

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

In re Application of REFINERÍA DE CARTAGENA
S.A.S. for an Order Directing Discovery from
MCDERMOTT INTERNATIONAL, LTD. Pursuant
to 28 U.S.C. § 1782

Index No. 23-cv-3607

**REFINERÍA DE CARTAGENA S.A.S.'S MEMORANDUM OF
LAW IN SUPPORT OF *EX PARTE* PETITION FOR DISCOVERY
IN AID OF FOREIGN PROCEEDINGS PURSUANT TO 28 U.S.C. § 1782**

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Refinería de Cartagena S.A.S. f/k/a Refinería de Cartagena S.A. (“**Reficar**”) submits this memorandum in support of its *ex parte* petition pursuant to 28 U.S.C. § 1782 for discovery in aid of foreign legal proceedings.

I. PRELIMINARY STATEMENT

Reficar seeks an order authorizing it to take discovery from McDermott International, Ltd. (“**McDermott**”), a global engineering and construction company maintaining its headquarters and principal place of business in this district, for use in restructuring proceedings recently commenced in the Netherlands and England (the “**Foreign Restructuring Proceedings**”) by two of McDermott’s principal subsidiaries. Reficar requests permission to serve a document subpoena requiring McDermott to produce financial and legal information concerning McDermott and the two subsidiaries in question – McDermott International Holdings B.V., f/k/a Comet II B.V., f/k/a Chicago Bridge & Iron Company N.V. (“**CB&I N.V.**”) and CB&I UK Limited (“**CB&I UK**,” and together with CB&I N.V., the “**CB&I Entities**”). Reficar also requests permission to serve a deposition subpoena requiring McDermott to designate an officer or director to testify concerning that financial and legal information. As explained below, Reficar seeks this information so that it can critically evaluate and challenge the restructuring plans and the valuation analyses submitted by the CB&I Entities in the Foreign Restructuring Proceedings.

Reficar holds an arbitral award (the “**Award**”) against the CB&I Entities in the amount of approximately US\$ 937.5 million, plus (i) interest on that amount at the rate of six-month LIBOR plus 2%, compounded daily, accruing from December 31, 2015, and (ii) legal and arbitration costs of approximately US\$ 58.7 million. The Award was signed on June 2, 2023 by a distinguished international arbitral tribunal under the Arbitration Rules of the International Chamber of Commerce (“**ICC**”), and the seat of the arbitration was New York. On June 8, 2023, the CB&I Entities filed a petition to vacate the Award in the United States District Court for the Southern

District of New York, and on August 4, 2023, Reficar filed a cross-petition to confirm the Award. Those proceedings are currently pending.

Notwithstanding those ongoing proceedings, on September 8, 2023, McDermott issued a press release stating that, pursuant to an agreement with its key financial stakeholders, it intended to cause CB&I N.V. and CB&I UK to commence “parallel in-court proceedings” in the Netherlands and England, respectively, for the express purpose of “discharg[ing] certain legacy legal liabilities,” including the “arbitration decision issued by the International Chamber of Commerce . . . in favor of Reficar[.]” The CB&I Entities commenced the Foreign Restructuring Proceedings on or about September 8, 2023.

On September 8, 2023, CB&I UK sent a so-called “Practice Statement Letter” to its creditors within the context of the restructuring proceedings it had commenced in the High Court of Justice of England and Wales. The Practice Statement Letter sets forth the key terms of the Restructuring Plan proposed by CB&I UK, and it explains that “[t]he Restructuring Plan is being proposed to the Plan Creditors in order to restructure the [McDermott] Group’s existing indebtedness.” It also states that CB&I N.V. will make a “parallel” proposal “[o]n or around 20 October 2023” within the context of the Dutch restructuring proceedings and that CB&I N.V.’s proposal will be “broadly consistent with the terms of [CB&I UK’s] Restructuring Plan.”

Under CB&I UK’s proposed Restructuring Plan, Reficar, which is the largest unsecured creditor of the CB&I Entities, will receive a maximum, contingent payment of US\$ 4 million over two years, which Reficar will share with a Colombian regulatory entity with a claim related to the same project. The CB&I Entities’ debt under the Award, with a total current value of well over US\$ 1 billion, will be otherwise fully extinguished. By contrast, the proposed Restructuring Plan will not materially impair any of CB&I UK’s other creditors or lenders, and it will allow the CB&I

Entities' shareholders to retain their full ownership stake in each of the CB&I Entities with no impairment at all.

As explained more fully below and in the accompanying declarations of Reficar's English and Dutch counsel, Reficar has the right under English and Dutch law to dissent from the restructuring plans proposed by the CB&I Entities in the Foreign Restructuring Proceedings. If (as expected) Reficar dissents from the proposed restructuring plans, the plans can become binding only if the English and Dutch courts with jurisdiction in relation to the plans determine that Reficar would not be any worse off under the plans than it would be if the CB&I Entities were to enter into liquidation proceedings. That determination will depend on the English and Dutch courts' valuation of the CB&I Entities, and Reficar will have the right to challenge the restructuring plans and the valuation analyses submitted by the CB&I Entities in the Foreign Restructuring Proceedings.

The financial and legal information that Reficar seeks in the document and deposition subpoenas is directly relevant and material to the valuation of the CB&I Entities and will be used by Reficar to critically evaluate and challenge the restructuring plans and the valuation analyses submitted by the CB&I Entities in the Foreign Restructuring Proceedings. McDermott's press release of September 8, 2023 and CB&I UK's Practice Statement Letter of the same date clearly establish that McDermott is orchestrating the restructuring of the CB&I Entities' indebtedness through the Foreign Restructuring Proceedings and that McDermott therefore has possession, custody or control of the information sought in the subpoenas concerning McDermott and the CB&I Entities. To date, however, McDermott has provided only a small fraction of the information requested by Reficar.

The CB&I Entities have stated that they intend to conclude the Foreign Restructuring Proceedings within approximately two months from today’s date, necessitating this urgent *ex parte* application under 28 U.S.C. § 1782. As explained below, Reficar satisfies the three statutory requirements for relief under § 1782: (i) Reficar seeks discovery from an entity found in this district; (ii) the discovery is for use in foreign legal proceedings; and (iii) Reficar is an interested party in those foreign proceedings. Reficar also satisfies the four discretionary factors that courts consider under the statute: (i) the discovery is not sought from the counterparty in the foreign proceeding; (ii) courts in the Netherlands and England are receptive to discovery obtained pursuant to § 1782; (iii) the request does not circumvent foreign proof-gathering restrictions; and (iv) the request is not unduly intrusive or burdensome. Accordingly, Reficar respectfully moves *ex parte* for leave to serve McDermott with the two subpoenas attached to the Petition as **Exhibit A**.

II. FACTUAL BACKGROUND

A. The Arbitration and Award

The Award that McDermott and the CB&I Entities seek to “discharge” through the Foreign Restructuring Proceedings arose from the CB&I Entities’ bad-faith and profit-driven misconduct on a construction project in Colombia.

In June 2010, Reficar and the CB&I Entities entered into six interrelated agreements (collectively known as the “**EPC Agreement**”), by which the CB&I Entities agreed to perform the engineering, procurement, and construction for the expansion of Reficar’s refinery. Stenglein Decl. ¶ 4, Ex. 2, ¶ 263. After the parties signed the EPC Agreement in June 2010, the CB&I Entities repeatedly violated its core contractual obligations, leading to enormous cost overruns and a significant delay in the project’s completion. *Id.* Ex. 2, ¶ 2256.

The CB&I Entities were ultimately over two years late in meeting their construction deadlines and Reficar paid US\$ 5.90 billion in EPC costs — approximately US\$ 2.75 billion more

than the CB&I Entities had represented in a 2010 estimate. *Id.* ¶ 280. That was no accident. As CB&I’s Operations Manager testified, “the view of CB&I was that the longer the job went on, the more money CB&I would make.” *Id.* Ex. 2, ¶ 936. In other words, the CB&I Entities prioritized their own profit margins over their contractual obligations, as the arbitral tribunal later expressly found. *Id.* Ex. 2, ¶¶ 931–36, 2205-15.

Pursuant to the parties’ Dispute Resolution Agreement, Reficar initiated arbitration against the CB&I Entities under the ICC Arbitration Rules, and the seat of the arbitration was New York. *Id.* Ex. 2, ¶¶ 27–28. The arbitration lasted seven years, and the parties submitted over 6,000 exhibits, the testimony of dozens of fact witnesses, nearly 30 expert reports, 11 joint expert reports, and 25 pleadings. *Id.* Ex. 2, ¶¶ 122–131. On June 2, 2023, the arbitral tribunal unanimously issued the Award.

The Award ordered “(i) CB&I UK, CBI Colombiana and CB&I N.V. to pay jointly and severally to Reficar USD 937,495,061[.]” *Id.* Ex. 2, ¶ 2500(11). It further ordered “CB&I UK, CB&I N.V. and CBI Colombiana to pay jointly and severally to Reficar an award on costs of USD 58,659,079,” and it ordered the parties to pay interest on all amounts due in accordance with the tribunal’s instructions. *Id.* Ex. 2, ¶ 2500(13–14).

B. The Pending S.D.N.Y. Proceedings

On June 8, 2023, the CB&I Entities filed a petition to vacate the Award with the United States District Court for the Southern District of New York. *Id.* ¶ 5. On August 4, 2023, Reficar filed a cross-petition to confirm the Award. *Id.* ¶ 5. On August 31, 2023, CB&I filed its reply and opposition to the cross-petition. *Id.* ¶ 7. On September 22, 2023, Reficar filed its reply, and the two petitions are now ready for the District Court’s decision. *Id.* ¶ 7.

C. McDermott’s Press Release Announcing the Initiation of the Foreign Restructuring Proceedings

On September 8, 2023, McDermott issued a press release announcing its intention to initiate the Foreign Restructuring Proceedings, under which: (i) CB&I N.V. and Lealand Finance Company B.V. (“**Lealand**”), another subsidiary of McDermott, would initiate restructuring “procedures” in the Netherlands under the Dutch Act on Confirmation of Extrajudicial Plans (*Wet Homologatie Onderhands Akkoord* or “**WHOA**”); and (ii) CB&I UK would initiate a Restructuring Plan under Part 26A of the Companies Act 2006 (UK) in England. Stenglein Decl., ¶ 8, Ex. 3. McDermott’s press release explicitly linked the Foreign Restructuring Proceedings to the Award, announcing that McDermott “strongly disagrees” with the Award and “intends to discharge certain unsecured claims associated with legal matters related to the [Reficar] project, which was originated by [CB&I N.V.]” *Id.* McDermott also stated in the press release that “[f]ollowing completion of the Netherlands and UK processes, [it] will make a voluntary filing in the United States to secure legal recognition of the international court decisions,” and that it “expects to complete the processes no later than early 2024.” *Id.*

D. Overview of the Foreign Restructuring Proceedings

On the same date as McDermott’s press release (*i.e.*, September 8, 2023), CB&I UK initiated a court-supervised voluntary restructuring proceeding in the High Court of Justice of England and Wales under Part 26A of the Companies Act 2006. Schumann Decl. ¶ 3. CB&I UK indicated that CB&I N.V. and Lealand intended to initiate similar proceedings in the Amsterdam District Court in the Netherlands under the WHOA. *Id.* ¶ 3, Ex. 1, ¶ 6.6. On September 21, 2023, Reficar was informed that CB&I N.V. and Lealand have initiated the WHOA proceedings by means of filing the declaration (*startverklaring*) as described in Article 370(3) of the Dutch Bankruptcy Act. van den Berg Decl. ¶ 6.

As explained in the accompanying declarations of Reficar’s English and Dutch counsel, the restructuring procedures that CB&I UK and CB&I N.V. have initiated or will initiate in England and the Netherlands, respectively, are court-supervised proceedings that allow a debtor to propose a restructuring plan to its creditors and shareholders. Schumann Decl., ¶ 3; van den Berg Decl., ¶ 3. Importantly, Part 26A of the Companies Act 2006 allows a debtor to agree to a restructuring plan with its creditors (or classes of creditors and/or members) and, under the terms of that plan, to bind any dissenting creditors (or classes of creditors and/or members), but only on condition that the English court with jurisdiction over the plan determines that the dissenting creditors would not be any worse off under the plan than they would be if the debtor were to enter into liquidation proceedings. Schumann Decl., ¶ 10. In respect of the WHOA, the conditions for binding a dissenting class are, amongst others, that (i) the distribution of the value realized with the plan (*reorganisatiewaarde*) does not deviate, to the disadvantage of the class that did not accept the plan, from its legal ranking or preference, except for the situation that there is a ‘reasonable ground’ to deviate, and (ii) the plan does give the respective non-secured creditor(s) a right to opt for a cash payment in the amount they would have expected to receive in cash in formal insolvency proceedings (*faillissement*). van den Berg Decl., ¶ 13.

CB&I UK describes the financial difficulties of the McDermott “Group” (defined as McDermott and its direct and indirect subsidiaries) in a so-called “Practice Statement Letter” issued by CB&I UK to its creditors on September 8, 2023. Schumann Decl., ¶ 3, Ex. 1 at ¶¶ 4.3, 5.1-5.24. In that document, CB&I UK asserts that the primary objectives of the CB&I Entities’ restructuring include: (i) to “avoid [CB&I UK] and the wider Group having to enter into insolvent liquidation, which would likely result in recoveries for [creditors] being materially lower than if the Restructuring Plan were approved and sanctioned”; and (ii) to “provide the Dispute Proceeding

Plan Creditors [*i.e.*, Reficar and the *Contraloría General de la República*, an administrative agency of the Republic of Colombia that also has claims against the CB&I Entities arising from the Reficar project] with an opportunity to benefit from the potential upside anticipated assuming the successful implementation of the Restructuring.” *Id.* Ex. 1, ¶ 6.2(b), (f).

CB&I UK’s Practice Statement Letter states that CB&I UK’s Restructuring Plan “is being proposed to the Plan Creditors in order to restructure the [McDermott] Group’s existing indebtedness,” and it sets out the key terms of the Restructuring Plan. *Id.* Ex. 1, ¶¶ 7.1, 10.1-10.21. It also states that CB&I N.V. will make a “parallel” proposal “[o]n or around 20 October 2023” within the context of the Dutch restructuring proceedings and that CB&I N.V.’s proposal will be “broadly consistent with the terms of [CB&I UK’s] Restructuring Plan.” *Id.* Ex. 1, ¶¶ 6.6, 6.8.

Under CB&I UK’s proposed Restructuring Plan, Reficar, which is by far the largest unsecured creditor of the CB&I Entities, will receive a maximum payment of approximately US\$ 2.5 million over two years, and its claim under the Award, with a total current value well above US\$ 1 billion, will be released in full. *Id.* ¶¶ Ex. 1, 8.4, 10.7-10.11. By contrast, the proposed Restructuring Plan will not materially impair any of CB&I UK’s other creditors or lenders, and it will allow the CB&I Entities’ shareholders to retain their full ownership stake with no impairment at all. *Id.* Ex. 1, ¶¶ 8, 10.1-10.6.

According to CB&I UK’s Practice Statement Letter, the “Sanction Hearing,” at which the English court will be asked to approve CB&I UK’s Restructuring Plan, is “currently expected to be held on 10 November 2023.” *Id.* Ex. 1, 18.7.

E. Reficar’s Need for Financial and Legal Information Concerning McDermott and the CB&I Entities in the Foreign Restructuring Proceedings

The financial and legal information that Reficar seeks in the subpoenas is directly relevant and material to the valuation of the CB&I Entities and to the question whether Reficar would be

worse off under the CB&I Entities' proposed restructuring plans than it would be if they were to enter into liquidation proceedings or another relevant alternative that may be available. In particular, Reficar requests certain specific categories of information concerning McDermott and the CB&I Entities that was created, sent, received, edited, revised, or transmitted at any time since and including June 30, 2020, including: (i) project-level historical financial statements and projections; (ii) quarterly and annual audited financial statements; (iii) entity-level breakdowns of assets and liabilities; (iv) loan agreements, leases, credit lines, derivatives, letters of credit, security agreements, guarantees, equipment leases and other financing documents; (v) valuation analyses of the CB&I Entities; and (vi) an up-to-date corporate structure chart showing all members of the McDermott Group together with a summary of any mergers, acquisitions or name changes to entities within the structure and the corresponding supporting documentation. Reficar will use this financial and legal information to critically evaluate and challenge the restructuring plans and the valuation analyses submitted by the CB&I Entities in the Foreign Restructuring Proceedings.

Endeavoring to avoid litigation, on August 9, Reficar initially requested this financial and legal information from McDermott. Stenglein Decl., ¶ 6. McDermott provided only a small portion of the requested information under a non-disclosure agreement. *Id.* ¶ 6.

On September 20, 2023, Reficar requested this financial and legal information from CB&I UK within the context of the English restructuring proceedings. Schumann Decl. ¶ 12, Ex. 2. Reficar explained in its letter that “[i]n order for [Reficar] to understand how it will be affected by the proposed Restructuring Plan, it is vital that [CB&I UK] provide further important information on an urgent basis (by 5pm on Friday 22 September 2023 at the latest)” *Id.* Ex. 2, ¶ 4.1. Reficar also explained that, *inter alia*: (i) “[t]he Restructuring Plan appears to contain assertions, assumptions and/or pronouncements which are largely unsubstantiated – such that it is impossible

for any third party outside CB&I to undertake any meaningful interrogation and/or analysis of which is set out therein;” and (ii) “[o]n the face of the Restructuring Plan as drawn and given the failure of CB&I UK to provide relevant information in support, it appears to Reficar that the Restructuring Plan is manifestly flawed.” *Id.* ¶ 5.1. Paragraph 34 of Reficar’s letter of September 20, 2023 sets out 14 specific categories of documents and information requested by Reficar. *Id.* ¶ 34.

On September 21, 2023, Reficar requested the same financial and legal information from CB&I N.V. within the context of the Dutch restructuring proceedings. van den Berg Decl. ¶ 15. As of the date of the present petition, Reficar has not received a response to its request for this information. van den Berg Decl. ¶ 16.

On September 22, 2023, Reficar received a response from CB&I UK to Reficar’s letter of September 20, 2023. Schumann Decl. ¶ 13; Ex. 3. CB&I UK stated in its letter that it will produce certain documents and information on September 25, 2023. *Id.* Based on prior experience, however, Reficar believes that such documents and information will be incomplete and insufficiently granular to allow Reficar to critically evaluate and challenge the restructuring plan and valuation analysis submitted by CB&I UK in the English restructuring proceedings. *Id.*

If (i) this Court grants the present § 1782 petition and (ii) the CB&I Entities produce documents to Reficar prior to the date on which Reficar serves McDermott with the document subpoena attached as **Exhibit A** to the petition, Reficar will narrow the document subpoena prior to serving it by deleting any document request that has been fully responded to by the CB&I Entities.¹

¹ Considering that McDermott has previously rebuffed Reficar’s requests for documents and information (*see* Stenglein Decl., ¶ 6), and in light of the time needed to obtain documents

III. ARGUMENT

District courts apply a two-step analysis when considering whether to grant a petition pursuant to 28 U.S.C. § 1782. *First*, the court must determine whether the threshold statutory requirements are met; *second*, if the statutory requirements are met, then the court must then assess whether it should exercise its discretion to grant the requested assistance in light of the discretionary factors articulated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004). *Bravo Express Corp. v. Total Petrochemicals & Ref. U.S.*, 613 F. App'x 319, 321-22 (5th Cir. 2015). The district court's decision should be "informed by the 'twin aims of the statute,' which are 'to provide efficient means of assistance to participants in international litigation in our federal courts and to encourage foreign countries by example to provide similar means of assistance to our courts.'" *Tex. Keystone, Inc. v. Prime Nat. Res., Inc.*, 694 F.3d 548, 553-54 (5th Cir. 2012).

A. Reficar's Petition Satisfies the Statutory Requirements of § 1782

Section 1782 authorizes district courts to grant discovery from persons located in the United States for use in foreign proceedings. The statute provides, in pertinent part, as follows:

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 The order may be made . . . upon the application of any interested person and may direct 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(a).

A party seeking discovery under § 1782 must satisfy three statutory requirements: "(1) the person from whom discovery is sought must reside or be found in the district in which the

even once a § 1782 petition is granted, Reficar has determined that it would be irresponsible to take a wait-and-see approach before filing the present petition.

application is filed; (2) the discovery must be for use in a proceeding before a foreign tribunal; and (3) the application must be made by a foreign or international tribunal or ‘any interested person.’” *Bravo Express*, 613 F. App’x at 322. Here, each of these three statutory requirements is plainly met.

1. McDermott Resides and Is Found in This District

The first requirement is satisfied because Reficar seeks discovery from an entity “found” in this district. A corporation may be “found” in a district where it has its principal place of business. *In re Application of HydroDive Nigeria, Ltd.*, No. 13-MC-0477, 2013 WL 12155021, at *1 (S.D. Tex. May 29, 2013) (“There is no dispute that Cal Dive has its corporate offices and principal place of business in Houston. Thus, Cal Dive is clearly ‘a person who resides or is found’ in the district.”). McDermott is found in this district because it is headquartered and has its principal place of business in Houston. Stenglein Decl., ¶ 3, Ex. 1.

2. The Discovery Sought Is For Use in Foreign Proceedings

The discovery sought is “for use” in the Foreign Restructuring Proceedings, which were duly commenced “before a foreign or international tribunal” in England and the Netherlands. To be “for use” in a foreign proceeding, the discovery sought must “be employed with some advantage or serve some use in the [foreign] proceeding.” *In re Accent Delight Int’l Ltd.*, 869 F.3d 121, 132 (2d Cir. 2017); *Eni Ghana Expl. & Prod. Ltd v. Gaffney Cline & Assocs., Inc.*, No. 4:22-MC-01285, 2022 WL 3156224, at *3 (S.D. Tex. Aug. 8, 2022) (noting that an “applicant may seek discovery of any materials that can be made use of in the foreign proceeding to increase [its] chances of success.”) (citing *Mees v. Buiter*, 793 F.3d 291, 299 (2d Cir. 2015)). The “for use” element requires only a “*de minimis*” showing that the information sought would be relevant to the foreign proceeding. *See In re Atvos Agroindustrial Investimentos S.A.*, 481 F. Supp. 3d 166, 175 (S.D.N.Y. 2020). Courts have found the “for use” requirement met where a creditor in

Canadian restructuring proceedings sought financial information from the U.S. subsidiary of the Canadian debtor. *In re Application of CBRE Glob. Invs. (NL) B.V.*, No. 20-MC-315 (VEC), 2021 WL 2894721, at *9 (S.D.N.Y. July 9, 2021) (authorizing creditor to take discovery concerning “the nature of the HBC restructuring, HBC US’s role in that restructuring, and, by extension, information pertaining to HBC US’s financial situation”).

Here, Reficar seeks financial and legal information concerning McDermott and the CB&I Entities for use in the Foreign Restructuring Proceedings, which are being supervised by the High Court of Justice of England and Wales and the Amsterdam District Court in the Netherlands. As explained above, Reficar seeks this financial and legal information so that it can critically evaluate and challenge the restructuring plans and the valuation analyses submitted by the CB&I Entities in the Foreign Restructuring Proceedings.

3. **Reficar Is an Interested Person**

Reficar is an “interested person” within the meaning of § 1782. The term “interested person” includes someone with “participation” or procedural rights, who “possess[es] a reasonable interest in obtaining [judicial] assistance.” *Intel*, 542 U.S. at 256-57. The legislative history of § 1782 also makes plain that “interested person” includes “a party to the foreign . . . litigation.” Senate Report at 8, 1964 U.S.C.C.A.N. at 3789; *Intel*, 542 U.S. at 256 (noting that litigants in the foreign proceeding are “no doubt” the most common example of interested persons).

Here, Reficar appears to be the single largest creditor of the CB&I Entities, and it is one of only two creditors whose debt McDermott and the CB&I Entities intend to discharge fully in the Foreign Restructuring Proceedings. Reficar intends to appear in the Foreign Restructuring Proceedings and to challenge the restructuring plans and the valuation analyses submitted by the CB&I Entities in those proceedings. Accordingly, Reficar is an “interested person” under § 1782.

B. The Discretionary Factors Favor Granting the Requested Relief

If the court determines that the party seeking discovery has satisfied the statutory requirements, it must then consider the four *Intel* discretionary factors, namely: “(1) whether ‘the person from whom discovery is sought is a participant in the foreign proceeding,’ because ‘nonparticipants in the foreign proceeding may be outside the foreign tribunal’s jurisdictional reach’ and therefore their evidence may be ‘unobtainable absent [§ 1782] aid’; (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] 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 [§ 1782] request is ‘unduly intrusive or burdensome.’ ” *Bravo Express*, 613 F. App’x at 323-24 (per curiam) (quoting *Intel*, 542 U.S. at 264-65).

Here, each of these four discretionary factors weighs in favor of granting the discovery requested by Reficar.

First, McDermott may be outside the jurisdictional reach of the English and Dutch courts because it is not a participant in the Foreign Restructuring Proceedings.

Second, the nature of the Foreign Restructuring Proceedings and the receptivity of the English and Dutch courts to U.S. federal-court judicial assistance favors granting Reficar’s request. “In considering this factor, courts typically analyze whether there has been a ‘clear directive’ from the foreign tribunal that it ‘would reject evidence’ produced in the United States.” *Eni Ghana Expl.*, 2022 WL 3156224, at *4. A clear directive derives from “authoritative proof—in the form of a judicial, executive, or legislative declaration—that the foreign jurisdiction would be hostile to such evidence.” *Id.*

Here, there is no such “clear directive.” To the contrary, courts in the Netherlands and England have historically been receptive to assistance by the courts of the United States. *See e.g., In re Bloomfield Inv. Res. Corp.*, No. 18-mc-2608 (NGG)(CLP), 2018 U.S. Dist. Lexis 206338, at *14 (E.D.N.Y. Dec. 6, 2018) (“the regularity with which U.S. courts grant similar Section 1782 discovery requests for Dutch litigation also suggests that there is little potential offensiveness to such grants”) (collecting cases); *Matter of Upper Brook Companies*, No. 22-MC-97 (PKC), 2022 WL 18046694, at *8 (S.D.N.Y. Dec. 29, 2022) (permitting discovery for use in proceedings in Dutch courts); *In re Akhmedova*, No. 5-20-MC-1099-JKP-RBF, 2020 WL 6376651, at *3 (W.D. Tex. Oct. 30, 2020), report and recommendation adopted, No. SA20MC1099JKPRBF, 2020 WL 13190300 (W.D. Tex. Nov. 29, 2020) (noting English courts would likely be receptive to assistance from a United States court as it would help the English court in ensuring disclosure and compliance with its orders); *In re Ex Parte Application of Glob. Energy Horizons Corp.*, No. 5:15-mc-80078-PSG, 2015 WL 1325758, at *2 (N.D. Cal. Mar. 24, 2015) (“There is no authority suggesting the English government would be hostile to or otherwise reject discovery obtained through a Section 1782 subpoena.”); *Application of Sarrio S.A. for Assistance Before Foreign Tribunals*, 173 F.R.D. 190, 197 (S.D. Tex. 1995) (noting that “a decision of England’s highest judicial body, expressly approved a private litigant’s use of section 1782 to gather evidence in the United States for use in English proceedings”).

Third, Reficar’s request does not seek to “circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.” *Intel* 542 U.S. at 264-65. In this respect, a court may “consider [the foreign country’s] restrictions and whether this request is an attempt to thwart those restrictions.” *Eni Ghana*, 2022 WL 3156224, at *5 (finding this factor met where the discovery sought in the United States involved different type of evidence and different discovery

targets than the discovery requested in the foreign country). As this court, and others, have found, there is no obligation to first request discovery in the foreign court. *In re Application of HydroDive Nigeria, Ltd.*, No. 13-MC-0477, 2013 WL 12155021, at *4 (S.D. Tex. May 29, 2013) (“Section 1782 does not require [an applicant] to seek discovery in the foreign jurisdiction before seeking the assistance of a district court.”); *Venequip, S.A. v. Mustang Mach. Co., LLC*, No. 4:21-MC-2391, 2022 WL 3951173, at *2 (S.D. Tex. Aug. 30, 2022), *aff’d sub nom.* 2023 WL 5031480 (5th Cir. Aug. 7, 2023) (“Section 1782 does not impose an exhaustion requirement . . .”); *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997).

Here, there are no “proof-gathering restrictions or other policies” of England or the Netherlands that Reficar is circumventing by seeking discovery of financial and legal information from McDermott.

Fourth, the request is not unduly intrusive or burdensome. In light of the significant financial interests at stake in the Foreign Restructuring Proceedings (*i.e.*, McDermott’s declared intention to cause the CB&I Entities to “discharge” fully their debt to Reficar of well over US\$ 1 billion under the Award), Reficar’s request for financial and legal information concerning McDermott and the CB&I Entities is entirely appropriate and proportional. *See In re Empresa Publica De Hidrocarburos Del Ecuador – EP Petroecuador v. WorleyParsons Int’l, Inc.*, No. 4:19-MC-2534, 2020 WL 13412872, at *6 (S.D. Tex. Apr. 13, 2020) (reasoning that § 1782 petition seeking discovery from more than 20 individuals and 20 business entities over a nine-year period was not unduly burdensome).

Further, the requested financial and legal information is plainly in McDermott’s “possession, custody, or control” within the meaning of Rule 34(a) of the Federal Rules of Civil Procedure. Typically, “control” of documents includes both actual possession and the “legal right

or practical ability to obtain the documents from a nonparty in the action.” *Tex. v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2018 WL 2348669, at *2 (W.D. Tex. May 23, 2018) (citing *Edwards v. City of Bossier City*, No. CV 15–1822, 2016 WL 3951216, at *3 (W.D. La. July 20, 2016); *cf. Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 305 (M.D.N.C. 1998) (“[A] litigating parent corporation has control over documents in the physical possession of its subsidiary corporation where the subsidiary is wholly owned or controlled by the parent.”)).

Here, McDermott has both the legal right and the practical ability to obtain the financial and legal information that Reficar seeks. First, McDermott is the “ultimate parent” of the CB&I Entities, which operate as a “fully integrated, onshore-offshore corporate group.” Schumann Decl., ¶ 3, Ex. 1, ¶¶ 4.2, 4.7. Thus, McDermott and the CB&I Entities likely exchange financial and legal information in the ordinary course of business. Second, McDermott has control over the requested documents because it admittedly is orchestrating the restructuring of the CB&I Entities’ indebtedness – and the desired discharging of Reficar’s claim – through the Foreign Restructuring Proceedings. Stenglein Decl., ¶ 8, Ex. 3 (McDermott’s press release stating that “McDermott International, Ltd. (‘McDermott’ or the ‘Company’) today announced that it has entered into a transaction support agreement . . . to initiate a financial restructuring process to strengthen its capital structure, enhance its liquidity position, and further position the Company for long-term success”); Schumann Decl., ¶ 3, Ex. 1, ¶ 7.1 (CB&I UK’s Practice Statement Letter stating that CB&I UK’s Restructuring Plan “is being proposed to the Plan Creditors in order to restructure the [McDermott] Group’s existing indebtedness”).

C. The Petition May be Granted *Ex Parte* Without Prejudice to McDermott

Reficar brings this petition on an *ex parte* basis in accordance with well-established practice in this and other federal courts. *Eni Ghana*, 2022 WL 3156224, at *3 (“Applications under § 1782 routinely proceed *ex parte*.”).

Granting this petition on an *ex parte* basis will not impinge upon McDermott's due process rights, as it may subsequently move to quash the subpoenas and/or vacate the order granting the petition. *Tex. Keystone*, 694 F.3d at 554.

IV. CONCLUSION

For the foregoing reasons, Reficar respectfully requests that the Court grant the Petition, authorize Reficar to serve McDermott with the two subpoenas attached to the Petition as **Exhibit A**, and authorize Reficar to issue additional document and deposition subpoenas to McDermott as Reficar reasonably deems appropriate and as are consistent with the Federal Rules of Civil Procedure.

Dated: September 22, 2023

Respectfully submitted,

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