

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

**IN THE MATTER OF THE APPLICATION OF**

**OPINION AND ORDER**

**AUTO-GUADELOUPE INVESTISSEMENT S.A.,  
FOR AN ORDER TO TAKE DISCOVERY  
PURSUANT TO 28 U.S.C. § 1782**

12 MC 221 (RPP)

-----X

**ROBERT P. PATTERSON, JR., U.S.D.J**

On July 3, 2012, Auto-Guadeloupe Investissement S.A. (“AGI”) filed an ex parte application for an order to take discovery of Leucadia National Corporation (“Leucadia”) pursuant to 28 U.S.C. § 1782. (Ex Parte Appl. for an Order to Take Disc. (the “§ 1782 Appl.” or “§ 1782 Discovery Request”), ECF No. 1.) AGI requested discovery under § 1782 in connection with an unfair competition lawsuit that it and several affiliate companies identified as the “Loret Group” have filed in the Commercial Court of Pointe-à-Pitre, Guadeloupe,<sup>1</sup> against Leucadia. (Decl. of Raphael Gauvain in Support of Mot. to Take Disc. (“Gauvain Decl.”) ¶ 3, July 2, 2012, ECF No. 4.) The Honorable Paul A. Engelmayer, sitting by designation in Part I, granted the application on July 5, 2012, (Order Pursuant to 28 U.S.C. § 1782, July 5, 2012, ECF No. 5), and AGI filed its subpoena the next day, (Subpoena to Testify at a Dep. in a Civil Action, (the “Subpoena”), ECF No. 1, Ex. 1). Now pending before this Court is Leucadia’s July 28, 2012 Motion to Quash the subpoena. (See Mot. to Quash Subpoena (“Mot. to Quash”), ECF No. 12.) For the reasons stated below, Leucadia’s Motion to Quash is GRANTED in part and DENIED in part.

---

<sup>1</sup>Guadeloupe, a Caribbean island located in the Lesser Antilles, is an overseas territory of France. (Gauvain Decl. ¶ 5.)

## I. BACKGROUND

### A. Joint Venture Between AGI and Leucadia

AGI is a privately held corporation organized under French law with its offices in Pointe-à-Pitre, Guadeloupe. (Decl. of Dennis Lesueur in Support of Mot. to Take Disc. (“Lesueur Decl.”) ¶ 1, July 2, 2012, ECF No. 3.) Leucadia is a publicly-traded holding company with offices in Manhattan, New York. (§ 1782 Discovery Request ¶ 2; see also Decl. of Justin Wheeler in Support of Mot. to Quash (“Wheeler Decl.”) ¶ 1, July 26, 2012, ECF No. 15.)

On May 29, 2007, AGI and Leucadia<sup>2</sup> entered into an agreement to combine their Caribbean-based underseas telecommunications businesses into a joint venture fiber optic cable operation called Global Caribbean Fiber. (Wheeler Decl. ¶ 6.) The agreement provided AGI with 60% interest in Global Caribbean Fiber and Leucadia with 40% interest. (Id.; Lesueur Decl. ¶ 11.) Soon after the joint venture was formed, Columbus,<sup>3</sup> the largest submarine fiber optic operator in the Caribbean, approached AGI and Leucadia about acquiring Global Caribbean Fiber for 120 million dollars. (Wheeler Decl. ¶ 7; Lesueur Decl. ¶¶ 12-13.) AGI, Leucadia, and Columbus negotiated over this acquisition for more than nine months and appear to have finalized a sale contract. (See Wheeler Decl. ¶¶ 7-8; see also Decl. of Ana Vermal in Support of Mot. to Quash (“Vermal Decl.”) ¶ 4, July 27, 2012, ECF No. 14; but cf., Lesueur Decl. ¶¶ 19-20; Gauvain Decl. ¶¶ 14-17.)

---

<sup>2</sup>Leucadia entered into the joint venture agreement through its subsidiary, Caribbean Fiber Holdings. (Wheeler Decl. ¶¶ 5-6.) Parties’ moving papers refer to the acts performed by Caribbean Fiber Holdings as having been undertaken by Leucadia or the “Leucadia Group.” (See, e.g., Lesueur Decl. ¶ 5.) The same convention is employed here.

<sup>3</sup>Without explaining the connection, parties reference “Columbus” as including Columbus International, Inc., Columbus Acquisitions, Inc., and Columbus Holdings France S.A.S. (See Lesueur Decl. ¶ 5; Gauvain Decl. ¶ 4.)

In April 2009, however, AGI withdrew from the sale claiming that terms and conditions critical to the sale agreement could not be met. (Gauvain Decl. ¶¶ 14-15; Lesueur Decl. ¶¶ 18-19.) Namely, AGI reported that the “sale required the Regional Council of Guadeloupe’s consent be obtained” and that “[s]uch consent was never granted.” (Lesueur Decl. ¶¶ 18-19.) Columbus and Leucadia contested AGI’s withdrawal, arguing that AGI had actually asked the Council “to refuse approval [of the sale] if such approval was sought” and that the Council President was “in fact inclined to approve the transaction.” (Wheeler Decl. ¶ 8.) Columbus and Leucadia further stated that AGI’s withdrawal from the sale agreement had caused them to suffer significant economic harm. (Wheeler Decl. ¶¶ 7-8; Vermal Decl. ¶¶ 4-5.) Numerous legal proceedings followed, and these are critical to understanding the basis of the instant dispute. (See Vermal Decl. ¶ 3.)

#### **B. International Proceedings**

Soon after AGI withdrew from the sale of Global Caribbean Fiber to Columbus, Columbus initiated an arbitration proceeding (“the Columbus Arbitration Proceeding”) in Barbados against AGI and Leucadia to either enforce the sale or obtain damages for the alleged breach of the sale contract. (Wheeler Decl. ¶ 9; Vermal Decl. ¶ 5.) Leucadia cross-claimed against AGI alleging that AGI had breached the sale contract by withdrawing under false pretenses. (Vermal Decl. ¶¶ 4-5.) In March 2011, the arbitrator in the Columbus Arbitration Proceeding held that AGI was liable for breaching its agreement to sell Global Caribbean Fiber to Columbus. (*Id.* ¶¶ 5-6; Wheeler Decl. ¶ 9.) The arbitrator denied specific performance, however, and the proceeding moved into its current phase for the assessment of damages.<sup>4</sup>

---

<sup>4</sup>AGI subsequently challenged the arbitrator’s liability finding before the International Centre for Dispute Resolution (“ICDR”) on grounds that the arbitrator was biased. (Vermal

(Vermal Decl. ¶¶ 7-8.)

Simultaneous to the Columbus Arbitration, Leucadia began another arbitration proceeding (the “Joint Venture Arbitration Proceeding”) in France to rescind the joint venture agreement with AGI. (Wheeler Decl. ¶ 12.) Leucadia explains that it was compelled to initiate this proceeding separately from the Columbus Arbitration Proceeding because of venue specifications in the joint venture agreement. (*Id.*; Vermal Decl. ¶ 10.) On December 21, 2011, the tribunal in the Joint Venture Arbitration Proceeding found that AGI had breached several of its obligations under the joint venture agreement, but that the court lacked jurisdiction to declare the agreement rescinded. (Wheeler Decl. ¶ 12; Vermal Decl. ¶ 11.)

Related to Leucadia’s action to rescind the joint venture agreement, Leucadia also sought to recover shareholder loans totaling 4 million euros, which it had made to Global Caribbean Fiber to finance the company during the acquisition negotiations with Columbus. (Wheeler Decl. ¶ 13; Vermal Decl. ¶ 12.) Therefore, on September 16, 2009, Leucadia filed an action against AGI in the Tribunal de Grande Instance (the “Superior Court”) of Paris seeking an order to sequester 4.86 million euros in Global Caribbean Fiber’s account. (Wheeler Decl. ¶ 13) After obtaining the sequester order, Leucadia petitioned the Tribunal de Commerce (the

---

Decl. ¶ 15; *see also* Decl. of Oleg Rivkin in Opp’n to Mot. to Quash (“Oleg Rivkin Decl.”) ¶¶ 4-8, Aug. 22, 2012, ECF No. 19, Ex. 6; *see also* AGI’s Mem. of Law in Opp’n to Mot. to Quash (“Opp’n Mem.”) at 14-15, Aug. 22, 2012, ECF No. 18.) The ICDR rejected this challenge, but thereafter the arbitrator resigned. (Vermal Decl. ¶ 15.) In January 2012, AGI requested that the ICDR vacate its decision rejecting AGI’s challenge to the arbitrator’s impartiality because, AGI argued, the ICDR did not have jurisdiction to hear the challenge. (*Id.*) AGI made this challenge even though it had been the one that filed the action before the ICDR in the first place. (*Id.*) AGI is also currently attempting to vacate the decision in a Barbados court because of the lack of the appearance of impartiality in the Columbus Arbitration Proceeding. (*Id.*; Oleg Rivkin Decl. ¶¶ 6-8; Wheeler Decl. ¶ 14.) In connection with the Barbados vacatur action, AGI served Leucadia with a subpoena pursuant to 28 U.S.C. § 1782. (Wheeler Decl. ¶ 14.) Leucadia has since disclosed the documents requested as well as submitted to a deposition. (*Id.*)

“Commercial Court”) of Paris for a summary order directing the recovery of the sequestered funds. (Vermal Decl. ¶ 13.) On December 17, 2009, the Commercial Court declared that it lacked jurisdiction over these claims because Leucadia had raised the same or similar claims in the still-pending Columbus Arbitration Proceeding. (Id.; see also Decl. of Raphael Gauvain in Opp’n to Mot. to Quash (“Second Gauvain Decl.”) ¶¶ 12-13, Aug. 22, 2012, ECF No. 19, Ex. 5.) The Court of Appeals of Paris upheld the Commercial Court’s decision on February 2, 2010. (Second Gauvain Decl. ¶ 12.) Leucadia then withdrew its claim for reimbursement before the tribunal in the Columbus Arbitration Proceeding and re-commenced its proceeding on the merits of its reimbursement claim in the Commercial Court of Paris. (Id. ¶ 13.)

In February 2012, AGI initiated a suit in the Commercial Court of Pointe-à-Pitre (the “Pointe-à-Pitre Proceeding”). (See Gauvain Decl., Ex. A; Lesueur Decl. ¶¶ 5-7.) This suit underlies AGI’s currently pending § 1782 Discovery Request. In the Complaint, AGI alleges that the various litigation and arbitration proceedings “interposed by” Columbus and Leucadia against AGI constitute abusive litigation brought with the intention of “intimidat[ing] AGI into selling its interest in G[lobal Caribbean Fiber] to Columbus or to eliminate AGI from the market.” (Opp’n Mem. at 4; see also Gauvain Decl. ¶¶ 23-25; Lesueur ¶¶ 5-7.) AGI’s suit also alleges that, pursuant to French unfair competition laws, it is entitled to damages because Leucadia informed AGI’s financial investors about the proceedings pending against AGI before any decisions in those proceedings had been rendered, and as a result, AGI’s financial investors altered or discontinued their business relationships with AGI and the Loret Group. (Gauvain Decl. ¶ 25 (citing Nouveau Code de Procedure Civile (N.C.P.C.) art. 11 §§ 1382, 1383 (Fr.)); see also Opp’n Mem. at 5.)

**C. The Ex Parte Application for an Order to Take Discovery and the Proposed Subpoena**

In order to prove its claim that Leucadia and Columbus violated French unfair competition laws, AGI filed a § 1782 Discovery Request on July 3, 2012. (See § 1782 Discovery Request.) The application seeks discovery of materials evidencing any intent to harass or intimidate AGI or the Loret Group. (Id. ¶ 15.) On July 5, 2012, the Honorable Paul A. Engelmayer, sitting by designation in Part I, granted AGI's ex parte request ordering that a subpoena be issued to Leucadia. The next day, AGI sent Leucadia a subpoena requesting discovery of:

(1) All communications between Columbus and Leucadia relating to G[lobal Caribbean Fiber] or the G[lobal Caribbean Fiber] submarine fiber optic cable, from January 1, 2008 to the present, in particular but not limited to any notes and any reports prepared in connection with a meeting held between Columbus, Leucadia and AGI on July 11, 2008.

(2) All documents concerning Leucadia's or Columbus's intentions regarding the Loret Group, after the Regional Council of Guadeloupe did not approve the sale of G[lobal Caribbean Fiber] to Columbus.

(3) All documents concerning Leucadia's demand that the Loret Group repay Leucadia's current account in Global Caribbean Fiber.

(4) All documents concerning the commencement or contemplated commencement of legal and arbitration proceedings by Columbus or Leucadia against any member of the Loret Group.

(5) All documents concerning information given by Leucadia to any third-parties, including but not limited to the Guadeloupe region banks and the Loret Group's creditors and/or clients, regarding legal or arbitration proceedings commenced against any member of the Loret Group, in particular but not limited to any internal memos or emails on the subject.

(Subpoena at 5.)

On July 28, 2012, Leucadia responded to AGI's subpoena by filing a Motion to Quash. In the motion, Leucadia argues that AGI, and not Leucadia, is the party filing the abusive

litigation and that the Pointe-à-Pitre Proceeding is only AGI's latest attempt "to obstruct the Columbus Arbitration and to drive up the costs of this dispute in an attempt to push Leucadia towards an unfavorable settlement." (Leucadia's Mem. in Support of Mot. to Quash ("Leucadia Mem.") at 7, July 28, 2012, ECF No. 13.) Leucadia further contends that the actions it initiated against AGI were only brought to enforce its legal rights. (*Id.*) Leucadia thus argues that AGI's subpoena is nothing more than an overly broad "fishing expedition," which seeks papers that are either irrelevant or outside the time period pertaining to AGI's withdrawal from the sale of Global Caribbean Fiber. (*Id.* at 7; see also Wheeler Decl. ¶¶ 15-17.)

## **II. DISCUSSION**

### **A. Legal Standard**

In pertinent part, 28 U.S.C. § 1782 provides that a federal district court "may order" a person residing or found in that court's district to give testimony or to produce documents "for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person." § 1782(a). If a party seeking discovery meets these three "statutory requirements," then a district court may exercise its discretion to grant the party's § 1782 application. Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 83-85 (2d Cir. 2004) (discussing "statutory requirements" of § 1782); In re Esses, 101 F.3d 873, 875 (2d Cir. 1996). In exercising its discretion, a district court is guided by the factors articulated in Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004). Specifically, a district court should consider whether: (1) the person from whom discovery is sought is a participant in the foreign proceeding; (2) the foreign tribunal might be receptive to U.S. federal court judicial assistance; (3) the § 1782(a) request conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or of the United States; and (4) the request is

unduly intrusive or burdensome. See Intel Corp., 542 U.S. at 264-65.

A court considering a request for discovery under § 1782 must also be mindful of U.S. federal discovery procedures under Rules 26 and 45 of the Federal Rules of Civil Procedure. See In re Gushlak, 2011 WL 3651268, at \*6 (E.D.N.Y. Aug. 17, 2011) (“Section 1782(a) mandates that discovery under the statute be produced in accordance with the Federal Rules of Civil Procedure.”) (internal quotation marks omitted). These two federal rules direct that a party may “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim” to the extent that “the discovery appears reasonably calculated to lead to the discovery of admissible evidence,” Fed. R. Civ. P. 26(b)(1), and to the extent that it does not cause any “undue burden or expense,” Fed. R. Civ. P. 45(c)(1). “Whether a subpoena imposes an ‘undue burden’ depends on factors including relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described, and the burden imposed. The party seeking discovery bears the initial burden of showing relevance.” Noel v. Bank of New York Mellon, 2011 WL 3279076, \*2 (S.D.N.Y. July 27, 2011) (internal quotation marks and citation omitted). Should a court find that a subpoena is unduly burdensome, it must quash or modify that subpoena. Fed. R. Civ. P. 45(c)(3)(A)(iv); see also Fed. R. Civ. P. 26(b)(2)(C) (“[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that the discovery sought is unreasonably cumulative or duplicative . . .”).

## **B. Analysis**

On the face of AGI’s papers requesting § 1782(a) discovery, the Part I Judge correctly found the statutory requirements met: Leucadia is a U.S. corporation with its principal offices in Manhattan; the requested discovery is for use in a proceeding before the Pointe-à-Pitre



Commercial Court of Guadeloupe; and AGI, having initiated the action, is “an interested party” in this proceeding. See § 1782(a). These requirements are not the end of the inquiry, however. See Schmitz, 376 F.3d at 83-85. Rather, this Court must consider the four Intel factors. See Intel Corp., 542 U.S. at 264-65. Applying these factors here, Leucadia’s Motion to Quash AGI’s § 1782 Discovery Request is granted as to Requests 1, 2, and 3, but denied as to Requests 4 and 5.

1. Leucadia is a Participant in a Foreign Proceeding

Leucadia first argues that its status as a party in the Pointe-à-Pitre Proceeding weighs heavily against AGI’s § 1782 Discovery Request. (Leucadia Mem. at 8-9.) To support this assertion, Leucadia relies on the Intel Court’s conclusion that, because a foreign tribunal has jurisdiction over the parties appearing before it, the tribunal may order the production of evidence from those parties. (Id.) Thus, “the need for § 1782(a) aid generally is not as apparent as it ordinarily is when the evidence is sought from a nonparticipant in the matter arising abroad.” Intel Corp., 542 U.S. at 264.

As an initial matter, this Court is not persuaded that Intel precludes § 1782 discovery of parties participating in the underlying international proceeding. Section 1782 aid is not foreclosed just because the need for such aid may not be as readily apparent. Cf. id. Moreover, in this case, it is not clear the Pointe-à-Pitre Court could order Leucadia to produce the documents that AGI is seeking. A cursory examination of France’s Code of Civil Procedure reveals that a party seeking discovery is required to identify the precise document that it seeks produced. (See Gauvain Decl. ¶¶ 30-34 (citing N.C.P.C. art. 11 §§ 138-42, 862 (Fr.)).) AGI explains that it would be “insufficient to request, for example, that the court order a party to produce documents related to a specific relevant subject matter. The actual documents must be

specifically identified to the court before the French court will consider ordering its production.” (Gauvain Decl. ¶ 34.) Thus, AGI argues, because it does not know the precise correspondence or specific documents to request, “[t]he only realistic way . . . to obtain such proof is by this Court granting its § 1782 application.” (See Opp’n Mem. at 7.)

Other decisions in this district support AGI’s argument. In In re Servicio Pan Americano de Proteccion, 354 F. Supp. 2d 269 (S.D.N.Y. 2004), for example, the court granted a § 1782 application to take discovery of a party participating in the foreign proceeding because “the apparent limitations of [the foreign court’s] discovery rules suggest[ed] that the exercise of jurisdiction by this Court m[ight] be necessary to provide [the party] with the documents it seeks.” 354 F. Supp. 2d at 274; see also In re OOO Promnefstroy, 2009 WL 3335608, at \*5-7 (S.D.N.Y. Oct. 15, 2009) (reasoning that the relevant inquiry is whether the foreign tribunal has ability to control the evidence and order production, not whether the tribunal has control over the party targeted by the § 1782 application); In re Godfrey, 526 F. Supp. 2d 417, 419 (S.D.N.Y. 2007) (same).

Thus, in light of the fact that the materials which AGI seeks would be unavailable but for § 1782 assistance, the first Intel factor weighs against quashing AGI’s subpoena requesting discovery from Leucadia.

## 2. Receptivity of Pointe-à-Pitre Commercial Court to U.S. Judicial Assistance

Leucadia next argues that France is “decidedly unreceptive to discovery” and that AGI has failed to introduce “authoritative proof” showing how the Pointe-à-Pitre Court might be receptive to discovery here. (Leucadia Mem. at 10 (emphasis in original); see also Vermal Decl. ¶¶ 22-31.) Critically, however, the burden of proof to show receptivity is not on AGI. (See Opp’n Mem. at 8.) Rather, Second Circuit case law places the burden on the party opposing

discovery to show that a foreign court would not be receptive to this assistance. In Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995), for example, the Second Circuit advised district courts to look for “authoritative proof” that a foreign jurisdiction would reject § 1782 assistance because district courts have neither the competency nor the time “to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law.” 51 F.3d at 1099; see also Promnefstroy, 2009 WL 3335608 at \*7.

Leucadia fails to provide this Court with any evidence showing that the Pointe-à-Pitre Commercial Court would not be receptive to the use of evidence obtained under § 1782. Instead, Leucadia directs this Court’s attention to statements France made when ratifying the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and also to a “so-called [French] ‘blocking statute’ that forbids and punishes with fines and imprisonment the communication of documents to foreign authorities.” (Leucadia Mem. at 11 (emphasis in original); see also Vermal Decl. ¶¶ 31-32; Vermal Decl. Ex. 4.) But this evidence only concerns general principles of discovery under French civil law and, as the Intel Court observed, a “foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts.” 542 U.S. at 261. This evidence therefore does little to show how receptive the Pointe-à-Pitre Commercial Court might be to this Court’s assistance in obtaining documents from an American company situated within this Court’s jurisdiction. Cf. In re Schmitz, 259 F. Supp. 2d 294, 299-300 (S.D.N.Y. 2003) (finding foreign court not receptive to U.S. judicial assistance where foreign ministry of justice and prosecutor asked the district court judge to deny the discovery request).

Accordingly, because Leucadia has not presented this Court with any authoritative proof that the Pointe-à-Pitre Commercial Court would reject the § 1782 assistance sought here, the second Intel factor slightly weighs against quashing AGI's subpoena requesting discovery from Leucadia.

### 3. Circumvention of Foreign Proof Gathering Restrictions or of U.S. Discovery Rules

Leucadia next argues that AGI is attempting to circumvent foreign proof gathering restrictions by seeking discovery in the United States even though it chose to sue Leucadia, a U.S.-based company, in France. (Leucadia Mem. at 11-12.) Leucadia fails to explain, however, how this scenario might constitute an attempt to circumvent foreign proof gathering limits in France. (See id.) Indeed, if this scenario alone was sufficient to show impermissible circumvention, § 1782 would be irrelevant to much international litigation. See In re Metallgesellschaft AG., 121 F.3d 77, 80 (2d Cir. 1997) (“[T]hrough § 1782 Congress has seen fit to authorize discovery which, in some cases, would not be available in foreign jurisdictions, as a means of improving assistance by our courts to participants in international litigation and encouraging foreign countries by example to provide similar means of assistance to our courts.”)

Nonetheless Leucadia brings to this Court's attention several facts which were not disclosed to the Part I judge and which suggest that AGI may have tried to circumvent some of the safeguards instituted in the United States to prevent discovery from becoming a vehicle for unwarranted expense and harassment. Indeed, AGI's description of the relevant arbitration proceedings and litigation in AGI's § 1782 Discovery Request was very misleading. AGI's § 1782 Application claimed that, in one year, Leucadia and Columbus had “commenc[ed] not less than five court proceedings against the Loret Group, as well as two international arbitrations.” (§ 1782 Discovery Request ¶ 8.) A declaration supporting the application went

further, stating that the “centerpiece of [Leucadia’s] illicit plan” to harass AGI was the commencement of these seven proceedings. (Lesueur Decl. ¶ 21; see also Gauvain Decl. ¶ 18.) AGI thus represented to the Part I judge that discovery was necessary to determine why Leucadia had filed so many proceedings against AGI. (See § 1782 Discovery Request ¶ 8.) By this Court’s count, however, Leucadia and AGI are involved in, at the most, five proceedings: the two international arbitrations—only one of which Leucadia initiated—and the three procedurally complex, intertwined actions brought by Leucadia to recover the shareholder loans made to finance Global Caribbean Fiber during the Columbus acquisition negotiations. (See Leucadia Mem. at 2-5.)

In addition, AGI failed to inform the Part I judge about the finding made by the arbitrator in the Columbus Arbitration Proceeding that AGI had entered into and breached its agreement to sell Global Caribbean Fiber to Columbus. (See Vermal Decl. ¶ 11.) Similarly, AGI failed to disclose that the Joint Venture Arbitration Court had also found AGI to have breached some of its obligations under the joint venture agreement. (Id. ¶¶ 13-14.) Nor did AGI make clear to the Part I judge that Leucadia initiated the second Joint Venture Arbitration Proceeding in France separately from the Columbus Arbitration Proceeding because of the joint venture agreement’s arbitration clause requiring the proceeding to be brought in that venue. (Wheeler Decl. ¶ 12.)

AGI acknowledges that its characterization of Leucadia’s actions in court was inaccurate. (See Opp’n Mem. at 4, n.2; Second Gauvain Decl. ¶¶ 4-5.) AGI explains that “there was an inadvertent discrepancy in its papers due, in part, to the fact that declarants are not native English speakers.” (Opp’n Mem. at 4, n.2.) This excuse is dubious at best. Even if language translation issues were sufficient to explain the errors made in the declarations, they do little to justify the mischaracterization made by the U.S.-based attorney who prepared and submitted

AGI's § 1782 Discovery Request. (See AGI § 1782 Discovery Request ¶ 8.) AGI's miscounting of the number of cases filed to date is especially glaring because the number of actions that Columbus and Leucadia have initiated is the avowed "centerpiece" to AGI's claim of abusive litigation in the underlying Pointe-à-Pitre proceeding. (See Lesueur Decl. ¶ 21.) AGI also explained that it omitted reference to the liability finding in the Columbus Arbitration Proceeding because of the still-pending collateral challenges it has brought to vacate that arbitrator's "highly dubious [p]artial [a]ward." (Opp'n Mem. at 15; see also supra n.4.) Regardless of AGI's view of this decision, however, the holding exists and it would have been highly relevant to the Part I judge's consideration of the breadth of AGI's § 1782 Discovery Request.

Because AGI did not disclose much of this critical information in its ex parte § 1782 Application, the Part I judge was not able to consider whether, as Leucadia claims, the actions it initiated against AGI were necessary to protect Leucadia's legal rights in the Columbus Arbitration Proceeding or to compel reimbursement of loans made by Leucadia's shareholders to finance Global Caribbean Fiber during the acquisition negotiations. (See Leucadia Mem. at 2.) This Court now has the benefit of a more complete record, and having considered this record, concludes that AGI may have acted in bad faith when it filed its § 1782 Discovery Request. For this reason, the third Intel factor weighs in favor of quashing all or part of AGI's subpoena to take discovery from Leucadia.

#### 4. Several of AGI's Requests are Unduly Intrusive or Burdensome

Finally, Leucadia argues that AGI's subpoena as a whole is so overly broad that it constitutes an impermissible "fishing expedition" and should be quashed in its entirety. (Leucadia Mem. at 12-22.) Alternatively, Leucadia argues that Requests 1, 2, and 3 seek

information irrelevant to the claims presented in the underlying Pointe-à-Pitre Proceeding and are unduly burdensome, but that Requests 4 and 5 should proceed with limited modification.

(Id.)

Requests 1 through 4 seek production of information relating to AGI's claim that Leucadia and Columbus commenced the various litigation and arbitration proceedings against AGI with the intention of "intimidat[ing] AGI into selling its interest in G[lobal Caribbean Fiber] to Columbus or to eliminate AGI from the market." (Opp'n Mem. at 4; see also Gauvain Decl. ¶¶ 23-25; Lesueur ¶¶ 5-7.) Request 4, which seeks "[a]ll documents concerning the commencement or contemplated commencement of legal and arbitration proceedings by Columbus or Leucadia against any member of the Loret Group[.]" addresses AGI's abusive litigation claim. (Subpoena at 5; see also Leucadia Mem. at 14-15.) Leucadia, itself, agrees that "[p]roduction and testimony pursuant to this Request will clearly lead to the discovery of any and all information that could potentially be relevant" to AGI's abusive litigation claim.

(Leucadia Mem. at 14.)

In comparing Requests 1, 2, and 3, they appear to cover Request 4 but are overly broad and seek information that is irrelevant to AGI's abusive litigation or unfair competition claims. Request 1, for example, attempts to discover "[a]ll communications between Columbus and Leucadia relating to G[lobal Caribbean Fiber] or the G[lobal Caribbean Fiber] submarine fiber optic cable, from January 1, 2008 to the present . . . ." (Subpoena at 5.) Considering that Leucadia had a 40% interest in Global Caribbean Fiber, this Request would compel production of thousands of documents related to Leucadia's internal communications about its subsidiary, but which would have little connection to Leucadia's intent to commence legal proceedings against AGI or to otherwise engage in unfair competition. (See Reply Mem. of Law in Further

Support of Mot. to Quash (“Reply Mem.”) at 7, Sept. 6, 2012, ECF No. 24.) Furthermore, Request 1 seeks production of documents dating to January 1, 2008, a date which precedes the filing of any litigation by more than one year. (Wheeler Decl. ¶ 15.) In fact, during the year leading up to the commencement of legal proceedings, AGI, Leucadia, and Columbus reportedly “exchanged many thousands of emails—many with numerous attachments—as part of intensive business negotiations regarding the sale of G[lobal Caribbean Fiber.” (Id.; see also Leucadia Mem. at 18.) Because, as Leucadia argues, “[n]o one other than AGI could have foreseen AGI’s breach before it occurred[,]” the parties’ communications between 2008 and 2009 are not relevant. (Reply Mem. at 8.)

Request 2 appears even more sweeping. It seeks “[a]ll documents concerning Leucadia’s or Columbus’s intentions regarding the Loret Group, after the Regional Council of Guadeloupe did not approve the sale of G[lobal Caribbean Fiber] to Columbus.” (Subpoena at 5.) In light of the arbitrator’s decision in the Columbus Arbitration Proceeding that AGI had breached the agreement to sell Global Caribbean Fiber to Columbus, it is unclear as to whether the Regional Council actually rejected the sale agreement. (Wheeler Decl. ¶¶ 8-9; Vermal Decl. ¶¶ 5-6; cf. Gauvain Decl. ¶ 15.) It could be, as Leucadia contends, that the Regional Council “was inclined to approve” the sale of Global Caribbean Fiber to Columbus, but that no approval was requested by AGI. (Wheeler Decl. ¶¶ 8-9; see also Leucadia Mem. at 16.) It is thus impossible to determine the specific point in time to which Request 2 relates. Furthermore, Request 2’s demand for any document concerning “Leucadia’s or Columbus’s intentions regarding the Loret Group” would impose an undue burden on Leucadia because it would encompass producing the “myriad exchanges” between Leucadia and Columbus during the companies’ intensive and lengthy negotiations over the proposed sale of Global Caribbean Fiber. (Wheeler Decl. ¶¶ 15-



17.)

In addition, Request 3, which seeks “[a]ll documents concerning Leucadia’s demand that the Loret Group repay Leucadia’s current account in G[lobal Caribbean Fiber,” goes far beyond the discovery of any intent Leucadia may have had in commencing litigation against AGI. (Subpoena at 5.) Moreover, to the extent that Request 3 may contain some relevant documents, these documents would be produced in response to Request 4, and thus they are duplicative of Request 4. See Trilegiant Corp. v. Sitel Corp., 272 F.R.D. 360, 366 (S.D.N.Y. 2010) (denying several discovery requests as duplicative and unduly burdensome because relevant information would be produced in response to other requests).

Finally, Request 5 relates to AGI’s claim that Leucadia violated French unfair competition laws by informing AGI’s financial investors about the proceedings pending against AGI before any decisions in those proceedings had been rendered. (See Gauvain Decl. ¶ 25; see also Opp’n Mem. at 5.) The Request specifically seeks the production of all documents, not subject to the attorney-client privilege, relating to “[i]nformation given by Leucadia to any third-parties, including but not limited to the Guadeloupe region banks and the Loret Group’s creditors and/or clients, regarding legal or arbitration proceedings commenced against any member of the Loret Group, in particular but not limited to any internal memos or emails on the subject.” (Subpoena at 5.) Leucadia does not raise any specific challenge or objection to the breadth or scope of this request, (see Leucadia Mem. at 13-14), but at oral argument asked this Court to limit the Request to the entities specified: the Guadeloupe region banks and the Loret Group’s creditors and/or clients.

In light of the foregoing analysis, this Court concludes that AGI’s subpoena as a whole would compel Leucadia to undertake an unduly burdensome, time-consuming, and expensive

search of its files for many documents that are irrelevant to the Pointe-à-Pitre proceeding. (See Wheeler Decl. ¶ 17.) Accordingly, the fourth Intel factor weighs in favor of quashing AGI's Discovery Requests. See In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988) ("If the [district court] . . . suspects that the request is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request), abrogated on other grounds by Intel Corp., 542 U.S. at 249.

### III. CONCLUSION

Although this Court may be concerned that AGI filed its § 1782 claim in bad faith and that AGI's § 1782 Discovery Request as a whole is too broad, this Court recognizes that "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." Euromepa, 51 F.3d at 1101. Accordingly, pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure and in consideration of the discretion afforded under § 1782, this Court orders that Leucadia's Motion to Quash be GRANTED in part and DENIED in part as follows:

1. The Motion to Quash Requests 1, 2, and 3 is GRANTED.
2. The Motion to Quash Request 4 is DENIED subject to the following modification. The Request shall read: "All documents concerning Leucadia's or Columbus's intentions or motives with regard to the commencement or contemplated commencement of legal and arbitration proceedings by Columbus or Leucadia against any member of the Loret Group." (modification underlined).
3. The Motion to Quash Request 5 is DENIED subject to the following modification. The Request shall read: "All documents concerning information given by Leucadia to the Guadeloupe region banks and the Loret Group's creditors and/or clients, regarding legal or arbitration proceedings commenced against any member of the Loret Group, in particular but not limited to any internal memos or emails on the subject[.]" (modification underlined).

It is further ORDERED:

4. Leucadia's request for reciprocal discovery is DENIED. Leucadia has failed to identify any documents or witnesses that are within this Court's jurisdiction and for which it might seek discovery.
5. Leucadia's application for attorney fees and for sanctions to be imposed on AGI is DENIED. Leucadia has not shown that AGI acted in a manner that was substantively prejudicial to Leucadia when it filed its § 1782 application ex parte.

IT IS SO ORDERED.

Dated: New York, New York  
October 10, 2012

A handwritten signature in black ink, appearing to read "Robert P. Patterson, Jr.", written over a horizontal line.

Robert P. Patterson, Jr.  
U.S.D.J.

**Copies of this Opinion & Order were sent via fax to:**

*Counsel for Leucadia National Corporation:*

Ana Vermal  
Proskauer Rose LLP  
11 Times Square  
New York, NY 10036  
Ph: (212) 969-3000  
Fax: (212) 969-2900

*Counsel for Auto-Guadeloupe Investissement S.A.:*

V. David Rivkin  
Fox Horan & Camerini LLP  
825 Third Avenue, 12th Floor  
New York, NY 10022  
Ph: (212) 480-4800  
Fax: (212) 269-2383