UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-mc-80651- MARRA/MATTHEWMAN

IN THE MATTER OF THE APPLICATION OF
KATE O' KEEFFE,

TO ISSUE A SUBPOENA FOR THE
TAKING OF A DEPOSITION AND THE
PRODUCTION OF DOCUMENTS FOR
USE IN A FOREIGN PROCEEDING
_____/

**ORDER GRANTING MOVANT, SHELDON G. ADELSON'S MOTION TO QUASH SUBPOENA TO NIKITA ZUKOV [DE 10]**

THIS CAUSE is before the Court upon Movant, Sheldon G. Adelson's ("Adelson") Motion to Quash Subpoena to Nikita Zukov ("Motion") [DE 10]. This matter was referred to the undersigned by United States District Judge Kenneth A. Marra. *See* DE 5. Kate O'Keeffe ("O'Keeffe") has filed a Response [DE 12], and Adelson has filed a Reply [DE 13]. The Court held a hearing on the Motion on July 28, 2015.

***Background***

On May 22, 2015, O'Keeffe filed an Ex Parte Application for an Order Under 28 U.S.C. §1782 to Issue a Subpoena to Nikita Zukov for the Taking of a Deposition and the Production of Documents for Use in a Foreign Proceeding [DE 1]. O'Keeffe is a Hong Kong-based reporter who is employed by Dow Jones & Company, Inc. *Id.* She is seeking evidence to help her defend against a libel claim filed by Sheldon G. Adelson ("Adelson") currently pending against her in Hong Kong. *Id.* O'Keeffe, along with another individual, wrote an article that was published in the December 7, 2012 edition of the *Wall Street Journal*. *Id.* The article stated that Adelson was a "scrappy, foul-mouthed billionaire from working class Dorchester, Mass." *Id.* The libel claim

filed by Adelson hinges on the adjective "foul-mouthed." *Id.* O'Keeffe is seeking evidence that the term "foul-mouthed" is "true in substance and fact" in that Adelson has used foul, obscene, profane, scurrilous, abusive, blasphemous, coarse, offensive, rude, lewd, or bad language in the past. *Id.*

According to O'Keeffe's motion [DE 1], Nikita Zukov ("Zukov") is an architect living in Palm Beach, Florida who frequently interacted with Adelson while providing architectural services for a project for Adelson's company, Las Vegas Sands, Inc., in approximately 1989. O'Keeffe explains, "[u]pon information and belief, during that time, Zukov personally witnessed Adelson use foul or otherwise offensive language." *Id.* Zukov was terminated from the project after approximately nine months and later prevailed in a breach of contract action against Las Vegas Sands, Inc. *Id.*

On June 12, 2015, the Court granted O'Keeffe's motion [DE 1] and gave O'Keeffe leave to issue a subpoena for documents and testimony to Zukov. *See* DE 9. The Court also provided Zukov with twenty days to file any objections. *Id.* Zukov never filed any objections; however, Adelson timely filed a Motion to Quash Subpoena within the twenty-day period.[1] [DE 10].

***Motion, Response, Reply, Stipulation, and Hearing***

In Adelson's Motion, he argues that O'Keeffe is embarking upon a facially irrelevant fishing expedition concerning an event from 26 years ago. [DE 10, p. 1]. He also emphasizes that there is no mention of Zukov in O'Keeffe's answer and defenses in Hong Kong. *Id.* at p. 3. He argues that the Zukov subpoena is harassing and improper. *Id.* at. p. 6. Adelson also argues

[1] The issue of Adelson's standing to file a motion to quash has not been raised by O'Keeffe. Therefore, the Court need not consider the issue.

that the subpoena improperly circumvents Hong Kong law, is contrary to the Hague Convention, and is the product of unexplained delay. *Id.* at p. 2.

In response, O'Keeffe asserts that two other federal courts—in Nevada and in New Jersey—have already rejected Adelson's arguments (1) that O'Keeffe has not demonstrated that the Hong Kong court will accept the evidence she seeks and (2) that O'Keeffe is circumventing Hong Kong procedures. [DE 12 at pp.7-8]. She contends that the evidence sought is extremely relevant no matter how old it is. *Id.* at pp. 13-15. Finally, O'Keeffe claims that the subpoena is very timely. *Id.* at p. 16.

In his reply, Adelson argues that O'Keeffe has failed to meet her burden of establishing that the discovery is relevant. [DE 13, pp. 1; 3]. He also asserts that that the New Jersey federal case pertained to a witness with whom Adelson had dealings for many years, continuing beyond the date of the article at issue. [DE 13, p. 4]. He emphasizes that the facts in this case are very different from those in the New Jersey case. *Id.*

On July 27, 2015, the parties filed their Stipulated Facts [DE 14]. They agree to several of the facts listed above, including that Adelson, a prominent businessman, filed suit in Hong Kong against O'Keeffe, a journalist for The Wall Street Journal, asserting that the allegation and description of Adelson by O'Keeffe as "foul-mouthed" in a published newspaper article was defamatory. They also agree that in "approximately 1989, for a period of months", Zukov provided architectural services for Las Vegas Sands, Inc., a company for which Adelson served as a chief executive; that Zukov was terminated by Las Vegas Sands, Inc. "later in 1989"; that Zukov filed suit against Las Vegas Sands, Inc. in 1990 for breach of contract; that Zukov obtained a favorable jury verdict; and that, thereafter, Zukov and Las Vegas Sands, Inc. reached a

confidential settlement. *Id.* They also stipulate that "Mr. Zukov is not a party to the Hong Kong lawsuit." *Id.*

***Legal Standards and Analysis***

The statute that permits this type of discovery, 28 U.S.C. § 1782(a), states in part that "[t]he 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." The statute further explains that the order may be made "upon the application of any interested person and may direct that the testimony be given, or document or other thing be produced, before a person appointed by the court." 28 U.S.C. § 1782(a). If the court does appoint such a person, the individual has the "power to administer any necessary oath and take the testimony or statement." *Id.* Additionally, the court's order "may prescribe the practice and procedure . . . for taking the testimony or statement or producing the document or other thing. 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." *Id.* The statute does not, however, preclude the assertion of any privileges by the individual directed to give testimony or produce a document or other thing. *Id.*

In deciding on a Section 1782 application, the Court must first determine whether the four statutory requirements are met. If these prima facie requirements are satisfied, the Court may then consider certain other factors to determine whether it should exercise its discretion to grant the Section 1782 application. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 244-45 (2004); *In re Kivisto,* 521 Fed. Appx. 886, 888 (11th Cir. 2013); *Kang v. Noro-Moseley Partners,* 246 Fed. Appx. 662, 664 (11th Cir 2007). Accordingly, the Court will first analyze whether O'Keeffe has met the statutory requirements of Section 1782. Second, the Court will analyze the

discretionary *Intel* factors. Third, the Court will address the relevancy, fishing expedition, and harassment issues raised by Adelson, as well as whether the request is cumulative.

**a) Whether the Statutory Requirements of § 1782 Are Met in this Case**

A district court can grant an application under Section 1782 if four requirements are fulfilled: "(1) the request must be made 'by a foreign or international tribunal,' or by 'any interested person'; (2) the request must seek evidence, whether it be the 'testimony or statement' of a person or the production of 'a document or other thing'; (3) the evidence must be 'for use in a proceeding in a foreign or international tribunal'; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance." *In re Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 747 F. 3d 1262, 1269 (11th Cir. 2014) (citing *In re Clerici*, 481 F. 3d 1324,1331-32 (11th Cir. 2007)); *Kang*, 246 Fed. Appx. at 664. Adelson states in his Motion that the statutory prerequisites are not at issue here. [DE 10, p. 5]. The Court previously considered the four requirements under Section 1782 when it considered the *ex parte* Application and granted the Application. [DE 9]. The Court finds that the statutory prerequisites under Section 1782 are clearly met as O'Keeffe, an interested party in a foreign proceeding, is seeking testimony from a person for use in the Hong Kong proceeding. Additionally, it is undisputed that Zukov resides in the Southern District of Florida.

**b) Whether the *Intel* Factors Are Met in this Case**

Since the prima facie statutory requirements have been satisfied in this case, the following *Intel* factors may be considered by the Court in deciding whether to exercise the discretion granted under Section 1782(a):

> (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," because "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant"; (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 judicial 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 otherwise "unduly intrusive or burdensome."

*In re Clerici*, 481 F.3d at 1334 (quoting *Intel Corp.*, 542 U.S. at 264-65).

(i) The First Intel Factor:

Adelson does not dispute that the first *Intel* factor has been satisfied. The Court notes that Zukov is not a participant in the Hong Kong proceeding. Accordingly, the first factor weighs in favor of granting O'Keefe's Application.

(ii) The Second Intel Factor:

With regard to the second *Intel* factor, Adelson asserts that O'Keeffe has the burden of producing "evidence that the requested testimony and evidence would be admissible in the Hong Kong Court." [DE 10 at p. 8]. O'Keeffe argues that the second factor actually concerns "'the nature of the foreign tribunal, the character or the proceedings underway abroad, and the receptivity of the foreign government or the court or agency to U.S. federal-court judicial assistance'—not[2] the tribunal's receptivity to the specific evidence sought" and quotes *Intel*, 542 U.S. at 264-65. [DE 12, p. 7]. O'Keeffe explains that the Nevada and New Jersey courts[3] both found that this second factor weighed in favor of O'Keeffe, not Adelson. She also cites two Southern District of Florida cases in which the courts determined that the argument that an

[2] Emphasis added by O'Keeffe in her Response [DE 12, p. 7].
[3] *In re O'Keeffe*, No. 2:14-cv-01518-RFB-CWH, 2015 WL 1308546 (D. Nev. Mar. 24, 2015); *In re O'Keeffe*, No. 2:14-cv-05835, 2015 WL 540238 (D.N.J. Feb. 10, 2015). *See also* DE 16, which attaches District Judge Martini's Opinion and Order affirming Magistrate Judge Falk's Decision in the New Jersey case and denying Adelson's appeal of the Magistrate Judge's Decision.

interested party must meet a foreign discovery requirement prior to being entitled to assistance under Section 1782 had already been rejected by the Supreme Court. *See Ex rel Application of Winning (HK) Shipping Co. Lt.*, No. 09-22659-MC, 2010 WL 1796579 at *10, n. 7 (S.D. Fla. Apr. 30, 2010); *In re Application of Mesa Power Grp., LLC*, 878 F. Supp. 2d 1296, 1304 (S.D. Fla. 2012). Moreover, O'Keeffe argues in her response to Adelson's Motion that the fact that Hong Kong is a signatory to the Hague Evidence Convention shows that it is receptive to foreign evidence, and she also cites several cases in which Section 1782 has been applied to authorize discovery for matters pending in the Hong Kong courts. [DE 12 at p. 9].

Adelson's interpretation of the second *Intel* factor is not correct as is clear from the case law. In the *Mesa Power Group* case, the court compressed the second and third factors and explained that "the party requesting judicial assistance does not have to prove receptivity to show that they are not attempting to circumvent foreign proof-gathering mechanisms. If anything, this factor weighs against judicial assistance when the opposing party shows that the foreign tribunal actively opposes the discovery." 878 F. Supp. 2d at 1304. The court further stated, "[a]bsent a persuasive showing that a section 1782 applicant like Mesa Power is actively seeking to circumvent the foreign tribunal's discovery methods and restrictions, which showing has clearly not been made here, this factor does not counsel against section 1782 relief." *Id.* at 1305.

Other courts have similarly interpreted the second *Intel* factor. *See, e.g., In re Pimenta*, 942 F. Supp. 2d 1282, 1288 (S.D. Fla. 2013) (finding that there was nothing in the record to suggest that the Brazilian court would be unreceptive to the application); *In re Chevron Corp. (Banco Pichincha)*, No. 11-24599, 2012 WL 3636925, at *11 (S.D. Fla. June 12, 2012) (finding that nothing in the record suggested that the foreign forum at issue would be unreceptive to the Section 1782 discovery and that the second *Intel* factor weighed in favor of granting the

application); *Weber v. Finker*, No. 3: 07-mc-27-J-32MCR, 2007 WL 4285362, at *5 (M.D. Fla. Nov. 30, 2007) ("In the instant case, there is no such 'authoritative proof' that the Swiss Magistrate would be unreceptive to any relevant evidence uncovered through the discovery here. Accordingly, the Court finds there is no reason for the second factor to weight against permitting the discovery."). Thus, the second *Intel* factor weighs in favor of granting O'Keefe's Application as there is no evidence before the Court that Hong Kong would be unreceptive to the testimony sought by O'Keeffe.

(iii) The Third Intel Factor:

With regard to the third *Intel* factor, Adelson contends that O'Keeffe has attempted to circumvent foreign proof-gathering restrictions or other policies of Hong Kong because she "never sought the assistance of the Hong Kong Court in seeking discovery from Zukov." [DE 10 at pp. 8-9]. He points out that Hong Kong is a signatory to the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters. *Id.* at p. 9. Adelson argues that O'Keeffe "should, at the very least, explain her avoidance of the Hong Kong Court in the first instance." *Id.* O'Keeffe responds that she chose to pursue this discovery by means of Section 1782 rather than by letters rogatory because letters rogatory require applications to both the Hong Kong and the U.S. courts, whereas Section 1782 is more efficient and cost effective. [DE 12 at p. 10]. She explains that the case law states, and Adelson agrees, that a litigant is not required to exhaust efforts in the foreign court in order to obtain Section 1782 discovery. *Id.* at 11. O'Keeffe distinguishes the circumvention cases cited by Adelson on the bases that she has not tried and failed to obtain the same evidence in Hong Kong in the past, Zukov lives in the United States, and the Hong Kong tribunal has not written a letter strongly opposing the discovery request. *Id.* at. 11-12.

The Court finds that the third *Intel* factor weighs in favor of granting O'Keefe's Application because there is no evidence that O'Keeffe has tried to circumvent foreign proof-gathering restrictions or other policies of Hong Kong. She was not required to exhaust all possible discovery processes in Hong Kong before filing her Section 1782 Application. *See Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098 (2nd Cir. 1995) (explaining that there is not a "quasi-exhaustion requirement" that forces litigants to seek "information through the foreign or international tribunal" before filing a Section 1782 application). O'Keeffe, a United States citizen, is relying upon a discovery procedure that is available to her under United States law and should not be penalized for that, just as Adelson has not been penalized for opting to bring his libel case in Hong Kong rather than in the United States. *See Weber*, 2007 WL 4285362, at *7 (rejecting concept that invoking Section 1782 creates an "inference" of circumvention).

(iv) The Fourth Intel Factor:

Finally, the fourth *Intel* factor involves determining whether O'Keeffe's discovery request is "unduly intrusive or burdensome." The Court finds that, as Zukov himself has not objected to the subpoena, the subpoena is not unduly intrusive or burdensome. Additionally, the discovery request is limited to a short period of time in 1989 and therefore is not burdensome as to Zukov. Further, Adelson has not raised any substantive argument about this factor. Therefore, the fourth *Intel* factor weighs in favor of granting O'Keefe's Application.

In sum, the Court finds that the discretionary *Intel* factors weigh in favor of granting the Section 1782 Application. Zukov is not a party to the Hong Kong proceeding, and the Court agrees with the New Jersey and Nevada federal courts that have considered other Section 1782 applications and motions to quash related to the same Hong Kong libel case and have found that the second and third *Intel* factors have been met. *See In re O'Keeffe*, No.

2:14-cv-01518-RFB-CWH, 2015 WL 1308546 (D. Nev. Mar. 24, 2015); *In re O'Keeffe*, No. 2:14-cv-05835, 2015 WL 540238 (D.N.J. Feb. 10, 2015). Finally, the Court finds that the fourth *Intel* factor has been met as, if the Application was unduly intrusive or burdensome, Zukov himself would have objected.

However, despite the above findings, the Court's analysis is not yet complete. This is because the Court must also determine whether the subpoena complies with the requirements of the Federal Rules of Civil Procedure. *See In re Appl. of Inversiones y Gasolinera Petroleos Valenzuela, S. DE R.L.*, No. 08-20378-MC, 2011 WL 181311, at *13 (S.D. Fla. Jan. 19, 2011).

**c) Whether the Evidence Sought Is Relevant and Appropriate or Is Part of an Improper Fishing Expedition, a Vehicle for Harassment, or Cumulative[4]**

In addition to the *Intel* factors listed above, the Eleventh Circuit instructs that courts should also consider whether the application is "made in bad faith", "for the purpose of harassment", or is part of a "fishing expedition." *In re Kivisto,* 521 Fed. Appx. at 888. Specifically, the Eleventh Circuit has instructed:

> We expect "the district [court] [to] carefully examine and give thoughtful deliberation to any request for assistance submitted by an 'interested person'" and "deny the request" when it "suspects that the request is a 'fishing expedition' or a vehicle for harassment."

*Id.* at 889 (quoting *Ministry of Legal Affairs of Trinidad and Tobago,* 848 F.2d 1151, 1156 (11th Cir. 1988)). The Eleventh Circuit has stated that, in considering a Section 1782 application, "[a] district court can deny discovery where the information sought is irrelevant to the causes of action." *Kang,* 46 Fed. Appx. at 664; *In re Appl. of Braga*, 789 F.Supp.2d 1294, 1304 (S.D. Fla.

[4] The Court finds no merit in Adelson's argument that O'Keeffe's Application has been unnecessarily delayed. Adelson recently filed an Amended Statement of Claim in the Hong Kong case on June 1, 2015, and so it is only fair for O'Keeffe to be provided sufficient time to complete discovery as it pertains to the Amended Statement of Claim.

2011). "[I]f the district court determines that a party's discovery application under section 1782 is made in bad faith, for the purpose of harassment, or unreasonably seeks cumulative or irrelevant materials, the court is free to deny the application in toto, just as it can if discovery was sought in bad faith in domestic litigation." *United Kingdom v. United States,* 238 F.3d 1312, 1319 (11th Cir. 2001) (citing *Euromepa S.A.,* 51 F.3d at 1101 n.6). Both the Supreme Court and the Eleventh Circuit have explicitly recognized that "[a] district court has the authority to grant an application for discovery if the applicant satisfies statutory requirements, 28 U.S.C. § 1782(a), but the 'court is not required to grant…[the] application merely because it has the authority to do so.'" *Intel,* 542 U.S. at 264; *In re Kivisto*, 521 Fed. Appx. at 888.

In this case, the 1782 Application was granted on an *ex parte* basis because the statutory and *Intel* factors were met by O'Keeffe. However, in the Order granting O'Keeffe's Application, the Court specifically allowed for a 20-day objection period. This was intended to allow either Zukov or Adelson to raise any relevancy or other issues by way of a motion to quash. Adelson did, in fact, file a motion to quash. The Court has now been fully informed as to the relevancy, fishing expedition, and other issues by virtue of the fact that both O'Keeffe and Adelson have filed written papers and engaged in oral argument in an adversarial hearing, as distinct from the *ex parte* procedure initially (and properly) utilized in this case. Adelson has timely come forward with some strong arguments that an alleged 26-year-old incident is irrelevant, a vehicle for harassment, and is part of an improper fishing expedition. The Court is also concerned about the cumulative nature of O'Keeffe's requests in light of O'Keeffe's arguments made in the Section 1782 applications filed by O'Keeffe in the New Jersey and Nevada federal courts.

(i) Relevancy:

As instructed by the Eleventh Circuit, the Court has carefully examined and given thoughtful deliberation to O'Keeffe's Application. The Court has also carefully analyzed Adelson's motion to quash subpoena and O'Keeffe's response in opposition. A major (and primary) bone of contention in this case is relevancy, in light of the fact that O'Keeffe seeks to inquire into a contract dispute between Zukov and Las Vegas Sands, Inc., that occurred more than 26 years ago. In the Eleventh Circuit, relevancy under Section 1782 is determined pursuant to the federal discovery rules. *See In re Clerici,* 481 F. 3d at 1336; *Weber,* 554 F.3d at 1384-85.

Federal Rule of Civil Procedure 26(b)—which governs the scope of discovery even in a Section 1782 case[5]—provides, in pertinent part, that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense . . . Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Courts are required, however, to limit the "frequency or extent of discovery" where the discovery sought is "unreasonably cumulative or duplicative" or where "the burden or expense of the proposed discovery outweighs its likely benefit considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(i) and (iii).

A primary concern of the Court in this case is whether the evidence sought is relevant. O'Keeffe acknowledges in her response to the motion, as she did at the hearing, that, while relevance is not part of the fourth *Intel* factor, it is an additional potential ground for denial of her

[5] The parties agreed at the hearing that the Court may determine the relevancy of the discovery sought, although it may not delve into whether the court in Hong Kong would find the discovery to be admissible as evidence.

application. *See* DE 12 at p. 13. ("Indeed, the discovery is entirely relevant to the Hong Kong lawsuit, as it must be under §1782."). In the Eleventh Circuit, after the Section 1782 factors have been met, the Court considers "the federal discovery rules, Fed. R. Civ. P. 26-36, [which] contain the relevant practices and procedures for the taking of testimony and the production of documents." *Weber*, 554 F. 3d at 1385 (quoting *In re Clerici*, 481 F.3d at 1336); *see also In re Appl. of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 747 F.3d at 1272.

The New Jersey and Nevada federal courts did not address extensively the issue of relevance in their orders. In the Nevada case, relevancy was not a disputed issue. The Nevada court explicitly stated in its Order, "this Court finds, and movants do not dispute, the relevance of the requested discovery to the libel claim in the Hong Kong litigation." *In re O'Keeffe*, 2015 WL 1308546 at *5.

In the New Jersey case, while the court did implicitly find the discovery sought to be relevant[6], the underlying facts were very different from the case at hand. In the New Jersey case, O'Keeffe subpoenaed an individual who is a partner in PricewaterhouseCoopers' Florham Park, New Jersey office. *In re O'Keeffe*, 2015 WL 540238 at *1. This individual was the auditor for Adelson's United States-based company for twenty-five years, until April 2013. *Id.* Additionally, "[t]he *Wall Street Journal* had previously reported that 'personal tension' between Adelson and [PricewaterhouseCoopers] played a role in [PricewaterhouseCoopers'] decision to resign as [Adelson's company's] auditor, as did Adelson's 'challenging demeanor and demands on the auditors.'" *Id.* The Court notes that the lengthy relationship between Adelson and that individual is incredibly and materially different from the short-lived and temporally remote

[6] In the District Judge's Opinion and Order affirming the Magistrate Judge's Order and denying Adelson's appeal, the District Judge conducted no relevancy analysis whatsoever. *See* DE 16-1.

relationship between Adelson and Zukov alleged in the instant case. Additionally, O'Keeffe provided more information about her basis for believing that the individual in the New Jersey case would be able to testify about Adelson being "foul-mouthed" than she did regarding Zukov in this case.[7]

Furthermore, in the New Jersey and Nevada cases, all but one of the witnesses in those cases had much more extensive, ongoing relationships with Adelson, and the one witness who did not have a lengthy, ongoing relationship with Adelson was actually listed in O'Keeffe's defenses to the Statement of Claim in Hong Kong.[8] Therefore, relevancy was not a critical factor in those two cases, whereas it is a critical factor in the instant case. The fact that relevancy was not a critical factor in the Nevada and New Jersey cases is seemingly one reason why those two opinions do not extensively address the relevancy issue. A second possible reason that the New Jersey and Nevada courts did not address relevance in detail is that relevance is a particularly important issue in the consideration of Section 1782 applications in the Eleventh Circuit. This Court is required to follow Eleventh Circuit case law, which emphasizes the importance of relevance when considering a Section 1782 application. *See Kang*, 246 Fed. Appx. at 664; *In re Appl. of Braga*, 789 F.Supp.2d at 1304; *United Kingdom*, 238 F.3d at 1319. Eleventh Circuit case law also instructs that a court should deny the request when it suspects that the request is a fishing expedition. *Trinidad and Tabago*, 848 F.2d at 1156; *In re Kivisto,* 521 Fed. Appx. at 888.

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[7] In our case, O'Keeffe simply states that Zukov provided architectural services for Adelson's company in 1989, that Zukov frequently interacted with Adelson during that short period of time, that Zukov was terminated from the position after nine months, that Zukov sued Adelson's company for breach of contract and was awarded over $2 million, and that the case settled after Adelson's company appealed the judgement. [DE 1 at p. 7]. O'Keeffe also states, "[u]pon information and belief, during that time, Zukov personally witnessed Adelson use foul or otherwise offensive language." *Id.*

[8] In contrast, Zukov is not mentioned at all in the Hong Kong litigation.

Zukov interacted with Las Vegas Sands, Inc., a company for which Adelson served as a chief executive in 1989, approximately 26 years ago for a short, approximately nine-month, time period. Zukov was terminated from the project in 1989 and sued Las Vegas Sands, Inc., for breach of contract. From this encounter, O'Keeffe speculates that, upon information and belief, Zukov will have testimony as to Adelson's "foul-mouthedness." While O'Keeffe's counsel stated during the hearing on the matter that she believes Zukov has first-hand knowledge of Adelson being "foul-mouthed", the Court is still very troubled by the lack of support for O'Keeffe's fishing expedition and by how far-removed the evidence is and its stark temporal remoteness. Twenty-six years is a very long period of time and would almost certainly render any information possessed by Zukov as ancient, stale, and irrelevant.

O'Keeffe argues that libel cases are unique, especially in Hong Kong where O'Keeffe has the burden of showing that Adelson truly is "foul-mouthed." However, she has not provided any case law whatsoever establishing that evidence of the allegedly defamed party's character from over 26 years prior is relevant in a libel case. She has simply distinguished the cases cited by Adelson. Moreover, the Court has independently researched the issue in the Eleventh Circuit, as the parties agreed that Eleventh Circuit law concerning relevancy is to be applied in this case. The Court was unable to find any case law that supports O'Keeffe's contention that there should be no temporal limitations to this type of discovery in a libel case. O'Keeffe's argument is that as long as she has "information and belief" that Adelson may have been "foul-mouthed," she can conduct discovery into any possible encounter between Adelson and another person, no matter how ancient or temporally remote that encounter may be. However, it would lead to absurd results if there were no temporal limitations to discovery in a Section 1782 application. Without such reasonable temporal limitations, discovery could reach back 25, 30, or 40 or more years prior,

perhaps to ancient elementary school, high school, or college disputes. The Court has a duty to impose reasonable temporal relevancy limitations on Section 1782 discovery.

Although admissibility is not the deciding factor in a discovery relevancy analysis, it is certainly a factor that should at least be considered. The information sought by O'Keeffe would not be admissible under Federal Rule of Evidence 404(b).[9] The Eleventh Circuit has stated that temporal remoteness depreciates the probity of an extrinsic offense. *U.S. v. Holman*, 680 F.2d 1340, 1350 (11th Cir. 1982). In the instant case, the temporal remoteness of the purported encounter between Adelson and Zukov clearly depreciates the probity of the alleged "evidence."

The Court also finds that the 26-year-old purported "evidence" would not be admissible under Federal Rule of Evidence 401.[10] Its probative value is negligible. *See generally, Hill v. Rolleri*, 615 F.2d 886, 891 (9th Cir. 1980) ("The trial court is to determine, under all of the circumstances, whether testimony is too remote to have probative value."). The evidence O'Keeffe seeks is simply too remote to have any probative value. And further, even if it had some arguable probative value, such tenuous probative value would be substantially outweighed by the risk of unfair prejudice, confusing the issues, wasting time, or needlessly presenting cumulative evidence under Federal Rule of Evidence 403.[11]

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[9] Rule 404(b) states in relevant part that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Ev. 404(b)(1).

[10] "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Ev. 401.

[11] "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Ev. 403.

While Federal Rule of Evidence 405[12] does apply here, *see Schafer v. Time, Inc.*, 142 F.3d 1361, 1372 (11th Cir. 1998), and the Court does not dispute that Adelson's alleged "foul mouth" is a crucial issue in the case, the Court simply does not find that evidence of Adelson possibly cursing (based upon "information and belief") during a very short employer/employee relationship involving Zukov and Las Vegas Sands, Inc., from over 26 years ago can possibly be considered to be relevant. Even if libel cases allow for slightly broader discovery, as argued by O'Keeffe, there must be a point past which the discovery does not fall within the Federal Rules of Civil Procedure. For example, under O'Keeffe's theory, evidence that Adelson possibly used foul language when he was in elementary school would be relevant. However, this type of logic would lead to absurd results and an abuse of the discovery process.

It is very rare for federal courts to allow such ancient discovery in any context. O'Keeffe cites only one case—*Schafer*, 142 F.3d 1361—for her argument that there are no temporal limits to character evidence under Federal Rule of Evidence 405(b). But *Schafer* held only that it was not an abuse of discretion for the district court to allow the defendant "to explore selective incidents and acts in [the plaintiff's] background but excluding evidence of others." 142 F.3d at 1371. It is important to note that *Schafer* primarily considered past criminal conduct (not non-criminal foul language), and the age of the incidents cannot be ascertained from the opinion. The *Schafer* court emphasized that, even in defamation cases, "the rules of evidence prescribe particular methods for broaching the issue of character," *Id.* at 1370, and, even if evidence is potentially admissible under Rule 405(b), "a district court must still determine whether such acts pass muster under Federal Rule of Evidence 401 (relevance) and Federal Rule of Evidence 403 (prejudice)." *Id.* at 1372, n.

[12] Federal Rule of Evidence 405(b) states that "[w]hen a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct." Fed. R. Ev. 405(b).

13. O'Keeffe fails to submit any case law other than *Schafer* to support her position that there are no temporal limitations on character evidence in a defamation case. O'Keeffe's exclusive reliance upon *Schafer* is unavailing.

The Court is aware that, under Federal Rule of Civil Procedure 26(b)(1), relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Our discovery rules "expressly contemplate the use of inadmissible evidence in prosecuting or defending a case." *Glock v. Glock, Inc.*, --F.3d--, 2015 WL 4880090, at *3 (11th Cir. 2015). However, after a careful and thoughtful analysis, the Court finds that the information O'Keeffe seeks is not even reasonably calculated to lead to the discovery of admissible evidence. It is simply is not relevant.

(ii) Improper Fishing Expedition:

As discussed to some extent in the prior section, the Court is also concerned that O'Keeffe is engaging in an improper fishing expedition. After carefully examining this matter, the Court does find that O'Keeffe's Section 1782 Application is, in fact, an improper fishing expedition. She is seeking to throw a large net into a very large ocean, with no real proof that any fish are present, on the chance that she may uncover outdated and ancient information about Adelson that somehow may arguably support her defense in the Hong Kong action. She has offered "information and belief" to support her position that Zukov, who was only employed for nine months 26 years ago by a company for which Adelson was a chief executive, has relevant information. O'Keeffe's Section 1782(a) Application is simply an improper fishing expedition whose expense "outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C)(iii); *Shannon v. Albertelli Firm, P.C.*, --Fed. Appx.--, 2015 WL 2114055, at *4 (11th Cir. 2015). This type of conduct is not permitted under Rule 26.

(iii) A Vehicle for Harassment:

Adelson also argues that O'Keeffe's Section 1782 Application is harassing. [DE 10, p. 6]. Adelson points to the search terms contained in the subpoena to Zukov [DE 1-2, p. 8]. A review of those search terms reveals inflammatory, racist, and wholly irrelevant requests. O'Keeffe has provided no factual support for why the numerous search terms are necessary or appropriate. Many of the search terms are so embarrassing and prejudicial to Adelson that the court will not repeat them in this Order. It would appear to the Court that these search terms were designed, at least in part, to embarrass and harass Adelson. This is not the intended purpose of a Section 1782 application.

As instructed by the Eleventh Circuit in *In re Kivisto*, 521 Fed. Appx. at 888-889, and *Trinidad and Tabago*, 848 F.2d at 1156, this Court should deny a Section 1782 request when it suspects that the application is a vehicle for harassment. The Court does find that, in light of the overly-broad and inflammatory search terms contained within the subpoena, the lack of any factual support for the inclusion of all of those search terms, and the lack of relevancy as found in Section (c)(i) of this Order, O'Keeffe's Application does appear to be a vehicle for harassment.

(iv) Cumulative Request:

The Court also is concerned about the cumulative nature of O'Keeffe's request. O'Keeffe has made similar requests in Nevada and New Jersey federal courts, and the purported evidence she seeks in this case is clearly cumulative to what she sought in those two cases. In those cases, she sought to issue subpoenas to several different parties who she believes have relevant information demonstrating Adelson's "foul mouth." Moreover, in O'Keeffe's Amended Defence filed in the Hong Kong court [DE 1-5], she has already cited several particular examples of Plaintiff's interactions with others that she considers evidence of his "foul mouth." She also

states that she "had at least ten sources . . . who described to her incidents in which Plaintiff had used foul language in their presence and/or confirmed to her that the term 'foul-mouthed' was an adjective which truthfully described the Plaintiff." *Id.* Aside from being irrelevant, part of an impermissible fishing expedition, and harassing, O'Keeffe's request in the instant case is cumulative to what she seeks in the two prior federal cases and to evidence that she has already described in the Hong Kong action.

***Conclusion***

This Court must follow Eleventh Circuit case law which instructs lower courts to "carefully examine" and "give thoughtful deliberation" to a Section 1782 application by an interested person, and to deny the request when it "suspects that the request is a 'fishing expedition' or a vehicle for harassment." *In re Kivisto*, *supra* (quoting *Trinidad and Tobago*, *supra*). After engaging in this process, the Court finds O'Keeffe's Section 1782 Application and subpoena to be the classic improper fishing expedition. The Court further finds that the Application is a vehicle for harassment and seeks irrelevant and cumulative information.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Sheldon G. Adelson's Motion to Quash Subpoena to Nikita Zukov [DE 10] is **GRANTED**.

**DONE and ORDERED** in Chambers at West Palm Beach, Palm Beach County, Florida, this 27th day of August, 2015.

William Matthewman

WILLIAM MATTHEWMAN
United States Magistrate Judge