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United States District Court,
S.D. New York.

In re APPLICATION OF OOO PROMNEFSTROY FOR AN ORDER TO CONDUCT DISCOVERY FOR USE IN A FOREIGN PROCEEDING.

Misc. No. M 19–99(RJS).
|
Oct. 15, 2009.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge.

***1** Before the Court is the application of OOO Promnefstroy ("Promnefstroy" or "Applicant") for an order pursuant to 28 U.S.C § 1782 authorizing deposition and document discovery from Daniel Caleb Feldman ("Feldman" or "Respondent") for use in several pending proceedings in the Netherlands (collectively, the "Dutch Proceedings"). For the reasons set forth below, Promnefstroy's application is denied in its entirety.

I. BACKGROUND [1]

A. Facts

1. The Yukos Oil Bankruptcy

Yukos Oil was a joint-stock company organized under the laws of the Russian Federation in the early 1990s. (Daniel Caleb Feldman's Opp'n To Application for Order to Take Discovery Pursuant to 28 U.S.C. § 1782 ("Feldman Opp'n") 3.) During the late 1990s and early part of this century, Yukos Oil experienced dramatic growth, but then came under fire from Russian tax authorities in late 2003. (*Id.*) After subsequent audits and the imposition of fines, penalties, and back taxes, a consortium of banks pushed Yukos Oil into bankruptcy in March of 2006. (*Id.*) Eduard Rebgun ("Rebgun") was appointed receiver of the crippled giant. (*Id.*)

One of the assets Rebgun became responsible for as receiver of Yukos Oil was the Dutch company Yukos Finance B.V. ("Yukos Finance"), a wholly-owned subsidiary that held foreign companies in the Yukos Oil group. (Feldman Opp'n Ex. 3 ¶ 2.1 (Dutch decision dated March 21, 2008).) Among Yukos Finance's holdings were all the shares of Yukos International UK B.V. ("Yukos International"), another Dutch company with substantial holdings in the oil and gas

industry. (*Id.*) Yukos Finance and Yukos International were overseen by two Yukos Oil executives, David Godfrey ("Godfrey") and Mark Misamore ("Misamore"), who acted as directors of Yukos Finance and Yukos International. (*Id.* ¶¶ 2.5.)

On August 11, 2006, Rebgun attempted to dismiss Godfrey and Misamore from Yukos Finance and appoint two new directors. (*Id.* ¶ 2.7.) Four days later, Rebgun sold all of the shares of Yukos Finance to Promnefstroy, a Russian "closed joint-stock company." (*Id.* ¶ 2.8.) At that time, Promnefstroy attempted to appoint its own directors, Robert Reid ("Reid") and Stephen Lynch ("Lynch"). [2] (Feldman Opp'n Ex. 5 ¶ 4.30 (Dutch decision dated February 25, 2009).)

2. Original Dutch Proceeding

Upon their dismissal as directors of Yukos Finance, Godfrey and Misamore brought an action in the Amsterdam District Court, which culminated in a decision dated October 31, 2007. (Feldman Opp'n Ex. 2 (Dutch decision dated October 31, 2007).) This action sought a declaratory judgment that shareholder actions taken by Rebgun as receiver of Yukos Oil, including the dismissal of Godfrey and Misamore, were null and void. (*Id.* ¶ 2.1.) Godfrey and Misamore also sought a declaratory judgment that all actions taken by Rebgun's appointed directors were likewise null and void. (*Id.*)

The Dutch court found in favor of Godfrey and Misamore, declaring Misamore and Godfrey the lawful directors of Yukos Finance and voiding Rebgun's actions. (*Id.* at 20.) The Dutch court's October 31, 2007 judgment is currently pending on appeal, now with Promnefstroy as an intervening party. (Application for Order to Take Discovery Pursuant to 28 U.S.C. § 1782 and Request for Expedited Ruling ("Application") 6.)

***2** The various interested parties from the first proceeding have commenced no less than five additional proceedings in Dutch courts since the October 31, 2007 decision. (*Id.*) Each of these proceedings revolved around either establishing ownership and control of Yukos Finance and its related entities, preserving the assets of Yukos Finance and its related entities, or discovering information relevant to those two goals. The Court will briefly recount the portions of those proceedings relevant to Promnefstroy's § 1782 application.

3. Subsequent Dutch Proceedings

a. March 6, 2008 Order

In March 2008, the Dutch courts approved proposed asset sales by Yukos International disposing of a Lithuanian oil refinery and Yukos International's 49% stake in Transpetrol, a Slovakian company. (Application Ex. H. ¶¶ 2.41–2.42 (Dutch court decision dated March 6, 2008).) The court also granted Promnefstroy's request for an order requiring Yukos International, Godfrey, and Misamore to deposit proceeds from these sales in a separate interest-bearing account and not to dispose of the funds. [3] (*Id.* ¶ 6.1.) At least a portion of these funds were placed in an account in Fortis bank (the "Fortis Account") and ordered frozen, pending final resolution of the ownership of Yukos Finance. (*Id.* ¶ 2.43.) This preliminary relief was affirmed on appeal, with the Dutch appellate court concluding that Promnefstroy had an interest in maintaining the assets of Yukos Finance pending its appeal of the October 31, 2007 ruling. (Application Ex. I ¶ 12 (Dutch decision dated February 19, 2009).) Promnefstroy did not seek access to any information from Yukos Finance in these proceedings. [4]

b. February 19, 2009 Order

On February 19, 2009, a Dutch court ordered Reid and Lynch, the directors whom Promnefstroy had attempted to appoint to the board of Yukos Finance, to disclose any actions they had taken on behalf of Yukos Finance and to "render their cooperation to undoing" those same actions. (Feldman Opp'n Ex. 4 ¶¶ 7.1–7.2 (Dutch decision dated February 19, 2009).) The court also enjoined Promnefstroy, Reid, and Lynch from exercising "any right[s] in relation to the Yukos Finance shares." (*Id.* ¶¶ 7.3–7.4.)

In the same proceeding, Promnefstroy sought "information about the state of affairs in regard to the sale of the interest in Transpetrol," as well as information about any attachments levied against shares of Yukos Finance by various creditors of the now defunct Yukos Oil. (*Id.*) The court concluded that "Promnefstroy *et al.* have no interest beyond the securing of the proceeds" from the sale of Transpetrol and thus "cannot lay claim to information about the state of affairs" of the transaction. (*Id.*) The court did, however, order Yukos Finance to disclose how *much* it received for the sale of the Lithuanian refinery (the proceeds of which were placed in the Fortis Account) and what attachments had been levied against Yukos Finance's stock by former creditors of Yukos Oil. (*Id.* ¶¶ 7.9, 7.10.)

c. February 25, 2009 Order

***3** On February 25, 2009, the Dutch courts rebuffed an effort by Reid and Lynch [5] to force Yukos Finance, Godfrey, and Misamore to turn over "copies of the procedural documents, including records of hearings in the tax proceeding" that ultimately forced Yukos Oil into bankruptcy. (Feldman Opp'n Ex. 5 ¶ 3.1 (Dutch decision dated February 25, 2009).)

d. May 1, 2009 Order and May 26, 2009 Appeal

On March 2, 2009, Promnefstroy commenced an additional proceeding against Godfrey, Misamore, Yukos International, Yukos Finance, and Yukos Oil, in which it asserted "that [Godfrey and Misamore] are indeed attempting to secretly remove the assets" of Yukos Finance and "are making use of various existing companies of the former Yukos Oil group spread out across the world, which are still under their control," to do so. (Application Ex. L ¶ 38 (Promnefstroy Dutch court filing dated March 2, 2009).) Specifically, Promnefstroy asserted that Godfrey and Misamore were using another company under their control to secure collusive judgments against Yukos International. (Feldman Opp'n Ex. 7 ¶ 3.1 (Dutch decision dated May 1, 2009).) These judgments were then enforced against the Fortis Account that was supposed to be frozen under the May 6, 2008 proceeding, thus circumventing the Dutch court's freezing order. (*Id.*)

In its request for relief, Promnefstroy sought an order forcing Misamore and Godfrey to return any funds they had removed from certain accounts. In addition, Promnefstroy requested that

> Yukos International, Godfrey and Misamore be ordered to give Promnefstroy copies of the bank statements at their disposition or under their control relating to the Fortis account and court documents, including documents regarding attachments, in respect of assets of and ongoing proceedings in the name of or against Yukos Finance, Yukos International and their subsidiaries, as Promnefstroy has a legitimate and urgent interest therein. [6]

(Application Ex. L ¶ 39.) Promnefstroy was successful in its request for information with the Dutch district court, which found that the alleged malfeasance of Misamore and Godfrey now entitled Promnefstroy to certain information regarding the balance and activity in the Fortis account, as well as any information regarding legal action or attachments initiated by or levied against Yukos Finance or Yukos International. (Feldman Opp'n Ex. 7 ¶ 5.1.)

Promnefstroy's victory was short-lived, however, as the Dutch appellate court reversed the disclosure order and determined that

> [t]he implementation of the order given by the Court in Summary Proceedings will cause Promnefstroy to obtain free disposal of information with respect to Yukos Finance and Yukos International, which it can use in a manner and for purposes as it sees fit, without it having been established that it is entitled to the shares in Yukos Finance and accordingly is entitled to said information.

(Feldman Opp'n Ex. 8 ¶ 5.2 (Dutch decision dated May 26, 2009).) The court further noted that "the provision of said information is irreversible in the sense that the knowledge thus acquired can no longer be undone." (*Id.* ¶ 5.3.)

B. The § 1782 Application

***4** Promnefstroy filed this application to take discovery pursuant to 28 U.S.C. § 1782 on June 4, 2009, approximately one week after its attempt to compel discovery was rejected by the Dutch appeals court.

The application targets Feldman, a resident of New York State who was intimately involved in the affairs of Yukos Oil, having served as Corporate Secretary of Yukos Oil in 2003 and then as Secretary of the Board of Directors in 2004. (Application 4.) Today, Feldman serves on the Board of Yukos Hydrocarbons, a company not related to Yukos Finance, but nevertheless, according to Promnefstroy, an entity ultimately controlled by Misamore and Godfrey. (Application Ex. L ¶ 29.)

The application for foreign discovery itself contains forty-one paragraphs of document requests in addition to a request for the deposition testimony from Feldman. The vast documentary requests do not focus on Feldman's personal or business affairs, but focus almost exclusively on the business practices, litigation, financial statements, bank accounts, calendars, and even personnel changes of Yukos Finance, its subsidiaries, and related companies, which are parties to the Dutch Proceedings.

The briefs in this matter were fully submitted on August 13, 2009. The Court held oral argument on August 25, 2009 sitting in the Miscellaneous Part of the Court ("Part I").

II. DISCUSSION

A. Legal Standard

Section 1782 of Title 28 of the United States Code, entitled "Assistance to Foreign and International Tribunals and to Litigants before such Tribunals," provides 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." 28 U.S.C. § 1782(a). The statute authorizes district courts to grant such relief only where (1) the person from whom discovery is sought resides or is found in the district of the district court where the application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the application is made by the foreign tribunal or "any interested person." *Schmitz v. Berstein Liebhard & Lifshitz, LLP,* 376 F.3d 79, 83 (2d Cir.2004) (citing *In re Application of Esses,* 101 F.3d 873, 875 (2d Cir.1996) (per curium)).

For applications that meet the three statutory prerequisites, "Congress planned for district courts to exercise broad discretion over the issuance of discovery orders pursuant to § 1782(a)." *In re Edelman,* 295 F.3d 171, 181 (2d Cir.2002); *see also* *Schmitz,* 376 F.3d at 83–84 (citing *In re Application of Metallgesellschaft AG,* 121 F.3d 77, 78 (2d Cir.1997)). "This discretion, however, is not boundless" but must be exercised " 'in light of the twin aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.' " *Schmitz,* 376 F.3d at 84 (quoting *Metallgesellschaft,* 121 F.3d at 79). Subsequently, the Supreme Court and lower courts have articulated several relevant considerations to further guide the discretion of district courts, including:

> ***5** (1) Whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach, and thus accessible 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 a[n] attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and
>
> (4) Whether the subpoena contains unduly intrusive or burdensome requests.

In re Application of Microsoft Corp., 428 F.Supp.2d 188, 192–93 (S.D.N.Y.2006) (citing *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 264–65 (2004)). [7]

B. Analysis

The parties do not dispute that the three mandatory requirements of § 1782 are met in this case. First, Feldman resides in the Southern District of New York. (Application 1.) Second, Promnefstroy seeks to use the information that would be obtained by this application in various proceedings currently pending in the Netherlands. (*Id.*) Finally, Promnefstroy is either a plaintiff, defendant, or intervenor in many of those Dutch Proceedings. (*Id.* 5–9.) The Court therefore concludes that Promnefstroy has satisfied the technical requirements of § 1782 and will next consider whether the purposes of § 1782 are best served by approving Promnefstroy's application.

1. Foreign Tribunal's Jurisdictional Reach

The first discretionary factor asks the Court to evaluate whether the documents or testimony sought by the application are within the foreign tribunal's jurisdictional reach, and thus accessible absent resort to § 1782. *Microsoft,* 428 F.Supp.2d at 192–93; *see also* *Intel* 542 U.S. at 264–65. In this case, the vast majority of the application covers

documents within the reach of the Dutch courts. Therefore, the Court concludes that the first factor weighs in favor of Feldman.

As a preliminary matter, Promnefstroy asserts that the relevant inquiry is whether the *person* targeted by the subpoena is a party in the foreign proceedings, not whether the *information* is within the foreign tribunal's jurisdictional reach. In *Intel,* the Supreme Court explained factor one this way: where the "foreign tribunal has jurisdiction over those appearing before it, [the foreign tribunal] can itself order them to produce evidence." *Intel,* 542 U.S. at 264. This rationale suggests that it is the foreign tribunal's ability to control the evidence and order production, not the nominal target of the § 1782 application, on which the district court should focus. Other courts in this district have agreed. *See* *In re Godfrey,* 526 F.Supp.2d 417, 419 (S.D.N.Y.2007) (asking " 'whether the *document or testimony* sought were within the foreign tribunal's jurisdictional reach, and thus accessible absent § 1782 aid' " (quoting *Microsoft,* 428 F.Supp.2d at 192) (emphasis added)); *Microsoft,* 428 F.Supp.2d at 194 ("While IBM and Cleary Gottlieb are not 'participants,' *per se,* in the underlying proceeding, all the documents sought by Microsoft are within the Commission's reach."); *cf.* *Schmitz,* 376 F.3d at 85 ("Although technically the respondent in the district was [the foreign counter-party's law firm], for all intents and purposes petitioners are seeking discovery from DT, their opponent in the German litigation."). *But see* *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf,* Misc. No. Civ. M19–88 (BJS), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) ("When the target of discovery is not a party the foreign tribunal may be less inclined—even if it is empowered—to compel third-party discovery or, more precisely here, to compel the production of material subject to a third-party's confidentiality restrictions.").

***6** In this case, while Feldman may be beyond the reach of the Dutch courts, the information Promnefstroy seeks most certainly is not. For example, requests one through twelve and fourteen through eighteen relate to the assets, financial information, tax returns, sales or transfers of shares, asset or business appraisals, corporate records or books, communications between, and any calendars, planners, or journals of any "Misamore Entity," defined as any organization in the Yukos Finance corporate structure. (Subpoena, Document Requests ¶¶ 1–12, 14–18.) Only one or two of these initial requests even concern Feldman, and those do so only indirectly by relating to Yukos Hydrocarbons. (*Id.*)

Request thirteen seeks "any and all documents relating to Misamore and Godfrey's denial that Promnefstroy owns Yukos Finance," including contentions based on the illegitimacy of the Russian tax sale. (*Id.* ¶ 13.) Similarly, request nineteen demands "any and all documents related to the subject matter or allegations of the legal action brought in the Amsterdam District Court by Misamore, Godfrey, and Yukos Finance ... which action resulted in the judgment ... dated October 31, 2007." (*Id.* ¶ 19). Requests twenty and twenty-one demand any documents relating to the tax proceedings against Yukos Oil in Russia and its subsequent bankruptcy. (*Id.* ¶¶ 20–21.) Yet the Dutch decision dated February 25, 2009 denied Promnefstroy this exact relief—access to information regarding the Russian bankruptcy and tax proceedings—until and unless Promnefstroy won its appeal of the October 31, 2007 decision. (Feldman Opp'n Ex. 5 ¶ 4.4.2.)

Requests twenty-two through twenty-four relate to the allegedly fraudulent lawsuit between Yukos Hydrocarbons and Yukos International. (*Id.* ¶¶ 22–24.) Promnefstroy asserts that Feldman is an appropriate party from which, and this an appropriate jurisdiction in which, to discover documents relating to Yukos Hydrocarbon. Promnefstroy, however, also maintains that, through one of their holding companies, Godfrey and Misamore are ultimately "the executive officers of Yukos Hydrocarbons." (Application Ex. L ¶ 29 (Promnefstroy filing in Dutch court dated March 19, 2009).) [8]

When weighing the first discretionary factor, then, the Court must ask why Godfrey and/or Misamore, already parties to the Dutch Proceedings, are not the appropriate conduits for securing these documents. This is not to say that documents available in foreign proceedings cannot be procured by § 1782, but the first discretionary factor simply asks if the information is within the foreign tribunal's jurisdictional reach, and this material is.

The remaining requests seek information on legal claims or cases, transactions, and bank accounts relating to Yukos Finance, its subsidiaries, and certain third parties. (*Id.* ¶¶ 25–41.) None of these remaining document requests, however, relates to Feldman or any company purportedly owned by Feldman, controlled by Feldman, or employing Feldman.

***7** Because the Court concludes that nearly all the documents that the subpoena seeks are also in the possession of parties to the foreign proceeding, the first factor weighs squarely in favor of Feldman.

2. Receptivity of the Foreign Government

The second discretionary factor requires district courts to inquire into the nature of foreign proceedings and the "receptiveness" of the foreign tribunal to United States court assistance. *Microsoft,* 428 F.Supp.2d at 194 (citing *Intel,* 542 U.S. at 264). Because the Court has not been presented with any evidence that the Dutch legal system rejects § 1782 type assistance, the second factor is neutral or slightly favors Promnefstroy.

United States courts have neither the competency nor the time to fully understand a foreign legal system or how such a system might respond to § 1782 assistance from a United States court. For this reason, district courts have been instructed to tread lightly and heed only clear statements by foreign tribunals. The Second Circuit counsels:

> We think that it is unwise—as well as in tension with the aims of section 1782—for district judges 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 .... [W]e do not read the statute to condone speculative forays into legal territories unfamiliar to federal judges. Such a costly, time-consuming, and inherently unreliable method of deciding section 1782 requests cannot possibly promote the twin aims of the statute.

Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099–1100 (2d Cir.1995). Thus, courts must look for "authoritative proof" that the foreign jurisdiction would reject the § 1782 assistance. *Id.* at 1100. Courts have found such proof in cases where the foreign tribunal or government has written to the district court hearing the application and expressly stated that it did not want the American court's help. *See* *Schmitz,* 376 F.3d at 84 (noting that the German Ministry of Justice and the local German prosecutor explicitly asked the district court judge to deny the discovery request); *In re Microsoft,* 428 F.Supp.2d at 194 (noting explicit opposition to Microsoft's discovery request by the EU Commission).

In this case, Feldman asserts that "Promnefstroy has not demonstrated that Dutch courts would be amenable to a U.S. court providing Promnefstroy assistance in obtaining information." (Feldman Opp'n 15.) Feldman attempts to shift the burden to Promnefstroy to affirmatively show that Dutch courts would be receptive to the § 1782 application now before this court. District courts, however, are only to accept "authoritative proof that a foreign tribunal would *reject* evidence obtained with the aid of section 1782." *Euromepa,* 51 F.3d at 1100 (emphasis added). Feldman has not come forward with any such evidence. In such cases, "the Second Circuit has instructed that district courts generally should err on the side of permitting the requested discovery." *In re Gemeinshcaftspraxis,* 2006 WL 3844464, at *6 (citing *Euromepa,* 51 F.3d at 1101).

***8** Alternatively, Feldman argues that the Dutch decisions provide ample evidence that the Dutch courts would not be receptive to United States judicial assistance. Feldman is undoubtedly correct that the foreign tribunal's rulings in the foreign proceeding are relevant to the Court's discretion under § 1782. Those rulings, however, are more relevant to whether the § 1782 request is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country—the third of the discretionary factors. [9] Because the Court cannot give Respondent double credit for the Dutch rulings, the second prong is neutral or in fact favors Promnefstroy.

3. Circumvention of Foreign Proof–Gathering Restrictions

The third discretionary factor seeks to identify "attempt[s] to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Microsoft,* 428 F.Supp.2d at 192–93 (citing *Intel,* 542 U.S. at 264–65). Here, the record is replete with instances in which the Dutch courts rejected Promnefstroy's attempts to procure the same information it seeks through its § 1782 application. For this reason, the Court finds that the third factor weighs strongly in favor of Feldman.

Under the third discretionary factor, district courts may consider how the applicant fared or is faring in the foreign jurisdiction in its attempts to procure the same information it now seeks under § 1782. *See* *Microsoft,* 428 F.Supp.2d at 195 (finding that Microsoft was trying to circumvent the Commission's rules that provided narrower discovery than Microsoft requested). In *Microsoft,* the Honorable Colleen McMahon, District Judge, explained the rationale and importance of the third discretionary factor: "Through its current application, Microsoft attempts to divest the Commission of jurisdiction over this matter and replace a European decision with one by this Court. However, a decision by this Court which would either preempt or contradict a decision by the Commission would render the Commission's proceedings meaningless ." *Id.* at 195. Judge McMahon went on to explain that such interference is antithetical to the purpose of § 1782: "A decision by this Court upholding Microsoft's discovery request would contravene the purpose of § 1782 by pitting this Court against the Commission, rather than fostering cooperation between them." *Id.*

Intel indicates, however, that the foreign jurisdiction's discovery rules and rulings are not necessarily dispositive. *See* *Intel,* 542 U.S. at 260. *Intel* made clear that whether or not the foreign jurisdiction would allow discovery of the material, if it were located in that jurisdiction, is not dispositive. *See id.* [10] There is nothing in the *Intel* opinion, however, to suggest that discovery *must* be granted to parties who have repeatedly attempted to access the same types of information in a foreign tribunal only to have that foreign tribunal reject the applicant's requests.

***9** The Dutch proceedings reveal that Promnefstroy repeatedly sought information relating to the bank accounts, legal actions, and business decisions of Yukos Finance and its subsidiaries, but that it was routinely rebuffed by Dutch courts. For example, as noted above, the Dutch appeals court concluded that to allow Promnefstroy access to even the court documents and lists of attachment against Yukos Finance would "cause Promnefstroy to obtain free disposal of information with respect to Yukos Finance and Yukos International, which it can use in a manner and for purposes as it sees fit, without it having been established that it is entitled to the shares in Yukos Finance and accordingly is entitled to said information." (Feldman Opp'n Ex. 8 ¶ 5.2.) Given the conclusions of the Dutch courts, granting Promnefstroy's Application would only frustrate the careful balance struck by the Dutch courts in the underlying Dutch Proceedings.

Another court in this district, faced with these very same underlying Dutch Proceedings, came to the same conclusion less than two years ago. Although the Honorable Jed S. Rakoff, District Judge, decided that the application in that case had failed to meet the mandatory requirements of § 1782, he went on to conclude that it still "would not be a case for exercising discretion to provide the requested assistance, because the connection to the United States is slight at best and the likelihood of interfering with Dutch discovery policy is substantial." *In re Godfrey,* 526 F.Supp.2d

at 424. Although the target of the request now before the Court does reside within this District, the information that Promnefstroy seeks is principally of a foreign nature, even if Feldman also has access to it. Even more importantly, since Judge Rakoff's well reasoned opinion was issued, Promnefstroy has repeatedly made entreaties to various Dutch courts to get the same information it now seeks, and it has been rebuffed.

4. Burdensomeness

The final discretionary factor asks courts to be mindful of overly intrusive or burdensome discovery requests. *Microsoft,* 428 F.Supp.2d at 192–93 (citing *Intel,* 542 U.S. at 264–65). Because Promnefstroy's application is unreasonable given the circumstances, the final factor weights in favor of Feldman.

While few reported decisions address the issue of burdensomeness in the context of § 1782, the Court finds Promnefstroy's subpoena to be broad by any standard. Promnefstroy's application thus bears little resemblance to those cases in which such applications were routinely approved—cases requesting a single document or report, or even those documents relating to a single transaction or event. *See, e.g.,* *Gemeinshcaftspraxis,* 2006 WL 3844464, at *8 (approving application seeking documents relating to the creation of a single report by consulting firm); *In re Servicio Pan Americano de Protection, C.A.,* 354 F.Supp.2d 269, 275 (S.D.N.Y.2004) (approving application for "documents related to ... insurance coverage for a single loss on a single day"). Instead, Promnefstroy's application extends to a wide array of documents related to tens of business entities and to all of their affairs, many of which Feldman is not even associated with. (*See generally* Subpoena, Document Requests.) The subpoena also includes all of Feldman's computers since 2005. (*Id.* ¶ 14.)

* * *

***10** In sum, three of the four discretionary factors articulated in *Microsoft* counsel against granting Promnefstroy's application. While Feldman failed to overcome the assumption that the Netherlands would not object to United States assistance, this single factor is too meager to outweigh the availability of the evidence to the Dutch courts, the serious attempt to circumvent well-reasoned Dutch court orders, and the tremendous breadth of the application.

Further, granting Promnefstroy's application would frustrate rather than promote the twin aims of § 1782: " 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.' " *Schmitz,* 376 F,3d at 84 (quoting *In re Malev,* 964 F.2d 97, 100 (2d Cir.1992)). Put simply, this Court would not provide "efficient means of assistance" to litigants by giving parties an incentive, after losing in their original requests for information in the foreign tribunal, to rush to the United States in hopes of obtaining a second bite at the apple. Finally, ordering the discovery would not "encourage foreign countries by example," unless that example is to aid litigants in circumventing the judicial systems of foreign countries. Therefore, the Court finds that granting Promnefstroy's applications would not promote the twin aims of § 1782. [11]

III. CONCLUSION

Promnefstroy no doubt has a good-faith belief that it is the lawful owner of Yukos Finance and that it will be vindicated in its Dutch appeal. The Court is not convinced, however, that Feldman is an appropriate target for § 1782 relief in this case. Promnefstroy seeks primarily corporate records of transactions, legal actions, and finances of entities controlled by Misamore and Godfrey—entities organized mainly in the Netherlands, but in no case in the United States. Indeed,

Promnefstroy filed its § 1782 Application not because Feldman was the only party with these documents, but because Dutch courts had rejected similar requests for the information from more appropriate parties: Yukos Finance, Yukos Oil, Misamore, Godfrey, and Rebgun—all of which are parties, or controlled by parties, to the Dutch Proceedings.

For the reasons stated above, Promnefstroy's application to take discovery pursuant to 28 U.S.C. § 1782 is DENIED.

The Clerk of the court is respectfully requested to terminate this matter.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3335608

Footnotes

1 The facts described below are taken from the application, Feldman's oppositions, and the various exhibits and declarations attached to those documents.

2 Rebgun had initially appointed S.S. Shmelkov and L.J. Hogerbrugge as directors of Yukos Finance to replace Godfrey and Misamore, but Promnefstroy replaced them with Reid and Lynch as soon as it purchased Yukos Finance at the bankruptcy sale. (Feldman Opp'n Ex. 3 ¶ 2.7.)

3 Promnefstroy was joined in this action by Rosneft, a creditor of Yukos Oil that maintained that it was entitled to Yukos Finance's shares and assets in satisfaction of its claim against Yukos Oil. (Application Ex. H ¶ 2.33.)

4 The Dutch court noted, however, that Promnefstroy was seeking an "inquiry" in the Enterprise Chamber, another Dutch court, based on allegations of mismanagement against Godfrey and Misamore. (Application Ex. H ¶ 3.2.) This action was rejected by the Enterprise Chamber. (Feldman Opp'n Ex. 3 ¶ 3.16.)

5 Godfrey, Misamore, and Yukos Finance filed the action culminating in the February 25, 2009 decision against Reid and Lynch's similarly named Yukos Finance B.V., known in the Dutch Proceedings as "Yukos Finance (new)." Whatever the label, it is clear that Promnefstroy, Reid, Lynch, and "Yukos Finance (new)" are the same interested party for the purpose of the Dutch Proceedings.

6 Promnefstroy requested further relief in these proceedings, including having the shares and affairs of Yukos Finance put under administration. (Feldman Opp'n Ex. 7 ¶ 4.4.) These requests were rejected in the lower court. (*Id.*)

7 *Microsoft* divides the discretionary considerations into four factors. The *Intel* decision confined the same considerations to only two numbered factors. *Intel,* 542 U.S. at 264–65. Although the Court will analyze the current application under the four factors laid out in *Microsoft,* there would be no difference in the contents or the outcome of the analysis if the Court followed the *Intel* test.

8 In its March 19, 2009 filing to the Dutch courts, Promnefstroy asserted that, while Hydrocarbons was not owned by Yukos Finance:

> [I]t appears that all the shares in Yukos Hydrocarbons are held by the company Financial Performance Holdings B.V., domiciled in Amsterdam .... According to its registration in Amsterdam, managing director of Financial Perfonnance Holdings B.V. is Godfrey. In addition, it appears from the registration also that all shares in this company are held by the foundation stichting Administratiekantoor Financial Performance Holdings, of which, according to the registration, managing directors are Godfrey and Misamore. Thus Godfrey and Misamore are the executive officers of Yukos Hydrocarbons.

(Application Ex. L ¶ 29.)

9 The second *Intel* factor is "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 .... Specifically, a district court could consider 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." *Intel,* 542 U.S. at 264–65. *Microsoft,* on the other hand, considers these inquiries as analytically distinct under factors two and three, While some overlap exists between the two inquiries, the Court finds the *Microsoft* formulation more suited to analyzing the facts of this application.

10 In *Intel* the Court rejected the so-called "foreign discoverability rule," which asked whether, if the documents sought were actually located in the foreign jurisdiction, the applicant could obtain them in the foreign tribunal. *Intel,* 542 U.S. at 260; *see also In re Servicio Pan Americano de Proteccion, C.A.,* 354 F.Supp.2d 269, 274–75 (S.D.N.Y.2004). In *Servicio Pan Americano,* the Honorable Victor Marrero, District Judge, ordered discovery to proceed where a defendant in a foreign proceeding applied to take discovery against the plaintiff in those proceedings to overcome a "technical limitation" of Venezuelan discovery rules. 354 F.Supp.2d at 274–75 ("The Court instead understands Pan Americano's application as a reasonable effort to overcome a technical limitation of Venezuelan discovery rules in order to obtain documents that are critical to its defense from *a corporation located within this District."* (emphasis added)). In this case, however, the documents that Promnefstroy primarily seeks relate to Dutch companies, in addition to Yukos Oil, a Russian company, and Yukos Hydrocarbons, a British Virgin Islands company, Further, Promnefstroy's subpoena sweeps broadly, seeking any and all documents that may touch a myriad of corporate entities. The applicant in *Servicio Pan Americano,* by contrast, requested a targeted subpoena seeking only documents relating to a single insurance policy. *Id.* at 275.

11 Because the purposes of § 1782 are best served by denying Promnefstroy's application, the Court need not address Feldman's argument for judicial estoppel and request for reciprocal discovery.

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