996) (affirming order granting § 1782 application where appellant "[did] not present[] us or the district court with any pronouncement from the Hong Kong court in this cause that would lead us to question whether the district court's discovery order trenches upon foreign law or is otherwise interfering with the Hong Kong proceedings"); *Euromepa*, 51 F.3d at 1101 ("Since no authoritative declarations by French judicial, executive or legislative bodies objecting to foreign discovery assistance appear in the record, we are unable to accept the district court's conclusion that granting MEPA's discovery request will in fact offend the people of France.").

The Bellostas have not identified any concrete "proof-gathering restrictions or other policies" that the Proposed Subpoena offends, much less provided the necessary "authoritative

proof" of those restrictions.⁸ Instead, they accuse CAT of "playing fast and loose" by "pursuing parallel discovery requests in both the United States and Curaçao against the same party, . . . hoping one of them [will] pay off." Bellosta Opp. Mem. at 18 (quotations and citation omitted). As discussed above, however, the Proposed Subpoena seeks AmEx records beyond those that could be in the Bellostas' personal possession. Moreover, while the pendency of a parallel discovery request in the foreign forum can be considered by the district court (ordinarily under the first *Intel* factor), the Bellostas' suggestion that there is a *prohibition* on seeking the same or similar evidence in both courts, *see* Bellosta Opp. Mem. at 18, is unfounded. It is well-settled that § 1782 contains no "quasi-exhaustion requirement." *Metallgesellschaft AG*, 121 F.3d at 79); *Mees*, 793 F.3d at 303. Not surprisingly, therefore, the cases on which the Bellostas rely for the proposition that CAT should not be permitted to "hedge" its Curaçaoan discovery rights with a § 1782 petition all involve factors not present here.⁹

⁸ The only evidence the Bellostas offer on this point is the conditionally phrased and entirely unsourced opinion of Ms. Bellosta's attorney that "a Curaçaoan court would disfavor the disclosure of this type of sensitive, personal information." Van den Heuvel Decl. ¶ 26.

⁹ In *In re Microsoft Corp.*, 428 F. Supp. 2d 188 (S.D.N.Y. 2006), *abrogated by In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019), Judge McMahon denied a "parallel" § 1782 application seeking evidence that Microsoft had also requested in an antitrust investigation pending before the European Commission – but only after the Commission itself wrote a letter "strongly opposing Microsoft's application" and describing it as "an attempt to circumvent the established rules on access to file in proceedings before the Commission." *Id.* at 192. Here, as noted above, the record contains no "authoritative" evidence that the discovery sought would "trench[] upon foreign law." *App. of Esses*, 101 F.3d at 877. In *In re XPO Logistics, Inc.*, 2016 WL 3528195 (S.D.N.Y. Jan. 8, 2016), Judge Schofield overruled objections to an order by Magistrate Judge Netburn that stayed a ruling on portions of a § 1782 application – after both the district court and the French court *denied* the applicant's previous efforts to obtain the same category of documents. *See* Order (Dkt. 76), *In re XPO Logistics, Inc.*, No. 15-MC- 205 (S.D.N.Y. Jan. 8, 2016), at 3-4. As Judge Netburn explained, it was "not self-evident that circumstances ha[d] changed to justify circumventing the foreign proceedings[]." *Id.* at 4.

In this case, while there is overlap between CAT's request to the Curaçao Court and its § 1782 applications in various district courts, the Curaçao Court has neither granted nor denied CAT's request, nor has it otherwise expressed any view as to the propriety of CAT obtaining or using those records in that forum. Curaçao's silence on this point significantly undercuts the Bellostas' reliance on the third *Intel* factor. *See Ex Parte Abdalla*, 2023 WL 2911047, at *4 (S.D.N.Y. Apr. 12, 2023) (granting amended § 1782 application for evidence to be used in a Brazilian legal proceeding where similar requests remained pending but undecided before the Brazilian court). Thus, whether or not CAT's request to the Curaçao Court sought "discovery," as that term is used in the United States,¹⁰ the Bellostas have not shown that its § 1782 application is an "attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country[.]" *Intel*, 542 U.S. at 264-65

3. Fourth Factor

Under the fourth *Intel* factor, "unduly intrusive or burdensome requests may be rejected or trimmed." *Intel*, 542 U.S. at 265. The Bellostas characterize CAT's application as "unduly intrusive or burdensome" because it seeks "pretextual pre-judgment asset information" that is "premature and irrelevant in any setting," and because CAT asks for "the same documents" from AmEx that "can be requested from the Bellostas in the Curaçao Proceeding." Bellosta Opp. Mem. at 21-22. These arguments, recycled from the Bellostas' discussion of other statutory or *Intel* factors, are no more persuasive in this context. I note as well that the Proposed Subpoena cannot be "burdensome"

¹⁰ CAT states that its request to the Curaçao Court "is not akin to an application for discovery in the United States. In particular, the Curaçao Court lacks any mechanism which could force Mrs. Bellosta to produce the documents sought." De Vries Supp. Decl. ¶ 46. Ms. Bellosta's attorney counters that "if the Curaçao Court orders her to produce any of the discovery CAT has sought from the Curaçao Court, she will (of course) comply with any such order. I am informed that Mr. Bellosta likewise will comply with any such order." Van den Heuvel Supp. Decl. ¶ 8.

to the Bellostas, who are "not being asked to produce anything." *In re Hellard*, 2022 WL 2819408, at *3 (S.D.N.Y. July 19, 2022); *see also In re GMJ Asset Mgmt. Co., Inc.*, 2022 WL 4547445, at *4 (S.D.N.Y. Sept. 29, 2022) (denying § 1782 application as to respondent KBC NY, which complained that it would be required to "run[] searches for the documents from 1995 to the present" and "prep[] for a [Rule] 30(b)(6) deposition regarding a transaction in which KBC NY played no part and which took place 26 years ago in Belgium," but granting application as to respondent Federal Reserve Bank, which raised no burden issue).

The Bellostas are correct that the AmEx records sought by CAT will inevitably reveal information concerning their credit card spending and payment habits, which is ordinarily non-public and may be "sensitive." Bellosta Opp. Mem. at 9, 13, 21. However, they do not describe any particular harms that will flow from CAT's possession of this information. Further, any concerns about its misuse can be addressed through "an appropriate protective order," *id.* at 15 n.8, such as the order entered by the Western District of Washington. *See CAT-WA Prot. Order* ¶¶ 3-5 (governing designation and use of "confidential" material).

The Bellostas are on somewhat firmer ground when they argue that the Proposed Subpoena is overbroad as to time. To evaluate the scope of a § 1782 request, the district court applies "the familiar standards of Rule 26 of the Federal Rules of Civil Procedure." *Mees*, 793 F.3d at 302. Under those standards, a party may obtain "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Contrary to the Bellostas' suggestion, *see* Bellosta Opp. Mem. at 22, Rule 26(b)(1) does not require that a subpoena be "surgically measured" to prevent even the slightest scrap of irrelevant information from being produced. An overbroad subpoena, however, can and should be

"tailored," where feasible, to minimize unnecessary overreach. *App. of Esses*, 101 F.3d at 876; *Euromepa*, 51 F.3d at 1101.

CAT seeks Ms. Bellosta's AmEx records for a three-year period, beginning on October 16, 2014 (one year before her husband signed the first Personal Guarantee) and ending on October 11, 2017 (one year after he signed the second Personal Guarantee). Prop. Subp., Req. No. 1. The Bellostas argue that "[h]er residency *after* the guarantees were signed is of no legal moment," Bellosta Opp. Mem. at 22, to which CAT responds only that "[q]uibbling over one year of documents does not justify wholesale rejection of the subpoena." CAT Reply Mem. at 10. In this instance, both parties are right. As to Ms. Bellosta, therefore, the subpoena should be limited to the period October 16, 2014 – November 11, 2016.¹¹

CAT seeks Mr. Bellosta's records for the same three-year period, plus an additional year and a half (April 6, 2021 to "the present," presumably meaning September 27, 2022). Prop. Subp., Req. No. 2. The Bellostas argue that his physical location has "no bearing on Mrs. Bellosta's residency," and therefore that the "only theoretically relevant period" for him would be April 2021-April 2022, "which may be related to Mr. Bellosta's residency for the purpose of jurisdiction." CAT has no good answer to this point. As to Mr. Bellosta, therefore, the subpoena should be limited to the period April 6, 2021 – May 6, 2022.

IV. CONCLUSION

For the foregoing reasons, I recommend, respectfully, that CAT's discovery application be GRANTED IN PART. Request No. 1 (seeking Ms. Bellosta's records) should be narrowed to the period October 16, 2014 – November 11, 2016. Request No. 2 (seeking Mr. Bellosta's records) should be narrowed to the period April 6, 2021 – May 6, 2022. Additionally, CAT's use of the

¹¹ I have included one extra month to accommodate AmEx's monthly billing cycle.

AmEx records should be limited to the Curaçao Proceeding. I further recommend that the parties be given the opportunity to negotiate an appropriate protective order that incorporates this limitation as well any appropriate restrictions on the disclosure of the Bellosta's non-public financial information.

Dated: New York, New York
May 24, 2023



BARBARA MOSES
United States Magistrate Judge

NOTICE OF PROCEDURE FOR FILING OF OBJECTIONS
TO THIS REPORT AND RECOMMENDATION

The parties shall have 14 days from this date to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). *See also* Fed. R. Civ. P. 6(a) and (d). Any such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the Hon. John G. Koeltl at 500 Pearl Street, New York, New York 10007, and to the chambers of the undersigned magistrate judge. Any request for an extension of time to file objections must be directed to Judge Koeltl. **Failure to file timely objections will result in a waiver of such objections and will preclude appellate review.** *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Frydman v. Experian Info. Sols., Inc.*, 743 F. App'x, 486, 487 (2d Cir. 2018) (summary order); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).