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"Found" Wherever We've Stayed: Interpreting the "Found" Requirement of 28 U.S.C. § 1782

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Under 28 U.S.C. § 1782, parties with an interest in an actual or anticipated foreign litigation can seek discovery for that foreign litigation from entities who reside or are "found" in the United States. Thus, for example, a party to a foreign litigation can obtain discovery in the United States from its adversary's United States subsidiary or any other entity that is "found" here, making § 1782 a very valuable too. Indeed, as opposed to foreign jurisdictions where discovery is limited or effectively non-existent, a U.S. resident subject to § 1782 discovery could be compelled to comply with full scope of discovery allowable under the Federal Rules. *Cf. Crocs, Inc. v. Cheng's Enterprises, Inc.*, Case No. 1-06-cv-00605 (D. Colo. Jan. 11, 2021) (Order) ("In a colossal waste of attorney time and judicial resources, Dawgs refuses to produce a copy of the Settlement Agreement entered into between itself and George Boedecker, a cofounder of Crocs, even though all parties agree the document is relevant and material."). Accordingly, what it means to be "found" in a jurisdiction is a key question for obtaining information from foreign adversaries.

A legal entity is indisputably "found" where it is incorporated or has its principal place of business. *See In re Valitus, Ltd.*, Case No. 20-mc-91133-FDS, 2020 WL 6395591, *5 (D. Mass. Nov. 2, 2020); *In re Kei Animal Clinic*, Case No. 20-mc-80183-VKD, 2020 WL 6381341, *2 (N.D. Cal. Oct. 30, 2020); *In re Montilla*, Case No. 8:19CV549, 2020 WL 2571175, *3 (D. Neb. May 21, 2020). Moreover, the "found" requirement has been linked to a District Court's exercise of general personal jurisdiction. *See In re Ex Parte Application Under 28 U.S.C. § 1782 to Take Discovery from Américo Fialdini Junior*, Case No. 210mc-0007-WJM-NYW, 2021 WL 253455, *3 (D. Colo. Jan. 26, 2021) (extending "found" requirement to extent of Colorado long-arm statute); *In re Kurbatova*, Case No. 18-mc-81554-BLOOM/Valle, 2019 WL 2180704, *2 (S.D. Fla. May 20, 2019) (finding corporate respondent "found" in Florida based on "tag" jurisdiction). This means that corporations can generally be "found" where they are incorporated or have their principal place of business. But courts applying § 1782 have gone further, holding that a corporation may be "found" wherever it satisfies the minimum contacts necessary for a court to exercise specific personal jurisdiction.

The Second Circuit, for example, has tied the "found" requirement directly to specific personal jurisdiction, finding the requirement satisfied if a petitioner "set[s] forth facts sufficient to establish that the Court possesses personal jurisdiction" over the respondent "consistent with due process." *Pfaff v. Deutsche Bank AG*, 2020 WL 3994824, *4 (S.D.N.Y. July 15, 2020); *see also In re del Valle Ruiz*, 939 F.3d 520, 528 (2d Cir. 2019) ("§ 1782's 'resides or is found' language extends to the limits

of personal jurisdiction consistent with due process."); *In re Petrobras Sec. Litig.*, 393 F. Supp. 3d 376, 382 (S.D.N.Y. 2019) ("This Court therefore concludes that it should apply a personal jurisdiction analysis to determine whether Petrobras is 'found' in the district for the purposes of the § 1782 motion."); *In re Sargeant*, 278 F. Supp. 3d 814, 820 (S.D.N.Y. 2017) ("[C]ompelling an entity to provide discovery under § 1782 must comport with constitutional due process."). For example, in *Valle Ruiz*, the Second Circuit further explained that discovery under § 1782 is available "where the discovery material sought proximately resulted from the respondent's forum contacts" or where "the respondent's having purposefully availed itself of the forum [is] the primary or proximate reason that the evidence sought is available at all." 939 F.3d at 530. Indeed, the Second Circuit has found that § 1782 permits "depositions in any judicial proceeding without regard to whether the deponent is 'residing' in the district or only sojourning there." *In re Edelman*, 295 F.3d 171, 179–80 (2d Cir. 2002) (internal quotations omitted) (quoting H.R. Rep. No. 81-352, at 40 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1270) ("[A] sojourn is a temporary stay (as of a traveler in a foreign country).").

The Second Circuit is not the only court to apply specific personal jurisdiction to the "found" requirement of § 1782. For example, in *Matter of de Leon*, the D.C. District Court found "the Second Circuit's reasoning persuasive" and extended the "found" requirement based on a discovery target's relationship with litigation in the D.C. District Court. Case No. 19-mc-0197 (TSC), 2020 WL 1047742, *2 (D.D.C. Mar. 4, 2020). There, the petitioner sought discovery under § 1782 from two Cayman Islands companies that "operate in the United States." *Id.* at *1. One of the companies had a headquarters in D.C., so was indisputably "found" there, while the other, headquartered in Bethesda, Maryland, was also "found" in Washington, D.C. because its work for the first company subjected it to specific personal jurisdiction there. *Id.* at *2. In *Américo Fialdini Junior*, the District of Colorado extended the "found" requirement to a corporate respondent whose holdings were "located in the District of Colorado," based on Colorado's long-arm statute. 2021 WL 253455, at *3 ("Given that Aspen LLC owns and rents property in the District of Colorado, and the fact that this discovery request pertains to the potential payment of rental fees for such property, this court finds that there is sufficient evidence to conclude that for the purposes of § 1782(a), Aspen LLC is 'found' in this District."). And, in *Kurbatova*, the Southern District of Florida ruled a foreign corporation "found" in the Southern District of Florida because the corporation had a registered agent in Florida who was served with a subpoena. 2019 WL 2180704, *2.

However, not all courts have exercised their authority to allow discovery under § 1782 so broadly, even within the Second Circuit. For instance, the Southern District of New York has rejected arguments that banks could be "found" in New York for § 1782 purposes simply because they were registered to do business there, reasoning that registering to do business in a state does not establish general personal jurisdiction there. *See Pfaff*, 2020 WL 3994824, at *7; *Motorola Credit Corp. v. Uzan*, 132 F. Supp. 3d 518, 521 (S.D.N.Y. 2015) ("[The] mere operation of a branch office in a forum — and satisfaction of any attendant licensing requirements — is not constitutionally sufficient to establish general jurisdiction."); *In re Aso*, No. 19 Misc. 190 (JGK) (JLC), 2019 WL 3244151, at *5 (S.D.N.Y. July 19, 2019) ("declin[ing]," in a § 1782 case, "to bridge the crucial gap between New York's business registration statute and the Subject Entities' consent to general jurisdiction of state's courts").

Thus, while many courts have interpreted the "found" requirement of § 1782 as broadly as the Constitutional limits of personal jurisdiction and due process allow, others have required something more than the minimum contacts necessary to establish specific personal jurisdiction. However, § 1782's "found" requirement has consistently been satisfied where the entity from whom information is sought has contacts with the forum related to the underlying discovery. Thus, Petitioners who wish to employ § 1782's powerful tools should explore the requirements of their chosen venue to determine whether a discovery target can be "found" there.

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