

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re
Petition of BUREAU VERITAS, etc., et al.
for an Order to Conduct Discovery for Use
in Foreign Proceedings Pursuant to 28
U.S.C. § 1782

Case No. [5:22-mc-80132-EJD](#)

**ORDER GRANTING IN PART AND
DENYING IN PART PETITION TO
CONDUCT DISCOVERY FOR USE IN
FOREIGN PROCEEDINGS PURSUANT
TO 28 U.S.C. § 1782**

Re: Dkt. No. 1

Before the Court is Bureau Veritas Brasil’s ex parte application for an order under 28 U.S.C. § 1782 granting leave to obtain discovery for use in a foreign proceeding. Petition, Dkt. No. 1. At the Court’s request, Petitioners filed a supplemental brief on July 21, 2022. Supp. Brief, Dkt. No. 22. For the reasons discussed below, the Court **GRANTS** in part and **DENIES** in part Petitioners’ ex parte application.

I. BACKGROUND

Petitioners Bureau Veritas do Brasil Sociedade Classificadora e Certificadora Ltda., as well as its subsidiaries, BVQI do Brasil Sociedade Certificadora Ltda. and Kuhlmann Monitoramento Agrícola Ltda., (collectively, “Petitioners”) are Brazilian entities seeking permission to serve subpoenas on Delaware entity Gaivota, LLC, Ram Rajagopal (Founder and Chief Scientific Advisor of Gaivota), and Alexandre Spitz (Co-Founder and Chief Executive Officer of Gaivota), under 28 U.S.C. § 1782 for use in ongoing judicial proceedings currently pending in Brazil and arbitration proceedings in the International Court of Arbitration of the International Chamber of Commerce (“ICC”). *See* Petition.

Case No.: [5:22-mc-80132-EJD](#)

**ORDER GRANTING IN PART AND DENYING IN PART PETITION TO CONDUCT
DISCOVERY FOR USE IN FOREIGN PROCEEDINGS PURSUANT TO 28 U.S.C. § 1782**

1 Petitioner Bureau Veritas do Brasil Sociedade Classificadora e Certificadora Ltda.
2 (“Bureau Veritas”) and Petitioner BVQI do Brasil Sociedade Certificadora Ltda. (“BVQI”) belong
3 to the Bureau Veritas Group, which provides services relating to testing, inspection, and
4 certification in “in various market segments such as: Agribusiness & Commodities, Banking &
5 Insurance, Construction & Infrastructure, Energy & Utilities, Marine & Offshore, among others.”
6 Memorandum in Support of Petition (“Memorandum”), Dkt. No. 1-2 at 2. In December of 2016,
7 Petitioners Bureau Veritas and BVQI entered into a Quota Purchase Agreement to purchase
8 Eduardo and Leila Kuhlmanns’ entire equity interest in Petitioner Kuhlmann Monitoramento
9 Agrícola Ltda. (“KMA”), which operates in the field of cotton fiber. *Id.* at 4. KMA provides
10 technical tests and analysis, agriculture support services, and business management consulting
11 within the cotton industry. *Id.* at 2. The parties also entered into a Consulting Agreement
12 whereby Mr. Kuhlmann would assist in developing KMA’s business. *Id.* at 4. The Purchase
13 Agreement imposed four principal duties on the Kuhlmanns, including non-solicitation, non-
14 competition, avoidance of conflict of interest, and a duty of loyalty. *Id.* at 6.

15 In December 2021, Petitioners learned from Alexandre Spitz that Mr. Kuhlmann is an
16 investor and shareholder in Gaivota, LLC. *Id.* at 1, 7. Gaivota, LLC is a Delaware limited
17 liability company that is the owner and sole member of Gaivota Sistemas Inteligentes Ltda
18 (“GSI”), a Brazilian limited liability company headquartered in São Paulo (collectively,
19 “Gaivota”). *Id.* Gaivota is a developer of agricultural technology software and a competitor of
20 Petitioners. *Id.*

21 Petitioners allege that after Bureau Veritas and BVQI purchased KMA, they discovered
22 that the Kuhlmanns, acting directly or through affiliated companies like Gaivota, competed
23 directly with KMA in violation of the Agreement to “divert clients, employees, and business
24 opportunities.” *Id.* at 6–7. More specifically, Petitioners allege that the parties executed the
25 Agreement and Mr. Kuhlmann was terminated from KMA, Mr. Kuhlmann renewed a contract
26 with one of KMA’s most important clients, Bayer AG (“Bayer”), but used Gaivota’s technology

1 services as part of the contract to the detriment of KMA, which supplies its own comparable
2 technology and could have performed this function of the contract. *Id.* at 8. Mr. Spitz informed
3 Petitioners that Mr. Kuhlmann represented Gaivota during negotiations of the Bayer contract. *Id.*
4 Petitioners further allege that Mr. Kuhlmann pushed KMA to continue business with Gaivota. *Id.*
5 at 8–9. In sum, Petitioners assert that “Eduardo diverted clients, employees, and business
6 opportunities from KMA to third-party companies linked to him and his family” by taking
7 advantage of his position in Gaivota and convincing Petitioners’ clients to use Gaivota services
8 instead, in direct breach of the Agreement. *Id.* at 9.

9 Petitioners ask the Court to authorize service of a subpoena pursuant to Federal Rule of
10 Civil Procedure 45 on Gaivota, LLC, compelling the company to produce documents and provide
11 deposition testimony related to the Kuhlmanns’ involvement with Gaivota to determine the extent
12 that they used their industry-specific knowledge to compete, and divert clients, employees, and
13 business opportunities from Petitioners. *Id.* at 1, 10. In addition, Petitioners seek to serve
14 subpoenas on two Gaivota employees, Mr. Spitz and Mr. Rajagopal, for testimony related to the
15 same subject matter. *Id.*

16 **II. LEGAL STANDARD**

17 Title 28 United States Code Section 1782(a) provides federal court assistance in gathering
18 evidence for use in foreign proceedings. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S.
19 241, 247 (2004). The statute specifically authorizes a district court to order a person residing or
20 found within the district “to give his testimony or statement or to produce a document or other
21 thing for use in a proceeding in a foreign or international tribunal, including criminal
22 investigations conducted before formal accusation.” 28 U.S.C. § 1782(a).

23 Even where the statutory requirements are met, the district court retains discretion in
24 determining whether to grant an application under § 1782(a) and “may impose conditions it deems
25 desirable.” *Intel Corp.*, 542 U.S. at 260 (quotations and citation omitted). In *Intel*, the Supreme
26 Court created a non-exhaustive list of factors to consider in ruling on a § 1782(a) request. *Id.* at

1 264. These considerations include: (1) “whether the person from whom discovery is sought is a
2 participant in the foreign proceeding;” (2) “the nature of the foreign tribunal, the character of the
3 proceedings underway abroad, and the receptivity of the foreign government or the court or
4 agency abroad to U.S. federal-court judicial assistance;” (3) “whether the § 1782(a) request
5 conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a
6 foreign country or the United States;” and (4) whether the request is “unduly intrusive or
7 burdensome.” *Id.* at 264–66.

8 **III. DISCUSSION**

9 **A. Statutory Factors**

10 In analyzing whether a petitioner meets the statutory requirements, the Ninth Circuit
11 adopted a three-step approach. *Khrapunov v. Prosyankin*, 931 F.3d 922, 925 (9th Cir. 2019). A
12 petitioning party must show: (i) the person or entity from whom discovery is sought “resides or is
13 found” in this district; (ii) the discovery must be for the purpose of “use in a proceeding” before a
14 “foreign or international tribunal;” and (iii) this application must be made by an “interested
15 person” in the foreign judicial proceeding.” *Id.* The Court finds that Petitioners satisfy the
16 statutory criteria of 28 U.S.C. § 1782(a) as to the two Gaivota employees but not with respect to
17 Gaivota, LLC.

18 First, Petitioners satisfy the “resides or is found” requirement with respect to the two
19 Gaivota employees, Ram Rajagopal, the Founder and Chief Scientific Officer, and Alexandre
20 Spitz, the Co-Founder and Chief Executive Officer, because they reside in this district. Memo. at
21 11; *see* Dkt. Nos. 1-15, 1-16, 1-17, 1-18. Mr. Rajagopal resides in Santa Clara County and Mr.
22 Spitz resides in the Bay Area. Memo. at 8.

23 However, Petitioners have not satisfied the first requirement with respect to Gaivota, LLC.
24 In this district, business entities are “found” where the business is incorporated, is headquartered,
25 or where it has a principal place of business. *See e.g., Illumina Cambridge Ltd. v. Complete*
26 *Genomics, Inc.*, No. 19-MC-80215-WHO-TSH, 2020 WL 820327, at *3 (N.D. Cal. Feb. 19, 2020)

1 (“A business entity is ‘found’ in the judicial district where it is incorporated or headquartered.”);
2 *In re Super Vitaminas, S.A.*, No. 17-MC-80125-SVK, 2017 WL 5571037, at *2 (N.D. Cal. Nov.
3 20, 2017) (finding that an office within the district satisfies the requirement); *In re TPK Touch*
4 *Sols. (Xiamen) Inc.*, No. 16-MC-80193-DMR, 2016 WL 6804600, at *2 (N.D. Cal. Nov. 17, 2016)
5 (finding subpoenaed party was “found” within the district because it maintained an in-district
6 office). Courts have also concluded that companies are found in a district where “they conduct
7 systematic and continuous local activities in this district.” *In re Qualcomm Inc.*, 162 F. Supp. 3d
8 1029, 1036–38 (N.D. Cal. 2016). There is no evidence that Gaivota, LLC is incorporated,
9 headquartered, or has its principal place of business in this district.

10 Petitioners cite to *Edelman*, where the Second Circuit examined the legislative history of §
11 1782(a) and interpreted “found” as requiring nothing more than an individual’s physical presence.
12 *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002) (holding that an individual who lives and works
13 abroad but traveled to the U.S. may be subpoenaed pursuant to § 1782(a) while “physically
14 present” in the district). Petitioners allege that the “resides or is found” requirement is satisfied
15 with respect to Gaivota, LLC because it “operates” and “conducts business” in this district.
16 Memo. at 1, 3, 11. However, Petitioners have not provided sufficient information for the Court to
17 conclude that the Gaivota, LLC operates or conducts business in this district. Gaivota, LLC is a
18 holding company and the owner and sole member of GSI, a Brazilian limited liability company.
19 GSI is headquartered in Brazil with its primary office located in São Paulo while Gaivota, LLC is
20 incorporated in Delaware. Petition at 3; Dkt. No. 1-14; Dkt. No. 1-19. That two of its
21 subsidiary’s corporate officers reside in this district is insufficient to show Gaivota, LLC conducts
22 business in this district.

23 Turning to the second requirement, Petitioners have demonstrated that the discovery is
24 sought for use in a proceeding before a “foreign or international tribunal.” The Supreme Court has
25 held that “foreign or international tribunal” refers to governmental or intergovernmental bodies.
26 *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2088 (2022). “Thus, a ‘foreign tribunal’ is

1 one that exercises governmental authority conferred by a single nation, and an ‘international
2 tribunal’ is one that exercises governmental authority conferred by two or more nations.” *Id.* This
3 requirement is not limited to adjudicative proceedings that are pending; § 1782(a) may be invoked
4 where such proceedings are “likely to occur” or are “within reasonable contemplation.” *Intel*
5 *Corp.*, 542 U.S. 241 at 258–59. Petitioners indicate that the requested discovery relates to
6 “ongoing judicial proceedings in Brazil and an international tribunal in the International Chamber
7 of Commerce” arising from the Kuhlmanns’ breach of the Agreement. Petition at 3.

8 A Brazilian civil court in the Central Court of Rio De Janeiro partially granted Petitioners’
9 Motion for Preliminary Injunction in Advance of Petitioners’ Request for Arbitration. Dkt. No. 1-
10 9; Memo. at 11. Petitioners subsequently filed a request for arbitration with the ICC alleging the
11 Kuhlmanns’ breach of contract. Dkt. No. 1-10. Furthermore, two additional proceedings are
12 pending between Petitioners and the Kuhlmanns and their affiliated companies, including civil
13 action initiated by KMA in the Civil Court of the District of Pinhais, Brazil, and criminal
14 proceedings initiated by Petitioners in the Criminal Court of the District of Pinhais, Brazil, arising
15 from the Kuhlmanns’ alleged breach of contract and violation of civil and criminal laws. Supp.
16 Brief at 5. Petitioners have indicated that these proceedings would be aided and supplemented by
17 the discovery sought in the instant Petition. The civil and criminal proceedings in Brazil’s court
18 system clearly meet the requirements of a “foreign or international tribunal” under § 1782(a).

19 Finally, Petitioners satisfy the final prong. “Any interested person” includes “not only
20 litigants before foreign or international tribunals, but also foreign and international officials as
21 well as any other person whether he be designated by foreign law or international convention or
22 merely possess a reasonable interest in obtaining the assistance.” *Intel Corp.*, 542 U.S. 241 at 257
23 (quotations and citation omitted). Petitioners have demonstrated that they are active litigants in
24 the Brazilian proceedings, thereby satisfying the “interested persons” requirement. Memo. at 12.

25 Accordingly, Petitioners have satisfied all statutory requirements with respect to the
26 Gaivota employees. Because Petitioners have only satisfied two of the three statutory

1 requirements as to Gaivota, LLC, the Court ends its analysis with respect to the business entity.

2 **B. Intel Factors**

3 The *Intel* discretionary factors weigh in favor of granting Petitioners’ request with respect
4 to the Gaivota employees.

5 Turning to the first factor, the Court finds that the material is not within the jurisdictional
6 reach of the foreign proceeding. The relevant inquiry is whether the evidence is available to the
7 foreign proceeding or tribunal “because in some circumstances, evidence may be available to a
8 foreign tribunal even if it is held by a non-participant to the tribunal’s proceedings.” *In re*
9 *Qualcomm Inc.*, 162 F. Supp. 3d at 1039; *see also In re Varian Med. Sys. Int’l AG*, No. 16-MC-
10 80048-MEJ, 2016 WL 1161568, at *3 (N.D. Cal. Mar. 24, 2016). “[T]he first *Intel* factor militates
11 against allowing § 1782 discovery when the petitioner effectively seeks discovery from a
12 participant in the foreign tribunal even though it is seeking discovery from a related, but
13 technically distinct entity. *In re Varian Med. Sys. Int’l AG*, 2016 WL 1161568 at *4 (quotation
14 marks omitted).

15 Here, Gaivota, LLC and the Gaivota employees, Mr. Spitz and Mr. Rajagopal, are not
16 participants in the foreign proceeding. Petitioners seek information conveyed by Mr. Spitz
17 regarding Mr. Kuhlmann’s participation in negotiations of the Bayer contract, as well as
18 information involving other Gaivota contracts since 2015 in which Mr. Kuhlmann was involved.
19 Petition at 8–9. Petitioners allege that “Brazilian courts do not have extra-territorial jurisdiction
20 over entities entirely outside the country’s borders, and thus cannot directly order Gaivota, LLC to
21 produce any discovery” and that the Gaivota employees “reside in the Bay Area, beyond the
22 jurisdiction of Brazilian Courts.” *Id.* at 13. Accordingly, this factor weighs in favor of granting
23 Petitioners’ request with respect to the Gaivota employees.

24 Likewise, the second factor favors granting the Petition. In consideration of the receptivity
25 of the foreign court or tribunal, “[c]ourts conducting this analysis focus on the utility of the
26 evidence sought and whether the foreign tribunal [or court] is likely to receive the evidence.” *In*

1 *re Qualcomm Inc.*, 162 F. Supp. 3d at 1040. Petitioners assert that Brazil’s criminal and civil
 2 codes of procedure allow for the use of legally obtained evidence from outside Brazil. Memo. at
 3 14. Petitioners further contend that a Brazilian Courts’ receptivity can be inferred from
 4 international treaties evidencing such willingness, noting that the U.S. and Brazil have entered into
 5 multiple treaties facilitating judicial assistance. *Id.* at 14–15 (citing Treaty with Brazil on Mut.
 6 Legal Assistance in Criminal Matters, S. Treaty Doc. No. 105-42 (Oct. 14, 1997); Inter-American
 7 Convention on Letters Rogatory Jan. 30, 1975, 14 I.L.M. 339 (1975); Vienna Convention on
 8 Consular Relations & Optional Protocol on Disputes, T.I.A.S. No. 6820 (Dec. 14, 1969)). Since
 9 there is nothing to suggest that the Brazilian civil or criminal courts would reject evidence
 10 obtained with U.S. federal-court assistance, this factor weighs in Petitioners’ favor.

11 The third factor, which is whether an applicant seeks “to circumvent foreign proof-
 12 gathering restrictions or other policies of a foreign country or the United States,” also weighs in
 13 favor of granting Petitioners’ request. *Intel Corp.*, 542 U.S. at 265. “A perception that an
 14 applicant has side-stepped less-than-favorable discovery rules by resorting immediately to § 1782
 15 can be a factor in a court’s analysis. Courts have found that this factor weighs in favor of
 16 discovery where there is nothing to suggest that the applicant is attempting to circumvent foreign
 17 proof-gathering restrictions.” *Med. Inc. Ass’n Smile Create*, 547 F. Supp. 3d 894, 899 (N.D. Cal.
 18 2021) (quotations and citations omitted). Petitioners assert that “[t]he documents and information
 19 Petitioners currently seek are not protected by any privilege or prohibition under Brazilian civil
 20 law, and a Brazilian court would have authority to enforce a subpoena for them if said court had
 21 jurisdiction to do so.” Memo. at 16; Gama e Silva Decl., ¶ 31. They contend that such
 22 information would be discoverable if the Gaivota employees had a presence in Brazil. Memo. at
 23 16. Absent any evidence that Petitioners are attempting to circumvent foreign proof-gathering
 24 restrictions, this factor also weighs in Petitioners’ favor.

25 Finally, the Court must consider whether the discovery sought is “unduly intrusive or
 26 burdensome.” *Intel Corp.*, 542 U.S. at 265. Courts have found discovery requests to be intrusive

1 or burdensome where they are overbroad and “not narrowly tailored temporally, geographically or
2 in their subject matter.” *In re Qualcomm Inc.*, 162 F. Supp. 3d at 1044. Petitioners’ proposed
3 subpoenas seek to depose Mr. Spitz and Mr. Rajagopal on the following topics:

- 4 1. The precise nature and amount of Eduardo’s investment and/or ownership interest in
- 5 GAIVOTA, from 2015-present.
- 6 2. The nature of the services or products offered by GAIVOTA.
- 7 3. The nature of GAIVOTA’s relationship with Bureau Veritas, BVQI and/or KMA. 4.
- 8 The nature of GAIVOTA’s relationship with EDUARDO.
- 9 4. The nature of GAIVOTA’s relationship with LEILA.
- 10 5. GAIVOTA’s dealings, contracts or communications with EDUARDO and/or LEILA,
- 11 from 2015-present.
- 12 6. Any and all transfers of ASSETS or capital between (to or from) GAIVOTA and
- 13 EDUARDO from 2015-present.
- 14 7. EDUARDO’s role in negotiating on GAIVOTA’s behalf, including but not limited to
- 15 in connection with its relationship with Bayer or KMA.
- 16 8. The relationship between EDUARDO and GAIVOTA’s CEO A. Spitz, CTO Mateus
- 17 Neves Barreto or Chief Scientific Advisor Ram Rajagopal.
- 18 9. YOUR knowledge of the dispute and underlying facts involving BUREAU VERITAS,
- 19 BVQI, KMA, EDUARDO, and LEILA, in (a) the action currently pending in the
- 20 Central Civil Trial Court of the Judicial District of the Capital of Rio de Janeiro, Brazil
- 21 under civil case number GRERJ No. 43439207636-90, or (b) the action currently
- 22 pending in the International Court of Arbitration of the International Chamber of
- 23 Commerce under case number 26827/PFF.

24 Dkt. No. 1-4 at 9. Neither subpoena compels Mr. Spitz or Mr. Rajagopal to bring any documents
25 with them. *See* Dkt. No. 1-4, Ex. A-2 and Ex. A-3. The Court concludes that these deposition
26 topics are relevant and narrowly tailored to the requested subject matter and, therefore, are not
27 unduly intrusive or burdensome.

28 Accordingly, the Court finds that the *Intel* factors strongly weigh in favor of granting
Petitioners’ requests to serve Section 1782 subpoenas to testify on Gaivota employees Mr. Spitz
and Mr. Rajagopal.

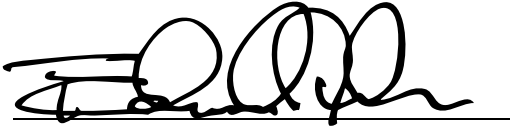
IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** in part and **DENIES** in part Petitioners’
Petition to Conduct Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782. The
Court finds that Petitioners meet the statutory criteria of § 1782(a) with respect to the two Gaivota
Case No.: [5:22-mc-80132-EJD](#)
ORDER GRANTING IN PART AND DENYING IN PART PETITION TO CONDUCT
DISCOVERY FOR USE IN FOREIGN PROCEEDINGS PURSUANT TO 28 U.S.C. § 1782

1 employees but not with respect to the Gaivota, LLC. Because Petitioners' request as to the
2 Gaivota employees also meets the factors set forth by the Supreme Court in *Intel*, the Court
3 authorizes service of the proposed subpoenas to testify with respect to Mr. Spitz and Mr.
4 Rajagopal. Petitioners' request to subpoena Gaivota, LLC for documents and testimony, however,
5 is **DENIED** without prejudice.

6 **IT IS SO ORDERED.**

7 Dated: August 17, 2022

8 

9
10 EDWARD J. DAVILA
United States District Judge

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27