

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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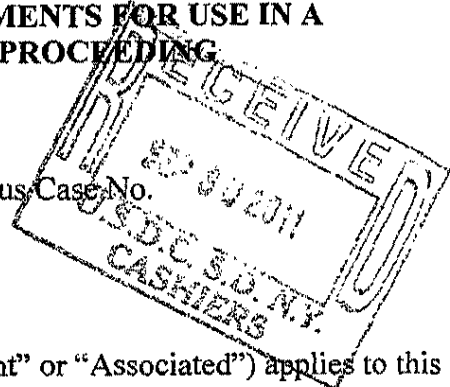
In re Application of

Associated Newspapers Limited,
a private limited company

To Issue a Subpoena for the Taking of a
Deposition and the Production of Documents
for Use in a Foreign Proceeding

**EX PARTE APPLICATION FOR AN
ORDER UNDER 28 U.S.C. § 1782 TO
ISSUE A SUBPOENA TO RICHARD
"JAKE" SIEWERT FOR THE TAKING OF
A DEPOSITION AND THE PRODUCTION
OF DOCUMENTS FOR USE IN A
FOREIGN PROCEEDING.**

Miscellaneous Case No.



1. Associated Newspapers Limited (the "Applicant" or "Associated") applies to this Court for an Order, under 28 U.S.C. § 1782, and Rules 26, 30, 34 and 45 of the Federal Rules of Civil Procedure, granting Applicant leave to serve the subpoena attached as Annex A to the Declaration of Laura R. Handman, requiring Richard "Jake" Siewert ("Mr. Siewert") to produce documents and appear at a deposition. Applicant is one of the United Kingdom's newspaper publishers and the publisher of the *Daily Mail*, which, at the relevant time, had an approximate circulation of 2,090,469 copies, and which is also published online at www.dailymail.co.uk. As explained below, Applicant seeks this evidence in aid of its defense against a libel claim pending against it in the United Kingdom and asks this Court to grant such leave *ex parte*, or, in the alternative, that this Court enter an Order to Show Cause why the subpoena should not issue and order an accelerated briefing and hearing schedule.

2. The libel claim against the Applicant arises out of a two-part article published by

the Applicant in the May 22, 2010, edition of the *Daily Mail*.¹ The article reports on a dinner on January 30, 2005, which was hosted by Russian industrialist Oleg Deripaska, chief executive of the mining company Basic Element, at Cantinetta Antinori in Moscow. The dinner was held in connection with the £500 million sale of the Samara and Belaya Kalitva aluminum plants by UC Rusal to Alcoa, Inc.

3. The article reports that the dinner was attended by Lord Peter Mandelson, the European Commissioner for Trade, and that Nathaniel Rothschild facilitated the attendance of Lord Mandelson at the dinner. The article questions the propriety of Lord Mandelson's attendance in his capacity as EU Trade Commissioner.

4. The claimant in the libel case, Nathaniel Rothschild, is a member of the Rothschild banking family, and is a "financier with substantial international business interests." He was a financial advisor to Mr. Deripaska and attended the dinner in Moscow.

5. On July 7, 2010, Mr. Rothschild filed a libel claim against the Applicant based upon statements made in the May 22, 2010, article describing the role Mr. Rothschild played in facilitating Lord Mandelson's attendance at the dinner.² Mr. Rothschild alleges, *inter alia*, that the article's words meant and were understood to mean that "there were strong grounds to suspect that the Claimant had facilitated the attendance of EU Trade Commissioner Lord Mandelson at a meeting between Russian oligarch Oleg Deripaska and American aluminum executives so that Oleg Deripaska could close a £500 million deal by securing corrupt and improper disclosures and commitments concerning EU aluminum tariffs from Lord Mandelson."

¹ A copy of the articles is attached to the Declaration of Laura R. Handman (hereinafter "Handman Decl.") as Exhibit A.

² *The Honourable Nathaniel Philip Victor James Rothschild and Associated Newspapers Limited*, Particulars of Claim (hereinafter "Particulars of Claim") is attached to the Handman Decl. as Exhibit B.

Particulars of Claim ¶ 5(2). Mr. Rothschild claims that, by “reason of the Defendant’s publications the Claimant has been seriously damaged in his character and reputation and has suffered considerable distress, embarrassment and injury to his feelings.” *Id.* ¶ 6.

6. The subpoena sought by Associated is reasonably calculated to lead to the discovery of evidence relevant to and for use in the defense of the libel claim against them. As outlined in its Defence, Associated contends:

There are reasonable grounds for believing that Lord Mandelson, when EU Trade Commissioner, discussed aluminum tariffs with Mr. Deripaska, in terms which would be open to criticism as inappropriate, before the closure of the Alcoa deal and that the Claimant facilitated that contact.

Defence, Handman Decl., Ex. F at 2.³ Evidence establishing the date upon which a deal between Alcoa and UC Rusal was completed is an important issue in dispute in this case. Establishing the subjects of discussion with Lord Mandelson at the dinner and whether they included EU aluminum tariffs is an important issue in dispute in this case. Establishing Claimant’s role in Lord Mandelson’s attendance at the dinner is an important issue in dispute in this case.

7. Mr. Siewert, a former Vice President, Business Development and Public Strategy for Alcoa, Inc. (“Alcoa”), was one of several Alcoa executives present at the dinner. Mr. Siewert has knowledge of the facts surrounding Lord Mandelson’s attendance at the dinner, the topics of discussion at the dinner, and the date on which the deal between UC Rusal and Alcoa was signed.

8. The Applicant has tried to obtain the requested discovery using informal channels with limited success. On June 8, 2011, Reynolds Porters Chamberlain (“RPC”), English counsel to the Applicant, contacted Mr. Siewert, and his former employer, Alcoa, and asked them for

³ A copy of Associated’s Defence (“Defence”) is attached to the Handman Decl. as Exhibit F.

their assistance confirming Mr. Rothschild's attendance at the January 30, 2005, dinner and the closing date of the deal between Alcoa and UC Rusal.⁴ Mr. Siewert and Alcoa did not respond to RPC's letter. On July 11, 2011, Davis Wright Tremaine LLP, counsel to the Applicant in this matter, wrote to Max Laun, Assistant General Counsel at Alcoa, and Mr. Siewert, once again asking for their assistance with this matter.⁵ Mr. Siewert and Mr. Laun did not respond to Davis Wright Tremaine's letter. The nonresponsiveness of Mr. Siewert and Alcoa to the Applicant's repeated requests leaves the Applicant with little choice but to seek judicial assistance of this Court under 28 U.S.C. § 1782.

9. This application meets the statutory requirements of Section 1782, which provides as follows:

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

28 U.S.C. § 1782 (2006). As stated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246-47 (2004), to obtain discovery, the applicant must make a threshold showing that:

- (1) the person from whom the discovery is sought either "resides" or is "found" in this District;
- (2) the discovery is "for use in a proceeding" before a "foreign tribunal"; and

⁴ Letters from Jaron Lewis to Alcoa, Inc. and Mr. Siewert (attached to the Handman Decl. as Exhibit C).

⁵ Letters from Laura Handman to Max Laun, Esq. and Mr. Siewert (attached to the Handman Decl. as Exhibit D).

(3) the applicant qualifies as an “interested person.”

Id. See also In re Microsoft Corp., 428 F. Supp. 2d 188, 192 (S.D.N.Y. 2006). The application filed by Associated meets all of the requirements of 28 U.S.C. § 1782.

10. Mr. Siewert is a resident of New York, New York. In August 2011, Bloomberg News reported that Mr. Siewert, former Senior Counselor to U.S. Treasury Secretary Timothy Geithner, was planning to leave the Treasury Department in August to return to “New York, where his family lives.”⁶ *See Handman Decl. Exhibit E.* He is, therefore, “found” in this judicial district for purposes of Section 1782 by force of his residence in New York, New York.

11. The discovery sought is for use in the defense of the libel claim brought by Mr. Rothschild, a civil proceeding currently pending in the United Kingdom against the Applicant. The English court entertaining the civil proceeding clearly qualifies as a foreign tribunal and English courts have historically been receptive to Section 1782 assistance from federal courts. Section 1782 previously has been applied to authorize discovery for matters pending in the English courts. *See Phillips v. Beierwaltes*, 466 F.3d 1217 (10th Cir. 2006); *In re Letter of Request From Crown Prosecution Service of the United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989); *In re IKB Deutsche Industriebank AG*, 2010 WL 1526070 (N.D. Ill. Apr. 8, 2010); *In re Application of Blue Oil Trading Ltd.*, 2009 WL 3353293 (W.D.N.C. Oct. 15, 2009); *In re Application of Michael Wilson & Partners*, 2009 WL 1193874 (D. Colo. Apr. 30, 2009); *In re Application of Guy*, 2004 WL 1857580 (S.D.N.Y. Aug. 19, 2004).

12. As a defendant in a civil proceeding, the Applicant qualifies as an “interested person” within the meaning of Section 1782. *See Intel Corp.*, 542 U.S. at 256 (“No doubt

⁶ Mike Dorning & Ian Katz, *White House Said to Be Confident Geithner Will Stay At Treasury*, Bloomberg News, Aug. 5, 2011, <http://www.bloomberg.com/news/2011-08-04/white-house-officials-confident-geithner-to-remain-as-treasury-secretary.html> (attached to the Handman Decl. as Exhibit E).

litigants are included among, and may be the most common example of, the ‘interested person[s]’ who may invoke § 1782.”) (alteration in original).

13. Once the statutory requirements of § 1782 are met, “a district court is free to grant discovery in its discretion.” *In re Chevron Corp.*, 709 F. Supp. 2d 283, 290 (S.D.N.Y. 2010); *see also Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995) (stating that policy underlying § 1782 generally obliges district courts to assist the applicant in the requested discovery). The Second Circuit has counseled that a district court ought to exercise its discretion in favor of allowing discovery. *In re Application for an Order Permitting Metallgesellschaft AG to Take Discovery*, 121 F.3d 77 (2d Cir. 1997) (“[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.”) (citing *Euromepa S.A.*, 51 F.3d at 1101).

14. In *Intel Corp.*, the Supreme Court set forth the factors that may inform the district court’s discretion in deciding to grant a Section 1782 application. A court need not consider all of these factors in making its decision on the application, but may use them as guides in its decision-making. The discretionary factors that may be considered are as follows:

- (1) whether the persons from whom the discovery is being sought are participants in the foreign proceeding;
- (2) the nature and character of the foreign proceeding and the receptivity of the foreign tribunal to U.S. federal judicial assistance;
- (3) whether the request is an attempt to circumvent foreign proof gathering limitations; and
- (4) whether the discovery sought is unduly burdensome.

Id. at 264-65.

15. Each of the *Intel Corp.* discretionary factors are met here in Associated's request for judicial assistance:

- The Respondent Siewert is not a party to the civil proceedings in the United Kingdom, and his evidence is, therefore, unavailable in that proceeding without this Court's assistance. Alcoa, his former employer, is also not a party to the libel action in London. *Intel Corp.*, 542 U.S. at 264 (“[N]onparticipants in the foreign proceeding may be outside the foreign tribunal’s jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.”).
- The nature and character of the proceedings in England warrant the Court’s assistance, *Intel Corp.*, 542 U.S. at 264. The libel claim is brought against a publication for an article reporting on a matter of significant public import: the propriety of the European Union’s Trade Commissioner’s attendance at a dinner prior to the closing of a multimillion pound aluminum deal between two titans of industry and the conflict of interest issues that may have arisen. “[I]t is sufficient that the applicant intend to offer the evidence to a foreign court. Whether the foreign court will ultimately accept the evidence is beyond th[e] [U.S.] Court’s ability to determine.” *In re Imanagement Servs. Ltd.*, 2006 U.S. Dist. LEXIS 8876, at *8 (D.N.J. Feb. 28, 2006). Section 1782 contains “no foreign-discoverability” prerequisite. *Intel Corp.*, 542 U.S. at 259-64.
- The application is not a bad faith attempt to circumvent proof-gathering restrictions in the foreign proceedings, but rather is a good-faith effort to secure relevant evidence that is beyond the jurisdiction of the foreign court. *Minatec*

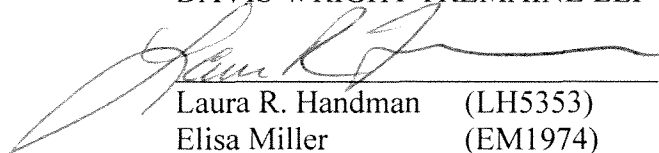
Fin. S.A.R.L. v. SI Group Inc., 2008 U.S. Dist. LEXIS 63802, at *26 (N.D.N.Y. Aug. 18, 2008) (“The primary issue for us is whether [Petitioner] is pursuing this discovery in bad faith.”).

- The discovery requests are not unduly intrusive or burdensome, since the subjects of inquiry relate to one dinner Mr. Siewert attended and to the closing date of a deal in which Mr. Siewert was involved. Proprietary information, such as the financial terms of the deal can be redacted or subject to a protective order. The date of the closing does not implicate sensitive, proprietary information.

16. Accordingly, Associated respectfully requests that its Application under 28 U.S.C. § 1782 be granted and that it be authorized to serve the subpoena attached as Annex A to the Declaration of Laura R. Handman, which is attached to this Application.

Respectfully submitted,

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