20-678(L)

20-679(CON), 20-680(CON)

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: APPLICATION OF GORSOAN LIMITED FOR AN ORDER PURSUANT TO 28 U.S.C. 1782 TO CONDUCT DISCOVERY FOR USE IN A FOREIGN PROCEEDING,

Petitioner.

GORSOAN LIMITED,

Petitioner-Appellee,

—against—

STUART SUNDLUN, ZOE BULLOCK REMMEL, EUGENIA BULLOCK, ZOYA KUZNETSOVA,

Respondents-Appellants,

JANNA BULLOCK,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR INTERVENOR-APPELLANT

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INTRODUCTION

Section 1782 permits discovery of evidence "for use" in a pending or contemplated foreign proceeding, but not otherwise. Remarkably, in its brief Gorsoan fails to articulate how the discovery it seeks will be used, if at all, in the pending Cyprus proceeding. Gorsoan told the district court that the discovery might be used to establish Bullock's contempt of an ancillary asset freeze and disclosure order. The district court accepted this rationale and based its ruling upon it, even though no contempt proceeding was pending or within reasonable contemplation, and even though Gorsoan had never mentioned this rationale in its application for §1782 discovery.

Now Gorsoan abandons this rationale. It does not even argue that a contempt proceeding is ongoing or reasonably contemplated. Instead, it claims that §1782 is available for "non-adjudicative asset identification" so long as the identification occurs in the context of a "larger adjudicative proceeding." In other words, according to Gorsoan, it doesn't matter that Gorsoan has no plans to "use" the discovery "in" the Cypress proceeding; all that matters is that the Cyprus proceeding is ongoing, and that Bullock's assets may one day be used to satisfy a judgment. But §1782 does not authorize federal courts to assist foreign litigants seeking to identify assets that may one day be used to satisfy a judgment that the litigant has not yet obtained. Gorsoan's argument squarely conflicts with the

statutory text and the controlling precedent holding that discovery is only "for use" under §1782 if the applicant has a means of "injecting the evidence into the proceeding" so that it can "be employed with some advantage or serve some use" to increase the "chances of success." Indeed, Gorsoan's interpretation would expand the scope of §1782 far beyond its terms and impose vast new burdens on courts as well as the many businesses and individuals in the U.S. who may have records related to the assets of a foreign litigant.

Gorsoan attempts to avoid the central question on this appeal by arguing that Bullock and Respondents are precluded from raising the "for use" requirement because Bullock did not make this argument in a prior §1782 proceeding. But the prior §1782 proceeding involved different subpoenas and sought different documents from different parties, and there is no case supporting Gorsoan's argument. Gorsoan raised the same argument below. Unsurprisingly, the district court did not even bother to address it.

At bottom, Gorsoan's application is little more than an attempt to harass Bullock into settling its Cyprus case, which arises from a politically motivated criminal prosecution in Russia, by using the federal courts to seek extraordinarily overbroad discovery from Bullock's elderly mother, daughters, and an associate. Even if Gorsoan had satisfied the statutory requirements for §1782 discovery,

discovery should have been denied because the district court committed three errors in exercising its discretion, none of which Gorsoan even attempts to defend.

The district court's decision should be reversed.

ARGUMENT

I. GORSOAN FAILED TO SATISFY THE STATUTE'S "FOR USE" REQUIREMENT

The district court considered whether Gorsoan was entitled to discovery under §1782 a "difficult question." Its sole basis for finding an adjudicative "use" "within reasonable contemplation" was Gorsoan's assertion that asset discovery *might* be used to support a motion for contempt relating to Bullock's non-compliance with the Cyprus court's asset freezing and disclosure order. Bullock demonstrated in her opening brief that such a speculative, theoretical purpose is insufficient under the statute. In response, Gorsoan no longer even pretends the hypothetical "contempt motion" was its purpose in bringing the §1782 application and makes no attempt to defend the district court's reasoning. Instead, it now claims, for the first time, that "non-adjudicative asset identification" is *itself* a valid statutory use under §1782. As explained below, this argument, like the district court's reasoning, defies the statutory text and the controlling caselaw.

A. Non-Adjudicative Asset Identification Is Not Discovery "For Use" In A Foreign Proceeding

Discovery under §1782 must be "for use in a proceeding in a foreign…tribunal." "By adopting the phrase 'for use,' Congress meant to require that §1782 applicants show that the evidence sought is 'something that will be employed with some advantage or serve some use in the proceeding.'" *Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 120 (2d Cir. 2015) (quoting *Mees v. Buiter*, 793 F.3d 293, 297 (2d Cir. 2015)). The §1782 applicant therefore must have a means of "injecting the *evidence* into the proceeding," *Certain Funds*, 798 F.3d at 120 (emphasis added), and of using it to "increase [the] chances of success, *Mees*, 793 F.3d at 299.

This threshold "for use" requirement is why discovery was barred in *Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24 (2d Cir. 1998), where an "already extant judgment [was] merely being enforced" against the assets of a bankruptcy estate, *id.* at 28, and why courts have held that discovery is not available merely to obtain asset identification, *see Jiangsu Steamship Co. v. Success Superior Ltd.*, 14 Civ. 9997, 2015 WL 518567, at *2-3 (S.D.N.Y. Feb. 5, 2015); *In re MT Baltic Soul Produktentankschiff-Ahrtsgesellschaft mgH & Co. KG*, 15 Misc. 319 (LTS), 2015 WL 5824505, at *2 (S.D.N.Y. Oct. 6, 2015); *In re Asia Maritime Pacific, Ltd.*, 253 F. Supp. 3d 701, 706-07 (S.D.N.Y. 2015) (Caproni, J.).

And it is why Gorsoan may not obtain asset discovery here absent a reasonably contemplated use for that evidence in the Cyprus proceeding.

Ignoring the text of the statute and controlling caselaw, Gorsoan argues that a §1782 application seeking "non-adjudicative asset identification" satisfies the "for use" requirement so long as the information it seeks relates to "a larger adjudicative proceeding." (Gorsoan.Br.32-33). But this Court's cases establish that §1782 discovery is not available merely because it relates to a foreign litigation and might be of general use to the applicant. "The key question…is not simply whether the information sought is relevant, but whether the [applicant] will actually be able to *use* the information *in the proceeding*." *Certain Funds*, 798 F.3d at 120 (emphasis added). As this Court explained, that the "information might also be *useful* to the [applicant] in determining" whether to challenge a foreign proceeding "does not imply that there is any way for the [applicant] to *introduce* that information as *evidence* in the [foreign] proceedings or on appeal." *Id.* at 122 (emphasis added). Indeed, this Court has repeatedly insisted that "a Section 1782 applicant must establish that he or she has the practical ability to inject the requested information into a foreign proceeding." *In re Accent Delight Int'l Ltd.*, 869 F.3d 121, 132 (2d Cir. 2017); *accord Certain Funds*, 798 F.3d at 120.

Gorsoan cherry-picks one sentence in *In re Application of Aldunate*, 3 F.3d 54 (2d Cir. 1993), to argue that "non-adjudicative asset identification" is permissible under §1782. (Gorsoan.Br.33). But the quoted phrase is out of context, and *Aldunate* is inapposite. *Aldunate* was a §1782 proceeding brought by the provisional guardians of an allegedly incompetent 86-year old Chilean businessman. *Id*. at 55-56. The Chilean court required them to submit "a certified inventory of the [businessman's] property" as a condition for approving their guardianship. *Id.* at 56, 62. Thus, when the provisional guardians filed a §1782 application seeking information about U.S. property owned by the businessman, that information was required for a prospective ruling and thereby served an adjudicative purpose. The "for use" requirement was clearly met. Indeed, the primary disputed issue was not whether the information would be used, but whether §1782 discovery is permitted even if the same discovery is not generally permissible in the foreign jurisdiction. *See* 3 F.3d at 58-62.

Gorsoan focuses upon the Court's statement that "[w]hether or not the compilation of the inventory is contentious or adjudicative is irrelevant, because it is part of the incompetency proceeding." *Id.* at 62. But that statement does not detract from the fact that the information sought in *Aldunate* had a clear adjudicative purpose: to satisfy a necessary predicate for the approval of guardianship. It might well be, as the Court observed, that the compilation of the

information as presented by the provisional guardians was neither contested nor itself subject to adjudication, but the information nevertheless had a clearly defined "use" and was required by the Chilean court to adjudicate the question of whether the guardianship could be approved. Here, Gorsoan has abandoned any pretense about hypothetical contempt proceedings, and, in contrast to the straightforward scenario presented in *Aldunate*, Gorsoan is unable to demonstrate that the Cyprus proceeding will entail any ruling based on the information sought in its latest round of subpoenas.

Gorsoan fails to identify any other appellate precedent that even plausibly supports its interpretation of the statute. Instead, it points to three district court decisions in which courts allowed discovery of a party's assets. The cases are non-binding and, in any case, inapposite because in each case the asset discovery was plausibly destined for an adjudicative use in the foreign proceeding. In *In re Vale S.A.*, 20-mc-199, 2020 WL 4048669, at *4 (S.D.N.Y. July 20, 2020), the Magistrate Judge permitted discovery of assets for use in a pending adjudicatory proceeding in the High Court in London in which various parties were pursuing "proprietary claims" relating to the assets themselves. Similarly, in *In re Stati*, 15-mc-91059, 2018 WL 474999, at *4 (D. Mass Jan. 1, 2018), the applicants "need[ed] the discovery concerning ownership of assets and the interrelationship of [various entities] for use in…ongoing, contested, and adjudicatory foreign

proceedings" in which there were, among other things, "contested issues of ownership and/or sabotage." And in *In re Celso De Aquino Chad*, 19-mc-261, 2019 WL 2502060, at *1-3 (S.D.N.Y. June 17, 2019), the court determined that the requested discovery was "for use" by the administrator of a Brazilian bankruptcy in connection with his "ongoing statutory duties" to locate the assets of three insolvent estates. None of these cases involved discovery that could not be used in connection with the merits of a pending proceeding.

Gorsoan next argues that "prohibiting Section 1782 discovery for use in any attachment or enforcement proceeding would be to read an additional requirement into the plain language of Section 1782." (Gorsoan.Br.32). But Bullock does not contend that §1782 discovery can never be used in proceedings to enforce a judgment. Rather, Bullock argues that §1782 may not be used to obtain discovery unless the applicant can *use* the discovery in the predicate foreign proceeding. The requirement that discovery be "for use in a proceeding in a foreign…tribunal" is imposed by the text of the statute itself.

Finally, Gorsoan does not explain how its argument, if accepted, would be anything other than an open door for foreign litigants to use U.S. courts to obtain asset disclosure in aid of preliminary freezing and disclosures orders—so-called *Mareva* injunctions—that the Supreme Court has held to be beyond the equitable powers of the federal courts. (*See* Br.36, 49-50). As the law stands, §1782

discovery is unavailable for this purpose, because it would be disclosure for the sake of disclosure, not disclosure "for use" in the pending adjudicatory proceeding. Gorsoan's theory, if accepted, would eliminate this limit on §1782 discovery, and lead to a flood of §1782 applications.

B. Gorsoan Did Not Establish That Its Hypothetical Contempt Motion Was Within Reasonable Contemplation

The basis for the decision below was the district court's belief that Gorsoan "intends to file a motion for contempt against Bullock in the Cyprus court regarding her 'satisfaction of the freezing order abroad'" and that the contempt motion "could have consequences on the case's outcome." (SPA-14-15). But as Bullock argued in her opening brief (at 41-42), §1782 discovery for non-pending foreign proceedings is not permitted absent "reliable indications" founded on "objective" facts that the foreign adjudicative proceeding is "within reasonable contemplation." *Certain Funds*, 798 F.3d at 123. Because Gorsoan failed to offer a "concrete basis from which [the district court could] determine that the contemplated proceeding [was] more than just a twinkle in counsel's eye," *id.* at 124, the §1782 application should have been dismissed.

Gorsoan completely ignores this point. It does not deny that it has never made firm representations that it will actually use the discovery for a contempt motion. (*See* Br.20, 43). Gorsoan also does not deny that Bullock's non-compliance with the Freezing and Disclosure Order has never been in dispute, or

that it has made representations to U.S. courts making exactly this point since 2013. (*See* Br.19-20, 43). And yet Gorsoan has declined to pursue contempt proceedings against Bullock. Remarkably, even now, it makes no affirmative representations that it intends to file a contempt motion if it obtains §1782 discovery. *Cf. Certain Funds*, 798 F.3d at 124 (pointing to the five years that had elapsed between the accrual of the foreign cause of action and the filing of the §1782 application in holding that foreign proceedings were not "within reasonable contemplation").

In short, Gorsoan entirely failed to show that contempt proceedings in Cyprus are "within reasonable contemplation." Having launched its discovery efforts in the U.S. in lieu of seeking contempt in Cyprus, Gorsoan cannot now claim that the very purpose of the discovery it seeks is to support an application that it has not pursued and has consistently chosen not to pursue. The district court erred in finding that Gorsoan's purely hypothetical contempt motion was "within reasonable contemplation," and Gorsoan's application should have been dismissed.

C. Gorsoan's Failure To Mention Any "Contempt Motion" Argument In Its §1782 Application Precludes Discovery For Any Such Use

The pretextual nature of Gorsoan's contempt rationale is evident in the fact such a rationale was never set forth in its application for discovery under §1782. As this Court has made crystal clear, a §1782 applicant must satisfy the "for use" requirement "*at the time the §1782 application was filed*." *Certain Fund*, 798 F.3d

at 124 (emphasis added); *accord Matter of Wei*, 18 Misc. 117, 2018 WL 5268125, at *2 n.1 (D. Del. Oct. 23, 2018). Given that §1782 applications are typically *ex parte*, the requirement that applicants "put their cards on the table" is eminently reasonable.

Gorsoan does not disagree that the "for use" requirement must be satisfied at the time the application was filed. Instead, it argues that the statute does not require applicants to make "an inventory of every possible use of discovery in the proceeding abroad." (Gorsoan.Br.34). But while applicants may not have to itemize *all* possible adjudicative uses, they must show that *at least one such use* is within reasonable contemplation. Gorsoan failed to do so.

Gorsoan also points to its 2013 Application—cross-referenced in its 2018 Application—in which it noted Bullock's failure to make "any disclosure" in Cyprus. (Gorsoan.Br.34). But the 2013 Application does not describe any contemplated motion for contempt in Cyprus, merely Bullock's failure to comply with the Freezing and Disclosure Order in Cyprus. This is insufficient to satisfy Gorsoan's burden of showing, at the time it filed its application, that the discovery was destined to be "used" in adjudicative proceedings in Cyprus.

II. EVEN IF THERE WAS A VALID STATUTORY USE, THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING DISCOVERY

Bullock's opening brief raised three separate arguments regarding the district court's mishandling of the *Intel* factors. First, Bullock argued that the district court erred as a matter of law by rejecting on *forum non-conveniens* grounds Bullock's argument that the Cyprus proceedings were part of an abusive and politically charged prosecution and asset hunt orchestrated by the Russian state, for which Gorsoan serves merely as a nominal proxy. (Br.46-48). Second, Bullock argued that the pre-judgment asset discovery sought here would both violate norms embodied in the Federal Rules of Civil Procedure and provide a backdoor into federal court for so-called *Mareva* injunctions, which the Supreme Court has held to be beyond the equitable powers of the federal courts. (Br.48-49). Third, Bullock argued that the staggering breadth of Gorsoan's subpoenas, which sought documents about every aspect of Respondents' lives, including their social lives, regardless of any connection to the alleged municipal bond fraud in Russia, demonstrated bad faith, and was reason to deny the application *in toto*. (Br.50-51).

Gorsoan has nothing at all to say about these three specific points. Its only response is to assert that that "Bullock's argument is precluded" as "the appropriateness of Gorsoan's discovery was already litigated and decided during the original action." (Gorsoan.Br.36). But as explained in Point III below, the

subpoenas in this matter are not the same or even similar to the subpoenas in the 2013 Application, and in any case, are addressed to Respondents, as to whom the appropriateness of the discovery Gorsoan seeks here has not been decided.

III. RES JUDICATA DOES NOT BAR RESPONDENTS' OBJECTIONS TO GORSOAN'S SUBPOENAS

Gorsoan tries to evade the central question on appeal by arguing that Bullock and Respondents are barred from challenging Gorsoan's failure to satisfy the "for use" requirement because Bullock did not do so in opposition to Gorsoan's 2013 application. (Gorsoan.Br.25-31). But Gorsoan raised this same argument—which it characterizes as "claim preclusion"—below, and the district court declined to consider it, for good reason: It has no basis in fact or law.

A. As a preliminary matter, the distinctions between the subpoenas are critical to understanding why claim preclusion doesn't apply, and why the district court did not even bother to address it. The subpoenas at issue in the 2018 Application are not the same, or even similar to, the subpoenas issued pursuant to the 2013 Application. They seek different categories of documents, from a different time period and different parties.

First, Bullock had no viable "for use" challenge to the 2013 subpoenas, because they primarily sought information relevant to the merits of Gorsoan's claims in the Cyprus proceedings, which arise from an alleged municipal bond fraud supposedly perpetrated between 2005 and 2007. (A-13). As Gorsoan

explained to the district court in 2013, its subpoenas were "directly relevant to [its] claims in the Cyprus proceeding" and called for evidence dating back to 2005 "regarding the issuance of the Bonds in Russia, and the various transactions benefitting Bullock and her companies allegedly accomplished through the fraudulent diversion of investments in the Bonds." (Dkt.2 in 13 Misc. 397, at 7-8; *see also* A-320-22). Only two demands sought information about assets supposedly subject to the Cyprus court's Freezing and Disclosure Order. (A-320-21). Significantly, those demands sought information about Bullock's assets dating back to the period of the alleged fraud—information that plausibly could have assisted Gorsoan on the merits.

In contrast, the subpoenas in this matter seek *only* asset discovery unconnected the merits of the case. Each of the 2018 subpoenas defines the "relevant time period" as beginning five years *after* the underlying alleged fraud, on August 24, 2012—the effective date of the first Cyprus asset freezing order. (A-63, A-70, A-76, A-82, A-158). And the demands are focused squarely and exclusively on assets. The subpoena issued to Zoe Bullock Remmel, for example, seeks "[a]ll documents concerning your Assets," "[a]ll documents concerning any Assets you or Bullock Transferred to your Husband," "[a]ll documents concerning any Assets you or Bullock Transferred to your Children," "[a]ll documents prepared for you by third parties concerning your Assets," "[a]ll documents

concerning your expenses and sources of payment(s) for those expenses, including without limitation, costs in connection with any of your Assets, your Husband's Assets, or your Children's Assets," along with similar categories of documents. (A-64). The subpoenas issued to Eugenia Bullock, Zoya Kuznetsova, and Stuart Sundlun likewise focus exclusively on assets. (A-71, A-77, A-83). Indeed, Gorsoan has conceded that, in contrast to the discovery it sought in 2013, the discovery it now seeks is "unlikely" to "bear on the fraud itself." (A-332).

Second, the 2013 subpoenas and the 2018 subpoenas—with one exception—seek discovery from different parties. The 2013 subpoenas sought discovery from Bullock, Zoe Bullock Remmel, Stuart Smith, and RIGroup LLC. (A-13). In contrast, the 2018 subpoenas seek discovery from Eugenia Bullock, Zoe Bullock Remmel, Zoya Kuznetsova, and Stuart Sundlun. (A-12). The only Respondent in the 2018 Application also a Respondent in the 2013 Application is Zoe Bullock Remmel, Bullock's oldest daughter. However, as Gorsoan told the district court in its *ex parte* application, the 2018 Bullock Remmel subpoena is distinct from the 2013 Bullock Remmel subpoena because the earlier subpoena solely "concerned the company Solferino Developments S.A." (A-13). In contrast to the limited category of corporate records sought from Bullock Remmel in the 2013 Application, "[t]he [2018] subpoena…concerns assets held by Bullock Remmel" herself. (A-13).

B. Given these facts, claim preclusion simply does not apply. Even if a defense argument not raised in a prior proceeding could be precluded in a subsequent proceeding, a "necessary predicate" for such preclusion is "identity of claims" between the two proceedings. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1595 n.2 (2020). In *Lucky Brand*, the Supreme Court questioned whether principles of claim preclusion could ever bar a litigant from raising a defense not raised in a prior proceeding. Although it declined to decide whether to recognize such defense preclusion at all, it held that, even assuming the doctrine is valid, "a defense can be barred only if the 'causes of action are the same' in the two suits—that is, where they share a 'common nucleus of operative fact.'" *Id.* at 1595. Here, the subpoenas (i.e., the "claims") at issue in the 2018 Application are not the same as the subpoenas at issue in the 2013 Application. They seek different types of discovery from different parties. Gorsoan does not address this point—or *Lucky Brand*, the controlling precedent—which disposes of its claim preclusion argument.[1]

[1] *Lucky Brand* reversed *Marcel Fashions Grp. Inc. v. Lucky Brand Dungarees, Inc.*, in which this Court had held, for the first time, that principles of claim preclusion may, in certain circumstances, bar litigation defenses (in *Marcel*, the affirmative defense of "release") that could have been raised in a prior proceeding. 898 F.3d 232, 241 (2d Cir. 2018). However, while aspects of *Marcel* may remain the law of this Circuit, *Marcel* had no occasion to consider whether the "defense preclusion" rule extends to defense arguments attacking a plaintiff's prima facie entitlement to relief. The doctrine that *Marcel* termed "defense preclusion"—and

Moreover, even if there had been any overlap between the 2013 and 2018 subpoenas, *res judicata* would not bar Bullock or Respondents from arguing that the subpoenas here failed to satisfy the statutory "for use" requirement. As the Supreme Court observed in *Lucky Brand*, "'[v]arious considerations, other than actual merits, may govern' whether to bring a defense." 140 S. Ct. at 1595 n.2 (citation omitted). For this reason, "courts often 'assume[e] that the defendant may raise defenses in the second action that were not raised in the first, even though they were equally available and relevant in both actions.'" *Id.*

Similarly, this Court has recognized that "there exist distinctions between preclusion as a shield *by* defendants and as a sword *against* defendants." *Marcel*, 898 F.3d at 239. Notably, "[i]t might be unfair to bar a defendant from raising a defense that it elected not to bring in an earlier action, because that action was of a significantly smaller scope, or the defense was somehow tangential to the matter." *Id.* at 240. A defendant, rather, "should be given room to make tactical choices…without… forever abandoning a defense." Accordingly, a defense not raised in a prior proceeding may only be precluded if the district court, "in its discretion, concludes that preclusion of the defense is appropriate because efficiency concerns outweigh any unfairness to the party whose defense would be

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which the Supreme Court found "good reasons to question," 140 S. Ct. at 1595 n.2—should not be further extended to this new context.

precluded." *Id.* at 241 & n.8 (observing that "th[e] balancing element of the defense preclusion doctrine is best left to the discretion of the district court").

Here, of course, the district court has made no such finding. And for good reason: "Identity of claims" is lacking, and even to the extent that there is some overlap between the 2013 and the 2018 subpoenas, any "for use" argument would have been "tangential" to the defense of the 2013 Application and certainly would not have resulted in the denial of all discovery. As such, preclusion here would not advance the interest of efficiency, and it would be fundamentally unfair to preclude Respondents from raising the "for use" argument in *this proceeding* now that it is centrally relevant.

C. Gorsoan's claim preclusion argument should also be rejected because Respondents were not parties to the earlier proceeding and had no interests in that proceeding (with the exception of Bullock Remmel, from whom no asset discovery was sought in the earlier proceeding). They are also not in privity with Bullock and are not subject to any preclusive effect of the earlier matter. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

In a futile effort to establish privity, Gorsoan invokes the so-called "virtual representation" rule, saying that "[p]rivity may be found where a party's interest in litigation is virtually identical to an interest it had in a prior litigation, where it was not actually named." (Gorsoan.Br.30 (quoting *Melwani v. Jain*, 02-cv-1224, 2004 WL 1900356, at *2 (S.D.N.Y Aug. 24, 2004)). But the Supreme Court has expressly disapproved such a "virtual representation" privity rule. *Taylor*, 553 U.S. at 898. And this Court recently reaffirmed that a nonparty may not be found to be in privity with a party based "solely on their sufficiently close relationship and *identical* interests." *Sacerdote v. Cammack Larhette Advisors, LLC*, 939 F.3d 498, 509 (2d Cir. 2019) (emphasis added). In any event, Bullock Remmel aside, Respondents had *no* interest in the 2013 Application, and so would not have been bound by that proceeding, even if the "virtual representation" rule remained good law. Nor is a family relationship sufficient to establish privity. *See* C. Wright & A. Miller, Federal Practice & Procedure § 4459 (3d ed.).

Gorsoan's other privity arguments go nowhere. Under the "adequate representation" rule (Gorsoan.Br.29), a party may be bound by an earlier judgment "if his interests were adequately represented by another *vested with the authority* of representation." *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000) (emphasis added). The exception applies only in "limited circumstances," such as "class action…and suits brought by trustees, guardians, and other

fiduciaries." *Taylor*, 553 U.S. at 894-95, 900-01; *see, e.g.*, *Monahan*, 214 F.3d at 285-88 (members of correction officers union were in privity with union president who previously brought suit in his official capacity). Apart from Bullock Remmel, Respondents had no interests in the earlier litigation, nor was Bullock "vested with the authority" to represent them.

Gorsoan also speculates that Respondents "financed [Bullock's] defense" of the 2013 Application. (Gorsoan.Br.31). But speculation is not proof, and even if true, it is insufficient to show that Respondents "assume[d] control" of the defense of the 2013 Application as required for privity. *Taylor*, 553 U.S. at 895 (privity may be established where a party "assumed control" over the prior litigation such that it "had the opportunity to present proofs and argument" and "has already had his day in court"). Even where it can be demonstrated that "Appellants helped to finance" a prior suit, that alone is "not sufficient, without other facts, to warrant the application of res judicata." *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 652 (4th Cir. 2005).

Finally, Gorsoan argues that privity exists between Bullock and Respondents because *its* interest in discovery from Respondents is the same as *its* interest in discovery from Bullock. (Gorsoan.Br.30). But the six recognized privity rules focus on the relationship between the parties allegedly in privity with each other, not on the interests of the party invoking privity. *See Taylor*, 553 U.S. at 893-95;

Sacerdote, 939 F.3d at 506. Gorsoan's argument should be rejected because it turns privity law on its head. *See Taylor*, 553 U.S. at 901 (rejecting an "all-things-considered balancing approach" to privity in favor of "crisp rules with sharp corners").

Ultimately, Gorsoan's *res judicata* argument proves too much. If Gorsoan is right, and its subpoenas in this case seek the same discovery it was awarded in the 2013 Application, then its application is barred by the doctrine of merger, and it is limited to compelling enforcement of its prior subpoenas. *See* Restatement (Second) of Judgments § 17 (1982) ("If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment[.]"). But the subpoenas in this matter are not the same as the subpoenas in the prior action. They seek different discovery, from different parties. Accordingly, *res judicata* has no bearing on this case.

CONCLUSION

The district court's order granting Gorsoan's motion to compel and denying Bullock's motion to quash should be reversed and the §1782 application dismissed.

Dated: New York, New York
October 20, 2020

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Dated: October 20, 2020

/s/ Alexandra A.E. Shapiro
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