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Is **Section 1782 Discovery** Available From **Corporations Not 'at Home'** Under 'Daimler'?

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A recent New York Law Journal article explored a decision in which Southern District Judge Valerie Caproni applied modern constitutional limitations on personal jurisdiction to an application for discovery from a nonparty under 28 U.S.C. §1782. See Edward M. Spiro and Judith L. Mogul, "At the Intersection of Section 1782 Subpoenas and Personal Jurisdiction," N.Y.L.J. Oct. 17, 2017, discussing *Australia and New Zealand Banking Group v. APR Energy Holding*, 2017 WL 3841874 (S.D.N.Y. Sept. 1, 2017), app. docketed (2d Cir. Oct. 3, 2017) (No. 17-3164).

More recently, another Southern District judge answered an even more fundamental question: Does §1782 even *authorize* issuance of subpoenas to a corporation that is not "at home" here under *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014)—i.e., one that is neither incorporated nor maintains its principal place of business in New York. As Judge William Pauley concluded in *In re Sargeant*, 2017 WL 4512366 (S.D.N.Y. Oct. 10, 2017), the answer is no.

Judge Caproni in *ANZ Bank* noted, but did not resolve, this statutory issue. She found it unnecessary to decide whether the statute authorized issuing a subpoena to a foreign bank with a New York branch, because under prevailing constitutional tests the applicants' allegations failed to support either general or specific personal jurisdiction. In contrast, in *In re Sargeant*, Judge Pauley held that a foreign limited liability company was not "found" in the Southern District within the meaning of §1782, because it was not "at home" here in the *Daimler* sense, even though it had an office in New York. Judge Pauley therefore denied an ex parte application for the issuance of a §1782 subpoena to the company.

This article addresses the text of §1782, pre-*Daimler* decisions construing the relevant statutory requirement and the recent *Sargeant* decision, and shows how Judge Pauley's statutory analysis in that case

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limits §1782's reach even more significantly than the constitutional analysis of *ANZ Bank*.

Section 1782

Section 1782 authorizes a district court to order a person to provide discovery for use in a foreign proceeding if: (1) that person "resides or is found" in the district in which the court sits; (2) the discovery is "for use in a proceeding in a foreign or international tribunal" and (3) the applicant is either a foreign or international tribunal or "any interested person." If, and only if, the applicant has carried its burden on all three prerequisites, the district court has the discretion to grant its request for discovery, including by issuing subpoenas for documents or testimony, under factors set out in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).

Pre-'Daimler' Case Law

The Second Circuit, in a pre-*Daimler* decision, held that an *individual* residing abroad was "found in" the Southern District for §1782 purposes when he was served with a subpoena while visiting New York. *In re Edelman*, 295 F.3d 171 (2d Cir. 2002). The *Edelman* court cited a Supreme Court plurality opinion, *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), sustaining the exercise of personal jurisdiction based on the traditional practice of "tagging" an individual temporarily in the state.

As Judge Pauley explained, however, "*Edelman* does not control the outcome" in cases involving *corporate* respondents, "because *Burnham's* holding applied only to individuals, not corporate entities." *Sargeant*, 2017 WL 4512366, at *3. Indeed, before *Daimler*, a separate line of §1782 decisions involving corporations emerged; most district courts construed "found" as implicating the then-prevailing test for general personal jurisdiction.

Southern District Judge Jed Rakoff, in *In re Godfrey*, 526 F. Supp. 2d 417 (S.D.N.Y. 2007), quashed §1782 subpoenas addressed to non-New York companies that had offices or were registered to do business here. Judge Rakoff noted that the petitioners had failed to allege that the respondents "have engaged in systematic and continuous activities in this district"—New York's pre-*Daimler* standard for general jurisdiction. Id. at 422. Prefiguring *Daimler*, Judge Rakoff observed that "petitioners have cited no case finding that a corporation" was found in a district for §1782 purposes, "where the corporation was neither incorporated nor headquartered there." Id. In *In re Nokia Corp.*, 2007 WL 1729664 (W.D. Mich. June 13, 2007), the court quashed a §1782 subpoena, holding that a German corporation was not "found" in the Western District of Michigan even though it owned a subsidiary headquartered there and had previously alleged, in a patent infringement suit filed there, that it had a place of business in that district. Id. at *3-4. In *In re Inversiones y Gasolinera Petroleos Valenzuela, S. de R.L.*, 2011 WL 181311 (S.D. Fla. Jan. 19, 2011), a magistrate judge, applying the *Godfrey* analysis, held that Exxon Mobil Corporation was "found" in the Southern District of Florida because it was "undisputed[ly]" subject to general personal jurisdiction in Florida under then-governing principles (based on its "continuous and systematic activities" there). Id. at *8. And in *In re Thai-Lao Lignite (Thailand)*, 821 F. Supp. 2d 289 (D.D.C. 2011), a §1782 application was denied because the applicants failed to show that the respondents, including a Delaware corporation headquartered in Maryland, were "found" in the District of Columbia.

These decisions drew support from an article by Prof. Hans Smit, who had played a significant role in drafting the 1964 amendments to §1782, which (among much else) introduced "found" to the statute. Professor Smit opined that as applied "to legal rather than natural persons," the term "found" "may safely be regarded as referring to judicial precedents that equate systematic and continuous local activities with presence," in assessing entities' amenability to general personal jurisdiction. Hans Smit, "American Assistance

to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited," 25 Syracuse J. Int'l L. & Com. 1, 10 (1998).

'Daimler' and 'Sargeant'

In *Daimler*, the Supreme Court changed the law of personal jurisdiction: The inquiry now "is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 761(internal quotation marks and citation omitted)). After *Daimler*, a corporation is almost invariably "at home," and subject to general jurisdiction, *only* in its state of incorporation and principal place of business.

In *Sargeant*, Judge Pauley addressed for the first time the impact of *Daimler* on the meaning of "found" in §1782. The applicant sought *ex parte* authorization to issue a subpoena to a litigation funding company that was not incorporated in New York but allegedly maintained "one of its 'primary business offices'" in Manhattan. *Sargeant*, 2017 WL 4512366, at *4. This allegation failed to establish the first statutory prerequisite of §1782: that the person from whom discovery is sought "resides or is found" in the District. Judge Pauley held that "[a]t [a] minimum, … compelling an entity to provide discovery under § 1782 must comport with constitutional due process." Id. at *3. And "if a business entity could be subject to personal jurisdiction anywhere it maintains a physical presence—i.e., an office—then *Daimler*'s holding would be rendered meaningless." Id. at *4. Accordingly, the court concluded, that to be subject to §1782 discovery, "a corporate entity must at the very least be subject to the court's general jurisdiction under *Daimler*." Id.

Significance of 'Sargeant'

Sargeant, even more (and more clearly) than *ANZ Bank*, limits the application of §1782 subpoenas in cases involving corporate respondents. Under *Sargeant*, any corporation not "at home" in New York under *Daimler*—including foreign banks with branches, agencies or representative offices here—is simply beyond the reach of §1782.

Judge Pauley's statutory analysis in *Sargeant* should render irrelevant any inquiry into whether specific jurisdiction could constitutionally support a particular §1782 subpoena addressed to a corporation. After all, if the proponent has failed to establish a *statutory* basis for jurisdiction, the court need not consider whether exercising jurisdiction would comport with due process. See, e.g., *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007). This approach reflects judicial "respect for the doctrine of constitutional avoidance." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 61 (2d Cir. 2012). And because §1782 fails to authorize *specific* jurisdiction to any degree, whether a corporation is "at home" in the relevant district under *Daimler* should be determinative, regardless of the "nexus" that might exist "between [the respondent's] New York contacts and the subject matter of the discovery sought." *ANZ Bank*, 2017 WL 3841874, at *5. However, in deciding another §1782 case last month, Judge Pauley appears to have left the door open to a specific jurisdiction theory, while rejecting the particular applicant's reliance on "speculation" to support it. *In re Fornaciari,* 2018 WL 679884 (S.D.N.Y. Jan. 29, 2018). Evolving case law exploring the relationship between §1782 and the modern law of personal jurisdiction will continue to bear close watching.