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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Application of

No. 14-mc-80277-JST (DMR)

GRUPO UNIDOS POR EL CANAL, S.A.,

**ORDER GRANTING EX PARTE
APPLICATION FOR ORDER UNDER 28
U.S.C. § 1782 TO OBTAIN DISCOVERY
FROM URS CORPORATION AND URS
HOLDINGS, INC. FOR USE IN
INTERNATIONAL PROCEEDING**

Before the court is an ex parte application by Grupo Unidos por el Canal, S.A. (“GUPC”) for an order to obtain written discovery from URS Corporation (“URS”) and URS Holdings, Inc. (“URS Holdings”) for use in an international arbitration. Having considered GUPC’s papers and accompanying submissions, the court **grants** the application.

I. BACKGROUND

GUPC is a Panama-based company that is constructing the Panama Canal expansion. Menes Decl. [Docket No. 2] at ¶ 2. In August 2009, as part of a program to expand the Panama Canal, GUPC entered into a contract with Autoridad del Canal de Panama (“ACP”), a legal entity of the Republic of Panama established pursuant to the Panamanian Constitution. Application at 7; Menes Decl. at ¶ 3, Ex. 3. Construction on the Panama Canal expansion is ongoing.

GUPC, ACP, and others parties are engaged in an international arbitration currently proceeding under the auspices of the International Chamber of Commerce (“ICC”). *Id.* at ¶ 11-12,

1 Exs. 10-11. GUPC alleges that ACP has failed to perform its obligations, including by concealing
2 and withholding information regarding the true nature of the existing conditions and status of
3 aspects of the canal expansion.

4 URS is a company based in the United States that provides engineering, construction, and
5 technical services for public agencies and private sector companies around the world. *Id.* at ¶ 5, Ex.
6 4. URS Holdings is a subsidiary of URS. *Id.* at ¶ 6, Ex. 5. According to GUPC, since at least 2007,
7 URS and/or URS Holdings have worked as environmental and engineering consultants to ACP in
8 connection with the Panama Canal expansion project, and URS publicly holds itself out as having
9 performed a wide range of services for the project, including an environmental impact study. *Id.* at ¶
10 7-8, Exs. 6-7. Both URS and URS Holdings are headquartered in San Francisco. *Id.* at ¶ 9-10, Exs.
11 8-9.

12 GUPC states on information and belief that due to their role as advisors to ACP, URS and
13 URS Holdings have custody and control over documents relevant to the arbitration, specifically
14 documents relating to GUPC’s claims that ACP withheld and misrepresented information about the
15 canal expansion project.

16 II. LEGAL STANDARDS

17 GUPC’s application is brought pursuant to 28 U.S.C. § 1782, which states as follows:

18 The district court of the district in which a person resides or is found may order him to give
19 his testimony or statement or to produce a document or other thing for use in a proceeding in
20 a foreign or international tribunal, including criminal investigations conducted before formal
21 accusation. The order may be made . . . upon the application of any interested person and
22 may direct that the testimony or statement be given, or the document or other thing be
produced, before a person appointed by the court To 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.

23 28 U.S.C. § 1782(a). The purpose of Section 1782 is “to provide federal-court assistance in the
24 gathering of evidence for use in a foreign tribunal.” *Intel Corp. v. Advanced Micro Devices, Inc.*,
25 542 U.S. 241, 247 (2004); *see also Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84
26 (2d Cir. 2004) (noting that Section 1782 has the “twin aims” of “providing efficient means of
27 assistance to participants in international litigation in our federal courts and encouraging foreign
28 countries by example to provide similar means of assistance to our courts”) (quotations omitted).

1 A district court is authorized to grant a Section 1782 application where (1) the person from
2 whom the discovery is sought resides or is found in the district of the district court to which the
3 application is made, (2) the discovery is for use in a proceeding before a foreign tribunal, and (3) the
4 application is made by a foreign or internal tribunal or “any interested person.” 28 U.S.C. § 1782(a);
5 *see also In re Republic of Ecuador*, No. C-10-80255-CRB (EMC), 2010 WL 3702427 at *2 (N.D.
6 Cal. Sept. 15, 2010).

7 “However, simply because a court has the authority under § 1782 to grant an application
8 does not mean that it is required to do so.” *In re Republic of Ecuador*, 2010 WL 3702427 at *2
9 (citing *Intel*, 542 U.S. at 264). The Supreme Court has identified several discretionary factors that a
10 court should take into consideration in ruling on a Section 1782 request:

11 (1) whether the material sought is within the foreign tribunal’s jurisdictional reach and thus
12 accessible absent Section 1782 aid; (2) the nature of the foreign tribunal, the character of the
13 proceedings underway abroad, and the receptivity of the foreign government or the court or
14 agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the Section 1782
15 request conceals an attempt to circumvent foreign proof-gathering restrictions or other
16 policies of a foreign country or the United States; and (4) whether the subpoena contains
17 unduly intrusive or burdensome requests.

18 *Id.* (citing *Intel*, 542 U.S. at 264-65).

19 It is both common and proper for the process of presenting a request to a court to obtain an
20 order authorizing discovery pursuant to Section 1782 to be conducted *ex parte*. *Id.* (summarizing
21 cases).

22 III. DISCUSSION

23 A. Authority to Issue Subpoena

24 The court has reviewed GUPC’s application and determined that the statutory requirements
25 have been satisfied. First, GUPC has established that URS and URS holdings reside in this district.
26 Second, an arbitration pending in a tribunal established by an international treaty constitutes a
27 foreign tribunal for purposes of Section 1782. *In re Republic of Ecuador*, 2010 WL 3702427 at *3.
28 Third, GUPC qualifies as an “interested person” because it is a party to the arbitration.

B. Discretionary Factors

1 Having concluded that it has the authority to issue the subpoena, the court turns to the
2 question of whether the discretionary factors identified by the Supreme Court weigh in favor of or
3 against issuance of the subpoena.

4 With respect to the jurisdictional reach of the foreign tribunal, the Supreme Court has noted
5 that “when the person from whom discovery is sought is a participant in the foreign proceeding . . . ,
6 the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought
7 from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those
8 appearing before it, and can itself order them to produce evidence. In contrast, nonparticipants in
9 the foreign proceeding may be outside the foreign tribunal’s jurisdictional reach; hence, their
10 evidence, available in the United States, may be unobtainable absent § 1782(a) aid.” *Intel*, 542 U.S.
11 at 264. Here, URS and URS Holdings are not parties in the arbitration, and this factor weighs in
12 GUPC’s favor.

13 With respect to the nature and receptivity of the foreign tribunal, GUPC avers that the nature
14 of the arbitration is such that the tribunal can be expected to be receptive to the information obtained
15 by this request. GUPC notes that the ICC Rules of Arbitration provide that the arbitral tribunal may
16 consider the documents submitted by the parties without explicit limitations on the types of
17 documents presented, and there is no indication in the Rules that the tribunal would reject
18 documentary evidence obtained pursuant to Section 1782. *See* Application at 13; Menes Decl. at ¶
19 13, Ex. 12 (copy of ICC Rules of Arbitration). *See also In re Republic of Ecuador*, 2010 WL
20 3702427 at *4 (noting prior examples of Section 1782 applications to obtain discovery for use in
21 international arbitration in which the arbitral tribunal appeared to be receptive to that discovery).
22 Accordingly, this favor also weighs in GUPC’s favor.

23 With respect to the third discretionary factor, there is nothing to suggest that GUPC is
24 attempting to circumvent foreign proof-gathering restrictions. Indeed, it appears that GUPC cannot
25 obtain the requested discovery through the discovery procedures authorized by the arbitral tribunal,
26 because URS and URS Holdings are not parties to the international arbitration and are beyond the
27 reach of its discovery procedures. Application at 13. This factor thus weighs in GUPC’s favor.
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1 Finally, the discovery sought is not unduly burdensome. GUPC seeks information relevant
2 to the disputed canal expansion project, and its nine document requests target specific, limited
3 categories of documents. GUPC avers that the information sought will be critically important to
4 GUPC’s arbitration claims, and the burden on URS and URS Holdings will be slight, since this
5 information should be readily available. The court finds that GUPC has shown that the information
6 it seeks has relevance to the international arbitration and is not unduly burdensome, especially in
7 proportion to the alleged extent of URS and URS Holdings’ involvement with the canal expansion
8 project. Of course, this finding does not preclude URS and URS Holdings from contesting the
9 subpoena based on undue intrusion, burden, or other grounds. *See In re Republic of Ecuador*, 2010
10 WL 3702427 at *2 and *5 (noting that ex parte applications under Section 1782 are “typically
11 justified by the fact that the parties will be given adequate notice of any discovery taken pursuant to
12 the request and will then have the opportunity to move to quash the discovery” and to contest the
13 subpoena “based on undue intrusion or burden or based on other grounds (e.g., overbreadth”).

14 **IV. CONCLUSION**

15 For the reasons stated above, the court **grants** GUPC’s application. GUPC may serve the
16 subpoena attached as Exhibit 2 to this application.

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18 IT IS SO ORDERED.

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23 Dated: October 27, 2014

