



NEW DECISION STRIKES BALANCE

BETWEEN PROVIDING PARTIES IN FOREIGN LITIGATIONS DISCOVERY AND RESPECTING THE FOREIGN FORUM'S DISCOVERY RESTRICTIONS

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Federal law allows U.S. courts to permit discovery in the United States for use in foreign litigation. To foster cooperation between U.S. courts and foreign courts, U.S. courts have been careful to try to strike a balance between helping foreign litigants while respecting foreign discovery laws. A recent decision by a New York federal court exemplifies this attempt at balance, with the court concluding that U.S. courts can compel U.S.-based entities to produce documents maintained abroad, but only if the laws of the country in which the documents are held do not prohibit their disclosure.

In a much-anticipated opinion, Judge George B. Daniels of the United States District Court for the Southern District of New York recently affirmed the decision of a magistrate judge regarding the scope of discovery in aid of a foreign litigation pursuant to 28 U.S.C. § 1782.¹ Briefly, Magistrate Judge Gabriel W. Gorenstein grappled with an issue that has divided federal courts: whether Section 1782 can be used to compel the production of documents maintained outside the United States.² Magistrate Judge Gorenstein held that documents maintained overseas did not bar the discovery sought so long as the documents are within the control of a discovery target located in the U.S.—in this case, a New York-based law firm with a branch office in Russia.

Notwithstanding this finding, however, Magistrate Judge Gorenstein denied the at-issue discovery application because of, among other things, issues regarding attorney-client privilege and confidentiality under Russian law. The Magistrate concluded that it was unclear how Russian law would apply to the documents, and that requiring disclosure could potentially force the target of the discovery application to violate Russian law. Moreover, the court worried that permitting discovery under these circumstances

might encourage Russian courts to force U.S. firms to violate U.S. disclosure laws under similar circumstances.³

In a decision dated September 5, 2019, District Judge Daniels affirmed Magistrate Judge Gorenstein's decision. Judge Daniels held, among other things, that Magistrate Judge Gorenstein properly dismissed the application based upon the lack of clarity in applicable Russian law.⁴ The applicants argued to Judge Daniels that Russian law is relatively clear, and that it was the burden of the respondent to demonstrate, through "authoritative proof," that the documents in question would be inadmissible in the foreign litigation.⁵ Judge Daniels responded that admissibility is irrelevant to the burden imposed by the potential conflict with Russian privilege and confidentiality laws.⁶ Judge Daniels concluded also that Magistrate Judge Gorenstein's decision had properly relied upon the "twin aims" of Section 1782: "providing efficient means of assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts."⁷

Judge Daniels did not expressly address Magistrate Judge Gorenstein's holding that Section 1782 could be used (in circumstances not including the privilege issues present at bar) to compel the production of documents held outside of the United States. Nonetheless, soon after Judge Daniels' decision, the Second Circuit, in another matter, specifically concluded, as did Magistrate Judge Gorenstein, that Section 1782 can be used to obtain documents located outside of the United States.⁸ Federal courts in California and Ohio then adopted this position as well.⁹ Thus, litigants in federal courts in New York may now be able to obtain documents held overseas by U.S.-based entities through Section 1782.



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¹ Eddy Salcedo & Owen Wolfe, *The Broad Scope of 28 U.S.C. Section 1782* (April 10, 2019), <https://www.carpdatumlaw.com/2019/04/the-broad-scope-of-28-u-s-c-section-1782/>.

² *In re Application of Hulley Enterprises, Ltd., et al.*, 358 F. Supp. 331, 343-45 (S.D.N.Y. 2019).

³ *Id.* at 352-54.

⁴ *In re Application of Hulley Enterprises, Ltd., et al.*, 400 F. Supp. 3d 62 (2019).

⁵ *Id.* at 73-76.

⁶ *Id.*

⁷ *Id.* at 74.

⁸ *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019); *In re Accent Delight Int'l*, 2019 US App. LEXIS 33785, 2019 WL 5960348 (2d Cir. Nov. 13, 2019).

⁹ *Illumina Cambridge Ltd. v. Complete Genomics, Inc.*, 2020 U.S. Dist. LEXIS 29201 (N.D. Cal. Feb. 19, 2020); *In the Matter of Application of De Leon*, 2020 U.S. Dist. LEXIS 42968 (S.D. Oh. Mar. 12, 2020).



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